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ARTICLE

The racialising effects of non-marriage in English Law: A critical postcolonial analysis

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Abstract

In this article I argue that the judicial concept of non-marriage racialises and orientalises minoritised communities and their marriages. Applying a critical postcolonial lens, I show how the development of non-marriage has been influenced by colonial racialising attitudes towards marriage. This has led to its application in racist and orientalist ways to demean and other minoritised marriage practices. My analysis of the case law exposes three patterns in the judicial discourse in this area. First, that the courts emphasise "English (Christian) marriage" and its supposed hallmarks when deciding if a ceremony is non-existent; second that judgments foreground the technical, formal aspects of the law obscuring the use of personal judicial opinions which are orientalist. Finally, the application of this concept to playacting, sham and forced marriages at the same time as legitimate minoritised marriage practices is demeaning and insulting to the already marginalised communities that practise them.

Keywords: Non-Marriage; Marriage Law; Coloniality; Family Law; Minoritisation

1 Introduction[1]

In her televised 2021 interview with Oprah Winfrey, Meghan Markle shared details of her "real" marriage ceremony three days before her public royal wedding to Prince Harry. The real ceremony was conducted by the Archbishop of Canterbury in their garden with no other witnesses and they exchanged personal vows. Why is this idea of two ceremonies so interesting? And how does it concern minoritised communities in England and Wales? The private garden ceremony was a non-marriage. Non-marriages are performed outside of the regulatory framework for legally binding ceremonies set out in the Marriage Act 1949 if conducted in England and Wales. Or, if celebrated abroad they fail to meet the requirements for legal validity in their place of celebration. Non-marriages are non-existent and parties to them are therefore legal strangers or cohabitants. In this article I argue that non-marriage is applied in ways that target minoritised couples' and communities' marriage practices. The concept racialises and orientalises families and communities through their marriage ceremonies. Non-marriage maintains and upholds the ideal Western Christian marriage in English law. Legal responses to minoritised marriages are therefore influenced by colonial racialising attitudes that privilege Christian marriages creating an orientalist hierarchy which positions minoritised marriages as inferior.[2] Whilst existing literature recognises its

[1]Special thanks to Maebh Harding for her comments on an early draft of this article.

[2]The terms 'racialised' and 'minoritised' signify when people and practices are marginalised, excluded, or treated differently because they are not white or associated with whiteness which was intrinsic in the colonial mission (El-Enany, 2020).

discriminatory effects on minoritised couples (see e.g. Probert, 2002, 2013; Le Grice, 2013), little attention has been given to questions of race and coloniality surrounding non-marriage. I address this gap by analysing the law through a critical postcolonial lens. The term "non-marriage" changed to "non-qualifying ceremony" in 2020 to address its problematic implications but the longstanding connotations of the concept remain. Non-marriage has evolved solely in the courts but who is more likely to have their marriage declared non-existent or non-qualifying?

For Meghan and Harry, the backyard wedding was a nice personal touch – their legal status as a married couple would never be in doubt because of their royal wedding. Moreover, it was conducted by an Anglican clergyman and they exchanged vows. Their private ceremony did not fall greatly outside of the marriage ceremony aesthetic idealised by English law. However, minoritised couples are not always in the same position. Their meaningful ceremony is one which matches the norms of their families and communities. However, if their ceremony falls outside of the preferred aesthetic, it will not be binding in English law. There is a disparity between who is able to obtain legal recognition through a ceremony which is meaningful to them and who is not.

After outlining the legal background to non-marriage, I set out my critical postcolonial conceptual framing for this article underpinned by two arguments. First, that legal responses to minoritised marriages are influenced by colonial racialising attitudes positioning them as inferior. Second, non-marriage is a manifestation of this marriage hierarchy and its disproportionate application to minoritised ceremonies, so they fail to qualify as marriages in English law. I then share three analytic arguments that emerged from my examination of over forty case reports. First, that non-marriage has developed in response to the question "What is an English marriage?" In answering this question, the courts have racialised and orientalised minoritised ceremonies to confirm that "English" marriage is Western and Christian. Second, the emphasis on the form of marriage ceremony over the parties' intentions when deciding whether the marriage is legally binding masks orientalist stereotypes imposed by the courts. Finally, the use of non-marriage to refer to play-acting, sham and forced marriages whilst simultaneously applying it to ceremonies that have been celebrated for thousands of years is demeaning and orientalist. We need to reconsider the implications of non-marriage and its racialising underpinnings before discussing any changes to the law.

2 Legal background

The law in this area is 'unnecessarily complex' (Law Commission, 2015, para. 1.6). The common law presumption of marriage tells us that a marriage ceremony is always presumed to be legally valid unless it is actively challenged (see e.g. *Chief Adjudication Officer v. Bath*;[3] Probert, 2002). The question of marriage validity can arise in different contexts. For example, if a spouse petitions for a divorce, the other may argue that the marriage was never valid in the first place to prevent the courts making financial orders for the petitioner (e.g. *Hudson v. Leigh*).[4] Or one of the parties has died and the deceased's family does not want the marriage to be recognised to prevent the spouse and children from inheriting their wealth (e.g. *In Re Bethell v. Hildyard*).[5] A marriage's validity may be challenged for immigration reasons to stop a spouse and children from being granted stay or leave to remain in the UK (e.g. *ECO New Delhi v. SG*).[6] Or to prevent the spouse from receiving widowed parent's allowance and other state welfare support (e.g. *Bibi v. Chief Adjudication Officer*).[7] When a ceremony is challenged, the courts are tasked with deciding whether a marriage is fully valid; recognised for limited purposes or non-existent.

[3][1999] 10 WLUK 747.
[4][2009] 2 FLR 1129.
[5](1887) 38 Ch. D 220.
[6][2012] UKUT 00265 (IAC).
[7][1998] 1 FLR 375.

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A valid marriage is recognised for all legal purposes. If celebrated in England and Wales, a valid marriage is one which fulfils the requirements or formalities in the Marriage Act 1949. The 1949 Act sets out the routes for entering into a legally valid marriage covering civil and religious ceremonies that are conducted by Anglicans, Jews, Quakers and all other faiths. However, none of the individual statutory requirements like giving notice or registration are essential in and of themselves (Fisher, Saleem and Vora, 2018). So overall, there is no clear guidance on what exactly makes a marriage valid (Probert, 2002). This means that as long as a ceremony complies with some of the formalities and the parties were not aware of the ones that were missed, it will still fall within the scope of the 1949 Act and be valid (Probert and Saleem, 2018). For ceremonies celebrated overseas, the rules of private international law provide the standard for a fully valid marriage. As long as a ceremony complies with the law of the place where it was celebrated, it will be valid for all legal purposes in the English courts (Lord Collins of Mapesbury *et al.*, 2012, Rule 73).

