Law Reform Commission of Canada

Commission de réforme du droit du Canada

CRIMINAL LAW

bigamy

Working Paper 42

Canada

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Catalogue No. J32-1/42-1985
ISBN 0-662-53856-0

Law Reform Commission
of Canada

Working Paper 42

BIGAMY

1985

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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To the memory of Jacques Fortin, who will always be a source of inspiration and encouragement in the effort to examine and reform our criminal law.

Introduction

In the *Criminal Code*, five generic offences against conjugal rights and the solemnization of marriage are classified as crimes against the person. They are: bigamy; polygamy; feigned marriage; pretending to solemnize a marriage; and solemnizing a marriage contrary to law.

The very existence of these offences in our criminal law cannot fail to raise many questions. The first which naturally come to mind concern their basis and the need to make them subject to criminal penalties. It is easy to see that these offences have their roots in the fundamental institutions of society: the family and marriage. The common and essential characteristic of the offences is that they threaten the institution of marriage. Of course, this fact cannot by itself justify criminal sanctions. It is thus necessary to consider the special nature of the problems associated with threats to this institution. To begin with, an analysis of marriage in Canadian society will make it possible to determine the nature of these threats and to assess their relative seriousness.

The problems having been indicated, the responses to them by existing law, civil and criminal, must be examined and evaluated. This leads to assessing the need for criminal sanctions, which must take into account not only the reprehensible nature and intrinsic seriousness of the prohibited behaviour, but also the quality and adequacy of non-criminal solutions. Further, examining the relevance of criminal sanctions in light of the civil rules of marriage is likely to disclose conflicts or ambiguities which may result in two concurrent types of solutions. This kind of situation, when it exists, may make the law uncertain in the eyes of the public, and demands reform.

CHAPTER ONE

The Problem of Criminal Sanctions

I. The Institution of Marriage

In a well-ordered State, the principal laws will be those governing marriage. (Plato, *Laws*)

It would be impossible in this Paper to review all aspects of the importance of the family and marriage to society. The family remains the nucleus around which most societies are organized. In the Preamble to the *Canadian Bill of Rights*, for example, the Parliament of Canada expressly confirms the attachment of the nation to the position of the family in Canadian society.[1]

Social stability and cohesion require that the family unit be itself stable and cohesive. The stability and continued existence of the family are given concrete form by marriage. Accordingly, the pursuit of these fundamental qualities is the purpose of legislation on marriage, which clearly defines the effects of marriage and the causes and methods of dissolving it. Thus, legislation elevates marriage to the rank of a true institution. The fact that it is an institution also affects the formation of a marital union. Marriage is not an ordinary contract; the contractual obligation cannot be defined or limited by the spouses. In the solemnization of the marriage, the spouses agree that a new social and legal status will apply to them.

Consequently, a valid marriage must meet certain conditions of form and substance imposed by the law. The social importance of the institution of marriage thus explains the solemnity surrounding it and the attention paid to it by the law. We recognize, however, that there are some members of society who no longer attach such importance to this institution. Many prefer a union which does not meet the conditions of form and substance imposed by the law. Nevertheless, the criminal law must provide protection for those who accept the values of marriage.

1. *Canadian Bill of Rights*, R.S.C. 1970, App. III.

II. The Characteristics of Marriage

[TRANSLATION]
Society makes the weight of its restraint felt in matrimonial matters by the prohibitions and the rites which it imposes. (Jean Carbonnier, *Droit civil*, p. 331)

The institution of marriage has certain essential characteristics; the various attacks upon marriage, which may or may not be penalized by the law, are defined in relation to these characteristics.

In Canada, as in most Western countries, marriage has its origins in Roman law as developed by canon lawyers since the beginning of the Christian era.[2] This common origin is reflected in the identical nature of the essential properties of modern marriage in civil law systems and marriages with a common law tradition.[3]

The essential properties of marriage result directly from the very nature of the institution. To them may be added in modern law the characteristics associated with the form and solemnization of marriage.

A. The Essential Properties of Marriage

In its widest sense, which embraces the various Western legal traditions, marriage is defined as the voluntary union of a man and a woman to the exclusion of any other person during the continuance of that union.

This definition contains the fundamental characteristics of marriage in our Western societies: the difference in sex between the spouses; their consent to a lasting marital union; and its exclusivity. These same characteristics were also embodied in the concept of a "Christian marriage" developed by the English courts in the nineteenth century,[4] to differentiate it clearly from marital practices alien to European traditions.

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2. J. Carbonnier, *Droit civil, Tome premier: Introduction à l'étude du droit et Droit civil*, 3rd ed. (Paris: P.U.F., 1967), p. 331 ff. See also E. Roguin, *Traité de droit civil comparé: le mariage* (Paris: ed. Pichon, 1904); J. Pineau, *La famille* (Montréal: P.U.M., 1982), p. 3; J. T. Hammick, *The Marriage Law of England* (London: Shaw and Sons, 1873), p. 3.

3. See in general: H. R. Hahlo, *Nullity of Marriage in Canada: With a Sideways Glance at Concubinage and Its Legal Consequences* (Toronto: Butterworths, 1979); Roguin, *supra*, note 2.

4. See in particular: T. C. Hartley, "Polygamy and Social Policy" (1969), 32 *Modern L. Rev.* 155, p. 160; M. L. Marasinghe, "Polygamous Marriages and the Principle of Mutation in the Conflict of Laws" (1978), 24 *McGill L.J.* 395, especially pp. 395-402. The classic cases in English law are: *Warrender* v. *Warrender*, [1835] 2 Cl. & F. 488 — in particular the celebrated dictum of Lord Brougham, p. 532; *Hyde* v. *Hyde* (1866), L.R. 1, P. & D. 130 (decision of Lord Penzance); *In re Bethell* (1887), 38 Ch. D. 220.

The first two characteristics of marriage are relatively straightforward. A union of persons of the same sex is not a marriage; secondly, defects in consent between spouses may compromise the validity of a marital union.

However, the exclusive nature of marriage presents some difficulties. In moral and religious terms, first of all, this characteristic is given the status of a principle in modern canon law:[5]

> The essential properties of marriage are unity and indissolubility; in Christian marriages they acquire a distinctive firmness by reason of the sacrament. (Canon 1056)

In legal terms, this essential characteristic of marriage is the source of specific conjugal duties, including the obligation of fidélity between the spouses. Finally, the exclusivity of the conjugal union is the basis of the principle of monogamy.

The monogamous marriage is derived directly from the oldest Roman law, as reinforced by canonical theory. This Romano-Christian concept[6] is the historical substratum of the matrimonial systems of countries with a Christian tradition. As Jean Carbonnier writes, [TRANSLATION] "the institution of monogamous marriage is a capstone of European legal civilization."[7] This tradition is, therefore, the source of Canadian matrimonial law in the common law provinces and in Québec, where the legal system is based on civil law.[8]

Monogamous marriage is not simply the result of a legal tradition. It is also a fundamental aspect of society and civilization. Furthermore, the principle of monogamy is not an exclusively Romano-Christian concept. Monogamy and its corollary, the prohibition of polygamy, have existed in other civilizations. According to Tacitus, the Germanic tribes in antiquity generally accepted only monogamous marriage. Seeking to establish the antiquity of the institution, Blackstone explains that in ancient Scandinavian law, polygamy was a crime punishable by death. In the Age of Enlightenment, the uniformity of monogamous practice in Europe was explained by the climate of the Nordic countries and demographic conditions in Eastern nations.[9]

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5. *Code of Canon Law*, promulgated on January 25, 1983 and effective on November 27, 1983.
6. Monogamous marriage does not belong to the Judaic tradition of the Bible. The polygamy of the Old Testament patriarchs was not adopted by the Church. However, it should be noted that even in the European Judaic tradition, biblical polygamy has given way to the monogamous principle. Hartley, *supra*, note 4, p. 155; Carbonnier, *supra*, note 2, pp. 339-40.
7. *Supra*, note 2, p. 331.
8. See in general: Hahlo, *supra*, note 3; Pineau, *supra*, note 2.
9. W. Blackstone, *Commentaries on the Laws of England*, 1st ed. (Oxford: Clarendon Press, 1769), Book IV, pp. 163-4; Montesquieu, *L'esprit des lois*, Title XXIII: "Laws in Their Relation to the Number of Inhabitants."

These reasons may seem amusing today, but whatever the original causes of its practice, monogamy still corresponds to a pervasive sociological reality. The monogamous structure of the marital union, whether the formal institution of marriage or concubinage, is a fundamental part of the cultural mores and traditions of a Western society.

