

Polygamy in Britain

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Introduction

English law has taken an openly hostile¹ and restrictive approach to polygamy,² which has been prohibited and outlawed, with strict consequences in terms of legal validity and punishment.³ The consequences of this strict prohibition on polygamy in British law were and are related to migrations and settlements in the UK of people, coming from different countries, with their own contrasting laws and cultures.

Today, in Britain there are families with polygamous arrangements made abroad prior to migration. In addition, there are Muslim husbands who engage in polygamous marriages in the UK. They follow *angrezi shariat*⁴ without falling foul of English law.⁵

The aim of this essay is to explain how polygamy is, by and large, only apparently a phenomenon by now resolved and old. This phenomenon in fact, not only shows a circle

¹ The reason for this could be found in Christian teaching, although some research doubts of this. See Poulter, Sebastian [1986]: *English Law and Ethnic Minority Customs*. London : Butterworth, p.45. Another explanation, according to Parashar , could be found in the intolerant attitude towards Afro-Asian culture. See Parashar, Archana [1982]: 'Poligamous Marriage in Conflict of Laws'. In: *Islamic and Comparative Law Quarterly*, pp. 187-208, at p. 206.

² Regarding the polygamy is to specify well that it speaks polyandry to the case in which a woman can have more husbands and in polygyny if is the man to be able to get married more women. In that case, in the paragraph 278 of HC 395, as amended, the word 'polygamous' is employed in a gender neutral way. See also on

http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/table_of_contents/chapter_8.html.

³ Pearl, David and Werner Menski [1998]: (3rd) *Muslim family law*. London: Sweet & Maxwell, p. 273.

⁴ English law of Islam.

⁵ Pearl D. and Menski W.,[1998] p.277.

rich in implications,⁶ but it reveals that, despite the English system assimilationist's claim, ethnic minorities have no intention of abandoning their religious laws and customs⁷ with first or following immigrants' generations.

Analyzing the phenomenon of polygamy in Britain, it is possible to cover a multilevel dialogue between national immigration laws and customs of the immigrants' countries of origin. This relationship seems in many ways to be approaching the subordination of the alien customs to the Western legal system, rather than to interdependence and dialogue.

In particular, regarding polygamy, the UK has constantly tried to conform immigrants' laws to national law. Failing this, it does not admit the entry of spouses whose marriages seem not conform with the British pattern, or it simply pretends not to see the actual existence of polygamous marriages in the UK. Nevertheless, it seems a legitimate question if the contraction of more than one marriage or by preventing the admission of second wives achieves its actual abolition.⁸

The paper that follows first gives a brief overview of the recent history of polygamy related to immigration in the UK. Indeed, immigration cases were one of the areas of litigation where questions relating to polygamous marriages were featuring prominently.⁹ A historical perspective also gives the necessary tools to understand the actual situation.

Then it will proceed to the different regulations of marriage and divorce in the immigrants' countries of origin and the UK, trying to compare Afro-Asian personal law with the British one.

Finally, the last part analyses the unofficial level of polygamy in UK today, pointing out the consequences of this coexistence of rights on different planes, namely the discrimination and the nonexistent guardianship of the second wives and their children, at an official level.

⁶ The questions of the recognition of the marriage and the divorce have consequences for the recognition of the legitimacy of the marriage and of those children born to such marriages and the entitlement of each family's member to come to UK. See Clayton, Gina [2004]: *Textbook on immigration and asylum law*. Oxford: Oxford University Press, pp.227-228.

⁷ Yilmaz, Ihsan [1999]: *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim laws in England, Turkey and Pakistan*. Unpublished PhD thesis. London: Scholl of Oriental and African Studies, p.49.

⁸ Shah, Prakash [2003]: 'Attitudes to polygamy in English law'. In: Vol. 52 *International and Comparative Law Quarterly*, pp. 369-400, at p.397.

⁹ Pearl, David [1986]: *Family Law and the Immigrant Communities*. Bristol: Jordan & Sons Limited. p.40.

History

From an historical perspective, during the post Second World War, courts reacted by trying to reconcile their historic disdain for polygamy with the new migrants' demand of justice.

In the early 1970s,¹⁰ the government introduced statutory reforms to force immigrants to conform to British patterns.¹¹ An important early effect¹² of the inhospitable attitude towards polygamy was to deny any form of matrimonial relief to spouses, even in a potentially polygamous marriage.

Secondly, due to increasing immigrants' numbers, recognition was being given to an essentially alien custom.¹³ Nevertheless, the reaction was to make it undergo the process of conversion. Thus, English judges found a way out by holding that the nature of marriage could change in attitude from a complete denial of validity, to the position that a potentially polygamous marriage¹⁴ could become monogamous.¹⁵ This 'assimilationist attitude' informed the statutory reforms;¹⁶ indeed the Law Commission¹⁷ suggested that this reform was designed to encourage polygamous spouses to conform to English standard of behaviour.

