English Common Law, Extraterritoriality and Parsi Law: A Case in 1930s' China

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ABSTRACT

The paper analyses the request of an Indian Parsi, living and working in the Republic of China, to the British consul in Peking to register his Chinese wife and their three children as British subjects in 1937. To a first marriage, that had been conducted according to the Chinese tradition in 1919, a second marriage followed in 1934. This was celebrated after the conversion of the couple to Catholicism. Of the three children, two sons had been born before the Catholic wedding, while the youngest one, a daughter, was born in 1935. The marriage of an Indian Parsi and a Chinese woman who later converted to Catholicism and married again is certainly an extremely rare event (if not a single one). The archival documents allow a better understanding of various aspects related to the issue of extraterritoriality of British subjects in the Republic of China, as well as the relationship of British institutions and English Common Law with the traditions of religious communities — and in this specific case, the Parsi Zoroastrian community — of the British Raj.

KEYWORDS

Parsis, Parsi Law, Zoroastrianism, English Common Law, Lex loci contractus, extraterritoriality, nationality

INTRODUCTION: A RARE CASE IN A COMPLEX SCENARIO

Within the Parsi Zoroastrian community of India, the issue of mixed marriages remains one of the most controversial and divisive points. The rift on the topic is defined on several levels. It involves a religious, historical and social debate aimed at defining, among other things, the possibility of joining the community for the children of a single Parsi parent. The space of the debate is articulated on the distinction between Parsi and Zoroastrian. In the first case, it is a question of belonging by descent to the community of refugees who landed on the coast of Gujarat, perhaps in

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the eighth or tenth century according to tradition,[2] after the Arab occupation of Iran.[3] In the second case there is instead a free religious choice to join a universal religion that does not directly involve the ethnic dimension.[4] A century-old and ever more

2 A. WILLIAMS, *The Zoroastrian Myth of Migration from Iran and Settlement in the Indian Diaspora. Text, Translation and Analysis of the 16th Century Qeṣṣe-ye Sanjān 'The Story of Sanjan'*, Leiden — Boston 2009, p. 7. The volume contains the Persian manuscript, the transliteration into Latin letters and the English translation of the story of the journey of the Iranian Zoroastrians to India, *Qeṣṣeh-ye Sanjān*, written by a Parsi priest at the end of the sixteenth century. The authenticity of the story has been contested (see B. N. BHATENA, *Kisse-Sanjan: A Palpable Falsehood, A Paper submitted to the Twelfth All India Oriental Conference (History Section) Benares, 1943*, Bombay 1944).

3 In a broader sense, the definition also extends to the Irani community, which arrived in India in the British era. See the next footnote.

4 In India, the connection and at the same time the distinction between the two aspects — ethnic and religious — emerged in the early twentieth century. One of the best-known cases of conversion to Zoroastrianism in a contemporary Parsi environment — known for its journalistic coverage at the time, but above all for the impact it had over the following decades — is the case of Suzanne Briere who in 1903 had married Ratanji Dadabhoy Tata. The case was accompanied by another conversion, that of a "*Rajput lady*", also married to a Parsi. The judicial issue that followed the two cases (Sir Dinsha Manekji Petit vs. Sir Jamsetji Jijibhai) concerned essentially two issues: "*(1) Whether the defendants are validly appointed Trustees of the properties and funds of the Parsi Panchayet, and whether, in the event of death or resignation of one or more of them they have the right of filling up such vacancy or vacancies as they occur. (2) Whether a person born in another faith and subsequently converted to Zoroastrianism and admitted into that religion is entitled to the benefit of the religious Institutions and Funds mentioned in the plaint and now in the possession and under the management of the defendants*" (p. 514). According to the judgement by Dinshaw Davar: "*For the reasons I have recorded above, I come to the conclusion that even if an entire alien–a Juddin–is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the Funds and Institutions now under the defendants' management and control ; that these were founded and endowed only for the members of the Parsi community ; and that the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who come to India, either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion*" (pp. 554–555). For the purposes of this article, it is also interesting to read another passage from the decision: "*It will thus be seen that the word Parsi, when used in India, could only mean the people from Pars. When the emigrants from Persia settled in India, the people around them probably knew little of their religion but they knew they came from Pers or Fars, and they called them Parsis. Thus, all the descendants of the original emigrants came to be known as Parsis. A Parsi born must always be a Parsi, no matter what other religion he subsequently adopts and professes. He may be a Christian Parsi, and he may be any other Parsi, according to the religion he professes; but a Parsi he always must be. The word Zoroastrian simply denotes the religion of the individual: the word Parsi denotes his nationality or community, and has no religious significances whatever attached to it. To my mind, the distinction between the two terms, Zoroastrian and Parsi, is most clearly defined when one sets about carefully examining the real meaning of the two expressions ; but before the French wife of the sixth plaintiff proposed to be converted to the Zoroastrian religion and*