Marriages which are recognised for limited purposes can be acknowledged in certain contexts, so the English courts have jurisdiction over them to provide relief and remedies. The most prominent type in this category is the void marriage. A marriage is declared void because it has some fatal flaw or defect. A void marriage never existed at law, but the courts still have powers to make financial orders concerning the parties. A marriage can be void if one or both of the parties lacked the capacity to marry because they were: related within the prohibited degrees through blood or affinity; under the age of 16 or already married. In addition, a ceremony may be void because the formalities are defective, and the parties 'knowingly and wilfully' disregarded them (Matrimonial Causes Act 1973, s.11). Another marriage given limited recognition is the overseas polygamous marriage celebrated in a place which permits polygamy between people who are not UK residents, domiciliaries or citizens (Lord Collins of Mapesbury *et al.*, 2012). These marriages are not recognised for all legal purposes, but the courts can make orders and provide remedies for the parties (Matrimonial Causes Act 1973, s.47). They are treated and framed as foreign marriages which is why the English courts can cope with them to a limited degree.

Finally, a ceremony may be invisible or non-existent in English law because it 'does not create any kind of marriage, even a void one' (Jackson, 1969, p. 86). Non-marriages or non-qualifying ceremonies are lesser in status than void marriages (Leong, 2000). Whilst void marriages can attract financial remedies like in divorce, a non-marriage cannot. The first key characteristic of non-marriage therefore, is that it is neither fully valid nor recognised for limited purposes. Cases resulting in findings of non-marriage have involved situations such as Islamic Nikah ceremonies being performed in locations that are not licensed for marriage; a couple going through a civil ceremony when they had already celebrated a legally binding marriage; certain cases of forced marriage and other marriages where the courts felt a ceremony should not be recognised for policy reasons (see further Probert, 2013).

A non-marriage that has been celebrated in England and Wales must also not purport or claim to be the type allowed by English law or aim to fall within the scope of the Marriage Act 1949. Probert (2013) states that the concept of non-marriage can be traced from *R v. Bham*[8] where a Muslim imam who had performed an Islamic Nikah ceremony appealed against his conviction for wilfully solemnising a marriage contrary to the Marriage Act 1949, s.75(2)(a). The conviction was quashed, and it was held that 'the provisions of the Act of 1949 [do not] have any relevance or application to a ceremony which is not, and does not purport to be, a marriage of the kind allowed by English domestic law' (*Bham*, [1966], p. 129). Later, this was expanded to '"marriages" according to foreign religions, and to any other ceremonies which make no attempt to be English marriages within the Marriage Acts' (*A-M v. A-M*, [2001], p. 23.[9] See also *Gandhi v. Patel*).[10]

[8][1966] 1 QB 159.
[9][2001] 2 FLR 6.
[10][2002] 1 FLR 603.

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This does not concern overseas ceremonies that are being challenged because the rules of private international law would apply.

Another key development in defining non-marriages resulted from the decision in *Hudson v. Leigh*[11] where a couple celebrated a non-legally binding religious ceremony in South Africa because they later intended to have a civil ceremony in England. The relationship broke down before the civil ceremony and whilst the wife applied for a divorce or alternatively a decree of nullity, the husband applied for a declaration under the Family Law Act 1986 that the South African ceremony was never valid. The judge outlined a much more detailed set of guidelines for deciding when a marriage is non-existent:

> 'Questionable ceremonies should be addressed on a case by case basis, taking account of their various factors and features including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and (d) the reasonable perceptions, understandings and beliefs of those in attendance. In most if not all reasonably foreseeable situations, a review of these and similar considerations should enable a decision to be satisfactorily reached.' (*Hudson*, [2009], p. 1130)

This case concerned an overseas ceremony which meant the 1949 Act did not apply but the more general private international law rules. However, to avoid any later confusion over the status of the parties if they wanted to marry again, the court effectively exercised domestic jurisdiction through the Family Law Act 1986 to decide that the South African ceremony never created the status of marriage between the parties.

The debate around defining non-marriage experienced a resurgence in Nasreen Akhter's cases. In 2018, Akhter who had entered into an Islamic Nikah ceremony in the UK applied for a decree of nullity after eighteen years of marriage. At first instance, the court held that the marriage was void because 'save for the issue of legal validity, this was a marriage and a long one at that' (*Akhter v. Khan*, [2018], p. 598).[12] This was reversed on appeal because limiting the scope of non-marriage to situations where there was clearly no intention to form any marital relationship would 'open up a path which would create very considerable difficulties . . .' (*Her Majesty's Attorney General (Appellant) v. Nasreen Akhter and Mohammed Shabaz Khan (Respondents) and Fatima Mohammed Hussain and Southall Black Sisters (Interveners)* [2020], p. 158).[13] The court accepted that the term non-marriage is pejorative and insulting so the new term 'non-qualifying ceremony' was coined to shift the focus towards the ceremony.

Very recently, the Law Commission (2022) has published its full review of Weddings Law which addresses non-marriage. Despite the reasoning in *Akhter*, the review proposes that the law should be reformed to narrow the scope of a non-qualifying ceremony. This approach limits the application of non-qualifying ceremonies to situations where the preliminaries have not been properly carried out and the officiant is absent; the preliminaries have not been completed and the couple believes the officiant is unauthorised; at least one person has not expressed consent at all or at least one person is expressly consenting to a non-legally binding ceremony. In addition, the suggestion is made to reform the law to provide financial relief to cohabiting couples whilst recognising that couples in religious-only marriages would see themselves as married rather than as cohabitants.

[11][2009] 2 FLR 1129.
[12][2018] EWFC 54.
[13][2020] EWCA Civ 122.

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3 Coloniality and English marriage: a conceptual framework

English law is Christian in origin. There is no separation between the Church of England and the state, so the state ultimately upholds Christian values (Chatterjee, 2010; Rivers, 2012). Legal responses to marriage are heavily influenced by Christian ethics: civil marriage which is supposedly detached from religion follows the template of Anglican marriage (Rivers, 2017). It is therefore unsurprising that the first English legal definition of marriage in *Hyde v. Hyde and Woodmansee*[14] (hereafter *Hyde*) was framed as: '... marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others' (*Hyde*, [1866], p. 130). This definition was more aspirational than authoritative since it excluded the possibility for divorce which was certainly allowed in 1866 (Probert, 2007). However, it indicates the wider attitudes around marriage in English law. The Marriage Act 1949 and the requirements for a legally binding marriage are based on its predecessors from the 1800s that are more explicitly Christian-inspired. English marriage law is therefore structured by Anglican Christian understandings of marriage. Christian marriage is privileged by the law, and this plays out in judicial understandings too.

What does this have to do with non-marriage? It has been argued that non-marriage may be traced back to the *R v. Bham* decision in 1966 (Probert, 2013). However, I contend that non-marriage has been a part of English marriage law for much longer. For example, the Clandestine Marriages Act 1753 gives us a precursor to non-marriage. The 1753 Act set out the formalities for a binding ceremony in English law and was designed to prevent clandestine marriages taking place. Clandestine marriages were Anglican marriages that had taken place in front of an Anglican clergyman but failed to meet all of the requirements of canon law and were considered void (Probert and D'Arcy Brown, 2008). The Act therefore attempted to do away with limited purpose marriages and create an all or nothing approach. Marriages that were not celebrated in front of an Anglican clergyman were not viewed as marriages in the first place: they were non-existent (Probert, 2009; Naqvi, 2023). Here, we have an early example of marriages that were celebrated entirely outside of the legal framework. We can see how English marriage law operated to distinguish between the Anglican Christian norm and all other marriages. This dichotomous approach continues to underpin what marriage is in English law. The factors that shape this binary are the focus of this article.