¹⁰ According to Poulter, while before men's immigration dominated the scene, the 1970s saw the consolidation of the family in Britain. See Poulter, Sebastian [1990]: 'The Claim to a Separate Islamic system of Personal Law for British Muslims' In: Chibli Mallat and Jane Connors (eds), *Islamic Family Law*. London Graham and Trotman, pp.147-166. Indeed Ballard underlined that there was a mutually reinforcing effect between the perception of tighter immigration regulations and the desire to reunite the family rapidly to avoid stricter controls. See Ballard, Roger [1994]: *Desh Pardesh : the South Asian presence in Britain*. London: Hurst & Co, p.20.

¹¹ Shah, P. [2003]: pp.369-370.

¹² Pearl D. and Menski W., [1998] p.274.

¹³ Poulter, S. [1986] p.51

¹⁴ Polygamous marriage can be defined as 'those where under the law of the place of the celebration of the marriage the husband is permitted to marry more than one wife during the subsistence of the marriage, or the wife is permitted to take another husband'. A marriage can be actually or potentially polygamous. In the first option, the husband has more than a wife, or the wife has more than a husband. The polygamous marriage is instead considered as a potentially polygamous marriage when the husband or the wife is entitled to take more than a spouse under local law, even if the couple has no other wives or husband at the present time. See Macdonald, I.A. and Webber F. [2001] p.418.

¹⁵ Shah, P. [2003] p.307.

¹⁶ Namely the Matrimonial proceedings (Polygamous Marriages) Act 1972, soon enacted in the Matrimonial Causes Act 1973.

¹⁷ See the Law commission, [1972] Working Paper No 48, *Family Law, Report on Jurisdiction in Matrimonial Causes* London: HMSO, and The Law commission, [1973] Working paper No53, *Family Law, Matrimonial Proceedings in Magistrates' Courts*, London: HMSO, and the Law Commission, [1976] Working Paper No 77, *Family Law, Report on Matrimonial Proceeding in Magistrates' Courts*, London HMSO.

UK law divided marriages into those governed by common law¹⁸ and regulated by s.11 of MCA¹⁹.

After 1972, English courts accepted jurisdiction even if there was a polygamous marriage.²⁰ It²¹ showed the beneficial effects of the new law for wives.²² But on the other hand, under s.11 (d) of MCA, a marriage was void for polygamy, even if it was only 'potentially polygamous'.²³

The consequences of this scenario²⁴ were revealed when it was held²⁵ that a marriage contracted in a country²⁶ in which polygamy is permitted, could only be potentially polygamous and hence void, if one of the spouses had the capacity to marry polygamously.²⁷ Here, because a man domiciled in the UK did not have the capacity to enter into a polygamous marriage under s.11(b), the marriage could only be potentially polygamous if the wife could marry a second spouse. Under *Shari'ah* women are not permitted to marry a second man, so the marriage was held to be *de facto* and *the jure* monogamous and therefore valid. For the husbands this position is reversed, hence if an English domiciled wife²⁸ marries overseas in polygamous form, the marriage will be void in UK law and the husband must enter as a fiancé.²⁹

The reasoning adopted by the court caused problems for several academics.³⁰ The position of marriages solemnised earlier than 31 July 1971 was not clear³¹ and problems

¹⁸ That are those celebrated before 31 July 1971

¹⁹ Originally was s.4 of Matrimonial Proceedings (Polygamous Marriages) Act 1972.

²⁰ Pearl D. and Menski W., [1988] p.275.

²¹ *Chaudhry v Chaudhry* [1976] Fam 148.

²² Indeed their husbands could no longer rely on the argument that in English courts had no jurisdiction to grant any form of matrimonial relief.

²³ Macdonald, I.A. and Webber F. [2001] p.419.

²⁴ See further Shah, Prakash [2003]: 'Attitudes to polygamy in English law'. In: Vol. 52 *International and Comparative Law Quarterly*, pp. 369-400, p.369-370, pp.375-377.

²⁵ *Hussain v. Hussain*, [1982] All ER 369, CA.

²⁶ This judgement does not take notice of the fact that the spouses also contracted a Muslim marriage in England at about the same time as they registered their marriage there. This is exactly the typical process under *angrezij shariat*. See Pearl D. and Menski W., [1998] p.276.

²⁷ Macdonald, I.A. and Webber F. [2001] p.419.

²⁸ The prospect of an English domiciled woman proposing to sponsor a husband who also happens to have a second wife with a potential claim to entry would be totally unimaginable. See Shah, Prakash [2003]: 'Attitudes to polygamy in English law'. In: Vol. 52 *International and Comparative Law Quarterly*, p.380.

²⁹ Mole, Nuala [1987]: *Immigration: Family Entry and Settlement*. Bristol: Jordan & Sons Limited, p.43.

³⁰ Shah, P. [2003] p.377

³¹ Pearl, D [1986] p.46.

arose when a British Muslim woman went to a Muslim country to marry a man domiciled there.