widespread awareness of the deepest roots of the religion has led to attempts at reform[5] and revision of originally alien traditions[6] and rigidities that had crystallized in pre-modern times and resulted in the logics of the caste system.[7]

claimed to have become a Parsi, I doubt if anyone ever cared to make the smallest distinction in the use of the two words. Before 1903, no one ever gave a thought to this distinction. As late as 1872, in a legislative enactment (Act III of 1872), the manifestly unmeaning expression "Parsi religion" is used to designate the Zoroastrian religion. Surely, there is no Parsi religion in existence. What, however, was intended to be conveyed by the expression was the religion generally professed by the Parsi community. To my mind, the expression "Parsi religion" is as meaningless as the expression: "English religion," "French religion," or "Dutch religion."" (pp. 538–539). Full text of the decision on the case Sir Dinsha Manekji Petit vs. Sir Jamsetji Jijibhai in *The Indian Law Reports*, Bombay Series, vol. XXXIII, 1909, pp. 509–609. On this case see, among others, M. SHARAFI, *Judging conversion to Zoroastrianism: Behind the scenes of the Parsi Panchayat case (1908)*, in *Parsis in India and the Diaspora*, edited by J. R. Hinnells and A. Williams, London 2007, pp. 159–180; J. R. HINNELLS, *The Parsis*, in *The Wiley Blackwell Companion to Zoroastrianism*, edited by M. Stausberg and Y. Sohrab-Dinshaw Vevaina with the assistance of A. Tessmann, Chichester, West Sussex pp. 164–165.

5 On this see: M. BOYCE, *Zoroastrians: Their Religious Beliefs and Practices*, London — Boston — Henley 1979, pp. 199–201.

6 M. N. DHALLA, *History of Zoroastrianism*, New York — London — Toronto 1938, pp. 495–501.

7 This reads in the decision on the case Sir Dinsha Manekji Petit vs. Sir Jamsetji Jijibhai: "*The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis–thereby implying a caste, or communal, or tribal organization*". Sir Dinsha Manekji Petit vs. Sir Jamsetji Jijibhai in *The Indian Law Reports*, Bombay Series, vol. XXXIII, 1909, pp. 510–511. Maneckji Nusservanji Dhalla, High Priest of the Parsis in Karachi, wrote in 1938: "*Living in an atmosphere surcharged with the Hindu caste system, they felt that their own safety lay in encircling their fold by rigid caste barriers* [...] *Though the practice of an active religious propaganda had thus fallen into desuetude, the question of conversion does not seem to have died out entirely, for we find recorded in the Rivayat literature that a heated polemic regarding the subject was carried on during the latter part of the eighteenth century. With the beginning of economic prosperity, the Indian Parsis, we learn, were in the habit of purchasing male and female slaves of low Hindu castes. These slaves, in many cases, were invested with sacred shirt and girdle and admitted into the Zoroastrian fold by the priests at the request of their masters. Those members of the community who were opposed to the mingling of their blood with that of such a low class of people denied to these converts the full privileges of a true believer. The contesting parties applied to their coreligionists in Persia for their advice and decision in the matter. The point made by those who favored the cause of the new converts was that the Parsis of India who owned slaves for their work not only often had them admitted to the Mazdayasnian faith in accordance with the tenets of the religion, but also, without and religious scruples, partook of food prepared by them, and even permitted them, at the season festival to prepare the sacred cakes used*

As can be foreseen, these issues — which are accompanied by questions such as the demographic collapse to which the communities of the subcontinent have been subjected for several decades[8] — are at the centre of a heated debate involving leading figures in the religious hierarchy.[9] At the same time, however, Parsi women and men from the world of culture have also intervened over the years to contribute to a deepening and renewed consideration of these problems:[10] problems that involve different sensitivities facing family fractures first and then community ones.[11] An essential point is also the different treatment reserved for men compared to women and, consequently, for their descendants.[12]

