

Polygamy and the Nature of Marriage in Islam and the West

by

Ghulam Ali

A thesis submitted in conformity with the requirements
for the degree of Master of Laws (LLM)

Faculty of Law
University of Toronto

© Copyright by Ghulam Ali 2012

Polygamy and the Nature of Marriage in Islam and the West

Ghulam Ali

Master of Laws (LLM)

Faculty of Law
University of Toronto

2012

Abstract

Section 293 of the Criminal Code of Canada provides that polygamy is an indictable offence. In a recent reference to the Supreme Court of British Columbia, the court held that this section was constitutionally valid and did not infringe upon religious freedom because of the harm polygamous marriages caused to women, children, society and most importantly, “the institution of monogamous marriage”.

This paper will revisit the court’s analysis of polygamy and discuss why it was considered harmful and preserved as a criminal act. The paper will canvas the underlying differences between the roles ascribed to marriage in Islam, as an example of a non-Western religio-legal tradition, and the collective liberal West. Ultimately, the paper will consider whether a balance can be struck between the measures required to protect women and children from harm, and preserving religious freedom, while remaining within the bounds of the Canadian Charter of Rights and Freedoms.

Table of Contents

Table of Contents	iii
1 Introduction.....	1
1.1 Assumptions and Omissions	2
2 Section 293 of the Criminal Code	4
3 Background to the Reference	5
4 Understanding the Courts Ruling.....	9
4.1 The Roots of Monogamy and Polygamy	10
4.2 Understanding Polygamy through Evolutionary Biology.....	12
4.3 Statistical Analysis of Polygamy	16
4.4 Individual Testimonies and Witnesses.....	17
5 Perspectives on the Harms of Polygamy	18
6 Marriage in Islam	21
6.1 Polygamy in Islam	21
6.2 Elements of Marriage in Islam.....	26
6.2.1 The Offer and Acceptance (<i>Sighah</i>).....	28
6.2.2 Witnesses	28
6.2.3 Mehr	28
6.2.4 The Role of the Guardian (Wali)	31
6.2.5 Kufu	31
6.3 The Role of the Husband and Wife.....	32
7 Marriage in the West.....	34
7.1 Polygamy in the West	34

7.2 The Institution of Monogamous Marriage	38
8 Conclusion: Alternatives to Criminalizing Polygamy	43
8.1 Targeting the Individual Harms of Polygamy	43
8.2 Conclusion	46
Bibliography.....	48

1 Introduction

In 2011, a Reference to the Supreme Court of British Columbia asked the court to determine whether Section 293 of the Criminal Code of Canada was consistent with the Canadian Charter of Rights and Freedoms. Section 293 of the Criminal Code provides that anyone who practises any form of polygamy or conjugal union with more than one person at the same time is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. After months of testimonies and legal arguments, Chief Justice Robert Bauman held that section 293 was constitutionally valid and did not infringe upon religious freedom because of the harm polygamous marriages caused to women, children, the society and the institution of monogamous marriage.

The understanding that polygamy is inherently harmful is foundational to the court's 350 page judgement. The judgement comprehensively deals with a variety of issues around polygamy and also takes into account a number of belief systems that allow the practice of polygamy. This paper revisits the court's comprehensive analysis of polygamy and its harms and explores the underlying factors that led the court to believe that polygamy needed to remain a criminal act. In doing so, it tries to reweight the court's reservations towards polygamy and argues that while the court correctly considers that some polygamous marriages result in harm to their participants, nonetheless, there are individual offences in the Criminal Code that can cure these harms and leave polygamy a safe marital option in Canada. The paper suggests that the court's conviction to proscribe polygamy was driven in part by the questionable need to protect and preserve the "institution of monogamous marriage"- a concept that predates the foundation of a secular legal tradition in Canada and the West.

With the criminalization of polygamy in the backdrop, the paper then discusses the differing conceptions of marriage in Islam and the liberal West; marriage in Islam, with its emphasis on the ethical and spiritual meaning that the religion has attributed to marriage and familial life; and

marriage in the West, where traditional notions of a Christian Marriage have been displaced by liberal conceptions of marriage that are nonetheless informed by the former's underlying understanding of what a marriage ought to be. Ultimately, the paper tries to strike a balance between measures that aim to protect women and children from harm, and the preservation of religious freedom, while remaining within the bounds of the Canadian Charter of Rights and Freedoms.

1.1 Assumptions and Omissions

With the abundance of approaches and perspectives on polygamy and its uncomfortable position in the liberal West, it is necessary to define the niche that this paper seeks to fill. While not a comprehensive list, the following are some notable exclusions and assumptions that the reader will find in this paper:

First, it is important to differentiate between the different kinds of polygamy and explain how this paper addresses them. The first is polyandry, where one woman marries multiple men; the second is polygyny, where a single man marries multiple women simultaneously; a third is polyamory, where multiple men and women enter into a marital association with each other. Since polygyny is by far the most common form of polygamy practiced in the world and is also the only mode of practice in the FLDS Church and Islam, this paper refers to this particular form when it talks about 'polygamy'.

Second, this paper is neutral to the nature of polygamy as being either good or bad. Avoiding this debate helps us in moving the discussion to whether a secular and politically liberal society, like the one that exists in Canada, should de-criminalize polygamy. The de-criminalization of polygamy, it is argued, should occur not because of polygamy's inherent benefits to society but to uphold and protect the beliefs of religious communities or individuals who hold polygamy as

an integral part of their religion.¹ In particular, these religious communities would include the FLDS church, as a sub-sect of Mormon Christianity which has long since left the practice of polygamy, and the exceptional Muslim who feels that polygamy is mandated by his religion, even though a majority of pre-modern Muslim theologians have held it out to be merely “permissible” and not “mandatory”.² Due to the paper’s focus on upholding religious practices that a politically liberal society can reasonably accommodate without compromising on its core principles, the paper will largely focus on polygyny as only this form of polygamy is relevant to the two religious groups mentioned above. This, however, is not to suggest that the manner in which a liberal society ultimately chooses to adopt polygamy might not also accommodate polyandry and polyamory to provide for great gender equality.³

Third, the paper avoids propagating the argument that what qualifies as marriage should be left to the private decisions of consenting adults and should not be regulated by the state, hence making way for the decriminalization of polygamy. As such, the diminution of the role of the state in marriage is not addressed because the status quo, particularly with regards to the various provincial and federal family laws in Canada, offers an adequate setting for the recommendations that this paper makes with regards to regulating polygamy. It is for this very reason that the paper steers clear of using the slippery slope argument and suggesting that the allowance of same-sex marriage and the consequent weakening of the “institution of monogamous marriage” should now accommodate a similarly liberal interpretation of marriage and thereby the full accommodation of the practice of polygamy.⁴

¹ Canadian courts in *Amselem* have determined that freedom of religion embodies the freedom of religion as perceived by the individual believer and not with reference to what the majority or the theologians of a particular religion consider to be right. *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 SCR 551.

² See, for example, Mohammad H. Fadel, “Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law” (2008) 8:1 *Chicago Journal of International Law* at 10.

³ Indeed, the *Polygamy Reference* expressly allows polyamory as practitioners of this form of polygamy generally do not require solemnizing the relationship into a formal marriage, and hence posing a threat to the institution of monogamous marriage.

⁴ Andrew F. March, “Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification” (2011) 8 *Journal of Moral Philosophy* 246.

Fourth, the paper restricts the scope of the rights it discusses latently to those of religious freedom, which I argue favours the decriminalization of polygamy, and the right to life, liberty and security, which cites the harm to women, children and the society as reason to maintain the constitutionality of s. 293 of the Criminal Code, as enshrined in the Canadian Charter of Rights and Freedoms. As a result, the suggestion that consenting adults be allowed to choose whatever form of marriage they deem suitable for themselves, at least for the purposes of this paper, will be situated in the “religious freedom” right and will not be based on that individual’s personal opinion (even though such an opinion may otherwise form a very reasonable consideration in a politically liberal society). Therefore, while the more learned liberal would judge the value of polygamy independently of religion or culture, this paper considers polygamy a religious or cultural practice that holds inherent value for those who believe in it, and seeks to protect the practice based on the right to religious freedom.

2 Section 293 of the Criminal Code

Before we consider the judgment of the court it is important to understand section 293 of the Criminal Code of Canada and what it stipulates. The code provides that:

- “1. Everyone who
- a) practices or enters into or in any manner agrees or consents to practice 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.

2. Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or upon the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.”

As the court clarifies, the offence of polygamy thus takes place when (1) an identified person, who; (2) with the intent to do so; (3) practices, enters into, or in any manner agrees or consents to practice or enter into; (4) a marriage, whether or not it is by law recognized as a binding form of marriage, with more than one person at the same time.

Under Canadian law, marriage by its very nature is understood to be a monogamous relationship. Therefore, marriage to a person already married is ab initio void. Curiously, however, there is one instance where polygamous marriages are recognized by law in Canada. Section 1(2) of the Ontario Family Law Act states that: “a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid”. This recognition is useful in securing a polygamous wife’s rights when it comes time to divide the matrimonial property, and determine support for the wife.⁵

3 Background to the Reference

This reference revolves around a small polygamous community of the Fundamentalist Church of Jesus Christ of Latter-Day Saints or FLDS in Bountiful, BC. The reference was brought to determine the constitutionality of polygamy after the Supreme Court of British Columbia

⁵ Brenda Cossman and Carol Rogerson, *Family Law: Cases and Materials*, Vol. 1 (University of Toronto, 2011) at 174.

quashed the appointment of the special prosecutor and his approval of polygamy charges against Winston Blackmore and James Oler, the two leaders of the FLDS Church in Bountiful, BC.

Unlike most other Mormons, members of the FLDS continue to believe that polygamy is a foundational tenet of their faith. As Professor Angela Campbell explained to the court, “marriage is the central social and religious institution within Mormonism. It is viewed as essential to realizing the promise of resurrection after death, and of exaltation, or becoming close to, or like, God.”⁶

Polygamy, also known as Plural marriage or “celestial marriage” in the FLDS Church, was first divinely revealed through Joseph Smith, the founder of the Latter Day Saint Movement, in 1831. Plural marriages were seen as necessary to the achievement of “celestial exaltation”; however, since only a few men were deemed deserving of entering the celestial kingdom, women were encouraged to marry these men so that they too could join their husbands in the celestial kingdom. In Practice, this meant that most polygamous marriages were practiced by leaders of the Church who could invest both time and money into their relationships.

