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To ban or not to ban: lessons for India from America's endeavor to proscribe polygamy

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Abstract Both the United States [U.S.] and India are home to communities that practice polygamy. Given this commonality and the fact that India has often been inspired by U.S. precedent on various matters of law, it is not surprising that flagship Indian cases on polygamy are influenced by U.S. polygamy law cases. However, it will be shown that this reliance on U.S. case law is confined to archaic 19th century cases. These cases, which strictly proscribe polygamy, don't reflect the changes of the last 60 years in favor of non-enforcement of the polygamy ban by American law enforcement officials at the state and Federal level. They are also unreflective of a recent judicial trend in the U.S. that (a) indicates a shift away from imposition of majoritarian values upon the population and (b) firmly rejects the 'public harm' justification of polygamy proscription. Such a justification infused the writings of the 19th century U.S. Supreme Court decisions and subsequently found expression in Indian judicial pronouncements. The paper concludes by examining the relevance of the U.S. move away from its ban on polygamy to the ongoing discussion in India over whether to ban polygamy for Muslims.

Keywords Polygamy · Ban · Public harm

1 Introduction

The Supreme Court of India (SCI) in a landmark judgment on polygamy stated that:

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> [i]t has been judicially acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers.[1]

It is not out of coincidence that the SCI mentioned the United States (U.S.) in the context of a judgment of polygamy. Both India and the USA have long histories of dealing with minority religions that practice polygamy.[2] In both countries, similar arguments have been used to justify a ban on polygamy. Indeed, the arguments advanced in the U.S. in the nineteenth century form the basis of many pro-ban arguments in India today. Primarily, these arguments revolve around the "police power" of the state to regulate the freedom of religion in the public interest.

The genealogy of the "police power" theory can be traced back to the landmark U.S. Supreme Court (SC) judgment of *Reynolds v United States,*[3] delivered in 1878. This case concerned the constitutionality of legislation banning the practice of polygamy or plural marriage engaged in by members of the Church of Latter Day Saints (commonly known as Mormons). While recognizing the existence of a Free Exercise Clause[4] that guaranteed freedom of religion the U.S. SC declined to extend such constitutional protection to polygamy. It asserted that constitutional protection could not be extended to practices such as polygamy, which are inherently harmful to society.[5] Thus, the justification for upholding the ban on polygamy[6] was that the state enjoyed an inherent power to shield society from harmful religious practices.

The U.S., contrary to popular perception, has actually moved away from its ban on polygamy. This is not a well-known development as evidenced by the fact that Indian courts continue to rely on the antiquated U.S. view of polygamy as barbaric and harmful. This paper will detail the Indian borrowing of nineteenth-century U.S. jurisprudence on polygamy, explain the shift in the U.S. away from this old perspective and will also deal with the implications of this shift for India.

In explaining how the Indian judiciary came to adopt the harm framework of the U.S. SC to characterize polygamy, Part 2 will discuss several key judgments on polygamy delivered in the U.S. and India. Primarily, it will detail how the framework of harm established by Reynolds became part of Indian court decisions on polygamy. Part 3 will detail the evolving perspectives of U.S. law enforcement officials on the question of enforcing the polygamy ban. It will also detail the U.S. judiciary's turn away from the harm theory originating in Reynolds and comment on the general loosening of the grip of social mores on constitutional jurisprudence.

[1] Sarla Mudgal, President, Kalyani and Others v Union of India and Others A.I.R. 1995 S.C. 1531.

[2] Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. COLO. L. REV. 963, 964 (2011–2012).

[3] Reynolds v United States 98 U.S. 145 [1878].

[4] The First Amendment to the U.S. Constitution which contains the Free Exercise Clause provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…".

[5] *Id.*

[6] Subsequent case law in the nineteenth century ratified the theory of harm articulated in *Reynolds*. This body of case law will be referred to in this paper as "nineteenth-century U.S. jurisprudence."

Part 4 will consider the lessons on offer for India about the dangers inherent in instituting a ban on polygamy.

2 How India came to adopt nineteenth-century U.S. jurisprudence on polygamy

Polygamy has traditionally been sanctioned by the personal laws of both the majority Hindu and the minority Muslim community of India.[7] Beginning in the late 1930s, shortly before independence, initiatives were undertaken to reform the personal laws of religious communities.[8] One major plank of reform concerned the abolition of polygamy.

It is in this context that the question of polygamy came before the courts of India. Having abolished polygamy almost a century before, the jurisprudence of the U.S. became a significant point of reference. Indeed, it is quite common for U.S. legal traditions to serve as a template for India to draw upon. For instance, the framers of the Indian constitution drew upon various aspects of the U.S. constitution in the course of the drafting process. Moreover, U.S. case law is routinely cited in Indian judgments, indicating the value of the U.S. legal tradition as a model for Indian law. Part of the reason for this affinity has to do with historical similarity as both India and the U.S. are democratic republics that were once British colonies. Both countries also inherited the common law system from their erstwhile colonizer.[9]

It is not surprising that the U.S. justification for proscription of polygamy has been utilized by Indian judges. What is surprising is the fact that the U.S. cases relied on are old nineteenth-century cases which espouse antediluvian justifications for a ban on polygamy. These justifications are not based on gender justice or equal rights. In fact, they are based on a celebration of differences rather than similarities—differences between civilizations. U.S. courts posit that polygamy cannot be countenanced in the U.S. because of its association with the despotic civilizations of Africa and Asia. They contend that allowing such a practice in the U.S. will convert American system of government into a despotic system of government like those prevailing in Africa and Asia. Hence to protect the superior American system of government, polygamy must be banned.[10] Through the following examples from Indian case law, this paper aims to demonstrate the reliance on such nineteenth-century U.S. court decisions.

