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Natasha Carver

‘For her protection and benefit’: The Regulation of Marriage-Related Migration to the UK

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Abstract

This paper argues that a two-tier system has evolved dividing intra-UK/EU marriages from extra-UK/EU marriages. For the former, marriage is a contract between two individuals overseen by a facilitating state. For the latter, marriage has become more of a legal status defined and controlled by an intrusive and obstructive state. I argue that this divergence in legislating regulation is steeped in an ethnicized imagining of ‘Britishness’ whereby the more noticeably ‘other’ migrants (by skin colour or religion) are perceived as a threat to the national character. The conceptualisation of women as legally “disabled” citizens (1870 Naturalisation Act) for whom a state must act as responsible patriarch, is a fundamental part of this imagining of the nation. The paper therefore examines the social (gendered and ethnicized) assumptions and political aims embedded within the legislation.

Keywords: Immigration, Gender, Law, Marriage, Migration, Intersectionality

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.

William Blackstone (1769)

In his 2013 book *Exodus*, government advisor Paul Collier CBE contends that family migration is the only category of immigration regulation that is of any significance to the regulating state. Collier argues that if all citizens regardless of ethnic heritage have the same rights to bring in a foreign spouse, then ‘diaspora relatives will just crowd out everyone else’ (BBC 2013b). He claims that his argument is about ‘nation’ not ‘race’, about the loss of trust and social capital that comes with the presence of ‘diasporas’, a term which he defines as ‘the accumulated stock of *unabsorbed* migrants’ (2013:258 emphasis in original). For Collier, the threat to the nation-state is not economic but social. Collier’s

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position is hardly new, echoing Margaret Thatcher in 1978ⁱ, Enoch Powell in 1968ⁱⁱ, and harking right back to the 1708 'Act for naturalizing Foreign Protestants' which was repealed after three years because 'national identity was felt to be under attack' (Fransman 1998:159).ⁱⁱⁱ What marks Collier, Thatcher and Powell out from other policy-makers of the last fifty years, is their explicit acknowledgement of a usually unspoken objective of immigration regulation: the preservation and definition of a national culture. What they in turn fail to recognise is the extent to which policy-makers *do* harness the law in order to preserve and define their 'imagined community' (Anderson 1991) through the exclusion of undesirable others. Despite Collier's claims, and although frequently cloaked in a discourse of *protection and benefit* (both of individual female citizens and of a feminized welfare state), rules relating to family migration and, in particular, marriage migration, have always involved attempts to limit entry of particular 'diaspora relatives' (BBC 2013b) whose customs and norms are perceived to threaten the cultural identity of Britain.

Scholars have examined the inherent tension within liberal democracies surrounding notions of universal citizenship for a limited citizenry (Anderson 2013; Bosniak 2006; Cohen 2009). Analysis of marriage within the framework of this tension has shown an underlying reliance on a binary of active-dependent citizen (Fineman 2004) as well as opposing political viewpoints over what is seen as protection or empowerment (Dustin and Phillips 2008; Macey 2008). Within this overarching framework, the regulation of 'marriage-related migration' to the UK has been critically apprehended at particular junctures (Charsley et al 2012), from particular (socio-legal) disciplinary viewpoints (Wray 2011) or considered particular rules (e.g. Wray *et al* 2015; Pannick *et al* 1993). Building on this work, I argue that a two-tier system has evolved dividing intra-UK/EU marriages from extra-UK/EU marriages. For the former, marriage is a contract between two individuals overseen by a facilitating state, a notion explored briefly in the first section. For the latter, marriage has become more of a legal status defined and controlled by an intrusive and obstructive state, a contention examined in detail in the central analysis of the paper. Viewing the current juncture on marriage migration to the UK through a historical lens, I argue that policy-makers continue to use legal measures to limit spousal entry of particular ethnic groups, and to select for entry couples whose marriage conforms to an ideal-type of marriage, one that is no longer demanded of intra-UK/EU unions. To that end, with an intersectional approach, I examine the laws, policies and regulations that have made up the immigration legislation as well as the political discourse of *protection* that accompanied their enactments. From a legislative and working-practice perspective, change has been the one constant of the statute book with twenty-one acts relating to immigration since 1962, and seven in the last ten years alone. Despite this flurry of legislative activity and despite the shifts in power between Conservative and Labour governments,

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historical analysis of the regulation of marriage-related migration to the UK shows more ideological continuity than change.