In Canada, aside from the moral value which it represents, monogamous marriage constitutes the very fibre of the social fabric. The 1981 census of the Canadian population indicates that the great majority practices monogamy:

- 11,949,165 persons stated they were married, separated or cohabiting;
- 500,135 persons stated they were divorced;
- 1,157,670 were widows or widowers of a former monogamous couple;
- 10,736,215 persons stated that they were single (this figure includes children).

Thus, the monogamous principle not only represents an essential characteristic of the institution of marriage; it also constitutes a basic part of Canadian society.

B. The Marriage Rites

Unlike its fundamental characteristics, the formal requirements of marriage have changed considerably over the centuries. In modern law, there are essentially two formal conditions: the necessity of a rite; and the publication of the marriage.[10]

Originally, canon law, following Roman law, regarded the act of marrying as a purely consensual agreement. This concept gave marriage a private nature which was reflected in the absence of any public rite. A simple exchange of vows between spouses sufficed to conclude a marriage. The possession of this status subsequently confirmed the married state of the spouses.[11] The Church undoubtedly did recommend that the union be blessed by a priest in a religious ceremony. This was the usual form of marriage. However, failure to follow this recommendation did not affect the validity of the marriage from either a legal or religious standpoint.[12]

10. Carbonnier, *supra*, note 2, p. 335 ff.; Hahlo, *supra*, note 3.

11. A complex system of establishing matrimonial status existed in the old law. See Roguin, *supra*, note 2, p. 96 ff.

12. In legal terms the continuance of the marital union took precedence over form; in religious terms the sacrament of marriage was regarded as administered by the spouses themselves, so much so that the absence of a religious celebrant was not a bar to the formation of an effective and valid marriage or even to receiving the sacrament. See Roguin, *supra*, note 2, p. 100.

This extreme simplicity in the formation of a marriage was, however, capable of producing difficulties in determining whether persons were married. To begin with, there was an inevitable confusion between consensual marriage, also referred to as irregular marriage, and concubinage. Unlike Roman law, the canon law made a clear distinction between the two, and tended to treat concubinage as marriage.[13] The same was true of a defective marriage, which would have been acceptable had it not been subject to some departure from the rules or rites prescribed by the Church. A clandestine marriage celebrated by a priest had the effect of a valid marriage.

All this confusion created by the state of matrimonial law was aggravated when the problem arose of the validity of a marriage or even of its existence. Needless to say, the question became a crucial one in cases of a second marital or concubinary union, in view of the principle of monogamy.

Historically, this confusion occurred at different periods with the re-emergence of obscure marital connections and cases of more or less legal bigamy.[14] The Council of Trent in 1563 resolved this confusion by imposing a public formality as an essential condition of the validity of marriage. Henceforth, only a regular marriage celebrated *in facie ecclesiae* would be recognized. The situation in England remained unchanged, however, because of the separation of the Anglican Church from Rome some thirty years before the Council. The principles of pre-Trent canon law thus remained those of British common law:

> As the result of these views there were three distinct modes of entering into matrimony under the ancient law of England: (1) By public celebration in facie ecclesiae; (2) By clandestine celebration covertly conducted by a clergyman ecclesiastically ordained; and (3) By the mere consent of the parties.[15]

This historical circumstance explains the survival of marriage by consent, also known as common law marriage, into modern times. At the present day, this form of union has a legal status in certain jurisdictions, especially in some of the American states.[16] However, English law was to encounter the same difficulties inherent in this matrimonial system. Various ecclesiastical legislative measures in the seventeenth century were powerless to limit irregularities in marriage and a shameless traffic in clandestine unions assumed disquieting proportions at the end of the century.[17]

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13. Roguin, *supra*, note 2, p. 102.

14. It would be beyond the the scope of this text to review the various historical events punctuating the development of the marriage rites. A useful work of reference in this regard is Roguin, *supra*, note 2, p. 98 ff.; Hammick, *supra*, note 2, pp. 3-20.

15. Hammick, *supra*, note 2, p. 4.

16. See "Bigamy," 10 *Am. Jur.* 2d, 967, in particular pp. 974-5, 977 ff.

17. The year 1603 continues to be an important date in the evolution of regulation of marriage. It was in this first year of the reign of James I that the ecclesiastical Assizes of Canterbury were convened, and this assembly promulgated comprehensive canons regarding government of the Church of England, clergy and marriage. Many canons provided specific rules for the solemnization of marriage. Thus, canon 62 provided for a penalty of suspension *per triennium* for any celebrant performing a marriage without

Notwithstanding the stringency of the ecclesiastical law on the subject of marriage, irregularities continued to exist, in part traceable to the old doctrine that a want of completeness in the manner of solemnization did not render the contract less binding. A shameless traffic in clandestine marriages commenced towards the close of the 17th century, and was continued in defiance of the law and heavy pecuniary penalties, to the great scandal of the Church, until put an end to by Lord Hardwicke's Act (26 Geo. II, chap. 33).[18]

In 1753, therefore, the English Parliament in its turn imposed the requirement of a public formality for the conclusion of a valid marriage. The statute on marriage entitled *An Act for the Better Preventing of Clandestine Marriages* (26 Geo. II, chap. 33), better known as *Lord Hardwicke's Act*, provided that marriages not concluded in accordance with religious and public formalities were void. This legislation also substantially reinforced the provisions of earlier ecclesiastical law regarding the duties of celebrants in the conclusion of marriage. This was the period when criminal legislation took over the function of religious legislation in punishing offences relating to the solemnization of marriage. Indeed, the situation had so far deteriorated in the early eighteenth century that some taverns were known as "marriage houses." Celebrants no longer even took the trouble to celebrate in accordance with the rites, and actually sold the parties a marriage certificate which conferred marital status on them.

Lord Hardwicke's Act further defined the crime of "clandestine marriage" by classifying it as a "felony" and making it subject to severe penalties. This offence was directed at marriage celebrated outside of a church or without authorization. It also included a rite in which formalities such as publication of the banns or the obtaining of a licence had not been complied with. Finally, the prohibition extended to the entire area of tampering with registers and other documents relating to marriage. The definition and punishment of offences against the proper celebration of marriage were clearly intended to deal with a real problem of delinquency, which was able to develop because of the inadequacies of a vague matrimonial law.

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publishing the banns or without a licence. There were even provisions as to the times when marriages could be solemnized. These canons laid down the formal and substantive conditions of marriage which we are familiar with today. Though it was binding on the clergy, however, this ecclesiastical legislation did not have the force of law. Thus, in order to deal with non-compliance with these canons, a 1695 statute (6 & 7 Will. III, c. 6) gave them more general effect and a penal aspect. This legislation provided for fines in cases of marriages solemnized contrary to the rites. However, the profits which churchmen derived from the celebration of marriage, regular or irregular, made such measures pointless.

What was even more serious, however, was that the developments in regulating marriage resulted in the growth of clandestine marriages outside the churches:

> One effect of the measures taken for the prevention of secret matrimony in churches, was to extend this scandalous trade in other direction. A class of profligate and degraded clergymen confined in the Fleet Prison, or residing within its rules, undertook to marry couples in a private manner, and these men touted for clandestine marriages with unblushing effrontery. (Hammick)

Over the next hundred years, other legislation sought to reinforce compliance with the law (7 & 8 Will. III, c. 35, 10 Anne, c. 19 (s. CLXXVI)). However, it was not until a statute in 1753 that matrimonial legislation was finally introduced to correct the situation: Hammick, *supra*, note 2, p. 3 ff.; Blackstone, *supra*, note 9, p. 162 (on "clandestine marriages").

18. Hammick, *supra*, note 2, p. 9.

In short, the historical development of matrimonial law demonstrates that clarity in the marital status of individuals in society is necessary. The uncertainty as to the civil status of couples, resulting from an irregular or clandestine marriage, to some extent encouraged marital instability and matrimonial fraud.

By making the public formality of an official rite compulsory for the validity of a marriage, the law eliminated at one stroke these causes of uncertainty and all types of claims based on an obscure marital union.

At the present day, marriage requires the formality of an official and a public act, whether the marriage is civil or religious in nature. The other special formalities of the rite thus appear as technicalities added to these fundamental characteristics. To a degree, the clarity of contemporary matrimonial law makes the crucial problems of irregularity and clandestinity underlying the prohibitions concerned with the celebration of marriage things of the past.

III. Threats to Marriage

> We now think that an act should not be made a crime unless its commission involves harmful social consequences.[19]

The most serious threats to marriage are clearly those which affect the fundamental characteristics of the institution. However, not all justify the use of criminal sanctions for this reason alone. The threat must involve a degree of seriousness and social undesirability, making intervention by the criminal law both plausible and necessary.

The seriousness of deviant behaviour is seen in light of several factors which will ordinarily constitute the rational bases for making it a crime. A clutch of justifications have been suggested and debated to making threats to marriage criminal, without their providing any satisfactory answers.[20] Lord Devlin and Dean Rostow consider that the defence of public morality is essentially the basis for the prohibition and punishment of bigamy and polygamy.