We find another example in *Hyde* where a man petitioned for the dissolution of his Mormon Christian marriage which had been celebrated overseas in Utah. His divorce petition was denied because there was 'strong doubt whether the union of a man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England' (*Hyde*, [1866], p. 133). The marriage did not count as a marriage to the English court for the awarding of 'remedies, the adjudication, or the relief of the matrimonial law of England' (*Hyde*, [1866], p. 138). The judgment was limited to matrimonial relief but allowed for later cases to deal with legitimacy and succession around such marriages. Part of the reasoning for this concerned the wife's second polygamous marriage, which was permitted by Mormon doctrine, after the petitioner left her. However, the decision was also heavily influenced by the judge's view that 'it is obvious that the matrimonial law of this country is adapted to the Christian marriage' (*Hyde*, [1866], p. 135). Mormonism is a sect of Christianity but of course, the court here means Anglicanism when referring to Christian marriage. The line is drawn between Anglican Christian marriage and all other marriages. If you fall on the wrong side, your marriage does not exist or has limited recognition. The principle remains today: the distinction between a valid marriage and non-existent one turns on how well the ceremony matches Anglican Christian ideals.

The legal environment and culture that non-marriage has been developed in are heavily steeped in coloniality which shapes how the law is applied in this area. Colonialism which involved

[14][1866] LR 1 PD 130.

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colonial powers annexing and taking control over colonised nations has happened in many forms over the centuries but 'none has been as violent or enduring in its radical transformation of the globe as European colonialism' (Mgbeoji, 2006, p. 857). The British empire is a prominent example of European colonialism and the damage that it caused around the world endures today. It is therefore important to think about the ideological effects of colonialism and coloniality which encompasses 'the cultural, political, sexual, spiritual, epistemic, and economic oppression/exploitation of subordinate racialized/ethnic groups by dominant racialized/ethnic groups with or without the existence of colonial administrations' (Grosfoguel, 2007, p. 220). Colonial powers sought to colonise minds and bodies through ideological and racial domination which was undertaken 'in colonial regions *and* Europe' (Stoler, 2010). This emphasis on Europe is important for understanding the operation of coloniality today in English law.

Colonial activities were justified through orientalism which created a false division between the West and everyone else in the "Orient" who were racialised, colonised and minoritised.[15] Orientalism is a discourse that deals with the Orient and authorises views of it (Said, 1978). Through these authorised views, the Orient and those associated with it are marked out by how they differ from the Western standard and are therefore "othered". This othering results in orientalised communities and people being characterised as inferior and in need of control and colonial rule. The domination over minds and bodies was carried out using the law. When a territory was taken over by an empire, that empire's legal order was also imposed on the colonised space and its people. This imperial law told a particular story about the colonised and their inferiority to subjugate them and legitimise colonial administration (Klerman *et al.*, 2011). Without the law, colonisation would not have endured in the colonies. This has led to a legacy of European laws with European colonial values being embedded into legal systems around the world (Kapur, 2019; Naqvi, 2023).

Another important tool for dominating the colonised was religion. It was extremely important to civilise the natives by converting them to the superior Christian way of life. Rivers (2012) argues that English law was directly used to coerce people into Christian practice, and this was replicated in the colonies. Inherent in this correct way of life was the need for the natives to adopt virtuous (Christian) family lives and structures (Grimshaw, 2007). Ideals of marriage and domesticity underpinned the success of imperial governance and were a vital part of colonial culture which was 'constituted in and through the family' (Cleall, Ishiguro and Manktelow, 2013). Imperial practices and ideals of domesticity were therefore used to destabilise families and communities by taking them from their original state and structure to "improve" them (McClintock, 1995). For minoritised communities whether inside or outside of Europe, marriage and the family are mired in this violent context even today. I argue that legal responses to minoritised families and marriages remain influenced by colonial racialising attitudes that create an orientalist hierarchy of marriage which places Christian marriage at the top. The positioning of Christian marriage in England was originally concentrated on clandestine marriages: to "fix" all of the problems with marriage law, the standard Anglican template was introduced. This matched the dominant population's form of marriage in England at the time. However, with time it became an important manifestation of the Christian supremacist narrative that underscored the colonial mission and understandings of marriage throughout the empire. The same panic about clandestine and irregular marriages arose in the colonies amidst the imperial authorities fearing the loss of their Christian supremacist authority over the colonised. English marriage is Christian marriage because most English people were Christian when the law which still shapes today's approach was developed.

[15]By Orient, I mean places that are typically not considered part of the "West" or predominantly white nations with Christian-influenced values and institutions (see Bonnett, 2004). European colonies fall under this but the Orient and processes of othering are contextually specific and multilayered. My intention is not to impose the label or feeling of being othered indiscriminately on all communities stereotypically associated with the Orient but to showcase the deliberate effects of British coloniality and colonial legal thought on communities affected by the category of non-marriage.

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English marriage law is roughly divided into Anglican Christian marriage and all other marriages. This is demonstrated in the way that the routes to a legally binding marriage are constructed in the Marriage Act 1949. There are four routes to celebrating a legally valid religious marriage. First, according to the usages of the Jews; second, according to the usages of the Quaker community or Society of Friends; third, according to the rites and ceremonies of the Church of England or Wales and fourth for all other religions in a form and ceremony that the parties choose. The first three routes have far fewer requirements than the fourth one. For example, Jewish ceremonies only have two requirements: the parties must be Jewish, and the ceremony must be according to the usages of the Jews. For a ceremony that is for all other religions, the steps include: a form and ceremony of the parties' choice; open doors; two witnesses; the prescribed form of words in the ceremony; the presence of an authorised person and it must be held in a registered place of worship. There are far more hoops to jump through if you are not Jewish, Quaker or Anglican when entering into a legally binding marriage in English law. For civil ceremonies, there are two routes where a couple marries in a register office or on approved premises. Again, these routes have more requirements than Jewish, Quaker and Anglican ceremonies.[16]

It is also noteworthy that Jewish and Quaker ceremonies were exempted from the requirements in the Clandestine Marriages Act 1753, but this was because the authorities were not concerned with them or their practitioners. Jewish marriages were a matter for Jewish (read foreign) law whilst Quaker marriages had been described by Parliament as 'pretended' in a 1694 statute (Henriques, 1908; Probert, 2009). The exemption did not state that they were legally valid in English law just that they were exempt. Their legal validity was not confirmed until 1836 (Probert, 2009). This all points towards a hierarchy of legal marriage with Anglican Christian marriages at the top and all other religions and communities at the bottom. Whether they need more steps to achieve legal recognition or are viewed as a matter for foreign law, it is harder for minoritised ceremonies to achieve legal recognition – they are classed as inferior which orientalises them.