Intra-UK/EU Marriages – Marriage as a Contract

The 1753 Marriage Act saw the first intrusion by the State as a third party into what had previously been a bilateral contract between two parties (Stone 1977). The Act set a minimum age, decreed who could marry whom (consanguinity), and provided for legal recognition of only those marriages conducted by the Church and state licence system.^{iv} It did not, however, dictate the purpose of marriage, something which remains unchanged today. British citizens can marry each other fully intending never to live with one another or to consummate the marriage. They can marry for tax purposes, for inheritance, to provide care, or with the intention of compromising evidence in a murder trial.^v Marriage, says Lord Millet, 'need not be loving, sexual, stable, faithful, long-lasting, or contented' (quoted in Herring 2011:43). From this list, the only direct legal change since 1753 has been to the requirement that marriage be 'long-lasting': the 1969 Divorce Reform Act (which came into effect in 1971) allowing divorce on the grounds of adultery, behaviour with which it would be unreasonable to live with, desertion and mutual consent after two years, or five years if without the consent of both parties. Whether current developments which challenge marriage as *the* fundamental embodiment of heterosexuality induce change to marriage as an ideology remains to be seen: legislation allowing same-sex marriage in the UK came into force in March 2014. Immigration law has kept pace with modifications in law in relation to same-sex partnership.

There have been major transformations in UK marital *practice* over the last sixty years, and correspondingly, major changes in the majority's attitudes to the institution of marriage (Chamber 2012). People who do marry are marrying later in life than previously and the rate of divorce has increased dramatically (Barlow *et al* 2005). UK marriages are at their lowest rate since 1917 and many are choosing to spurn the institution of marriage completely (Barlow *et al* 2005). Noting such changes, social commentators such as Giddens (1992) and Beck-Gernsheim (2002) have celebrated these developments as a product of a reflexive and efficacious individualism which they see as breaking the shackles of the male-breadwinner/female-homemaker family model, which tied sexuality to reproduction and reproduction to the institution of marriage. Others have noted, however, that despite outward changes in practice, the institution of marriage as a life-long, state-sanctioned commitment based on unequal and gendered divisions continues to act as 'hegemonic ideal' (Gross 2005:288; Barlow *et al* 2005, Chambers 2012). All have noted the relatively recent phenomenon of romantic love as the defining pillar of cohabiting and marital partnerships.

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Whilst there was little legal change to the notion of marriage as contract, the UK State spent considerable energy in the twentieth century regulating marital status to prescribe a gendered ideal-type of marriage comprised of an 'active citizen' and his dependent (Jamieson and Cunningham-Burley 2003). Feminists have long-since examined – and campaigned to dismantle – such provisions which upheld the institution of marriage as the *sine qua non* of gender inequality. The legal regulation of reproduction in particular sought to limit notions of "family" to the heterosexual nuclear model (Chambers 2012). Since the late 1980s, however, whether due to successful campaigning, or reflective of wider societal change, governments have focused their regulating energy on biological ties as the purveyors of social responsibility,^{vi} thus demoting the marriage contract to a back-seat role in the content of intra-British unions. In this way the state has shown an increasing disinterest in the social characteristics of partners for "in-group" members or how they live their married lives.

Nationals of European Economic Area countries derive their right to enter the UK and bring with them their EEA or non-EEA spouses through their country's membership of the European Union. Their free movement and that of their spouses is controlled and regulated by supranational institutions and legal systems (Treaty of Rome, 1958; Directive 2004/38/EC). The EU regulatory system does not direct or even allude to the content of the marriage: there are no financial requirements and no dependency requirements. Its ideological purpose (to ensure the free movement of workers) shares the same facilitating approach of UK marriage law. However, the British state has shown reluctance to comply with the spirit of the EU system when one spouse is a non-EEA citizen.^{vii}

To conclude, common sense and legal definitions of marriage in the UK consider it primarily as a contract between two individuals (Herring 2011). As such, these individuals are relatively free to determine the content of the marriage themselves, thus allowing for a wide-range of motivations for marriage (religious, legal, ceremonial, tradition, or even solely for the purpose of social display, reflecting Giddens' (1999) claim that marriage has become a 'shell institution'). Whilst laws relating to "family" have continued to enforce the notion of a heterosexual nuclear model, these laws operate on the basis of biological ties rather than through the marriage contract (Chambers 2012). Laws relating directly to marriage in the UK have not been used recently by policy-makers to define or limit citizens to an ideal-type marriage, rather such limitations have been demonstrably eroded as seen in the Divorce Reform Act 1969 and the Marriage (Same Sex Couples) Act of 2013, both of which were at least in part state-led consolidation of changing social attitudes.

Extra-UK/EU Marriages – Marriage as Legal Status

Shachar (2001) argues that the regulation of marriage between group members and non-group members always gives rise to questions pertaining to group identity. As explained above,

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nationals of EEA countries are nominally – under the law, although frequently not in practice – treated as group members. The legal position of marriage between a UK resident and a non-European, however, has been the site of considerable group-defining activity by policy-makers such that it is now less of a contract between two individuals, and more of a legal status from which certain rights and benefits may flow or be restricted. For such marriages the state places limitations on not just who can marry and when marriages can be terminated, but also the (significant) consequences that flow from being married and from ending marriage. This divergence in legislating regulation is steeped in an ethnicized imagining of “Britishness” whereby the more noticeably “other” migrants (by skin colour or religion) are perceived as the threat to the national character.^{viii} The regulation of marriage-migration has become the locus of the manifestation of this fear because the incoming ‘dependent’ spouses ‘are for the most part the material of the future growth of the immigrant-descended population’ (Powell 1968); it is this type of migration that will ‘swamp’ the nation/’British character’, undermining democracy and the rule of law (Thatcher 1978) because these migrants remain ‘unabsorbed’ (Collier 2013).

