RELIGIOUS MARRIAGES WITHIN ENGLAND AND WALES; THEIR CELEBRATION AND DISSOLUTION

By
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INTRODUCTION

In most areas of English civil law, the religious beliefs and customs of clients and their families is information which it would be unusual to raise and its relevance to the legal advice offered would be tangential. The same cannot be said within the arena of family law. For the majority of international family practitioners, it is a rare moment when both parties are from the same national and /or cultural background or are seeking advice about the future of the relationship, in the same jurisdiction as that jurisdiction in which the marriage was celebrated.

This article seeks to alert practitioners of the importance of obtaining information relating to the circumstances of a client's marriage which may impact upon what steps need to be taken upon marital breakdown to allow both parties to be free to marry again in the future according to civil law as well as their customs and beliefs anywhere in the world. It also highlights the potential impact upon other family members of failing to dissolve religious as well as civil marriages and identifies the limited role that religious tribunals play alongside civil courts within the family arena.

All references to English law are to include the jurisdictions of England and Wales. Where available Scottish references are also given.

In England, marriage is defined as ,"the voluntary union for life of one man to one woman to the exclusion of all others",(*Re Bethell, Bethell v Hildyard (1888) 38Ch D 220*).This essentially reflects the Christian concept of monogamous marriage. For a valid civil marriage to be celebrated in England , the parties must have the capacity to marry each other (both parties must be over the age of 18 or over 16 with their parents consent; have the physical capability to consummate the marriage; and not already be related by blood or be married to another person, save for specific exceptions).

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Polygamous marriage is not permitted in England and Wales (Matrimonial Proceedings (Polygamous Marriages) Act 1972, now section 11(d) of the Matrimonial Causes Act 1973). It is, however, possible for a person domiciled in England and Wales to enter into a marriage abroad which is potentially polygamous to the extent that that jurisdiction allows such marriage. However, only those who are domiciled in a country where polygamy is permitted can enter into a polygamous marriage abroad ,which would be recognised as a valid marriage in England.

However, since the Private International Law (Miscellaneous Provisions) Act 1995, a marriage entered into outside England and Wales between parties neither of whom is already married, remains a valid marriage on the ground that it is entered into under a law which permits polygamy and with either parties domiciled in England and Wales. Section 47 MCA 1973, dealing with matrimonial relief and declarations of validity in respect of polygamous marriages, allows the English courts to grant financial relief even if one of the parties to such a marriage has been married to more than one person.

Jewish law ("*halachah*") does not permit polygamy (although some communities - the Sephardim - still practised until recent times). Islam permits polygamy . In most faiths, there is a wide variation of the level of practise it is prudent to identify the exact place of celebration of the marriage and under which auspices of which particular group and to return to that place of worship or auspices to identify what steps should be taken to ensure that local usages are adhered to.

A civil marriage cannot be for a term of years but rather a union for life.

Civil partnership between same sex partners is a distinct civil status from marriage (see Civil Partnership Act 2004). Judaism and Islam also reflect that marriage can only be between a man and a woman .Only Liberal and Reform Jewish communities in England celebrate same sex unions.

Place of celebration of marriage

In England, prior to celebration of a wedding, the reading of banns, a licence or a registrar's certificate must be obtained if the wedding is to be celebrated according to the Church of England rites. Civil marriages may be solemnised on premises approved by local authorities (Marriage Act 1994).This means that parties can marry in church, at a registry office, at registered addresses and, in certain situations, in other places of worship. These options have

evolved from the historical position of those religious groups , which are limited to those who only recognise monogamy.

Historically and reflecting where certain groups were in society at the time, Jews and Quakers have exemption from the provisions of the Marriage Acts. Consequently if both parties are Jews or Quakers, they may marry anywhere in England according to their own marriage customs (subject to obtaining a registrar's certificate or certificate and licence).This can take place at a synagogue , hotel or private home .

