

POLYGAMY,
BIGAMY AND
HUMAN
RIGHTS LAW

POLYGAMY,
BIGAMY AND
HUMAN
RIGHTS LAW

Samuel Chapman

Copyright © 2001 by Samuel Chapman.

ISBN #: Softcover 1-4010-1244-2

All rights reserved. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the copyright owner.

This book was printed in the United States of America.

To order additional copies of this book, contact:

Xlibris Corporation

1-888-795-4274

www.Xlibris.com

Orders@Xlibris.com

CONTENTS

Chapter 1—Introduction	9
Chapter 2—Review of the Literature on Plural Marriage	13
Chapter 3—The Criminal Law—Bigamy and Related Offences	23
Chapter 4—The Civil law and Plural Marriage	41
Chapter 5—Comparison of Reasoning and Identification of Assumptions	55
Chapter 6—Testing assumptions against Research and Data	61
Chapter 7—Plural Marriage and Human Rights	71
Chapter 8—Opportunities for Change in the Law	83
Chapter 9—Conclusion	95
Recommended further reading	99

To A.A.S. Zuckerman, Fellow in Law at University College,
Oxford, who first taught me that the law was whatever I could
successfully argue it to be.

CHAPTER 1—INTRODUCTION

In the latter half of the twentieth century a variety of laws which were associated with traditional views of morality and family life were repealed or amended, such as those regulating abortion, homosexual acts and divorce. Bigamy, however, remains a criminal offence, and its practice or the avoidance of the offence have various implications under other branches of law.

This becomes an issue due to the large increase in the Muslim population in the United Kingdom which has taken place over a similar period of time, and the fact that under Islamic law it is permissible for a man to have up to four wives. While this has been happening, a change in attitudes to personal morality has apparently resulted in a move away from strict monogamy within the population as a whole, so that the assumption of monogamous marriage becomes open to question.

At the beginning of a new millennium however, it is possible that the law may now be challenged. Medi Siadatan, a Walsall restaurateur, wants the law to guarantee multiple wives the same rights as any other spouse, and the Muslim Parliament of Great Britain is considering a challenge to the law. With the incorporation of the European Convention of Human Rights into domestic law for the first time, it is clear that both individual polygamists and at least one prominent Muslim organisation intend to seek legal recognition for the relationships in which they are living, or which they believe their communities should be able to contract.

Against this background, chapter two presents a review of the available literature on plural marriage and the law, focussing on the commentary on English law, but also including information

from other fields that have not usually been considered by the law.

Chapter 3 gives details of the history of the English Criminal law of bigamy and some related offences. This begins with the use of similar offences within the Roman Empire, through controversies during the reformation which challenge the assumption that monogamy is of Christian origin, and on to the modern application of the law.

The law of England and Wales is of international interest in this regard, because of its similarity to the law of Northern Ireland, and its persuasive force in Scotland, the Republic of Ireland and across the Commonwealth. The English law on bigamy has also been cited in leading cases in the United States and before the European Court of Human Rights, further establishing the relevance of considering the current state of the law at a time when prosecutions of polygamists have revived in Utah.

Chapter 4 traces the development of the civil law relating to plural marriage, and specifically the move towards greater recognition.

Chapter 5 compares the reasoning behind the different areas of the law and identifies the assumptions that lie behind them, which are then tested in chapter 6 against research and argument from a number of disciplines and against demographic information. This reveals the assumptions and reasoning to be largely open to question, and in need of debate.

Chapter 7 identifies relevant sections of the European Convention on Human Rights that will need to be applied by the English Courts, and the likely issues to be raised in the context of polygamy are highlighted in chapter 8. The study concludes that the law has not developed in a logically coherent way, but that the law has contributed towards stifling interest in debating the subject. The Human Rights Act therefore presents both a stimulus for comprehensive debate and a considerable challenge to the existing law. Some opportunities that the Act presents for reform are identified, should anyone wish to take them forward to the courts.

Finally, it is worth noting that some commentators treat bigamy as the practice of having two wives, and polygamy as the practice of having more than two wives, but this reflects neither the common usage nor the dictionary definition.

The term ‘polygamy’ is used in this book to refer to the practice of one man having more than one wife at the same time, otherwise known as ‘polygyny’. This is how the term is used by most writers as this is by far the most prevalent form of plural marriage, but technically the term can also cover ‘polyandry’, the practice whereby a woman has more than one husband. In this text, polyandry will be referred to separately from polygamy.

In this book a “potentially-polygamous” marriage is a marriage involving two parties only, but which was celebrated under a law which allows polygamy.

The term ‘bigamy’ will be used in reference to the criminal offence.

CHAPTER 2—REVIEW OF THE LITERATURE ON PLURAL MARRIAGE

The literature surrounding the topic of plural marriage is very diverse. Much literature is concerned with moral or religious issues, while other works relate historical, sociological and economic analysis, and others refer directly to legal issues. A great deal of the literature refers to cultures and legal systems beyond the United Kingdom, which is useful for comparative purposes.

This chapter will consider the various kinds of literature which are available, and examine how they relate to the situation in England and Wales. Case law will be considered in later chapters.

The major works referring to polygamy from the perspective of English Law are the two reports of the Law Commission, in 1971 and 1985. The first examined the previous practice of English courts refusing to grant matrimonial relief to those involved in polygamous or potentially-polygamous marriages, and recommended the abolition of that rule, which duly followed in the Matrimonial Proceedings (Polygamous Marriages) Act 1972. The report argued that parties to a polygamous marriage should be encouraged to conform to English standards of behaviour by having, as far as possible, the same rights and duties as other married people in England but, as Sebastian Poulter pointed out in 1986, could easily be seen as permitting greater diversity by increasing legal recognition of “an alien custom”.

The report limited its consideration to the recognition of polygamous marriages for the purposes of family law and social

security legislation, and did not deal with other important areas of the law, including the crime of bigamy.

The second Law Commission report considered the need for reform and certainty with respect to the recognition of potentially-polygamous foreign marriages, and recommended that such marriages should be recognised by the civil law as if they were monogamous. This corrected a curious decision of the Court of Appeal which had meant that a marriage, celebrated in a jurisdiction which allowed for polygamy between a man with an English domicile and a woman with the foreign domicile, would be treated differently than a similar marriage where the man had the foreign domicile and the woman had the English domicile. The report did not make any recommendation concerning the recognition of actually polygamous marriages and, as with the earlier report, had a very limited remit that did not include the criminal law.

The recommendations of this second report led to the Private International Law (Miscellaneous Provisions) Act of 1995.

Much of the rest of the literature on English law is, to some extent at least, dated by the adoption of the Law Commission recommendations, which tend to cover the same areas of discussion, but which occasionally venture into other territory.

The best of these is Poulter who, in one article in 1976, considered the original reasons given for not recognising potentially-polygamous marriages, elsewhere attempted to formulate a general theory for the recognition of such ethnic minority customs and, in another place, considered the development of the law, policy considerations, the many types and varieties of legal recognition given to actual or potentially polygamous marriages, and the scope for reform. This includes some brief consideration of the crime of bigamy, human rights issues and how they interact with issues related to sexual discrimination. The conclusions worthy of note are that polygamy does not restrict Muslim religious practice as Islam does not *require* polygamy, but merely *permits* it; that, where religion requires polygamy, courts have held that bigamy laws do

not unnecessarily interfere with religious rights, and that the European Convention requirements concerning gender equality in marriage would present difficulties for polygamy that tends to provide different remarriage rights for men and women.

G Bartholomew considers bigamy in some detail (in “Polygamous Marriages and English Criminal Law”; (1954) 17 MLR 344) but his arguments largely rest on the assumption of the continued existence of “common law marriage”, which is supported by some more recent authors, such as Hall (in “Common Law Marriage”; (1987) 46(1) Cambridge Law Journal 106) and Lucas (in his “Common Law Marriage”; (1990) 49(1) Cambridge Law Journal 117), but was explicitly denied by the Law Commission (on page 7 of their 1971 report). He suggests that any form of marriage involving a declaration of consent would be recognised in English Law, and that this would include informal Islamic marriages, but there is no case law to show this, and what there is tends to point in the opposite direction, not recognising such marriages for offences relating to solemnisation. His assertion that a potentially-polygamous marriage would be a good first marriage for a prosecution for bigamy has also not been accepted in later decisions of the courts.

R D Leslie (in his “Polygamous Marriages and Bigamy”; (1972) 17 Juridical Review 113) makes similar suggestions for reinterpreting the law of bigamy, to avoid the anomaly of a polygamous man being held civilly, but not criminally, bigamous but the case of *R v Sagoo* shows that the law persists in maintaining this anomaly.

C G J Morse identifies 5 reasons from literature, rather than case law or statute, justifying the criminal prohibition of bigamy, and finds it frustrating that the courts have not allowed these reasons to affect their decisions (see his “Polygamists and the Crime of Bigamy”; (1976) 25 ICLQ 229). Neither he, nor the writers he quotes (Williams, H L A Hart in his “Law, Liberty and Morality” (1963) London: Oxford University Press; J A Andrews in his “A Licence for Bigamy?” [1963] *Crim. L.R.* 261; and Polonsky in his “Polygamous Marriage: A Bigamist’s Charter?”; [1971] *Crim. L.R.*

401, provide evidence that any of these reasons are used by courts in their decisions, except for the argument that bigamy is “the prostitution of a solemn ceremony”, which shall be examined later.

T C Hartley considers the policy basis of the law, concentrating on the Conflict of Laws, although elsewhere he comments briefly on bigamy. (see his “Polygamy and Social Policy” (1969) 32 MLR 155 and his “The Policy Basis of the English Conflict of Laws of Marriage.” (1972) 35 MLR 571)

Glanville Williams gives a brief, but powerful, critique of the offence of bigamy and in particular of its uncertain application to British subjects abroad, and the opportunities that one of its defences provides to the determined serial bigamist, suggesting how it could be replaced.

Keith Soothill and others question the Home Office classification of bigamy as a sexual offence, in finding no relation between the criminal careers of bigamists and sex offenders, and increasingly lenient treatment by the courts and police, but seeing closer binds with those of crimes of deception. (see Soothill K, Ackerley E, Sanderson B & Peelo M, “The place of bigamy in the pantheon of crime?” *Med. Sci. Law* (1999) 39 (1) 65)

David Pearl lists some reasons why changes to legislation on the Indian sub-continent may mean there are less cases concerning polygamy in the future, and seeks to provide legal practitioners with guidance across family and immigration law, and with regard to legitimacy and tax issues, but completely ignores bigamy (even in describing cases where the English offence is made out)

Hence, the literature surrounding English Law of plural marriage tends to split into two types. That which considers the civil law is fairly continuous, but much of the recommendations within it have been accepted, and there is little to show the current state of the law, or further developments. That which considers the criminal law of bigamy, tends to relate to only a few cases, and ventures suggestions for why the law is the way it is, or for how it should be, but the literature does not tend to support the reasons

for the crime being in place with evidence of these reasons being used in judicial decisions.

Furthermore, most of the literature was generated long before human rights issues have gained their current prominence, and with no view of incorporation of the European Convention on Human Rights. Hence the literature is largely silent on human rights issues, and where they are mentioned they are normally passing references which are not fully developed or tested, and tend only to refer to the rights of religions that allow but do not require polygamy.

The relevant English academic literature on this part of Islamic law is not as extensive. Pearl covers the nature of laws in Islamic countries, and in particular those with a history of providing immigrants to the United Kingdom. We see that countries on the Indian sub-continent have restricted the availability of polygamy to their citizens, and that this may have a corresponding effect on the numbers of likely cases in England involving nationals of those countries.

Jamal Badawi, in his American Trust Publications “Polygamy in Islamic Law” argues from an Islamic perspective that polygamy is not immoral *per se*, owing to its presence in Jewish and Christian scriptures, and that the Qur’an permits polygamy in order to show compassion to widows and orphans, with the restrictions that a man may not have more than four wives and that he must deal justly with them. Badawi appears decidedly lukewarm about polygamy, aiming to prevent it tainting the Islamic faith, and describing it as the lesser of two evils, but it is clear that where it is the lesser of those evils it may be regarded as necessary, and that societies which profess monogamy are perceived by Muslims as having greater social problems of infidelity and family breakdown.

The other main source of legal writing on the subject of polygamy is generated by the experience of the Mormons in the United States, and the response of the courts to their religious faith and practices.

Bud Ryerson (in “Religious Freedom, Polygamy and the Law”, available online) and Elizabeth Harmer-Dionne (in “Once a peculiar people: Cognitive dissonance and the suppression of Mormon polygamy as a case study negating the belief-action distinction.” (1998) 50 *Stanford Law Review* 1193) outline and criticise the reasoning of the US Supreme Court for upholding laws that proscribed bigamy in direct conflict with Mormon religious belief of the time, which linked the practice of polygamy to the individual Mormon’s salvation in the afterlife, effectively commanding it. It is worth noting that US laws on bigamy are, in some senses, more extensive in their scope than the English counterpart. At the time of the major cases, and still in some states today, the law defines cohabitation as marriage for the purposes of bigamy laws. Therefore, the legal reasoning in American cases is concerned with the prohibition of the practice of polygamy, and not just the public recognition of it. The cases are of interest to English Law in that the reasoning depends on considering freedom of religion and the extent to which the state can infringe upon it. In considering this, whether it is possible to distinguish between beliefs and actions, and the concept of what is necessary in a democratic society, the cases provide a few precedents which can assist our understanding of Convention points.

David Chambers considers the parallels between federal interference in state law to regulate polygamy and its more recent actions to prevent the recognition of same-sex marriage, making some helpful analytical points about modern debates as he does so. (see his “Polygamy and Same Sex Marriage”; *Hofstra Law Review*, 26(1) available online).

David Troy Cox uses recent US law to show how the law can act as a mediator between conflicting groups, which can be a helpful way of considering certain arguments related to freedom of expression and the possible legal development of Convention points related to polygamy. (see his “The Law as a Mediator of Identity Conflicts”; unpublished; available online)

There are a variety of perspectives represented in the writing

about plural marriage and which can be of assistance in considering the treatment of the subject in English law.

B. Carmon Hardy (in "Solemn Covenant: The Mormon Polygamous Passage" (1992) Chicago: University of Illinois Press), Richard Van Wagoner (in his "Mormon Polygamy, A History" (1989) Utah: Signature Books) and Martha Bradley (in "Kidnapped from that Land: The Government Raids on the Short Creek Polygamists" (1993) Salt Lake City: University of Utah Press) between them give an extensive account of the experience of Mormons and the consequences of their belief in polygamy from the critical periods of the 19th Century almost to the present day. This helpfully documents the impact of anti-polygamy legislation on a large group of people over a prolonged period of time, and helps to establish reasons and perspectives for understanding the change in Mormon doctrine over this period. The largest Mormon denominations now no longer require the practice of polygamy for salvation, and have effectively minimised the doctrine's involvement in their religious lives, but Fundamentalist groups continue to practice polygamy. This is largely ignored by the authorities, but occasionally leads to prosecutions.

Other writers concentrate on the sociological and anthropological study of polygamy. This includes Peter Bretschneider's analysis of 186 polygamous societies, whose statistical evidence as to societal conditions associated with polygamy is useful for consideration of the links between polygamy and social structures in a democratic society (see his "Polygyny: A Cross-Cultural Study" (1995) Stockholm: Uppsala University Press). Also of interest are Phillip Kilbride's analysis of new family types (in his "Plural Marriage for our times—A reinvented option" (1994) Westport, Connecticut; Bergin & Garvey), and Audrey Chapman's suggestion that polygamous family types may be particularly suited to modern societies (in her "Man-sharing: Dilemma or Choice" (1986) New York; William Marrow and Company). Irwin Altman and Joseph Ginat have produced a longitudinal study of modern polygamous communities in a western

democratic context (“Polygamous Families in Contemporary Society” (1996) Cambridge: Cambridge University Press), and Janet Bennion (in “Women of Principle: Female Networking in Contemporary Mormon Polygyny” (1998) Oxford: Oxford University Press) has made a particular analysis of the effects of modern polygamous practice on the women who are involved, which is useful for considering points about whether women’s rights would be compromised by allowing polygamy.

The effect on women is also considered by economists such as Gary Becker, (in his “Treatise on the Family” (1981) Cambridge, MA: Harvard University Press), who argues that polygamy is more commonly found than polyandry because of the preference people have towards raising their own children rather than someone else’s. As the father of a child is not readily known when a mother has several husbands, each husband effectively lowers the productivity of the other husbands by increasing the uncertainty that subsequent children are theirs. This reduces the return on investment from children and so polyandrous systems would not be expected to be able to compete against polygynous systems. Thomas Bergstrom (online in “On the Economics of Polygamy”, University of Michigan”) adds that extra husbands do not significantly increase fertility rates for a woman, whereas extra wives do for a man, and therefore there is a natural tendency which favours polygyny over polyandry. They both are joined by David Friedman in arguing that polygynous societies can be better for women than for men, by raising the competition amongst men and increasing the value of wives.