Ever since the institution of polygamy was recognized under the Mormon Church, which subsequently established a community in Utah, the practice had consistently been viewed with suspicion by outsiders. The United States Congress eventually criminalized polygamy by enacting four statutes between 1862 and 1887.⁷

⁶ *Reference Re: Section 293 of Criminal Code of Canada*, 2011 BCSC 1588 at 264

⁷ *Ibid* 6 at 278

In his testimony to the BC Supreme Court, Dr John Witte explained that in proscribing polygamy the Congress was motivated by a number of concerns, including, the exploitation and enslavement of women; allowing richer men to take more wives at the expense of “fitter men”; the coercion of young girls into relationships; the exposure of children to violence and discord in a polygamous household; and their resulting incapacity to adopt the habits of good citizenship.⁸ In addition to these concerns, the Congress was also growing increasingly wary of the theocratic form of government that Mormons had instituted in the Utah Territory where the lines between Church and State had largely been blurred.⁹ In order to curtail these practices not only was polygamy criminalized but the Mormon Church was disbanded, all marriage ceremonies were required to be registered, and religious organizations were prevented from owning more than \$50,000 in assets. Finally, women’s suffrage in Utah was also revoked in a bid to prevent them from using their votes to bolster pro-Mormon policies in the public domain.

Professor Martha Ertman explains that the later two of the four statutes passed by congress were designed to “demote Mormons from full civic membership to punish them for committing two types of treason: political treason and social, or race, treason.”¹⁰ The first, due to the Mormon’s allegedly traitorous establishment of a theocracy in Utah, and the second, due to their practice of polygamy, which was deemed acceptable for “backward African and Asian races” but “unnatural” for white Americans.¹¹

⁸ Ibid 6 at 276, [Transcript, 10 January 2011, p. 55, l. 24 to p. 56, l. 9.]

⁹ Ibid 6 at 263

¹⁰ Ibid 6 at 296

¹¹ Ibid 6 at 297-299

In 1887 the criminalization of polygamy in the USA forced some devout Mormons to move to Canada with only one of their several wives, thereby remaining “*de facto* monogamous”.¹² Since Mormons were widely considered to be hard working and particularly adept at farming, most Canadians were happy to see them settle in Alberta.¹³ The prospect of the spread of polygamy in Canada, however, prompted the passing of the first criminal prohibition of polygamy in 1890, three years after the arrival of the first Mormons. This provision can now be found in the 1954 Criminal Code albeit with minor amendments. Since the criminalization of polygamy, the section has largely remained unused, having been employed once in a case from 1937.¹⁴ The first charge laid against a Mormon under section 293 of the Criminal Code was in 2009, 118 years after polygamy was first criminalized in Canada.¹⁵

It is interesting to note that the FLDS Church was not the only group engaged in polygamy in Canada during the later 19th century. The First Nations had been practicing polygamy with little prohibition from the Department of Indian Affairs long before the arrival of the first Mormons.¹⁶ Sarah Carter explains that the close proximity between the Mormon settlement and the First Nations Reserve made the Canadian government extremely apprehensive. They feared that not only would the First Nations be encouraged to engage in more polygamous marriages but that the lack of an explicit prohibition would be taken as proof by the FLDS Church that such a practice was tolerated in Canada.¹⁷

¹² Card, Brigham Y. *et al.*, *The Mormon Presence in Canada*, (Edmonton, Alberta: The University of Alberta Press, 1990) at 178.

¹³ *Ibid* 6 at 354

¹⁴ Karen Selick, “Polygamy—Two Rights Shouldn’t Make a Wrong”, online: <<http://www.karenselick.com/CL0508.html>>.

¹⁵ *Ibid* 6 at 380

¹⁶ *Ibid* 6 at 360

¹⁷ Sarah Carter, “The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915 (Edmonton: University of Alberta Press, 2008).

4 Understanding the Courts Ruling

At the outset, Chief Justice Bauman explains in his judgment that “this case is essentially about harm; more specifically, Parliament’s reasoned apprehension of harm arising out of the practice of polygamy. This includes *harm to women, to children, to society and to the institution of monogamous marriage*” [emphasis added].¹⁸ Additionally, he concludes that “polygamy (especially polygyny) is inherently harmful to the participants, to their offspring and to society generally”¹⁹

In coming to these conclusions the court relies on four main sources as evidence: the history behind the establishment of monogamous marriages, including Greek and Roman secular influences in addition to the later Christian tradition; theories of polygamy based on evolutionary biology; a broad statistical analysis of the effects of polygamy; and individual testimonies from people who have been directly affected by polygamous marriages.

While statistical analysis and direct testimonies from people involved in polygamous marriages were useful in determining the harms of polygamy, the history of monogamy in the West and the theoretical existence of polygamy determined through evolutionary biology were far less convincing evidential sources. It is surprising then to find that the court relied on the later two sources far more than the first two. Let us now look at each of these sources in detail and determine if the court was justified in the weight it placed on them.

¹⁸ Ibid 6 at 5

¹⁹ Ibid 6 at 1182

4.1 The Roots of Monogamy and Polygamy

As the court recognizes, polygamy has been the norm for most of human history while monogamy has been the exception to the rule.²⁰ Monogamy was first established universally in ancient Greece and Rome. Historians argue that levelling the field for the rich and poor in constructing their familial lives could have been seen as necessary for building a more egalitarian society as a building block for the republic, which may have prompted the restriction on polygamy.²¹

Marriage in the West has its primary origins in Roman Law. This law was eventually spread around the world by parceling it with Christianity. One example of the pervasiveness of this underlying understanding of marriage can be observed when one compares the characteristics of marriage in civil law systems and common law systems. Despite the credible differences in the way the law operates in these two systems, it is interesting to note the similarities between the laws of marriage and divorce under both regimes.²²

The properties of a Christian marriage, including its form and manner of solemnization, are firmly rooted in the nature of the institution of marriage in the Western legal tradition. Therefore, the broadest classical formulation of what qualifies as marriage entails the “voluntary union of a man and a woman to the exclusion of any other person during the continuance of that union.”²³

²⁰ Ibid 6 at 148

²¹ Ibid 6 at 154, also see, Walter Scheidel, "Monogamy and Polygyny in Greece, Rome, and World History" (2008) Princeton/Stanford Working Papers in Classics.

²² H.R. Hahlo, *Nulity of Marriage in Canada: With a Sideways Glance at Concubinage and Its Legal Consequences* (Toronto, Butterworths, 1979)

²³ Law Reform Commission of Canada, *Bigamy*, 1985, Working Paper 42 at 4.

This definition of marriage, as the Law Reform Commission of Canada explains in its report on Bigamy,²⁴ is based on at least three basic assumptions: First, that the marriage will take place between heterosexual couples; Second, the exclusivity of the marriage and the preclusion of any foreign partners; Third, the indefinite nature of marriage with regards to its duration.²⁵ These three features underlie the concept of a “Christian marriage”, as formulated by English courts during the 19th century, and are designed to be distinct from other non-European conceptions of marriage.²⁶

Out of the three features of marriage described above, only the exclusivity of the marriage is recognized as a foundational element of a conventional marriage in the West today. The remaining two classical features of the union of a “man and a woman”, that is, the heterosexuality of the couple, and the binding nature of marriage now stand as antiquated mores that have failed to keep pace with the demands of modern life.

As the report goes on to explain, however, delving deeper into the meaning of the second feature of a classical marriage reveals interesting details. The ‘exclusivity’ of a Western monogamous marriage, which is relevant in discussing the fundamentally ‘unexclusive’ nature of a polygamous marriage, is derived from modern canon law. As the report states: “The essential properties of marriage are unity and indissolubility; in Christian marriages they acquire a distinctive firmness by reason of the sacrament.”²⁷ Exclusivity, therefore, is foundational to determining the rights and obligations of spouses in a “Christian” marriage and forms the basis of the emphasis on monogamy in Western conceptions of marriage.

²⁴ Ibid 23

²⁵ Ibid 23 at 5

²⁶ T.C. Hartley, “Polygamy and Social Policy” (1969) 32 Modern L. Rev 155 at 160.

²⁷ Code of Canon Law, promulgated on January 25, 1983 and effective on November 27, 1983, Canon 1056

Comparing the Christian conception of exclusivity to that in an Islamic marriage is a complicated task. While both legal frameworks require fidelity from the participating parties to a marriage, Christian marriage secures fidelity by restricting the number of parties to the marriage. While an Islamic marriage secures fidelity in a similar manner, thereby prohibiting extra-marital relationships, it nonetheless allows men to enter into similar marriage contracts with up to four separate parties. Additionally, the lack of the absoluteness of marriage in Islam (flowing from the fact that divorce has always been permit, though frowned upon) means that each of these four unions are then deemed to be absolute in their own exclusivity, that is, none of the four wives independently married to one man owe any rights and obligations to each other, yet the marriages are transmutable and the parties to one marriage can dissolve the marriage and re-enter into another marriage with another party. An Islamic marriage, as compared to a Christian marriage, is therefore both exclusive and inclusive. It is this inclusivity that is anemic to the Western notion of what constitutes a marriage.

While Christianity's exposure to Roman law makes it difficult to determine whether the practice of monogamy has genuine roots in Christian theology, nonetheless, with the onset of European colonization and Christian missionaries, the practice of monogamy has become the dominant norm in many parts of the world today, particularly in countries with a Christian religio-legal tradition like Canada.²⁸ This tradition of monogamy, therefore, informs Canadian matrimonial law in common law provinces and in Quebec, where the legal system is based on civil law.²⁹

4.2 Understanding Polygamy through Evolutionary Biology

Having discussed the roots of monogamy in the West, can it be said that monogamy is a superior form of marriage to polygamy? While it is possible that the institution of monogamy has contributed to western development, as Dr Scheidel explains, this assertion is ultimately

²⁸ Ibid 21

²⁹ Ibid 19

unverifiable as empirical tests of the correlation between polygamy and the indicators of development have produced conflicting and unreliable results.³⁰ Since Dr Scheidel's expert report seemed to offer few solid conclusions the court attempted to buttress his results by introducing the report prepared by Dr Joseph Henrich and his view of polygamy as seen through the prism of Evolutionary Biology.