This paper moves on another perspective. However, it remains indirectly connected to the other issues hitherto mentioned. During a study on some archival documents on British diplomacy in China in the first half of the twentieth century, a particularly interesting case emerged relating to a member of the Parsi community in the Far East. Although radically different from most of other cases involving

for consecration and sacrificial purposes. It was urged that having allowed the converted slaves all such rights of a true Zoroastrian in their lifetime, certain priests as well as laymen objected to the corpses of these slaves being deposited in the Tower of Silence when they died. The Iranian high priests, in replying to their inquiring brothers in India advised them in the beginning to take precautionary measures in all such conversions that no harm should thereby be done to the religion and to the community. It was certainly an act of great merit, they proceeded, to purchase alien children and bring them up as Zoroastrians. It was unfair and highly objectionable, they added, nay it was an inexpiable sin, to refuse these unfortunate people all the privileges of a believer after once admitting them into the Zoroastrian religious fold. It is taught by the scriptures, they argued, that all mankind will be brought over to the religion of Mazda in the time of the future savior prophets. It was, therefore, the pious duty of every true Zoroastrian to help this great cause by leading all to the path of righteousness. In the face of such commands, they concluded, those who denied to the proselytes the full rights of a faithful believer did not deserve to be called Zoroastrians. On another occasion in reply to a question about the conversion of such low-class people, the Iranian informant wrote that even a man who dug graves or followed the profession of burning the dead (two inexpiable sins according to Zoroastrianism), should be admitted into the Zoroastrian fold, provided his admittance would not be harmful to the faith", DHALLA, pp. 474–475.

8 The studies on the demographic issue that have taken place in the various decades since the independence of India are relatively numerous. See, among others: C. C. SEKAR, *Some aspects of Parsi demography*, in: Human Biology, Vol. 20, No. 2, May 1948, pp. 47–89; P. AXELROD, *Cultural and Historical Factors in the Population Decline of the Parsis of India*, in: Population Studies, Vol. 44, No. 3, November 1990, pp. 401–419; S. UNISA — R. B. BHAGAT — T. K. ROY — R. B. UPADHYAY, *Demographic Transition or Demographic Trepidation? The Case of Parsis in India*, in: Economic and Political Weekly, Vol. 43, No. 1, 5–11 January 2008, pp. 61–65.

9 See, as a prominent case: *An unsettling settlement?*, in: Parsiana, 7 May 2015.

10 Clear examples are the novel *An American Brat* by the Parsi writer Bapsi Sidhwa (New Delhi 1994) or the film *Little Zizou* (2008) by Sooni Taraporevala.

11 See, inter alia, L. VEVAINA, *Excarnation and the City: The Tower of Silence Debates in Mumbai*, in: *Topographies of Faith: Religion in Urban Spaces*, edited by I. Becci, M. Burchardt and J. Casanova, Leiden — Boston 2013, pp. 73–95.

12 On this issue, see inter alia: *Building and breaking barriers*, in: Parsiana, 21 May 2016; S. DALAL, *The outsiders*, in: Parsiana, 7 March 2018.

mixed couples in which one of the spouses is a member of the Parsi community or to cases related to adoption,[13] the analysis of this case can help better delineate different aspects related to Parsi family law and in particular to the meeting place with English Common Law and international law. In fact, the case that will be presented in the following pages is, in a certain sense, the opposite of those that were studied in the past. This is not in fact a mixed marriage which was followed by an attempt to make the community accept the bride first and the children later. At least, with the documents consulted, it is not possible to establish whether or not this attempt had taken place. As I will explain, a different and rare story emerges. This story does not fail to arouse a certain curious amazement at the distances between individual life paths and community identity in the geopolitical and cultural space of the British Empire in Asia.