The position of women in polygamous society has also been addressed from a historical perspective by John Cairncross, although his analysis is limited to polygamous experiments in western Christian societies. He judges that the women in the polygamist societies he studied were at least no worse off than contemporaries in other groups, but it must be acknowledged that there were very few groups available for him to study. However he also gathered together the writings of “polygamophile” Christian authors and

reckoned them to give women a higher status than their counterparts.

Other historical comment leads into discussion of Christian theology as Cairncross, Leo Miller (in his "John Milton among the Polygamophiles" (1974) New York: Leowenthal Press) and Ursula Vogel (in her "Political Philosophers and the trouble with Polygamy"; The History of Political Thought Volume XII (2) 1991, p229) all recount many instances of prominent Christian historical figures who defended or advocated polygamy, especially during the reformation. Suggestions of polygamy as a possible resolution to Henry VIII's difficulties were considered by both Protestants and Catholics, and Phillip, Landgrave of Hesse in 1541, and James 1's grandson Charles Louis in 1658, the Prince Elector of the Rhenish Palatinate, both married second wives without divorcing the first. Phillip's marriage took place with the express approval of reformers such as Luther and Melancthon. Vogel interprets continuing European debates about polygamy as a "struggle for *dominium* over the province of knowledge" whereby there is a continual attempt "to free the terrain of moral and political philosophy from the jurisdiction of religious doctrine" (see her "Political Philosophers and the trouble with Polygamy"; The History of Political Thought Volume XII (2) 1991, p229). This echoes earlier suggestions that bigamy became a crime in England in a struggle between the church and the state.

The final batch of writers to be considered cast doubt on the supposition that the church should be anti-polygamy. The English poet and statesman John Milton, who was born just after bigamy was made a crime, was a dedicated proponent of polygamy, basing his arguments entirely on Biblical sources. His *De Doctrina Christiana* was dedicated to Cromwell but only published in 1825, over 150 years after the author's death. While this is clearly a minority opinion, it is also an opinion which has had, and continues to have, some currency wherever organisations take the name of Christian, whether it be Catholics such as Eugene Hillman, African Christians such as David Maillu, Mormon Fundamentalists such

as Ogden Kraut, Methodists like Westley Hall and Martin Madan, or evangelical Protestants like S. John Butt. (see Hillman E, *Polygamy Reconsidered—African Plural Marriage and the Christian Churches* (1975) New York: Orbis; Maillu D G, *Our Kind of Polygamy* (1988) Nairobi: Heinemann Kenya; Kraut O, *Polygamy in the Bible* (1983) Utah; Pioneer Press; Butt S J, “Inside Christian Polygamy and the Patriarchal Christian Movement”)

In conclusion, it is clear that the literature on plural marriage is very diverse, and little attempt has been made to draw it all together into a coherent whole. The literature that directly refers to the law is largely out of date in the case of civil law, and of questionable relevance in the case of criminal law. Also there is sufficient legal precedent outside the UK to compare with British thought, and sufficient argument or research in many different spheres of knowledge which can illumine the assumptions made by the law and provide further food for judicial or academic thought. While a completely comprehensive integration of these many parts is outside the scope of a work of this size, it does present an opportunity to begin the process of relating the various pieces together, and fitting them to the modern world.

CHAPTER 3—THE CRIMINAL LAW—BIGAMY AND RELATED OFFENCES

The roots of bigamy laws extend deep into the past, and are as much entwined with established religious organisations as they are with social or democratic concerns. As a nation that professed Christianity until relatively recently, English law has felt the impact of the Bible and various theologians in a variety of ways. Polygamy is recorded in the Bible as a practice of the patriarchs and Kings, and the text speaks of the relationship between God and Israel, and later between Christ and the Church, in polygamous terms. Polygamy itself escapes any form of scriptural condemnation and appears instead to attract support. After the Bible was completed, as one church or another became established as rival sources of authority and law, and as the Roman Church itself married the Empire, condemnations of polygamous behaviour began to become more common.

The *Lex Antonia De Civitate* of 212 AD required monogamy for all citizens of the Roman Empire except Jews. According to Kofon, in 258 AD Valerian and Gallienus made a law forbidding second marriages when the first partners were still alive, and in 285 AD Diocletian and Maximian abolished polygamy in the whole of the Roman Empire without exception. As the Jews, who at that point still practised polygamy, largely ignored this, in 393 AD Theodosius issued another law in an attempt to make them change their ways, apparently without success, as Jewish groups were still practicing polygamy within the Empire into the 11th Century.

Part of the reason for this lack of success may be the contribution of the Emperor Valentinian who, according to the Roman writer Socrates Scholasticus, took a second wife and decreed a law legitimising the practice around 400 AD.

Milton's *History of Britain* records a number of early British polygamous kings and, in 597 AD, Augustine, a missionary to Britain, enquired of Pope Gregory I as to what he should do about the polygamous Britons. He was told that perhaps toleration would be better than condemnation. Pope Gregory II gave similar advice to Boniface in 726 about polygamous Germans, and in 757, according to Hitchens, the Church Council of Compiègne allowed a leprous spouse to permit their partner to marry again. (see Hitchens R J, *Multiple Marriage: A Study of Polygamy in the Light of the Bible* (1987) Maryland: Doulos Publishers)

In 1201 Pope Innocent III, in answering a practical question from the Bishop of Tiberias, refused baptism to polygamists who had converted, and later that century Thomas Aquinas saw continued polygamy among such converts as continual sin which prevented them from receiving the sacraments, although this was tempered by his view that polygamy only breached secondary precepts which did not apply always and everywhere.

However, the situation became far more varied and intriguing with the onset of the Reformation, which was of particular relevance to England as Henry VIII's repeated failure to produce a male heir gave him a particular interest in Christian teaching on marriage that differed from the official Roman position. It appears that both sides of the Reformation entertained positive attitudes to polygamy and discussed them in relation to the King's case in the late 1520's. On the Roman Catholic side, one of Henry's envoys reported that a "great theologian", thought to be Cardinal Cajetan, had advised Pope Clement VII that a dispensation for polygamy could resolve the situation. On the Protestant side, both Melancthon and Martin Luther advised that polygamy was permissible for the King, but the latter wished to avoid a wider application of the principle to prevent scandal. Cairncross views the reformers here as concerned

more with political considerations, preferring a polygamous King to a divided kingdom, and not concerning themselves with what would happen if polygamy were more widely practised.

The reformers had plenty of opportunity to consider the lawfulness of polygamy as in 1526, Philip, the Landgrave of Hesse sought their permission to enter a second marriage, and they advised that it was not a good idea.

Meanwhile, a group of Anabaptists gained control of Munster in 1534 and, under the leadership of John of Leyden, established a government which treated polygamy as the ideal form of marriage. The reaction of their neighbours was intense and extreme, for within a year they had achieved what ecumenism so far has not, in uniting Catholics with Lutherans, albeit only to invade the city, kill much of its population and torture and execute its leadership.

In 1532 the Emperor Charles banned bigamy (again) within the Empire, making it a capital offence, and in 1537 Pope Paul III ruled (in *Altitudo Divini Consilii*) that converted polygamists who could not remember which wife they had married first should choose one, marry her in Church and send the rest away. This appears to be another concession to practical considerations over doctrine, as it seems strange that a man could forget which of his wives he had married first.

The Reformers advice and these other developments were insufficient to prevent Philip of Hesse raising the issue again in 1539, this time securing the written permission of Luther, Melancthon and Bucer, and the attendance of these last two at the resulting wedding in 1540. But the Reformers insisted that the marriage remain secret, and when it became public knowledge they backed away from their previous support. The events that had taken place since their advice to Henry had given them concern as to what would happen if polygamy was extended beyond princes and was practised by the general population. This lukewarm and evasive stance caused Philip to show a similar attitude in his support for the political advancement of Protestantism, which did not run smoothly after this.

In 1563 the Council of Trent reclarified the Catholic position by declaring anyone who held polygamy to be lawful to be *anathema*, and in the same year a former Franciscan, Bernardo Ochino, published a book in Zurich which argued for the moral legitimacy of polygamy.

In 1567 Jan Willemsen established a polygamous community in Westphalia which later ended when he was caught and burned to death in 1580.

In 1571 Pope Pius V ruled (in *Romani Pontificus*) that converted polygynous Indians should stay with the wife with whom they were baptised in to the Church, irrespective of whether she was the first, and in 1585 Pope Gregory XIII ruled (in *Populis ac nationibus*) that converted slaves could remarry if their former partners were no longer available

Bigamy has been a criminal offence in England and Wales since 1604, when the first Parliament of James 1 took action to restrain the “divers evil disposed persons” who were bigamously marrying “to the greate dishonour of God and utter undoinge of divers honest mens children and others”, by ensuring that anyone found guilty would receive a sentence of death. This was not a complete innovation, having previously been a matter for the ecclesiastical courts, but now taken over by the criminal courts.

It is clear however that the issue of polygamy had been aired many times in the century preceding this enactment, and it is therefore notable for two reasons. Firstly, that the law should represent some degree of resolution of the question, with England enshrining bigamy as a crime, and secondly that it actually avoided the issues rather than addressing them. The law was a fudge which portrayed the sort of behaviour that it was outlawing as that of people who were wandering the country and forming unions which secretly were bigamous, rather than the open polygamy which had been taking place across Europe and which had been presented as an option to Henry VIII. It is unsurprising then that later courts would interpret it solely with reference to bigamy as a

type of crime of deception, and would claim that it simply does not address the practice of polygamy.

Before we move on, there are two other matters of note with regard to the timing of the Act of 1604. Firstly, it was an enactment of James I, whose name has ever since been linked with the King James Version, a translation of the Bible made in 1611 and authorised to be read in Churches. Like any translation of the Bible it finds it impossible to conceal the polygamy of the patriarchs, but some of the polygamous references in the New Testament are rendered with sufficient ambiguity to let the reader pass on without noticing their polygamous content.

Secondly, it is clear that the Act of 1604, whatever its effect against bigamy-by-deceit, did not cease the discussion about the practice of polygamy which, if anything, intensified in England during the 17th Century. The concept drew support from Sir Walter Raleigh and Sir Thomas Browne in England as well as the jurists Hugo Grotius and Samuel Pufendorf elsewhere. John Donne, one of James 1st favourites, and two other poets, John Milton and John Dryden, wrote favourably of polygamy and James I's own grandson, Charles Louis, Elector of the Rhenish Palitinate, married a second wife without apparently divorcing the first, and at least sponsored, and possibly wrote, a defence of polygamy himself.

In 1671, after the Restoration, Charles II was reputed to have gone through a bigamous ceremony with one of his mistresses, the then Duchess of Portsmouth, and Leo Miller has shown that in 1675 a Michael Mallet MP introduced a Bill in the House of Commons to repeal the Act of 1604 (see his "John Milton among the Polygamophiles" (1974) New York: Leowenthal Press). Furthermore, Jonathan Swift was one of many to allege that William Cowper, first Lord Chancellor of the United Kingdom, was a bigamist and had written in defence of polygamy, and it is clear that Bishop Burnet had also written such a work to keep open the way for Charles II legitimately to provide a Protestant heir to the throne.

The Act of 1604 was eventually repealed, but only as one of a number of consolidations and amendments in 1828, where the

offence itself was retained and reworded, the maximum sentence being reduced to being “transported beyond the Seas for the Term of Seven years”. In 1861, the familiar law of today was passed as a further consolidation, repealing and restating the Act of 1828 but this time reducing the maximum sentence to penal servitude of not less than three years and not more than seven, which has since become a maximum term of imprisonment of seven years.

Its essential elements are that it is committed by “whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere,” subject to the provisions that nothing in the section extends to second marriages outside England or Ireland by “any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time,” or shall extend to any person who, at the time of the second marriage, had the first marriage divorced or declared void “by the sentence of any court of competent jurisdiction”.

The drafting of the legislation has in many ways not significantly changed since 1604, and this may in part be the reason why there are a number of interpretative difficulties. As interpretation of legislation is a key point of the Human Rights Act 1998 it is necessary to examine these.

The first is a simple point of the *actus reus*. It concerns “whosoever, being married, shall marry any other person”, but in English law it is not possible to marry another person if you are already married, because the second marriage is void. It has been decided by the courts that, at the opening of the section, the legislation uses the term “married” in two different senses. The first refers to a valid subsisting marriage, and the second refers to the act of going through a marriage ceremony. (See *R v King* [1964] 1 QB 285, 48 Cr App Rep 17, CCA)

But what counts as a valid subsisting marriage? Obviously the

defences concerning a void marriage, or a divorce, count such marriages out of the definition of “being married”, but the courts have also held that a continuing potentially-polygamous marriage is not a marriage for the purposes of this definition. In *R v Sarwan Singh* [1962] 3 All ER 612, the West Bromwich Quarter Sessions ruled that a man who had brought his wife from abroad and had gone through a second ceremony with another woman was not guilty of bigamy because his first marriage was potentially-polygamous and to “be married” meant you had to be married monogamously. This caused distress to writers such as Morse in his “Polygamists and the Crime of Bigamy”; (1976) 25 ICLQ 229; J Andrews in his “A Licence for Bigamy?” [1963] Crim. L.R. 261; and Polonsky, who thought it a bigamists’ charter in [1971] Crim. L.R. 401, allowing men who were first married under a system which allowed polygamy to “marry” in the English system as many times as they liked with impunity. The decision was however largely upheld in *R v Sago* [1975] QB 885, [1975] 2 All ER 926, CA where the Court of Appeal held, on similar facts, that the reasoning was correct but that it neglected to include that a potentially-polygamous marriage could, by change of law and domicile, become monogamous, and therefore good as a first marriage from the point of view of the bigamy legislation. This leaves open the possibility that where a domicile had not changed, or where the law of the originating country had not changed, or where the marriage was in fact polygamous, that the marriage would not convert to being monogamous and no bigamy charge could stand. And crucially, it can make guilt dependent on the difficult question of whether the defendant has changed his domicile, which is something he may not know until the court tells him that he has.

It is also necessary to consider what counts as a marriage ceremony for the second marriage. In *R v Robinson* [1938] 1 All ER 301, 26 Cr App Rep 129 a couple contracted a marriage in Scotland, having been over the border for less than the 21 days needed to make the marriage valid. The man pleaded that this, his second marriage, was invalid and therefore that, as no valid marriage could

have resulted, he should be acquitted. However this did not impress the Court of Appeal, who found that the offence consisted of going through the ceremony of marriage, and not its validity, following Denman CJ in *R v Brawn* (1843) 1 Car & Kir 144 who said "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterward by either of the parties during the lifetime of the other." So it is clear that technical defects in the second marriage do not constitute a valid defence.

There are a number of cases on either side of this argument, but perhaps the most revealing for the purposes of this study is that of *R v Allen* (1872) L.R. 1 C.C.R. where Cockburn CJ, in overruling cases where it had been held that invalid marriages did not qualify as second marriages for bigamy, spoke of the legislation in terms of the "mischief it is intended to prevent." He went into some detail saying that the court "cannot agree...that the purpose of the statutes against bigamy was simply to make polygamous marriages penal" as "Polygamy, in the sense of having two wives or two husbands, at one and the same time, for the purpose of cohabitation, is a thing altogether foreign to our ideas, and which may be said to be practically unknown; while bigamy, in the modern acceptance of the term, namely that of a second marriage consequent on abandonment of the first while the latter still subsists, is unfortunately of too frequent occurrence. It takes place, as we all know, more frequently where one of the married parties has deserted the other; sometimes where both have voluntarily separated. It is always resorted to by one of the parties in fraud of the law; sometimes by both, in order to give the colour and pretence of marriage where the reality does not exist. Too often it is resorted to for the purpose of villainous fraud. The ground on which such a marriage is very properly made penal; is, that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows to be

applied only to a legitimate union, to a marriage at best but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception.”

The judge later went on to say that as even otherwise invalid marriages involved outrage, scandal and deception, they also were covered by the statute.

But the practice of treating an invalid marriage as a marriage because it is the ceremony that is important has caused confusion for some judges. In *R v Treanor* (or *McAvoy*) [1939] 1 All ER 330, 160, LT 286, CCA, the Lord Chief Justice, delivering the verdict of the Court of Criminal Appeal took “second marriage” as literally as possible. Mr Treanor had gone through three marriages, the first valid, the second after deserting the first wife for 12 years, and the third after deserting his second (bigamous) wife for only 1 year. Treanor was convicted of bigamy only related to the last marriage, and argued that he should have had the benefit of the defence that he hadn’t seen his first wife in seven years and did not know her to be alive. The court held that the statute allowed him to rely on this defence for his second marriage, not his “second or subsequent marriage”, and therefore upheld his conviction.