Dr Henrich was the BC Attorney General's principal witness and presented the court with a report on his understanding of the practices of polygamy and monogamy based on his expertise in evolutionary biology. Dr Henrich speculates that monogamy may have catered to development in the West by forcing men in all social stratas to abide by the same rules; reducing the competition for women, easing restrictions on them; and eradicating the notion of unmarried men, thereby pacifying their aggressiveness.³¹

In addition to these observations, the court takes particular note of five of Dr Henrich's conclusions with regards to the affects of an increase of polygamy in a community. First, that a "non-trivial" increase in polygamy would increase crime, as unmarried men, unable to find suitable companionship, would develop antisocial tendencies. Second, that the average age of marriage for women would come down to meet the community's extra demand. Third, that inequality between the sexes would increase as men would seek greater control of 'their women'. Four, men would invest in a greater number of offspring and acquiring additional wives which would result in less resources for each individual child's development. Five, the per capita GDP would go down.³²

³⁰ Ibid 6 at 164

³¹ Ibid 6 at 167, also see, Joseph Henrich, "Polygyny in Cross-Cultural Perspective: Theory and Implications" expert's report prepared from the Crown in the BC polygamy reference, emailed by Dr. Henrich to the author.

³² Ibid 6 at 499, also see Joseph Henrich, "Polygyny in Cross-Cultural Perspective: Theory and Implications" at 2

In coming to these conclusions Dr Henrich relies on the difference in mating strategy that men and women have evolved over time. Women, he cites, are limited in the number of offspring they can rear in their lifetime, as they remain unavailable during their pregnancies. Men, on the other hand, are free to mate with as many women as they like and have thousands of offspring; as they are uninhibited by any natural constraints on their capacity to procreate.³³ Dr Henrich believes that while current norms of marriage prevent men from pursuing their natural mating patterns, the existence of prostitution, infidelity, divorce and ‘serial monogamy’, suggests that removing the barrier to polygamy would hasten a return to their ‘state of nature’.³⁴

Without going into further details with regards to Dr. Henrich’s report, it is important to emphasize that out of all the evidence presented to the court, Dr Henrich’s report appears to be the single most important piece of evidence that is relied upon to make a determination on the viability and dangers of polygamy in Canada. The Amicus does notice this lean and points out to the court that the court should not rely too heavily on Dr Henrich’s evidence considering that he had never written on the subject of polygamy before. The Amicus also brings to light the fact that Dr Henrich’s report may be askew considering that he initiated his “study [of] the question of polygamy and its purported harms” following a request by the Attorney General.³⁵ However, placing his trust in Dr Henrich’s evidence, Bauman CJ states at para 538:

“... [Dr. Henrich] applied his unquestioned academic rigor to a subject which he has lectured on in the past. It is Dr. Henrich’s acknowledged expertise in evolutionary psychology which he has applied to the question of polygamy that gives me comfort with his conclusions. While he is new

³³ Ibid 6 at 499

³⁴ Ibid 6 at 499

³⁵ Ibid 6 at 537

to writing in this area, that expertise and his methodology ensure, in my mind, reliable evidence on this subject”.³⁶

It is also troubling to see that the court largely disregards the Amicus’ witness on Evolutionary Biology, Dr Todd Shackelford, and his testimony on some of the weaknesses in Dr Henrich’s view on polygamy. Dr Shackelford notes that Dr Henrich had done an admirable job of summarizing the negative consequences of polygamy, however, such consequences could be found in any kind of marital relationship even monogamous ones.³⁷ Dr Shackelford explains that such consequences could, for example, arise when divorced women remarry taking their children from the previous marriage into their new partner’s house. He cites the fact that the rate of harm for a child living with one stepparent as opposed to genetic parents can be 40 to 100 times higher.³⁸ While the court explicitly acknowledges the “obvious” abuse that exists in monogamous relationships similar to polygamous ones it, nonetheless, ignores Dr Shackelford’s evidence citing it as unuseful for determining the alleged harms relating to polygamy.³⁹

At the end of the court’s examination of the two experts’ reports, Dr Shackelford explains that neither he nor Dr Henrich had enough credible data regarding polygyny that supported either of their views since the data could not account for possible cultural and contextual difference in polygamous relationships. In this regard Mark Henkel, an advocate for the right of polygamy between consenting adults, argues that Dr Henrich’s use of “non-modern, non-western” samples

³⁶ Ibid 6 at 538

³⁷ Ibid 6 at 541

³⁸ Ibid 6 at 543

³⁹ Ibid 6 at 544

to predict how polygamy would play out in the West contradicts his own academic research published just a month before he filed his anti-polygamy report.⁴⁰

In a research piece written by Dr Henrich and other scholars titled “The Weirdest People in the World?” published by the Cambridge University Press, fellow researchers were warned not to make universal interpretations based on population samples taken from Western societies, as the Western, Educated, Industrialized, Rich, and Democratic (WEIRD) societies were very different from other sample populations around the world.⁴¹ It is surprising then that Dr Henrich’s report to the court is constructed on universal generalizations about polygamy as it would be practiced in the West based on his sampling of Mormon in Canada and African polygamous societies abroad.

4.3 Statistical Analysis of Polygamy

The statistical analysis of the impact of polygamist relationships on women, children and society was largely provided by Dr Rose McDermott. Dr McDermott took into account various variables including birth rates, education, age of marriage, life expectancy, maternal mortality and even variables like defence expenditure and inequality of men and women before the law to come up with her account of the affects of polygyny (as the dominant form of polygamy). She concluded that polygynous societies were more dangerous for women and children in almost all respects. Additionally, she argued that such societies spent more on defence and afforded fewer liberties to their residents.⁴²

⁴⁰ Mark Henkel, *Scholar’s Anti-Polygamy Report for Court is Discredited*, online: <<http://www.pro-polygamy.com/articles.php?news=0079>>.

⁴¹ Joseph Henrich, Steven J. Heine and Ara Norenzayan, “The Weirdest People in the World?” (2010) *Behavioral and Brain Sciences* 33 61.

⁴² *Ibid* 6 at para 622

While Dr McDermott’s analysis is largely based on established empirical evidence, the Amicus nonetheless points out some obscure features of her report. He points out that under her classification of countries based on their acceptance of polygamy, countries like the United Kingdom and Canada, scored a “1” based on the existence of some polygamy in the society (despite it being criminalized). Countries like East Timor and the Ivory Coast, that scored a “0” because of the absence of polygamy, however, scored lower on many development factors including education. Similarly, the Amicus points out that Dr McDermott’s inclusion of an increase in defence expenditure accompanied by a rise in polygyny suggests that she is randomly assigning various ills of the society onto a single variable: polygamy. While the Amicus’s characterization of Dr McDermott’s study methodology as “abracadabra” was exaggerated, even the court accepted that some aspects of her report were “surprising”.⁴³

4.4 Individual Testimonies and Witnesses

The individual testimonies of the people, both men and women, who had been affected by the practice of polygamy in the FLDS Church, appeared to be the most convincing of the harms of polygamy, especially as practiced in Bountiful, BC. Women identified the difficulties of living with co-wives, and step-siblings, while a few men recounted their experience of being kicked out of the community for violating the rules of the community.

This portion of the judgment is also notable for the lack of cross-examination offered by the Amicus of these witnesses, attesting to the genuine nature of the witness’ grievances. While the Amicus did produce witnesses who told of functional polygamist house-holds, it can be established conclusively that many people in Bountiful have experienced tangible harm as a direct result of the particular practice of polygamy in the FLDS Church.

⁴³ Ibid 6 at 616-631

5 Perspectives on the Harms of Polygamy

It is undeniable that Justice Bauman's understanding of harm to women and children as being at the root of this reference is correct. For a considerable number of people living in polygamous marriages, polygamy causes harms that need to be controlled. There is a vast array of opinions with regards to why polygamy should stay criminalized in Canada. These range from the tangible and physical harms suffered by wives in polygamous marriages to the principled drive to create a more equal world for both men and women. While this paper seeks not to engage with the benefits and drawbacks of polygamy, if the practice is to be permitted in a secular and politically liberal society, and that too on religious grounds; the concerns of anti-polygamists need to be canvassed to come to a solution that meets John Rawls' idea of "public reason"⁴⁴ in a pluralist society.⁴⁵ The following are a sampling of some of the most prominent objections to polygamy based on religious grounds, particularly as practiced in Canada.

The UN Committee that monitors the implementation of the 1981 UN Convention on the Elimination of All Forms of Discrimination Against Women Convention (CEDAW) has consistently campaigned against polygamy, and in 1992 issued a General Recommendation that included the following statement:

"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 prohibited. The Committee notes with concern that some state parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance

⁴⁴ John Rawls, *Political Liberalism*, (Columbia, 1993). The concept of public reason requires that groups with opposing views come to a common understanding by forwarding arguments that are based on assumptions that they believe would be acceptable to the other party.

⁴⁵ For a similar application of the idea of "public policy" to the interaction of Islamic law with the Secular West, see, *Ibid* 2.

with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.”⁴⁶

Cheryl Milne of the Canadian Coalition for the Rights of Children and the David Asper Centre for Constitutional Rights explains the dire situation in Bountiful, BC and states:

“[The Government] has failed to protect generations of children living there and is in violation of its responsibilities under the UN Convention of the Rights of the Child... excessive deference has been paid to parental religious rights, which have been privileged over children’s rights and the principle of the best interests of the child.”⁴⁷

In her interview with the Vancouver Sun she adds that the government failed to act on the evidence that it received as far back as 2008 that pointed towards child abuse in Bountiful. Such incidents she explains were serious enough for the police to lay charges even if there was a likelihood that prosecutors might not be able to secure convictions on them. This abuse, Milne explains, even extended to Bountiful’s government-funded schools where employees of the school are required by law to report child abuse if they come across it.⁴⁸

As David Matas explains in his closing on behalf of Beyond Borders, an organization that works to end international child sexual exploitation, polygamy does facilitate those who wish to exploit children and the practice makes it harder to detect and report such abuse. This fact, he explains,

⁴⁶ CEDAW, *Equality in Marriage and Family Relations*, online:
<<http://www.unhchr.ch/tbs/doc.nsf/0/7030ccb2de3baae5c12563ee00648f1f?Opendocument>>.

