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**A Contextualised Historical Account of Changing Judicial
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A Contextualised Historical Account of Changing Judicial Attitudes to Polygamous Marriage in the English Courts

Abstract

Whilst much of the literature focuses on debating polygamy as a harmful practice, the purpose of this paper is to consider a different form of harm by exploring judicial responses to this relationship and the women who engage with it. Over the years, the courts have been faced with numerous questions on the recognition and regulation of polygamous marriages. Commencing with an overview of existing literature on polygamous marriage, I situate and explain the postcolonial feminist inspired conceptual framework which underpins my judicial discourse analysis of English case law in this area spanning from 1866 to the present day. A postcolonial feminist lens exposes the racist, orientalist, imperialist and sexist attitudes permeating judicial language in relation to polygamy and its participants. These patterns of discourse subordinate women in polygamous marriages, leaving them in a vulnerable position. With time, these discourses seemingly fade but through a closer reading of recent cases, it becomes evident that they are still present, albeit in a subtler form as a matter of public policy, morality and “good”.

I. Introduction

In 1866, whilst deciding that John Hyde’s marriage could not be dissolved in English law, Lord Penzance asserted that it did not fall under the definition of marriage as ‘understood in Christendom’ (p.130).¹ Over twenty years later, the marriage of Christopher Bethell to a woman of the Baralong tribe in Bechuanaland² was deemed invalid as it had not been formed on the ‘same basis as marriages throughout Christendom’ (p.234).³ Following a leap of over 50 years, in *Shahnaz v Rizwan*⁴ in which the plaintiff sought to enforce her Islamic

¹ *Hyde v Hyde and Woodmansee* [1866] L Rev 1 P & D 130. Hereinafter *Hyde*.

² Now in present-day South Africa.

³ *In Re Bethell Bethell v Hildyard* (1887) 38 Ch. D 220. Henceforth *Bethell*.

⁴ [1964] 3 WLR 759. Hereafter *Shahnaz*.

dowry rights, her marriage was not seen as 'offensive to the standards of decency accepted by the English law,' (p.397) whilst more recently, in *ECO New Delhi v SG*,⁵ a child was denied entry into the UK because she failed to meet the relevant Immigration Rules criteria. The judgment concluded that discouraging her parents' form of marriage was a legitimate aim to pursue the protection of morals. These cases all have one thing in common: they concern polygamous marriage.

In this paper I argue that current judicial attitudes towards women living in polygamous marriages in the UK are problematic. This will be shown by applying a postcolonial feminist lens to the existing case law on polygamous marriage to observe discursive patterns throughout the judgments.

The discourse analysis method adopted in this paper is inspired by Didi Herman's (2011) arguments surrounding judicial agency. Her research demonstrates that 'judges are active agents in the production of orientalist, racialized and Christian discourse' (p.20-21). I seek to demonstrate that this is also true in relation to polygamous marriage. The best way to discover what judges think about polygamy is to analyse what they say and for this reason, a discourse analysis is appropriate. Discourse analysis concentrates on instances where speech equates to action. A judicial decision is not merely speech but 'is intended to create an action, both in respect of the parties in the instant case and, where applicable, in future cases...' (Harding, 2012, p.434). By looking for patterns of discourse within judicial rhetoric, we can see what influenced and continues to influence judicial perceptions of polygamy. Over fifty English cases were read and analysed, all of which were electronically reported.

⁵ [2012] UKUT 00265 (IAC).

The paper commences with an exploration of existing literature on polygamous marriages, women and the law to explain the utility of a postcolonial feminist inspired lens. Postcolonial feminism disrupts dominant discourses and places practices and situations within their historical context. Feminist scholars use these insights to further contemporary understandings of polygamy by disrupting the dominant discourse that polygamy is harmful in itself. Disrupting this discourse then paves the way for an expansion of the harm debate to look for other sources of harm affecting women in polygamous marriages. Additionally, I consider research on contemporary English legal responses to polygamous marriage which shows that the current legal framework is problematic, leaving women and children to suffer.

I then discuss the two concepts of orientalism and imperialism, drawing on existing scholarship to demonstrate their relevance. I argue that orientalist thought denies women's capacity to contract polygamous marriages as they are subject to orientalising and othering processes which position them and their marriage as inferior. This is manifested in the religious Christian supremacy which underscores many judgments as the courts grapple with ideals of marriage. Orientalist Christian supremacy is linked with the imperialist civilising mission as religion plays a key role in constructing and dismissing polygamous marriage. Debates surrounding the legal recognition of polygamous marriage are steeped in imperialist and nationalist rhetoric as the UK seeks to preserve the Christian monogamous ideal.

Following this, I chart the evolution of judicial attitudes towards polygamous marriage and women who engage in polygamy in the UK. From the analysis, three main arguments arise. First that racist, imperialist, orientalist and sexist discourses are present throughout the case

law on polygamous marriage. Second, these discourses intersect and intermingle to affect women in a negative manner. Third, judicial language has evolved so that in more recent times, these themes are still present but are not longer as explicit.

II. **Polygamous Marriage and Women – A Postcolonial Feminist Approach**

In this section, I provide a critical overview of the scholarship on polygamous marriages, women and the law, demonstrating how existing research has inspired the postcolonial feminist conceptual framework underpinning this paper.

Patriarchy, History and Postcolonial Feminism – A Conceptual Framework

Much of the research conducted on legal responses to polygamous marriage is centred on its harms. For example, Thom Brooks (2009) argues that greater harms are attached to polygamous marriage for women because it is structurally inegalitarian in practice and theory. He explains that polygamy is practically inegalitarian because it is rarely polyandrous,⁶ leaving women without the opportunity to engage in polygamy in the same way as polygynous husbands. In addition, polygamy is theoretically structurally inegalitarian because although a polygynous husband can divorce any of his wives at will, the wives may divorce him but not one another. As such, they may be bound in a relationship with another wife against their wishes. These two issues lead to the conclusion that polygamous marriages are incapable of existing outside of a patriarchal framework. Bhikhu Parekh (2010) adds to this by arguing that polygamous marriages are more harmful because

⁶ Polyandry denotes the form of polygamy in which one wife is married to multiple husbands; polygyny is the term used for polygamous marriages involving a man married to multiple wives.

spouses feel 'dispensable' (Parekh, 2010, p.287), whilst monogamous marriages provide a better prospect of spousal equality.

At first glance, the assertion that inequality and patriarchy underlie polygamy, does not seem especially controversial until it becomes evident that monogamy is inherently positioned as the ideal non-patriarchal and egalitarian model of marriage (Beaman 2014). Gillian Calder (2009) questions the reality of this ideal arguing that patriarchy transcends familial structure and to assume otherwise is naïve. This critique exposes the unfair treatment suffered by women in polygamous marriages based on the flawed assumption that patriarchy is exclusive to their form of marriage. In addition, the idealised construction of monogamous marriage is damaging to monogamous wives as the harm and patriarchal attitudes that they experience may be downplayed.

Whilst developing her thesis on minimal marriage, Elizabeth Brake (2012) questions whether 'marriages within religious traditions that subscribe to gendered spousal roles [should] be deprived of recognition' (p.199). She further examines the harm arguments by undertaking a more contextualised comparison between monogamy and polygyny in the 'small patriarchal religious communities within which polygyny tends to be located in the United States' (p.198). In finding that polygamy's 'problematic features are not sufficiently different in kind from existing male-female monogamy to justify differential treatment...' (p.200), Brake therefore demonstrates the importance of context to determine that the influencing factor on harm and gendered roles in these communities is patriarchy.