Another consequence of this is visible in non-legally binding ceremonies. With more steps for a ceremony if you are not Anglican, Jewish, or Quaker, it is easier to fall foul of the larger number of legal requirements. The concept of non-marriage is disproportionately applicable to minoritised ceremonies as couples marry in ways that fall outside the legal framework. This is especially true since the current laws were formed before many of the migrant communities were established in England and Wales through colonial and postcolonial movement (Mahmud, 1997). A non-marriage is even more flawed than a void marriage. It is a non-starter and does not create a marriage status (Leong, 1995). Jackson discusses how in 'concubinage and the like, no act of the requisite nature [to create a marriage status] exists' (1969, p. 85). Non-marriages are akin to concubinage, they fail to create a marriage status which tells a particular legal story about the ceremony and the parties. One that is orientalist and degrading to them and their marriage celebrations.

There are further problematic connotations attached non-marriage that it is illegal or improper. When a marriage was designated as clandestine or void in the past, there was a sense that it was done secretly and inappropriately. For non-marriages which are even more "flawed", these same negative connotations are apparent. If a void ceremony is 'idle' and does not change the status of the participants, a non-marriage must be even worse than this in English law (*Re Spence, deceased*).[17] This is mirrored in public perceptions of non-qualifying ceremonies. Probert, Akhtar and Blake (2022) observe that at times they needed to reassure participants in their study on this area that a non-legally binding ceremony was not illegal. The fact that some 'felt – or were made to feel – that they had done something wrong' (Probert, Akhtar and Blake, 2022, p. 52) is the clearest expression of the damage that non-marriage can cause. When the law operates

[16]See further: Law Commission (2015) which provides a simple infographic on this area.
[17][1990] Ch 652.

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as part of colonial governance structures to make communities associated with the colonies feel unsafe and insecure, these racialised and orientalised people automatically worry that they have done something wrong. The colonialist law is making people feel this way because it wants them to feel like they do not belong (see further Naqvi, 2021).

The differential treatment that targets these communities through racialising and orientalising processes is further highlighted when we look at how legal responses to void marriages have developed. Historically, when the ecclesiastical courts declared a marriage void the parties had no rights to any remedies (*Bird v. Bell*;[18] Probert, 2020). Void marriages were never intended to attract judicial remedies – they were originally like non-marriages. This changed to first provide for any children of the relationship and later progressed to grant maintenance and alimony to the parties. These developments were aimed at protecting parties from a decree of nullity because the consequences were so drastic (Probert, 2020). Even then, the grave consequences of today's non-marriages were recognised, and lawmakers sought to limit them. It has been argued that void marriages are indistinguishable from non-marriage, but the consequences are different. What has caused this difference? I argue that the distinction is organised using the same colonial logics that separate marriage into Anglican Christian marriages and all other marriages. This gradual attachment of judicial powers to void marriages which are flawed but still attempt to fit within the Marriage Act 1949 and its Western Christian paradigm shows how non-marriages are marked out for not fitting with imperial ideals of domesticity. If it does not fit within the Anglican template, it will not be a marriage – even if the ceremony would be legally recognised elsewhere.[19] Non-marriage is therefore, a manifestation of the orientalist hierarchy of marriages in English law which overwhelmingly affects minoritised couples. Void marriages are also said to have never existed in law, but the end results are different simply because they fit more with colonial ideals.

4 Thematic analysis findings

Non-marriage is a judicial concept developed through common law. The most effective way to understand its development and application is to look at what is being said and done in the courts because judges are active agents who represent mainstream understandings and as a result reproduce orientalist, racialised and Christian discourses (Herman, 2011; Naqvi, 2017). I have analysed over forty case law reports that I sourced on the legal database Westlaw using the keywords 'non-marriage' and 'non-qualifying ceremony'. I read each judgment through a critical postcolonial lens which meant that I paid attention to how the courts described non-marriage as well as the wider context surrounding each case. I recorded any recurring themes or patterns in the reasoning and approaches that displayed the wider context and influences surrounding these judicial perspectives towards non-marriage (Braun and Clarke, 2006). What follows is a discussion of the prominent themes and select examples from the case law that illustrate them. This is not an exhaustive study of non-marriage and there are limitations to what I have done. I could have potentially looked for even earlier cases and looked into archival sources that provided further context around the cases at the times they were heard. This issue would also benefit from empirical research which shares people's stories of non-marriage. So, this does not reveal everything about non-marriage and its effects on minoritised communities in England and Wales. My aim is to contribute to a larger ongoing discussion about what counts as a legally valid ceremony whilst calling for a more contextualised understanding of how the law affects the marginalised. My discussion also supports the case for more detailed empirical explorations into the effects of non-marriage on minoritised communities.

[18](1754) Lee 621; 162 ER 367. Thanks to Rebecca Probert for her guidance on this point.

[19]For example, in *Akhter v. Khan* [2018] although the couple had undergone an Islamic Nikah ceremony in the UK which was not legally binding, they were treated as validly married in the United Arab Emirates where they lived for a number of years.

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5 What is marriage in English law?

Earlier I explained how the courts are generally tasked with deciding if a marriage is valid, recognised for limited purposes, or non-qualifying. There is an added underlying aim for them which is to answer the question of 'What is an English marriage?' When answering this question, the courts operate within the colonial Christian context that permeates the English legal system:

> 'A Mohammedan marriage, using the term "marriage," is something quite different. Ladies taken to wife in the Mohammedan sense do not acquire that status and that position which the sole wife allowed in Christian countries is given and enjoys. The difference between these two positions has been often pointed out.' (*R v. Hammersmith Superintendent Registrar*; *Ex parte Mir-Anwaruddin*, p. 466)[20]

For most of the past millennium, English marriage law has been shaped both by Christianity and by how other marriage practices differ from the European Christian standard. This was reinforced in *Mir-Anwaruddin* where an Indian Muslim law student married English woman Ruby Hudd in a civil ceremony at a Register Office and then divorced her by talaq in the Indian courts. When he tried to marry a second woman a year later in England, questions arose about whether the first marriage had been dissolved. The court held that a marriage celebrated in England in accordance with English law could not be dissolved by the husband pronouncing the talaq because it was only effective for 'Mohammedan' marriages (Savage, 2008). This was because Ruby and any woman married in English law was a 'Christian wife' who enjoys a superior status to wives 'in the Mohammedan sense'. A Christian wife cannot therefore be divorced under 'Mohammedan' laws and procedures. Probert (2021) notes that Christianity is mentioned over fifty times in the judgment as the court stressed the nature of marriage in England. In doing so, the court drew a clear line around marriage in English law. At its core, English marriage is Christian and in this decision any woman marrying under English law, regardless of her beliefs was also viewed as a Christian wife. As Fitzpatrick observes, Christian marriage is:

> 'intended to include many marriages which can be called "Christian" only because they conform to a type which we are apt to regard as peculiar to Christianity ... [it] is [also] intended to exclude marriages, say of a polygamous nature, which some Christian community might, without ceasing to be Christian, think fit to sanction among its members in an out-of-the-way part of the world' (1900, p. 360).