⁴⁷ Daphne Bramham, *Few Disagree that polygamy can cause harm*, online:
<<http://www.vancouversun.com/life/disagree+that+polygamy+cause+harm/4538957/story.html>>.

⁴⁸ Ibid 47

is enough of a reason to make section 293 of the Criminal Code constitutional, as children are extended a guaranteed right to security.⁴⁹ As he states: “The violation of that right has to weigh more heavily in the balance than the right of freedom of expression or religion of adults manifested by allowing them to live in polygamous communities.”⁵⁰

Many also argue that there are profound biological reasons why it makes sense to move against polygamy particularly in Canada. Sexual dimorphism, that is, men’s greater size and strength and late maturity as compared to their women counterparts, it is argued, has evolved our species towards a tendency of engaging in polygamous relationships. This is cited as the primary reason why polygamy has been the more widely-accepted form of marriage throughout our history (even if only a limited number of people actually practiced it).⁵¹

The same critics of polygamy than contrast the structure of marriage in ‘the state of nature’ to that in civilized society and point towards the obvious need for monogamy in this day and age. Tom Flanagan explains their position well when he states:

“Monogamy requires the support of cultural norms and legal enforcement to exist. And this is no mere lifestyle choice. Monogamy is the sexual constitution underlying the West’s political constitution of liberal democracy. Monogamy lowers the stakes of reproductive competition by guaranteeing a roughly equal availability of mates for all. Men who are excluded from reproductive opportunities will break any law in search of them, meaning that those who

⁴⁹ Ibid 47

⁵⁰ Ibid 47

⁵¹ Tom Flanagan, *The Biological and Philosophical Reasons why we should Prosecute Polygamy*, online: <<http://www.oacas.org/news/08/april/24poly.pdf>>.

monopolize women in a polygamous society must be harsh and authoritarian in controlling not just their female chattels but also the surplus men.”⁵²

This argument, combined with the fact that a country like Canada is accepting a large number of new immigrants from Africa and the Middle East, where polygamy is considered rampant, leads Flanagan and other critics to believe that unless anti-polygamy laws are enforced, the very institution of free society and constitutional government in Canada stands in jeopardy.⁵³

6 Marriage in Islam

While many of the above-mentioned concerns are based on fact, several of the apprehensions also extend from an improper understanding of how polygamy has functioned in societies that have allowed the practice. In this regard, surveying the scope of polygamy under Islamic law, which has “permitted” and consequently regulated the practice for over 1400 years, offers some insight on how de-criminalizing polygamy might play out. In conducting such a survey, we shall now discuss both polygamy and the broader role of marriage in Islam in which it is contextualized.

6.1 Polygamy in Islam

Marriage is perhaps the most important aspect of a Muslim’s life and lies at the heart of the ideal envisioned Islamic society. The importance of marriage in Islam is highlighted by the following saying of the Prophet Muhammad: “When a man marries, he has fulfilled half of his religion, so

⁵² Ibid 51

⁵³ Ibid 51

let him fear God regarding the other half”.⁵⁴ Men in Islam are allowed to be married with up to four women at a time.⁵⁵ A man, who consummates his marriage with a fifth wife knowing that his initial four wives are alive, commits fornication.⁵⁶

The privilege of polygamy is primarily rooted in the Quranic verse 4:3 which states: “If you fear that you shall not be able to deal justly with the orphans, marry the women of your choice, two, or three or four. But if you fear that you shall not be able to deal justly with them, then only one.”⁵⁷ To a lesser extent this privilege is also attributed to a tradition related from the Prophet Muhammed where he said to one of his companions, when the companion converted to Islam and had ten wives, “Hold on to four and let go the rest”.⁵⁸ One particular Islamic sect historically allowed for nine wives based on their opinion that the numbers in the Quranic verse of “two, three and four” (based on a different translation of the Quran) could be added to provide for a maximum number of nine wives.⁵⁹

In his affidavit to the BC Supreme Court,⁶⁰ Professor Anver Emon explains that the Quranic verse mentioned above uses a conditional “if” to qualify polygamous marriage. This condition pivots on the foundational requirement of “justice to orphans”. It is only when this requirement

⁵⁴ Reported by Anas; similarly the Mishkat reports: "When the servant of Allah marries, he has fulfilled half the (responsibilities laid on him by the) faith; so let him be God conscious with respect to the other half".

⁵⁵ F.H. Ruxton, *Maliki Law*, (London: Hyperion Press, 1916) at 99, translation on Mukhtasar of Sidi Khalil.

⁵⁶ Ibid 55 at 329

⁵⁷ Quran 4:3

⁵⁸ Imran Nyazee, *The Distinguished Jurist's Primer Vol. II* (Reading: Garnet Publishing, 1996) at 47, translation of Ibn-Rushd's *Bidayat Al-Mujtahid*.

⁵⁹ Ibid 58 at 47

⁶⁰ Anver Emon, Affidavit to the BC Supreme Court, for *Reference Re: Section 293 of Criminal Code of Canada*, 2011 BCSC 1588.

of justice is fulfilled and is continuously maintained that a man gains the privilege of entering into and remaining in marriage with up to four women simultaneously.⁶¹

Emphasis on this particular precondition on polygamy is largely absent when one surveys the prominent juristic texts of the four major Sunni schools of thought. Instead, the condition is supplanted by an absolute right to marry up to four women. One pre-modern Islamic Jurist, Abu Bakr b. Al'Arabi (d. 954), for example, wrote that scholars of his age generally agreed that “whoever knows he can be just to orphans can [still] marry whichever [of them], just as [marrying the orphans] is permitted to one who fears he cannot be just [to orphans].”⁶² Similarly, juristic texts generally do not discuss “polygamy” per se; instead polygamy is discussed under the rubric of the “number of wives that can be married concurrently”, as just one of the many laws regulating marriage. Therefore, while the Quranic verse suggests that there is a credible barrier to polygamy, Muslims jurists have largely done away with the absolute precondition of justice between women.⁶³

There are a number of reasons why these jurists did not highlight the requirement of justice, particularly with regards to gender equality. Contextualizing this phenomenon in the historical practice of marriage in pre-Islamic Arabia offers some clues. In pre-Islamic times, for example, there was no limitation on the number of wives a man could take. The Islamic limitation of four wives therefore acted as a restriction on the rights of men to marry and raised the status of women in Islamic society.⁶⁴ For pre-modern jurists, Islam’s restriction on polygamy was already an accession to gender equality under the new marital laws that the religion introduced (we shall discuss some of these laws below). The requirement of ‘justice’, under these new marital laws,

⁶¹ Ibid 60

⁶² Ibn al-‘Arabi, *Ahkam al-Quran*, 1:310, also see Ibid 60 at 3.

⁶³ Ibid 60

⁶⁴ John Esposito and Natana Delong-Bas, *Women in Muslim Family Law* 2nd ed. (Syracuse University Press, 2001) at 100-102.

was fundamental to all forms of marriage and not just specific to polygamous ones. In this sense, jurists conceived of justice to be a particularly onerous requirement for husbands regardless of whether they had one wife or four.

Regardless of the reading down of polygamous ‘justice’, Muslim jurists have generally interpreted justice to mean treating the wives ‘equally’. This equality has generally been restricted to the fair division of goods, as Ibn al-‘Arabi holds: God may demand justice, however, God does not demand one to manage his heart in this fashion.⁶⁵ Consequently, it is this understanding of ‘justice’ in polygamous marriages that is espoused by the vast majority of Muslims today; it is also a major reason that keeps Muslim men from taking multiple wives.

The discussion of polygamy under Islamic law, however, cannot be completed without reference to verse 4:129 of the Quran. The verse states: “You will never be able to be just among [your] women even if you tried”. While this verse is separated by verse 4:3 mentioned above by some space, critics of polygamy in Islam often use this verse to curtail the privilege of polygamy extended to men. Professor Emon explains that verse 4:129 is often read as a gloss on verse 4:3, but whether this can justifiably be done depends on how one interprets the interplay between a verse which is legislative in nature and the second which lays down a general principle and which is not quite as resolute in its legislative qualities.⁶⁶

The Quran itself is largely silent on this issue even though the second source of law in Islam, the narrations and life of the Prophet Muhammad, suggest that while polygamy is not prohibited (even though men will never be able to deal justly between their wives) there is nonetheless a heavy burden on men who choose to engage in polygamy. This burden becomes obvious when

⁶⁵ Ibid 62 at 1:313, see also Ibid 60 at 4.

⁶⁶ Ibid 64

one refers to some pre-modern juristic texts, which categorically state: “It is unlawful for a free man to marry more than four women. It is fitter to confine oneself to just one.”⁶⁷

A purview of similar texts reveals that pre-modern jurists have since long entertained the notion of restricting the rights of grooms by allowing for restrictions in marriage contracts.⁶⁸ These restrictions generally appear as stipulations on the marriage contract where conditions are placed on the occurrence of certain events (generally tied to the husband’s actions or omissions). Many of these restrictions have been aimed at making grooms more accountable husbands to their wives and preventing them from taking multiple wives. For example, a marriage contract can stipulate that a wife would gain the right to divorce herself⁶⁹ or that she would automatically stand divorced if the husband took another wife.⁷⁰ Many of these restrictions have become a regular feature of modern Muslim marriage contracts (even though many traditionalist Muslims argue that these restrictions corrupt the purity of marital law as conceived by the primary sources of Islamic law), and have together acted to placate the gender inequality concerns that are perceived to exist in Muslim family law.

The regulation of polygamy in modern Muslim majority states also suggests that the practice of polygamy amongst most modern Muslims is on the wane. Modernist interpretations of the conditions framing polygamy in Islam have led to a complete ban in Tunisia⁷¹ while Turkey’s embrace of secularism saw polygamy criminalized there in 1926.⁷² Countries like Egypt,

⁶⁷ Nuh Ha Mim Keller, *The Reliance of the Traveler* (Evanston: Sunna Books, 1991) at M6.10, a translation of *Umdat-ul-Salik wa-uddat al-nasik*.

⁶⁸ This practice is referred to as *Tamlik*.

⁶⁹ This practice is referred to as a *Talaq-I-Tafweed*, popular amongst followers of the Hanafi School.