This appeared to confuse the second act of going through a ceremony (marrying) with a valid first marriage (being married), but in fact was treating literally the defence which is available “to any person marrying a second time”, and ignoring the fact that the bigamous marriage which is the subject of the indictment is called “the second marriage” earlier in the section.

This was duly corrected in *R v Taylor* [1950] 2 KB 368, 34 Cr App Rep 138 CCA where similar facts brought before the Court of Criminal Appeal caused the court to give leave to appeal against conviction even though such leave had not been sought. On similar facts, Lord Goddard C. J. stated that from considering the Act of 1604, ‘It is clear from that section that what is aimed at there is what I may call polygamy—not merely bigamy, a second marriage, but any number of marriages, because the words are “shall marry any person or persons”.’ This showed that the defence was intended

to be available no matter how many times the ceremony of marriage had been gone through and helped to establish that in the Act of 1861 “second marriage” meant the same throughout the section, and included subsequent marriages. Otherwise, once a man became a bigamist, he could continue to marry without offending, because his third marriage or fourth marriage would not be his “second marriage”. For the court the “second marriage” was the second marriage charged in the indictment. The Court did not mention it, but it is clear that under the original law the case would be less likely to arise. Given that a man found guilty of his first offence of bigamy would have been executed, he would not tend to reoffend.

Another issue has been the geographical ambit of the offence. It takes place when the second marriage is “in England or Ireland or elsewhere”. In *R v Earl Russell* [1901] AC 446, HL the Earl had obtained a divorce in Nevada which was not recognised in English law, so when he remarried in America this led to a trial by his peers in the House of Lords for bigamy. His counsel argued that “elsewhere” meant elsewhere in Her Majesties dominions, as some sections in the same 1861 act which were extraterritorial explicitly said so, and did not simply use “elsewhere”, but the House and the judges present did not believe there was an argument here that the Attorney-General need answer, and with that Earl Russell pleaded guilty and was sentenced to three months hard labour for his troubles. This decision has been regretted by Williams who points out that it put in danger many of the Queen’s citizens who practiced polygamy lawfully in the colonies. This absurdity could only be resolved by the production of the doctrine in *R v Sarwan Singh* and *R v Sagoo* that a potentially or actually polygamous marriage was not a good first marriage for an indictment for bigamy.

Another point of interpretation suggests itself from the legislation but has not come before the courts. The proviso that the section does not extend to second marriages outside England or Ireland “by any other than a subject of Her Majesty” may exclude those marriages where a British subject marries a foreigner. This

would make it a crime to marry an Australian bigamously abroad, but not a crime to so marry an American.

The final interpretative point is that regarding the *mens rea*, or intent, required for the offence to be complete. In *R v Tolson* (1889) 23 QBD 168, CCR the Court decided that some form of mental element was necessary to the crime and, notwithstanding that the Act provided a defence after seven years absence, held that a bona fide belief on reasonable grounds that her first husband had died, gave the defendant a good defence even though she had remarried within seven years of the supposed death. In *R v Wheat* and *R v Stocks* [1921] 2 KB 119, [1921] All ER Rep 602 the Court of Criminal Appeal held that a genuine but mistaken belief by the accused that he had been divorced when he contracted the bigamous marriage was no defence to bigamy, and distinguished the case by relating the mental element to the act of marrying “any other person during the life of the former husband or wife”. As someone who mistakenly believed they were divorced was clearly intending to “marry any other person during the life of the former husband or wife” they still had the requisite *mens rea*, whereas someone who genuinely believed their spouse to be dead did not.

This in turn was found unacceptable by the Court of Appeal in *R v Gould*, [1968] 2 QB 65, 52 Cr App Rep 152, CA who found that while the words of the Act were absolute, *mens rea* was required and could not be supplied by an “innocent mind”. The Court found that, in as much as the proviso applied to divorce it was not an exception at all, for a divorced man is not married and therefore cannot be bigamous, and so its only value must be to shed light on the absolute terms of the Act. The Court in *R v Wheat* had completely misconstrued *R v Tolson*, and had substituted a belief in the death of the first spouse for what the legislation said about a lack of knowledge that they were alive. “An honest defendant may freely admit that he believed his former spouse to be alive at the time of the second marriage as long as he did not *know* her to be so at any time within the previous seven years.” The Court followed *R v Tolson* and accepted that an honest and

reasonable belief in a fact affecting the matrimonial status of the defendant which, if true, would make his second marriage lawful and innocent could constitute a defence.

The significance of this decision is not only that it accepts the necessity for *mens rea* in the offence of bigamy but that it re-affirms *R v Tolson* in so doing, and there is much in the judgments in *Tolson* to help define the *mens rea* that the court found to be required.

R v Tolson was a case about a mistaken belief in the death of the first husband, and was referred to a full court of 14 judges of the Court of Criminal Appeal, who found by a majority of 9 to 5 that *mens rea* was required but absent in this case. There are four speeches for the majority. Wills, J said that the guilty intent must be either to do a thing prohibited by the statute or to do something prohibited by no statute but that no-one would hesitate to call wrong, and the examples he gives are fornication and seduction. He also states that the severity of the possible punishment means that “such a fate seemed properly reserved for those who have transgressed morally as well as unintentionally done something prohibited by law.” Cave, J said that the Act of 1604 predated the presumption of a man’s death if he had not been heard of for seven years, and that a person could believe their spouse to be alive and still take advantage of the proviso, and so the proviso did not provide the only defence. Stephen, J said that “It could not be the object of parliament to treat the marriage of widows as an act to be if possible prevented as presumably immoral. The conduct of the women convicted was not in the smallest degree immoral, it was perfectly natural and legitimate” and that “the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years’ penal servitude”. Hawkins, J said that, as a felony, it had to be done feloniously, “accompanied by an evil intention” or “done with a mind bent on doing that which is wrong”.

Interestingly, Manisty, J, a judge for the minority commented on what he thought was one principle reason why the Act had

been passed which was “namely, the consequence of a married person marrying again in the lifetime of his or her former wife or husband, in which case it might and in many cases would be that several children of the second marriage would be born and all would be bastards.”

So it is clear then that the law of bigamy has not been the easiest to interpret. “Whosoever being married shall marry any other person” is taken to mean that “whoever, being married *monogamously* shall go through a marriage ceremony”.

Whether a person who started with a potentially-polygamous marriage is married monogamously is seen to depend on the laws of the place where he married, and on his domicile, which the court will decide for him.

Treating a “second marriage” as only the second in a series would have allowed men to marry wives three and four with impunity, but when this was re-read as if to mean the “second marriage on the indictment” it allowed the defence of the first seven year absence to be applied to a series of bigamous marriages even on the same day.

“Elsewhere” has been taken to mean anywhere in the world for a British subject, so that a peer of the realm underwent three months hard labour because the English courts would not recognise his divorce, and yet it is unclear that a British subject would be guilty if he married someone abroad who was not a British subject. And this appears to have led the courts to distinguish between polygamous and monogamous first marriages in order to prevent the absurdity of British subjects being convicted in England for polygamous marriages which were legal in the colonies in which they lived.

Finally, an Act written in absolute terms has been held to require a *mens rea* which is relatively undefined, save that it includes mistakes of fact as to death, divorce and invalidation of the first marriage, although even this judgment was not followed by a later Court of Appeal, whose judgment in turn had to be rejected by a yet later Court. And the Court in *R v Tolson* seemed to imply that

the form of guilty mind needed to include some form of immoral or evil intent in addition to the intent to breach the absolute terms of the Act, and that a belief that the former spouse was alive would not be enough for guilt due to the proviso for a seven year absence.

It is only recently that courts have taken to examining parliamentary debates to ascertain the purposes of Parliament in legislating, and as the law establishing bigamy is of considerable antiquity, and the more modern statutes mainly re-enacted the provisions of the earlier law, there is little hope of uncovering the proceedings which give the real reasons.

The judges in *R v Tolson* could not agree on the weight to be lent to the Act of 1604 in determining the meaning of its surviving descendent, but the Court which upheld their decision in *R v Gould* does reveal some evidence of how the Court of Appeal views the Act. Diplock, LJ, when commenting on the proviso, said "in 1603, when the jurisdiction of the Ecclesiastical Courts was still in the realm of political controversy and statutory draftsmanship was in its infancy, it may well have been prudent to state expressly what the consequences of the decrees of the Ecclesiastical Courts should be as respects the newly created felony." This supports the view that the Act was part of a slow transfer of power from the Church to the State or, more particularly, away from the Church, echoed in James 1's main achievement, of providing a Bible which was widely available in the language of the masses and not just the language of the churchmen. Indeed, according to Diplock, LJ, even the provisions of the Act of 1861 were drawn in mind of a recent transfer of matrimonial jurisdiction away from the Ecclesiastical Courts.

One reason then for the bigamy statute is for the state to take responsibility for areas previously entrusted to the Church. Another is that given above by Manisty, J, that legally unrecognised marriages would increase the rate of illegitimacy. His fellow judges, in discussing the *mens rea* allude to something beyond the words of the statute, something involving a moral as well as a legal wrong, similar to how fornication and seduction were viewed at the time,

which would have been less than a valid and honourable marriage. They imply that the serious sentences which follow conviction help to show the need for moral culpability.

Aside from this case there are few clues as to the reasoning behind the prohibition of bigamy. There is the judgment of Cockburn, C.J. that bigamy is not directed at polygamy so much as the abandonment of subsisting marriages and the subsequent “prostitution of a solemn ceremony” in order to give the pretense of marriage where it does not exist, involving outrage, scandal and deception, (in *R v Allen* (1872) LR 1 CCR 367 at 374) and the highly favourable acceptance in *R v King* of the Australian High Court decision of *Thomas v The King* (1937) 59 CLR 279 that “it is only because of the wrong done by the wickedness of going through a form of marriage with the knowledge of the impediment of a previous marriage that the subsequent marriage merits punishment.”

And there is a case from another jurisdiction which can also assist in our formulation of policy reasons for the law. The case of *Attorney-General of Ceylon v Reid* [1965] A.C. 720 involved a man who had married monogamously, separated from his wife, converted to the Muslim faith and married a Muslim woman polygamously. The Privy Council held that in a country of many races and creeds, and with a number of marriage laws which allowed adherents of different faiths to be governed by their personal law that a Christian monogamous marriage could not prohibit for all time a change of personal law and adoption of polygamy. Reid had an inherent right to change his religion and contract a valid polygamous marriage, if recognised by the laws of Ceylon, notwithstanding an earlier subsisting monogamous marriage. This establishes both that monogamous marriages can become polygamous, and that the bigamy laws could not be applied to such future monogamous marriages. Hence it seems reasonable to suggest that the laws against bigamy, which covered Ceylon at the time, were not intended to prevent those who had married monogamously from marrying polygamously.

And then there is the Act of 1604 itself, which sought to restrain the “evil disposed persons beinge married, runne out of one Countie into another, or into places where they are not knowen, and there become to be married, havinge another husband or wife livinge to the greate dishonour of God and utter undoinge of divers honest mens children and others”, which links the offence to concepts of evil, the exploitation of ignorance, abandonment of responsibilities, lack of respect for God, and its effects on other people, presumably the victims.

While it may be difficult to establish much about the reasoning behind the bigamy laws, it is possible to eliminate reasons by use of the analysis of those laws conducted earlier in this chapter.

Bigamy is not illegal in order to prevent polygamy, as a bigamous marriage is not recognised by the law, and polygamous marriages in the colonies have been allowed to be added to monogamous marriages already contracted. Neither is it illegal in order to limit what polygamy already exists, because such marriages do not count as first marriages for bigamy prosecutions. It is not illegal because of an inherent wrong in the act, as it depends on a guilty mind, and it is not illegal in order to stop all second marriages as it expressly provides a defence to anyone who has been abandoned without trace for over seven years.

Nor is bigamy illegal in order to punish a second marriage, as such a marriage is unrecognised by the law. It is not illegal in order to punish a knowledge that the original spouse remains alive, due to the operation of the proviso, and it does not even seem to be concerned with eliminating deceit as the law allows those with pre-existing potentially polygamous marriages to go through further ceremonies with impunity.

There are also some related offences which need to be considered. In the case of *R v Bham* [1966] 1 QB 159 [1965] All ER 124 a man was prosecuted for the related offence of solemnising a marriage in a building which was not registered under the Marriage Act. The ceremony was designed to meet the requirements of the Islamic faith, but did not confer the recognition of the marriage

by English Law, and was not intended to. The Court of Appeal held that the offence of solemnising the marriage was only made out when the marriage would have been recognised by English law. As it wasn't, there was no offence.

Finally, a number of writers allude to the fact that people attempting to marry have to make statements that they are single and free to marry, suggesting that this covers the question of those who have a prior potentially-polygamous marriage. False statements, they argue, could be charged as perjury. However, as Bartholomew points out in "Polygamous Marriages and English Criminal Law" (1954) 17 MLR 344, if a man with such a marriage is "single" for the purposes of bigamy, what is to stop him being "single" for the purposes of perjury in the very statement he makes to obtain the ceremony? In fact, from what the courts have said about bigamy, he would not appear to be lying at all.

Consequently, it appears that the policy of the law is not to ban bigamy to prevent people lending respectability to their relationship by going through a marriage ceremony even in England, for only the official ceremony appears to be capable of founding an offence.

CHAPTER 4—THE CIVIL LAW AND PLURAL MARRIAGE

There are a number of issues that must be considered with respect to how the law treats plural marriage. There are the basic questions of whether plural marriages have any consequences in English law, what those may be, and how they came to be, and there is also the intriguing question of what difference is made by a marriage not being recognised at all.

In the area of Private International Law the courts generally recognise marriages subject to a “dual domicile” test. This is the approach favoured by the Law Commission, many writers and most court decisions. This means that marriages will be recognised if the marriage ceremony was legally capable of forming a marriage where it took place (the *lex loci celebrationis*) and if the parties to the marriage were free and able to marry according to the law of their domicile (*lex domicili*). Both parts of this test are open to debate. The first part does not adequately recognise the continuing discussion of “common law marriage” which, if it takes place anywhere, is more likely to take place in foreign countries where normal English law does not reach, irrespective of local law. The second part has been put differently by a number of judges, referring to the law of the intended marital home, (*Radwan v Radwan*) or the law of a place with which the parties have a “real and substantial connection”, (*Lawrence v Lawrence*) or whichever of the dual-domicile/marital home tests leads to the marriage being recognised. (Also *Lawrence v Lawrence*)

Polygamous marriages also had a further hurdle they could not clear, added by the decision in *Hyde v Hyde and Woodmansee*

(1866) LR1 P&D 130. Mr Hyde had gone to Utah and married a woman there, subsequently renounced the Mormon faith, and had therefore been renounced in turn by his church and his wife, who divorced him in Utah. This divorce was not recognised by English law and Mr Hyde sought a divorce from his wife on the basis that she had committed adultery by remarrying. His request was denied by Lord Penzance, who said the court had no jurisdiction over a polygamous marriage, which was a totally different institution from “Christian marriage”.

This is significant not only in denying recognition to the marriage, or because of the reasons that Lord Penzance gave, but because it described Hyde’s marriage as polygamous, when in fact he had only one wife, because it was entered into under a system which allowed polygamy. Therefore, when Lord Penzance talked of polygamous marriages being different, he meant that they were different even if they only involved one husband and one wife.

The reasons he relied on included that recognising polygamy would cause problems because a second marriage would have to be held adulterous, and this would be creating conjugal duties rather than enforcing them. This showed that polygamy was a system with which English law was not designed to deal.

He also believed it unfair to impose Christian standards of treatment of wives on to men who had married under polygamy, saying that polygamous wives did not stand on the same level as their husbands, unlike in Christian marriages. He said that polygamy was “revolting to the ideas we entertain of the social position to be accorded to the weaker sex”.

He also based his decision on an earlier comment by Lord Brougham in *Warrender v Warrender* (1835) 2 Cl & Fin 488 which bears quotation in full:—“But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from a Turkish or other marriages among infidel nations, because we clearly should

never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere.”

Lord Penzance’s reasoning has been criticised in detail by Poulter, who states that the courts would not need to hold second marriages adulterous, as adultery is only committed between parties who are not married. Poulter also suggests that Lord Penzance appeared blind to Victorian laws which meant that women were not held equal to men and that, in fact, in certain polygamous societies, women probably got a better deal than in Victorian England. And of *Warrender* he says that it was decided in 1835, and that the Marriage Act 1836 recognised civil marriages without any religious trimmings, therefore diluting the idea of “Christian” marriage, to which Penzance referred.