However, HO's practice was to accept the marriage for immigration purpose.³²

In 1995 the application of s.11(d) was simplified. Section 5³³ of PIL(MP)A³⁴ provides that s.11(d) only applies to actually polygamous marriages. The effect is that where the practical reality of the marriage is monogamous, it will be treated as such by UK law, wherever it is celebrated.³⁵

Thus the clear message was that English law would not countenance actually polygamous marriages for English domiciliaries. When English domicile is established a person is not regarded as capable of contracting an actual polygamous marriage. Therefore UK law, seeking to control a person's personal law, seemed a continuing failure in distinguishing between personal law and the relevant jurisdictional law.³⁶

Similarly, direct pressure to convert potentially polygamous marriages to monogamous form was seen³⁷ in the fact that HO officials advised parties of actually monogamous unions to make a further marriage celebration in the UK, since their marriage could not be recognised in UK.

It seems therefore that English conflict of laws was considered priority.

From a rapid *excursus* of the most remarkable cases, it is in fact possible to deduce that the capacity to contract a polygamous or potentially polygamous marriage was governed by the choice of law rule.³⁸ In a famous case³⁹ the court chose the traditional domicile⁴⁰ theory.⁴¹ It was held that under English law the sponsor had no capacity to contract an actually polygamous marriage. Thus, if a British domiciliation is a second wife's sponsor,

³² Macdonald, I.A. and Webber F. [2001] p.419

³³ S.7 for Scotland.

³⁴ Private International Law (Miscellaneous Provisions) Act 1995

³⁵ Clayton, G. [2004] p.225.

³⁶ Shah, P. [2003] p.380.

³⁷ Shah, P. [2003] p.383.

³⁸ Mole, N. [1987] p.42.

³⁹ *Zabra and Another v. Visa Officer, Islamabad* [1979-80] Imm AR 48.

⁴⁰ In that case, according to Fransman, the domicile of origin has been abandoned in favour of domicile of choice. See Fransman, Laurie [1989]: *British Nationality Law*. London: Fourmat, p.204.

⁴¹ The traditional domicile theory is also called 'dual domicile' or 'prenuptial' or 'ante-nuptial'.

their marriage is declared void. British Immigration law was able to exclude the second wives⁴² simply refusing to recognise the validity of a marriage.

On the other hand, sometimes Tribunals, seeing the injustice behind some decisions refusing entry, tried to find a way to declare that a marriage was valid according to the prenuptial test⁴³ or challenging the traditional test itself.⁴⁴

Subsequently,⁴⁵ the impression that the law was slowly moving to considering the overseas law⁴⁶ arose. The Tribunal noted that it was still not clear which test determined the validity of marriages which took place before 1 August 1971, therefore they were not required to apply one test in contrast to the other, since England was the relevant country for both spouses.⁴⁷

In other words, until 1988, entry could be given to a second wife of an actually polygamous marriage if that marriage was recognised valid accordingly to the domiciliary law of the parties involved.⁴⁸

Afterwards, through the IA 1988⁴⁹ and the IR, the UK imposed an 'outright ban' on the wife's admission where another wife had already been admitted. This legislation marked a new departure in the attempt within British law to control polygamy through immigration restrictions.⁵⁰

The IA 1988 provided that no entry clearance or certificate of entitlement would be issued to a woman married under a system of law that allows polygamy, if there was another wife alive who has been to the UK since the marriage or has been granted entry clearance or a certificate of entitlement.⁵¹

⁴² This position was described as the traditional and prevalent in *Lawrence v Lawrence* [1985] 2 All ER 733.

⁴³ See *Rokeya and Rably Begum v Entry Clearance Officer, Dacca* [1983] Imm AR 163.

⁴⁴ See *Entry Clearance Officer, Dhaka, v Ranu Begum and Others* [1986] Imm AR 461.

⁴⁵ *Regina v Immigration Appeal Tribunal, ex parte Rafika Bibi* (4603) The High court gave this decision on 11 February 1988.

⁴⁶ Shah, P. [2003] p 387.

⁴⁷ Mole, N. [1987] p.42.

⁴⁸ Macdonald, I.A. and Webber F. [2001] p.420, and Macdonald, Ian A. and Nicholas J. Blake [1995]: *Immigration law and practice in the United Kingdom*. London et al: Butterworths, p.325.

⁴⁹ There was who underlined that the Immigration Act 1988 meant that for actually polygamous couples the prospect of securing full family reunion rights was now overridden by statute, although the position under private international law had still allowed some room for manoeuvre at the official levels. See Shah, P. [2003] p.393

⁵⁰ Shah, P. [2003] p.389.

⁵¹ Macdonald, I.A. and Webber F. [2001] p.420.

This legislation was indicative of the politics followed by the English government: the purpose was the so-called ‘ban on second wives’⁵². According to s.2, women who had the right of abode as Commonwealth citizens married to a CUKC before the 1983 may be prevented from exercising their right of abode. This disqualification will not include British citizens and only applies if the right of abode was obtained as a wife.⁵³ A wife is not prevented from returning to the UK if she previously came for settlement, as a wife, before 1 August 1988 or if she has been in the UK at any time since her marriage before there was a second wife. S.2(7) also provided that disqualifying presence in UK by the other wife will be disregarded if she were a visitor, or a person on temporary admission or as an illegal entrant.