⁷⁰ Amira El-Azhary Sonbol, “History of Marriage Contracts in Egypt” (2005) *Hawwa* 3 at 167.

⁷¹ Elizabeth H. White, “Legal Reform as an Indicator of Women’s Status in Muslim Nations”, in *Women in the Muslim World* 52, 58 (Lois Beck and Nikki Keddie eds., 1978)

⁷² Turkish Penal Code, Article 230, online: <<http://legislationline.org/documents/action/popup/id/6872/preview>>.

Pakistan, and Iran have introduced strict requirements based on the need for material justice amongst wives.⁷³ Similarly, Iraq and some Malaysian states require permission from the court before the husband is allowed to enter into another marriage.⁷⁴ There are exceptions to this general trend, embodied in the permissive polygamy laws of Saudi Arabia; however, the recent increase in international scrutiny of the Kingdom and its restrictive laws for women may translate into stricter rules around polygamy and other controversial practices.⁷⁵

6.2 Elements of Marriage in Islam

Having considered the basis of polygamy in Islam and in modern day practice, we will now discuss the basics of marriage in Islam so as to understand the nuances of Islamic marriage law. This will allow us to compare an Islamic marriage with that under the common and civil law tradition. Before looking at the specifics of marriage, however, it is important to look at the various prohibitions on marriage in Islam:

There are essentially fifteen categories of people whom a man cannot marry (and vice versa): (1) His mother; (2) step mother; (3) grandmother; (4) daughter; (5) sister; (6) father's sister; (7) mother's sister; (8) brother's daughter; (9) foster mother; (10) foster mother's sister; (11) sister's daughter; (12) foster sister; (13) wife's mother; (14) step daughter; and (15) son's wife. (Quran 4:22-24)

⁷³ Afaf Lutfi al-Sayyid Marsot, "The Revolutionary Gentlewomen in Egypt", in *Women in the Muslim World* 261, 263 (Lois Beck and Nikki Keddie eds., 1978)

⁷⁴ Noel Coulson & Doreen Hinchcliff, "Women and Law Reform in Contemporary Islam", in *Women in the Muslim World* 37, 40 (Lois Beck and Nikki Keddie eds., 1978)

⁷⁵ The Kingdom bowing to pressure from the international community on entering female athletes at the 2012 London Olympics, and the increased attention being brought to the ban on driving for women are good indicators of the gradually changing gender landscape in Saudi Arabia.

Similarly, a man may not be married to two sisters at once; he may not marry a woman already married to someone else; and he may only be married to four women at any given moment. The Quran also lays down certain etiquettes for approaching a woman for marriage, when it says: “do not make secret contact with them except in terms honorable, do not rescue on the tie of marriage till the term prescribed is fulfilled”.⁷⁶ Considering this, not only is it a duty for a man not to propose to a woman if he knows that she may be in *Idah*, the prescribed waiting period before a widow may remarry, but also that if a woman is herself in *Idah*, she should not elope before the end of her prescribed time.

Apart from prohibitions placed on marrying certain relatives, marriage to certain non-Muslims are also prohibited. Muslim women cannot marry anyone other than a Muslim man, while Muslim men may only marry from amongst the “people of the book”, in other words, Christians and Jews. This is due to the Quranic verses which state: “Do not marry unbelieving women idolaters until they believe: a slave woman who believes is better than an unbelieving woman, even though she allures you...” and “do not give believing women in marriage to idolaters until they believe”.⁷⁷ According to the juristic reasoning of certain Islamic scholars, marrying non-Muslim women will be considered unlawful if there are a good number of Muslim women to choose from; however, this is not a majority opinion.

There are various requirements to the actual solemnizing of a marriage for the different schools of fiqh. For the Maliki School there are three main requirements, the first and foremost of which is the guardian, without whom there is no legal marriage. The others are Mehr and the offer and acceptance of Marriage. For the Shafi School, the three major requirements are the guardian, two witnesses and the offer and acceptance. For the Hanfi School, however, the most important part of a marriage is the offer and acceptance (*Sighah*).

⁷⁶ Quran 2:235

⁷⁷ Quran 2:221, 60:10

6.2.1 The Offer and Acceptance (*Sighah*)

The marriage in plain words is a contract between two parties. All the schools maintain that just like any other contract there has to be an offer made for marriage which has to be subsequently accepted. The right to accept and propose may be delegated to certain people. There are comprehensive rules relating to who can become a delegate and how far he may go in proposing and accepting offers for marriage. The form and wording of the offer and acceptance is also an important consideration and great care has to be taken in this regard, for example, to avoid the delegates from inadvertently accepting or offering proposals on their own behalves.

6.2.2 Witnesses

The presence of witnesses is an important requirement for solemnizing the marriage. The Quran states: “And take as witnesses two just persons from among you (Muslims)”⁷⁸ as there is no marriage without a guardian and two just witnesses. For the Hanfi School, the two witnesses have to be two Muslim men or one Muslim man and two Muslim women. The Shafi and the Hanbali Schools do not cater to this view and only consider two male Muslims as fulfilling the witness requirement. However, in case the woman is a non-Muslim and there is an absence of Muslim witnesses, non-Muslims may be invited to witness the marriage according to the Hanfi School. Again, the Shafi and Hanbali Schools do not consider this as a valid view and maintain that a non-Muslim cannot be held as a witness over a Muslim’s marriage.

6.2.3 Mehr

The Mehr is an important part of the marriage and has received great attention from jurists. The Quran and Hadith state: “And give to the women their Mehr with a good heart”⁷⁹ and “Find

⁷⁸ Quran 65:2

⁷⁹ Quran 4:4

something to give the woman, even if it is a ring made of iron.”⁸⁰ Mehr must be distinguished from consideration of a contract for terming it as such would be very misleading. Consideration under contract law is the means through which the offer/acceptance are given a badge of enforceability; without consideration a promise is not binding. Mehr, while similar in character to consideration, has different theoretical connotations that distinguish it from consideration. A marriage contract does not ‘fail’ if there is no stipulation as to the Mehr. This is primarily because Islamic law, upon failing to stipulate the Mehr in a marriage contract, considers that the appropriate Mehr will be implied into the contract. This is a unique feature of Mehr that places it on a much sounder footing than consideration and takes it closer to the Canadian law on marriage contracts.

Anything that is capable of being treated as *mal* (property) may constitute Mehr. It is worth noting however that future property like rent to be received cannot constitute Mehr. In particular the amount and substance of the Mehr should be taken account of. For the Hanfi School, the minimum amount of Mehr is 10 dirhams, while for the Maliki School, it is only 3 dirhams. However, for other schools there is no fixed Mehr. The substance of the Mehr has to be constituted of permissible things only and may not be paid in wine or pigs or other things that cannot be traded by a Muslim.⁸¹

For purposes of understanding the role of Mehr, it is important to appreciate the nature of Muslim marriages in light of the marriage contract and consummation. In particular, consummation plays a considerable role in determining the wife’s right to receive her Mehr. Some argue that with the emphasis placed on consummation in determining Mehr, a balance is essentially struck between the husband’s financial honor and the wife’s sexual honor.⁸²

⁸⁰ As quoted in Al-Sahi Al-Bukhari and Al-Muslim

⁸¹ Asaf Fyzee, *Outlines of Muhammadan Law*. 4th ed. (New Delhi: Oxford University Press, 2002)

⁸² Mona Siddiqui, “Mahr: Legal obligation or Rightful Demand?” (1995) *Journal of Islamic Studies* 14.

It is normal for spouses to have agreed on a particular amount within their marriage contract, this is termed as the *Mehr al Musamma* (specified dower). However, the entire specified dower is not payable immediately. It is perfectly acceptable for the husband to pay part of the specified dower as *Mehr al Muajjal* (dower paid immediately) and stipulate that he will pay the rest at the occurrence of a particular event or at some particular time (*Mehr al Muwajjal*). However, there are situations in which the wife can claim the entire amount of the dower despite the stipulation of deferred dower having not been met: First, if the marriage has been consummated; second, if the husband dies, and third, if the parties have engaged in a valid 'privacy' such that they had the opportunity to consummate the marriage even if they did not.

It is worth noting here that the wife can claim full dower upon her husband's death even if the marriage has not been consummated. This underpins the essence of the requirement of *Mehr*. Since the wife lived as a partner while her husband was alive, she is entitled to the rights that the marriage contract generates. On the other hand if the wife is divorced before the marriage is consummated, the husband is obliged to pay her only half the specified dower. If the dower were proper (i.e. *Mehr al Mithal*, not specified in the marriage contract) then the wife is entitled to a gift called *Muta*, the value of which must not exceed half of the proper dower. However, this opinion holds true for some schools of thought only.

If a valid 'privacy' is established, the wife will have a claim upon the full *Mehr*. However, if the privacy occurred in a situation where sexual intercourse is prohibited, e.g. when the parties are on pilgrimage or when the husband/wife are fasting, then this cannot give rise to the full *Mehr* because it cannot be inferred that such a privacy actually resulted in a consummation of the marriage.

Mehr is, therefore, strictly a right to which the wife is entitled irrespective of whether it is specified or not. It is interesting to note that according the Hanafi school, a woman is *sui juris* to

contract her own marriage; the consent of the *Wali* or guardian is not required. However, one of the seldom used instances where the guardian can in fact repudiate the marriage is where the bride had agreed to a sum less than her *Mehr al-Mithal*. The only bar to this right of the guardian is when the wife has become pregnant.

6.2.4 The Role of the Guardian (Wali)

The Shafi and the Maliki Schools have laid great emphasis on the approval of the guardian for marriage, while the Hanfi and Hanbali Schools consider it optional. The guardian is usually the father or the closest male relative and in no circumstance is he allowed to marry off a woman without her consent, except if she is a minor (in which case she will be able to exercise *Khiyar al-Shart*, and repudiate the marriage upon reaching majority). Apart from this, whether the bride-to-be is a widow or a virgin; she still needs to consent to her marriage as part of the offer and acceptance. The Prophet Muhammad said: “A woman who has been previously married has more right over herself than her guardian, and a virgin must be asked for her consent, and her consent is her silence.”⁸³

6.2.5 Kufu

Kufu refers to the balance of standing between the bride and the groom. This balance pertains to the lineage, piety and material wealth of both the parties (it may also be construed to exclude the fornicator from marrying a pious Muslim as the Quran provides at 24:3: “A man guilty of adultery or fornication does not marry other than a woman guilty of adultery or fornication, or an idolatress, and as for a woman who committed adultery or fornication, no one but a man who committed adultery or fornication, or an idolater, marries her. And that has been prohibited for the Believers”⁸⁴). For the Hanfi School if the *Wali* finds the marriage to be unacceptable based on the lack of Kufu than such a marriage may be annulled. For the Maliki School, the *Wali* has a

⁸³ As Quoted in Malik’s Muwatta.