In other work, Joanna Sweet (2013) examines the abuse suffered by women and children in Canadian polygamous marriages concluding that 'patriarchy (as evidenced in the extreme form of polygyny) is harmful' (p.18). In her exploration of the 2010-2011 Reference

regarding s.293 of the Canadian Criminal Code, which considers the constitutionality of Canada's prohibition of polygamy, Sweet (2013) also finds that the Reference does not 'delve into the extent to which patriarchal monogamous marriage creates gender inequality' (p.18). She concludes that it is the manifestation of patriarchy which is harmful, thereby aligning her critique with Calder's (2009) and Brake's (2012) assertion that patriarchy is the real concern.

The work on patriarchy and harm in polygamous marriage has inspired the choice of a postcolonial feminist conceptual framework for two main reasons relating to the disruption of dominant discourses and historical consciousness. I view postcolonialism as an 'intellectual movement' (Woo, 2011, p.92) focussing on critiques of colonisation which situate postcolonial as a label for the study of colonial practices and their consequences. Postcolonial feminism explores the intersection of colonial critique and gender to consider the effects of colonisation on women. Gayatri Spivak (1999) observes that colonised women are essentially constructed as brown women who need white men to save them from brown men. This serves as a starting point for understanding the characterisation of women in polygamous marriages and the harms that they suffer in English law. The mentality that brown women still need saving persists today as evidenced by the discourses surrounding other practices including the hijab.

After decolonisation, many women have used the hijab to make a political statement and declare their resistance to colonialist narratives which portray them as oppressed and forced to hide (Yeğenoğlu, 2003). Through this resistance, women use the veil to disrupt colonialist discourses which provide them with a white saviour (Chow, 2003). Thus, a postcolonial feminist lens serves to expose gendered and colonialist narratives in legal

judgments which can then be disrupted or questioned. In doing so, steps can be taken to interrogate the assumptions and attitudes which govern approaches to polygamy in the law (for further discussion see e.g. Lewis and Mills (eds.), 2003 and Vakulenko, 2012). The utility of such discursive disruption is further evidenced by the feminist scholarship on polygamous marriage outlined above. By exposing the presence of harm and patriarchy in monogamous marriages, the argument that polygamy is inherently harmful is successfully disrupted, informing my analysis of judicial discourse.

The second reason that I have adopted a postcolonial feminist approach concerns historical context. Jane Haggis (2003) refers to postcolonial feminism as a 'feminist historical project' (p.163) and scholars in this branch of feminism use the past to better understand and question the present. Kaganas and Murray (1991) illustrate the effectiveness of historical consciousness by grounding their analysis of South African polygyny in colonial history. Referring back to the 'ethnocentrism of white colonizers' (Kaganas and Murray, 1991, p.125) facilitates a more nuanced deconstruction of legal approaches to South African polygyny, so that prevailing attitudes can be problematised. The use of history to contextualise the development and presence of colonial discourse is effective in advancing contemporary understandings of case law as legal judgments, especially those on marriage, are shaped by prevailing social attitudes (Probert, 2012). This provides a clearer picture of the current situation and how the courts have arrived there, enabling us to challenge contemporary judicial attitudes towards polygamy in English law.

It is also pertinent to consider some of the research investigating attitudes to polygamy in English law in the postcolonial context. For example, Prakash Shah (2003) looks at the vulnerability of individuals in polygamous marriages in the UK and concludes that outlawing

polygamy drives the practice underground. Shah attributes the rise of polygamy and its presence in the courts, to Asian and African immigration into the UK, thereby showing the importance of paying heed to context. He engages in a thought-provoking and historically conscious analysis of the existing English legal framework, arguing that the current system remains unsatisfactory. Adopting a legal pluralism approach, he ultimately asserts that individuals engage in polygamy outside of official law and in failing to recognise this and adapt accordingly, women and children suffer the most. Shah limits his analysis of the law to the areas of immigration and family reunion and there is little evidence of engagement with feminist legal critiques. However, this piece is useful as it highlights the implications for women in polygamous marriages of current legal and judicial attitudes to this practice. Building on this, I can then move towards exposing the underlying influences and views which impact upon and subordinate women in this area.

Adrien Wing (2011) has also been active in researching polygamy using a global critical race feminist approach in the UK. Wing expands critiques of polygamy to consider the broader socio-legal dynamics which shape and influence the legal framework with reference to polygamous families in Black Britannia. Along with insights provided by Shah, I use her work to examine legal and judicial attitudes towards polygamous marriage in the UK through a critical postcolonial feminist lens, thereby improving understandings of how the law responds to women who practise polygamy and why it responds in this manner.

Investigations into colonialist influences on polygamous marriage also uncover patterns of orientalist and imperialist thought which bear consideration. Drawing again on the existing research on polygamous marriage I shall now explain the interpretation and use of these two closely-linked concepts.

Orientalising Discourse: Personal Agency and Religious Supremacy

Edward Said (2003) defines orientalism as a discourse which encompasses dealing with the Orient and authorising views of it. There has been much debate over defining the Orient but I argue that the Orient encompasses both the Arab and Asian world and simply comprises nations which are not considered part of the West.⁷ Due to its exotic and different nature, the West deals with the Orient by forcing it into a western paradigmatic model which it cannot fit into because of its differences (Said, 2003). This difference is held as evidence of the Orient's inferiority providing colonisers with knowledge which they would then use as a source of power to exercise over the backward colonial natives (Lewis, 2000).

Critiques of orientalist behaviour in the law are effective in highlighting orientalism as a source of the western supremacy which drives imperialism and the white colonialist saviour. Teemu Ruskola (2002-2003) studies orientalist influences on the Chinese legal system, arguing that the West claims an 'ultimate interpretative authority' (p.234) over laws and legal systems in the Orient. Here, we can see orientalism at work with western observers claiming superior knowledge over the laws of an "other" oriental nation. Interestingly, orientalist "knowing and othering" processes permeate contemporary studies of polygamous marriage. Beaman (2014) notes that attitudes towards polygamy are constructed around an "us" (monogamists) versus "them" (polygamists) approach and this manifests in the lack of legal recognition for polygamous marriage. Looking for patterns of

⁷ Defining the 'West' is also plagued with difficulties. Alastair Bonnett (2004) argues that there are strong links between the desire to find a non-contentious alternative to what was once called 'Christendom' and the rise of the idea of the West. I use the West as a way to describe predominantly white nations with Christian-influenced values and institutions.

orientalist thinking in the case law on polygamy enables us to understand how and why polygamy has been “othered” using western monogamy as the comparative standard.

Another theme in the polygamy literature related to “othering” is concerned with the agency of women. In her work on Mormon polygamy and religion, Rebecca Johnson (2014) observes that women are portrayed as lacking in agency when making the decision to enter into a polygamous marriage as ‘a powerful social narrative presumes [their] consent to have been coerced...’ (p.110-111). Women are subject to orientalist assumptions regarding their agency to make the right decision about their marriage, rendering their decision-making abilities inferior to women in monogamous marriages.