The IR, moreover, prevents entry clearance from being granted to a wife where another wife of the same man has, since her marriage to him, visited the UK or been granted entry clearance or a certificate of entitlement. Therefore, paragraph 278 is wider than the 1988 Act because the restriction is on the second wife’s entry as a wife and applies whether or not the second wife has a right of abode.

A possibility that IR were declared *ultra vires* was had when the court⁵⁴ did not find any problems in the rules being wider than the Act. Thus, the idea that the 1988 Act was the source of the power to make rules was rejected, as the source of power remains the 1971 Act. Also, rights of abode were statutory and could only be taken away by statute, whereas conditions of entry are set by rules and can be changed by them.⁵⁵

This corroborates the idea that after the 1988 Act the case law has been less concerned with the marriages’ validity according to private international law and tends to be focused on the limits of exercise of administrative discretion, which now governs the admission of polygamously wives.⁵⁶

⁵² See also sections 1 and 3(9) that modified some dispositions of Immigration Act 1971. S.1 removed s.1(5) of IA 1971, while S.3(9), that replaced s.3(9) and 3(9A) of Immigration Act 1971, imposes a requirement of all claimants to the right of abode or British citizenship when seeking to enter to UK, to establish that status by obtaining a certificate of entitlement or a British passport.

⁵³ Macdonald, I.A. and Webber F. [2001] p.420 and Macdonald, I. A. and Blake, N.J. [1995] p.325.

⁵⁴ *Regina v Immigration Appeal Tribunal, ex parte Hasna Begum* [1995] Imm AR 249

⁵⁵ Clayton, Gina [2004]: *Textbook on immigration and asylum law*. Oxford: Oxford University Press, p.226.

⁵⁶ Shah, P. [2003] p.393.

In cases of actually polygamous marriages, a spouse cannot be admitted to the UK 'as such' until divorce or death removes the other wife or husband. The IDIs provide that entry clearance may not be withheld from a second wife if the husband has divorced the previous wife and the divorce is thought to be one of convenience, even if the husband is still living with the previous wife and to issue the entry clearance would lead to the formation of polygamous household.⁵⁷

Recently, since discrimination against women has been lifted, para278 was amended in order to apply to all applications made after 2 October 2000, regardless of the date of the marriage, to both sexes. In other words, the IR preclude admission of a polygamous husband of a woman in the same terms as rules for men⁵⁸.

Marriage

As it regards marriages⁵⁹, it was said that to obtain admission as a spouse, the applicant must satisfy the ECOs⁶⁰ that the marriage is a lawful one and complies with the IR's requirements.⁶¹

English law states that to have to valid marriage two requirements must be satisfied: both spouses have the capacity to marry and the form of the marriage celebration was valid.

The traditional approach to questions of capacity is to apply the dual domicile test.⁶²

⁵⁷ IDI Dec/00, Ch8, s.1, Annex E, para 8.

⁵⁸ See further Macdonald, I.A. and Webber F. [2001] p.420.

⁵⁹ Shah highlights that marriage relationships have often been doubted in South Asian family reunion cases for various reasons, but the validity of marriages on the basis of polygamy only seems to be raised in Pakistani and Bangladeshi Muslim cases. See Shah, P. [2003] pp.381-382. See also Murphy, John [2000]: 'The Discretionary Refusal of Recognition of Foreign Marriages' . In: Murphy, J. et al. [2000] *Ethnic Minorities, their Families and the Law*. Oxford: Hart Publishing, pp.71-86.

⁶⁰ Entry Clearance Officer.

⁶¹ Macdonald, I.A. and Webber F. [2001] p.418 and Macdonald, I. A. and Blake, N.J. [1995] p.323.

⁶² According to this theory, the capacity is normally determined by the ante-nuptial domiciliary law of each party. Even if most case law supports dual domicile as the test for issue of capacity, as the law is a confused state, it is possible to find cases where other tests have been applied. The mail rival is the intended matrimonial home test. See Dalla, Evans [1988]: *International Families and the Law*. Bristol: Jordan & Sons Limited, p.104-105. There also who vindicates the existence of a third theory, namely the *lex loci celebrationis* theory. See Mole, N. [1987] pp.42-44.

As far as the validity of a marriage is concerned, there are two different requisites.

The first one is monogamy. In England a polygamous marriage is always invalid, without a civil ceremony⁶³ and all marriages celebrated in UK must be monogamous, independent of the form used. According to courts,⁶⁴ the marriage's polygamous or monogamous nature is determined by the law of the place of the celebration of the marriage.⁶⁵

Apart from monogamy, marriages, if celebrated in UK, must comply with the requisites⁶⁶ of MA's requirements.⁶⁷ A marriage should be celebrated in a building approved for civil marriage and there should be a certificate issued by registrar or superintendent registrar, a Church of England or Wales clergyman, a synagogue, a Society of Friends non-conforming church.⁶⁸

Regarding immigration, often there is difficulty in establishing to the ECOs' satisfaction that the husband-wife relationship is as claimed.⁶⁹ The question is largely one of evidence and of credibility,⁷⁰ especially in relationship to the different's concepts of marriage.