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[7] *See* Ruma Pal, *Religious Minorities and the Law*, *in* RELIGION AND PERSONAL LAW IN SECULAR INDIA 28 (Gerald James Larson ed., 2001). *See also* Choudhury, *supra* note 2, at 972–74.

[8] ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY 79–80 (1992).

[9] Choudhury, *supra* note 2, at 965.

[10] Brown v Buhman 947 F.Supp.2d 1170, 1186–1188 (D. Utah 2013).

2.1 State of Bombay v. Narasu Appa Mali

This case involved a challenge to the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 which criminalized polygamy for Hindus. In upholding the ban on polygamy for Hindus, the Bombay High Court (HC) made use of nineteenth-century U.S. precedent, specifically *Reynolds v United States*[11] and *Davis v. Beason*.[12]

Reynolds was the first U.S. case to introduce a distinction between religious beliefs and practices. The *Narasu* court is acutely aware of the U.S. view on the difference between belief and practice. While it does not cite *Reynolds*, it clearly relies on the distinctions drawn by the latter between belief and practice. About this distinction, *Reynolds* states: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[13] Which practices? *Narasu* states: "[n]ow a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief."[14] Which practices can be interfered with? Those which are "inimical to the peace, good order, and morals of society"[15] says *Narasu*, citing *Davis*. This is the "police power" of the state to prevent the spread of harmful practices.

Reynolds is clear on why polygamy runs afoul of peace: It leads to despotism. "Polygamy has always been odious"[16] says *Reynolds*, because "…it fetters the people in stationary despotism."[17] Incidentally there are some societies which Reynolds identifies as despotic: the societies of Asia and Africa, where polygamy flourished. Therefore, the reason why polygamy must be kept at bay is because it is a harbinger of despotism. The conclusion of *Reynolds* and *Davis* is that the state has the power to ban polygamy because (a) it possesses the inherent 'police power' to ban harmful practices and (b) polygamy is harmful to society. Both these cases are relied upon by *Narasu* to illustrate the capacity of the state to intervene in the religious practice of marriage. To that extent, it can be said that these U.S. cases provide support for the relevance of police power to regulation of marriage. However, there is no evidence beyond mere assertions provided in the aforementioned U.S. cases to establish the harm justifying invocation of police powers. This lack of evidence will be heavily criticized in a later U.S. case.

Narasu nonetheless relies upon the police powers argument to uphold the decision of the state legislature to ban polygamy—the state, it says, has the right to institute social reform measures that dilute religious freedom.[18] However, as will be

[11] Davis v Beason is cited but this case comes after Reynolds and most of the citations from *Davis* are themselves taken from *Reynolds*. In addition, as will be shown, many aspects of the *Reynolds* case are used by *Narasu* without corresponding citation.

[12] Davis v Beason 133 U.S. 333.

[13] Reynolds v United States 98 U.S. 145, 166 [1879].

[14] The State of Bombay v Narasu Appa Mali A.I.R. 1952 Bom. 84, ¶ 5.

[15] *Id.*

[16] Reynolds*, supra* note 13, at 164.

[17] *Id.*, at 166.

[18] Narasu*, supra* note 14, at ¶ 7.

elaborated upon in a later part of this paper the justification for invocation of police power in the U.S. cases which it relies upon is marked by racist notions about people of color.[19] It may be contended that there were other justifications presented in *Narasu* for the ban on polygamy. Indeed, *Narasu* does offer the additional justification that polygamy is not essential to Hinduism. However, it adds that even if it were essential to Hinduism, the police powers of the state would constitute sufficient grounds to ban it.[20]

2.2 Ram Prasad Seth v. State of Uttar Pradesh

This case deals with a constitutional challenge to the prohibition of polygamy in section 5 (i) of The Hindu Marriage Act, 1955. The Allahabad HC relies heavily on the police powers argument articulated in *Narasu* to arrive at its conclusion that the ban on polygamy does not violate Article 25 of the Indian constitution.[21] In this way, it follows the line of reasoning laid out in *Narasu*, which as discussed above, borrows from the reasoning of *Reynolds* and *Davis*.

The similarity to *Narasu* extends further. The HC also relies on the additional justification for upholding the ban mentioned in *Narasu* that polygamy is not essential to Hinduism. Moreover, it retains *Narasu's* conclusion that even if it were essential to Hinduism, the police powers of the state would constitute sufficient grounds to ban it.[22]

2.3 Christian Medical College Hospital Employees Union and another v Christian Medical College Vellore Association and another

This is not a case about polygamy but it is included here because the SCI cites the key U.S. polygamy case of *Reynolds*. The goal of the SC in citing *Reynolds* is that it broke new ground when it came to recognizing the state's police powers to interfere with fundamental rights. As mentioned during the discussion of *Narasu*, *Reynolds* was the first U.S. case to introduce a distinction between religious beliefs and practices and sanction proscription of odious religious practices.