Johnson (2014) adds a religious dimension to her critique with her “coercion presumption”, providing the basis for examining religious orientalism in legal responses to polygamous marriage. Although not universal, many women participate in religiously sanctioned forms of polygamy, indicating the utility of exploring the position of religion in judicial decision-making. Johnson (2014) challenges legal responses by asserting that by assuming religious women lack the agency to be in a polygamous marriage, their beliefs are dismissed as ‘displaceable by logic’ (p.111). This indicates a presumption of inferiority for religions which provide for polygamy, showing the pervasive nature of orientalist attitudes towards this non-normative form of marriage.

Imperialist Ideals: National Values and Legal Recognition

Another useful concept for analysing judicial approaches to polygamous marriage is British imperialism. Imperialism has close ties to postcolonialism because it is related to Empire-building and colonisation. Robert Young (2001) states that imperialism provides the

motivation for the physical process of colonisation and Wolfgang Mommsen (1981) expands this to make two key arguments which underpin my use of imperialism. He first asserts that white supremacy stems from 'biological and racial variants of national imperialism' (p.8) and should therefore be included within understandings of imperialism; and second that imperialism may also be an objective process which results in the civilised coloniser taking necessary control of a backward society. By including biological and racial characteristics, the close connection between imperialism, racism and white supremacy is displayed, indicating the importance of noting the role of these latter two concepts in judicial understandings of polygamy.

Mommsen's second argument regarding the civilising mission has become increasingly prominent in more contemporary definitions of imperialism and the reason for this evolution is attributable to decolonisation. Colonisation constitutes the most recent form of Empire-building on the basis of imperialist thought and among others, Thornton (1961-1962) asserts that colonialists never saw themselves as exploiting colonies but mainly viewed themselves as 'trustees of civilisation' (p.335). Thus, colonisation was for the benefit of colonised nations and peoples.

Exposing the "civilising mission" mentality has been expanded in the research of critical scholars including Lila Abu-Lughod (1998). Although not explicit, I noted a connection in her work between the imperialist civilising mission and current ideas of modernity. The term 'backward' (Mommsen, 1981; Harshé, 1997) is frequently used to describe culture and society in former colonies and this word indicates a need to bring them forward into the present. When something is updated, it is modernised and so, modernisation is a newer and

more politically correct term for civilisation, with the same objective that I identify as western imitation.

The notion of western imitation is helpful for understanding judicial discourses surrounding polygamy because, as we shall see, marriage is also constructed in accordance with western monogamous ideals. By looking for imperialist tropes within judicial discourse, the disruption of dominant colonialist narratives can be broadened to include imperialist ones. By uncovering and questioning both colonialist and imperialist discourses within these judgments, the effects of colonisation and western supremacy on attitudes towards polygamy in the English courts can be investigated further.

It is noteworthy that existing research highlights the nation-state and its interests as a bar to legal recognition for polygamous marriage. Critiques of imperialism aid in confronting the use of national interests and Margaret Denike (2010) provides insight into this when she considers race and polygamous marriage in Canada and the US. She observes the historical connection between nationalist sentiments and marriage noting that 'anti-polygamy campaigns were deeply implicated in the alignment of normative sexual monogamy and racial Anglo-Saxonism within the imperial logic of the nation-state' (Denike, 2010, p.868). In charting racist and imperialist patterns of thought in these campaigns she interrogates the denial of recognition for polygamous marriages and the preservation of a national monogamous identity. Sweet (2013) also addresses these ideas in her critique of Canadian nation-building discourses, concluding that the monogamous marriage ideal is viewed as essential for upholding national values and women's equality.

In addition to religious orientalism, imperialist critiques of religion and the role of Christianity are useful for evaluating the English case law on polygamous marriage. Inherent

in the civilising mission is a sense of religious conversionism (Curtin, 1972). For natives to become fully civilised, they must follow the most civilised religion: Christianity. Christianity was seen as an essential facet of life in the West and colonial natives would never be truly civilised until they had converted to this religion. As civilising has become modernising, conceptions of Empire have become more secular in nature, but the influence of religion is still a real concern, particularly in relation to marriage and the law. In applying a critical lens which looks for undercurrents of Christian imperialism in judicial attitudes towards polygamy, we can challenge the Biblical ideal of marriage as monogamous.

Existing research on polygamous marriage provides a variety of interesting perspectives and critical examinations of this practice in the law. By drawing from and combining the insights of the existing scholarship, I am able to demonstrate that applying a postcolonial feminist lens to the case law on polygamy proves effective in promoting a deeper analysis and understanding of the influences and discourses that shape and affect legal responses to polygamous marriage and women who live in such marriages in the UK.

III. **Constructing Polygamy – Racism, Imperialism, Orientalism and Sexism in the English Courts**

The case law discussed in this part, starts during the height of British imperial rule with *Hyde v Hyde and Woodmansee*⁸ in 1866, moving through the 20th century and finally into the present day. From the analysis, three main arguments arise. First that racist, imperialist, orientalist and sexist discourses are present throughout the case law on polygamous marriage. Second, these discourses intersect and intermingle to portray polygamy in a

⁸ [1866] L Rev 1 P & D 130. Hereinafter *Hyde*.

negative manner and subordinate women who are living in polygamous marriages. Finally, judicial language has evolved with time so that in more recent times, the themes of discourse identified are no longer explicit. However, they still remain prevalent in the case law, albeit in a subtler form based upon considerations of 'public good' and legitimate aims for protecting certain interests.

(I) Late 19th Century – *Hyde* and *Bethell*

The first case on polygamy which bears consideration is *Hyde*.⁹ Here, the husband who was a former adherent to the Mormon faith, sought to dissolve his marriage to the respondent wife on the ground of adultery. The marriage had been solemnised in Utah in accordance with Mormon requirements. Once the husband petitioner had left the Mormon faith, the wife married another man in a Mormon ceremony. The question for the court was whether, due to the petitioner's English domicile, the marriage would be considered valid in English law so that jurisdiction could be established and the divorce petition granted. It was held that the marriage was not valid for the purpose of enforcing any duties or granting relief for breach of matrimonial obligations.

This case provides a starting point for polygamy as it was during the course of determining what constituted a marriage in English law, that Penzance LJ decided a legally recognised marriage could not be polygamous:

'A marriage contracted in a country where polygamy is lawful between a man and woman...is not a marriage as understood in Christendom...the English matrimonial court will not recognise it as a valid marriage...' (*Hyde*, 1866, p.130)

⁹ [1866] L Rev 1 P & D 130.

An English court could not dissolve a Mormon marriage which never existed in English law and no distinction was made between potentially and actually polygamous marriages: both remained unrecognised. Potential polygamy relates to unions which are ‘celebrated under a system of law permitting polygamy, [but] the husband may choose not to exercise his right to take a second wife’ (Lord Collins of Mapesbury with Specialist Editors, 15th edn, 2012, p.965). Such a marriage is therefore *de facto* monogamous, but due to the *potential* for it to be lawfully polygamous under the law under which it was celebrated, it is viewed as being potentially polygamous. The other category of actual polygamy is more straightforward as it constitutes ‘a marriage in which the husband has exercised his right to take a second wife during the subsistence of the first marriage’ (Lord Collins of Mapesbury with Specialist Editors, 15th edn, 2012, p.965). Throughout *Hyde*¹⁰ there are various examples of imperialist, orientalist and patriarchal statements. For example, during the course of the judgment, Lord Penzance defines marriage in the following terms: ‘I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others’ (*Hyde*, 1866, p.133). The emphasis on “Christendom” indicates the dominance of Christianity in shaping understandings of marriage,¹¹ illustrating the courts’ imperialist commitment to Christianity as the ideal for civilised marriage at the time, when faced with any form of polygamy.