Christian and 'non-Christian' marriages may be celebrated among Christians and non-Christians.[21] This tells us that English marriage is shaped by more than Christian ideals, that it is designed to preserve a particular set of priorities and a hierarchy where those who are English still remain at the top. If we think about Fitzpatrick's description of non-Christian marriages being sanctioned between Christians in an 'out-of-the-way part of the world', we see how western Christian ideals of monogamy can be disposed of somewhere far away. There is an excuse for Christians who enter into non-Christian marriages and may need to engage with polygamy. It is unlikely that the same accommodations for a non-Christian would be made. Mir-Anwaruddin was not classed as a Christian husband despite Ruby being a Christian wife. He was racialised, orientalised and could not rely on his own personal laws to divorce an English Christian wife: it was a non-divorce. Their marriage was English and could only be dissolved by English means. A Christian can enter into a Christian or non-Christian marriage without 'ceasing to be Christian'

[20][1916-17] All ER Rep 464.

[21]The term non-Christian is contentious because it orientalises communities by identifying them as what they are not or "fail to be", but I use it here to highlight how orientalist the division between English (Christian) marriage and all other marriages is.

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so they remain within understandings of English marriage, but a non-Christian will always be an outsider. As colonised others, they cannot be English, only their marriage can if it is performed in the proper English Christian way.

As time went on, the case law has fewer direct references to Christian marriage but that does not mean these influences have disappeared. We see this through the idea that a marriage in English law must bear certain 'hallmarks'. For example:

> 'It seems to me, having considered the facts, that this ceremony that took place in 1993 bore the hallmarks of an ordinary Christian marriage …' (*Gereis v. Yagoub*, p. 858)[22]

In *Gereis*, the Christian ceremony was performed in an unlicensed Coptic Orthodox Church. The couple had been told that the ceremony was not legally binding, and they would need to have another civil ceremony, but they ignored this. When the marriage broke down, the petitioner asked for a decree of nullity whilst the respondent argued that they had been in a non-marriage. The marriage was annulled, and the decision was based on these comments about the ceremony bearing 'the hallmarks of an ordinary Christian marriage'. Here, the value judgement about an English marriage is centred on Christian marriage and whilst the couple had celebrated a minoritised marriage ceremony, the degree of separation from mainstream Anglican ideals was not distant enough to make the marriage non-existent (Probert, 2002; Gaffney-Rhys, 2010). It fell within the boundaries of English marriage even though it never purported to be a marriage within the scope of the Marriage Act 1949. This adds a layer of protection for those in Christian marriages which non-Christian ceremonies can never enjoy. The orientalist division between Christian marriage and all other marriages becomes visible again leaving the non-Christian ceremonies on the outside. The courts have since distanced themselves from this case and the judgment with the decision even being described as 'merciful' (*A-M v. A-M*, [2001], p. 24).[23] However, this idea of marriage bearing certain hallmarks remains in the courts' assessments of non-marriage today. When deciding if a ceremony is non-existent, the judge in *Hudson* included a consideration of 'whether it bore all or enough of the hallmarks of marriage' ([2009], p. 1130). But what are these hallmarks of marriage? These hallmarks the courts are looking for today probably do not differ much from the hallmarks of an ordinary Christian marriage. This hierarchising discourse remains central to English legal understandings of non-existent marriage. Minoritised communities and their marriage practices are still othered – their ceremonies are much less likely to have enough of the hallmarks of a true English marriage, so they are constructed as inferior.

Within this pattern of discourse, there is another concerning marker – that of 'ordinary'. In *Gereis* it was not just that the ceremony had the hallmarks of a Christian marriage but an *ordinary* Christian marriage. This type of language is seen in later cases like that of *Burns v. Burns*:[24]

> 'The wife's evidence and case is that the build-up to the wedding day was in every sense normal and conventional …' (*Burns* [2007]: 816)

> 'Her version happens also to accord with common sense and ordinary human behaviour.' (*Burns* [2007]: 818)

These signifiers of 'normal', 'conventional', 'common sense' and 'ordinary human behaviour' highlight the deeper value judgements being placed on couples' behaviour and practices when deciding if their marriage is valid. In *Burns*, the couple married in a hot air balloon in California but did not obtain the necessary marriage licence until after the ceremony had taken place which

[22][1997] 1 FLR 854.
[23]See also *Chief Adjudication Officer v. Bath* where the judge preferred to express no view on *Gereis*.
[24][2007] EWHC 2492 (Fam).

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meant the marriage was invalid according to local Californian law. As this was an overseas ceremony, the court had more discretion whilst applying private international law rules but ultimately had to decide whether the marriage was void in English law rather than whether the ceremony was valid according to private international law. Whilst this context is important, the attitudes underlying this decision where the English court was effectively exercising domestic jurisdiction for an overseas ceremony remain problematic. It was held that the shortcomings in the formalities were a mere technicality which were enough to render the marriage invalid but nowhere near the category of non-marriage. The judge placed value on the wife's evidence about the wedding planning and bookings being normal and conventional which gives insight into the ways that value judgements can be made about ceremonies according to how well they fit with 'convention'. After the hot air balloon ceremony, the couple returned to England, the wife changed her name, and they had a lavish Church blessing followed by a reception with 'all the hallmarks' of a wedding reception. All of these little details painted the picture of a normal and conventional situation which led to an ordinary ceremony and marriage.

Contrast this with the portrayal of the religious Hindu ceremony celebrated in a London restaurant in *Gandhi*:

> 'I have been shown photographs from which it is clear that the ceremony was carried out in considerable style.' (*Gandhi*, [2002], p. 606)

The Church blessing in *Burns* was lavish and the reception had the hallmarks of a wedding reception whilst the ceremony for *Gandhi* happened in considerable style. However, we see that it is only for *Burns* these details about the surrounding events were helpful for avoiding the categorisation of non-marriage. The ceremonies in these cases were different and there was more of an attempt to enter into a legally binding marriage in *Burns* but I call attention to the latitude given to a ceremony between an English couple who later had a Christian Church blessing. Their behaviour leading up to the ceremony and the events after were all viewed favourably by the court for a simple reason: the *Burns* ceremony and couple fit more closely into the ideal western Christian template. The overt value judgements of their normal, conventional, common-sense situation are racialising and orientalising to those who differ from that standard. Minoritised ceremonies are always less likely to conform to these normal, ordinary, conventional standards of marriage because they are too different and too foreign. The ceremony in *Burns* was overseas but the English parties and their later Church blessing negated the foreign, peculiar nature of the hot air balloon ceremony in California. Minoritised couples and their marriages cannot compare. These markers of ordinary and normal cannot be removed from the context that they have developed in. What is ordinary in English marriage law, is ordinary because of the representation of European and Christian marriage as the ideal. The approach to minoritised marriage practices in English law has long been designed to see them as the exception: the exception to what is ordinary, the exception to what is a true marriage. They have been othered, racialised and cast as foreign based on who is celebrating them and where they come from. The orientalist underpinnings for English marriage are strengthened by the courts' assessments of what is normal, what is common sense and what is ordinary. Those who fail these assessments are abnormal and strange – they and their marriages are less likely to be valid because they cannot meet these colonial standards.