There is no doubt that moral precepts underlie making certain threats to marriage criminal. However, as Hart and Packer have pointed out,[21] moral justifications are not

19. G. Williams, "Language and the Law" (1945), 61 *L.Q.R.* 71, p. 77.

20. The debate between Professor Hart and Lord Devlin as to the moral basis of the criminal law has been the occasion for a searching analysis and discussion of this entire question. See in particular the comments made by B. Mitchell in *Law, Morality and Religion in a Secular Society* (London: Oxford U. P., 1967), in particular pp. 18-35.

21. H. L. A. Hart, *Law, Liberty and Morality* (London: Oxford U. P., 1963); H. L. Packer, *The Limits of the Criminal Sanction* (Stanford, California: Stanford U. P., 1968), in particular pp. 312-6; Mitchell, *supra*, note 20, pp. 23 and 28.

a complete explanation. In particular, the defence of public morality is hard to reconcile with the silence of the criminal law on certain immoral types of conduct connected with marriage.

The classic illustration of this weakness of the moral justification is adultery. Historically in the common law, adultery has never been regarded as a crime. Blackstone tells us that it was made a criminal offence by statute during a short period in the middle of the eighteenth century.[22] Its repeal was greeted as ending an "unfashionable rigour."[23]

There are, in addition, other threats to marriage which, despite their seriousness in moral terms, are nevertheless not offences. Thus, abandonment of a spouse, incestuous (consanguineous) marriage or homosexual relations are threats to matrimonial law which are penalized by civil laws on marriage and divorce. However, they are not crimes. In fact, the moral justification for penalizing threats to marriage is difficult and vague because it is subject to the constant fluctuations in public morality. Moral standards in marital and sexual matters have varied at different periods in different countries, or at least the threshold of tolerance has changed. A moral system may accept a compromise or, on the other hand, it may in other circumstances demonstrate extreme rigidity. Thus, although adultery is not a crime in the common law tradition, it has been made criminal in other countries, and even in some parts of Canada by pre-Confederation statutes.[24]

The same fluctuations characterize religious standards. The new Code of Canon Law of the Roman Catholic Church has substantially altered its criminal law. Since 1983, it no longer regards bigamy as an offence subject to punishment by ecclesiastical penalties.

Similarly, it is difficult in moral terms simply to condemn polygamy. Some schools of thought do not regard polygamy as contrary either to natural law or to historical divine law. Its prohibition is actually the result of the Gospel and ecclesiastical legislation.[25]

In reality, polygamy is a social institution in the same way as is a monogamous marriage. For demographic, economic, religious or cultural reasons, some societies have made polygamous marriage a part of their social structures. In Canada, and in the West in general, similar reasons have been responsible for an emphasis on monogamous marriage.

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22. Blackstone, *supra*, note 9, p. 64.

23. *Ibid.*

24. A pre-Confederation statute of New Brunswick made adultery a criminal offence: R.S.N.B. 1854, c. 145, s. 3. This statute was repealed by the first legislation passed on criminal matters by the federal Parliament: 32 and 33 Vict., c. 36 (1869). See J. Fortin and L. Viau, *Traité de droit pénal général* (Montréal: Les Éditions Thémis, 1982), p. 1.

25. Roguin, *supra*, note 2; *supra*, note 6.

The prohibition of bigamy, like polygamy, and *a fortiori* making them criminal, is thus not simply a matter of moral choice. Certainly, one may agree with Lord Devlin that the institution of monogamous marriage is an expression of social morals, but making threats to the monogamous principle criminal is perhaps based more on the defence of a social institution than on a defence of public morality. From this point of view, the most serious and menacing threats are those which compromise the institution of marriage itself. This sociological aspect can be used to identify clearly a degree of seriousness going beyond simple threats to the fundamental characteristics of marriage.

This is why the prohibition of bigamy seems justified, since by assuming all the ritual and official characteristics of marriage, such conduct destroys the meaning of the institution itself. Aside from its duplicity, a bigamous marriage is a valid marriage in all respects: this is what makes it a real threat to the institution. In consultations, certain contributors suggested adopting a form of bigamy in which fraud would be the deciding factor. Although attractive, we do not regard this solution as acceptable, for the concept of fraud does not encompass all situations in which there may be a threat to marriage. We feel that the proposal adopted by the Commission already takes into account the situations in which there is a victim.

This is not true of other threats to marriage, which may be in conflict with the institution but are not a denial of it. Thus, adultery, concubinage and clandestine or irregular marriage do not undermine the institution of marriage as part of the social framework. On the contrary, such conduct is defined by reference to the institutional norm. Matrimonial law is able, without the help of criminal law, to encompass and control it.

The same is true of polygamy, which is a practice so foreign to our way of life that it does not directly threaten the institution of marriage. Devoid of any official character, polygamy may be regarded as a marginal practice in the same way as adultery and so, does not call for criminal penalties. This is the view, replete with moderation, expressed by Glanville Williams:

> If it is thought that the law should discountenance them, this may be done sufficiently by failure to provide for them in the civil law, rather than by attempting the sterner dissuasion of penal sanctions.[26]

The existing criminal offences of feigned marriage and marriage contrary to law undoubtedly correspond to departures from the formal requirements of marriage. However, they no longer have the moral and social seriousness which historically justified making them subject to criminal prohibitions. Clandestine marriage and irregular marriage today have no legal status which can compromise the institution of marriage. Modern matrimonial law provides a means for considering and dealing with the problems raised.

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26. G. Williams, *Criminal Law*, 2nd ed. (London: Stevens, 1961), p. 750.

In addition to defending the social institution, protection of the spouses against fraud may be another justification for making certain threats to marriage criminal. Packer and Hughes consider that the essential utilitarian function of the crime of bigamy is to prevent the obtaining of sexual relations by fraud.[27] It is clear that feigned marriage or the second marriage constituting bigamy may, in some circumstances, induce a spouse in good faith to marry the "defrauder" as the result of a subterfuge involving deliberate use of the institution of marriage. However, the fraudulent nature of matrimonial offences is not their essential characteristic and does not cover all situations to which the offences apply.

In their present form, bigamy and feigned marriage may involve collusion by the spouses. The aspect of fraud is almost non-existent in other threats to marriage. In its most common form, polygamy assumes a marital union with willing participants.

The fraudulent use of the institution is still a factor to be considered in determining the seriousness of certain threats to marriage. However, it should be borne in mind that the fraudulent aspect of certain behaviour may already be implicitly covered by other offences or by other legislation. Finally, there is a very pragmatic justification for intervention by the criminal law in connection with the offence of celebration of marriage contrary to law.

The purpose of the criminal penalty is to ensure that laws regarding the celebration of marriage will be observed. This objective is certainly consistent with legislation of a regulatory nature, but could not justify maintaining a criminal penalty.

27. *Supra*, note 21. See also Mitchell, *supra*, note 20.

CHAPTER TWO

The Responses of Existing Law

As we know, acts prohibited by the criminal law do not include all threats to conjugal rights. Consideration of the state of the existing law will therefore be limited to threats subject to a criminal penalty. These may be divided into two categories: threats to the principle of monogamy, and threats to the celebration of marriage.

I. Threats to the Principle of Monogamy

> ... I am not unaware of the tremendous social importance of the marriage ceremony. It is this ceremony that, through the force of tradition, maintains the institution of monogamy and keeps families stable. Punishment is perhaps justifiable if it is necessary to preserve such an important institution; but we should first make quite sure that it is necessary, and that monogamy can be maintained in no other way. (Glanville Williams, "Language and the Law," p. 78)

Bigamy and polygamy are the principal threats to monogamous marriage. The two concepts coincide in many respects, and bigamy is often regarded as a special form of polygamy.

In its most general sense, polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage. It is the institution accepted by Islamic law and ancient Chinese matrimonial law. Polygamy can also take the form of simultaneously maintaining several independent marital unions. The maintaining of more than one monogamous union by the same person corresponds to the popular notion of bigamy. Under modern conditions the practice of polygamy, like bigamy, requires no marriage formalities. A concubinary union of more than two persons constitutes polygamy. In legal terms, however, these concepts have a more specific meaning. In particular bigamy, which is defined in relation to the legal institution of marriage, is distinguished from polygamy by the requirement of formal marital ties.

While the prohibition of bigamy in matrimonial law goes back to the origins of canon law, it was made a crime much more recently. In England, the criminal prohibition of bigamy coincides with the efforts undertaken in the early seventeenth century

to regulate marriage. An Act of 1603 (1 Jac. I, chap. 11) classified it as a "felony." This new crime was made a capital offence. The existing offence takes its origin from this legislation.