This definition has been criticised by contemporary scholars as unrealistic even in 1866. Rebecca Probert (2007) draws on the work of Sebastian Poulter (1979) to assert that Penzance LJ’s statement is fundamentally flawed. Marriage is not always lifelong as divorce

¹⁰ [1866] L Rev 1 P & D 130.

¹¹ See page 13 above.

decrees were granted even prior to *Hyde*¹² and it would be difficult to determine the meaning of 'voluntary' both in 1866 and today.¹³ Monogamy is not guaranteed, as infidelity provides a ground for divorce and so, even if two parties have contracted the marriage, further parties can be involved. Gillian Calder (2009) takes this forward to note that the only element of the definition which 'remains firm' is that parties marry 'to the exclusion of all others' (Calder, 2009, p.74). Thus, marriages which unite more than two parties are still excluded from understandings of marriage.

In addition to this Christian supremacist discourse, there are myriad examples of orientalism and patriarchy as demonstrated in the passage:

'There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms...In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live.' (*Hyde*, 1866, p.133-134)

Said's (2003) abovementioned definition of orientalism, included the notion of "authorising" views of the Orient based on western assumptions. The language of certainty employed in this excerpt through phrases including 'no doubt' and 'in some parts they are slaves...in

¹² [1866] L Rev 1 P & D 130. See eg *Warrender v Warrender* (1835) 2 Cl & Fin 488.

¹³ Steps have been taken to address the "voluntary" element in the forced marriage framework. See s.121 Anti-Social Behaviour, Crime and Policing Act 2014.

none do they stand...' provide evidence for this. Lord Penzance's confident and assured opinion orientalises and dismisses polygamous marriage because it does not fit within his understanding of the Christendom ideal of marriage.

The remainder of the passage exemplifies the intermingled Christian supremacist-patriarchal rhetoric to which women in polygamous marriages were subjected at the time. For example, unlike a Christian wife, the women in this scenario are not seen to be on the 'same level' as the man that takes them. This idea of being on the same level is encouraging at first because it suggests that a Christian wife could enjoy a level of equality with her husband. However, when read in conjunction with the words: 'with the man under whose protection they live', traditional gender roles become visible once more. This statement is self-contradicting because a woman cannot be on the same level as a man if she needs to live under his protection. The very notion of male protection instantly places a woman in a weaker and more vulnerable position, displaying the rampant sexism in judicial discourses which not only relate to women practising polygamy but also to the Christian wife. This discourse exemplifies Rebecca Probert's (2007) argument that rather than defining marriage, *Hyde*¹⁴ should instead be seen as a defence of marriage in 1866 which was shaped by its context. During this time, women were viewed as weaker and it is unsurprising that they were constructed in such patriarchal terms. Nevertheless, when combined with the imperialist and orientalist superiority displayed towards women in polygamous marriages, a hierarchy remains in which the Christian wife holds a higher value.

This passage also feeds into the debates discussed earlier surrounding women's agency. In the judgment, polygamous wives are portrayed as lacking the protection of an English

¹⁴ [1866] L Rev 1 P & D 130.

husband which can only be enjoyed by the Christian wife. Drawing on Spivak's (1999) theory of the white male saviour, this exemplifies the mentality that polygamously married women need to be saved from their marriage. The judgment proceeds to state that 'in some parts they are slaves' indicating a loss of agency and personhood. As slaves, these women are constructed as incapable of deciding the form of marriage that they engage in. This supports Rebecca Johnson's (2014) orientalist presumption of coercion, thereby illustrating how Christian imperialism justified the denial of recognition for polygamy when combined with the orientalist gaze.

More than twenty years after *Hyde*,¹⁵ little had changed in the courts' attitude as demonstrated in the case of *Bethell*.¹⁶ This case dealt with the *de facto* monogamous marriage between an English domiciled man and a woman named Teepoo, of the Baralong tribe in Bechuanaland. Their marriage was celebrated according to Baralong custom and was held invalid in English law because Baralong marriage does not confer the same status on the parties as Christian marriage. As such, Teepoo and her child with the deceased could not be recognised as heirs to his estate. The judgment also had stronger racist undertones than *Hyde*¹⁷ which involved parties who were both white and living in the West. Peter Fryer (1984) explains that '[f]rom the 1840s to the 1940s Britain's 'native policy' was dominated by racism. The golden age of British Empire was the golden age of British racism too' (p.165). As colonised natives, the approach to the Baralong, in line with native policy, was focussed on their inferior race.

¹⁵ [1866] L Rev 1 P & D 130.

¹⁶ (1887) 38 Ch. D 220.

¹⁷ [1866] L Rev 1 P & D 130.

Whilst establishing the facts it is stated that the deceased:

‘went through the form of marriage according to the custom of the Baralong tribe with Teepoo, a Baralong girl...; that the Baralongs had not any religion, nor any religious customs, and that polygamy was allowed in that tribe...’ (*Bethell*, 1887, p.221)

The reference to religion or lack thereof and its connection to polygamy is an example of Christian imperialism and orientalism. There is no indication of how this assessment was reached that the Baralong have no religion. In his depositions, the chief of the tribe refers to ‘*Baralong* custom’ (p.222) although whether this is rooted in religion or tradition is left unclear. The discourse suggests that polygamy can only be countenanced if participants are either non-Christian or have no religion, alienating this practice and its participants from England and English law.

Elsewhere in the judgment, the Baralong are portrayed as a ‘barbarous or semi-barbarous tribe...beyond the limits of the British dominion’ (*Bethell*, 1887, p.232). This is the first overtly racist discourse in the judgement and stems from the imperialist and orientalist notion that as the tribe is living beyond the British dominion,¹⁸ and outside the reach of the civilised British authority, it must be ‘barbarous’. To characterise a people in this way is dehumanising and insulting because to be barbarous, is to be uncivilised; cruel; coarse and unrefined (R.E. Allen (ed.) 1990). Such racist discourse supports Mommsen’s (1981) arguments regarding the use of racial and biological differences to bolster and underpin white supremacy and imperialism. At this time, the inferiority of a colonised people was

¹⁸ I treat this as a synonym for British Empire.

based on “scientific evidence” linking physical characteristics to intellect and morality in what Fryer terms the ‘pseudo-scientific mythology of race’ (p.165). Due to the Baralong being ‘barbarous’; having no religion; and permitting polygamy, their racial and religious differences were highlighted and used against Teepoo and her child by the racist, imperialist native policy at the time to deny them lawful recognition and a share of the deceased’s estate.

(II.) Mid to Late 20th Century – Secularity and Western Imperialism

By the mid-20th century some noticeable change in judicial attitudes becomes apparent. There are no longer any explicitly racist overtones in judgments and from the 1940s onwards, we start to see a shift in judicial discourse. Although The Marriage Act 1836, introducing the secular option of civil marriage was passed prior to *Hyde*,¹⁹ judicial decisions were still based on Christian ideas of marriage. During this period, the judicial discourse adopts more of a secular tone but Christian ideals remain prevalent alongside western imperialism and orientalism. In addition, the courts start to respond differently to actually and potentially polygamous marriages.