⁸⁴ Quran 24:3

similar power in prescribing a marriage through the exercise of *Ijbar*, although this power generally applies to minor females only.

6.3 The Role of the Husband and Wife

Islam envisages different roles and rights for both the spouses, and an ideal marriage is one where both the parties fulfill these roles and obligations. In this regard, the duty to care and provide for the family rests primarily on the husband's shoulders and the wife is not bound to work in order to support her family. The Quran clarifies this by saying that "Men shall take full care of women, because God has given one more strength than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard (in their husband's) absence what Allah would have them guard."⁸⁵ The concept of *Nafaqah* or support, may also be said to apply here. The Prophet Muhammad said: "You should give her food when you eat, clothe her when you clothe yourself, not strike her on the face, and do not revile her or desert her except in the house."⁸⁶ In the same light as the husband's duty to provide, the wife has the duty to care for and protect her husband's interests and property in his absence.

The difference in the roles ascribed to the husband and wife have often been criticised by those who feel that Islam as a whole fails to cater to gender equality. Polygamy, for them, is simply another example of this trend. As Leila Ahmed explains, however, there is an inbuilt tension between pragmatic and ethical perspectives within Islamic law that reveal the tug and pull between Islam as providing for male supremacy and Islam as a force for gender equality.⁸⁷

⁸⁵ Quran 4:34

⁸⁶ Sunan Abu Daud, *Kitab Al-Nikah* (Book of Marriage), 2137; Narrated Mu'awiyah al-Qushayri (When Mu'awiyah asked: Apostle of Allah, what is the right of the wife of one of us over him?)

⁸⁷ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, (New Haven: Yale University, 1992).

Ahmed suggests that while Islamic history foretells of pragmatic realities based on a hierarchical structure in marriage and in society as a whole, where men take the lead over women (and engage in polygamy for example), this understanding is ultimately at odds with the ethical perspectives that Islam was above-all established to articulate. These ethical perspectives, Ahmed explains, are “stubbornly egalitarian”, including with respect to the sexes. More importantly this tension can be found in the Quran itself. Therefore, verses like 4:129 mentioned above, and 2: 229 which states: “Wives have rights corresponding to those which husbands have, in equitable reciprocity”, suggest that men not be polygamous nor take a domineering position over women.

Ultimately, Ahmed states: “while there can be no doubt that in terms of its pragmatic rulings Islam instituted a hierarchical type of marriage that granted men control over women and rights to permissive sexuality, there can be no doubt, either, that Islamic views on women, as on all matters, are embedded in and framed by the new ethical and spiritual field of meaning that the religion had come into existence to articulate.”⁸⁸

This understanding of marriage in Islam, constructed within a hitherto unseen ‘spiritual field of meaning’, is at odds with the popular conception of marriage in the West today. In contrast to these conceptions, an Islamic marriage, as we shall shortly observe, does not need to be based on the flowering of love between two prospective spouses. Similarly, parties to an Islamic marriage do not understand themselves to be ‘meant for each other’ or ‘to have and to hold for as long as [the spouses] both shall live’. While love and respect are certainly present in an Islamic marriage, these attributes are seen as function of a marriage constructed in line with guidelines laid down by God, and are not seen to form independent reasons for marriage.

⁸⁸ Ibid 87 at 63

7 Marriage in the West

7.1 Polygamy in the West

It is important now to explore the role of marriage in the West and to come to a better understanding of why Justice Bauman felt polygamy harmed the “institution of monogamous marriage” and why this was so undesirable. We have already looked at the roots of monogamy in the West and how a “Christian Marriage” slowly became synonymous with a monogamous marriage under a heavy Roman-Greco influence. Similarly, we have discussed the laws proscribing polygamy in Canada and how similar laws in the United States motivated them. One additional jurisdiction that deserves attention here is Australia which shares much of Canada’s colonial history and multicultural demographic. More importantly for this paper, the two countries face the same conundrum of accommodating religious practices that are ostensibly at odds the moral and ethical conceptions of their majorities.

Highlighting the desire to reconcile the practices of marginalized groups with the mainstream, the Australian Department of Immigration and Citizenship mentions as one of its objectives “[the promotion of] equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians”.⁸⁹ In this regard, in 1992 the Australian Law Reform Commission published a report titled “Multiculturalism and the Law” in part to explore the nature and affects of polygamy in Australia. It was the commission’s motive that so far as possible it should come up with laws that “respect and protect relationships that people choose for themselves.”⁹⁰

⁸⁹ Department of Immigration and Citizenship, Government of Australia, “National Agenda for a Multicultural Australia”, on line: <<http://www.immi.gov.au/media/publications/multicultural/agenda/agenda89/object1.htm>>.

⁹⁰ Australian Law Reform Commission, *Multiculturalism and the law*, (Canberra: Australian Government Publishing, 1992) at 90.

While the Commission ultimately held, like the BC court, that polygamy should not be allowed in Australia, based on the thinking that allowing it would jeopardize Australia's commitment to Gender equality and would be rejected by a majority of Australians, some of the observations the report are worth noting:

In particular, the report mentions that there were a number of religious and ethnic groups in Australia that did engage in polygamy historically. It was therefore important to consider whether the law should provide for those groups to engage in matrimonial arrangements according to their own customs, inline with Australia's commitment to fostering a multicultural society. This was also important because Australian family law, like its other common law counterparts, provided for a person to engage in 'serial monogamy', that is, to engage in a string of marriages as long as a person was only legally married to one other person at a time. Second, the law did not bar married individuals from engaging in sexual relationships with parties outside the marriage and even rearing children with them, as long as this did not happen under a 'legal' marriage. Third, unmarried individuals were allowed to have multiple sexual partners simultaneously, again, as long as none of these relationships formed a legal marriage.⁹¹ Fourth, the report noticed that the law even gave rights to partners outside a marriage similar to those inside a legal marriage, particularly towards the end of such relationships, much like Canadian family law. This, the report felt, put genuine polygamous marriages at an unnecessary disadvantage and encouraged such couples to hide their marriages from the law. This behavior put women in polygamous marriages at a further disadvantage over those who were parties to extra-marital affairs.

Commenting on the Australian report, Patrick Parkinson argues that the law should cater to diverse matrimonial arrangements if they cater to the rights of those engaged in them- an argument very similar to that made by the Amicus in the polygamy reference in BC. He also notes that rejecting polygamous marriages because a majority of Australians are opposed to it

⁹¹ Ibid 5

defeats the purpose of have a law reform committee tasked with serving a pluralist society. If the committee simply builds consensus on established views espoused by the majority, it further ostracizes the practices of marginalized groups that are viewed as odd or abnormal by the majority.⁹² The opinion of the majority, therefore, does not constitute a good enough reason to reject the practices of a cultural or religious minority.

Responding to the gender equality argument, Parkinson suggests that the law be changed to allow for both polygynous and polyandrous marriages. This way the law would be truly gender neutral and liberal at the same time. This would further broaden the sphere of Australian Family Law as long as the second marriage takes place with the consent of the first marriage partner. One way of achieving this, he suggests, would be to require prior approval for a polygamous marriage from the Family Court, which, after an enquiry assisted by the Family Court Counseling Service, would be able to determine whether the first marriage partner had consented but also that the cultural or religious practices of the petitioner actually allowed for a polygamous marriage.

Similarly, Parkinson rejects the argument that polygamy would be oppressive to women by allowing men to build chattels of women to display their high social status. This, he argues, was a phenomenon that was only found in certain African and Middle-East cultures where having more than one wife was symbolic of a man's wealth and power. It was, therefore, unreasonable to use this reason to either prohibit polygamy in a country like Australia or to accept that this phenomenon was a universal feature of such African and Middle-Eastern communities.

Parkinson goes on to state:

⁹² Patrick Parkinson, "Taking Multiculturalism Seriously, Marriage Law and the Rights of Minorities" (1994) Sydney L. Rev. 16 437 at 474

“It is one thing to pass laws against discrimination and to provide women with legal remedies which empower them in cases where they are being treated unequally. It is another thing entirely to justify laws on the basis that they are for women’s own good even though the women themselves want to enter into such a relationship, especially if safeguards against forced acceptance of the second marriage are put in place, such as requiring the consent of a court after due inquiry. The argument concerning gender equality may also be double-edged. If the law only recognizes the claims of a first wife in cases where there is another de facto wife in the household, then this may leave second “wives” without the benefit of certain legal rights associated with being a de jure or de facto spouse.”⁹³

Therefore, as Parkinson concludes, if polygamy is deemed to be unconstitutional or unreasonable under Australian law, it cannot be on the grounds of gender equality or the majority’s views on the law. Such restrictions would then be similar to the same paternalistic views that the majority of Australian feel are part and parcel of polygamy.

In the end, however, it is interesting to see that Parkinson holds out the same reason for proscribing polygamy as was offered by Justice Bauman- to protect the institution of monogamous marriage as an attempt at preserving the traditional and fundamental values of the Australian majority. He states:

“How then might the balance be found between the rights of a minority and the preservation of fundamental moral and cultural values which are part of a society’s community of ideas? In each case, the importance of preserving the inherited cultural values of the majority must be balanced against the effects of such a law on the minority’s capacity for cultural expression. Perhaps the preservation of marriage as a monogamous institution is an example of where the preservation of

⁹³ Ibid 92 at 500

traditional values might override the claims of the minority group to recognition of polygamous unions as marriages.”⁹⁴

The perceived need of the majority to protect and preserve their traditional values is therefore the biggest obstacle in a bid to de-criminalize polygamy and allowing marginalized cultural and religious groups to practice their beliefs. However, as we have already discussed above, it is unlikely that polygamy will sweep across the nation and become the preferred form of marriage in Canada. Indeed, it is unlikely that those, like a large number of Muslims, who believe that polygamy is permissible for them will suddenly feel the urge to take additional wives. While members of the FLDS Church might legally take up polygamy after a possible de-criminalization, one wonders how such a situation would be different from the current de facto situation in Bountiful. Would decriminalization not bring members of the FLDS into the folds of mainstream society and ensure that their “insularity”, which polygamy is said to thrive on, is lifted?