A. Bigamy

(1) Duplication of Marriages

In its legal sense, bigamy is characterized essentially by the conclusion of a marriage when one of the spouses is already bound by the ties of a former marriage. It is the offence described in subparagraphs 254(1)(*a*)(i) and (ii) of the Canadian *Criminal Code*:

> Every one commits bigamy who
>
> (*a*) in Canada,
>
> (i) being married, goes through a form of marriage with another person,
>
> (ii) knowing that another person is married, goes through a form of marriage with that person ....

Bigamy is defined in terms of an offence of commission, which is in keeping with the logic of matrimonial law, since the second marriage is in any case subject to invalidity as a result of the bigamy. The expression "form of marriage" refers to the general way in which the marriage is contracted. It is thus a reference to the general conditions of contracting a marriage. The expression is defined in section 196 of the *Code*:

> ... "form of marriage" includes a ceremony of marriage that is recognized as valid
>
> (*a*) by the law of the place where it was celebrated, or
>
> (*b*) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated; ....

This definition does not err on the side of clarity. In fact, it confuses more than it clarifies the "form of marriage" concerned in the offence of bigamy. The courts have clearly established that there must be a ceremony recognized by law as resulting in a valid marriage.[28] In Canada, there must be a solemnization authorized by laws in effect in one of the provinces. In matrimonial law, without our going into the very complex questions of conflict of laws, it may simply be said that a marriage celebrated in one province is generally recognized in another, when the formal requirements of the law of the province in which it was celebrated have been observed.[29]

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28. *R.* v. *Howard*, [1966] 3 C.C.C. 91 (B.C. Co. Ct.). See A. W. Mewett and M. Manning, *Criminal Law* (Toronto: Butterworths, 1978), pp. 483-7, especially p. 484; I. Lagarde, *Droit pénal canadien* (Montréal: Wilson & Lafleur, 1974), p. 692 ff.

29. Pineau, *supra*, note 2, p. 49; J-G. Castel, "Recognition of Provincial Divorces in Canada" (1978), 24 *McGill L.J.* 646; Hahlo, *supra*, note 3.

From this point of view, paragraph 196(*b*) ("form of marriage") of the *Criminal Code* is in conflict with the existing matrimonial law. This provision has the effect of conferring validity on a ceremony which has none in civil law terms. When a ceremony performed in a particular jurisdiction is not valid under the matrimonial laws in that jurisdiction, there is no marriage. Legally, therefore, there can be no second marriage, and in those circumstances, the question of bigamy does not even arise.

However, the legality of the formal requirements of the ceremony does not extend to the technical or secondary details, such as the prior obtaining of the marriage licence and its submission to the celebrant.[30] In fact, the courts require observance of the essential conditions of form, namely, the celebration of a rite and that it be in public. This solution coincides perfectly with matrimonial law, since the mere absence of a specific formal requirement will not generally, of itself, result in the invalidation of the marriage. The lack of publication of the banns may make publicity of the marriage incomplete, without resulting in an absolute lack of publicity. In assessing the facts, the courts may conclude that a marriage was validly celebrated, although this particular aspect of it was lacking.[31]

These provisions of matrimonial law also make superfluous the prohibition of excuse stated in subsection 254(5):

> No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid.

The act or omission by an accused tending to invalidate a form of marriage may bear either on an essential aspect of form or on a detail. In the first case, the marriage was not validly celebrated. In the second, the act or omission does not affect the validity of the form of marriage. The exclusion contained in *Code* subsection 254(5) thus appears to be both unnecessary and unfair. It is the function of the court to assess, in light of the circumstances, whether or not there was a solemnization of marriage. The offence of bigamy is based on use of the rites of the institution. This essential component must be clearly established by proper evidence.

In short, bigamy is committed by use of the forms of a proper marriage. It is only in this way that it can be a real threat to the institution of marriage. In bigamy, the solemnization of marriage is itself the subject-matter of the offence. In principle, one need not consider the substantive requirements of a marriage in deciding whether the very form of the marriage was valid.

In social terms, the potential invalidity of the second marriage for some cause other than bigamy does not alter the fact that there was a double marriage. If the form of marriage is valid, it does not matter whether the spouses lack the capacity to contract

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30. *R.* v. *Howard*, *supra*, note 28.

31. On the causes of nullity of marriage related to its solemnization, see Pineau, *supra*, note 2, p. 63 ff.; Hahlo, *supra*, note 3.

a marriage; there was a threat to the institution as a result of the bigamy. Indeed, in such a situation the lack of capacity, resulting from age or a family relationship, for example, is a cause of invalidity of the marriage in addition to the existence of an earlier marriage. Nevertheless, the legislator has seen fit to provide specifically, in subsection 254(3), for the exclusion of a defence based on invalidity of the second marriage:

> Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.

Where the second marriage is solemnized in Canada, this provision seems to be superfluous, since the mere fact of going through a form of marriage suffices for the commission of bigamy. The implications of this provision for a second marriage performed abroad are discussed below in this Paper, in connection with the extraterritoriality of the offence.

(2) Former Marriage

Bigamy, of course, assumes the existence of a former marriage. Unlike the expression "form of marriage," this first marriage is not defined in the *Code*. However, it is consistent with the logic of the criminal sanction that this first marriage must be one recognized as valid by law and must not have been dissolved by the death of a spouse or by divorce. In matrimonial law, the validity of the marriage is presumed. The *Criminal Code* adopts this presumption in subsection 254(4):

> Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.

This presumption that the first marriage is valid was not introduced into the statute until the codification of 1953-1954. The origins of its adoption lay in an excessive interpretation by the courts of the burden of proof on the prosecution.[32] In fact, the validity of the marriage should be presumed without even being stated.

What is important for the purposes of a criminal sanction is that the first marriage was a proper marital union recognized by Canadian matrimonial law. Thus, whether this union was celebrated in Canada or abroad, it will be regarded as valid if it is in accordance with the substantive requirements and minimal formal requirements of the institution.[33] In this context, it should of course be possible to establish that the first marriage is void in order to deny its existence. This solution is not only consistent with the spirit of criminal sanctions but also with that of matrimonial law.

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32. *R.* v. *Haugen*, [1923] 2 W.W.R. 709, 17 Sask. L.R. 57, 41 C.C.C. 132 (Sask. C.A.); *R.* v. *Tucker* (1953), 16 C R. 156, 8 W.W.R. 184, 105 C.C.C. 299 (B.C. C.A.); Lagarde, *supra*, note 28, p. 698 ff.

33. Pineau, *supra*, note 2, p. 49; *R.* v. *Bleiler* (1912), 4 Alta. L.R. 320, 2 W.W.R. 5, 19 C.C.C. 249, 1 D.L.R. 878 (Alta. C.A.); *R.* v. *Naguib*, [1917] 1 K.B. 359 (U.K.); *R.* v. *Moscovitch* (1927), 20 Cr.

At common law, a marriage which, as a result of the absence of an essential condition, is void, as opposed to a voidable marriage, may be regarded by the spouses as non-existent.[34] From a practical standpoint, this means that it is not necessary to obtain a ruling by the court that a marriage is invalid. In civil law, on the other hand, the solution is different, since intervention by the court is required in every case. In theory, nevertheless, a marriage which is regarded as void is considered to have never existed. Thus, when bigamy is cited in civil law, the court must first decide on the question of the validity of the first marriage if there is no judgment of nullity.[35]

Understandably, the burden of establishing the invalidity of a marriage which is not dissolved by official means rests with the accused. On the other hand, the non-existence of a marriage resulting from the death of a spouse, a divorce decree or a judicial judgment of nullity constitutes a complete answer to a charge of bigamy. In fact, in such situations the prosecution is unable to establish the existence of the first marriage. The clarifications provided by paragraphs 254(2)(*a*), (*c*) and (*d*) are utterly useless in this regard:

> No person commits bigamy by going through a form of marriage if
>
> (*a*) that person in good faith and on reasonable grounds believes that his spouse is dead,
>
> ...
>
> (*c*) that person has been divorced from the bond of the first marriage, or
>
> (*d*) the former marriage has been declared void by a court of competent jurisdiction.

In the absence of formal proof of the death of the first spouse, belief in such death, even if erroneous, may constitute a valid defence of mistake of fact which will be assessed by the courts in light of the general rules on that defence. The proposals of the Law Reform Commission, in Working Paper 29 on the General Part of the *Criminal Code*, offer an adequate solution which makes the provisions of section 254 superfluous.[36] Similarly, mistake of law equivalent to a mistake of fact is now accepted by the courts.[37] Thus, a person charged with bigamy who erroneously believes, on

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App. R. 121 (U.K.); *R.* v. *Foster*, [1935] 8 M.P.R. 10, 62 C.C.C. 263, [1935] 1 D.L.R. 252 (N.B C.A.); *R.* v. *Griffin* (1879), 14 Cox C.C. 308; *R.* v. *Debard* (1918), 44 O.L.R. 427, 31 C.C.C. 122 (Ont. C.A.). These cases are concerned primarily with proof of a foreign marriage, but by implication confirm the conditions for recognition of such marriages in Canada.