One of the earliest indications of attitudinal change is found in *The Sinha Peerage Claim* case.²⁰ This decision was different because the courts were willing to view potentially polygamous marriages celebrated in accordance with the law of a land which permitted polygamy as valid in English law. In this judgment concerning an Indian Hindu marriage, Lord Strickland refers to ‘religious toleration throughout the Empire’ (p.225) which suggests the

¹⁹ [1866] L Rev 1 P & D 130.

²⁰ *HL Deb 12 December 1935, vol 99, cols 224-32.*

underlying reasons for this shift could be attributed to a developing tolerance towards Hinduism and its adherents in the British Empire. However, the word 'toleration' is limited in scope and denotes reluctance. Wendy Brown (2008) scrutinises tolerance, arguing that it is a 'token of Western supremacy' (p.182), centring the West as the standard for civilisation. Applying Brown's (2008) insights to this case, it is apparent that toleration remains a tool for orientalism. Other non-Christian religions and their practices will be tolerated but there is no room for full acceptance.

Despite the increasing decline of the British Empire,²¹ the elevated status accorded to Christian marriage continues into the 1950s and 60s through the use of certain key words in case judgments. When discussing polygamous relationships, terms including "union" and "association" are used instead of "marriage", creating a clear distinction between acceptable Christian marriage and all other non-Christian relationships. In *Matthew Olajide Bamgbose Appellant v John Bankole Daniel and Others Respondents*,²² the appellant claimed to be the lawful nephew of the deceased who was being prevented from inheriting all of an uncle's estate by the deceased's children from his nine customary Nigerian actually polygamous marriages. Interestingly, the Court of Appeal used the word 'union' to describe both Christian monogamous and polygamous marriages although it is then stated that 'the courts of Nigeria attached to monogamous and Christian marriages a sanctity not accorded to polygamous unions by native law and custom' (p.112). Thus, the descriptor of 'union' was used in the context of discussing the Nigerian courts' approach to these two types of marriage, suggesting an imperialist racialised response to the court system in colonial

²¹ E.g. India gained independence from the Empire in 1947.

²² [1955] AC 107. Hereinafter *Matthew*.

Nigeria along with Nigerian conceptions of marriage. There is a sense of approval for the imperial-administered courts as they are implicitly compared to the native law which would have been addressed in the native courts (Falola and Heaton 2008). Thus, polygamy is distinguished from monogamy on the same colonial judicial platform that native law (and its native judges) is distanced from the colonial administration.

A few years later, a further shift is noted in *Shahnaz*.²³ In this dowry case for an Islamic marriage celebrated in India, polygamy is instead referred to as an 'association' (p.398) thereby discursively distancing polygamy from marriage even further:

'The reason I think is one of policy, of morality as conceived first in the mid-19th century but surviving into modern times, that nothing should be done to blur the distinction between Christian marriage – marriage properly understood...and, on the other hand, polygamous associations more resembling concubinage or slavery.' (*Shahnaz*, 1964, p.398)

Between *Matthew*²⁴ and *Shahnaz*,²⁵ views of polygamy have deteriorated as manifested in this descriptive change to 'polygamous association'. Whilst 'union' still retains a sense of people coming together or uniting, 'association' is further removed from ideas of intimacy. It is possible to consider 'union' as a personal relationship but 'association' has more commercial and impersonal connotations. According to the Christian imperialist view, a union or association can never equate to the social and religious institution of marriage. The

²³ [1964] 3 WLR 759.

²⁴ [1955] AC 107.

²⁵ [1964] 3 WLR 759.

relationships entered into by adherents of other religions are therefore inferior and undeserving of the same level of recognition. The reasons for this deterioration are not clear, especially since there is a gap of under two years between the cases. It may either be down to the personal views of the presiding judge or to an overall shift in ubiquitous views of polygamy. Regardless, in excluding polygamy from understandings of marriage, its inferiority is reinforced whether it is labelled a union or association. This then combines with the orientalist assumption that Christian marriage is the only form of marriage that is 'properly understood' as a matter of 'morality', thereby indicating that only those who have grown up with Christianity in the West can conceive of a proper marriage. Sexist discourses are further apparent in this passage as women in polygamous marriages are equated with 'concubinage or slavery'. This pattern of thought is steeped in imperialist rhetoric as these "brown" women were clearly established as slaves or concubines who required saving. Such a portrayal is subordinating to women in polygamous marriages as the courts subject them to the degrading status of a concubine or slave who is associated or united with a man, rather than lawfully married to him.

Although there are multiple problematic discourses in *Shahnaz*,²⁶ progress was made regarding overall responses to polygamy. In this case, a woman's contractual right *in personam* to the promised dowry from her potentially polygamous marriage was enforced, supporting the notion that such a marriage was 'not unlawful' (p.391). However, the court was careful to ensure that it was not the potentially polygamous marriage or any right arising from it which could be enforced but the dowry right from the contract the woman

²⁶ [1964] 3 WLR 759.

entered into in contemplation of the marriage. It is likely that the *de facto* monogamy here aided the court's subtle, but cautious change in viewpoint. As explained by Judge Winn:

'Nor do I see any foundation in any of the decided cases that have been brought to my notice for any judicial ruling that that marriage involved any element offensive to the standards of decency accepted by the English law.' (*Shahnaz*, 1964, p.397)

Judges were now willing to entertain claims related to potentially polygamous marriages as by conforming to a *de facto* monogamous structure they were no longer deemed "offensive" or unlawful. In addition, Winn J was cognisant of the difficulties that women who are party to a 'Mohammedan marriage' face after coming to the UK declaring that:

'...it is better that the court should recognise in favour of women who have come here as a result of a Mohammedan marriage the right to obtain from their husband what was promised to them by enforcing the contract and payment of what was so promised, than that they should be bereft of those rights and receive no assistance from the English courts.' (*Shahnaz*, 1964, p.401–402)

This sympathetic policy statement is demonstrative of the progress made by the courts to adopt a proactive attitude towards the rights of women in potentially polygamous marriages celebrated overseas. It could also be attributed to the courts becoming more accustomed to seeing such cases, as immigration from polygamy-permitting colonies into the UK became more prevalent (Shah, 2003). This in turn led to a willingness rather than outright dismissal to hear these women and their issues.

That being said, the colonial saviour theme is also prevalent in this statement, reflecting a persistent lack of development in cultural perceptions of gender. The suffering of women who come here is attributed to their 'Mohammedan marriage' rather than the courts' attitude to that marriage. This constitutes a protection narrative, in which the court protects a potentially polygamous wife by enforcing her rights. Pathak and Rajan (1992) argue that such discourses of protection disguise power politics as '[a]n alliance is formed between the protector and protected against a common opponent...[which]...conceals the opposition between protector and protected, a hierarchical opposition that assigns higher value to the first term' (p.263). This alliance and its protection come at the price of othering the wife by blaming her relationship and the new problems it has created for the law.