The conceptualisation of women as legally ‘disabled’ citizens (1870 Naturalisation Act; Blackstone 1769) for whom a state must act as responsible patriarch, is a fundamental part of this ethnicized imagining of the nation within the nation-building legislation. For white British women – the biological reproducers of the nation’s ethnicity (see Anthias and Yuval-Davis 1989) – this entailed a legal status which recognised them as a primary site of risk to national borders. Their ability to act as conduits of national identity depended on their marital status. British nationality law prohibited women from transmitting their nationality up until 1983 and also deprived them of their nationality if they, in the words of the then Secretary of State for the Colonies 1910-15, ‘deliberately married an alien’ (Lewis Hardcourt, quoted in Klug 1989:22) until 1949. For non-white British women, and particularly women of Asian descent, their orientalist social and structural construction as the Other-within, led to restrictions on their ability to marry outside the UK. As the following section explains, from 1960 to 1997 the regulation of marriage-related migration overtly targeted, in a gendered manner, cross-border marriages in relation to the nationality or citizenship of the applicant and the ethnicity of the UK sponsor. The aim was to restrict spousal migration within “transnational communities” or those “ethnic minority groups” which had a sizeable presence in the UK and were not of European descent (particularly those from South Asia and the Caribbean). The law discriminated against cross-border marriages on the basis of ethnicity, and the application of this discrimination was gendered. Since 1997, there has been a shift in target, not least in part in response to the accusation of racism in the law, so that now the law restricts spousal migration on the basis of cultural and economic capital. A normative and nationalist conceptualisation of a masculine state protecting its

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female nation (Young 2003; Anderson 2013) remains in place and this approach still speaks to a definition of the majority *ethnie* or “Britishness”. Moreover, the application of this discrimination remains ethnicized and gendered, which is to say the law is applied to people differently on the basis of their ethnicity and gender. The result, as Wray succinctly puts it, is a ‘hierarchy of acceptable marriages’ where ‘[t]he location of a marriage in the hierarchy depends upon the weight attached at a particular moment to factors such as gender, race and compliance with legal and social norms’ (Wray 2011:38). While the importance given to ethnic origin, type of marriage (e.g. “love”, arranged, polygamous) or legal status have shifted, most noticeably in 1997, the ideology of protecting the nation from cultural others has remained constant. Group membership is not an unqualified right for anyone and marrying the “wrong” person can result in the loss of state protection and membership in the most extreme cases, and more frequently in the loss of benefits and rights that go with membership. The state interferes not just with partner choice, but with the practice of married life, so that the state’s required social characteristics of the married couple (a high level of economic activity, showing the marriage to be ‘subsisting’, and, therefore, long-lasting, for example) are examined on three occasions spanning over five years (HC395). This section traces the ideological continuity within the multiple changes to nationality and immigration legislation whilst noting the fluctuation of intersecting – and intersectional – factors used to limit entry of particular ethnic groups.

Pre 1948 – Protecting the bloodline

Until the Naturalisation Act of 1844, marriage to a non-British subject, or ‘alien’ was not directly regulated and the principles of common law held that marriage had no effect on the parties’ nationality. The 1844 Act provided for automatic acquisition of nationality for alien women marrying male British subjects and allowed female British subjects to retain their British subject status on marriage to an alien. But this provision was repealed by the 1870 Naturalisation Act and marriage to an alien thence entailed automatic deprivation of British subject status for women (Fransman 1998).^{ix} Such changes can be seen as state-attempted enforcement of patriarchal control over the conduits of national identity. The 1870 Act limited access to naturalisation, renouncement and transmission of nationality to those who were not legally ‘disabled’. Section 17 states that “Disability’ shall mean the status of being an infant, lunatic, idiot or married woman’ (cited in Fransman 1998:160). A married woman could not, therefore, renounce her British nationality or pass on her nationality to her children. An unmarried women was not considered a parent, so transmission was reserved for British subject fathers of legitimate children and widows. This situation remained law (it was reaffirmed in the 1914 British Nationality and Status of Aliens Act) until 1949 (Fransman 1998).