The question that arose before the SCI in this case was: does the state have the right to interfere with the fundamental right enshrined in Article 30 of the Constitution of India which on its face does not admit of any reasonable restrictions or provisos? Once again, the SCI looks to the American tradition of reading restrictions into the "fundamental rights in the…Bill of Rights."[23] This shows the durability of the American impact on Indian jurisprudence in the realm of provisos to fundamental rights. The SCI concludes on the basis of U.S. precedent that fundamental rights must be tempered "in the public interest."[24] This case quotes

[19] Brown, *supra* note 10, at 1186–1188.

[20] Narasu, *supra* note 14, at ¶ 6, 7.

[21] Ram Prasad v State of Uttar Pradesh A.I.R. 1957 All. 411, at ¶ 7.

[22] *Id.*

[23] VII CONSTITUENT ASSEMBLY DEBATES, 40–41.

[24] Christian Medical College Hospital Employees Union and Another v Christian Medical College Vellore Association and Another 1988 A.I.R. 37.

Reynolds in support of its conclusion, thereby reaffirming the American provenance of the idea that religious freedom must be balanced with societal well-being. However, two observations must be made: One, the SC is relying explicitly on a case which holds that polygamy promotes despotic government and cites to the part of the case which makes this point.[25] Two, the *Christian* case introduces into Indian case law the comparison made by Reynolds between polygamy, sati and human sacrifice. Quoting *Reynolds*, *Christian* states:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband; would it be beyond the power of the civil government to prevent her carrying her belief into practice?[26]

This is another disturbing feature of the SC's reliance on *Reynolds*—that it would countenance and endorse a comparison of polygamy to sati and human sacrifice in a judgment that makes no attempt to explain the connection between them. Why should a ban on sati and human sacrifice justify a ban on polygamy? In the case of sati and human sacrifice, people die. That's the harm caused by them and the reason for banning them. But *Reynolds* provides no explanation for why two practices that kill people justify banning a practice connected with marriage. The *Reynolds* decision itself stresses that it is a case having to do with marriage—it justifies banning polygamy on the ground that this form of marriage will have a harmful effect on society by plunging it into despotism—as described above, this conclusion is itself without any basis. Making matters worse is another unsubstantiated assertion that polygamy is in the same league as sati and human sacrifice.

2.4 Sarla Mudgal v Union of India

In this case, the SC lamented that the existence of multiple personal laws invited abuse and manipulation of the legal system. Consequently, the SC called upon the government to close the loophole which enabled Hindus to practice polygamy under cover of conversion to Islam. This polygamy case also reflects the view articulated in Reynolds and other nineteenth-century U.S. case law that polygamy is a barbaric practice comparable to human sacrifice and sati.[27] When we see Indian courts speaking of human sacrifice and sati in the context of polygamy, we see a direct importation of the cultural biases held by U.S. judges toward polygamy.

Relying on *Reynolds*, *Sarla Mudgal* says:

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[25] *Id.*

[26] *Id.*

[27] The SC sought to justify its ability to proscribe polygamy by drawing a parallel to its ability to proscribe sati and human sacrifice in the face of religious objections.

> It has been judicially acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers. It can be superseded by the State just as it can prohibit human sacrifice or the practice of "Suttee" in the interest of public order.[28]

The importation of cultural biases becomes more evident when one considers that the historical experience of polygamy in India is far removed from that of the U.S. Polygamy. It was legal during British rule and sanctioned by the religious traditions of both majority Hindus and minority Muslims for centuries altogether. Before polygamy cases in independent India came to bear the stamp of U.S. jurisprudence, the judicial record betrayed little trace of anti-polygamy rhetoric. Clearly the British did not see sati and polygamy in the same light—they banned the former while retaining the latter.

2.5 Javed and others v State of Haryana and others

This case concerns sections 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994. These provisions "disqualif[y] a person having more than two living children from holding…offices in Panchayats."[29] The question placed before the SC was whether this restriction violated Article 25 of the Indian constitution which guarantees religious liberty.[30] Based in part on an analysis of prior precedent, which themselves rely on *Reynolds*, the SC found that no violation of Article 25 resulted from the impugned provisions of the Haryana Panchayati Raj Act, 1994.

Here again we see an affirmative reliance on *Sarla Mudgal*, specifically the part that borrows from the Reynolds judgment the extremely disturbing comparison of sati and human sacrifice to polygamy.[31] Once again, we see a reliance on *Narasu* which relied on *Reynolds* to assert a distinction between belief and practice.[32]

Similarly, SC relied on *Narasu* which relied on *Reynolds* to justify invocation of police powers to ban polygamy without offering any evidence to substantiate this claim. Therefore, once again we see an endorsement of the view of *Reynolds* that polygamy causes despotism without any evidence to support the claim.[33]

2.6 Khursheed Ahmad Khan v State of Uttar Pradesh and others

This polygamy case concerns a challenge to a government rule issued by the state of Uttar Pradesh (UP). Specifically, Rule 29 (1) of the UP Government Servant Conduct Rules prevents government employees from contracting polygamous marriages. An aggrieved government employee dismissed for violating this rule

[28] Sarla Mudgal, *supra* note 1.