Further into the 1960s and 70s another theme relating to entitlement to public money arose in the late 1960s which is still relevant today. In this area, individuals – mainly women and children living in polygamous families – were deemed an unacceptable burden on the state. The courts have sought to protect state funds from abuse by those in polygamous marriages as shown in *Imam Din v National Assistance Board*.²⁷ Here, a man abandoned his second wife and their children in the UK, leaving them destitute and reliant on the National Assistance Board for financial provision. It was held that there was no good reason to deny recognition to the wife and children as being lawfully related under Pakistani law to the deserter husband so that he could not 'avoid all responsibility and thereby throw the whole burden of maintaining his wife and children upon the public' (*Imam*, 1967, p.218). As Salmon J stated: 'I can find no such reason, and every reason in common sense and justice why they should be recognised' (*Imam*, 1967, p.218). Recognition of this polygamous

²⁷ [1967] 2 WLR 257. Hereafter *Imam*.

marriage prevented the use of public money and forced a man to take responsibility for his second family, whilst also implying that the maintenance of the polygamous wife and children is a burden on the state.

The court's attitude stems from the privatisation of responsibility for welfare that is at the heart of the neoliberal state in the UK today. Whitehead and Crawshaw (2012) explain that as a result of neoliberalism, societal institutions are now expected to function as 'business corporations whose rationale is profit generation' (p.233). As such, the line between the public service and private sectors has become increasingly blurred. In *Imam*,²⁸ recognition of the polygamous marriage negated state responsibility for the welfare of the wife and children, placing the burden on the husband, but also placing this family in a vulnerable position. Even with a legal order, there was no guarantee that the husband would take financial responsibility, leaving this woman and her children at the mercy of a man who has previously refused to fund their needs. In addition to this vulnerability, the wife has been treated undeserving of aid by the state because of her polygamous marriage. To save state funds, the court created a gap between the provision of state aid which was denied to them and private aid for which there was no guarantee of payment leaving the woman and children in an untenable situation of uncertainty and financial insecurity.

This was contrasted against *Nabi (Ghulam) v Heaton (Inspector of Taxes)*²⁹ which dealt with the income tax relief of a man who had two subsisting Pakistani polygamous marriages and could only claim relief for the maintenance of his first wife. It transpired that the husband in

²⁸ [1967] 2 WLR 257.

²⁹ [1981] 1 WLR 1052. Henceforth *Nabi*.

*Imam*³⁰ had deserted his second wife after the death of his first wife and so he had only one living wife at the time of the desertion. The court recognised the marriage because although it may have been polygamous at its inception, following the death of the first wife, the marriage became *de facto* monogamous.

In the period between these two cases, the Law Commission published its 1971 report on polygamous marriages, leading to the enactment of the Matrimonial Proceedings (Polygamous Marriages) Act 1972. This report departs from the reasoning in *Imam*³¹ to opine that the wife's lack of entitlement to social security benefits was:

'...unfortunate and anomalous... [because she] ...should be treated just like any English wife is she was in fact her husband's only wife throughout their period of residence in England' (Law Commission, 1971, p.42).

This statement exposes the key source of suffering for women in polygamous marriages: judicial interpretations of their marriage ensure that they are treated differently and to their detriment. This differentiation is an orientalist othering process in which the courts deny a woman social security relief because she and her marriage are different from their monogamous ideal. Unfortunately, the Law Commission's opinion had little effect on later case law as evidenced by the later *Nabi*³² judgment.

³⁰ [1967] 2 WLR 257.

³¹ [1967] 2 WLR 257.

³² [1981] 1 WLR 1052.

During the *Nabi*³³ decision, whilst interpreting the meaning of 'his wife' in s.8(1) of the Income and Corporation Taxes Act 1970, Vinelott J stated 'it seems to me to read the expression "his wife" as meaning "a wife" or "any wife" would be to do too great violence to the language of the section' (*Nabi*, 1981, p.1058). The word 'violence' is troubling as it connotes an extreme reaction to the inclusion of polygamous wives within the scope of this provision. In Vinelott J's opinion, including polygamous marriage would cause significant harm on par with physical damage to the section. This choice of words is reminiscent of the strong language used nearly a century earlier in *Bethell*.³⁴ In both cases, there is a feeling of disturbance at the thought of polygamy and even though the much earlier *Bethell*³⁵ judgment is more explicit, the statement in *Nabi*³⁶ demonstrates that these patterns of intolerant discourse are still present.

By recognising the two marriages to prevent the husband claiming two lots of tax relief, the court had a clear agenda of preserving and protecting state funds. This could harm the second wife as the recognition of her polygamous marriage deprived her husband of a tax benefit linked to her maintenance which remained with respect to the first wife. The second wife was disadvantaged and both her financial security and position were affected. The decision impressed upon her that as a second wife, she was not worthy of the same status as the first wife and her husband would not benefit from their marriage as much as he does from his first, leading again to financial loss and a sense of inferiority.

³³ [1981] 1 WLR 1052.

³⁴ (1887) 38 Ch. D 220.

³⁵ (1887) 38 Ch. D 220.

³⁶ [1981] 1 WLR 1052.

The message of inferiority running through these two cases is both orientalist and patriarchal. The wives have been othered and subordinated through their depiction as a burden on everyone because their polygamous marriage is not suited for the welfare state's construction and regulation of marriage. When compared to the much earlier *Bethell*,³⁷ it is also noteworthy that whilst judicial attitudes towards recognition have evolved, the courts' aim remains the same at this stage: to deny relief and assistance to polygamous wives and their children. The problematic discourses surrounding polygamous marriages are still present in the case law at this stage and are negatively impacting upon women who engage in polygamy.

(III.) Late 1990s – Potential for Progress?

As we move closer to the present day, the courts appear to be more accustomed to dealing with polygamy. During this period, the statutory framework also developed to reflect the judicial tolerance for potentially polygamous marriage with s.5(1) Private International Law (Miscellaneous Provisions Act) 1995. As a result of s.5, potentially polygamous marriages are now not automatically void unlike actually polygamous marriage.

The case law further indicates a willingness to protect the interests of individuals in polygamous marriages. For example, in *R v Department of Health Ex p Misra*,³⁸ the two widows of a doctor who were both lawfully married in India, were equally entitled via extra statutory concession to a pension under Reg 14(1) of the National Health Service

³⁷ (1887) 38 Ch. D 220.

³⁸ [1996] 1 FLR 128. Hereafter *Misra*.

(Superannuation) Regulations 1980.³⁹ Consequently, the existing pension amount was divided equally between the two wives. No additional support was to be given to one over the other and even if one wife were to pass away, her share would not be given to the other wife.

*Misra*⁴⁰ is a fascinating development in the recognition precedent because the marriages were held valid for the purpose of awarding pensions to both widows. There was no agenda for protecting monogamy or preventing the abuse of public funds and the rights of these polygamous widows were recognised and upheld so that ostensibly they may benefit. The courts are generally more focussed on the money rather than the polygamous wife claimant but they are still willing to uphold her interests provided there is no conflict with state interests. There is no explicit reasoning for the superannuation scheme providing for polygamous widow pensions but delving into NHS history provides some explanation. Snow and Jones (2011) state that a national shortage of doctors by the 1960s led to overseas recruitment from former British colonies. In recruiting such a large proportion of staff from nations with a history of polygamy, the NHS could have expanded the scheme as an incentive to accommodate immigrant personnel. This case is significant because it shows that the courts are capable of dealing with polygamous marriage without being openly sexist, racist, imperialist or orientalist.