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Thus the first regulations of marriage between a British subject and an alien were enacted through legislation pertaining to nationality, and directly imposed an effect of legal status, speaking to the content of the marriage. Furthermore, it was explicitly gendered: British men, through their legitimate children, were the conduits of national blood. Although the British State subscribed formerly to *jus soli* until 1983 (when the 1981 British Nationality Act came into force), these legislative provisions have overtones of nationality acquisition being substantively more than birthplace – overtones which, as seen below, crept into the arena of immigration regulation as well. If, as Bevan argues, ‘the framing of nationality legislation is an opportunity for a State to define itself, as it please’ (1986:105), then the nineteenth- and twentieth-century British state saw itself as a protective patriarch, a guardian of the national character through lineage.

1948 to 1997

The British Nationality Act of 1948 was intended to provide clarity and restructuring of the piecemeal nationality law that had arisen by way of the differing acquisition of colonies, dominions, territories and areas of protection (Fransman 1998). However, its tortuous construction left a category of people as ‘British subjects without citizenship’ and also allowed for the unrestricted entry of Commonwealth citizens; it became in effect ‘an unplanned open-door policy’ (Bevan, 1986:22). The response to this unforeseen migration came in the form of the two Commonwealth Immigration Acts of the 1960s, which had a significant impact on marriage-migration. Political discussions focused on ‘race relations’ and the integration of ‘coloured’ people (Clayton 2011:11-12). Immigrants arriving in large numbers were presented as a threat to the existing population in terms of services and opportunities (housing, schools, employment) – problems which cross all migration categories – but also to the ‘national character’ which was raised in relation to marriage-migration (for example Powell 1968). Legislators continued to provide separate provisions for male and female marriage migrants, so that for women marriage represented ‘a public declaration of allegiance as well as a private commitment’ (Wray 2011:10).

Male British citizens continued to be allowed to bring in wives and fiancées under the existing legislation. Nonetheless, such couples frequently experienced racially-driven procedural hurdles such as excessive delay and an unrealistically high bar to proving the relationship ‘genuine’. An extreme example of the latter saw enforced “virginity testing” of fiancées arriving from South Asia in the 1970s (Wray 2011). The physical manifestation of this racial discrimination in the law was both gender-specific (it was, and could only, be done to women) and gender-related: women from South Asia were the target of this persecutory policy because of cultural assumptions on the part of UK officials about “genuine” arranged marriages being limited to virgin females.

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For female British residents discrimination was more overt. Commonwealth husbands and fiancés might be admitted 'as a concession' but this provision was withdrawn in 1969 (Bevan 1986). Women who wished to bring in a non-Commonwealth husband or fiancé had the uphill struggle of having to prove that joining their partner abroad would involve an unacceptable degree of 'hardship' (Bevan 1986:245). British-born ethnic minority women struggled in the courts due to prejudice against arranged marriages combined with racist assumptions about their better suitability than white women to live in poverty (Wray 2011). Both through direct legislation and through legislative interpretations in the courts, the state premised an idealized British-cultural norm of a gendered "love-match" defined in opposition to the culturally-other arranged marriage.

In 1974 the Labour Government amended the rules so that the position was the same for incoming husbands. Just three years later, husbands (and British-resident women) were singled out again as purveyors of marriages of convenience (Pannick *et al* 1993:5). Bevan notes both the heightened tension provided by the press during this time (with headlines such as 'brides for purchase') and the government's inability and unwillingness to provide evidence to support its claim that the system was being abused (1986:247). The 1977 measures – the Primary Purpose Rule – required the applicant to show that the primary purpose of the marriage was not for the husband to obtain settlement in the UK, and introduced an initial leave of twelve months (the probationary period) (Pannick *et al* 1993:5).

In 1980 the new Conservative government strengthened these measures so that only British citizens – women – who had been born in the UK or had a parent who was born in the UK could sponsor a husband or fiancé (Pannick *et al* 1993). This measure had such a significant impact that the previous restrictions went largely unnoticed. All, however, were challenged and three women took their cases before the European Court of Human Rights (*Abdulaziz, Cabales and Balkandali v UK*), arguing that the rules were discriminatory on the basis of sex, race, and in the case of Mrs. Balkandali who was a British citizen born outside the UK, birth. The ECtHR found in the women's favour only on the basis of sex (para 83). In relation to birth discrimination, the Court stated that 'there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it' (para 88). It is not clear whether one of those 'general social reasons' was the UK government's misogynistic argument to the Court that the state merely aimed to protect British women from – in an apparent echo of the wording of the concession mentioned above – the 'hardship' they would encounter if they had to move abroad in order to remain with their husbands (para 87).

Both male and female marriage migrants, and their female and male British resident counterparts, suffered from racially-driven discrimination through this period, and this discrimination

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manifested in largely gender-specific and gender-related discriminatory, and at times persecutory, practices. The discourse at the point of intersection revolved around the 'purpose' of the marriage. The result of the historic ruling in *Abdulaziz* ended overt sexual discrimination within the legislation. The manner in which the UK government chose to legislate, however, was to restrict and reduce provisions for male sponsors to that of female sponsors (Pannick *et al* 1993). The Primary Purpose Rule in its gender-neutral form ran from 1985 until 1997: the state had largely accepted Powell's (1968) claim that permitting UK residents to enact arranged marriages with non-EU nationals was 'insane'.