This case denied matrimonial relief to anyone involved in a marriage in a system that allowed polygamy. It did not extend beyond matrimonial relief, and indeed in other matters courts began to recognise polygamous marriages for various purposes. In *Srinivasan v Srinivasan* [1946] P 67 the court recognised the first marriage abroad in order to invalidate the second marriage in England, as otherwise the man would be living with his lawful wife in each country and this would encourage polygamy and not frown on it. Barnard J. went on to state that “to deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based.”

But the decision in *Hyde* alone was sufficient to cause significant problems, and to cause the courts to follow the rule where they had to, but to take every conceivable opportunity to distinguish the case. One of the more common ways for this to happen was to hold, where possible, that a polygamous marriage had converted into a monogamous marriage.

This was still less than satisfactory and in 1971 the Law Commission published a report recommending the abolition of the rule in *Hyde*. This recommendation was immediately taken up and now forms part of section 11 of the Matrimonial Causes Act 1973, which allows a marriage to be recognised even if it is potentially or actually polygamous.

The Law Commission gave detailed reasons for its recommendations, namely that “to close the doors of all matrimonial courts in England to either party to a polygamous marriage gives rise to hardship and to a risk of a social problem which, in our view, the law should not ignore.” The Commission believed the extent of this problem to be such that following *Hyde* had caused judges to be “compelled by ancient authority to come to a conclusion which manifestly shocks their sense of justice.”

The Commission also said that family relationships validly created under a foreign system of law should be recognised here, unless there are compelling reasons of English Public Policy to the contrary, explicitly recognising the point made by Hartley that polygamous marriages serve the same social function as their monogamous counterparts. (see his “Polygamy and Social Policy” (1969) 32 MLR 155 and his “The Policy Basis of the English Conflict of Laws of Marriage.” (1972) 35 MLR 571)

The Commission also said that “in the absence of compelling reasons, it is undesirable that people should be regarded as married for some purposes and not for others,” that people married elsewhere should be protected by English law when they settle here, and that the taxpayer shouldn’t lose out by maintaining the wives of a man who could afford to maintain them himself.

The Commission noted that the reform also had the benefit of extending divorce rights to Muslim women where these were denied by their own country, and of rectifying the position where the law allowed a husband to escape his responsibilities and gave his wife no protection against this.

The report therefore suggests the reasons behind the statute that abolished the rule in *Hyde*, but the rule change was limited

to marriages contracted by those with foreign domiciles. The same section that abolished Hyde formulated a rule that made void a potentially or actually polygamous marriage entered into outside England and Wales if either party was, at the time of the marriage, domiciled in England and Wales.

This latter rule was not recommended by the Commission but resulted in many immigrant men who had returned to Pakistan or Bangladesh to marry being advised that these marriages were not valid in England.

This advice needed to be altered following the decision of the court in *Hussain v Hussain*. Ormrod LJ held that “parliament, having decided to recognise polygamous marriages as marriages for the purpose of our matrimonial legislation, would think it right to preserve the principle of monogamy for persons domiciled here.” On this basis he said that if a man domiciled in England married a woman in Pakistan the marriage was monogamous and recognised by English law, because the husband’s personal law was English law, which is monogamous, and the wife’s personal law was Islamic law, which would not allow her to marry a second husband. If the situation between the genders were reversed, the marriage would be polygamous and therefore not recognised, because Islam allows a man more than one wife.

Hussain v Hussain created an anomaly between the sexes, which the Law Commission duly examined in their second report. The Commission alleged that the court in *Hussein* had decided Parliament’s intention against the weight of evidence in the Parliamentary debates. They found no other area of law which made a distinction between monogamous and potentially polygamous marriages and, interestingly, noted the comment of Sir Jocelyn Simon P in *Cheni v Cheni* [1965] P 85, 90 that “after all, there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses”. The Commission therefore recommended that a marriage should not be void because at its inception it was potentially polygamous.

This recommendation was eventually incorporated into law, via Part II of the Private International Law (Miscellaneous Provisions) Act 1995, resulting in the current situation that both potentially and actually polygamous marriages entered into by those with “polygamous” domiciles are recognised as valid by English courts, and that potentially polygamous marriages entered into by anyone with an English domicile are recognised as valid by English courts, leaving only actually polygamous marriages by those with English domiciles void in English law.

It remains unclear what the effect would be on a potentially polygamous, and therefore valid, marriage if the husband returned to the place where the marriage was celebrated and took another wife, but it seems clear that English matrimonial law has moved away from treating polygamous marriage as different from monogamous marriage, preferring instead only to treat it as different where it is actually polygamous.

As a result of the Matrimonial Causes Rules 1977 a wife in a polygamous marriage can be added as an additional party to the proceedings. Where there are two polygamous marriages, following the ruling in *Onabrauche v Onabrauche* (1978) 8 Fam Law 107 it is ‘artificial to state that the second marriage was adulterous’, but it could be “unreasonable behaviour”, particularly when, like the case of *Quorashi v Quorashi* (1983) 4 FLR 706 (FD); 1985 15 Fam Law 308 (CA), the husband had taken a second wife in direct opposition to his wife’s preference. The court held that she was justified in deserting him as “in acting without her consent he had taken a grave step which seriously imperilled the continuance of their marriage”. This relied on the Indian case of *Itwari v Asghari* (1960) AIR (All) 684 that presumed the second marriage to constitute cruelty in the absence of the first wife’s consent. It is notable that the first wife’s consent was an issue. The law is not clear what would happen where the first of the marriages was initially monogamous or where the first wife freely consented.

The Law Commission has commented that a valid polygamous marriage is recognised as constituting a bar to a subsequent

monogamous marriage, allowing the second “wife” to petition for a decree of nullity on the ground of bigamy but, as noted in the previous chapter, it would not necessarily be sufficient to support a criminal charge of bigamy.

The law related to Social Security benefits was summed up by David Pearl in 1986 and remains mostly true today:-“a valid polygamous marriage is regarded as a valid marriage for all purposes relating to contributory social security payments so long as the marriage is in fact monogamous. But if the marriage is actually polygamous, social security benefits are denied in respect of all wives, even though the man has been under mandatory contribution obligations. The position denying benefit exists notwithstanding the fact that one wife is abroad and has always been abroad.”

The Social Security & Family Allowances (Polygamous Marriages) Regulations 1975 No 561 state that the words ‘marriage’, ‘husband’, ‘wife’ and ‘widow’ describe a matrimonial relationship of a monogamous character and do not include polygamous relationships. ‘Wife’ cannot be extended to mean ‘wives’ so there is no increased retirement pension for a man with two wives, although a man with one wife will get an increase.

In the case of *Iman Din v National Assistance Board* [1967] 2 WLR 257 Salmon LJ ruled that Parliament did not provide for the recognition of actually polygamous marriages for social security purposes, as the husband’s contributions are calculated “on the basis of one wife at a time” and so it would be wrong for him “to reap benefits in respect of perhaps three or four wives”. On that basis it was thought fair that the husband should contribute and that none of his wives should be entitled to benefit.

A woman or widow may claim a pension based on her husband’s contribution as from any date on which her marriage was in fact monogamous, but not if the marriage remains polygamous. However, once a married woman is claiming a pension, it will continue even if her husband remarries.

The rules on child benefit provide for a higher rate to be paid for the eldest child in a family unit. It includes as a family unit a

normal marriage, an unmarried couple living together as if they were married, and the members of a polygamous marriage. Therefore where a man has two wives, who each have children, only one higher rate will be paid. However, the regulations do not cover the situation where the people are living in a polygamous relationship that is not recognised as a marriage, so in that situation it is conceivable that two higher rates of child benefit would be paid.

Other benefits treat actually polygamous marriages as if they were monogamous marriages (e.g. the Social Fund Winter Fuel Payment Regulations 1998 and The Social Security (Miscellaneous Amendments) Regulations 2000), counting the earnings of all members of the marriages in order to calculate benefit due (The Social Security (Back to Work Bonus) Regulations 1996), or to reduce benefits due to the age of one of the partners, or treating them as eligible for special consideration for hardship allowances where there are similar vulnerabilities (children and pregnancy) (both in Jobseeker's Allowance Regulations 1996). Once again, however, while unmarried couples can be treated as married, to qualify as polygamous, there must be a valid polygamous marriage, and a polygamous relationship does not suffice.

For Job Seeker's Allowance the Benefits Agency advises their Decision Makers "When a claimant lives as husband and wife with two or more people and shares time equally with them, the [Decision Maker] should decide which two members of the relationship form an unmarried couple. No other member of the relationship can be treated as a member of the claimant's household." The guidance goes on to advise the excluded person to make a separate claim, but as single persons normally receive more than half the benefit of an unmarried couple, this would seem to cost the taxpayer more, rather than less.

Schedule 7 and section 59 of the Welfare Reform and Pensions Act 1999 provides a power for the Secretary of State to prescribe in regulations how the provision for joint claims for Job Seekers Allowance will be applied to the members of a polygamous

marriage. The explanatory note that accompanies the legislation says that “The intention is that where one or more members of a polygamous marriage are born on or after the date set in regulations and there are no dependent children, two members of the marriage will be required to make a joint claim. One of the claimants will always be the male partner, but the members of the marriage will be able to choose which of the wives will be the other joint claimant. Currently, polygamous marriages are recognised under the benefit system provided they took place in a country where such marriages are legal. The husband may make a claim for himself and for his dependents and receives an addition in respect of each of his wives.”

This would seem to disfavour current practice and render the excluded partner, this time validly married, subject to making a separate claim as a single person.

The Child Support Regulations define a partner as a member of a married or unmarried couple living together, and a member of a polygamous marriage. This allows their income to be considered as part of assessing a parent’s contribution towards children from previous relationships. It does not appear to extend to polygamous relationships, just marriages, and to confuse matters more, when the Child Support Agency’s Decision Maker’s Guide refers to example members of polygamous marriages, they all have English names, which misses the point that those with English domiciles cannot contract actually polygamous marriages.

According to the case of *Imam Din v National Assistance Board*, if benefit is paid to a woman living alone who is married to a man either in an actually or potentially polygamous marriage, the Secretary of State is entitled to recover the expenditure from the husband.

The Married Man’s Tax Allowance has now gone, although it is clear that a polygamously married man could not get an additional allowance for his second wife, although she could perhaps obtain an equivalent additional personal allowance if she had children.

The Working Families Tax Credit and Disabled Persons Tax Credit both contain a balanced recognition of polygamous

marriages, whereby all partners assets and earnings are taken into account, but where each member of the family is also counted as a cost against these assets, and therefore capable of generating a tax credit. Once again, while the Regulations count both unmarried and married couples as partners, they only recognise those with valid polygamous marriages, and not those in polygamous relationships.

In the past, immigration was allowed where the marriage was valid, but this has now been tightened to meet the statement in the Immigration Rules that “It is Government Policy to prevent the formation of polygamous households in this country”. Wives in potentially polygamous marriages may be allowed entry but where there is an actually polygamous marriage the rules operate only to allow entry to one wife, unless she already has a right of abode. If another wife is or has been in the country, the wife at Immigration Control will not be allowed entry, even if she was chronologically married first. Children’s right of entry to the country depend on the mother’s rights.

However Chapter 8 of the Immigration Directorate’s Instructions says “Entry clearance may not be withheld from a second wife where the husband has divorced his previous wife and the divorce is thought to be one of convenience, even if the husband is still living with the previous wife and to issue the entry clearance would leads to the formation of a polygamous household.” This has led to concerns being expressed concerning Muslim wives being given civil divorces in order to get second wives through immigration. The community and perhaps the wives themselves still regard their marriage as valid and hence the marriage as polygamous, even though the law does not. This also creates a peculiar instance of the law encouraging divorce, which is normally contrary to public policy.

Children of polygamous marriages are recognised as legitimate for the purposes of inheritance according to *Coleman v Shang* [1961] AC 481, [1961] All ER 406 (PC) although this is slightly limited by not including such things as titles of honour where the

marriage is actually polygamous. (See *The Sinha Peerage Claim* (1939) Lords' Journal 350; [1946] 1 All ER 926)

According to *Chaudhry v Chaudhry* [1976] Fam 148 members of polygamous marriages may use the Married Woman's Property Act to determine their respective property rights as according to Dunn J. "any other conclusion would be an affront to common sense" as they would be allowed to do some things under the Matrimonial Causes Act, but not others.

A husband and wife cannot be guilty of the offence of conspiracy, (Criminal Law Act 1977, s 2) being one person, and this extends to those in polygamous marriages, (*Mawji v R* [1957] 1 All ER 385) although against this notion it has been held that a polygamous wife is a competent witness against her husband (in *R v Khan* (1987) 84 Cr. App. R. 44, where the judge held that the woman was not a wife under English Law).

In conclusion, the civil law relating to marriage may be more comprehensively reasoned than the criminal but, in so being, it covers a wide range of behaviour and arguments which lead to internal tensions, contradictions and changes. It begins with the statement in *Warrender* that 'Christian' marriage is "a wholly different thing, a different status from a Turkish or other marriages among infidel nations" and that the decision that "we clearly should never recognise the plurality of wives... cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere."

From there it moves to *Hyde*, where the idea further develops that even a potentially polygamous marriage, which is monogamous in fact, holds a different status from marriage as recognised by English law. This relies on a concept of adultery rejected by later courts and on a system then ill-equipped to deal with polygamous marriages, but which has been making itself better equipped ever since.

The court in *Hyde* thought polygamy "revolting to the ideas we entertain of the social position to be accorded to the weaker

sex” and therefore considered it unfair to enforce ‘Christian’ standards, but later courts were not so shy at making their conception of justice available to wives they had considered to be ill-treated, and the Law Commission secured a comprehensive change in the law when the days of the “infidel” and “the weaker sex” were seen to have passed.

This change, which reflects the current law, was based on a desire to avoid the hardship inherent in non-recognition, to extend the protection of the law to those in such marriages, to achieve consistency in recognition, to recognise valid marriages unless there were compelling reasons of public policy not to, and to protect the taxpayer from having to meet costs which were properly the responsibility of the husband.

This explicitly recognised that polygamous marriages serve the same social function as their monogamous counterparts, rejecting the previous thinking that they were completely different institutions. But even though this is acknowledged, the law persists in defining marriage as having two types, monogamous and polygamous, with the ability for any particular marriage to adopt either form dependent on the domicile and religion of the parties to it. The law only tends to treat a “polygamous” marriage differently when it actually involves more than two partners, and uses domicile to treat a difference in quantity as if it were a difference in quality. This is the after-effect of the judgements in *Warrender* and in *Hyde*, even though their supporting reasons have been swept away.

When there is an actual difference in quantity, the law will recognise that a second valid polygamous marriage does not constitute adultery, and implies that the first wife’s consent can stop it from being unreasonable behaviour. It appears that English law is at least capable of finding its way in regulating actual polygamy.

The law formally applies its policy to protect public finances from actual polygamy by denying actually polygamous wives any pension, by ensuring that polygamous families are treated as a

single unit for many types of benefit, and making provision for Child Support when relationships break down.

However, the law continues to restrict the availability of legally-recognised polygamy to British subjects. It will recognise actual polygamy for those with foreign domiciles, but will not allow people with English domiciles to marry polygamously either here or abroad.

It is clear then that the reasons for the existing law tend to be phrased in reaction to the restrictions of the Victorian cases, and while they justify the existing law, they tend to argue more for recognition than restriction. In terms of reasons for restriction, we have only the cases that have since been abrogated by statute, and bald statements of Government policy, which occasionally do not appear to achieve the aims that they set themselves.

CHAPTER 5—COMPARISON OF REASONING AND IDENTIFICATION OF ASSUMPTIONS

It is clear that both the branches of the law considered thus far have been tackling different problems. The Criminal Law has been largely attempting to tackle bigamy, whereas the Civil Law has been trying to resolve issues related to the legitimacy of polygamy. Marriages which involve deception of one of the parties by the other as to their status are somewhat different in nature from those entered into knowingly by all parties, but both areas of the law impinge upon the practice or custom of plural marriage which is the concern of this study, even where that practice does not involve deception.

As the problems in each area of the law are different it is reasonable to expect that the solutions will be different also, but it is desirable that the law should flow from a common set of principles, that it should be in some sense coherent, and that its integrity should not be compromised by contradiction.