[29] Javed and Others v State of Haryana A.I.R. 2003 S.C. 3057.

[30] Several other constitutional provisions were considered by the SC in this case but for the purpose of this paper the relevant provision was Article 25 dealing with religious freedom.

[31] Javed, *supra* note 29.

[32] *Id.*

[33] *Id.*

challenged its constitutionality. The SC upheld the rule, finding no violation of the constitutional right to religion embedded in Article 25 of the constitution. The Court justified the exclusion of Article 25 protection to a practice such as polygamy because it was "…counter to public order, health or morality."[34]

Narasu is once again heavily cited in this case and serves as a template for the SC as it has in many of the cases described above. We can see therefore the durability of the practice inaugurated decades ago in *Narasu* and supplemented by subsequent case law wherein the police powers of the state are invoked to justify proscription of polygamy. The idea that police powers should be used to justify proscription of polygamy comes from late nineteenth-century U.S. case law. That is why polygamy is compared to human sacrifice and sati—it is considered to be as injurious to peace, public order, etc. Thus, the above examples amply elucidate the Indian judiciary's generous use of nineteenth-century U.S. SC precedent on polygamy. However, as will be shown below, the U.S. judiciary has in more recent times rejected the comparison of polygamy to practices like sati and human sacrifice which justify invocation of a state's police power.[35]

Moreover, India is not only myopic about which U.S. judgments it employs but also about the nature of the U.S. experience with polygamy. The ban on polygamy had become virtually meaningless in the U.S. even before the despotic theory of polygamy came under judicial attack. If the U.S. is to serve as an example for India to emulate, then the diluted impact and questionable legacy of the ban must also be considered. Our U.S. citing judiciary presses Parliament to pass a Uniform Civil Code that will abolish polygamy, but it would be less likely to urge such a measure if it acquired a better understanding of the fallout from the imposition of a ban on polygamy in the U.S.

3 The U.S. moves away from the ban on polygamy

The *Reynolds* decision was delivered during the high-water mark of anti-polygamy sentiment in the U.S.[36] During this period of intense anti-Mormon sentiment in second half of the nineteenth century, the U.S. passed several pieces of federal legislation targeting the practice of polygamy by Mormons. Furthermore, their constitutionality was upheld by the SC.[37] Such legislation did not stop at simply

[34] Khursheed Ahmad Khan v State of Uttar Pradesh and Others 2015 A.I.R. 2015 S.C. 1429, ¶ 14.

[35] Brown, *supra* note 10, at 1186–1188.

[36] *See* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy* 19 COLUM. J. GENDER & L. 287, 294–295 (2010) [adumbrating the raft of legislative measures passed between 1861 and 1887 to tackle the "evil" of polygamy] and *Brown, supra* note 10, at 1186–1188 [describing a "crusade" against Mormon polygamy in the nineteenth century].

[37] U.S. polygamy was first outlawed through the Morrill Act for the Suppression of Bigamy of 1862. This was followed by the Poland Act of 1874. The SC upheld the constitutionality of the Morrill Act in *Reynolds* in 1879. This was followed up by the Edmunds Anti-Polygamy Act of 1882, which was upheld by the SC in Murphy v Ramsey in 1885. This was followed by the Edmunds-Tucker Act of 1887. This was upheld in 1890 in the SC in Late Corporation of the Church of Jesus Christ of Latter Day Saints v United States. *See* S. Crincoli (Sigman), *Everything Lawyers Know About Polygamy is Wrong* 16 CORNELL J.L. & PUB. POL'Y 101, 118–131 (2006–2007).

banning polygamy. It disenfranchised members of the L.D.S. or Mormon Church and "financially crippl[ed] the LDS Church…"[38]

Over the years, however, as the antipathy toward Mormons has fallen away, polygamy is no longer stigmatized as the preserve of barbaric and uncivilized peoples. As a result, the government's[39] penchant for enforcing the ban on polygamy has waned considerably. Furthermore, polygamy in the form of religious cohabitation has actually been bestowed with legal recognition in the state of Utah, home to a disproportionate number of polygamists in America.

As will be described below, this shift in perspective begins with the negative public reaction to an overzealous raid on a polygamous community in Arizona. Such negativity stymied future enforcement efforts and initiated a reassessment of the harms of polygamy by government officials. Informed by the events of Short Creek, government officials begin to view polygamy in a much more benign light. As a result, they refrained from enforcing the ban of polygamy.

Equally significant is the judicial repudiation of the view that polygamy is inherently harmful. The *Brown v Buhman*[40] decision of the Utah District Court upholding the legality of polygamy in the form of religious cohabitation is a rebuke to the jurisprudence of the *Reynolds* era. The judiciary has undermined *Reynolds* era jurisprudence in another respect as well. Over the course of the past half century, it has issued a cache of decisions curbing the ability of the state to impose majoritarian values on the population.[41] Such majoritarian values underlined the *Reynolds* era proscription of polygamy.