6 Form versus intention – who suffers?

My second thematic argument concerns the courts' emphasis on the form of a marriage ceremony over the parties' intentions when deciding if a marriage is valid at a domestic level. Whilst this focus presents the law as technical and concerned with the formal requirements making it seem

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fair and impartial, this masks the endemic orientalism imposed on minoritised people in judicial decisions. By pretending to be concerned with form of marriage over intentions, the courts pretend that there is nothing political in their approach to non-marriages. But the law's 'merely technical' façade is just a smokescreen to obscure the coloniality of judicial attitudes in this area (Kennedy, 2002; Watt, 2017). Despite there being a number of factors in the *Hudson* checklist mentioned earlier for deciding when a marriage is non-existent, there has been a general pattern in the case law where the form of the ceremony and some attempt at compliance with the Marriage Act 1949 are presented as the priority over the intentions of the parties and people present at the ceremony.[25] This reflects the law's emphasis 'on the external appearance of the marriage' (Probert, 2002, p. 406). It gives the false impression that there is little space for personal views in the courts because they are only interested in the technical facts of how the ceremony looked and how well it complied with the Marriage Act 1949. If the ceremony fits with the 1949 Act, the court is uninterested in looking at the intention. If it does not fit, the court checks if it is 'close enough' to the 1949 Act and suddenly intention starts to matter.

There are two problems with this. First, it supports the orientalist hierarchy which privileges the Anglican Christian ceremony because emphasising the form of ceremony requires an assessment of how well a ceremony matches this ideal. Second, whilst looking at these technical requirements, the courts racialise and 'other' parties to non-marriages by placing more weight on their intentions and character than they want us to believe. In *AAA v. ASH*,[26] a man had registered himself as the father on his child's birth certificate on the basis that he was married to the child's mother. The marriage was an Islamic Nikah ceremony and not binding in English law. It was therefore held that he had not followed the correct procedure to be registered on the birth certificate as the child's father. The father and his behaviour are described as follows:

> 'I have been concerned about the father's evidence. His zeal has on occasions led him to exaggerate or persuade himself incorrectly that events happened when they did not … I entirely accept that the Muslim marriage was the only form of marriage which would have meaning for him. When he thought its significance to him was being questioned, he reacted in an unusually excited manner, asking if he was being called a fornicator. I do not criticise his strong beliefs. But he allowed them to give answers which were not accurate.' (*AAA*, [2009], p. 44)

These judgment excerpts describe the father as passionate and excited because of his 'zeal' but what is really being said here about him? These descriptors are all examples of coded language that hide racial stereotyping (Bush, 2011). These terms imply the father is emotional, irrational, and unreasonable due to his Islamic beliefs. His reaction was 'unusually excited', and he exaggerates. He persuaded himself that 'events happened when they did not'. This portrayal of the father as unreliable and emotion-driven has a long history in colonial portrayals of racialised people. Colonised people were not intellectually sound or capable of rational thought, they needed to be controlled and tamed because the administration and institutions cannot engage with them as people. This language, these descriptions of the father are dehumanising (Fanon, 2008). They reduce him to being unreliable, dishonest, and delusional. He and his beliefs are not being criticised and yet his beliefs are still the root cause of the problem. Islam is the problem – the othered man, his othered faith and the marriage he believes in are the issue. The examination of the marriage provides the court with a greater opportunity to scrutinise this Muslim man and his faith before declaring his relationship non-existent. Non-marriage is therefore used as a racialising

[25]For example, *Dukali v. Lamrani (Attorney-General Intervening)* [2012] EWHC 1748 (Fam); *El Gamal v. Al Maktoum* [2012] 2 FLR 387; *Sharbatly v. Shagroon* [2012] EWCA Civ 1507. See further Barton and Probert (2018) and Cummings (2020).

[26][2009] EWHC 636 (Fam).

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and orientalising tool – it allows the courts to judge not only the ceremony but the parties and their beliefs.

In a more recent example, we see this description of the minoritised parties to a Nikah ceremony:

> 'Although a traditional Muslim and naïve in some respects she was not fundamentalist. I think she was quite meek. The husband in contrast would be dominant. Although intelligent and university educated there is still a strong streak of traditionalism in the wife's attitude to roles in marriage.' (*Akhter*, [2018], p. 596)

Cummings (2020) notes that the description of the wife falls into harmful and essentialist stereotypes of Muslim women that depict them as in need of delivery. He further argues that the Court of Appeal tends towards neutrality but then fails to examine the underlying cultural assumptions that have developed marriage law. However, there is no neutrality here and the certainty with which the judge pronounces these views of the husband and wife are an example of 'authorising views' of the 'other' (Said, 1978). Further, the descriptions of both the wife and the husband are an overt example of the colonial saviour narrative where a brown woman needs to be saved from a brown man and only the white colonial judge and court can do this (Spivak, 1999). This is another facet to the colonial civilising mission where colonial encounters happened because it was good for the colonised people – it improved their lives and ways of living which included their marriage practices. It brought them from their backwards traditional ways into the civilised present. The wife is in a position to be saved because 'she was not fundamentalist' and was 'intelligent and university educated.' This represents the model minority trope of minoritised people who have successfully 'transitioned' into the colonial society. The trope is used to drive a wedge between the right kind of minoritised person and those who have not managed the same transition (Wing, 2007). The wife is the right kind of brown woman – not a threat but a victim. Moreover, her intelligence and education mean she is the right kind of victim – one who has intellect. She is worth saving because she is traditional but not fundamentalist.

Her husband by contrast 'would be dominant'. The conditional tense shows us that the judge is assuming what kind of brown man the husband is. The orientalist assumption of his dominance is imposed upon him to fit with the colonial saviour narrative: to exist in opposition to the wife's meek and traditional nature. As a result of the judge's orientalist approach to the parties, the wife was 'rewarded' with a decree of nullity rather than non-marriage. This case may have been seen as positive with the judge taking a holistic view of the law and including human rights but at what cost? The same problematic, regressive and colonialist views underpin the decision, leaving minoritised couples and their marriages at the mercy of these racialising and orientalising discourses. The idea that the courts focus on the technical, factual formalities of the ceremony and pay less attention to the intentions of the parties may seem true, but judges include personal, racist views in their decisions. The category of non-marriage provides an opening for the judge to shape legal responses to this marriage, the parties, and their religious background according to these problematic attitudes. Judges are agents who are actively reproducing orientalist stereotypes in the courts based on their own thoughts and feelings (Herman, 2011). Stereotypes that belittle and dehumanise minoritised communities. It is impossible to separate non-marriage out from the racist and othering processes that formed its existence in the first place.

The broader orientalising of communities is visible in another recent case:

> 'Furthermore, I suspect that most passengers on the upper deck of a Birmingham bus, whether or not they are of Bangladeshi or Pakistani heritage, would regard the appellant as a "lawful" (rather than a polygamous) widow.' (*NA v. Secretary of State for Work and Pensions*, p. 6343)[27]

[27][2019] 1 WLR 6321.