Indeed, the heart of this paper is the issue of recognition of a marriage between an Indian Parsi and a Chinese woman by the British consular authority in the Republic of China in the 1930s.[14] It is specifically the case of a couple tied through two different marriages. Indeed, a first matrimonial union had taken place according to traditional Chinese forms in 1919. A second Catholic marriage, following the conversion of the couple to Catholicism, took place several years later. The case represents a rare event, but interesting from a historical and legal point of view. Indeed, it allows a greater understanding not only of the extraterritorial rights recognized to the subjects of the British crown in the Republic of China. The question also involved, as will be explained, the meeting space between English Common Law and the evolution of religious laws in general — and in particular of Parsi law — in the subcontinent and whose traditional or redefined rules[15] were conveyed within several Indian acts. It has

13 The Bella's Case is notorious. On this, see: M. J. SHARAFI, *Bella's Case: Parsi Identity and the Law in Colonial Rangoon, Bombay and London, 1887–1925*, PhD Dissertation, Department of History, Princeton University, 2006, University of Wisconsin Legal Studies Research Paper No. 1126.

14 During the British colonial era, the Parsis came to represent one of the main forges of the cultural, economic and professional elite of the subcontinent (see, inter alia, D. MENANT, *Les parsis: histoire des communautés zoroastriennes de l'Inde*, Paris 1898, pp. 360–477; A. GUHA, *The Comprador Role of Parsi Seths, 1750–1850*, in: Economic and Political Weekly, Vol. 5, No. 48, 28 November 1970, pp. 1933–1936; B. DADABHOY, *Sugar in Milk: Lives of Eminent Parsis*, New Delhi 2008). This socio-economic growth was also accompanied by the birth of several communities that appeared along the trade routes of British interests in Asia and the Indian Ocean. Amongst others, several Parsi communities flourished in China. On the Parsi presence in China, see: J. R. HINNELLS, *The Zoroastrian Diaspora: Religion and Migration*, Oxford — New York 2005, pp. 145–188. On the Indians in China between the second half of Nineteenth Century and the first half of the Twentieth Century until the defeat of the Nationalists in 1949 see: C. MARKOVITS, *Indian communities in China, c. 1842–1949*, in: *New frontiers: Imperialism's new communities in East Asia, 1842–1953*, edited by R. Bickers and C. Henriot, Manchester — New York 2000, pp. 55–74.

15 It should be emphasized that modern 'Zoroastrian law' in India is only faintly connected with Zoroastrian law from ancient and medieval times. This is the reason why in this paper I have preferred to use the definition 'Parsi law' instead of 'Zoroastrian law'. As Mitra Sharafi rightly writes: "*Pre-modern Zoroastrian law was an exhaustive legal system covering*

to be underlined that the Parsi community, although certainly a minority in the Raj, was fundamental both for their strong relationship with the British rulers, but also for the construction of the contemporary Indian identity.

A REQUEST TO THE BRITISH CONSUL IN PEKING

In November 1937, Allan Archer — the British consul in Peking — wrote to the then Secretary of State for Foreign Affairs, Anthony Eden, regarding the request of Hormi Nusserwanji Pavri, "*a British Indian subject born in Bombay, who has been registered as a British subject at this Consulate for many years*".[16] Hormi Nusserwanji Pavri asked to register four members of his family at the same consulate.[17]

Pavri was born within the Parsi Zoroastrian community of India and worked at the time "*as a watchman*" at the Mentoukou Coal Mining Company.[18] In particular, he asked to Archer "*the registration as British subjects of his wife and three children, and their full recognition as British subjects*" of his Chinese wife, "*Ma Li Ya*"[19], and of their three children.[20]

According to what was explained to Archer by Pavri, the latter had married Ma Li Ya in 1919.[21] That marriage had taken place "*on the 4th August, 1919 "By Chinese cus-*

most areas of social life — from criminal law to the law of property. This was particularly true before the Arab Muslim conquest of Persia. By contrast, the only areas of law in modern South Asia with a distinctly Zoroastrian character are matrimonial, inheritance, and religious trust law. There is little, if any, continuity between pre-modern and modern Zoroastrian law. The latter was something new. It was invented by elite male Parsis of colonial Bombay [...]. *Through legislation and litigation, they created a body of law that differed both from English law at critical points, and from the customary Zoroastrian norms of Persia and Gujarat. This reinvention of Zoroastrian law set the foundations for Zoroastrian law in India and Pakistan today*", M. SHARAFI, *Law and Modern Zoroastrians*, in: *The Wiley Blackwell Companion to Zoroastrianism*, p. 307. On the Parsi Zoroastrian legal modern tradition see also, inter alia, P. K. IRANI, *The personal law of the Parsis of India*, in: *Family Law in Asia and Africa*, edited by J.N.D. Anderson, London 1968, pp. 273–300; M. SHARAFI, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*, New York 2014. On the Zoroastrian family law of the Sassanid era and later, see: B. HJERRILD, *Studies in Zoroastrian Family Law: A comparative analysis*, Copenhagen 2002.