What is interesting is that such exceptions remain enshrined within primary legislation for two of the smallest minority communities . Indeed as far as the writer is aware no steps have been taken by any other communities to initiate legislative change in recent years. According to the 2001 Census of Population, there were 41 million Christians in the Uk;1.58million Muslims; 558,000 Hindus; 336,000 Sikh; 267,000 Jews and 149,000 Buddhists. Thus members of the English Muslim community being 3% of the total population and more than half of the total non Christian population, still need to enter into a separate civil marriage in addition to the, "*nikkah*" ,or religious marriage contract.

According to the latest National Statistics available (ONS Series FM2 no 26,2000), there are only 137 Sikh temples and 109 mosques registered . It is unclear as to why so few religious communities have opted to register their places of worship with local authorities which would enable a religious leader of the community to conduct a marriage and unless the venue is registered at a place at which a civil marriage can be celebrated (at which place a civil registrar will need to be in attendance), ethnic groups are limited in their options.

The purpose of raising such statistics is to remind practitioners to investigate the ethnic group from which the client comes and to investigate in some detail the circumstances of the marriage. It is necessary to identify not only where the marriage was celebrated in England but under whose auspices. Whilst a civil marriage certificate may be produced, this is only evidence of the *civil* marriage.

As an aside, practitioners should be aware that in truly exceptional circumstances, the English courts have chosen to recognise a religious marriage which has not been entered into as a civil marriage as well entitling the parties to a financial settlement under ancillary relief proceedings when the marriage broke down (Chief Adjudication Officer v Bath 2001 FLR 8). In this case the parties were unaware that their religious marriage celebrated in England in

accordance with Sikh rights was not valid. A mistaken belief in the fact that they lived as husband and wife for 37 years gave rise to a presumption of validity of the marriage in common law (also see A-M v A-M (2001) 2 FLR 6).

Religious marriages

Despite the availability of a number of civil options for marriage, some chose to celebrate a religious marriage only. Whilst in some jurisdictions this may be recognised as a valid civil marriage, a religious wedding ceremony in England cannot be dissolved in accordance with English law. According to the religion of the parties, the marriage may still need to be dissolved if either party wishes to remarry in accordance with the usages of that religion.

Certain faiths have clear roles setting timetables and sanctions upon those who do not dissolve the religious aspect of the marriage. This is particularly true of the Jewish and Muslim community where a *get* and a *talaq* respectively must be obtained.

Every Jewish marriage is evidenced by a marriage document ("*ketubah"*) which includes details of the husband's religious legal obligations to the wife during the marriage which can be terminated by death or divorce. In Jewish law ("*halachah"*) marriage is not stated to be a lifetime union. It also anticipates that in the event of a relationship breakdown, the process of consensual divorce is necessary including financial support. *Halachah* on the area of divorce *("get"/"gittin* "plural) is detailed and complex. A *get* is given by the husband to the wife. In the absence of the *get* being given, the parties remain married, notwithstanding the dissolution of any civil marriage. The wife is therefore "chained" ("*agunah*").

As the Jewish divorce process is consensual, many solutions have been pursued to "persuade" husbands to grant a *get.* Such steps can invalidate the religious effect of the divorce. Sadly, this has created opportunities for those wishing to manipulate a tactical advantage in relation to financial or child arrangements. Worse still, refusal to deliver the *get* might be motivated by malice or spite.

The impact, however, not only prevents a wife remarrying, but also impacts upon her children. This is because if a married Jewish woman does not receive a *get* and later has children by another Jewish man, the children will have the status of a *mamzer* (plural *mamzerim*) and cannot marry within the Orthodox Jewish communities. It is akin to illegitimacy and effects not just those children but their descendants too.

If the issue of a religious divorce is not raised within the civil proceedings and as part of the negotiations, the husband may not be willing to grant a *get* in the future, or it may not be possible to trace him or he may be mentally impaired or lack capacity to grant a *get*. There is no remedy for these situations and it is therefore essential that wives are advised of the pitfalls in advance of the civil divorce.

Sadly, efforts to explore *halachic* solutions worldwide to the problem have not produced comprehensive solutions. Whilst, historically, most refusals for a *get* relate to husbands refusing to deliver it, there are occasions when the woman will not "accept" the *get* .