7.2 The Institution of Monogamous Marriage

As the Amicus in the Reference points out, s. 293 is overly broad and is a disproportionate application of a law rooted in Christian conceptions of marriage. Historically, polygamy provided assurance to husbands that taking a barren wife would not end their pursuit of children. Polygamy made taking ill and aging wives less burdensome and such wives were less likely to be divorced in favor of younger wives. With a large family, polygamist families were better placed to work large sections of land and partake in the commercial and militaristic ventures that their communities embarked on. Since polygamous unions, like those in under Islamic law, could be exited, it offered women, who were largely seen to be dependent on men, a significantly better chance at leaving a troublesome marriage and re-entering marriage with another man.⁹⁵

⁹⁴ Ibid 92 at 503

⁹⁵ Ibid 87

While most of the above-mentioned benefits of polygamy may not apply to modern Canada, a number of women living in polygamous marriage under the FLDS Church have come forward to express their satisfaction with their way of life, and as consulting adults, they should be allowed to engage in whatever form of marriage they choose for themselves. However, in trying to understand why the BC court was so insistent on protecting the “institution of monogamous marriage”, it is important to dig deep and explore the reasons why monogamous marriage is held in such high esteem in the West.

The human rights paradigm that the liberal West has come to adopt cannot be separated from the culture and history behind it. In other words, the rights that we so fervently uphold today took hold in our own blend of views, perceptions and biases. Due to the importance of marriage as a building block of society, this institution has been particularly affected by the rights discourse and consequently the views and biases that these rights were constructed on. Modern marriage in the West with its allowance for civil unions, common-law partners, and same-sex marriages is a derivative of the “Christian Marriage”. While many of the new features of marriage we see today contradict the elements of a Christian Marriage, same-sex marriage and a no fault divorce being a good example- these new features arose in reaction to the very definitions that Christianity sought to frame marriage into. As a result, modern marriage in the West, defines itself as one that is unabashedly ‘un-Christian’. Unfortunately, its ‘un-Christian’ hallmark also means that it is insensitive to all other conceptions of marriage that are based on similar religious conceptions of marriage. Consequently, in contrast to a Muslim or a FLDS Celestial marriage, for example, the only thing maintained as ‘sacred’ in a modern marriage is its incorporation of ‘love’ as the foundation of the union between the parties seeking to elope.

The definition of modern marriage as ‘un-Christian’ is further complicated when, as we have discussed above, we realize that the monogamous Christian Marriage itself owes its existence to its Roman-Greco influence. While Christian patriarchs like the Biblical King Solomon were indeed polygamous, with King Solomon reportedly maintaining marital ties with 700 women.

These earlier tales of polygamy, with the onset of the Roman-Greco influence, were quickly written-off as God's instructions to fill a thinly populated world that are of little significance now.⁹⁶

However, as the Western world moved into the age of Enlightenment and underwent the Industrial Revolution, a rising middle class began to question concepts like polygamy that were associated with antiquated practices of bygone monarchs. The new middle class combined with new ideas of the balance of power between men and women slowly transformed the role and nature of marriage.⁹⁷ The Patriarch's control over his family and his children's personal lives slowly began to diminish, while individuality took hold. At about the same time, marriage for the sake of love rather than raising a family or fulfilling a sacred duty came to be the dominant norm. It was love rather than economic need or religion that people felt would provide them with the safety of companionship and familial support that marriage was so cherished for. At the same time it was hoped to put an end to marriages that entrapped women often without their consent.⁹⁸

For those of a more Christian mindset, divorce was never an option- a marriage could not be ended. The marriage vows of 'to have and to hold... till death do us part', a concept largely absent in Islam and other non-Western polygamist cultures, retained great weight with these couples. However, Abbott explains, 'as love gained currency as the primary reason for marriage, the idea of ending a love-less marriage also gained root- a phenomenon that had hitherto remained largely absent. With the decline of the power of the Church, divorce eventually came to be seen as a legal matter rather than a moral or religious one. These divorce laws then received a further boost with the eventual introduction of no-fault divorce. The end result of these changes was that marriage had lost much of its traditional footing and had become an altogether more

⁹⁶ Elizabeth Abbott, "Big Love or Big Lie?" (2011) National Post, online:
<<http://elizabethabbott.wordpress.com/2011/06/07/big-love-or-big-lie-should-a-liberal-society-tolerate-polygamy/>>.

⁹⁷ Ibid 96

⁹⁸ Ibid 96

liberalized affair. At the same time, most state institutions started building programs around the assumption of monogamy as the sole form of marriage. As a result, tax law, and more importantly, social benefits, Employment Insurance, and pension benefits all came to be constructed around the concept of monogamy'.⁹⁹ The creation of these social schemes around monogamous marriages have become a further impediment for many anti-polygamists who argue that not only would changing the system be expensive but that supporting large polygamous families would put an unnecessary burden on society.

When the Mormons moved to Canada from the US, they brought some of their wives with them. These wives then became eligible for all the social benefits that were available to other Canadians at the time. These wives were entitled to medical care and pensions, which made it easier for men to support their large families in Canada and abroad. Similarly, as many of these wives were not shown to be married to these men, when they bore children, they became entitled to claim welfare assistance and other benefits as single mothers. This practice, as Elizabeth Abbott explains, came to be known as 'bleeding the beast'.¹⁰⁰ To outsiders it further cemented the image of polygamist families as un-Canadian, un-patriotic and an unnecessary burden on the system.

Despite this gradual shift away from a Christian Marriage, Canadian (and Western) suspicions of an encroachment of the old forms of marriage and new interpretations of religious marriages trying to claim legitimacy in the public space have led to a firm renunciation of any unfamiliar form of marriage. These suspicions, however, are a response to practices that belong to the 'other'. Therefore, while Canadians have tolerated the practice despite its criminalization for over a century, the reason the polygamists in Bountiful are being prosecuted today is the same as

⁹⁹ Ibid 96

¹⁰⁰ Ibid 96

that when the law was initially passed- the practice has resurfaced as a perceived threat to the institution of monogamous marriage.

It is curious that polygamy remains unacceptable to a majority of Canadians despite the fact that the traditional institution of monogamous marriage has been weakened by the legalization of same-sex marriages. Abbott suggests why this may be so:

“In our longing to ensure that everyone enjoys every possible right, we have been willing to stretch our imaginations, swallow our bile, and give polygamy a chance. That is no less than our values demand of us. But legalizing it is not ultimately in the same category as legalizing gay marriage. While much has been made, in particular, of the parallel between sanctioning same-sex unions and sanctioning polygamy, not least by polygamists themselves, the outcomes couldn’t be more different. The former brought people into an existing system of rights; the latter poses a significant threat to that system.”¹⁰¹

For a large number of liberals, like Abbott, same-sex marriage is distinct from polygamy in that the first is seen as the recognition of a fundamental right attesting to one’s innate self while the later is simply an “expensive taste”,¹⁰² that does not warrant protection under the rights regime. Viewed in this light, polygamy does seem unworthy of de-criminalization. For members of the FLDS Church, however, polygamy is sacred (in that it’s a means of entering heaven) and not a self-indulgent expensive taste. Denying it protection under the rights regime is akin to ignoring the freedom of religion. However, since it was the “Christian Marriage” and the primacy of religion that for centuries excluded the right for same-sex couples to elope, protecting the

¹⁰¹ Ibid 96

¹⁰² A similar perspective is taken by Andrew March, see Ibid 4 at 250

freedom of religion is not as appealing or in vogue for most liberals as championing gender equality and other fundamental rights.¹⁰³

8 Conclusion: Alternatives to Criminalizing Polygamy

8.1 Targeting the Individual Harms of Polygamy

There are a number of latent mores that guide the way marriage is seen by a vast majority of Canadians. Pandering to the wills of this majority is not a good enough reason to criminalize polygamy. At the same time, the legalization of polygamy needs to take place with the harms that flow from certain polygamous marriages firmly in mind. The optimal solution, it appears, is to allow consenting adults the right to choose their personal matrimonial arrangements, including the right to engage in polygamous relationships, while keeping the wellbeing of those affected by such relationships in check by targeting the specific harms through the independent provisions in the Criminal Code.

Criminal Code provisions such as s. 153 (sexual exploitation); s. 266 (assault); s. 271 (sexual assault); s. 273.3 (removal of a child from Canada); s. 279(2) (forcible confinement); and s. 279.01 (trafficking in persons); are more than adequate in keeping the purported harms of polygamy in check. While many disagree with this line of thinking arguing that polygamy and the insularity of its practice will ensure that its harms continue to go unnoticed- such views stem from an improper understanding of polygamy that are further aggravated by latent xenophobia and racism. It is important to remember that when polygamy was first criminalized in Canada in 1890 it went out of its way to ban the ‘Mormon’ practice of polygamy, it provided that any one who entered into: “(a) any form of polygamy; or (b) any kind of conjugal union with more than

¹⁰³ Ibid 4 at 271

one person at the same time; or (c) *What among the persons commonly called Mormons is known as spiritual or plural marriage...*¹⁰⁴ [emphasis added]

While the provision citing ‘spiritual or plural marriage’ was later removed and is no longer a part of the modern Canadian Criminal Code, it points to the biases that once existed towards the religious practice of polygamy. Although Canada is vastly more pluralistic now, some of these biases continue to mar its legal landscape today. Professor Susan Drummond, who vociferously argues against the anti-polygamy law, states:

“The provision itself was drafted in 1892 under pressure from the US government, busy enacting its own criminal law targeting fundamentalist Mormons. We had no shame in similarly tailoring our polygamy law to single out this religious minority - a piece of blatant religious discrimination rectified only in 1954... The conjunction of Canada's lonely conviction of an aboriginal man under the polygamy provision and this view of fundamentalist Mormons as race traitors should signal to us that the "family values" underpinning the section are poised to operate as a form of discipline for socially and politically marginalized people.”¹⁰⁵

As Professor Drummond also suggests, polygamy can be effectively legalized and regulated by using mechanisms that are already at our disposal. Among these mechanisms, she includes the individual offences in the Criminal Code that have been mentioned above. However, she notes that despite the existence of these offences any charges that have been laid against members of the Bountiful community have been under the “anachronistic polygamy section”.¹⁰⁶

¹⁰⁴ *An Act further to amend the Criminal Law, S.C. 1890, c. 37, s. 11*, adding the offence to *the Act respecting Offences relating to the Law of Marriage, R.S.C. 1886, c. 161*

¹⁰⁵ Susan Drummond, “A Marriage of Fear and Xenophobia, Our Criminalization of Polygamy isn’t about Protecting Women” (2009) initially published in the *Globe and Mail* (online), later incorporated into a paper.