34. Hahlo, *supra*, note 3, p. 4.

35. Pineau, *supra*, note 2, pp. 57-9 and 62-3, and the scholarly commentary cited and discussed therein.

36. Law Reform Commission of Canada, *The General Part - Liability and Defences*, [Working Paper 29] (Ottawa: Minister of Supply and Services Canada, 1982), p. 88 ff., especially pp. 89 and 94.

37. *R.* v. *Prue and Baril*, [1979] 2 S.C.R. 547, 46 C.C.C. (2d) 257, 8 C.R. (3d) 68; *Pappajohn* v. *The Queen*, [1980] 2 S.C.R. 120, [1980] 4 W.W.R. 387, 14 C.R. (3d) 243, 52 C.C.C. (2d) 481, 111 D.L.R.(3d) 1.

reasonable grounds, that the first marriage was dissolved by a divorce decree or a judgment of nullity, may validly put forward that defence in the present state of the law.[38]

It is therefore useless, in defining the offence, to define grounds of defence which in fact fall under the General Part of the *Criminal Code*. Moreover, the Commission's proposals cover this matter completely.

The case of non-existence of the first marriage based on absence of the spouse, covered by paragraph 254(2)(*b*), constitutes a special situation which requires some clarification. In matrimonial law, the spouse of someone who has disappeared cannot remarry unless he or she provides certain proof that the absent spouse has died. If circumstances warrant, a declaratory judgment of death may constitute such proof. Such judgment thus makes a second marriage possible. However, both at civil and common law, the reappearance of the absent spouse results in voiding the second marriage, which had been legally entered into, and in re-establishing the first. At common law, the continued absence of someone for seven consecutive years creates a presumption of death. However, he or she must have been absent in the legal sense, that is, someone about whom there has been no news and who is not known to be living or dead. The defence proposed by paragraph 254(2)(*b*) of the *Code* is based on this presumption:

> No person commits bigamy by going through a form of marriage if
>
> ...
>
> (*b*) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years, ...

An accused who has deliberately avoided investigating whether his spouse is alive may be regarded, however, as being in bad faith and may not be able to benefit from this presumption.[39]

The particular defence provided in paragraph 254(2)(*b*) no longer has any place in the present *Code*. To begin with, this provision does not correspond to existing matrimonial law; thus, it seems superfluous in view of the present provisions concerning mistake of fact and mistake of law.

Absence as such does not dissolve a marriage. Essentially it is the death of the spouse, established or presumed, which may be a cause of dissolution. A person whose absent spouse reappears after he has obtained a declaratory judgment of death and remarried may certainly put forward a general defence of mistake of fact. It should also be noted that divorce dissolves a marriage.[40]

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38. Law Reform Commission of Canada, *supra*, note 36, pp. 89 and 155, endnote 93; *R.* v. *Gould*, [1968] 2 Q.B. 65, 52 Cr. App. R. 152 (C.C.A.); *R.* v. *Woolridge* (1979), 49 C.C.C. (2d) 300 (Sask. Prov. Ct.); *R.* v. *Haugen*, *supra*, note 32 (belief in nullity of marriage); Mewett and Manning, *supra*, note 28, p. 486; comment on section 254 in *Martin's Annual Criminal Code 1983* (Toronto: Canada Law Book, 1983), p. 287.

39. Law Reform Commission of Canada, *supra*, note 36, pp. 84-5.

40. *Divorce Act*, R.S.C. 1970, c. D-8, s. 4(1)(*c*).

In matrimonial law, remarriage is only possible in accordance with the conditions and formalities prescribed by provincial legislation.[41] Proof that these conditions have been observed and these formalities complied with constitutes a circumstance which the court may weigh in determining the sincerity of an accused's erroneous belief that his first marriage had been dissolved by the presumed or declared death of the absent spouse. It is neither necessary nor desirable for the criminal law to part company with matrimonial law in this respect.

Further, if the belief of an accused is based on an erroneous but sincere interpretation of the legal effects of the absence itself, current law does not preclude the accused from avoiding liability. Mistake as to a rule of civil law constitutes a defence when the knowledge of that rule is an essential ingredient in the *mens rea* necessary for the offence charged.[42] A person charged with bigamy who is unable to determine whether his absent spouse is alive but sincerely believes that such absence of itself dissolves the ties of his first marriage, makes an erroneous judgment which bears on an essential ingredient of the *mens rea* of bigamy. If all the conditions of its application are observed, the defence of mistake of law is still available to such an accused. The Law Reform Commission has proposed in Working Paper 29 (draft section 10) a codification of this judicial solution which makes the provisions covering the specific case of paragraph 254(2)(*b*) superfluous.

(3) Proof of Marriage

The part of the *Criminal Code* dealing with evidence should be deleted from the provisions dealing with the offences. The Commission has already suggested that these provisions be combined and incorporated into a code of evidence or the Special Part of the *Criminal Code*.

Section 255 illustrates the lack of coherence in the *Code* when it covers in the same provision the criminal definition of bigamy (subsection 255(1)) and a method of proof of marriage and the form of marriage (subsection 255(2)). The validity of subsection 255(2) is not in question: however, this provision has no place in a definition of the offence.

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41. It may be noted that provincial statutes on the marriage ceremony provide nearly all the special formalities in cases of absence to enable the abandoned spouse to remarry legally: Prince Edward Island: *Marriage Act*, R.S.P.E.I. 1974, c. M-5, s. 21; Québec: *Civil Code of Lower Canada*, ss. 70-73, 93, 94 and 108; Ontario: *Marriage Act*, R.S.O. 1980, c. 256, s. 9; Manitoba: *Marriage Act*, C.P.L.M., c. M50 (S.M. 1982-83-84, c. 57), s. 23; Saskatchewan: *The Marriage Act*, R.S.S. 1978, c. M-4, ss. 14(3), 29(3) and 36; Alberta: *Marriage Act*, R.S.A. 1980, c. M-6, s. 20(1) and (2); British Columbia: *Marriage Act*, R.S.B.C. 1979, c. 251, s. 40; Yukon: *Marriage Ordinance*, R.O.Y.T. 1971, c. M-3, s. 42; Northwest Territories: *Marriage Ordinance*, R.O.N.W.T. 1974, c. M-5, s. 42. However, the provinces of Newfoundland, Nova Scotia and New Brunswick do not seem to have similar provisions in their legislation.

42. Law Reform Commission of Canada, *supra*, note 36, p. 90, and more generally pp. 88-96. See also *supra*, note 38.

(4) Situations Governed by Subparagraph 254(1)(*a*)(iii)

The *Criminal Code* provides for a third method of committing bigamy. Subparagraph 254(1)(*a*)(iii) states that:

> Every one commits bigamy who
>
> (*a*) in Canada,
>
> ...
>
> (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; ....

In actual fact, this provision covers two distinct situations. To begin with, if an individual goes through a form of marriage with more than one person on the same day, there is a good chance that he is, in fact, going through two forms of marriage. In that case, the first marriage is legally valid and the second form of marriage constitutes the bigamy. This situation is already covered by subparagraph 254(1)(*a*). The other situation described in this section corresponds to an individual who goes through a single form of marriage simultaneously with more than one person. Such a situation is legally impossible in terms of Canadian matrimonial law. There is no "form of marriage recognized as valid in Canada" for a union of more than two persons.

This section in fact applies to polygamous marriage. By a species of legal acrobatics, it might still be argued that this criminal sanction is directed essentially at polygamists who, in their union, use the external forms of the marriage ceremony: without the knowledge of the celebrant; or, with his collusion. In the first case, however, it must be assumed that both ostensibly and officially only a single monogamous marriage was solemnized. In the second case, the marriage can have no official status and at best is a sham ceremony.

In reality, subparagraph 254(1)(*a*)(iii) is only meaningful if the offence of bigamy is given extraterritorial effect. The effect of the provision would then be to prohibit a Canadian from entering into a polygamous marriage in a foreign jurisdiction in which such a marriage ceremony was recognized as valid. The relevance of such a prohibition is discussed below in connection with polygamy.

(5) The Extraterritoriality of Bigamy

The bigamy described in subparagraphs 254(1)(*a*)(i) and (ii) consists in the act of going through a form of marriage. This may take place either in Canada or abroad, as a result of paragraph 254(1)(*b*):

> Every one commits bigamy who
>
> ...
>
> (*b*) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (*a*)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

A marriage performed abroad may produce legal effects in Canada on certain conditions and generally confers a valid marital status on the spouses. This fact and the very nature of the marital status in society justifies the extraterritoriality of the offence of bigamy.

