THE LEGAL STATUS OF POLYGAMOUS MARRIAGES FROM A COMPARATIVE LAW PERSPECTIVE

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SUMMARY

1. Research question and method

This research centres on the legal status of polygamous marriages in the Dutch legal system. The motivation for this research stems from an authorisation by the State Secretary of the Dutch Ministry of Justice of the Second Chamber to conduct research on the application of the public order criterion with regard to polygamous marriages. The research is comparative in its methodology and, besides the Netherlands, it incorporates four European jurisdictions: Denmark, Germany, England & Wales and France.[1] In five country reports the status quo in these jurisdictions has been expounded and analysed. On the basis of a comparative law analysis and an evaluation the question whether Dutch law is in need of legal reform has been answered.

Research by the Dutch Ministry of Justice has shown that on the 17th of November 2009 a total number of 1374 persons were listed as being polygamously married in accordance with the Municipal Personal Records Database. It is not known which part of these second marriages was solemnised in the Netherlands and which part abroad. In addition, how many of the polygamously registered persons have consciously entered into a polygamous marriage cannot be established on the basis of these data. It may be presumed in any case that some of these marriages only temporarily bear a polygamous character that, resulting from the lawful termination of the first marriage, comes to an end at a later stage. It may therefore be concluded that numerically it is a rather minor problem, given that polygamous marriages concern fewer than 0.01 per cent of the Dutch population. Moreover, a fraction of these marriages were not consciously entered into by parties, involving a temporary situation, while another fraction is the outcome of limping marriages.

2. Research findings

2.1 Polygamous marriages concluded in the Netherlands

The comparative legal analysis shows that in all of the examined jurisdictions the solemnisation of a polygamous marriage is prohibited under both civil and criminal law. In each country the principle of monogamy is entrenched in substantive matrimonial law. A shared European tradition, in combination with the influence of

[1] The choice of these jurisdictions was part of the assignment.

Christianity, helps to explain this situation. The conclusion of an *inviolable* polygamous marriage on the country's sovereign territory is impossible in all five selected countries. That does not mean that in practice polygamous marriages are not solemnised, for example because the polygamous nature of the marriage is unknown. Such a polygamous marriage is in breach of the law, thereby rendering it challengeable. If the lawfulness of the marriage is challenged, in each of the examined countries it may be brought to an end by virtue of a declaration that the marriage is null and void or by means of an annulment. This results in an end to the polygamous marriage, although there are some differences as to the legal consequences between the declaration that the marriage is null and void (that in principle has retrospective effect until the moment of the enactment of the marriage) and an annulment (that in principle only gives rise to future legal consequences).

From the comparative legal analysis no solutions have been derived that would be able to imbue Dutch law with a better result, i.e. the prevention of the conclusion of polygamous marriages within the Netherlands.

2.2 Polygamous marriages concluded outside the Netherlands

In none of the five examined countries are polygamous marriages that have been solemnised abroad precluded from recognition, even though the prohibition on polygamy represents a fundamental (moral) value shared by each of the selected countries.

Danish law differs from the four other jurisdictions in the sense that all polygamous marriages are recognised, regardless of a connection to the Danish legal order, for example if each of the spouses possesses Danish nationality. This does not in itself imply that these marriages may remain unaffected. This is because Danish law prescribes that a request for an annulment must in principle be instituted at a court.

In the four other countries the issue of the recognition of a foreign polygamous marriage within the domestic legal order is determined with reference to the degree to which the concerned parties are connected to the domestic legal order. The legal systems approach this issue in distinct ways, but the result is essentially the same.

As such, in the four examined countries the fact that a national subject (as far as England & Wales are concerned: a person having her or his *domicile* in England & Wales) was a party to the polygamous marriage constitutes a sufficient reason to refuse to recognise the marriage. In Germany, England & Wales and France the polygamous marriages of spouses of whom one has the nationality of a system where only monogamous marriages are lawful are not recognised, while in Dutch law the degree to which the party is connected to the legal order is decisive in determining whether public order has been violated. The nationality of the parties

involved, their habitual residence and the place where the marriage was solemnised are important. Only in the case of a close connection to the Dutch legal order will the recognition of the polygamous marriage be denied.