Formerly British West African⁷¹ countries⁷² recognised three types of marriage: monogamous statutory marriage, performed in a Christian Church or in a registry office; polygamous customary law marriage⁷³ and polygamous Islamic marriage.⁷⁴ Instead, in the Indian subcontinent⁷⁵ three kinds of marriages exist: monogamous marriage according to the SMA,⁷⁶ monogamous marriage under the HMA,⁷⁷ and polygamous Islamic marriage.

⁶³ *R v Bham* [1966] 1 QB 159.

⁶⁴ *Chetti v Chetti* [1909] P 67 and *Sinha Peerage Claim* [1946] 1 All ER 348n.

⁶⁵ Even if the case law shows that a marriage which starts off as polygamous it may be converted in monogamous ones by subsequent events.

⁶⁶ Nevertheless the recent case law shows that a long marriage preceded by an irregular ceremony in an unregistered Sikh temple was valid. See *Chief Adjudication Officer v Bath* [2000] 1 FCR 419, CA.

⁶⁷ Marriage Act 1949-94.

⁶⁸ IDI Dec/00, Ch 8, s.1, Annex D.

⁶⁹ The onus is on the parties to prove the relation as claimed.

⁷⁰ Macdonald, I. A. and Blake, N.J. [1995] p.331.

⁷¹ See further Anderson, JND [1954]: *Islamic Law in Africa*. London: HMSO.

⁷² Ghana, Nigeria, Sierra Leone and Gambia.

⁷³ It is based on family's consent and the giving of 'bride price' to the wife family

⁷⁴ Mole, N. [1987] pp.39-40.

⁷⁵ See also Menski, Werner [2001]: *Modern Indian family law*. Richmond: Curzon.

⁷⁶ Special Marriage Act 1954.

⁷⁷ Hindu Marriage Act 1955.

Therefore, a certificate is considered the best proof of marriage, sometimes the existence of marriages may have to be proved by other means.⁷⁸ The IAT has accepted that presumptions⁷⁹ which go to establish the existence of a marriage in the parties' country of origin can be used.⁸⁰ Moreover, the tribunal⁸¹ held that it was not essential for the exact marriage date to be given. Parties could establish by evidence that they were married without being able to fix the exact date when this took place.⁸² Clearly, this would be the situation if the presumptions of local law relating to cohabitation and acknowledgment of paternity operated.⁸³

Now,⁸⁴ English law does not consider invalid a marriage if it is entered for a purpose other than mutual cohabitation and the parties have the relationship of husband and wife.⁸⁵ On the other hand, the IR require parties to intend to live together permanently as

⁷⁸ The Tribunal accepted the quotation from Mulla, that a marriage, in the absence of direct proof, will be presumed from: a prolonged and continued cohabitation, or the fact of the acknowledgement by the man of the child born to the woman, or the fact of the acknowledgement by the man of the woman as his wife. See for instance in *Nazir Begum v Entry Clearance Officer Islamabad* [1976] Imm AR 31 and in *Inayat Begum v Visa Officer Islamabad* [1978] Imm AR 174. See Mulla, [1990] *Principles of Mohomedan Law* (19th ed) Bombay: N.M.Private LTD, p.268.

⁷⁹ In *Ur Rehman* (IH 5885/99) IAS 2000, Vo 13 No15 the Tribunal considered valid, under English law, a telephone marriage stipulated if both parties were domiciliated in a country where this kind of marriage is valid even if one spouse was resident in UK at that time. On the other hand, the IDI does not recognize a telephone marriage if one of the parties involved in UK at that time, but recognized proxy marriages if are recognized in the country where they are celebrated. See IDI Dec/00, Ch 8, s.1, Annex D, para 3.

⁸⁰ Macdonald, I.A. and Webber F. [2001] p.427.

⁸¹ In *Khanom* [1979-80] Imm AR 182.

⁸² Macdonald, I.A. and Webber F. [2001] p.428 and Macdonald, I. A. and Blake, N.J. [1995] p.332.

⁸³ Moreover, a marriage that is held to be invalid may nevertheless qualify the applicant for admission as a fiancé(e) if it is demonstrated that the applicant was willing and able to remarry at the date of the decision, or as an unmarried partner, if he/she is not able to do so. But there is no jurisdiction to allow an appeal in that (such) situation. The principle is that an applicant must make clear the facts that he/she relies on, but not necessarily all the different applicable rules. For this reason there are those who suggested that whether in doubt, simultaneous applications as a spouse or as a fiancé(e) or an unmarried partner would need to be made in alternative. See Macdonald, I. A. and Blake, N.J. [1995] p.332, and Macdonald, I.A. and Webber F. [2001] p.428.