3.1 Short Creek raid: turning point in enforcement of polygamy ban

For approximately 100 years, from the mid-nineteenth to the mid-twentieth century, the state resorted to varying degrees of force and coercion to enforce its mandate against polygamy.[42] Raids on polygamous communities formed part of this enforcement regime.[43] This changed in 1953 when a raid on a fundamentalist polygamous community in Short Creek, Arizona, generated considerable backlash against the government.[44]

The planning, preparation and execution of the raid were conducted with great vigor. The state of Arizona (Arizona) in whose jurisdiction the polygamous

[38] Sigman, *supra* note 36, at 118.

[39] Unless the context indicates otherwise, references to "the government" in this paper are usually references to the state governments of Utah and surrounding states where a disproportionate share of polygamists reside. *See* Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is A Many Splendored Thing*," 15 DUKE J. GENDER L. & POL'Y. 315, 316 (2008).

[40] Brown, *supra* note 10, at 1186–1188.

[41] Griswold v Connecticut 318 U.S. 479 [1965], Roe v Wade 410 U.S. 113 [1973], Lawrence v Texas 539 U.S. 558 [2003], Obergefell v Hodges 135 S. Ct. 2584 [2015].

[42] *See* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy,* 19 COLUM. J. GENDER & L. 287, 299–301 (2010).

[43] Sigman, *supra* note 36, at 136.

[44] Emily J. Duncan, *supra* note 36, at 321 [Talking about how Short Creek was a "public relations disaster"].

community of Short Creek resided apportioned USD 50,000 for the raid a year in advance. The state also hired private detectives to assist in the raid. Given then Arizona Governor Howard Pyle's perspective that polygamy was hardly less odious than slavery,[45] it is not surprising that Arizona was planning such an extensive raid.

Indeed, the intensity of the raid can be gleaned from the following comment of one member of the polygamous community of Short Creek: "[o]ur people have known other polygamy raids. But they say this time our families are to be broken up, our property to be confiscated."[46] Indeed, many were arrested and over two hundred children found themselves separated from their families.[47] In fact, "[i]t was not until several years of legal battles after the raid that all the Short Creek women and children were allowed to return to their community."[48]

Unfortunately for Pyle who subsequent to the Short Creek raid lost a bid for re-election, the general public did not go along with his comparison of polygamy to slavery. The nineteenth-century equation of polygamy and slavery as the twin relics of barbarism no longer held currency. Even though they may not have been favorably disposed toward polygamy, the public did not view it as an evil that merited the kind of fervor with which the state went about enforcing the polygamy ban.[49] This shift in public perspective triggered a reassessment of the harm associated with polygamy by the government.

3.2 The government reassesses its ban on polygamy: polygamy is harmless and impractical to prosecute

The public's rejection of nineteenth-century shibboleths concerning polygamy tempered the government's zeal to enforce the polygamy ban. As a result, after Short Creek, the raids of fundamentalist communities registered a steady decline. Government officials also began to recalibrate their approach toward polygamy in other ways. As polygamy came to be seen less as a crime and more as a lifestyle choice, prosecution no longer seemed like an appropriate response. The statement of former Utah Attorney General Jan Graham "advis[ing] prosecutors to avoid prosecuting consenting adults for polygamy"[50] testifies to this dramatic reassessment of polygamy by the government.

Viewing polygamy as a lifestyle choice made by consenting adults constitutes part of the major shift in the government's assessment of polygamy. It is complemented by the well-settled consensus among government officials that prosecution of polygamists would be impractical. Utah Attorney General Mark Shurtleff reasons that enforcement of the ban on polygamy would invite public

[45] Sigman, *supra* note 36, at 139 [Pyle described the Short Creek community as "dedicated to the production of white slaves who are without hope of escaping this degrading slavery from the moment of their birth"].

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Emily J. Duncan, *supra* note 36, at 321.

[50] Sigman, *supra* note 36, at 141.

censure reminiscent of Short Creek. He also asserts that the government lacks the resources to prosecute polygamists. The scarcity of funds available for allocation to polygamy is made all the more acute by the need to combat a raft of other crimes. Polygamy does not warrant much attention in the face of such pressing demands on prosecutorial resources.[51]

Shurtleff has also said that he would not go after polygamists even if the resources existed to prosecute them as such an action would mean "plac[ing] 20,000 kids in foster care."[52] The financial and social costs of undertaking such a course of action have kept the state enforcement mechanism at bay.

Apart from the unavailability of scarce resources, it is extremely difficulty to prosecute polygamists; this fact has also deterred government officials from enforcing the ban on polygamy. The difficulty arises due to a paucity of evidence recording the occurrence of multiple marriages. This is compounded by the paucity of available testimony that can lift the veil of secrecy shrouding polygamous communities. Members of these communities fear that the disclosure of such details will subject them to prosecution. Also, children of these communities are instilled to believe that speaking out will cause them to be separated from their families and placed in foster care.[53] As a result of these roadblocks thwarting the effectuation of the polygamy ban, government officials have gone on to assert that they will not prosecute cases of polygamy.