2.3 Interests involved in recognition and non-recognition

The interest in the prevention of limping marriages underlies the recognition of foreign marriages in the Dutch legal order also with a view to promoting the recognition of the marital status in other countries. This stems from the internationally and nationally generally accepted principle known as *favor matrimonii.* This principle is considered to require that the marital status that the citizen has acquired in a certain country is recognised in a third country, thereby promoting well-functioning international legal relationships. In contrast, in the case of limping marriages, where in one country a marriage between the spouses exists whereas in another country it does not, this gives rise to many problems for spouses and children alike. Given the factual existence of polygamy, it is important to protect the second spouse. After all, if the second marriage is not recognised, the legal consequences attached to that marriage will not be assigned to the parties either; non-recognition may tend to put the wife (and the children) of the second marriage in a more disadvantageous position. This has to be taken into account within the context of the legitimate expectations that citizens have when a polygamous marriage is concluded abroad.

The general rule of recognition is nonetheless limited by interests which may lead to non-recognition. Firstly, one may think of the importance that the state attaches to respect for its own set of fundamental norms and values, which include the prohibition of discrimination against women and the enforcement of monogamy. Secondly, the interest in respecting the legitimate expectations of the first wife also plays a role.

Against the background of these interests the question may be raised whether the public order criterion can be applied in the Dutch legal system in such a way that a better equilibrium between the aforementioned interests is achieved. This involves the optimisation of the criterion that concerns the degree of connection to the Dutch legal order. In view of the fact that on this point a different route has been chosen in the other countries, the comparative legal analysis does not provide any inspiring alternative solutions.

2.4 Balancing of interests in specific cases

The balancing of interests in case of recognition and non-recognition varies depending on whether it is a polygamous marriage before or after a durable connection to the Netherlands has come about. Accordingly, a distinction must be

drawn between 'old' and 'new' cases. In the case of a prior marriage the interests in recognition will in principle outweigh the interests in non-recognition, because at the moment the marriage is solemnized there is no connection to the Dutch legal order. If the polygamously married spouse in question settles in the Netherlands at a later stage, this marriage will in principle be recognised. The interest in offering protection to the second spouse alongside the interest of both spouses in preventing limping legal relationships, coupled with the fact that at the moment of the conclusion of the marriage they need not have taken into account the possibility of non-recognition because of a connection to the Netherlands, outweigh the interest in combating discrimination against women, the interest in the prevalence of the monogamy norm as well as the protection of the first wife.

The situation is different for 'new cases' where a man, after durable ties to the Netherlands have been established, goes abroad and enters into a polygamous marriage. In such a case the interests in non-recognition in principle prevail over the interests in recognition. The spouse involved has to be acquainted with the prevalent monogamy norm within the country and the interest in combating discrimination against women. The protection of the first wife therefore represents a higher-ranking value. The interest in the prevention of limping marriages and the protection of the second wife may generally be considered to be subordinate to this concern.

2.5 A better delineation of the 'close connection' criterion

The research has shown that it is possible to improve the delineation of the criterion that concerns the degree of connection to the Dutch legal order. This does not require an adaptation of the rules of private international law because the degree of connection must be determined within the ambit of the public order criterion and accordingly already leaves room for sufficient discretion. Rather, an optimisation of already existing possibilities is therefore used. It is important to note the fact that, above all, Dutch nationality is currently taken into account in determining the degree of connection to the Netherlands. This is a criterion that equitably meets all the requirements involved in a balancing of interests: legal certainty, practical efficiency and clarity. The conferral of Dutch nationality is a useful factor for determination. Dutch nationality is a criterion that is easy to determine and verifiable for those who have been charged with enforcing the law, such as civil status registrars. The largest group of citizens for whom polygamy plays a role is therefore already covered by this criterion.

In view of the fact that not all citizens living in the Netherlands have Dutch nationality, the question must be raised whether the degree of connection to the Dutch legal order can also be established on the basis of another determining factor in private international law. In this respect it must be borne in mind that the choice to be made ultimately involves a choice of legal policy. In the research it has been

discussed that, in any event, it will be important to choose an alternative that offers both legal certainty and an easy application (because the law will be applied in part by civil status registrars) and, furthermore, that, in as much as this is possible, the legitimate expectations of the citizen will be met.