⁸⁴ Between 1977 and 1979 there was no claim to admission to UK if authorities concluded that (a) the marriage was primarily entered into for the purpose of obtain a settlement and (b) there was no intention to live permanently together as husband and wife. For details see McKee, Richard [1999]: 'Primary purpose by the back door? A critical look at "intention to live together"'. In: Vol. 13, No. 1 *Immigration and Nationality Law and Practice*, pp. 3-5, and Menski, Werner [1999]: 'South Asian women in Britain, family integrity and the primary purpose rule'. In: Rohit Barot, Harriet Bradley and Steve Fenton (eds.): *Ethnicity, gender and social change*. Basingstoke: Macmillan and New York: St. Martin's Press, pp. 81-98, and Powell, Phil [1990]: 'Custom and tradition in primary purpose cases: does the ECO really know best'. In: [July 1990] *Immigration and Nationality Law and Practice*, pp. 107-109, and Sachdeva, Sanjiv [1993]: *The Primary Purpose Rule in British Immigration Law*. Stoke on Trent: Trentham, and Scannell, Rick [1992]: 'Primary purpose: the end of judicial sympathy?' In: Vol. 6, No. 1 *Immigration and Nationality Law and Practice*, pp. 3-6.

⁸⁵ Macdonald, I.A. and Webber F. [2001] p.429.

husband and wife,⁸⁶ and policy is only to permit admission as a spouse of matrimonial cohabitation.⁸⁷

The I(EEA)O 1994,⁸⁸ now the I(EEA)R 2000,⁸⁹ excludes parties to marriage of convenience from definition of spouse.

A marriage found to be sham⁹⁰ would not give rise to any right to enter or remain, since the IR requirement that the couple intend to live together would not be fulfilled. Therefore, a spouse's admission is conditional on intention to live together permanently as husband and wife and the continuing subsistence of a marriage.⁹¹

Recently, the Act 2004, Ss.19-25⁹² makes 'a major, targeted new enforcement effort against sham marriages'. McKee⁹³ underlines that the new procedures are intended to curb a perceived increase in the number of marriages of convenience.

Divorce

As mentioned above, divorce is a matter connected to polygamy for different reasons. The UK does not recognise polygamy for UK domicilates and does not permit entry of further spouses, therefore no entry clearance will be granted where an earlier divorce is not recognized as the person will be regarded as still married with the previous spouse.⁹⁴ Also, the recognition of *talaq* is a topic which regularly arises in immigration context when considering the capacity of parties to marry.⁹⁵ In effect if a person is not divorced, he/she

⁸⁶ HC 395, para 281 (iii).

⁸⁷ *Yanus Patel v Immigration Appeal Tribunal* [1989] Imm AR 416, CA.

⁸⁸ Immigration (European Economic Area) Order 1994.

⁸⁹ Immigration (European Economic Area) Regulations 2000.

⁹⁰ S.24 of Immigration and Asylum Act 1999 defines 'sham marriage'.

⁹¹ There are nevertheless those who has seen a reintroduction through the back door of the Primary Purpose Rule in the recent increase in refusals of entry clearance, despite the abolition of the PPR was intended to ensure that all those genuine with marriages would be able to live with UK based-spouses. See Macdonald, I.A. and Webber F. [2001] p.430.

⁹² Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

⁹³ McKee, Richard [2004]: 'A brief outline of some salient provisions of the 2004 Act'. In: Vol. 10, No. 3 [Autumn 2004] *Immigration Law Digest*, pp. 13-20, at p.16.

⁹⁴ For a critical analysis see Mayss, Abba [2000]: 'Recognition of Foreign Divorces: Unwarrantable Ethnocentrism'. In: Murphy, J. et al. [2000] *Ethnic Minorities, their Families and the Law*. Oxford: Hart Publishing, pp.51-70.

⁹⁵ Macdonald, I.A. and Webber F. [2001] p.424.

cannot marry another, therefore his/her application to enter as a spouse would not be considered as an application to enter as a fiancé(e) and granted on that basis.⁹⁶

Beginning the discourse in relationship to the countries of origin of the immigrants in the UK, in formerly British West African countries divorce is not easy under customary law. It is essentially an arrangement between the families, not the parties⁹⁷. Thus, as established by the FLA⁹⁸ and the RFDA,⁹⁹ parental consent can be obtained by writing form in the UK and will be recognised in UK as a valid divorce if the husband has retained his domicile in West Africa.¹⁰⁰ Instead, on the Indian subcontinent, divorce is quite common and when it does occur it is through normal civil proceedings, nevertheless in rural areas extrajudicial divorce sanctioned by the community's elders exists. Moreover, in both these areas, there are many forms of Islamic divorce.¹⁰¹

English legislation¹⁰² will recognise a divorce obtained in a foreign jurisdiction if some requisites were satisfied. If it was obtained by proceedings, it must comply with the legal requirements of the country in which was obtained, and either party was resident or domiciled in or a national of the country in which was obtained.¹⁰³

The majority of divorces obtained abroad are recognized, but problems arise about the recognition of *talaq*, a kind of Islamic divorce. Indeed, a *talaq* pronounced in the UK will not be regarded as valid in the UK.¹⁰⁴ According to the FLA 1986, s.46(2), a *talaq* pronounced in a Islamic country could be recognized in UK if it was obtained by proceedings,¹⁰⁵ or, if not, neither party was habitually resident in the UK for on year

⁹⁶ *ECO Islamabad v Mobammad Rafiq Khan* 01/TH 2798 and *ECO Islamabad v Shakeel* [2002] UKIAT 00605. Here we can notice stiffening. In the past there was another principle, as ruled by *Ach-Charki* [1991] Imm AR 162, in fact the fiancées were free to marry until the tribunal hearing.