1997 – 2014

From 1997 to 2010, the Labour governments embraced a liberalising policy with regard to economic migration whilst simultaneously passing increasingly restrictive measures on family migration. The government's focus on 'Managed Migration' along with its explicit linkage of migration and harmonious community relations within the UK, was reflective of a wish to control migration type over and above mere numbers (Flynn 2005). The articulated aim was for the UK to reap the economic benefits (although sometimes cultural and social benefits were acknowledged) of primary migrants, and thus measures of encouragement aimed at skilled workers were adopted into the immigration rules. At the same time, the unspoken context of the measures seeking to limit family migration was the economic disadvantage (and cultural and social) of the spouses of these migrants. The Conservative-Liberal Democrat coalition of 2010-2015 curbed numbers and rescinded many of Labour's more open-door policies towards primary migration, whilst continuing to restrict family migration. Despite the apparent gender-neutrality of the legislation post-1997 as compared with the earlier period, assumptions of men as breadwinners (highly-skilled or otherwise) and women as dependents (on husbands or the state) remained the implicit backdrop of policy-making (Charsley 2012; and see Home Office 2011). Furthermore, the political rhetoric explicitly and repeatedly underlined the state's need to 'protect' the nation, both in relation to cultural practice and economic welfare, reflecting a deeply ingrained conceptualisation of state and government as patriarch of a feminized nation.

The restrictions on marriage-migration of the twenty-first century cannot be understood outside of their immediate historical context. The 1990s gave rise to a political discourse centred on two types of migrant cheats: the 'bogus' asylum-seeker and the benefit 'scrounger' (Clayton 2011:14). As Clayton notes these reflect insecurity about how entry is being gained, and the type of person who is entering. The consequences of this debate, which took place mostly in reference to asylum rather than immigration law, resonate across all immigration legislation that followed.

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Protection

Since 2000 there have been a series of measures aimed directly at preventing unwanted, 'unmanaged' migrants from settling in the UK through marriage. Many of these measures purport solely to protect individual British citizens from unscrupulous outsiders, but analysis of political rhetoric, Home Office publications, and trends in decision-making based on ethnicity and gender, reveal a primary concern of protecting the economy and culture of the nation. The most prominent area of legal activity, government-funding and political rhetoric has been around 'sham' marriages.

Wray (2011) and Charsley and Benson (2012) have observed how marriage-migration subverts the State's (patriarchal) presumption that it holds the prerogative over entry, since the aspiring immigrant is chosen by the individual sponsor rather than selected through criteria laid down by the state. Seeking to regain control over who is eligible for group membership – and thereby imposing limitations on partner-choice for citizens – successive governments introduced measures which expanded state surveillance of extra-UK/EU marriages. In 2001 registrars were co-opted into the realm of immigration enforcement by requiring them to report 'suspicious' unions (s.24 1999 Act). In 2005, the Secretary of State introduced an application procedure for non-EU nationals wishing to marry in the UK: the Certificate of Approval. Marriages undertaken in the Church of England were exempt. Successfully challenged on grounds of religious discrimination, and as being in violation of ECHR Article 12, the right to marry, the Certificate of Approval was abolished in 2011. In response to this legal block the 2014 Act required registrars to notify the Secretary of State of all pending marriages involving a non-EEA citizen (s.56), gave the Secretary of State investigative powers to examine the content of these proposed marriages (s.48-54), and amended the 1949 Marriage Act so that extra-UK/EU marriages conducted by the Church of England also have to comply with civil preliminaries (s.57), thus redistributing the balance of power between citizen, church and state set by the 1753 Marriage Act.

Other measures used to increase the state's surveillance of such marriages included the 2003 'no switching' rule prohibiting those on visas of less than six months (such as tourists) from applying to remain in the UK on the basis of marriage, and the increase of the probationary period, which was raised in 2003 to twenty-four months, and again in 2012 to five years. There are now three stages of application for marriage migrants, all of which carry a fee. These measures allow the state multiple points – over time as well as through place – of border control, however they also shape marital content by requiring that such unions last for a minimum period of five years and show consistency across the period.