The state of Utah County Attorney has deposed before the Utah District Court that:

> I have now adopted a formal office policy not to prosecute the practice of bigamy unless the bigamy occurs in the conjunction with another crime or a person under the age of 18 was a party to the bigamous marriage or relationship.[54]

This statement highlights the non-enforcement of the ban on polygamy.

3.3 Moving away from enforcing ban on polygamy

3.3.1 The executive seeks other ways to combat crime

Government efforts are now directed toward taking measures other than enforcement of the ban on polygamy. These measures include, for example, raising the minimum age for marriage to prevent the marriage of polygamists to underage girls. This is because the government believes that crimes which may be committed by a miniscule minority of polygamists such as marriage to underage girls can be addressed without sanctioning the rest of the polygamist population. The following statement of an FBI official "familiar with polygynous sects"[55] gives some insight

[51] Emily J. Duncan, *supra* note 36, at 325.

[52] *Id.*

[53] Sigman, *supra* note 36, at 180.

[54] Brown, *supra* note 10, at 1188.

[55] Emily J. Duncan, *supra* note 36, at 332.

into the government's reappraisal of the polygamy ban: "[at] least 99 % of all polygamists are peaceful, law-abiding people, no threat to anybody. It's unfortunate that they're stigmatized by a band of renegades."[56]

To the extent that polygamous communities are still subject to prosecution, it is for the commission of "secular" offences such as rape and child abuse, not the practice of polygamy. For example, in 2008 a fundamentalist community in Texas was raided on account of the occurrence of underage marriage.[57] Such harms are a product of the circumstances of isolated communities where people are able to commit crime without significant fear of detection.[58]

In fact, it has been posited that the fear of enforcement drives polygamists to remove themselves from mainstream society and live in isolated settings. That is why the government has initiated programs such as "Safety Net"[59] which focuses on "the crimes, not the culture."[60] Such programs represent an effort by the government to work with polygamous communities rather than prosecute them. This is a far cry from the danger envisaged to the body politic in the nineteenth century.

3.3.2 The judiciary weighs in

In rejecting the nineteenth-century consensus on polygamy as a harmful practice, the executive branch has moved away from enforcing the ban on polygamy. A similar repudiation of past consensus can be observed in recent decisions of the U.S. judiciary. Detailed below are the following ways in which such repudiation took place: (1) The Federal District Court of Utah's 2013 *Brown v Buhman* decision holding that polygamous cohabitation is a protected religious practice under the First Amendment of the U.S. constitution and (2) Court decisions expanding individual freedom and sexual choice.

3.3.2.1 Brown v Buhman The judgment represents a glaring repudiation of the doctrine of social harm articulated by the *Reynolds* court. In recasting polygamy in a benign light, the Court has reinforced the prevailing policy of the government to not prosecute people for engaging in polygamy. Therefore, the law in the U.S. on polygamy has shifted not only in terms of non-application of the law but in terms of a transformation of the law's meaning.

The *Brown* case involves a challenge to the constitutionality of Utah's Anti-Bigamy law of 1973. Kody Brown is a practicing polygamist whose lifestyle has become the subject of a nationally broadcast television show called "Sister Wives."[61] He filed a lawsuit against the state of Utah seeking legal protection for his polygamous lifestyle which ran afoul of the cohabitation prong of the bigamy law.

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[56] *Id.*

[57] *Id.*, at 322.

[58] Ashley E. Morin, *Use It or Lose It: The Enforcement of Polygamy Laws in America*, 66 RUTGERS L. REV. 497, 512–513 (2013–2014).

[59] Emily J. Duncan, *supra* note 36, at 334.

[60] *Id.*

[61] Brown, *supra* note 10, at 1188.

This prong provided that someone who "cohabits with another person"[62] is guilty of bigamy.

During the course of proceedings, the state of Utah furnished several arguments to justify the continued ban on polygamy,[63] asserting the existence of "social harms."[64] Such nebulous language is reminiscent of the conceptualization of polygamy during the nineteenth century by *Reynolds* and associated judicial pronouncements banning polygamy.

The state proffered the theory that since a great many crimes were associated with polygamy allowing religious cohabitation will give succor to criminals and enable the perpetuation of such crimes. Furthermore, the state resorted to the claim that the cohabitation prong of the bigamy statute helped the government in its effort to combat other crimes. The state also argued that the isolated nature of many polygamous communities thwarted government efforts to obtain evidence of crime.

However, the *Brown* court firmly rejected these arguments. It put to bed the notion of social harm advanced by the defense, asserting the nonexistence of any evidence tying polygamy to incest or any other criminal activity. Moreover, the Court said that it would non-ban polygamy even if evidence were produced to show a correlation between polygamy and crime for:

> the state [has never been] forced to bring a charge of bigamy in place of other narrower charges, such as incest or unlawful sexual conduct with a minor, because it was unable to gather sufficient evidence to prosecute these other crimes.[65]

The Court also castigated the state's use of the bigamy law as a "fishing expedition"[66] to investigate the possibility of further crime. Furthermore, the Court emphasized that far from being an aid in combating crime, the ban on polygamy is actually counter-productive to the efforts of law enforcement officials. Removal of the ban on polygamy would eliminate a source of diversion of law enforcement efforts. It would enable officials to concentrate on tackling criminal activity without being distracted by the need to bring bigamy charges.[67]

This judgment of the Court shows how far the U.S. has come in its acceptance of polygamy. Based on the decision's legalization of religious cohabitation, all one has to do in the state of Utah to obviate any chance of prosecution is not get polygamous marriages registered. In any event, the polygamous "marriages" of fundamentalist Mormons[68] take the form of celestial sealings wherein a religious ceremony is performed but no registration takes place. So for all practical purposes

[62] *Id.*

[63] All references to polygamy in the *Brown* case are to be construed as references to "religious cohabitation", i.e., a polygamous relationship in which the parties have not formally registered their marriages.