⁹⁷ It involves agreement of both families and the return of the bride price. It is unlikely be accompanied by judicial proceedings unless there has been some dispute over the return of the bride price.

⁹⁸ Family Law Act 1986.

⁹⁹ Recognition of Foreign Divorce Act 1971.

¹⁰⁰ Mole, N. [1987] p.40.

¹⁰¹ See Hinchcliffe Doreen: [1970]: 'Polygamy in Traditional and Contemporary Islamic Law' In: Vol. 1 No 8 *Islam and the Modern Age*, pp.11-38.

¹⁰² The rules relating to recognition of foreign divorces and judicial separations are regulated by the Family Law Act 1986, Ss.44-54.

¹⁰³ Family Law Act 1986, section 46 (1).

¹⁰⁴ *ECO v Islamabad v Tanzeela Imran* [2002] UKIAT 07383.

¹⁰⁵ An exception is contemplated for Azad Kashmir, where a *talaq* may be validly obtained without a proceeding, and thus the *bare talaq* is recognized. Indeed, in this area the Muslim Family Law Ordinance 1961 does not have force. See also Macdonald, I.A. and Webber F. [2001] pp.424-425.

before the divorce. However, in immigration cases, usually a party has been resident in the UK and so divorce cannot be recognised.¹⁰⁶

Guide lines about the approach to be taken to ascertain whether a divorce can be recognised by the UK, were given when the court,¹⁰⁷ making ‘an important distinction between tradition and proceedings’,¹⁰⁸ regarded *talaq al-basan*¹⁰⁹ as a personal act and not a divorce obtained by proceedings. There are those who¹¹⁰ think that this decision was influenced by ‘the perception of its particular contemporary relevance, which arose from a trend in Pakistan towards recognition of a *bare talaq* as fully effective.’¹¹¹

Settlements in the UK

As far as immigration is concerned, it has seen that Muslim men circumvented English law by claiming that they had domicile where polygamy is allowed. British law recognises as valid a polygamous overseas marriage, but not its immigration consequences. Thus, a man can officially have only a wife residing in England at any one time.

Regarding settled people, it must be said that today many Muslims do not see a conflict between their presence and *shari’ah*: they concern themselves first with Muslim law rather than the law of the European country where they live.

Muslims keep control over *shari’ah* without any outside interference, and use official law aspects which assist them in maintaining their own unofficial law. This phenomenon of ‘Muslim post-modern legality’ is most visible in the field of family law, in particular

¹⁰⁶ Clayton, Gina [2004]: *Textbook on immigration and asylum law*. Oxford: Oxford University Press, p.227.

¹⁰⁷ *Baig v ECO Islamabad* [2002] UKIAT 04229

¹⁰⁸ Here, the court did not depart from previous authority of the House of Lords or other tribunal decisions. See Clayton, Gina [2004]: *Textbook on immigration and asylum law*. Oxford: Oxford University Press, p.227.

¹⁰⁹ See further Pearl, David and Werner Menski [1998]: (3rd) *Muslim family law*. London: Sweet & Maxwell.

¹¹⁰ Clayton, Gina [2004]: *Textbook on immigration and asylum law*. Oxford: Oxford University Press, page227.

¹¹¹ The message is clear: even if the Pakistan develops the recognition of divorce without proceedings, UK will not be influenced

related to marriage, divorce and polygamy.¹¹² Therefore, it can be argued that, in Britain, Muslim law exists both on an official level and on an unofficial level.¹¹³

Muslims settled in the UK continue the practice of polygamy.¹¹⁴ There are two hypotheses.

A man, whose wife lives abroad, marries with *nikah*¹¹⁵ only a second time without divorcing his first wife. Thus, if he wants he can still bring his first wife and his children from abroad.¹¹⁶

Or a husband divorces his first wife under English law¹¹⁷ but not under *shari'ah* and thus he can marry again. His first wife, who is not religiously divorced but only divorced under civil law, in the eyes of the community, is still married with him.¹¹⁸

This phenomenon happens because the contract of Muslim marriage or the *talaq* were simply not perceived and treated as a legal fact, as far as English law is concerned.¹¹⁹ Therefore Muslims seem to have found an autonomy to follow and reconstruct their Islamic and customary identity.¹²⁰

A quiet process of legal reconstructing is being achieved from within the community by the Islamic Shari'a Council of UK.¹²¹ Many disputes among Muslims are now settled in

¹¹² Yilmaz, Ihsan: [2002]: 'The challenge of post-modern legality and Muslim legal pluralism in England'. In: Vol. 28 No 2 *Journal of Ethnic and Migration Studies*. p. 347.