It is pertinent to remember the gendered introduction of the probationary period which in 1977 applied to incoming husbands only, purportedly to protect female British citizens from

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unscrupulous ‘visa-diggers’: the legal lack of capacity of women mandated by the 1870 Act remained explicit in 1977, and is still implicit. Discussions in 2007 similarly identified one type of sham marriage as being where the ‘British citizen was ‘duped’ and claimed there was a need for ‘increased protection against coercion and potentially violent or abusive situations’ (quoted in Charsley and Benson, 2012:12). There was and has been no data-gathering exercise in relation to this supposed protection need. This was not the case surrounding the need to protect British citizens from forced marriages. Having raised the minimum age for British sponsors of non-EEA spouses from sixteen years with parental approval (in line with the national age of consent) to eighteen years, the Home Office commissioned research on the impact of this age bar on forced marriages, and what impact raising the bar to twenty-one might have. The research found that raising the age had had no impact and that the age threshold should not be lifted higher, suggesting that this might indeed increase danger to British citizens involved in forced marriages since they might then be held outside of the UK (Hester *et al* 2007). The Home Office did not publish this research (the authors did so at a later date), but went ahead with increasing the age limit purportedly on protection grounds (*Quila*).

In July 2012, the government introduced guidelines for its caseworkers (Annex FM 2.0, Immigration Directorate Instructions) laying out precise, and yet inherently ambiguous, criteria of determining genuine/sham unions. Despite an exhaustive list of factors, any such assessment must necessarily remain a personal (and frequently culturally-prejudiced) judgement by the designated official due to the government’s ‘simplistic binary between genuine and sham marriages’ (Charsley and Benson, 2012:11). The 2014 Act (Part 4(2):55) solders this binary into statute by amending the current definition of ‘sham marriage’ found in the 1999 Act to add to the defining criteria that ‘there is no genuine relationship between the parties to the marriage’. The definition also increases the scope of the ‘purpose’ of the marriage/civil partnership from the existing provision (marriages which have been entered into to avoid the effect of UK immigration rules) to include those which are undertaken to enable rights under UK immigration rules, thus targeting the undesired migrants already on UK soil. Analysis of refusals by nationality show significant preference for applicants from predominantly white countries with Christian heritages (Charsley and Benson 2012), in an historical echo of the effects of the cultural-religious presumptions which underlay the Primary Purpose Rule. Just as successive judges despaired over having to determine the ‘primary purpose’ of a marriage (Pannick *et al* 1993), so it may prove impossible to ascertain ‘genuineness’, because ‘cross-cultural variation in the nature of marriage is such that no universal definition may be possible’ (Charsley and Benson 2012:18; Wray 2006). The “genuineness” test is not only at point of entry, however, and the couple must re-prove their ‘genuine’ and ‘subsisting’ marriage at two further junctures over the five year probationary period. In this way, the state regulates not just who is eligible as a marriage partner,

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but also the ongoing content of the marriage for both parties. Measurable criteria suggested by Annex FM 2.0 include reproduction, cohabitation and a joint mortgage.

As well as protecting feminized citizens from non-EU nationals – particularly poor ones – the state’s representatives also profess the need to protect the nation from unproductive (poor) migrants (see for example Cameron 2013). The reasoning behind this argument is found in the 2011 Home Office publication produced for a public consultation on family migration. Here the authors note that the employment rate for non-EU male partners is 68%, above that of the UK average (64%), whereas for females it is 44%, ‘considerably lower than the UK average for female employment (53%)’ (HO, 2011:s.3). The report goes on to note that employment rates for certain nationalities (Bangladeshi and Pakistani) are ‘especially low’. The implication is that female family migrants (who make up 68% of spouse applications) are a drain on the economy, an implication which runs contrary to research on female labour migrants (Kofman and Raghuram 2004). Indeed, Kofman (2004) has argued that this extends to prejudice against family migration as a whole which is seen in policy terms as subsidiary to, and a problematic result of, migration driven by labour markets. This attitude is also reflected in refusal rates in which husbands fare disproportionately poorly because of underlying assumptions about male economic motivation (Charsley and Benson 2012). Loss of control over the selection of those it perceives as primary migrants has continued to be a concern to successive governments, and gendered readings of family migration continue to be prominent.

In 2012, the changes to the spouse route of entry included a financial requirement that the UK sponsor show minimum income of £18,600 per annum or cash savings of £64,000 (HC395:App.FM E-ECP.3). This is significantly above the minimum wage (138% according to Wray *et al* 2015) and therefore precludes a section of the population from living in the UK with non-EU partners on the basis of socio-economic grounds. This criterion must be demonstrated over a minimum five-and-a-half-year period thus also regulating the content of the marriage. Forty-seven percent of the UK working population in 2012 would fail to meet the income requirements to sponsor a non-EU spouse (APPG on Migration 2013). While this measure is on the surface gender-neutral, the gender pay-gap (9.5% for full-time work in 2012; the part-time workforce is predominantly female, ONS 2013), means that female sponsors are disproportionately affected. In addition research into ethnicity pay-gaps indicates that men and women from ethnic minorities are more likely to be adversely affected than white British men (Wray *et al* 2015:63).