So far, this study has identified the reasons for the law propounded by the courts and those who have influenced the legislature. Before comparing the various reasons advanced, it is worth considering how they relate to the public policy reasons suggested by writers. Various writers, helpfully collated by Morse in (1976) 25 ICLQ 229, have identified the following reasons for justifying the criminal prohibition of bigamy:

Firstly, to discourage the procurement of sexual relations by fraud, and the deceit involved. Secondly, to prevent the public affront to the first wife and the risk of desertion and non-support involved. Thirdly, to prevent confusion of the public system of marriage registration. Fourthly, to punish deceit of those officiating at marriage ceremonies, and finally, to protect religious feelings of offence related to desecrating the marriage ceremony.

It is noticeable that, while some of these are mentioned in cases as aggravating factors, only the last two appear to attract the explicit support of the courts, and even these appear to have been ignored by the courts in preventing a polygamous marriage from forming the basis for a charge of bigamy.

Having earlier identified the reasoning that has explicitly supported the law, it can now be examined for similarities of treatment, and for differences, and to show any internal tensions. The assumptions on which the reasoning rests can then be drawn out for further comparison with research.

The first noticeable similarity in treatment of these issues is that they began with at least some religious basis, and that this basis was linked to some concept of Christian beliefs. The first Act of Parliament which made bigamy a crime was passed to stop the “great dishonour of God”, at a time when a Protestant state was encroaching on the power of the Church, possibly to prevent or limit any further turn towards Catholicism. It therefore incorporated into the criminal law a concept from religion, and a similar event is noticeable in the civil law which, in its early development, is concerned with “Christian” marriage as opposed to “infidel” marriages that it would not recognise.

The Civil law would not recognise polygamous marriages not because it misunderstood them, but because it professed that it did not understand them. Specifically, the only thing it would say about them was that they were clearly a different thing from “Christian” marriage, although courts now talk about “monogamous” marriage instead of “Christian”. The Criminal Law has treated polygamous marriages in a similar way, not recognising

them as constituting the first marriage in a prosecution for bigamy, although there does not appear to be a case which established whether they would count as a second marriage for that purpose.

Both areas of law have also needed to change tack with respect to recognition. Both have made use of the idea of domicile in order to change “polygamous” marriages into “monogamous” marriages, and the civil law has gone further by formally recognising polygamous marriages without them needing to change character, as long as their polygamous nature is not confirmed by the actual existence of more than one wife.

Similarly, both areas of law have been motivated by a desire to address hardship, whether it be to prevent the “undoing of divers honest men’s children” or to prevent spouses from evading their responsibilities simply by changing their location, although the application of the desire to prevent hardship has sometimes been open to criticism, whether it be leaving Hyde with a limping marriage, or for some time maintaining a clear gender-based discrimination in the recognition of potentially polygamous marriages.

Perhaps more importantly, both have involved what appears to be a considerable latitude in statutory interpretation, whether it be to import *mens rea* into an offence written in absolute terms, or to redefine the general understanding of the law and the probable intention of Parliament in order to legitimise at least some marriages contracted by English domiciliaries abroad. No doubt this tendency is encouraged by the statutes themselves not necessarily having been clear in their motivations, whether because of administrative re-enactment of ancient provisions in the criminal law, or due to debatable understanding of the capacity to marry in civil law.

And finally, this leads to a common problem of uncertainty. The piecemeal and variable interpretation of the criminal law, and the reliance on domicile by the civil courts have made it at times difficult for the individual to appreciate how the law applied to them. It is still not clear what the effect of actual polygamy would

be on a marriage now thought valid because of the Private International Law Act 1995, and individuals may be unsure whether they will be found to have changed their domiciles, and therefore the status of their first marriages, for the purpose of the bigamy law. Ignorance of the law may not be an excuse, but it may be more easily understood when lawyers and judges also appear unsure, and this extends to the related offence of perjury when one describes one's marital status to a Registrar.

There are also a number of areas where the treatment is different in practice, despite judges and the Law Commission holding similarity to be desirable.

The civil courts now appear to accept, following the Law Commission's reports and the enactment of some of their recommendations, that polygamous marriages have a similarity in social function and purpose to monogamous marriages. There is an internal tension then in the refusal to validate actually polygamous marriages anywhere by those with a domicile in England, and there is a clear difference in the way the criminal law cannot base a conviction on a polygamous marriage because such a marriage is different.

There is a further distinction in that the criminal law is interested in whether a person is a British subject, wherever they are, and is only interested in domicile to the extent that it helps indicate whether a marriage is monogamous, whereas for the civil law, domicile and location can be of extreme importance in determining whether a marriage is valid, irrespective of whether the parties are British subjects

A contradiction only recently resolved is that the old law in *Hyde v Hyde* was clearly based on a desire to protect women, whereas *Hussain v Hussain* resulted in direct discrimination against them, and whereas Hyde refused recognition on the basis of society's conception that women were to be protected as "the weaker sex", modern commentators deny recognition because of a concern for "equal rights".

Finally, there is the internal contradiction between policy statements and their effects. Foreign polygamous marriages are

recognised for some purposes in order to prevent public expenditure, but on other occasions, and for all polygamous relationships entered into anywhere by an English domiciliary, extra partners are treated as single people, and the public purse refuses to take the benefit of the economies of scale involved in recognising the relationships.

As noted above, both areas of the law assume a religious basis, although modern practice has been to refer less to this and more to monogamy. This reflects a past and continuing assumption that “Christian marriage is everywhere the same” and specifically that it is necessarily monogamous in character.

The criminal law clearly also assumes a great moral wrong for bigamy, perhaps based on the religious assumption. As currently understood, while some of this may refer to deception, this is not a part of the offence in itself and need not be present. The one deception apparently always present is not deception of an intended spouse but “fraud of the law”, whereby the law and its officers are deceived and where the marriage ceremony is used to trick society at large.

This perceived moral wrong was linked in the past by judges to other moral wrongs, such as fornication and seduction, and this moral language has tended to be impressed on other methods of description used by those judges, so that one talks of the “prostitution” of the ceremony and another talks of the “wickedness” of going through it. These morals are said to be those that “no-one would hesitate to call wrong”, assuming a common moral judgement and possibly a common foundation for morality.

Aligned to this is an assumption about public concern. The law talks of scandal, outrage, and public decency. This assumes that there is a strong common public opinion, and a common appreciation of seriousness, and that bigamy involves a real degradation of a valued ceremony. As it relates to the marriage ceremony and ultimately to marriage itself, this is linked to assumptions about the social centrality of marriage and traditional family relationships, as exemplified by the concern that bigamous marriages lead to illegitimacy.

There is also a basic assumption that there are two types of marriage that are different, that the difference in quantity implies a difference in quality. While the civil law has moved with regard to potentially polygamous marriages, there are still occasions where actual polygamy, whether a marriage or a relationship, is treated as different, and the criminal law insists on seeing them as completely different things, even when this does not assist with the policy aims suggested for the law. This reflects, in part at least, some assumption about a difference in purpose and function for two different types of marriage.

There are also a set of assumptions related to gender. As detailed above, this used to be described in terms of a “weaker sex” that needed protection, but is now expressed as an assumption that polygamy involves some form of oppression or unequal treatment of women that amounts to sexual discrimination.

One of the most basic assumptions is the assumption of monogamy. That involves a belief that polygamy is something “altogether foreign to our ideas” and “practically unknown”, either something that doesn’t happen much, may be happening less, or at least doesn’t happen *here*. This is expressed not only in older judgements but in modern statutory formulations that portray the country as monogamous, and attempt to keep the practice of polygamy outside the borders.

Finally, this is based around the assumption of state formulation of personal law. The responsibility for dealing with bigamy was taken from the church, and the job of registering births, marriages and deaths followed later. The assumption that common law marriage does not occur reflects this belief that marriage happens with the active involvement of the state rather than as a contract or agreement between two or more parties. This is noticeably different both from countries that allow polygamy, which often ascribe “family law” to various religious courts, and from those countries more actively anti-polygamous, such as the United States, which recognises common-law marriage in order to prosecute polygamous practice as bigamy.

CHAPTER 6—TESTING ASSUMPTIONS AGAINST RESEARCH AND DATA

There are a number of forms of information against which the identified assumptions can be tested. These range from statistical information concerning characteristics of the UK population, to economic theory, to religious history, and to fully-fledged anthropological research. It should, however, be noted that much of this information is not generated as part of a debate on polygamy, or on its relationship with the law.

The work in economics tends to be an interesting way of modelling economic rules, and the anthropological work has involved studying modern groups, rather than suggesting social change. In fact, the various types of information have largely developed in a context where, as in the UK, polygamy has not been recognised as valid and bigamy has been a crime. Consequently, the literature does not tend to be part of an ongoing debate on the merits of a particular lifestyle and, for that reason, combined with the lack of a real prospect of the legal recognition of polygamous conduct, it needs to be treated with caution. This study can establish whether there is research or data which affects the validity of assumptions made by the law, but must acknowledge that, in the lack of a developed debate, much of the information is one-sided. In short, those who may be opposed to polygamy have had little incentive to put forward their arguments, and so the assumptions may be questioned, but it is difficult to deal with them conclusively.

The first assumption that can be tested is the religious basis of the law. It is worth noting that the courts have retreated from the religious basis as time has gone on. Instead of referring to “Christian” marriage, they refer to “monogamous” marriage, but this is a slightly revisionist tendency, as it is clear that many of the initial justifications of the current law are motivated or explained in religious or moral terms.

It is difficult to measure the strength of religious feeling or community commitment in 1604 when the bigamy law was first enacted, but the main political contests were between Protestants and Roman Catholics and many political issues in the 17th century possessed a considerable religious element. As evidence of this it can be noted that the next law on the Statute book was the Witchcraft Act, showing great concern over religious issues. It seems safe to say that religious feeling was perhaps integral to public life and that church membership was high.

In modern times we are more able to assess religious belief by measuring church membership and attendance. Dr Peter Brierley at Christian Research estimates a growth over the last century in the numbers of UK citizens who are nominally Christian (from 32.8 million to 37.7 million), but this has been far outstripped by population growth, so that the proportion of nominal Christians in the population as a whole has dropped from 86% to 64%, whereas nominal members of other religions have grown from 0.25% of the population in 1900 to 4.5% in 2000. When measured in terms of church membership, the over 8.5 million UK church members in 1900 had decreased to just over 6 million in 1998, and in terms of Church attendance there was a drop from 10.2 % of the population to 7.7% of the population in England, and from 12.5% to 6.6% in Wales, in the last twenty years alone. (See his “UK Christian Handbook: Religious Trends” (2000) London: Christian Research)

It appears that even over the last century, there has been considerable change in the numbers of people with a religious affiliation, in the strength of the affiliation, and in the way in

which that affiliation is demonstrated. It is therefore likely that the commitment of the population to “Christian” ideas about marriage may be considerably less than it was previously, and certain aspects of this will be examined later.

However, irrespective of the effect on the assumptions of the current level and quality of religious commitment, there is evidence to suggest that the ideas that “Christian marriage is everywhere the same” and that it is necessarily monogamous are open to question. Even Poet and Anglican clergyman John Donne, a favourite of King James 1, wrote “How happy were our sires in ancient time, who held plurality of love no crime”, Eugene Hillman gives examples of African churches that accept polygamous members, and it is clear from a number of writers identified earlier, both that there is a significant minority opinion across Christendom which recognises polygamous marriage and that this has been the case for much of the last millennium at least. (see Cairncross, and Hillman E, *Polygamy Reconsidered—African Plural Marriage and the Christian Churches* (1975) New York: Orbis)

The Victorian judges who pronounced on the reasons bigamy was a crime were concerned to prevent it as a great moral evil, similar to fornication and seduction that “no-one would hesitate to call wrong”. There is evidence to suggest that the position has changed somewhat from that time. Keith Soothill found “a growing leniency in sentencing convicted bigamists” between 1973 and 1995, leading to a situation where generally more people were cautioned for the offence than prosecuted, and in 1994/95 only 3 of 36 offenders went from court to prison, and only one for a sentence of greater than 1 year (see Soothill K, Ackerley E, Sanderson B & Peelo M, “The place of bigamy in the pantheon of crime?” *Med. Sci. Law* (1999) 39 (1) 65). This stands in contrast to the initial fixed sentence of death in the Act of 1604, and the ability to sentence for up to seven years imprisonment, the severity of which persuaded the Victorian judges that an intent to do moral evil was a necessary part of the offence.

There certainly seems to have been a considerable change in

attitudes towards sexual morality. If it ever was true to say that no-one would hesitate to call fornication and seduction wrong, it is not true now. It is of course difficult to measure seduction and fornication but some help can be gained from examining trends in marriage and cohabitation.

The Office of National Statistics has found that 60% of couples marrying in 1994 had cohabited first, which broke down into 76% of civil marriages and 41% of religious marriages, and that 16% of 25-34 year-olds were cohabiting in 1996. This would tend to establish that even those marrying would not seem necessarily to view "fornication" as wrong, undermining the assumption of a common moral judgement accepted by the population.

The point on legitimacy also seems to have lost its relevance from the time when Tolson was decided. Official estimates of births outside marriage hover under 5% for the 400 years between 1550 and 1950 but had increased to 38% by 1998. While legitimacy may still be preferable, it is difficult to sustain an argument that bigamy makes much of a difference. Indeed, legal recognition of polygamy would legitimise children who are currently counted as being born "outside marriage".

The rise in illegitimacy and cohabitation tell one half of the story of the decline in the social centrality of marriage. In the last 30 years the annual number of weddings has declined by over 35% and the percentage which involve religious ceremonies has fallen from 60% to just over 30%.

Furthermore, it is no longer as easy to claim that polygamy is "foreign to our ideas" and "practically unknown". The numbers of the population which subscribe to a religion that allows or values polygamous practice has grown considerably. The largest Mormon denomination teaches that polygamy can be good but, as it is illegal in the United States, prevents its members from engaging in the practice. The Mormon faith has grown from less than 6,000 UK followers in 1900 to over 180,000 in 1998, the number of active Muslims has increased from 30,000 in 1960 to over 675,000 in 2000, and the number of active Hindus has increased from

40,000 in 1960 to 165,000 in 2000. This makes a total of over one million people who actively subscribe to religions that include some form of commitment to polygamy.

This all begins to undermine the notion that the monogamous marriage ceremony is a respected and valued institution that must be protected from abuse. In particular, it challenges the assumption that certain forms of behaviour are abusive to the institution. The law is not clear as to what constitutes an abuse, or what morally wrong intent is needed for the act. If polygamist Mormons or Muslims simply want to use a ceremony for purposes of social recognition, and if no party to the proceedings is deceived, it could be argued that the ceremony is not 'profaned' or prostituted, because the requisite intent may not be present.

The remaining moral/social concern is related to the concepts of scandal and public decency. It could be argued that if public values have moved so far from enshrining protected positions to marriage and legitimacy, that there is less of a strong common public opinion to be scandalised. That is not to say that if polygamists were to marry in the UK that it would not attract media comment, as it undoubtedly would, but it is not clear that it would be as offensive to a current generation as it would to that of 100 years ago, and it is not clear how offensive it would need to be to rate as scandal sufficient to justify the existence of the offence.

The final such issue is the assumption that there are two types of marriage that are different. As has been commented earlier, T C Hartley has argued, and the Law Commission has accepted that the purpose and functions of polygamous and monogamous marriage are similar, and the law now tends for civil purposes to treat polygamous marriages as if they were monogamous, effectively changing the nature of the distinction. This is combined with a recognition by judges that even monogamous marriages can be rendered potentially polygamous depending on domicile and religion. It then becomes easier to question the assumption. Is it that the marriages are different, or that we apply different rules to them

at different times? It is possible that the underlying marriage is the same, and it is the rules that change.

This also combines with an analysis of the divorce rate. Divorce has only recently become widely available, but the number of divorces each year has steadily increased to a level where it almost matches the number of first marriages and, significantly, the number of remarriages each year is also not far behind. Hillman describes this as serial polygamy, where people in fact may not marry for life, and instead have a number of marriage partners, only different from polygamy in that the partners are not held simultaneously, but in succession. This provides a further similarity between the institutions. (see Hillman E, *Polygamy Reconsidered—African Plural Marriage and the Christian Churches* (1975) New York: Orbis)

It is not possible to measure levels of adultery, but this provides an informal path for sexual diversity, which is generally beyond legal sanction, and which also suggests that Western marriage may often be only formally monogamous. The point is perhaps most succinctly made by Mahomet Effendi with the statement (quoted in Cairncross) that “We Turks are great simpletons in comparison with the Christians; we are at the expense and trouble of keeping a seraglio each in his own house; but you ease yourself of this burden and have your seraglio in your friends’ houses.”

The final and most topical assumption to be considered here is that polygamy is in opposition to women’s rights and is in some way oppressive. The literature in this area in particular needs to be treated cautiously, as there has not been a great debate for writers to respond to, and the contributions in this area are therefore particularly tentative.