¹¹³ Yilmaz, Ihsan [1999]: *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim laws in England, Turkey and Pakistan*. Unpublished PhD thesis. London: Scholl of Oriental and African Studies, p.49.

¹¹⁴ There was who said that it is not surprising to see advertisement from a man looking for a second spouse. See for example Yilmaz, Ihsan: [2001]: 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law'. In: Vol. 21 No 2, *Journal of Muslim Minority Affairs*. pp. 297-308.

¹¹⁵ The Muslim marriage ceremony is normally referred to as *nikah*. For details see Pearl D. and Menski W., [1998] pp.139-175.

¹¹⁶ Yilmaz, I [2002] p.349.

¹¹⁷ The flexible procedure of English divorce makes this even simpler.

¹¹⁸ These marriage are called limping marriages. See Yilmaz, I [2002] p.350 and Dalla, E. [1988], pp.103-104.

¹¹⁹ Pearl D. and Menski W., [1998] p.277.

¹²⁰ Yilmaz, I. [2001] p.297.

¹²¹ The Islamic Shari'a Council is a quasi-Islamic court that applies Islamic rules to deal with the problems facing Muslim families as a result of obtaining judgements in their favour from non-Islamic courts in the country, but not having the sanction of Islamic Shari'ah. See Yilmaz, I. [2001] pp.303-304, and Yilmaz, Ihsan [1999]: *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim laws in England, Turkey and Pakistan*. Unpublished PhD thesis. London: Scholl of Oriental and African Studies.

such unofficial conciliation and this will have wider implications on the future of Muslim law in Britain. This suggests that minorities are developing their own distinct lifestyle.¹²²

Regarding polygamy, conflicts between official and unofficial laws have been seen as temporary and it has been believed that ethnic minorities would soon follow the law of the land, but in Britain, after many years, Muslim law and custom are now increasingly visible.¹²³ An interesting explanation for that new visibility has been found in the recent phenomenon of reaffirmation of the religion as 'principal identity constituent'.¹²⁴

Conclusion

From this *excursus* the different ways adopted by English governments in order to reduce the increasing number of immigrants and to check polygamy are deduced. The latter, especially, has often been 'stigmatized' to reduce the immigrants entry in the UK or, vice versa, immigration restrictions have been used to control polygamy. In the UK a second spouse cannot officially exist, therefore a polygamous marriage is not recognized valid either for residents, or in case of family reunion. Polygamy shows that ethnic minorities have not remained passive recipients of official dictates.¹²⁵ Official bans on social practices simply drive the phenomenon underground, where the risk of abuse is great. In particular, regarding the position of 'unofficial second wives', courts¹²⁶ are unable to offer solutions and so these are found in the extra-legal sphere.¹²⁷ Case law highlights the wide gap in protection for wives under official law.¹²⁸

¹²² Ballard, Roger [2002]: 'The South Asian Presence in Britain and its transnational connections'. In: Singh, H and Vertovec, S. (eds), *Culture and Economy in the Indian Diaspora*. London : Routledge. See also at www.casas.org.uk.

¹²³ Yilmaz, Ihsan: [2002]: 'The challenge of post-modern legality and Muslim legal pluralism in England'. In: Vol. 28 No 2 *Journal of Ethnic and Migration Studies*, pp. 345-346.

¹²⁴ Tozy, Mohamed [2002]'L'islam e la sfida delle appropriazioni'. In: Mancini, R. et al., *La libertà religiosa tra tradizione e moderni diritti dell'uomo*. Torino: CESREA, pp.135-137.

¹²⁵ Shah, P. [2003] p.398.

¹²⁶ It is far from being the case that Western legal system is prepared to over towards the Afro-Asian model of personal law.

¹²⁷ Pearl D. and Menski W., [1998] p.278.

¹²⁸ Shah, P. [2003] pp. 359-400.

It would be necessary take into account the demands of people from all backgrounds, regarding culture, religion and ethnicity¹²⁹ rather than continue turning a 'blind eye' to ethnic minority legal facts. Indeed, it was suggested that the establishment of Afro-Asian legal cultures in Europe leads to question as to whether private international law offers a realistic prism through which the legal status of such people can be assessed.¹³⁰

As regards the IR, English law can be justified as immigration law as it does not focus on the right of settled people to be joined by their family, instead upon the status of the proposed entrants.¹³¹ Nevertheless, as it regards the birth of 'legal underground', in which the polygamy is perpetrated, it would be opportune to look for a balance between the demands of the socio-cultural legal sphere and the political stand of the state.¹³²

It is difficult to know when and if this can happen, since above all Western countries seem to be going in the opposite direction, but the attainment of a smaller 'legislative ethnocentrism' is nevertheless desirable.

¹²⁹ Yilmaz, I. [2001] p.305.

¹³⁰ Ferrari, Silvio [2000]: 'Introduction' In: Silvio Ferrari and Anthony Bradney (eds), *Islam and European Legal Systems*. Aldershot: Ashgate, pp. 1-9.

¹³¹ Clayton, G. [2004], p.226.

¹³² Yilmaz, I. [2001], p.305.

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