Whilst feminists have long-since noted the existence in welfare provision of a gendered binary of active-citizen/dependent (Fineman 2004; Jamieson and Cunningham-Burley 2003), these rules go over and above limiting the agency, and/or citizenship rights of “dependent” citizens. The rules

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purport to discriminate “purely” on the basis of economic capital, but the income level is set significantly higher than the minimum wage – this is not in any way about cost to the Treasury (see Wray *et al* 2015). These rules limit the rights of particular citizens, so that where in 1870 the legally ‘disabled’ were infants, lunatics, idiots and married women (s.17, Naturalisation Act), today the legally ‘disabled’ are most female citizens and many male citizens from ethnic minorities.^x

Integration

The state’s duty to protect individual citizens and the welfare state (jobs and resources) from unscrupulous non-group members is a standpoint which has been frequently articulated by Prime Ministers and Home Secretaries since 1997. Less explicit at the government-level during this period, has been the argument that the culture of Britain also requires protection. Instead, politicians employ a euphemistic discourse around the notion of ‘integration’, along with select use of the ‘sticky words’ (Ahmed 2004) associated with loss of cultural integrity borrowed from Powell and Thatcher.^{xi}

Integration as a protective measure against social disharmony and ‘home-grown’ terrorism was the theme of the Labour government’s approach to immigration and asylum law. Political rhetoric focused on the asylum ‘crisis’,^{xii} the so-called ‘race-riots’ of 2001 and 2005, and the July 2005 attacks on the transport system in London (see Blair 2006 ‘The Duty to Integrate’). Measures introduced in the name of integration, however, sought to further limit – by cultural capital – incoming spouses rather than improve the social and economic living conditions for British citizen ethnic minorities. In 2007, the ‘Life in the UK’ test was introduced for those applying for settlement on the basis of marriage to a British citizen or a person lawfully settled in the UK. In 2013, the government altered this test reducing the practical knowledge element and increasing the historical (nationalist) element of UK culture and society (BBC 2013a).^{xiii} In 2010, the government introduced a requirement that the spousal applicant show proficiency in the English language (HC395:281).

Kofman posits that the family, and therefore family migration, ‘represents the social dimension [of migration], often associated with tradition’ and is seen as a ‘socialising agent’ (2004:248). Thus underlying the discourse of integration and the measures taken in its name, is actually a fear of loss of cultural integrity or an ‘excess of alterity’ as Grillo called it (2007). Spousal migration is at the forefront of this fear due to the perceived loss of control by the state over the type of immigrant entering (Shah 2010). The Primary Purpose Rule was purportedly aimed at the ‘bogus’ marriage applicant (at point of entry), but the practical result was to discriminate against and limit entry of South Asians. In the same vein, the introduction of an English language requirement and the financial aspect to the 2012 rules, purports to target the ‘scrounger’ immigrant who will refuse to

Commented [S1]: The second stage is now to A2 proficiency (after 2/5 years in UK). See <https://www.gov.uk/government/news/new-a2-english-requirement-in-the-family-route> update if possible

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converse in English and live off benefits in a minority ghetto^{xiv} – indeed Cameron (2013) argues that welfare reform and immigration policy are ‘two sides of the same coin’, the ‘coin’ in this case being the “‘something for nothing” culture’.

Charsley’s (2012) analysis of refusal rates by nationality supports Wray’s (2011) findings of a hierarchy of acceptable marriages based on her qualitative study of decision-makers. The highest levels of refusals of spouse visas are for nationality groups where ‘marriage-related migration is perceived as predominantly intra-ethnic’ (e.g. British Pakistanis marrying Pakistani nationals) (Charsley 2012:200). Collier’s pro-assimilationist stance on welcoming the ‘culturally proximate’ migrants from ‘AlmostUsLand’ (or Poland) and limiting those from the ‘culturally distant [...] Mars’ (Bangladesh) (2013:89-91) is already in practice across Europe, both within the national legislative systems as officials act as ‘moral gatekeepers’ to the nation (Bonjour and Block, forthcoming; Wray 2006; Carver 2013) and at the supranational EU level (de Hart 2007).

Conclusion

Bevan noted the ‘sharp contrast [emerging] between family and immigration laws [...] since the former generally regards the ceremony and certificate of marriage as conclusive regardless of ulterior motives [...], whereas the latter looks to the reality rather than form of the marriage so as to discover if the marriage is genuine’ (1986:247). This contrast has been sharpened to a knife-edge up to the present day. Lord Millet’s 2004 comment that legally marriage ‘need not be loving, sexual, stable, faithful, long-lasting, or contented’ (quoted in Herring 2011:43), is not an opinion held by immigration courts:

Notions of marriage naturally vary between cultures, but we do not think that it would be wrong to regard permanence and exclusivity as essential features of the institution.

Deputy President of Immigration Tribunal Ockelton (2007) quoted in Shah (2010:31).