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A man married for the second time in Pakistan in a religious ceremony before obtaining a divorce decree absolute for his first marriage in the UK. His first wife passed away three years after this second ceremony. The second wife was his religious wife for eight years and his only living wife for five years before the husband passed away. The Secretary of State rejected the second wife's claims for bereavement payment and widowed parent's allowance because her marriage was polygamous at its inception and invalid in English law. The question for the court was whether the surviving partner of a religious marriage recognised in Pakistan could claim these benefits. It was held that since the marriage was valid in Pakistan and Islamic law, it was not good enough to say that the widow 'had never been married in the eyes of the law of England and Wales' (*NA*, [2019], p. 6340).[28] The ceremony did not lead to a non-marriage. Again, we see the desired outcome for this wife using the more flexible private international law rules, but the judicial reasoning is underpinned by harmful orientalist assumptions about the marriage.

The reference to the 'upper deck of a Birmingham bus' with Bangladeshi or Pakistani people shares stereotypes about the communities in Birmingham and their heritage. A story is still being told about the minoritised Bangladeshi and Pakistani communities in the UK – that they are present in Birmingham, that they travel on the bus. This comment does not add to the judgment, yet it is included presenting the judge's view of Birmingham and these communities along with the mode of transport that they are stereotypically considered as using. These remarks may refer to the reasonable person test which historically asked what a man on the Clapham omnibus would consider reasonable. However, as explained in *Healthcare at Home Limited v. The Common Services Agency*[29] the behaviour of the reasonable man is determined by applying a legal standard. The test is a standard that the court defines and then applies and so it follows that even if the test is 'tailored' to the facts of the case, it is still the court's understanding of the reasonable person that decides what is reasonable which can be bound up in stereotypes.

This is then followed by the contrast between a 'lawful' and 'polygamous' wife which provides insight into broader views of minoritised marriage forms like polygamy. It is important to clarify here that polygamy is not unlawful or illegal, it is simply not legally binding when celebrated in England and Wales.[30] It is a form of non-marriage. The emphasis on lawful marriage versus polygamy creates an orientalist division which is inaccurate and spreads fear amongst minoritised communities. As mentioned earlier, people may be afraid that their non legally binding ceremonies or non-marriages are 'illegal', and this type of judicial discourse does nothing to help (see Probert, Akhtar and Blake, 2022). By failing to match the Anglican template communities are made to feel they are engaging in criminal behaviour which is untrue and orientalist. Again, the thoughts and feelings of the judge come to the fore: the form of the ceremony may be prioritised in non-marriage cases but that does not mean intentions, thoughts and feelings, especially those of the judges are insignificant. The category of non-marriage and its association with illegality and unlawfulness are underpinned by racist and colonialist stereotypes. It is a legal category which degrades vulnerable and marginalised communities based on the ways they celebrate their relationships and build their families and communities. Representations of the law and the courts as technical and neutral are dangerous because they downplay the harmful orientalist and racist stereotypes being propagated at an institutional level. They do not just affect the couples in these relationships but have wider effects on communities and can make them feel vulnerable, worried that their marriage practices are illegal and liable for punishment.

[28]The appeal against this decision was later successful. See *Akhtar v Secretary of State for Work and Pensions* [2021] EWCA Civ 1353.

[29][2014] UKSC 49.

[30]This is not to be confused with the criminal offence of bigamy which requires a person to enter into what would be multiple legally binding ceremonies in English law. It is rarely enforced as a criminal offence today (see Offences Against the Persons Act 1861, s.57; Naqvi, 2023). This is unlikely to be the kind of situation that minoritised communities engage with – they usually involve one legally binding ceremony and subsequent non legally binding ones.

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7 From play-acting to forced marriage

I finally argue that the designation of minoritised marriages as non-marriages when the concept is simultaneously being applied to play-acting, sham and forced marriages is orientalising and demeaning. Throughout the case law, there are examples of non-marriages provided by judges to help us understand what this type of ceremony entails. The racist hierarchy that shapes the legal approach to marriage ceremonies constructs certain fake forms of marriage as equivalent to minoritised practices that do not fit with the ideal Anglican template. These examples include ceremonies performed in a play or soap opera and promises exchanged between children (see for example: *Gereis*, [1997]; *A-M*, [2001]). Judges specify that these are 'extreme' examples, but this obscures the starting point of non-marriage: that it applies to ceremonies that are for pretend purposes. As Probert argues '. . . nobody could think that a play-marriage could constitute a valid marriage' (2002, p. 406). In another more detailed example:

> 'It is inherently difficult to come up with examples (of a questionable ceremony, ritual or event) which do not appear fanciful; take a nervous and eccentric couple who wished to have a full dress rehearsal of their wedding ceremony, so as to be sure that everything would go alright on the day. Assume that the vicar was present and that he used the full wording of the marriage service.' (*Hudson*, [2009], p. 1147)

Play-acted marriages are the most extreme end of the spectrum for defining non-marriage but even something less 'fanciful' is positioned as abnormal. Non-marriage encompasses extreme, abnormal situations that only nervous and eccentric couples engage in. This othering discourse marks the couple out as different and strange with their behaviour – they are othered by the judge and this is because of their nature and personalities as a couple that lead to them acting in ways which lead to a non-marriage. In this passage, we also see that the rehearsal is one that involves a vicar and marriage service. The ceremony being practised is a Christian one which shows us how a less fanciful form of non-marriage is viewed by the courts. Here, a dress rehearsal or play-acted version of a legally binding ceremony would be non-existent, but can we compare this to a minoritised marriage ceremony that is definitely not an elaborate dress rehearsal? Should they be in the same category?

The court is telling us that the Christian play-acted ceremony is the equivalent of a full minoritised ceremony – a form which may have been celebrated for even longer than Christianity's existence. The orientalist hierarchy of marriages and how they are solemnised comes into play again placing Christian marriage at the top. These other(ed) marriages can only reach the level of a practice, pretend Christian marriage. We should forget them being recognised as valid and binding ceremonies in their original form. Even though the courts emphasise that these are extreme examples, this does not detract from the fact that minoritised ceremonies are still being dismissed and associated with fake, pretend rehearsals. The courts have been known to also include 'alternative marriage rites' and 'self-devised rituals' in understandings of non-marriage (*A-M*, [2001], p. 23). This may seem like another step away from the extreme playacting end of the non-marriage spectrum, but the opposite is true. These self-devised and alternative rites can include handfasting which was historically considered a part of pagan custom, but this never existed (Probert, 2009). It therefore includes rituals that have never created a legally binding marriage in any jurisdiction (Le Grice, 2013). This subcategory of non-marriage relates to ceremonies which are viewed as *alternatives* to marriage ceremonies and are implicitly intended to create an *alternative* relationship or partnership to that of a married couple. To include minoritised marriage ceremonies alongside soap opera marriages and alternatives to marriage when they are recognised in law around the world and have been practised by communities throughout history demeans them and the people who practise them. Again, they are othered: their ceremonies and relationships are just not good enough for English law and never will be.