Sebastian Poulter is one writer very concerned that polygamy conflicts with women’s rights. In both the African context and with reference to British Muslims he concludes that polygamy cannot “pass the human rights test” because it is sexually discriminatory. His argument is that the UK is a signatory to the International Convention on Civil and Political Rights, and

therefore that this will affect public policy considerations. Article 23 of the Convention provides that “States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.” Furthermore, while Article 8 of the European Convention of Human Rights provides for the right to marry, article 14 states that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex...” Poulter therefore suggests that African and Muslim polygamy is sexually discriminatory in an important respect, namely that it allows the man to have two wives, but does not allow the wife to have two husbands, giving the husband the exclusive “right to fundamentally and unilaterally alter the family life of his existing spouse or spouses”.

However, while Poulter seems to be one of the few to consider plural marriage from a human rights perspective, he does so only briefly, and there is more to be said in terms of the alleged conflict with women’s rights.

Firstly, there is an unstated assumption that adding a second wife to a polygamous family is something done *by* the man *to* his first wife, but this forgets the case of *Quorashi v Quorashi*, where the court held that a wife was justified in deserting her husband when he took a second wife because “in acting without her consent he had taken a grave step which seriously imperilled the continuance of their marriage”. The implication that a first wife’s consent is an issue can mean that polygamy is not purely about the man’s rights, but about his current wife’s rights also. If a wife consented or desired such a union, for whatever reason, would it not be up to her to decide whether her rights were being compromised? Indeed, for other purposes Poulter himself quotes a letter from a Mormon wife mentioning the “family and kindred ties which are inexpressibly dear to me” involving her husband’s other wives and children, and therefore implying that she did not see polygamy as something which infringed her rights, but rather that it was to her benefit.

Also, there is the question of the prospective wife's rights. Muslims have usually justified polygamy in terms of provision for orphans and widows, and to deal with shortages of men. If there is a right to marry, could it enable a prospective second wife to insist on a positive rather than a negative right? It would not mean much to her if there were no men, or no suitable men, available. What if the only suitable and willing man were already married? Could her right be denied then? This is echoed in Chapman's concern that "man-sharing" may be the only rational response for some modern women who, if they do not legally share a man, will effectively be denied marriage. She argues that sharing may be the most effective way of combining family and career, and that those who do not share their men formally often find that they share them informally, through adultery.

It might be said that the conflict between polygamy and women's rights is general, as a group, rather than the particular case of one individual, and that women are oppressed by polygamy generally, and therefore that equality demands that none be allowed to enter into polygamous marriage. But it is clear that there is evidence available from a number of sources to contest this suggestion.

John Cairncross states that polygamous groups throughout history have tended to offer a better deal for women than their monogamous contemporaries. David Friedman, Thomas Bergstrom (in his 1994 "On the Economics of Polygamy") and Gary Becker (in his 1981 "Treatise on the Family") state that this is not without reason, as in economic terms it raises the demand for women while increasing the supply of men, therefore meaning that men have to do more to attract women and to keep them, and are therefore inclined to better treat them than under monogamy.

Janet Bennion, in studying a modern Western example of polygamy argues that female polygamists choose their lifestyle because of definite benefits it brings them, and that they achieve status and power through polygamy and the networks it encourages them to create with other women. For more on this check her

“Women of Principle: Female Networking in Contemporary Mormon Polygyny” (1998) Oxford: Oxford University Press.

Finally, Poulter’s conclusions about polygamy and women’s rights includes the tacit assumption that Muslims or Africans would be asking the law to recognise only their type of polygamy. As seen above, this can be upset by involving the consent of the first wife, but also if polygamists were to argue that both sexes ought to be allowed plural partners, this would meet their requirements and would not be *prima facie* sexually discriminatory. As polyandry is incredibly rare in history, possibly for some of the reasons suggested by economists, this may not be viewed by them as too painful a concession, especially if their consent was needed before it could apply in their own case.

In summary, the concern in *Hyde* that polygamy oppresses women, which has been transformed into a concern about equal rights, cannot simply be answered by categorising polygamy as sexist, for the demand could be for the law to allow it to both sexes, it affects the rights of women who may want to be in such relationships, and the evidence that is available suggest it cannot be taken for granted that polygamy as an institution is harmful to women’s interests.

Many of the assumptions which underpin the law have been undermined by demographic change, or have been laid open to question by research, such that the basis for the current law on bigamy and polygamy is no longer capable of being justified without dissent. In particular, it is not possible at this stage to close off reform on the basis of human rights considerations, which are more complex than the little research that has been done so far would suggest. With the law’s own justifications open to attack, and with the need to assess laws for their necessity and proportionality in human rights terms, it is important to examine the various possible effects and opportunities presented by the incorporation of the European Convention of Human Rights into UK law.

CHAPTER 7—PLURAL MARRIAGE AND HUMAN RIGHTS

The Human Rights Act 1998 has applied in England and Wales from 2 October 2000. It incorporated the European Convention on Human Rights into UK law. It did not do this by constitutionally enshrining the rights and giving the courts power to overturn incompatible legislation. Rather it sought to affect interpretation of existing laws where possible, identification and amendment of existing legislation where incompatible, and to force Parliament to consider compatibility in each new law it passes.

Section 3 of the Act provides that “So far as it is possible to do so... legislation must be read and given effect in a way which is compatible with the Convention rights.” This departs from the tradition of construing texts in terms of the meaning that Parliament intended. It is no longer a question of what a text actually means, as a question as to whether it can have a meaning which is compatible with the European Convention.

Where the courts cannot construe the legislation in a compatible way they can make a declaration of incompatibility and, if a Minister considers there are compelling reasons for doing so he may, by Order, make the necessary amendments to legislation, which need to be passed by both Houses of Parliament before taking effect, although they do not have to go through the full three readings and Committee stage in each House.

It is important to note that the rights are not absolute and they may conflict. Competing rights have to be balanced and some

rights are qualified, allowing the state to breach them if it is “necessary in a democratic society” for certain specified purposes, but such breaches may only be proportional to the ends they seek to achieve.

Furthermore, public authorities may not act in a way incompatible with a Convention Right unless legislation gives them no choice, and when Courts are interpreting convention rights they must have regard for decisions made previously by the relevant European bodies, such as the European Court of Human Rights and the Commission, but it does not oblige them to follow those decisions. Parliament remains supreme and the House of Lords remains the highest court. However, the European Court has held that states have a “margin of appreciation” which can entitle them, because they best know local conditions, to some room for manoeuvre in application of the Convention, and it is anticipated that this will at least decrease, or perhaps be eliminated, when the UK courts are entitled to decide cases on a Convention basis.

At the time of writing, it is not possible to cite any UK cases decided under the Act for none have yet been made, but it is possible to consider the potential areas under which claims could lie, and the likely arguments that could be made.

With regard to the right to a fair trial enshrined in article 6, if a man who has a potentially polygamous marriage cannot determine whether his domicile has changed and therefore cannot determine whether he is married for the purposes of bigamy legislation then it may be doubted whether he can have a fair trial. It is one thing for ignorance of the law to be no excuse, but when the application of the law to any individual contemplating an act in full knowledge of the law is uncertain, it may be difficult to demonstrate fairness, or to demonstrate that the necessary intent was present. Therefore, article 6 of the Convention could conceivably mean that those with potentially polygamous first marriages may not be subject to prosecution for bigamy involving a second marriage in England and Wales. Certainly any man whose prosecution failed on this point may find himself able to go through as many bigamous

ceremonies as he chooses, so long as he doesn't make a change of domicile more certain.

With regard to the right to respect for private and family life enshrined in Article 8, there have been relatively few applications to the European court on the subject of polygamy. What cases there have been have been decided by the Commission rather than proceeding to the full court.

In the case of *M & OM v The Netherlands* (Application 12139/86) a Moroccan national and his father appealed against Dutch immigration laws which denied the son a residence permit on the basis that he was the son of a wife living in Morocco, rather than the son of a wife living in the Netherlands. They complained of a breach of article 8 (family life) in that the son could not stay with his father in the Netherlands, and of Articles 8 and 14 (equal treatment) in that the immigration policy discriminated against the children of one wife on the basis of their place of birth.

The Commission held that its case law does not guarantee a right to enter or reside in a particular country and that, as the son was a non-dependent adult, no family life within the meaning of Article 8 existed, therefore removing the basis for complaint. The Commission made the following statements which are of interest "When considering immigration on the basis of family ties, a Contracting State cannot be required under the Convention to give full recognition to polygamous marriages which are in conflict with their own *ordre public*. This does not mean, however, that there is no right to respect for the family life of a father and his children born by different wives in a polygamous marriage." The Commission also mentioned that the Dutch restriction of entry to the children of one wife only could "give rise to problems in relation to minor children".

In the case of *E.A. & A.A. v The Netherlands* (Application 14501/89), on very similar facts, the Commission also held that the immigration policy was clearly related to the economic well-being of the country, due to concerns about population density and the labour market.

In the case of *Bibi v the United Kingdom* (Application 19628/92) a daughter complained that her mother was being refused entry to the UK on the basis that she was the first of two wives and that the second wife had already settled in the country. The UK government explained that UK policy is to prevent the formation of polygamous households, “the practice of polygamy being unacceptable to the vast majority of people in the United Kingdom”. The complaint was of an infringement of the right to respect for family life and that the mother had been discriminated against on grounds of sex in that the law effectively allowed the husband to choose which wife could join him.

The Commission again mentioned that its case law gave no right of entry, even for married couples, but held that in this case the refusal of entry interfered with the daughter’s right to respect for family life. The Commission considered that the aim of the legislation appeared to be “the preservation of the Christian based monogamous culture dominant in that country” which was a legitimate aim falling within the scope of protection of morals or the rights and freedoms of others within the exceptions to Article 8. In considering whether the interference was “necessary in a democratic society” the Commission felt that States has a certain margin of appreciation in the field of immigration policy, and that the existence of the offence of bigamy for hundreds of years helped to establish that polygamous marriages were in conflict with the UK’s legal order, and so, in establishing an immigration policy the UK could not be required to give full recognition to polygamous marriages. The Commission also held that there was no sexual discrimination by the UK, as the law was neutral as to gender and it was only the father’s practice that was discriminatory, for which the UK could not be held responsible.

From these cases it can be seen that a restriction in immigration policy can interfere with family life where younger children are involved, that the government relies on the practice of polygamy being unacceptable to the vast majority of people in the country, and that Article 8 gives no right of entry over immigration policy,

even for monogamous couples. Specifically, in areas of immigration policy there can be no requirement to give full recognition to polygamous marriages where they conflict with the Christian-based monogamous culture evidenced by the bigamy law, as this is covered by the protection of morals or the rights and freedoms of others, and there is a clear margin of appreciation in this particular area.

The cases do not give much of a lead in areas apart from immigration, where it is admitted there is a considerable margin of appreciation, and it is not clear what the effect would be if the flaws or interpretative fluidity of the bigamy laws (or their application to polygamous practice) were challenged, or if the assumptions about public objections or the Christian-based monogamous culture were to be undermined.

Interestingly the point about sexual discrimination and Article 14 helps to meet the point raised about gender discrimination in the previous chapter. Were the law to recognise polygamy for both sexes, and it was only practised by men, on similar reasoning the Government would not be responsible for the discrimination.

With regard to the right to freedom of thought, conscience and religion enshrined in Article 9, this right is particularly interesting in that it not only provides for the freedom to change religion but also for the freedom to manifest, observe and practice that religion. There are no ECHR cases that bear directly on the question of polygamy in this regard, but it should be noted that one of the main points is whether the exceptions to the right are “necessary in a democratic society”.

The clearest reference to this concept is in the US courts’ treatment of polygamists, where the Supreme Court has ruled that a Mormon polygamist could be punished for practicing polygamy, even though his religion required it and the US Constitution prevented laws prohibiting the free exercise of religion. The current prohibition on polygamy is held in place because a “compelling state interest” can proscribe religious actions even where it cannot proscribe belief, and such an interest is established by the central importance of marriage and the view that polygamy “fetters the

people in stationary despotism”, could not coexist with monogamy and subverts democratic ideals.

This approach could provide a basis for a court to support anti-polygamy laws as being “necessary in a democratic society” but it is worth noting that it has come in for a great deal of criticism for allegedly misrepresenting the intentions of the framers of the constitution, (see Ryerson B, “Religious Freedom, Polygamy and the Law”, available online) and for creating an unsustainable distinction between belief and action. In particular, Elizabeth Harmer-Dionne argues that the restriction on actions changed the belief of the Mormon religion and so the restriction had a much more powerful effect in reality than it appears to have on paper. (see her “Once a peculiar people: Cognitive dissonance and the suppression of Mormon polygamy as a case study negating the belief-action distinction.” (1998) 50 *Stanford Law Review* 1193)

Points made elsewhere about interpretation in the light of present-day conditions and the need for proportionality should be noted here. It is clear that the law has allowed and recognised polygamy to some extent. It may then find it difficult to argue that its existence is subversive to democracy.

With regard to the right to freedom of expression enshrined in Article 10, proponents of strong views of freedom of expression will see the denial of recognition for polygamous marriages, together with the prosecution of those polygamists who seek to attain such recognition through use of civil wedding ceremonies, as a denial of the validation which is part of free expression. Hence denial of recognition of polygamy could be a denial of free expression, but it would necessitate a strong view to be taken by the courts, and there is as yet no evidence that such a view will be taken.

Article 12, which provides that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right” is one of the obvious candidates for any future arguments affecting the law on bigamy and polygamy. This could feasibly be argued from two

points. Firstly the husband could argue that to prevent him from marrying again was an encroachment upon his rights, discriminating against him because of his marital status, contrary to Article 14. Alternatively the prospective second wife, who may actually be living with the husband, could argue that her right to marry was being encroached upon.

There are no specific exceptions to article 12, but there is the qualifying clause about the national laws. There have been relatively few full judgments on the right to marry and some guidance can be obtained from these as to what this means.

In the case of *Rees*, a transsexual argued that UK law did not give him a change in legal status along with the sex-change operation, preventing him from marrying someone of the appropriate gender as this would be a same-sex marriage. The Court held that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex, and that this was supported by the wording which made it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.

The Court also held that the qualification “according to the national laws” must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired, but that a restriction preventing marriage of those who are not of opposite biological sex did not do this.

In *Johnston and Others* (Application 9697/82), it was argued that Ireland’s refusal to allow divorce restricted a man’s right to marry by removing his future capacity so to do, but the Court felt that the ordinary meaning of the words “right to marry” covered the formation of marital relationships but not their dissolution. The express reference to “national laws”; meant that the Court did not consider that, “in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12.”

In the case of *F v Switzerland* (Ref. 21/1986/119/168) the Court held that the use of a compulsory waiting period between

divorce and subsequent remarriage was a violation of the right to marry. In so doing it held that the Convention must be interpreted in the light of present-day conditions and that the field of matrimony was “closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.” The Court also held that, given that the potential new wife was “neither under age nor insane, her rights were in no way protected” by the waiting period, and that an unborn child could have been adversely affected by the prohibition, not because of the law but because of prejudices that would result in social handicap. The state was found to have used disproportionate interference to pursue a legitimate aim, and therefore lost the case.

In the *Cossey* case, which was another transsexual case, differentiated by the presence of a man willing to marry Cossey, and the going through of a void ceremony of marriage, the Court ruled that “as regards Article 12, whether a person has the right to marry depends not on the existence in the individual case of such a partner or a wish to marry, but on whether or not he or she meets the general criteria laid down by law”, and found that “attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.”

From these cases it can be seen that the phrase “according to the national laws” cannot be used as a *carte blanche* to impair the very essence of the right. This essence has been interpreted with reference to cultural traditions, to a social adherence to the acceptance of monogamy, and specifically to the continued adoption of biological criteria for determining a person’s sex for the purposes of marriage. Indeed, in the transsexual cases, the courts were pointed to the judgment in *Hyde v Hyde* to establish the nature of marriage as “the voluntary union of one man and one woman for life”.

But balanced against these considerations is the need for the Convention to be interpreted in the light of present-day conditions,

that the transsexual cases reflect the wording of marriage as the basis for a family, and that when children are made illegitimate (as they also are by non-recognition of polygamy) there is the possibility that the state restrictions are disproportionate to the aim. Also it could be argued by analogy that a prospective polygamous wife's rights are not protected by a ban on polygamy as long as she is "neither under age or insane" and therefore that she can decide what to do with her rights in these matters. Also if the existence of the right to marry does not depend on the existence of a person she could marry, it may be difficult to argue that the right is being denied to a potential wife of a polygamist on the ground that she could marry someone else.