In certain circumstances even if there is no formal religious marriage, if a couple cohabit as man and wife and children are born of that relationship, a *get* may still be needed if either later wish to remarry in a synagogue

Applications for a *get*, are made in the first instance to the religious tribunal, the *Beth Din* under whose auspices the marriage was conducted. Both parties need to contact the registrar and delivering the *ketubah*. The process can be initiated before the commencement of civil proceedings, but it cannot be written and finalised until the parties have physically separated. Helpful guidance can often be sought as to local practice and documentation necessary upon enquiry of the relevant *Beth Din.*

In the absence of effective *halachic* solutions to ensure that wives did not remain chained whilst their husbands were free to remarry civilly, the British Jewish community sought civil remedies . Initially, these were contained in Part II of the Family Law Act 1996 (section 9(3) and (4) later repealed). Finally, by the Divorce (Religious Marriages) Act 2002 which inserted s.10(A) of the Matrimonial Causes Act 1973 (and Family Law (Scotland) Act 2006 inserting s s.3(A) into the Divorce (Scotland) Act 1976) one route was found to help alleviate the position.

Section10 (A) (i) MCA 1973 now provides that, "the civil divorce decree is not to be made absolute unless, on the application of either party, a declaration is made by both parties that they have taken such steps as are required to dissolve a marriage in accordance with those usages". The court is given a discretion to prevent the granting of a final decree of divorce until confirmation has been received by the court that the formalities for dissolving the religious marriage have been completed. The confirmation is required from the appropriate *Beth Din* of the applicant's choice. The application should be made after decree nisi but

before decree absolute (in Scotland, such an application should be made prior to the decree of divorce being granted).

The civil remedy afforded by this enactment is not a panacea for all the problems arising form an inability to dissolve a religious marriage. If the decree absolute has already been granted dissolving the civil marriage, no steps can be taken. It has been suggested (Chris Barton - British Minority Ethnics Religion and Family Lawyers, Family Law - December 2008), that the Act does not apply to non-synagogue marriages or marriages celebrated abroad. That interpretation is not widely accepted .

The opportunity to prevent the dissolution of the civil marriage has worked most effectively as a deterrent to using the giving or refusal of a *get* as a blackmailing weapon. There are no records kept of court applications made pursuant to the Divorce (Religious Marriages) Act 2002. Anecdotally they are miniscule in number .There is as yet no reported decision of a grant or refusal of an application. The legislation was not made retrospective. Whilst it has been suggested that it may not apply to marriages celebrated before the Act, anecdotally again, that point has never been tested in the English courts and would be unlikely to succeed.

What remains perplexing is why no other religious minority group has yet taken steps to afford the protection of the Act.

According to Islam, *sharia* (translated "as the paths follow") is the religious law to be adhered to by Muslims worldwide. A Muslim marriage (*nikah*) may be conducted anywhere as long as it is in the presence of witnesses and with the husband agreeing to pay a defined dowry ("*mahr*"). "It is not unusual for the actual *nikah* to be conducted in the home of the bride and the wedding party to take place that evening". (Raffia Arshad - Solicitors Journal - 27.4.07). As explained above, an additional civil marriage will be necessary to bind the parties in English civil law. If however the *nikah* was entered into in Pakistan, his law and customs recognise the ceremony and if all the *nikah* rules were complied with, it would be recognised as a valid marriage in England.

The *mahr* is often standardised in wording and amount (as is the *get* in Judaism) although in some jurisdictions it is tailor made for the parties. It has been suggested it can be a useful evidential indicator of the parties' intentions as to financial expectations upon marital breakdown as to financial provision within an ancillary relief application (Qurashi v Quarashi

(1971) 2 WLR 518). The extent to which such standard wording of financial provision within a religious marital contract document is debateable.

In Islam, the right to divorce (*"talaq"*) is automatic for a husband whereas for a wife it has to be acquired ("*khula*") upon satisfying an Imam or scholar of entitlement. In the absence of a husband agreeing to grant a divorce, the wife's remedy is to approach a *sharia* council who can investigate the request and if reconciliation is impossible may grant her the *khula* (the divorce initiated by the wife). As its grant is dependent upon an investigation by the members of the council, the existence of a decree nisi or a decree absolute is useful evidence in support.