In this light a number of alternatives are conceivable that are connected with the citizen's residence in the Netherlands. This, in turn, prompts the question of which requirements this residence should meet in order to assume a sufficiently close connection to the Netherlands. In one view a mere residence in the Netherlands may be considered sufficient. In the alternate view at the other end of the spectrum, it may be considered that only after a certain period of residence in the Netherlands should it be possible to assume that the connection is sufficiently strong. Between both of these alternatives various middle-ground solutions may be worth considering. The latter would mean that further research is necessary to assess whether a certain type of residence permit in the Netherlands may provide good prospects to distinguish between those citizens who have genuine ties to the Netherlands and those who lack any real connection to the Netherlands.

Furthermore, on the basis of the comparative law research, the view has been defended that for determining a close connection importance should be attached to the fact that the second spouse possesses the nationality of a country that only permits monogamous marriages. In that case the interests in not recognising the polygamous marriage also prevail. It should be taken into account that adherence to the monogamy rule will be at the expense of the legal protection of the second wife. She will, after all, be considered unmarried in accordance with Dutch law in this case.

2.6 Ways of ending polygamous marriages

In examining the array of instruments to end unlawful polygamous marriages, the comparative legal analysis has shown that substantive family law is decisive if the polygamous marriage is to be able to be declared null and void or to be annulled. It has not been demonstrated that the instruments currently at the disposal of the Dutch legal system do not adequately function. The comparative analysis shows that the termination of a polygamous marriage by virtue of a declaration that the marriage is null and void or an annulment does not have (negative) effects for children that have been born out of such a marriage. This signifies an important protective measure that should definitely be left intact. Nonetheless, a number of questions remain with regard to annulment, such as the question whether there should be an obligation incumbent on the public authorities to declare the polygamous marriage null and void. It is also circumspect whether it is justifiable that the second spouse, who in good faith has become a party to a polygamous marriage, should not be entitled to lay a claim against the matrimonial property.

3. Conclusions

An important conclusion that may be drawn from the comparative legal analysis is that reforming Dutch law is not necessary. This research has made it clear that the Dutch legal system with regard to polygamous marriages generally functions well in relation to comparative legal standards. Dutch law generally resembles the other examined jurisdictions. No points of contention or other problems have emerged from legal practice. Furthermore, it is worth noting the fact that the number of registered polygamous marriages is insignificant.

In respect of polygamous marriages that have been solemnised in the Netherlands it is important to observe that registration systems cannot be made fully effective. This means that in the future polygamous marriages will continue to be concluded in the Netherlands, regardless of any prohibitive regulation. This research has shown that it is probably impossible to prevent persons from entering into polygamous marriages in the Netherlands in the future. It is important that the current legal possibilities to prevent these possibilities are already being used, both in criminal law and in civil law.

With regard to polygamous marriages concluded outside the Netherlands, a *desirable* legal reform involves the rating of the residence of the spouses as a (more) important factor in determining the degree of connection. It is first and foremost a choice of legal policy to determine which exact prerequisites this criterion should fulfil. In the research a number of alternatives have been explored. It has been proposed that in cases where the second spouse also possesses the nationality of a country that only accepts monogamy, this should be a factor that should be weighed in the assessment concerning the degree of connection to the Dutch legal order. Legislative reform is not necessary in such cases, a policy change will suffice.

As far as this issue is concerned, it is important to observe that the interests involved in the recognition of polygamous marriages in principle outweigh the interests in not recognizing them in the situation where durable ties with the Netherlands have not yet been established. Concerning polygamous marriages that have been concluded after such ties have developed, the reverse may hold true.

In the research *two possibilities* for legal reform have been discerned, but the merits of these possibilities will only be able to be assessed in a follow-up research. This involves issues which concern substantive family law within the context of international polygamy.

An *undesirable* legal reform has been provided by the proposal of the Dutch Minister of Housing, Communities and Integration that aims to end the recognition of foreign

polygamous marriages. Although this possibility is admissible in a technical and formal legal sense, such a measure would not be proportionate to the aim pursued. Rather, in every single case it should be examined whether the interests of non-recognition prevail over the interests of recognition.