[64] Brown, *supra* note 10, at 1176.

[65] *Id.,* at 1220.

[66] *Id.*

[67] *Id.,* at 1221.

[68] Fundamentalist Mormons constitute a sizeable chunk of practicing polygamists in Utah.

fundamentalist Mormons who wish to engage in polygamous cohabitation as part of their religious beliefs now face no legal obstacle.

3.3.2.2 Expansion of individual freedoms The *Brown* Court also highlighted the changed landscape of American law with regard to individual liberty. Over the course of the past half century, a general liberalization of sexual mores in the U.S. has consistently received judicial confirmation. From contraceptive rights to gay rights, the judiciary of the U.S. has delivered ringing endorsements of the right of individuals to be free from majoritarian mores. While the right to polygamous marriage may not yet have received state sanction, there is clear evidence of a trend in favor of recognizing and expanding the privacy rights of consenting adults. The state is simply less willing to constrain the sexual autonomy of consenting adults. There is a growing recognition of the need to keep the bedroom free from the prying eyes of the state.[69]

One tangible judicial outcome of the growing judicial discourse of liberalization and toleration is that courts are allowing polygamous families to adopt. Therefore, they "are actually accepting this practice as an adequate family structure."[70] As a result of the changes outlined above, the population practicing polygamy in Utah is growing at a significant pace. Moreover, many polygamists are now far from being secluded in isolated communities. Polygamy is now routinely depicted on popular television shows such as Big Love and practicing polygamists even depict their lifestyle on to TV audiences of millions.[71] This represents a giant stride forward in bringing isolated polygamous communities out of the shadows and thereby ensuring an end to the harm caused by criminalization of polygamy.

4 Implications for India

The polygamy ban in the U.S. is essentially defunct as the prevailing consensus runs against the penalization of law-abiding polygamists. Moreover, the U.S. has moved away from the notion that polygamy is a harmful barbaric practice justifying invocation of police powers. As a result, the judiciary is also taking steps to reverse course on criminalization of polygamy and embrace it in the form of religious cohabitation as a protected religious practice.

This development contains several implications for India as it considers whether to ban polygamy for Muslims. It is relevant at this point to reiterate the importance of U.S. legal traditions to Indian courts and even to the framers of the Indian constitution. Many of the rights guarantees in the Indian constitution bear close resemblance to the rights outlined in the American constitution. Indian framers did not only undertake a study of the text of the U.S. constitution—they assiduously tracked U.S. court decisions touching upon these provisions to gain a holistic understanding of how the rights embedded in the U.S. constitution worked in

[69] Brown, *supra* note 10, at 1181.

[70] Morin, *supra* note 58, at 518.

[71] *Id.,* at 498.

practice. For example: the right to religion in the form of the free exercise clause does not admit of any restrictions, but subsequent court cases have read restrictions such as public order into the text. The Indian constitution's fundamental right to religion provision directly incorporates such additional verbiage into its text.

Furthermore, as has been elucidated above, it is not just U.S. law in general but polygamy law in particular has been borrowed from the U.S. by Indian courts. Indian courts, however, have not seen fit to examine the application of the U.S. law on polygamy in practice. This section will consider the relevance of that experience for India. Furthermore, Indian courts have focused on nineteenth-century U.S. precedent. They have not considered the subsequent rejection of the reasoning underlying these cases. They have also neglected to consider subsequent cases which altered the complexion of the U.S. judicial record on sexual privacy and individual autonomy. As a result, the reflection of U.S. jurisprudence produced in Indian polygamy cases bears little trace of the principle of individual liberty, which has had a bearing on the judicial tolerance of polygamy.

If Indian courts wish to accurately rely upon U.S. polygamy law, then the lesson to draw is that a ban on polygamy is fraught with unexpected complications. The reasons that courts should approach the matter of advising the government to ban polygamy with some trepidation are as follows (1) the economic costs of enforcing a polygamy ban; (2) the problem of secrecy; and (3) the problem of selective prosecution.

4.1 Economic costs of enforcing polygamy law

Several considerations springing from the economic costs of a polygamy ban must weigh on the minds of India's judges and policymakers as they consider whether to impose a ban on polygamy for Muslims. The U.S., which has far greater resources, has found it economically infeasible to enforce its ban on polygamy. India should seriously question the wisdom of pursuing an action that a much wealthier country has decided that it is not worth pursuing.