At civil law, the second marriage performed abroad without prior dissolution of a former valid marriage will not be recognized as valid in Canada, even if in the state where it is performed a plurality of marriages is recognized. In moral terms, the second marriage ceremony performed abroad constitutes a threat in the same way as a second ceremony performed in Canada. In the cases of bigamy covered by subparagraphs (i) and (ii), the offence will be committed by a person's going through the form of marriage abroad. For there really to be a threat to the institution, the requirement that this ceremony be one recognized in the law of the place where it is performed is understandable. The definition of "form of marriage" in paragraph (*b*) of the present section 196 goes beyond this and by implication confers extraordinary scope on an invalid ceremony performed abroad. We feel that this situation is unjustified in light of matrimonial law and the bases of the criminal sanction.

Certain problems cannot fail to arise when the formal conditions of the *lex loci celebrationis* are totally alien to the minimal formal requirements under Canadian law, in particular the celebration of a rite and that the marriage be celebrated in public. The defects of the present law in this regard should be corrected. The form of marriage, in Canada or abroad, should correspond at least to the formal requirements which are capable of producing legal effects.

Paragraph 254(1)(*b*) specifies that only a Canadian citizen resident in Canada can commit bigamy abroad. This clarification of the subject of law for an extraterritorial offence is important. However, a permanent resident in good standing in Canada is excluded from the scope of the law. This situation is undoubtedly an oversight, for a permanent resident awaiting Canadian citizenship is, in theory, a subject of all the laws of the country. Moreover, the granting of such citizenship is subject to the adoption and observance of Canadian institutions. This provision should therefore be adjusted accordingly.

Bigamy committed abroad entails a further ingredient which is a fundamental characteristic of the offence. The *Code* requires that before bigamy can be committed abroad, the offender must have already had the specific intent of committing the offence when he left Canada. This requirement is exorbitant since, aside from the difficulty of proof, it assumes a continuing design which does not necessarily coincide with the psychological circumstances in which bigamy is committed. The reasons which prompted the formulation of this requirement are difficult to comprehend. In the case covered by subparagraph 254(1)(*a*)(i), a person married in Canada already has clear matrimonial obligations which bar him from remarrying abroad. The requirement of a specific intent on his departure from Canada for all practical purposes confers on him an impunity which reduces the meaning of paragraph 254(1)(*b*) to absurdity.

For the situations described in subparagraphs (ii) and (iii) of paragraph 254(1)(*a*) of the *Code*, the requirement of a specific intent has the effect of also limiting the prosecution of bigamy. Unlike subparagraph (i), the situations covered by these two subparagraphs actually concern a person who is not already married in Canada. The result is that the requirement of a specific intent in practice reduces the prohibition of bigamy solely to cases in which a single person leaves the country with the specific intent of contracting a polygamous marriage or marrying a person abroad who is already married. The case-law contains no example of this kind. It is true that in these cases, there is in practice no threat or affront to a marital union contracted in Canada, and the institution threatened, if any, is that in the foreign country.

The extraterritorial scope of the offence of bigamy is, in short, extremely limited. Except in cases where a first marriage exists in Canada, the situation covered by subparagraph 254(1)(*a*)(i), one looks in vain for the need or even the value of the extraterritorial scope of paragraph 254(1)(*b*).[43]

B. Polygamy

Unlike bigamy, the offence of polygamy in section 257 of the *Criminal Code* was introduced into our law much more recently. In fact, it was thought necessary by the legislator to prohibit this particular practice at the time of the codification at the end of the last century. There is no question that at this time Canadian legislation fell under the influence of American law, which was trying by means of the criminal law to stamp out a resurgence of the practice of polygamy among members of the Mormon community, especially in the state of Utah.[44]

As polygamous marriage corresponds to no institution in our law, the legislator was obliged to define polygamy in laborious language which is a monument of legal ponderousness:

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43. The legislative jurisdiction of the federal Parliament in light of paragraph 254(1)(*b*) was challenged on more than one occasion, at the end of the nineteenth century and in the early twentieth century.
The *Statute of Westminster, 1931* finally resolved the question by expressly providing a full power for the Parliament of the Dominion "to make laws having extra-territorial operation." The federal *Interpretation Act* reaffirms this jurisdiction in subsection 8(3).
In this regard, paragraph 254(1)(*b*) has been declared *intra vires* the federal Parliament in practically all cases considered by the courts and in scholarly commentary.
Section 91 of the *Constitution Act, 1871* is the most often cited source. The preamble to this section gives the federal Parliament the power "to make laws for the peace, order and good government of Canada." Many judges and writers have seen a justification in these words for paragraph 254(1)(*b*). See in this regard: *R.* v. *Brinkley* (1907), 14 O.L.R. 404, 12 C.C.C. 454 (Ont. C.A.); *Croft* v. *Dunphy* (1932), 59 C.C.C. 141, [1933] A.C. 156, 1 D.L.R. 225; P. C. Doherty, "Extra-territorial Bigamy"(1930), 8 *Can. Bar Rev.* 251, pp. 254-5.

44. American Law Institute, *Model Penal Code and Commentaries* (Philadelphia: American Law Institute, 1980), Part II, ss. 220.1 to 230.5 (1980), p. 368 ff.; see also, *supra*, note 16. From time to time the Canadian courts have stated that the purpose and the reason for the section prohibiting polygamy was to stamp out Mormonism: *R.* v. *Liston* (1893), 34 C.L.J. 546n (Ont.); *Dionne* v. *Pépin* (1934), 72 C.S. 393; 40 R. de Jur. 443 (Qué. C.S.).

257.(1) Every one 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 is liable to imprisonment for 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 upon the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

Despite the generality of the language used, the courts have concluded that this provision does not apply to adultery, even when those committing it are cohabiting.[45] In fact, there have been very few convictions for polygamy in Canadian history. The classic case was of an Indian who, although only following the customs of his tribe, was nonetheless punished for having two wives.[46]

Polygamy is a marginal practice which corresponds to no meaningful legal or sociological reality in Canada. Polygamy may in fact be practiced by a number of Canadians. The hippie communes in the sixties sometimes favoured a free union with several partners. All this still remains marginal and does not affect either the Canadian social fabric or the institution of marriage.

Moreover, polygamous marriages contracted abroad in theory have no validity in matrimonial law. Nevertheless, the courts have, from time to time, had to recognize their existence or ascribe certain effects to them for various reasons.[47] Accordingly, our civil institutions appear to be quite sufficient to foresee and control the phenomenon of polygamy. Like adultery or concubinage, such behaviour, which does not compete in Canada with the institution of monogamous marriage, should be ignored by the criminal law.

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45. *R.* v. *Tolhurst and Wright*, [1937] O.R. 570, 3 D.L.R. 808, 68 C.C.C. 319 (Ont. C.A.).

46. *R.* v. *Bear's Shin Bone* (1899), 4 Terr. L.R. 173, 3 C.C.C. 239 (N.W.T. S.C.); the only other reported case also concerned an Indian, *R.* v. *Harris* (1906), 11 C.C.C. 254 (Qué. S.C.).

47. See in general on these points Hartley, *supra*, note 4; Marasinghe, *supra*, note 4; C. A. Weston, "Polygamous and Monogamous Marriages — Bigamy" (1965), 28 *Modern L. Rev.* 484; K. L. Koh, "*Attorney-General of Ceylon* v. *Reid* — The Malayan Experience" (1966), 29 *Modern L. Rev.* 88; S. W. Bartholomew, "The Origin and Development of the Law of Bigamy" (1958), 74 *L. Q. R.* 259; "Polygamous Marriages and English Criminal Law" (1954), 17 *Modern L. Rev.* 344; "Recognition of Polygamous Marriages in Canada" (1961), 10 *Int'l and Comp. L.Q.* 305.

II. Threats to the Solemnization of Marriage

Threats to the solemnization of marriage relate essentially to the formal requirements of the institution.

A. Feigned Marriage

Subsection 256(1) of the *Code* imposes criminal sanctions on feigned marriage, although it does not explain the meaning of the term:

> Every person who procures or knowingly aids in procuring a feigned marriage between himself and another person is guilty of an indictable offence and is liable to imprisonment for five years.

Subsection 256(2) requires corroboration of a single witness in the proof of a feigned marriage. The fact that there is no jurisprudence or doctrine concerning this offence is significant. It has in fact become completely obsolete, and no longer corresponds to any behaviour which can be clearly stigmatized. Feigned marriage is a simulated marriage. On this basis, the offence may be compared to a fraud on the use of the marriage rites. It may also be a fraud on the other spouse, who is thus induced to enter into a common law union when he believed he was getting married.