³⁹ This provides for the entitlement of a widow to an 'annual widow's pension' and is supplemented by reg 9 of the National Health Service (Superannuation) Amendment Regulations 1989. In this case, the two wives were 'entitled to an equal share of the death gratuity...provided that such a share...shall not be increased by reason of the death of any other wife so entitled.'

⁴⁰ [1996] 1 FLR 128.

Despite this positive change, another concurrent harmful attitudinal discourse reinforces the inferior status of polygamous wives. The two wives here were still penalised because one wife's half of the pension was non-transferable to the other upon death. Thus, unlike a monogamous wife, a polygamous wife is only eligible for half a pension, which is damaging. The monogamous wife and her marital choice remain privileged and she is rewarded for her conformity to the dominant Western paradigm. Polygamous wives are denied access to a whole pension, demonstrating the disparity of treatment in the courts based on the imperialist perception that a polygamous marriage has a fraction of the value of an ideal monogamous marriage.

*Bibi v Chief Adjudication Officer*⁴¹ continues along this vein of putting state interests and monogamy first. Here, the widow of a Bangladeshi Islamic actually polygamous marriage was denied any claim to widowed mother's allowance under s.25 Social Security Act 1975 and the Social Security and Family Allowances (Polygamous Marriage) Regulations 1975 because the provisions only applied to the widows of potentially polygamous marriages.

Interestingly, Ward LJ was persuaded by the argument from the earlier *Imam* that:

'It would clearly be wrong for a man paying contributions on the basis indicated to reap benefits in respect of perhaps three or four current wives.' (*Imam*, 1967, p.221)

*Bibi v Chief Adjudication Officer*⁴² concerns a widowed mother's allowance and as, unlike *Imam*,⁴³ the husband in this instance was deceased, I question his reaping the benefits. By

⁴¹ [1998] 1 FLR 375.

⁴² [1998] 1 FLR 375.

focussing on the man, the widow and her needs were side-lined based on her polygamous marriage. Polygamous widows are left to suffer the consequences because the court deems it 'wrong' to divide their deceased husband's social security contributions between them. Women are again placed in a position of inferiority: they are made to feel like an unfair burden on the state because of their non-monogamous marriage. Thus, although some progress occurs in *Misra*,⁴⁴ polygamous marriages are still being recognised to protect state interests and idealise monogamy. This leads to the conclusion that underlying attitudes and approaches towards polygamous marriage have changed less than it would seem at this stage and are affecting women the same way that Teepoo was affected over a century earlier.⁴⁵

(IV.) 1990s through to the Present Day – Immigration and Human Rights

More recently, cases on polygamy have mainly arisen in an immigration context. Judicial discourse is less openly imperialist and orientalist, with the courts preferring the "protect public interests" approach. As illustrated in the above section, the preservation of monogamy is a modernised form of imperialist and orientalist thinking as women in polygamous marriages are subordinated by being positioned as a burden on the state. In existing research, Beaman (2014) identifies the use of idealised monogamy as the comparator against which polygamy is measured and found wanting. Due to their marriage running contrary to monogamous ideals, women are orientalist by the assumption that their arrival in the UK will be problematic for the state.

⁴³ [1967] 2 WLR 257.

⁴⁴ [1996] 1 FLR 128.

⁴⁵ See above at pages 18- 20.

Recent cases tend to involve the refusal of entry into the UK for second spouses or children from second or third marriages. Polygamous marriages in this instance are not considered recognisable for the purposes of granting leave to remain in the UK, but they are considered recognisable for the purposes of preventing the entry of multiple spouses. The immigration framework refuses to grant a right of abode in the UK to a man's second wife if his first wife is already exercising such a right in the UK and this echoes the focus on polygamous marriages to deny legal relief and remedy discussed above in relation to succession⁴⁶ and welfare benefits.⁴⁷

This limitation on the number of wives that can claim a right of abode is another imperialist and patriarchal method of preserving monogamy in the UK, although the effectiveness is questionable because a man is not prevented from having multiple wives abroad. The impact of this is illustrated in *R v Immigration Appeal Tribunal and Secretary of State for the Home Department Ex. p. Begum (Hasna)*⁴⁸ in which it is stated that the appellant:

'...has always lived with her mother in a house which is shared with her brother and his family...her brother considers it unacceptable that his sister should be condemned to her present life, being separated from her husband. He feels it is a matter of shame to his family that his sister has never gone to her husband's house to live with him.' (*Begum*, 1995, p.1)

⁴⁶ *Bethell* (1887) 38 Ch. D 220.

⁴⁷ *Imam* [1967] 2 WLR 257.

⁴⁸ [1995] EWCA Civ J1201-1. Hereafter *Begum*.

As a result of her marriage, Hasna Begum was living in a difficult situation away from her husband, whilst he lived with his first wife and their children in the UK. The reference to 'shame' is also telling as it unearths another form of harm to women in polygamous marriages which is not as prevalent in existing literature. In Part II, I explored the concept of harm as a tool to promote negative perceptions of polygamy, with scholars like Kaganas and Murray (1991) concluding that patriarchy is the real harm. I situate the applicant's shame for living with her maternal family as a form of harm resulting from patriarchal legal attitudes towards polygamy.⁴⁹ *Begum*⁵⁰ shows the consequences suffered by a woman who has been legally married in a polygamy-permitting jurisdiction. Despite having official recognition in Bangladesh, her refusal of entry left her to live as a single woman supported by her brother. It is understandable that a wife would desire to be with her husband in the UK and it must be a source of suffering for her to live without him because she has been refused entry by the immigration authorities. In addition, the emotional impact of being labelled as a source of "shame" for living like this cannot be underestimated.

Several attempts have also been made to invoke the European Convention on Human Rights (ECHR) in the UK regarding respect for private and family life, the right to marry and the prohibition on discrimination. One of the earliest indications of the judicial approach to human rights in polygamy is found in *Bibi v UK*.⁵¹ The applicant complained that her right to respect for family life was infringed under Article 8 ECHR by the UK's refusal to allow her polygamously married mother into the UK. She also argued that her mother was

⁴⁹ Shah (2003) discusses this type of harm in his work. See page 7-8 above.


⁵⁰ [1995] EWCA Civ J1201-1.

⁵¹ Appl. 19628/92, *Bibi v UK* (Dec) 29 June 1992.

discriminated against on the grounds of sex because her father was allowed to choose which of his wives would live with him in the UK.

It was held that there was an Article 8(1) infringement that was justifiable under Article 8(2) because the mother's exclusion:

'...was intended to prevent the formation of polygamous households, the practice of polygamy being deemed unacceptable to the majority of people who live there. The aim of the provision would appear, therefore, to be the preservation of the Christian based monogamous culture dominant in that country. The Commission considers that such an aim is legitimate and falls within the scope of the protection of morals or the rights and freedom of others within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.' (*Bibi v UK*, 1992, para 1)



There was no finding of discrimination as the exclusion stemmed from polygamy for which the UK was not answerable under the ECHR. This shows that preserving monogamy is a legitimate aim, even at European level and is demonstrative of the pervasive Christian and western imperialist ideals which govern English and ECHR legal responses to polygamy. Additionally, by situating the aim under the protection of morals, the court indicates that polygamy impacts upon public morality. The assumption that public morals would be affected is indicative of an underlying imperialist and orientalist message that polygamy is only practised by the immoral based on knowledge of the practice from a western perspective.