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Another trend that has appeared in the courts shows us where non-marriage is intertwined with other racialised concepts or forms of marriage:

> 'There are also, in my judgment, compelling reasons of public policy why sham "marriages" are declared non-marriages.' (*A Local Authority v. SY*, para. 50)[31]

In this case, a young white woman entered into a Muslim marriage with a Pakistani man who then tried to rely on the marriage to remain in the country. Their Nikah ceremony was declared a non-marriage and the husband could not rely on it to make a case for stay in the UK. The Immigration and Asylum Act 1999 defined a sham marriage as one entered into 'for the purpose of avoiding UK immigration law' (see also Wemyss, Yuval-Davis and Cassidy, 2018). It is therefore particularly associated with racialised immigrant communities. Like with play acting, elaborate dress rehearsals and self-devised rituals, to describe sham marriages as non-existent seems like a reasonable approach. These marriages are not intended to be real; they are not recognised the world over and should not be seen as marriages in the first place. However, what happens to those marriages which do not fall under these subcategories yet are still thrown into the same boat? These ceremonies are disproportionately likely to be minoritised or associated with racialised minorities in the UK. In this way, a particular narrative is being spread about racialised and minoritised marriage practices that fail to fit within the Anglican template. A narrative about them not actually leading to valid marriages which affects not only the couple but their communities with fears that they are acting illegally and that they may even be accused of engaging in sham marriages. It is not enough to present sham marriage as another 'extreme' example, the category of non-marriage is still loaded with misunderstanding and negative meaning even for the "non-extreme" examples.

This fearmongering is also borne out by the use of non-marriage to "save" minoritised individuals from forced marriage when it is too late to apply for a decree of nullity:

> 'The plaintiff in this case does not seek a declaration that the marriage was void at its inception, rather, she seeks a declaration that there was never a marriage capable of recognition in England and Wales.' (*B v. I (Forced Marriage)*, p. 1725)[32]

In this case, a woman was unable to bring proceedings to have her forced marriage annulled within the three-year statutory period. She therefore effectively applied for a declaration of non-marriage which was granted. As a result, forced marriage was included in understandings of non-marriage and the same approach has been deployed in later cases (see e.g. *SH v. NB*).[33] Forced marriage is highly racialised and associated with minoritised communities (Shariff, 2012) and the courts feed into this:

> 'However, despite this I am satisfied that the wife was placed under a great deal of physical and emotional pressure to withdraw this case. That sort of pressure is wholly unacceptable in a civilised society, given that courts are set up to deal fairly with all those who appear before them ... Varying cultures have different perceptions and traditions. All are worthy of equal respect and I start from that position. I make it clear at the outset of this judgment that I pay full regard to Pakistani traditions and cultural expectations. They are different from those in Western culture but that does not make them any less worthy.' (*Re P (Forced Marriage)*, p. 2062)[34]

[31][2013] EWHC 3485 COP.
[32][2008] EWCA Civ 248, [2010] 1 FLR 1721.
[33][2009] EWHC 3274 (Fam), [2010] 1 FLR 1927.
[34][2010] EWHC 3467 (Fam), [2011] 1 FLR 2060.

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In this decision, the judge attempts to temper their reasoning with an endorsement of other cultures but there is no escape from that colonial standard of civility. The pressure placed on the wife to marry was 'wholly unacceptable in a civilised society'. It is therefore particularly unacceptable to permit forced marriage in the civilised West. In English law it is even criminalised when the ceremony is not legally binding (s.121(4) Antisocial Behaviour, Crime and Policing Act 2014; Probert and Saleem, 2018). It goes without saying that forced marriage is wrong under all circumstances around the world. However, there is no missing the notion that forced marriage is uncivilised, foreign and something that other cultures propagate. Those that are different from Western culture are insulted as being uncivilised but then later placated by the judge because they are worthy of respect. Forced marriages and by extension non-marriages are unacceptable in a civilised society. These attitudes are further worrying because they promote the colonial saviour narrative again (Spivak, 1999). The courts use these declarations of non-marriage to 'save' these (mostly women) applicants from their forced marriages and the pressure they are placed under. They are therefore racialised women saved from their racialised men and communities by the white courts. There are already remedies in place for those forced into marriage and the very recent case of *NB v. MI (Capacity to Contract Marriage)*[35] addresses this by clarifying that marriages for which nullity decrees are time-barred can still be terminated by divorce. A fuller discussion of this option and the annulment of forced marriages is beyond the scope of this article, but the main point about the use of non-marriage as this colonial saviour device is important to include here. Non-marriage is not only racialising but is racialised itself by association with these other racialised categories of marriage. The ways it is used in the courts to demean the minoritised marriage practices it is disproportionately associated with are orientalising and harmful to minoritised communities.

8 Concluding thoughts

Non-marriage has existed in various forms in English law for centuries as a way to differentiate the idealised Anglican Christian form of marriage from all others. This underpins legal responses to minoritised communities and their marriage practices. I started with an introduction to the background which displays how complicated and unnerving the current legal framework is. The law requires couples to fulfil certain statutory formalities, but it is not even clear which formalities lead to a binding marriage. Amidst this confusion, there is a tendency to forget the legacy on which English matrimonial law is built: one which privileges Anglican Christianity and all of the colonial baggage attached to it. Under the influence of coloniality, marriage law creates an orientalist hierarchy which leaves minoritised marriage practices in an inferior position and much less likely to be seen as marriages in the first place. From my analysis of the cases on non-marriage, I made three thematic arguments. First, that the case law in this area has developed to answer the question "What is an English marriage?" The answer to this is generally that a marriage fits with or has the hallmarks of an Anglican Christian marriage ceremony. Even with the gradual distancing away from the explicit discourses which highlight the Christian nature of a ceremony, the courts remain committed to an ideal template which many minoritised practices fall outside of. Second, the emphasis on the technical form of a ceremony compared to the intentions (or thoughts and feelings) of the parties and those present obscures the presence of the judges' own thoughts, views and feelings which are racist and orientalist in the judgments. Finally, non-marriage is applied across a spectrum ranging from playacting to forced marriages. These proposed situations where non-marriage is relevant all relate to a ceremony and relationship being pretend or unacceptable in some way. To include legitimate minoritised marriage practices which have been practised for millennia in this category of marriage is orientalist and deeply insulting to the communities that practise them.

[35][2021] EWHC 224 Fam.

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The Law Commission's recent suggestions to narrow the scope of non-qualifying ceremonies seem sensible with the focus on the non-qualifying ceremony rather than marriage, but they do little to address the endemic racism and orientalism in the concept of non-marriage. The damage that non-marriage has done to erode the position of minoritised marriage practices remains unrecognised. The limiting of its application to a flaw in the formal requirements around preliminaries and capacity does not tackle the harmful stereotypes, discourses, and tropes that non-marriage has been used to perpetuate. The question that has always been asked in this area is what is an English marriage? Until the courts move away from that thinking and the colonial priorities that this entails, we cannot move forwards with a nuanced understanding of the direction that the legal framework needs to take. We should be asking how we can move forward from these harmful underpinnings to the law and take it from there.

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