In our consultation, some questioned the link that may exist between a feigned marriage and the practice, by certain individuals of foreign nationality, of marrying a Canadian specifically for the purpose of being able to settle in Canada, with no intention of living with the new spouse. This may undoubtedly be a "feigned" form of marriage. However, the courts and writers on matrimonial law seem to be divided as to the validity to be assigned to such marriages. Recent decisions have upheld the marriage tie, even when serious consent is lacking.[48] It should be added that the *Immigration Regulations, 1978* were amended in 1984,[49] to:

> provide that a spouse who has entered into marriage primarily as a means of gaining admission to Canada as a member of the family class is not eligible for sponsorship and a fiancée who has become engaged primarily for the same purpose may not be issued an immigrant visa.[50]

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48. J. Pineau, *supra*, note 2, p. 27.

49. *Immigration Regulations, 1978* — Amendment, *Canada Gazette, Part II*, Vol. 118, No. 4 (February 22, 1984), p. 825.

50. *Id.*, explanatory note, p. 826.
See also the amending regulation which reads as follows:
1. (1) All that portion of subsection 4(1) of the *Immigration Regulations, 1978* preceding paragraph (*a*) thereof is revoked and the following substituted therefor:

In general, the laws on marriage are sufficiently precise to prevent frauds and counterfeits in the formalities of the marriage ceremony.[51] Thus, most legislation provides that the celebrant should verify the identity of the intended spouses. There are even provisions prohibiting false declarations, tampering with registers and the marriage licence and unauthorized use of such a licence.

Marriage in a simulated form has no legal significance in matrimonial law; assuming that someone is duped into a feigned marriage, civil remedies provide an adequate means of repairing the injury which may thus have been caused.

B. The Unlawful Solemnization of Marriage

Under this generic heading, the *Criminal Code* describes two types of offence: pretending to solemnize a marriage; and solemnizing a marriage contrary to law. Pretending to solemnize a marriage as defined by section 258 is not a marriage. Essentially, it is the case where a celebrant has no authority to celebrate a marriage of any kind:

> Every one who
>
> (*a*) solemnizes or pretends to solemnize a marriage without lawful authority, the proof of which lies upon him, or
>
> (*b*) procures a person to solemnize a marriage knowing that he is not lawfully authorized to solemnize the marriage,
>
> is guilty of an indictable offence and is liable to imprisonment for two years.

"4.(1) Subject to subsections (2) and (3), every Canadian citizen and every permanent resident may, if he is residing in Canada and is at least eighteen years of age, sponsor an application for landing made"

(2) Section 4 of the said Regulations is further amended by adding thereto the following subsection:

"(3) Paragraph (1)(*a*) does not apply to a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse."

2. Paragraph 6(1)(*d*) of the said Regulations is revoked and the following substituted therefor:

"(*d*) in the case of a fiancée,

(i) the sponsor and the fiancée intend to reside together permanently after being married and have not become engaged primarily for the purpose of the fiancée gaining admission to Canada as a member of the family class,

(ii) there are no legal impediments to the proposed marriage of the sponsor and the fiancée under the laws of the province in which they intend to reside, and

(iii) the sponsor and the fiancée have agreed to marry each other within ninety days after the admission of the fiancée."

Section 6 of the Regulations concerns applications for an immigrant visa.

51. See *supra*, note 45. All provincial statutes are of course not uniform, and although some provinces specify in detail the technical requirements surrounding the solemnization of marriage, others are practically silent on the question.

The solemnizing of a marriage contrary to law under section 259, on the other hand, applies to a celebrant who is authorized by law to solemnize a marriage but who acts, as it were, without jurisdiction:

> Every one who, being lawfully authorized to solemnize marriage, knowingly and wilfully solemnizes a marriage in violation of the laws of the province in which the marriage is solemnized is guilty of an indictable offence and is liable to imprisonment for two years.

The authority of an individual to solemnize a marriage and the conditions on which that solemnization may take place are defined by provincial legislation. In constitutional terms, the provinces have exclusive legislative jurisdiction over the solemnization of marriage. In practice, therefore, the ways in which the offences described in sections 258 and 259 of the *Criminal Code* can be committed may only be defined in terms of the relevant provincial legislation.[52] This reference to provincial law may make the scope of the criminal penalty uncertain, especially in the implementation of section 259. In *Boggs*,[53] the Supreme Court found to be *ultra vires* a criminal offence which can no longer constitute a clearly identifiable objective for the prohibition of a public harm, provincial legislation providing sufficient sanctions. There is certainly room for doubt as to the harm which section 259 of the *Code* seeks to prevent.

The threats at which solemnization of marriage offences are aimed no longer justify intervention by the criminal law. To begin with, the problems of clandestine and irregular marriage which led to their adoption are now a thing of the past; but most importantly, modern matrimonial law provides a complete answer to the problems raised by the prohibited conduct.

Marriage without authority, like feigned marriage, is merely a pretence that can no longer reflect on the institution. Penalties exist in other, more adequate, specific legislation for the counterfeiting or alteration of the documents which may accompany these acts.

A marriage contrary to law is concerned essentially with the laws on marriage. These contain a complete system regulating the rites and formalities of the ceremony. Breaches of these legislative requirements may be effectively penalized by various measures which range from nullity of the marriage to disciplinary penalties applicable to the celebrant.

Threats to the marriage ceremony are more a matter for regulation than prohibition. The provisions of provincial legislation deal quite adequately with the matter and thereby remove the basis for involvement of the criminal law.

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52. On the constitutional jurisdiction of the provinces over the solemnization of marriage, see F. Chevrette and H. Marx, *Droit constitutionnel* (Montréal: P.U.M., 1982), pp. 656-61; L. Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage" (1975), 7 *Ottawa L. Rev.* 384; F. J. E. Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968), 14 *McGill L. J.* 209.

53. *Boggs* v. *The Queen* (1981), 58 C.C.C. (2d) 7, 19 C.R. (3d) 245, [1981] 1 S.C.R. 49, 120 D.L.R. (3d) 718, 34 N.R. 520, 8 M.V.R. 247.

CHAPTER THREE

Reform

I. The Need for Reform

The *Criminal Code* legislation respecting marriage and its solemnization closely parallels the development of matrimonial law over the centuries. The various offences were introduced at a time when prohibition may well have been the only effective response to certain types of behaviour that were threatening the institution of marriage and the fundamental structures of society itself.

Societies have evolved, however, and matrimonial law has become more precise. Often the loopholes that were allowing reprehensible conduct to develop have been closed. With improved communications and increased exchanges, ideas and values have also evolved. Modern judgments respecting adultery, concubinage and polygamy are certainly no longer what they were in the Victorian era. Thus, perhaps more than for any other offence, there seems to be a pressing need for reform and modernization of the *Code* as regards matrimonial offences.

II. Proposals for Reform

Bigamy is the only marital offence that still justifies a criminal law sanction, in our view. Although not uniform, the provincial statutes on the marriage ceremony contain provisions the purpose of which is similar to that of section 254 of the *Criminal Code*. However, Québec alone makes an express prohibition against contracting a second marriage before the first is dissolved.[54] The common law provinces and the territories confine themselves to formal requirements. Thus, they list the statements and documents which must be produced in connection with a marriage ceremony, especially in cases of a prior divorce, the dissolution of the former marriage and the death or absence of a spouse.[55]

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54. Civil Code of Lower Canada, Art. 118 and *Civil Code of Québec*, Art. 404 (not in effect).

55. Newfoundland: *The Solemnization of Marriage Act*, S.N. 1974, No. 81, ss. 15(1) and 22; Prince Edward Island: *Marriage Act*, R.S.P.E.I. 1974, c. M-5, ss. 16 and 21; Nova Scotia: *Solemnization of Marriage Act*, C.S.N.S., c. S-25, s. 14; New Brunswick: *Marriage Act*, R.S.N.B. 1973, c. M-3, para. 16(1)(*b*) and (*e*); Ontario: *Marriage Act*, R.S.O. 1980, c. 256, ss. 1(2), 8 and 9; Manitoba: *Marriage Act*, C.P.L.M.,

Despite the existence of provincial legislation, we feel it is necessary to include a section on bigamy in the *Criminal Code*, first, because of the nature of this offence, and secondly, to ensure uniformity throughout Canada.

The intrinsic gravity of the offence, which presupposes the solemnization of a valid marriage, and the reprehensible nature of this conduct as regards both society and the victim-spouse are reasons for retaining this crime in Canadian legislation.

However, these justifications are fully applicable only to bigamy involving the formalities required for a valid marriage. Consequently, the offence of bigamy should be limited to those situations described in subparagraphs 254(1)(*a*)(i) and (ii) of the present *Code*. The union referred to in subparagraph (iii) of the existing offence does not constitute a valid solemnization of marriage and acquires no legal validity. Moreover, the forms of bigamy provided for in subparagraphs (i) and (ii) can clearly be committed on the same day, and there is thus no need for such a qualification.