A few years later, it was alleged in *Khan v UK*,⁵² that the UK Government had infringed the A8 ECHR rights of the applicant by refusing his second wife entry when his first wife was already resident in the UK. Although the application was deemed inadmissible, the Government did argue that the second marriage has not been prevented by UK law in this case and the refusal of entry for the second wife is partially justified by the assertion that the multiple husbands of a polyandrous woman would not be permitted entry and stay as it would 'not be conducive to the public good.'⁵³

This is the first mention of polyandry in the case law and there is no explanation or justification for the statement made, providing the impression that the state is trying to demonstrate an equal approach to both polygyny and polyandry. Interestingly, this case represents a shift in attitudes reflecting the consciousness of sex discrimination. Throughout the case law, polygamous marriages which have mostly been polygynous have been orientalised and held up to western idealised standards of monogamy (Beaman 2014). By contrast in *Khan v UK*,⁵⁴ a polygyny versus polyandry stance has been adopted to justify the refusal of entry for any polygamous spouse. In addressing polyandry, the UK endeavours to avoid claims of sex discrimination under Article 8 ECHR, as it would refuse entry to all individuals in polygamous marriages regardless of their gender. Thus the authorities have changed the comparator from monogamous marriage to sex discrimination. Maleiha Malik (2007) explores and problematises the use of comparators in discrimination law, arguing that 'comparison is too individualistic and does not take sufficient account of the social

⁵² (1996) 21 EHRR CD67.

⁵³ (1996) 21 EHRR CD67.

⁵⁴ (1996) 21 EHRR CD67.

context' (p.79). In reality, polygyny is far more prevalent than polyandry and women are more affected by judicial attitudes towards polygamous marriage than men, indicating that this constituted a deliberate strategy to construct a comparator which was harder to challenge.

The phrase 'not be conducive to the public good'⁵⁵ is further problematic because it signifies the priority given to public interests as the UK Government authoritatively asserts that the public would be negatively affected by a polyandrous husband being granted entry into the UK. Employing the 'public good' justification shows that polygamy is still being othered based on orientalist knowledge that it is contrary to the public good. This links with the welfare cases explored above where women in polygamous marriages were portrayed as a strain on the state because their residence in the UK impacted upon public resources and finances. Thus, women in polygamous marriages are constructed in terms of their difference to the mainstream version of marriage in the UK and suffer as Hasna Begum⁵⁶ did.

Similar attitudes are displayed towards the offspring of polygamous marriages who seek entry and stay in the UK. Entry was denied to the daughter of a man and his third wife in *ECO New Delhi v SG*⁵⁷ as:

'The legitimate aim here is not limited to considerations of numbers alone, but to deter the formation of polygamous households in the United Kingdom. Such a

⁵⁵ (1996) 21 EHRR CD67.

⁵⁶ *Begum* [1995] EWCA Civ J1201-1.

⁵⁷ [2012] UKUT 00265 (IAC).

policy is well within the state's discretionary area of judgment.' (*ECO New Delhi v SG*, 2012, para 27)

These statements echo *Bibi v UK*⁵⁸ above, displaying the continued theme of preserving monogamy and deterring polygamy. It is legitimate to exclude a polygamous wife and by extension her children and the refusal of a child's entry is therefore tied up with that of its polygamously married mother. In keeping with the imperialist theme of preserving monogamy, the courts are willing to recognise the existence of polygamous marriage again to serve the interests of immigration rather than the desire of the wives and children affected.

Later in the *ECO New Delhi v SG*⁵⁹ judgment, Blake J mentions that:

'...the modest contribution to the discouragement of such marriages in Nepal or elsewhere is a legitimate aim in pursuit of morals and the rights of others particularly the pursuit of gender equality.' (*ECO New Delhi v SG*, 2012, para 47)

The question of morality and polygamous marriages arises again in this very recent case displaying the presence of orientalist discourses in current case law. At several points before this statement is made,⁶⁰ it is stressed that the child was not denied entry because of her parents' marriage but because she failed to meet the relevant criteria in the Immigration Rules. This therefore provokes the question of why it was necessary to explain and

⁵⁸ Appl. 19628/92, *Bibi v UK* (Dec) 29 June 1992.

⁵⁹ [2012] UKUT 00265 (IAC).

⁶⁰ See *ECO New Delhi v SG* [2012] UKUT 00265 (IAC) at paras 28 and 37.

commend the discouragement of polygamous marriages 'in Nepal or elsewhere.'⁶¹ The authoritative commentary on polygamy and its danger to gender equality is orientalist despite existing research showing that patriarchy transcends marital structure.⁶² Monogamy does not guarantee gender equality and to assume so is damaging for all married women. These recent immigration and human rights cases continue to perpetuate the same problematic discourses which have been appearing throughout the case law for more than a century, the only difference being that there are fewer explicit discursive markers. The language may have changed but the same imperialist, orientalist and patriarchal influences prevail causing women in polygamous marriages to suffer greater harm because of their marital status.

IV. Conclusion

Over the years, the courts have been compelled to deal with numerous issues regarding polygamous marriage. In this paper I explored judicial responses to this form of marriage and women living in these marriages, arguing that current judicial attitudes towards women living in polygamous marriages in the UK are problematic. A postcolonial feminist lens was applied to existing case law to observe discursive patterns throughout the judgments, providing insight into the factors which influence English legal responses to polygamy.

Using existing scholarship on polygamous marriages from several jurisdictions, I explained the relevance of an international postcolonial feminist inspired conceptual framework. Postcolonial feminism encourages us to disrupt dominant discourses and adopt a historically

⁶¹ I interpret this as "everywhere".

⁶² See page 5 above.

sensitive approach to polygamy. In scrutinising legal responses to polygamy through a postcolonial feminist lens, the reality of patriarchy as equally harmful to women in polygamous and monogamous marriages was exposed, challenging the idea that polygamy in itself is harmful. A consideration of historical context, using South African and Canadian literature, then uncovered the themes of imperialist and orientalist thought in legal perceptions of polygamous marriage. Drawing again on existing research conducted in the US to demonstrate their relevance for the judicial discourse analysis, I argued that orientalist thought denies women's personal and religious agency. They are subject to orientalisating and othering processes which position them and their marriage as inferior. This is manifested in the religious Christian supremacy underpinning judicial conceptions of what marriage is and should be in the West. Using scholarly critiques of imperialism, I demonstrated that orientalist Christian supremacy is connected to the imperialist civilising mission as religion plays a key role in dismissing polygamous marriage.

Building on research on contemporary western legal responses to polygamous marriage which note the harms to women in polygamous marriage, I charted the development of judicial attitudes towards polygamous marriage and women who engage in polygamy in the UK. From the analysis, three main arguments arose. First that racist, imperialist, orientalist and sexist discourses are present throughout the case law on polygamous marriage. Second, that these discourses intersect and intermingle to portray polygamy in a negative manner, subordinating and causing harm women who are living in polygamous marriages. Finally, judicial language has evolved so that in more recent times, the themes of discourse identified are no longer as explicit. However, these attitudes still permeate the case law, in a subtler form centred upon considerations of 'public good' and pursuing the protection of

others. Based on these findings, it is evident that current judicial responses to polygamous marriage need to be re-evaluated to address the harms suffered by women based on their choice of marriage.

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