Finally, it is to be noticed that there are potential crossovers between this subject and the area of same-sex marriage. Were same-sex relationships to be accepted as marriages this could sufficiently undermine the traditional conception of marriage to increase the chances of recognition of polygamy. Were they instead to be recognised in a registered relationship seen as broadly equivalent to marriage, but not actually as marriage, what would there be to stop a first wife from marrying a second, entailing many of the consequences of legal recognition of the polygamous unit?

Where the rights mentioned above are capable of being restricted it is only for certain defined purposes. For the right to private and family life (Article 8) these are "the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." For freedom of thought and religion (Article 9) these are "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." For freedom of expression (Article 10) these are "the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence,

or for maintaining the authority and impartiality of the judiciary.”

According to Article 14 the enjoyment of the rights and freedoms in the Convention shall be secured without discrimination on various grounds including “other status”. Article 17 prevents the limitation of the rights to a greater extent than is provided for in the Convention and Article 18 confines the restrictions so that they may only be applied for the purpose for which they have been prescribed.

Those reasons for restriction which are most likely to arise in the context of polygamy may be identified as protection of health or morals, and the protection of the reputation or rights and freedoms of others.

The protection of health could only be offered with evidence that polygamy provided some risk to health that would otherwise not exist. As the alternative is not only monogamy, but also the whole variety of sexual morality prevalent today, it is not easy to see how polygamy may be especially risky. Concerns about sexually transmitted diseases would concentrate on a plurality of partners, but as polygamous systems also emphasize fidelity, they are not significantly more likely to encourage the spread of disease. There would be a need to show that there was something about polygamy that was harmful, and indeed, so harmful that the law should intervene to protect people from their preferred choice. Is such evidence exists, it is not widely publicised, and runs contrary to the conclusions of those like Altman and Ginat (in “Polygamous Families in Contemporary Society” (1996) Cambridge: Cambridge University Press).

The protection of morals would of course depend on the preservation of the moral of monogamous marriage, which the European Court has recognised (in *Bibi v UK*). However, it seems that there has been no great argument over the morals involved. It is far from clear in law that public morality should be Christian, or that Christian morality should be monogamous. This would be the protection of the morals of some people, but not others, and

the protection of morals would need to be interpreted in the light of modern conditions. This would include a backdrop of a largely non-monogamous society. There may be no substantial monogamous morals to preserve.

The “protection of the reputation or rights and freedoms of others” is then the remaining justification for a restriction. Clearly the addition of a new partner has an effect on an existing partner’s rights and freedoms, and so, following the ruling on divorce and unreasonable behaviour, where there is a lack of consent it could be seen that this justification could have substance. It is not so easy to see how this could extend to situations where consent was present, as then the law would be insisting on granting “freedoms” which were unwanted. The possible exception to this relates to whether consent can properly be determined while a relationship subsists. In short, how could the courts tell if a woman freely consented to her husband marrying another woman, or whether she only did so under great pressure, such as a threat of divorce? Therefore, the Crown could argue that in order to protect those who would be so pressured it would be necessary to ban everyone from being polygamous, but it is not clear that this is a proportionate and effective way of obtaining the goal. It would be like saying that no-one should be allowed to marry or to divorce, for some may have been pressured into it.

Any restriction based on the above purposes can only be adopted where necessary in a democratic society. If there is another available method for obtaining the same goal, but which does not violate the Convention, or if the purpose makes the restriction only desirable, and not necessary in a democratic society, then the case is not established. And should a case be established, the degree of restriction must also be proportionate to the purpose under the Convention. The existence of polygamous *relationships* in democratic societies without legal sanction is an obstacle to establishing that the restriction of polygamous *marriages* is necessary. The use of “democracy” to restrict polygamy in the United States would be different for two reasons. Firstly, there the law actively includes

polygamous *relationships* as banned behaviour by defining them as a form of marriage, so there is a legal sanction. Secondly, it appears that Mormon polygamy may have been a threat to democratic government, not because it was polygamy, but because it was a manifestation of the power of a religious alternative to government in a frontier society. As that threat no longer exists, the argument that only monogamy can be allowed if democracy is to survive is no longer credible.

In addition, any argument that the non-recognition of polygamy was required would fall foul of the fact that the law already recognises certain polygamous marriages, and has done so for many years without apparent threat to health, morals or democracy.

In conclusion, it is clear both that a number of convention rights have the potential to impact on the legal treatment of polygamy and that the precise way in which they will be translated into law is not predictable. However, the passing of the Human Rights Act offers an opportunity to identify and test the reasoning and assumptions behind the law in the courtroom, and to account for social change since the laws were passed, and while the little legal analysis that there has been has tended to briefly exclude polygamy on the basis of women's rights, it seems clear that this will not be done so easily as there are a number of points to be considered by the courts before a judgement can be made.

The Convention, by limiting the scope of restrictions to the rights seems to assist the polygamist's case, if a right can be identified as being involved in a particular set of circumstances. The identification of such circumstances and the rights involved are necessarily speculative before any English cases exist, but they do illustrate the potential for challenge.

CHAPTER 8—OPPORTUNITIES FOR CHANGE IN THE LAW

The entrance of the European Convention of Human Rights into domestic law presents a number of definite opportunities for the law to be tested. Effectively, the Human Rights Act may have amended the meaning of the laws that governed polygamy and bigamy both in criminal and civil spheres. Due to the nature of the Act, it will only become clear what has changed when the courts deliver their judgements, and that will depend on the facts of the cases which are presented. Until then, this book can begin to identify possible areas of challenge.

The main tools of challenge are, firstly, establishing that the pre-incorporation law is incompatible with convention rights. Secondly, complying with the Human Rights Act will occasionally mean that other legislation should be construed according to *possible* meanings rather than *actual* meanings in order to avoid breach of protected rights. Thirdly, public authorities may not act in a way incompatible with the Act. This binds the police, the courts and Registrars of marriages.

In terms of incompatibility, as mentioned in the previous chapter, there are a number of rights that are at issue in any case about polygamy.

In order to establish the right for polygamists to have their marriages legally recognised, and for no criminal sanction to apply to their actions, it would be necessary to prove that their convention rights were being breached, in a disproportionate way or without lawful authority. If this could be established, it would then fall to the courts either to find some acceptable way of reinterpreting

existing law in line with the convention, or to make a declaration of incompatibility.

It would be simple enough for the courts to avoid the issues at the earliest opportunity by interpreting the Convention in a way which restricted the meaning of the terms so as to exclude plural marriage from the “marriage” and “family life” mentioned in the Convention. It may be argued that plural marriage was not in view when the Convention was framed, or that only monogamous or “lawful” family life was being referred to. Either way, such an approach would avoid any consideration of proportionality or reinterpretation of existing law.

However, in this regard, Article 14 of the Convention is particularly important as it establishes equal treatment in enjoyment of the rights. This is interesting in that British law does recognise *some* polygamy and allows *some* polygamists to go through bigamous ceremonies without punishment.

It has already been established that British citizens and residents who do not have a British domicile may go abroad and contract an actually polygamous marriage that will be recognised as a valid marriage under English law.

Therefore if a married person with an English domicile were to go abroad, lawfully marry under a polygamous law, and return to England, the law would treat them differently, by not recognising the marriage, purely on the basis of domicile. It could be argued that the person with the foreign domicile has better rights than the person with the English domicile, and that because of this the law was breaching article 14 (equal treatment) in conjunction with article 8 (respect for family life) and article 12 (right to marry). The breach would depend on domicile being recognised as an “other status” under article 14, possibly on account of its similarity to race, national origin and birth, which are each listed in article 14.

Article 14, when combined with British recognition of foreign polygamy, can establish that polygamous marriages fall within “marriage” and “family life” in Articles 12 and 8. This shifts the

debate to the question of whether the breach is allowed for a specified purpose.

The purposes have already been covered at the end of the previous chapter. It should be noted however that any reason justifying the breach would have to pass the Article 14 test. In other words, if “protection of morals” should prevent the recognition of polygamy for those with English domiciles, it would be necessary to show why that reason does not also apply to those with foreign domiciles, but who are living in England. It is submitted that this would be extremely difficult to do.

If the restriction test is capable of being passed it would still be necessary to show that the restriction was proportionate, and again, why it is proportionate to restrict those who hold an English domicile and not others.

In each of these cases, any arguments used to defend the status quo are capable of challenge on two points. Firstly, are they compatible with the arguments for that restriction that have been advanced over the history of the law in England or are they novel and without significant backing? Secondly, do they take account of the social and legal change demonstrated earlier in this book? The law needs to be justified on present evidence, not that of centuries past.

It is possible to perform a similar exercise with regard to the criminal law. A man with a foreign domicile and a potentially-polygamous marriage (or, for ease of argument, an *actually*-polygamous marriage) can go through a ceremony of marriage in this country without any danger of prosecution for bigamy. Someone who is monogamously married (or whose marriage has been converted into monogamy by the law from its potentially-polygamous origin) could be prosecuted for bigamy. The criminal law is then discriminating purely on the basis of domicile. A combination of the right to a fair trial, and the provision on non-discrimination would suggest that if the man with the foreign domicile cannot be tried, then neither should the man with the English domicile. Essentially, the trial is no longer fair because

possession of a certain domicile should lead to a not guilty verdict in every similar case.

With regard to reinterpreting the criminal law, as we have seen, the criminal law depends entirely on one section of the Offences Against the Person Act 1861. The vital elements are “Who-soever, being married, shall marry any other person during the life of the former husband or wife”.

The law is clear that the first marriage can only refer to a monogamous marriage, and that the second can only refer to going through a ceremony of marriage.

If a polygamous marriage is protected by a convention right and the law of bigamy would involve an unjustifiable breach of that right, then it must be asked whether a change in interpretation could remove the breach.

There are a number of possibilities for such a change in interpretation.

Firstly, it is acknowledged by the courts that “being married” means “being married monogamously”, and that in certain circumstances any marriage can change from being monogamous to being potentially polygamous. If a marriage was to change its nature to being potentially polygamous then the defendant would no longer meet the qualification that he was monogamously married. Such a change can be made by a change of domicile or personal law. Were polygamy to be fully recognised by the civil law, this change in itself may be enough to allow an initially monogamous marriage to change to being potentially-polygamous, and what better proof of polygamy than publicly entering into a marriage with another partner?

Secondly, it is already the case that the second marriage refers to a marriage that is in fact invalid. Were the reference to the second marriage to be restricted only to an “invalid marriage” then civil recognition of polygamous marriages, in rendering them valid, would mean they could not found a prosecution for bigamy.

Thirdly, the first marriage can only be made out by a monogamous marriage. Were the courts to adopt this interpretation for

the second marriage, then a polygamous second marriage could not result in a bigamy prosecution. The offence would then be restricted to obviously monogamous marriages, and so marriages that did not involve deceit as to marital status would fall outside the definition of the offence.

Fourthly, it has been shown that bigamy requires an evil intent. It would be possible for judges to be more specific about this intent. Given that civil marriages are not allowed to bear religious trappings, it may be no offence to such a ceremony for polygamy to be a result. It is possible that the intent could only be to profane a monogamous ceremony of marriage, or even a religious monogamous ceremony. Alternatively, the intent may only be made out where deceit is involved. Merely intending a polygamous marriage without deceit may not be enough to prove an offence of bigamy.

Fifthly, the section does not apply where the defendant has been “divorced from the bond of the first marriage”. Were the “bond” of the first marriage to be taken to be its monogamous character, rather than its entire existence, then again a polygamist would commit no offence.

Of these options, only the last involves stretching the meaning of words into a wholly new definition. The first three involve applying the way the law treats one of the marriages to the other, and so involve possible meanings that the courts could feel able to adopt. Any one of these interpretations could suffice, and the courts could adopt more than one if they chose.

What is clear is that reinterpretation is possible. The first three options depend on a change in the civil recognition of polygamous marriages. But in so doing they show that the courts could not rely on the criminality of bigamy in order to prevent changing the civil law, as a change to the civil law could easily be reflected in the criminal law so that there was no conflict.

It is also clear that reinterpretation of the criminal law is not dependent on the civil law. If the balancing of rights and the application of proportionality did not lead to civil recognition of

polygamous marriages contracted in England, it would still be open to the courts to hold that the greater consequences of criminal conviction could justify a restriction in the intent implied by the Act, so as to exclude polygamists from the crime of bigamy.

In either case, whether polygamy was civilly recognised or not, it would not be necessary for the courts simply to declare incompatibility with the Convention, for reinterpretation would be possible. Therefore for the law of bigamy to change, so that public marriage ceremonies involving polygamists were no longer criminal, would not need any reconsideration of the subject by Parliament. It need not be a matter for political controversy, or further legislation. In law, it may already have happened, and may only require a case to provide grounds for the decision.

With regard to reinterpreting the civil law, the current legislation governing the formal civil recognition of marriages is contained in the provisions of section 11 of the Matrimonial Causes Act 1973 which provides that "A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say... (b) that at the time of the marriage either party was already lawfully married; or... (d) in the case of a polygamous marriage entered into outside England and Wales ... either party was at the time of the marriage domiciled in England and Wales... For the purpose of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other."

It is worth briefly recapping the treatment of this section by the courts.

It was thought by writers and lawyers that paragraph (d) meant that people domiciled in England and Wales, and perhaps returning to marry in a country which allowed polygamy, would have marriages that were void in English law.

In *Hussain* the courts took the very different view that actually polygamous marriages were invalidated by (b) and so (d) must refer to something else, namely potentially polygamous marriages

only, and marriages abroad by someone with an English domicile could only be potentially polygamous where their personal law would allow remarriage. This was only the case when a woman domiciled in England married a man with a domicile that allowed polygamy, for he was free to marry again. But a man domiciled in England was prevented from remarrying by English law, and his wife prevented from remarrying by her personal law, so the marriage was in fact monogamous, and therefore could be valid.

The Law Commission were fairly scathing about this interpretation, and the Private International Law Act 1995 ensured that potentially-polygamous marriages would not be rendered void simply because they were entered into under a law which allowed polygamy. Using the reading of Hussain, paragraph (d) of the 1973 Act was rendered meaningless.

It is submitted that the reading of the law in Hussain is tortuous, and that it goes further than it needed to in order to recognise some marriages. It would have been sufficient to rely on the latter part of the reasoning to turn potentially-polygamous marriages into monogamous marriages. The arguments about section (b) were unnecessary. It is submitted that they were made in order to prevent polygamy being recognised by the law, for an alternative reading would allow that.

Reading the whole section together, it renders void those marriages where one party is already “lawfully married”, but only renders void those foreign polygamous marriages where one party is domiciled in England and Wales. “Polygamous” marriages specifically include potentially-polygamous marriages but, as this sub-set is added in at the end, the term also appears to include actually polygamous marriages. But if they are actually polygamous, they would already be void by virtue of paragraph (b). Paragraph (d) implies that actually polygamous marriages abroad are not void unless one party is domiciled in England and Wales, but that would mean that “lawfully married” in paragraph (b) did not include polygamous marriages. In effect, it would mean “lawfully monogamously married”.

So, reading the whole section together means that paragraph (b) renders void any marriage entered into by someone monogamously married, and paragraph (d) renders void any marriage entered into by someone with a domicile in England and Wales under a law which allows polygamy. The Act is not denying recognition to foreigners whose marriages abroad are actually polygamous.

But as the section is drawn absolutely, stating that there are no reasons for declaring void a marriage other than those listed, there is nothing to say that a polygamous marriage in England and Wales would be void. Monogamy cannot be assumed, due to the section's specific mention of polygamous marriage, and the restriction of paragraph (b) by paragraph (d) means that there is nothing to prevent someone with a potentially or actually-polygamous marriage from having a further marriage in England and Wales recognised as valid, notwithstanding that it is actually polygamous.

Hence, the tortuous reasoning in *Hussain* acts to prevent the law from introducing polygamous marriage to England and Wales, but establishing a violation of Convention rights could provide sufficient justification for dispensing with the convoluted reasoning in *Hussain*.

Clearly there is less scope for creative interpretation in civil law than with the law on bigamy. The "marriage celebrated" cannot be restricted to a monogamous marriage only, due to the later reference which makes clear it includes polygamous marriages.

However, it would still be possible for the courts to follow the example of the criminal law and apply the restriction of monogamy to the marriage in paragraph (b), so that only an existing monogamous marriage could render a second marriage void. This would apply a definition of "married" currently accepted in criminal law to a piece of civil legislation, and would have the effect of allowing those with potentially polygamous marriages to contract actually polygamous marriages in England and Wales.

This could then be extended, as the availability of some form of polygamous marriage in the UK could then be the basis for holding that a marriage which was monogamous at its inception in England and Wales could become polygamous, applying the reasoning in *Attorney-General of Ceylon v Reid*.