A former marriage is not defined in the present *Code*. Unfortunately, the case-law does not answer all the questions raised by the concept of a previous marriage. At first sight it would seem appropriate to require that the first marriage be a marriage recognized as valid in Canada. This is the approach adopted by matrimonial law. However, this clearly means that a marriage which is valid abroad but is regarded as invalid in Canada does not constitute a first marriage for purposes of bigamy. In terms of criminal policy this would appear to be an adequate principle that covers the main cases constituting a genuine threat to the institution of marriage in Canada. Furthermore, the decline in legal polygamy around the world and the small number of foreign marriages that do not meet the essential requirements of the institution under Canadian law indicate that there is no need to extend the concept of a "first marriage." The definition of bigamy, referring as it does to a first marriage that is valid in Canada, is thus reasonable and realistic.

The form of marriage through which bigamy is committed is defined in the present *Code*. This definition refers to the formal requirements of marriage, to the solemnization itself. Under present matrimonial law there are two essential formal requirements for a marriage: the celebration of a rite; and its being public. The definition in section 196 should reflect this through the addition of the adjective "public" before the word "ceremony." Paragraph 196(*b*) ("form of marriage") corresponds neither to present matrimonial law nor in particular to the spirit and bases of the offence. This part of the definition should be deleted.

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c. M50 (S.M. 1982-83-84, c. 57), ss. 21 and 23; Saskatchewan: *The Marriage Act*, R.S.S. 1978, c. M-4, ss. 14(4) and (5), 29(2) and (3) and 36; British Columbia: *Marriage Act*, R.S.B.C. 1979, c. 251, ss. 39 and 40; Northwest Territories: *Marriage Ordinance*, R.O.N.W.T. 1974, c. M-5, ss. 24(4), 41, 42 and 43; Yukon: *Marriage Ordinance*, R.O.Y.T. 1971, c. M-3, ss. 24(3), 41, 42 and 43.
It should be noted that Québec has similar provisions: Civil Code of Lower Canada, Arts. 7.1 and 108 and *Civil Code of Québec*, Art. 417.

In order for the extraterritorial aspect of the offence of bigamy to be of any practical effect, the requirement that the offender have a specific intent when leaving Canada should be abolished. However, such a reform would tend to expand the scope of the crime and should therefore be examined with caution.

The extraterritorial aspect of the offence of bigamy is fully justified only as a means of protecting a marriage that already exists in Canada. Protection of the institution of marriage in Canada makes sense only on the basis of a concrete marital union. Extra-territoriality should thus apply only to a person who already has married status in Canada and who, despite that status, decides to go through a form of marriage abroad. It is only in such a situation that there is a true threat to the institution in Canada. For such protection to be effective, however, a specific intent upon the person's leaving Canada should not be required. Not only is such a requirement unrealistic, but the burden of proof it involves is too onerous.

Finally, Canada is a country that receives numerous immigrants wishing to become part of its society and benefit from our laws. It is therefore fair and appropriate for the reduced extraterritorial effect of bigamy not to be limited to Canadian citizens but to apply also to permanent residents awaiting citizenship.

It is clear that there is no need for subsection 254(2). Death, divorce and annulment of marriage are events that result in a dissolution of the marital union and thereby do away with an essential element of the offence of bigamy, namely, a previous marriage.

An error of fact or an error of law resulting in an error of fact are defences that are already accepted by our law. The Law Reform Commission is proposing that they be codified in the General Part of the *Criminal Code*. There is no need to repeat them in the context of the definition of the crime of bigamy.

Finally, presumption of death on the basis of absence is a question that is already dealt with by the civil law. The solutions offered by these rules, and by the rules of criminal law dealing with the defences of mistake, justify a deletion of this provision.

Monogamy is a value generally shared by all Canadians. It has deep roots and colours our entire legal system. There would thus appear to be very few things that could genuinely jeopardize it. In view of this, polygamy appears so foreign to our values and our legal system that it is both unnecessary and excessive to sanction it criminally. Abolishing the crime of polygamy does not amount to condoning the practice. Our legal institutions and the institution of marriage adequately preserve the principle of monogamy. Repealing the offence of polygamy is thus evidence of moderation and a mark of confidence in our own institutions. By not giving polygamy any legal recognition, matrimonial law ensures that this phenomenon is not viable in Canada. This should therefore be reflected in the *Criminal Code*.

The offences in connection with the solemnization of marriage are based on the old ecclesiastical law, which had to deal with problems of clandestine and irregular marriages. Matrimonial law has evolved considerably, and today marriage and its rites are clearly

defined and regulated. Procuring a feigned marriage (section 256), pretending to solemnize a marriage and solemnizing a marriage contrary to law (sections 258 and 259) should no longer constitute criminal behaviour. This conduct presents less of a threat to the institution and to society than breaches of the regulations governing marriage. As such, provincial legislation provides an ample response to any problems the conduct in question may pose. In addition, in administering the laws within their jurisdiction the provinces may attach penal sanctions to their legal provisions that would be more appropriate than outright criminalization of the reprehensible conduct.

Repeal of these latter provisions thus reflects the reasonable and moderate attitude the public is entitled to expect in balanced criminal legislation.

III. Proposed Legal Measures

The following proposals have adopted a new formulation in order to make the provisions more precise. However, we have also given, as an alternative, a more literal formulation based on the present provisions to facilitate comprehension of the proposed amendments.

RECOMMENDATION 1

We recommend that section 254 of the present *Criminal Code* be repealed and the following new provision substituted:

254. (1) A person who goes through a form of marriage in Canada where one of the spouses is already bound by a former marriage that has not been dissolved commits bigamy.

(2) A Canadian citizen or a permanent resident of Canada who goes through a form of marriage outside Canada when he is already bound by a former marriage that has not been dissolved also commits bigamy.

(3) A person who commits bigamy is guilty of an indictable offence and is liable to imprisonment for five years.

An alternative formulation of the new section 254 could also read as follows:

254. (1) Every one commits bigamy who

(*a*) in Canada

(i) being married, goes through a form of marriage with another person, or

(ii) knowing that another person is married, goes through a form of marriage with that person;

(*b*) being a Canadian citizen or a permanent resident of Canada does outside Canada anything mentioned in subparagraph (*a*)(i) of this subsection.

(2) Every one who commits bigamy is guilty of an indictable offence and is liable to imprisonment for five years.

Bigamy is still an indictable offence. The reasons for its being a crime justify this characterization as well as the *Criminal Code* prohibition. However, the sentence proposed by the *Code* should be reassessed by the Commission in the more general context of sentencing policies.[56]

Subsections (2), (3) and (5) of the present section 254 are completely repealed.

Subsection (4) of the present section 254 is incorporated into the new definition of "former marriage" (or "married"), which might be set out in section 196 or in a new subsection of section 254.

RECOMMENDATION 2

We recommend that the expression "former marriage" (or "marriage" if we adopt the alternative formulation of section 254) be defined as follows:

(1) For purposes of section 254, "former marriage" means a marriage that may be recognized as valid in Canada.

(2) A marriage shall, for purposes of section 254, be deemed to be valid unless the accused establishes that it was invalid.

RECOMMENDATION 3

We recommend that the expression "form of marriage" in the present section 196 be amended as follows:

"Form of marriage" means a public ceremony of marriage that is recognized as valid by the law of the place where it was celebrated.

Paragraph 196(*b*) is repealed. The new definition could more appropriately be incorporated into a new subsection of section 254.

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56. See comments by Judge Borins in *R.* v. *Stanley Walter Friar*, April 27, 1983, Ont. Co. Ct. (W.C.B. No. 10-0040, p. 22):

> However, where both parties know the facts and marry perhaps to make the cohabitation appear respectable, the offence, in my view, becomes a relatively minor one and not deserving of severe punishment.
>
> It may be that when the Criminal Code is reviewed, as I understand it will be by Parliament over the next period of time, that cognizance may be taken of the following comment in *Smith and Hogan* at 688-9:
>
> Bigamy may still fulfill a useful purpose as a crime in the type of case *with grave social consequences*; but it cannot be regarded as satisfactory that a grave felony should extend so far beyond this to cases no longer regarded as really serious offences.

RECOMMENDATION 4

Furthermore, we recommend that:

(1) subsection 255(1) be incorporated into section 254;

(2) the provision in subsection 255(2) be retained, but it would be more appropriate in the *Canada Evidence Act*;

(3) sections 256 (procuring feigned marriage), 257 (polygamy), 258 (pretending to solemnize marriage) and 259 (solemnizing marriage contrary to law) of the *Criminal Code* be repealed.