Given the drain of resources that genuine realization of a ban would entail, the Indian government must countenance the implications of shouldering the additional burden of such a measure. It must be kept in mind that the extreme backlog of cases in India[72] does not afflict American courts to nearly the same degree. Furthermore, the addition of a polygamy ban to the statute book will further dilute limited prosecutorial and judicial attention.

The ripple effects of a polygamy ban extend further. In the face of an inadequate welfare state, the Indian government has allocated to married men the responsibility of caring for their existing and divorced wives. One question raised by a polygamy ban is what will happen to wives who will be rendered unmarried by a polygamy ban? Bigamous Hindu wives rendered unmarried by the ban on polygamy for

[72] Rashme Sehgal, *Why The Backlog of Over 3 Crore Cases in Indian Courts Will Continue to Grow*, SCROLL.IN, (Oct. 9, 2015) http://scroll.in/article/759809/why-the-backlog-of-over-3-crore-cases-in-indian-courts-will-continue-to-grow.

Hindus are abandoned by their former husbands. The state does not have the resources to care for them.

Incidentally, as per the current state of affairs bigamous Muslims wives enjoy an economic advantage over bigamous Hindu wives. They need not worry about losing access to maintenance from their husbands upon divorce.[73] Banning polygamy for Muslims would take away rights that Muslim wives today enjoy and place them in the same precarious position currently occupied by Hindu wives.

4.2 Problem of secrecy

It has been asserted in India that there should be a law banning polygamy for Muslims. Such a move is not without consequence. Perhaps the most salient lesson from the U.S. for India is the danger of such a position. The ban on polygamy in the U.S. has had the unfortunate effect of pushing many polygamists into isolation. The resulting secrecy which shrouds their existence is a breeding ground for crime. As a result, the state now recognizes that such disconnection from mainstream society makes crimes easier to commit and harder to detect. As the U.S. experience makes clear, this is not something that India will be happy to have as a consequence of a ban on polygamy. As it is the Muslim community in India is fairly ghettoized,[74] the government would not want them to go further underground.

4.3 Problem of selective prosecution

There is an additional issue arising out of the U.S. experience with a ban on polygamy that should seize the attention of Indian judges and policymakers. This is the problem of selective prosecution of cases of polygamy. It has been found in the U.S. that the existence of a ban invests prosecutors with excessive discretion to prosecute. This discretion has not been exercised with fairness. As fundamentalist Mormons are a vulnerable minority they have become the target of prosecutors who would not in general go after other bigamists.

A similar problem of selective prosecution arises in the context of India. A plethora of evidence reveals that the mindsets of the same class of judges who harp on the need for a common code that eradicates polygamy for minorities treat Hindu polygamists with great laxity.[75] This state of affairs strongly suggests that there is great interest in targeting the minority.

The U.S. ban on polygamy has fallen into disuse due to the constellation of factors outlined above. One way to avoid the current predicament of the U.S. wherein the ban on polygamy is hardly enforced would be to enforce a ban. But this

[73] Hindu wives forgo any claim to maintenance if their marriage is found to be void on grounds of bigamy.

[74] The Sachar committee report reveals that many Muslims are living on the margins of Indian society. It would not therefore seem wise for the government to further marginalize them. *See* PRIME MINISTER'S HIGH LEVEL COMMITTEE, SOCIAL, ECONOMIC AND EDUCATIONAL STATUS OF THE MUSLIM COMMUNITY OF INDIA (2006).

[75] Flavia Agnes, *Hindu Men, Monogamy and Uniform Civil Code*, 30 (50) ECON. & POL. WKLY. 3238–244 (1995).

is clearly the opposite of what the U.S. is doing. If India wants to take a leaf out of the U.S. playbook on polygamy then the way to avoid the predicament of the U.S. would be to not have a ban on polygamy.

5 Conclusion

It can no longer be legitimately claimed that the U.S. enforces its ban on polygamy. So it is not right for pro-ban proponents to cite the example of the U.S. as a model to be followed in the area of polygamy law. If India is to follow the U.S. in this area, then there should not be a ban on polygamy because of the adverse consequences of doing so.

The U.S. has moved away from enforcing its ban on polygamy because of problems that have arisen as a result of the imposition of ban. The U.S. has also repudiated the odious legacy of nineteenth-century case law upholding the ban on polygamy on the basis of its propensity to plunge society into despotism. However, Indian court judgments leading up to the very recent past continue to cite nineteenth-century U.S. case law on polygamy and rely on the arguments therein. It has been pointed out in the previous section of this paper that it is time for the Indian judiciary to rethink its reliance on such outdated precedent.

India's reliance on U.S. case law in the context of polygamy cases is outdated in another respect. This has to do with the neglect of judges to cite recent case law which rejects the imposition of majoritarian sexual mores on the rest of the population. There is a rich cache of such cases which don't find mention in the context of a discussion on polygamy.

India should review the ban on polygamy, given that the U.S. has reversed the course on its polygamy ban. The experience of the U.S. is relevant to India because India has chosen to follow its path on polygamy. But the relevance of the U.S. experience with polygamy goes beyond that. There are similarities in the trajectories of the two countries—both are large democracies in which a minority's practice of polygamy has stoked majoritarian ire. There are similarities in legal tradition as both countries inherited a common law system from the same erstwhile colonizer.