¹⁰⁶ Susan Drummond, “Polygamy’s Inscrutable Criminal Mischief” (2009) *Osgoode Hall Law Journal* at 321.

Similarly, in countering the concerns raised by Elizabeth Abbott, Drummond argues that benefits like child support are already extended to biological parents and stepparents acting *in loco parentis* regardless of the family structure that the children were born into. Allowing polygamous families to exist, therefore, will not tax the Canadian welfare system much further. Drummond goes on to provide a pertinent example of these laws at work:

“Wives who think they are in monogamous marriages may be surprised to find that their husband's income (and potentially the household income) will be unequivocally diminished by his children with a mistress, whether or not she consents... Courts have already generated some surprising decisions on spousal support in which both mistresses and wives are entitled to their conjugal partner's support following separation - whether or not the wife was aware of the mistress's existence.”¹⁰⁷

In contrast to women in monogamous marriages finding out that their end-of-marriage financial interests have been compromised by her husband's relationship with a mistress, ideally, women in polygamous marriage enter these marriages knowing exactly what they are agreeing to. As Drummond explains:

“Women in polygamous marriages have fair and effective notice of their economic vulnerabilities to sister wives and their children. How many wives, whose husbands are surreptitiously in a conjugal relationship with a mistress, are aware of their financial exposure? One of the other rare prosecutions in the past 100 years under the polygamy provision established (through an acquittal) that adultery is perfectly consistent with monogamy. The sighs of relief from monogamously, but loosely, married husbands should be accompanied by a gulp of

¹⁰⁷ Ibid 105

anxiety from their respectably married wives... decriminalizing polygamy and protecting women need not be mutually exclusive aspirations.”¹⁰⁸

8.2 Conclusion

The case of polygamy in Bountiful, BC brought to the forefront the harms that are a result of allowing people to engage in polygamy. A large number of these harms, we know now, flow for all forms of marriage. We have also come to understand that the reason polygamy was deemed unconstitutional was not only due to the tangible harms it caused to “women, children,[and] the society” but also because of the danger it posed to the “institution of monogamous marriage”, which is foundational to the traditional concept of marriage in Canadian Family Law.

In this light, it is prudent to criminalize and prosecute people who commit these particular wrongs rather than to criminalize an entire institution of marriage. As the lawyer for the B.C. Civil Liberties Association explained: “By intruding into adults’ decisions about the form of conjugal relationship that best meets their personal needs and aspirations, the law over-extends the reach of the criminal law into individuals’ private lives, intruding into their most private relationships.”¹⁰⁹

The changes that have affected Canadian family law over the past few decades have left the provision of polygamy largely “inscrutable”¹¹⁰. Canadian family law has adopted a new language for addressing marriage and those engaged in them. This new language, based on the

¹⁰⁸ Ibid 105

¹⁰⁹ Daphne Bramham, “Future of Canada’s polygamy law rests in hands of chief justice” (2011) Vancouver Sun, online:
<<http://www.vancouversun.com/life/Future+Canada+polygamy+rests+hands+chief+justice/4625907/story.html>>.

¹¹⁰ Ibid 106 at 367

notion of rights and freedoms has replaced earlier religious conceptions of marriage in the public realm and has affected a fundamental change in the way marriage is perceived.

Canadians have come to accept unmarried cohabitation and the unexclusivity of marriage,¹¹¹ the possibility of marriage being unabsolute, and one that is not heterosexual in nature.

Consequently, Canadian society has allowed itself to act in a public sphere of its own creation and choosing, free from archaic religious sanction. As Canada welcomes new immigrants to its bountiful shores, we have yet to see if the majority will tolerate the diverse and marginalized religious and cultural practices that these immigrants have brought with them and expand the public sphere to accommodate their beliefs and practices.

¹¹¹ Acts which would have once been charged under fornication and/or adultery

Bibliography

Afaf Lutfi al-Sayyid Marsot, “The Revolutionary Gentlewomen in Egypt”, in *Women in the Muslim World* 261, 263 (Lois Beck and Nikki Keddie eds., 1978)

Amira El-Azhary Sonbol, “History of Marriage Contracts in Egypt” (2005) *Hawwa* 3 at 167

Andrew F. March, “Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification” (2011) 8 *Journal of Moral Philosophy* 246.

Anver Emon, Affidavit to the BC Supreme Court, for *Reference Re: Section 293 of Criminal Code of Canada*, 2011 BCSC 1588.

Asaf Fyzee, *Outlines of Muhammadan Law*. 4th ed. (New Delhi: Oxford University Press, 2002)

Australian Law Reform Commission, *Multiculturalism and the law*, (Canberra: Australian Government Publishing, 1992) at 90.

Brenda Cossman and Carol Rogerson, *Family Law: Cases and Materials*, Vol. 1 (University of Toronto, 2011)

Card, Brigham Y. *et al.*, *The Mormon Presence in Canada* (Edmonton, Alberta: The University of Alberta Press, 1990) at 178.

CEDAW, *Equality in Marriage and Family Relations*, online:

<<http://www.unhchr.ch/tbs/doc.nsf/0/7030ccb2de3baae5c12563ee00648f1f?Opendocument>>.

Daphne Bramham, *Few Disagree that polygamy can cause harm*, online:

<<http://www.vancouversun.com/life/disagree+that+polygamy+cause+harm/4538957/story.html>>

Department of Immigration and Citizenship, Government of Australia, “National Agenda for a Multicultural Australia”, online:

<<http://www.immi.gov.au/media/publications/multicultural/agenda/agenda89/object1.htm>>.

Daphne Bramham, “Future of Canada’s polygamy law rests in hands of chief justice” (2011)

Vancouver Sun, online:

<<http://www.vancouversun.com/life/Future+Canada+polygamy+rests+hands+chief+justice/4625907/story.html>>.

Elizabeth H. White, “Legal Reform as an Indicator of Women’s Status in Muslim Nations”, in *Women in the Muslim World* 52, 58 (Lois Beck and Nikki Keddie eds., 1978)

Elizabeth Abbott, “Big Love or Big Lie?” (2011) National Post, online:

<<http://elizabethabbott.wordpress.com/2011/06/07/big-love-or-big-lie-should-a-liberal-society-tolerate-polygamy/>>.

F.H. Ruxton, *Maliki Law*, (London: Hyperion Press, 1916) at 99, translation on Mukhtasar of Sidi Khalil.

H.R. Hahlo, *Nulity of Marriage in Canada: With a Sideways Glance at Concubinage and Its Legal Consequences* (Toronto, Butterworths, 1979).

Ibn al-‘Arabi, *Ahkam al-Quran*, 1:310

Imran Nyazee, *The Distinguished Jurist’s Primer Vol. II* (Reading: Garnet Publishing, 1996) at 47, translation of Ibn-Rushd’s *Bidayat Al-Mujtahid*.

John Rawls, *Political Liberalism*, (Columbia, 1993).

John Esposito and Natana Delong-Bas, *Women in Muslim Family Law* 2nd ed. (Syracuse University Press, 2001) at 100-102.

Joseph Henrich, Steven J. Heine and Ara Norenzayan, “The Weirdest People in the World?” (2010) *Behavioral and Brain Sciences* 33 61.

Karen Selick, “Polygamy—Two Rights Shouldn’t Make a Wrong”, online:

<<http://www.karenselick.com/CL0508.html>>.

Law Reform Commission of Canada, *Bigamy*, 1985, Working Paper 42.

Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, (New Haven: Yale University, 1992).

Mark Henkel, *Scholar's Anti-Polygamy Report for Court is Discredited*, online: <<http://www.pro-polygamy.com/articles.php?news=0079>>.

Mohammad H. Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law" (2008) 8:1 *Chicago Journal of International Law* at 10.

Mona Siddiqui, "Mahr: Legal obligation or Rightful Demand?" (1995) *Journal of Islamic Studies* 14.

Nuh Ha Mim Keller, *The Reliance of the Traveler: The Classic Manual of Islamic Sacred Law* (Evanston: Sunna Books, 1991), a translation of *Umdat-ul-Salik wa-uddat al-nasik* by Ahmed ibn Naqib al-Misri.

Noel Coulson & Doreen Hinchcliff, "Women and Law Reform in Contemporary Islam", in *Women in the Muslim World* 37, 40 (Lois Beck and Nikki Keddie eds., 1978)

Patrick Parkinson, "Taking Multiculturalism Seriously, Marriage Law and the Rights of Minorities" (1994) *Sydney L. Rev.* 16 437 at 474

Reference Re: Section 293 of Criminal Code of Canada, 2011 BCSC 1588

Sarah Carter, "The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915" (Edmonton: University of Alberta Press, 2008).

Susan Drummond, "A Marriage of Fear and Xenophobia, Our Criminalization of Polygamy isn't about Protecting Women" (2009) initially published in the *Globe and Mail* (online),

Susan Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) *Osgoode Hall Law Journal* at 321.

Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 SCR 551.

T.C. Hartley, "Polygamy and Social Policy" (1969) 32 *Modern L. Rev* 155 at 160.

Tom Flanagan, *The Biological and Philosophical Reasons why we should Prosecute Polygamy*, online: <<http://www.oacas.org/news/08/april/24poly.pdf>>.

Turkish Penal Code, Article 230, online:

<<http://legislationline.org/documents/action/popup/id/6872/preview>>.

Walter Scheidel, "Monogamy and Polygyny in Greece, Rome, and World History" (2008)

Princeton/Stanford Working Papers in Classics.