There would, however, remain the anomaly that actually polygamous marriages contracted outside England and Wales by those with English domiciles would be void, unless the courts adopt a more creative approach to domicile. Were polygamous marriages in England to be allowed, polygamous marriages abroad may need to be considered by Parliament under the incompatibility proceedings. This in itself may be enough excuse for the courts to refer the whole matter to Parliament, rather than adopt a reading of the law that would leave such an anomaly, although it is clear the courts would not need to do this. It depends on whether they consider the anomaly to be a meaning compatible with the convention. This itself could depend on the facts of the case in front of them. Clearly a case which sought recognition for an actually polygamous marriage celebrated in England would not involve direct consideration of paragraph (d) and therefore may be more likely to result in the matter being resolved by the judges than by Parliament. This is of particular interest because it may be considered more difficult to steer such a change past Parliament.

Of course, allowing polygamous marriage does not dictate the form under which it may be allowed to be polygamous. Given that the law has indicated that a second marriage without the first wife's consent may be considered as unreasonable behaviour sufficient for divorce, it may not be necessary to insist on any extra element of such formal consent. It would of course be possible for some formal consent to be given. A first wife could act as a witness for future ceremonies, for example, but where there was no consent it could be expected that a divorce would follow and that the matter would resolve itself in that way. Hence, consent may be important, without it needing to be a necessary precondition for a second marriage. This would be an important issue to resolve because it is

one thing for the courts to allow polygamy by an appropriate reading of the law, but another for the courts then to be drawn into specifying the administrative requirements for validating the polygamous marriage.

As has been demonstrated, there is more to the civil law than the formal recognition of polygamous marriages for issues such as matrimonial relief. There is also the issue of differential treatment in benefits cases. Even without considering polygamous marriages, it is clear that some rules treat those in a monogamous relationship as if they were in a monogamous marriage, but do not treat those in a polygamous relationship as if they were in a polygamous marriage. However as some, if not all, of these benefits, place those in a polygamous relationship in a more financially advantageous position, it may be more likely that any challenge would originate from an unmarried couple.

Public authorities may not act in a way incompatible with the Act. This binds the police, the courts and Registrars of marriages.

It could be applied by polygamists as follows. Police and prosecution decisions could be open to scrutiny through the process of judicial review by adopting the arguments above. If the person could not be guilty of an offence, decisions about investigation, arrest and prosecution could be reviewable, and so launching such a review may be one of the most effective ways of getting these issues before the courts.

The Benefits Agency could similarly be subject to judicial review for not treating a polygamous family as married. This could turn on differential treatment of monogamous unmarried couples, or on non-recognition of common-law polygamous marriages, which could rely on the arguments given above.

Registrars of marriage will generally not allow a ceremony to proceed if an existing marriage is in place. Therefore, a judicial review of a Registrar's decision may be a safe way for a polygamist to bring the issue of the criminal law before the courts, for it removes the danger of being found guilty of a criminal offence.

Ironically, it may be possible for a polygamous family's case to be brought by one of the women who was not recognised as a wife by the law, and this very non-recognition could assist in obtaining Legal Aid, as she may have no property of her own, it being her husband's property held for the family as a whole. In this way the state could fund the challenge to the law.

In these cases the scope for judicial review will depend on whether the courts will consider whether the law has been changed by the Human Right Act. If they will, then it has direct bearing on whether the decision of a public official is "manifestly unreasonable". It is submitted that a decision to prevent a lawful ceremony would be unreasonable and so the issue of what the law is should be considered, but it is difficult to predict the courts in this regard. In addition to this the law of judicial review itself is expected to develop due to the Human Rights Act, to incorporate further consideration of the rights themselves and the principle of proportionality.

CHAPTER 9—CONCLUSION

It is sometimes thought that polygamists in England are breaking some law, but it has been shown that the practice of polygamy in England and Wales is not, in fact, illegal. The act of cohabitation with more than one marriage partner is not an offence in the United Kingdom, unlike certain States in America, and there is no evidence that it has ever been so. While the law has historically refused to give formal recognition to more than one legal partnership contracted in this country, it is clear that the law recognises foreign marriages which allow polygamy, including those that are actually polygamous and that are contracted by people who live, but are not domiciled, in England. The law has had no provision for recognising polygamous marriages by domiciled British subjects, but it remains the case that the law recognises some polygamous marriages.

Nor is it the case that polygamists breach the country's bigamy laws. It is clear that if they don't use the legal formalities that normally produce legal marriage, then they commit no offence. It is also clear that if they do go through those formalities, but already have a potentially-polygamous marriage, that they still do not commit an offence. In a very real sense the law has differentiated between bigamy, an offence which appears to require deception, and the practice of polygamy, to the extent that many polygamists could not be guilty of the offence of bigamy, even if they tried.

The effect of the Human Rights Act must also be taken into account. It has introduced much uncertainty into many areas of law, transferring a great deal of power from Parliament to the courts. There is, however, no real suggestion that it has made matters any

more difficult for polygamists. The only uncertainty is to what degree the Human Rights Act has extended legal recognition of polygamy. It is quite feasible, as has been discussed earlier, that the Act will result in recognition of polygamous marriages contracted abroad, possibly including those contracted by English citizens on holiday, and that it will spell out the end of the bigamy law except as a duplicate of the offence of deception that already exists. Depending on how willing the judges are to apply the Act it is possible that it will allow for polygamous marriages to take place and be legally recognised within this country.

One of the most important questions will be how much legal recognition continues to matter. With the decreasing use of the legal institution of marriage within the population, with the law and society making provision for relationships which fall outside the traditional legal category, and with a taxation and benefits system more concerned with the possession of children than the possession of a marriage certificate, whether the law considers polygamy as “marriage” may have all the practical impact of a scholastic debate as to how many angels can dance on the head of a pin. The less difference it makes, the easier it may be for judges to make decisions which extend recognition of polygamy, especially as they consider how the law came to be how it is, and what is justifiable in the 21st century.

The law against bigamy was formed in the early 17th century after a century of religious difficulty flowing from priest’s attempts to treat polygamy as a sin. Instead of addressing the practice of polygamy, it tackled the social issue of those who abandoned one marriage for another. It did this at the expense of the power of the established Church, and has been re-enacted with little debate ever since. The courts have accepted that the offence requires an evil intent in order to be committed, but there have been considerable difficulties in interpreting the statutes, largely because of the use of the term ‘married’ in two different senses. The courts also seem to have accepted at some points that bigamy was not designed to apply to polygamy, but to the degradation of the

marriage ceremony, often with deceit and in great offense to public morals.

While doing this the law has moved from thinking of polygamous marriages as completely different to monogamy and unmanageable by the law, to something which needed to be recognised and regulated. Problems and inconsistencies remain in the recognition of some foreign polygamous marriages for some purposes but not others, and the general denial to those who possess an English domicile of the ability to have anything more than an actually polygamous *relationship*.

This confusion has not been addressed due to the limited terms of reference in the Law Commission reports, the piecemeal way that reform has been handled, and the fact the basic legislation on the constituent elements of bigamy has not changed at all in around 140 years, and has not changed in substance in almost 400 years.

Examination of the law has identified reasoning and assumptions which are sometimes contradictory and often open to question in the light of social change since the time the laws were originally formulated, and the only way the law has been able to cope with it on the civil side is by extending recognition to marriages that are polygamous in nature, but not in fact, and on the criminal side by creative legal interpretation and the extensive use of cautioning and light sentences for an offence that once carried the death penalty.

The debate around how polygamy should be treated has not really taken place, possibly because the law defined the limits of socially acceptable behaviour, and because change to the law is difficult to achieve without comprehensive backing. With the passing of the Human Rights Act a debate which for many years has been restricted to religious circles, and which has not really developed on an academic or legal level is given the opportunity suddenly to leap to prominence by threatening to assess the law on rational principles of how it treats the rights of its subjects.

It is not difficult to see that the law may be found wanting in this regard, not because it should say one thing or another, but

because it has not developed in an orderly way and the justifications of the past may not ring true in modern ears.

As police officers prove reluctant to prosecute bigamy where there has been no deceit, and as courts prove reluctant to punish it severely, the uncertainty introduced by the Human Rights Act may take many years to resolve simply from there being a lack of polygamists who wish to challenge the law. In common with a growing section of the allegedly monogamous population, they may not care whether the law recognises their relationship, and so may not challenge it. Until they do, the English law will remain shrouded in mist. It may be that the Human Rights Act has fully legitimised polygamous marriages in the UK, but we may never know the answer if polygamous families simply want to be left alone. The English law interferes with the lives of polygamists less than in some other systems, and it is tested less as a consequence, but both these features are no doubt related to the historically low incidence of polygamy in the population. Higher rates of polygamy elsewhere have either led to persecution, as in the United States, or to complete acceptance, and it will be interesting to see which path the law follows during the supposed 'inclusion' of diverse ethnic and social groups.

Minorities may no longer always be required to excise their customs as they pass Customs and Excise, but the law has not provided for those customs passing on to the next generation, or to the indigenous population. The Human Rights Act has been justified as bringing rights home, but it may also finally have brought home the problems and compromises of Empire and the difficulty of deciding what morals are necessary in a democracy when the morals of the majority are difficult to read.

RECOMMENDED FURTHER READING

The main texts on UK law are the two reports of the Law Commission, namely “Family Law Report on Polygamous Marriages” (1971) No. 42: and “Law Commission & Scottish Law Commission, Private International Law. Polygamous Marriages. Capacity to contract a polygamous marriage and related issues” (1985) (Law Com. No. 146) (Scot. Law Com. No. 96), both available from Her Majesties Stationery Office.

For legal academics and practitioners there is David Pearl’s “A textbook on Muslim Law” (1979) London: Croon Holn and his “Family Law and the immigrant communities” (1986) Bristol: Family Law, although as commented here, the Human Rights Act may render much of this material dated.

Sebastian Poulter was prolific in this area, although the need for repetition means that you don’t have to get all these texts to read all his points. The texts in question are “Hyde v. Hyde—A reappraisal”, (1976) 25 ICLQ 475; “English Law and Ethnic Minority Customs” (1986) London: Butterworths; “Ethnic Minority Customs, English Law and Human Rights”, (1987) 36 ICLQ 589; “African Customs in an English Setting”; *Journal of African Law*; 31 [1988] 207; “A Separate System of Personal Law for British Muslims?” in Mallat, C and Connors, J (eds.) *Islamic Family Law* (1990) London: Graham and Trotman; and “Ethnicity, Law and Human Rights: The English Experience” (1998) Oxford: Clarendon.

Glanville Williams is worth reading, if only as a major figure in the development of English Law. See his “Language and the

Law” (1945) 61 LQR 71 at 76-8; “Bigamy and the Third Marriage”, (1950) 13 MLR 417 and “Venue and the ambit of Criminal Law”; (1965) 81 LQR 395 at 402-4.

For a good and humorous introduction to economics in general try David Friedman’s “Hidden Order”, (1996) New York: HarperBusiness, which mentions polygamy, but for more detail try “The Economics of Love and Marriage”, in his “Price Theory: An Intermediate Text” (1990) South-Western; which is available, for free, online.

For a well-researched and invaluable examination of examples of polygamy and its defense within Christendom see John Cairncross’s “After Polygamy Was Made a Sin. The Social History of Christian Polygamy” (1974) London: Routledge & Kegan Paul. This will lead you to Martin Madan’s “Thelyphthora” (1780) London: J Dodsley, a spirited defence of the compatibility of polygamy and Christianity, as is John Milton’s “De Doctrina Christiana” (1825). This last work was unpublished during Milton’s lifetime but translated almost 150 years later on the orders of King William IV by his librarian, Charles Sumner, and published by the Cambridge University Press as “A Treatise on Christian Doctrine”. The text is missing from many editions of Milton’s Complete Works, but the parts pertaining to polygamy are available online at <http://www.polygampage.com>

Moving beyond Christian to secular history you could try Foster B, Foster M & Hadady L, “Three in Love: Ménages a trois from ancient to modern times” (1997) San Francisco; Harper, although this talks more of affairs than marriages, and for a widely respected review of the Mormon experience you could do a lot worse than Richard Van Wagoner’s “Mormon Polygamy, A History” (1989)Utah: Signature Books.

1 JAC. 1. C. 11 OR “THE ACT OF 1604”

An Acte to restrayne all persons from Marriage until their former Wyves and former Husbandes be deade.

Forasmuch as divers evil disposed persons beinge married, runne out of one Countie into another, or into places where they are not knownen, and there become to be married, havinge another husband or wife livinge, to the greate dishonour of God and utter undoinge of divers honest mens children and others; Be it therefore enacted by the King’s Majestie, with the consent of the Lordes Spirituall and Temporall, and of the Comons in the present Parliament assembled, That if any person or persons within his Majesties Domyinions of England and Wales, beinge married, or which hereafter shall marie, doe at any tyme after the ende of the Session of this present Parliament, marrye any person or person, the former husband or wife beinge alive, that then everie such offence shalbe Felonie, and the person and persons so offendinge shall suffer death as cases of Felonie; And the partie and parties so offendinge shall receive such and the like preceedinge triall and execution in such Countie where suche person or persons shalbe apprehended, as if the offence had bene comitted in such Countie where such person or persons shall be taken or apprehended.

Provided alwaies, That this Acte nor any thinge therein conteyned, shall extende to any person or persons whose Husband or Wife shalbe continuallie remayinge beyond the Seas by the space of seven yeeres together, or whose Husband or Wife shall absent hym or her selfe the one from the other by the space of seaven yeares together, in any parts within his Majesties Dominions,

the one of them not knowing the other to be livinge within that tyme.

Provided also and be it enacted by the Authoritie aforesaid, That this Acte nor any thinge herein containd shall extend to any person or persons that are or shalbe at the tyme of such mariage divorced by any sentence had or hereafter to be had in the Eccliaſticall Courte, or to any person or persons where the former Mariage hath bene or hereafter shall be by sentence in the Eccliaſtical Courte declared to be voide and of no effect; nor to any person or persons for or by any reason of anye former Mariage had or be made, or hereafter to be had or made within age of consent.

Provided also, That no Attainder for this Offence made Felonie by this Acte, shall make or worke any corruption of Blood, Losse of Dower, or disinherſion of Heire or Heires.

9 GEO. IV. C. 31 (OFFENCES AGAINST THE PERSON ACT 1828—SECT 22)

And be it enacted, That if any Person, being married, shall marry any other Person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, shall be guilty of Felony, and being convicted thereof shall be liable to be transported beyond the Seas for the Term of Seven years, or to be imprisoned, with or without hard Labour, in the Common Gaol or House of Correction, for any term not exceeding Two years; and any such Offence may be dealt with, enquired of, tried, determined, and punished in the County where the Offender shall be apprehended or be in custody, as if the Offence had been actually committed in that County: Provided always, that nothing herein contained shall extend to any Second Marriage contracted out of England by any other than a subject of His Majesty, or to any person marrying a Second Time, whose Husband or Wife shall have been continually absent from such Person for the Space of Seven Years then last past, and shall not have been known by such Person to be living within that Time, or shall extend to any Person who at the Time of such Second Marriage, shall have been divorced from the Bond of the First Marriage, or to any Person whose former Marriage shall have been declared void by the sentence of any court of competent jurisdiction.

OFFENCES AGAINST THE PERSON ACT 1861—SECT 57

Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years *and not less than Three Years,—or to be imprisoned for any Term not exceeding Two years, with or without Hard Labour; and any such Offence may be dealt with, inquired of, tried, determined, and punished in any county or Place in England or Ireland where the offender shall be apprehended or be in custody, in the same Manner in all respects as if the Offence had been actually committed in that County or Place* ; . . . Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

(Words in italics were later *repealed* by the Criminal Justice Act 1925, s.49, Sch 3, and the Criminal Law Act 1967, s 10(2), Sch 3, Pt III.)

MATRIMONIAL CAUSES ACT

1973—SECT 11

A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say . . . (b) that at the time of the marriage either party was already lawfully married; or . . . (d) in the case of a polygamous marriage entered into outside England and Wales . . . either party was at the time of the marriage domiciled in England and Wales . . .

For the purpose of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other.

PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995

5 (1) A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.

(2) This section does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of Private International Law.

Section 6 determines the effect of section 5 on prior marriages.

RELEVANT PROVISION OF THE HUMAN RIGHTS ACT 1998

Schedule 1

ARTICLE 7 NO PUNISHMENT WITHOUT LAW

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9 FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10 FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11 FREEDOM OF ASSEMBLY AND ASSOCIATION

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12 RIGHT TO MARRY

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 14 PROHIBITION OF DISCRIMINATION

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 17 PROHIBITION OF ABUSE OF RIGHTS

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18 LIMITATION ON USE OF RESTRICTIONS ON RIGHTS

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

ARTICLE 23 OF THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.