The British state has little to say about the content of intra-UK unions. The law on marital status has broadened to reflect the radical changes in social attitudes to the institution of marriage. Marriages involving a non-EU partner, however, are expected to conform, and required to display conformity (Carver 2013), to an ideal-type of ‘love’ partnership, where having a joint mortgage is weightier evidence of commitment than a marriage certificate, or in the alternative a reified notion of the ‘arranged marriage’ (Carver 2013; Kofman 2004; Wray 2006). In tandem with the frequently xenophobic intent of immigration laws and practice, runs a latent cultural misogynist image of the family which holds men to be primary migrants or workers and women to be secondary migrants and non-workers. Despite academic work drawing out the nuances and intersections between economic

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and marital motivations for migration (Piper and Roces 2003) and despite strong data evidencing significant social change in this area (i.e. women as primary migrants) (Charsley *et al*, 2012) the UK government continues to operate with a reductive and simplistic ethnicized and gendered approach to marriage migration. Furthermore, a reflection on the historical approach to marriage between British people and aliens shows that although the discourse changes, the substance of the arguments, which is to say the ideology of protecting the nation's values from being over-run by cultural others, remains the same. The state has radically adapted legal provisions to reflect the dramatic changes in social attitudes towards marriage with regard to its intra-UK marriage. However, in concert with these liberalising alterations, the same state has shown a constant patriarchal and conservative approach to marriage between British residents and non-patrials. In this sense, membership of a minority ethnic group and/or femaleness arguably has already become a 'disability' under the law.

ⁱ '[...] there was a committee which looked at it and said that if we went on as we are then by the end of the century there would be four million people of the new Commonwealth or Pakistan here. Now, that is an awful lot and I think it means that people are really rather afraid that this country might be rather swamped by people with a different culture and, you know, the British character has done so much for democracy, for law and done so much throughout the world that if there is any fear that it might be swamped people are going to react and be rather hostile to those coming in.' (Thatcher 1978)

ⁱⁱ 'We must be mad, literally mad, as a nation to be permitting the annual inflow of some 50,000 dependants, who are for the most part the material of the future growth of the immigrant-descended population. It is like watching a nation busily engaged in heaping up its own funeral pyre. So insane are we that we actually permit unmarried persons to immigrate for the purpose of founding a family with spouses and fiancées whom they have never seen'. (Powell 1968)

ⁱⁱⁱ The 1708 Act was a vehicle to allow Calvinist Huguenots fleeing a surge of religious intolerance in Catholic France to naturalize in the UK.

^{iv} Non-group members (then Jews and Quakers) were exempt from the law.

^v As was seen in a 2003 case where the Court of Appeal refused to 'examine the reason why the couple wanted to marry and consider if it was a valid one.' (Herring 2011:43).

^{vi} This move is reflected in the Children Act 1989, the Child Support Act 1990, the Human Fertilization and Embryology Act 1990 and the Criminal Justice Act 1991 (see Chambers 2012).

^{vii} The key cases in this arena are: *Surinder Singh* (1992) where the ECJ forced the UK government to accept that British nationals who had worked in another EU country were 'qualified persons' and therefore could bring in a non-EU spouse without reference to national immigration legislation; *Akrich* (2003); and *Metock and Ors* (2008) where Ireland, supported by the UK, which had legislated against this in the form of Regulation 12 of the 2006 EEA Regulations, argued that unlawful residents should not get provisions of EU law even when married to a qualifying citizen. The ECJ disagreed but it took the UK government three years to amend the Regulations (Clayton, 2011). The regulations have been amended again (in favour of the UK government's interpretation) since the case of *O and B v Netherlands*. The EU Commission has stated the current regulations do not comply with the Directive.

^{viii} See Modood (2014) on how a Muslim / non-Muslim binary has become the dominant frame of identity discussions in the UK.

^{ix} Such women could apply to re-naturalize in the event of widowhood.

^x A potential source of mitigation against restrictive immigration legislation can be found in the right to respect for private and family life laid down by Article 8 of the European Convention of Human Rights and brought into national legislation in the form of the Human Rights Act 1998. This is a qualified right, however, and the ECtHR has repeatedly reiterated the nature of its qualification, in particular noting that individual state members retain the authority to regulate the entry of non-EU migrants.

^{xi} Most recently the Defence Secretary in 2014 said that British towns were being 'swamped' by immigrants and citizens were 'under siege'; Home Secretary David Blunkett in 2003 said asylum seekers were 'swamping'

local schools; Conservative Leader William Hague in 2000 used the words 'swamped' and 'flooded' in a debate about immigration (Ahmed 2004).

^{xii} In 2003, Blair promised to cut the numbers of asylum seekers by 50% within a few months (BBC, 2003).

^{xiii} The sample test includes questions on empire, religion, and the Queen.

^{xiv} Even before these changes took place there was evidence of a disproportionate application of the law by nationality in terms of refusals of spouse visas (Charsley 2012).

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