The financial impact upon parties and their family, who enter into religious marriages only in England can be significant. In place of the wide range of financial claims available under the Matrimonial Causes Act 1973, parties are treated as if they are cohabitants. Thus the only financial protection upon the breakdown of the relationship is under the Trust of Land and Appointment of Trustees Act 1996 (TLATA) - declarations and order relating to land or property held in the parties names and, if there are children, an application under Schedule 1 of the Children Act 1989.

There is little education either for parties or professionals as to the religious impact upon the failure to obtain religious divorces within the civil context. One such initiative within the Jewish community and led by the Chief Rabbi Sir Jonathan Sacks (for a pre-marital agreement obliging Orthodox Jews to grant and receive the *get* to be entered into prior to marriage) had a disappointing level of take up although did have some impact in raising awareness of the issues for parties themselves prior to marriage. This was also bolstered with the publication of a booklet "Jewish Family Life and Customs" – Board of Deputies of British Jews (2006). Other solutions have also been considered. See"The Pre Nuptial Agreement of Mutual Respect, Get and English Law", Rachel Levmore and Daniel Clarke .

Even if lawyers raise the issue with clients, they are often met with resistance. Parties may have celebrated a marriage at a level of religious observance which is longer practised by the couple and are therefore unwilling to concern themselves with the future impact on the personal status for them or their children. If legal advice is given and yet the party refuses to seek the dissolution of the religious marriage, practitioners would do well to seek a signed waiver of professional liability from their client.

No article relating to religious marriage and the interplay with English civil law would be complete without reference to the role of religious tribunals operating in England. This issue Religious and community leaders tend not to encourage divorce although they recognise a right to separate being conferred on both a husband and the wife. They may seek to reconcile the parties and can also support the individuals and their families within the community. Such a role is not strictly speaking mediation and is not without its difficulties because those conducting the exercise may not have the benefit of being entirely independent of both parties nor can all discussions be said to be privileged. Indeed the emphasis is often striving to achieve reconciliation.

Religious tribunals such as *sharia* councils and *battei din* are often approached to assist in the resolution of family disputes. Whilst the bringing of parties to a point at which there is agreement as to the dissolution of the marriage and steps to be taken, only the English civil court can effect the dissolution of the civil marriage and only the religious court can deal with the dissolution of the religious marriage.

Difficulties arise where the religious tribunals seek to assist the parties in achieving resolution of ancillary relief issues. Under the Arbitration Act 1996, the religious tribunal may be recognised as an appropriate body to enable civil disputes to be resolved through this route, any financial arrangements of marital property ancillary to divorce can only be approved by a civil court and can only be implemented following the decree absolute (civil dissolution).The Matrimonial Causes Act 1973 clearly prohibits the religious tribunal to fetter the discretion of the family courts. Parties may therefore have the benefit of negotiating what they believe to be an agreement, which later is treated by the family court as of evidential value only as in the exercise of its very wide discretion ,it may question any order that appears unfair in respect of the process through which the parties have reached this agreement.

It would appear that the English government have no plans to amend this position and so currently, arbitration through religious tribunals is not an effective system of dispute resolution to be used in family cases .The most recent government statement appears to be from Lord Bach (6.11.08 Hansard Official Report Column WA81). "The Government are considering changes to applications as Consent Orders in ancillary relief proceedings so that the statements of information indicate the means by which agreements were reached. Any proposed changes will be included in the family procedure rules consultation process."

Whilst that process is underway, the direction the recommendations are to take are unclear. Other requests have been made by specialist practitioner groups within the field (Board of Deputies Family Law Group and Resolution) for all parties completing civil divorce documentation to be alerted to the need to address the dissolution of a religious marriage within the guidance notes for divorce proceedings.

There remains a professional responsibility to alert parties and the wider community to the existence ,validity and need to dissolve any religious marriage which may not be dissolved by civil proceedings.