16 The National Archives, London, Kew (further only TNA), FO 671/531, Allan Archer (British Consul, British Embassy Peking) to Anthony Eden (Secretary of State for Foreign Affairs), 3 November 1937, Consular No.13 (12/91/37), 918/E.3, p. [1].

17 Ibidem.

18 Ibidem.

19 The archival documents cited here report the only phonetic Latin transcription of the Chinese names. For this reason, as it was not possible to trace the corresponding Chinese characters, I have decided to keep the transcription present in the documents also in the paper.

20 TNA, FO 671/531, Allan Archer (British Consul, British Embassy Peking) to Anthony Eden (Secretary of State for Foreign Affairs), 3 November 1937, Consular No.13 (12/91/37), 918/E.3, p. [1].

21 Ibidem.

tom"" in the presence of three witnesses: *"a Mr. and Mrs. Chang and the bride's mother, all three of whom are now dead"*.[22] The couple's first child was born in November 1920, followed by a second child in September 1932.[23] About two years later, on 27 November 1934, after being baptized, Hormi Nusserwanji Pavri married Ma Li Ya again, this time, however, with a wedding celebrated according to the rite of the Catholic Church.[24] The following year, in December 1935, a baby girl was born.[25]

For the British authorities, the Catholic marriage was valid[26] and therefore it was possible to extend British nationality to his wife as well as to their daughter born after the 'second' marriage.[27] The position of the first two children born before the Catholic wedding was far more complex. Indeed, Archer wrote to Eden: "*The status of the two sons born before the Catholic marriage seemed to depend in the first place on the validity of the alleged marriage "by Chinese custom" under the lex loci contractus. Accordingly, in the absence, owing to their decease, of all the alleged witnesses to the marriage I obtained a statement from Mrs. Pavri's brother* […]. *On the evidence produced, although it seems probable that a marriage valid in Chinese Law did in fact take place, it is not possible to state so positively*".[28] Although therefore the celebration of the marriage appeared to have actually taken place, this was not sufficient to guarantee its validity under the English Common Law. The problem of recognizing a marriage contracted by British subjects abroad was in fact a delicate legal issue, particularly in countries, such as China, which recognized extraterritorial rights to

22 Ibidem.

23 Ibidem.

24 Ibidem. Furthermore, Archer wrote to Eden: "*In support of these statements he has produced a certificate of marriage according to the rites of the Catholic Church* […], *on the 27th November 1934, and certificates of the baptism by a Catholic Priest of his wife therein described as "Marie Pavri nee Ma, epouse de M.Homi Pavri", and son Joseph on the 20th March 1927, and of his son Simon on the 18th September 1932*". Ibidem, pp. [1] –2.

25 Ibidem, p. [1].

26 The validity of Catholic marriage under the English Common Law had been confirmed to British consular authorities by the circular of the Foreign Office on the "*Validity of Marriages of British Subjects Solemnised Abroad*" of 14 January 1932 (TNA, FO 671/529, Validity of Marriages of British Subjects Solemnised Abroad, Circular T 12392/12392/376 (Foreign Office to His Majesty's Consular Officers), 14 January 1932, E/3, 1383/34/637). The document, expressly mentioned by Archer (TNA, FO 671/531, Allan Archer (British Consul, British Embassy Peking) to Anthony Eden (Secretary of State for Foreign Affairs), 3 November 1937, Consular No.13 (12/91/37), 918/E.3, p. 2), had made clear that "*the validity of the marriage (except, of course, where it has been celebrated under the Foreign Marriage Act) depends upon English Common Law. There is no doubt that under that law such marriages are valid if celebrated by a minister in episcopal orders, which phrase may, generally speaking, be taken as meaning in the orders of the Anglican, Roman Catholic, or Orthodox Churches*" (TNA, FO 671/529, Validity of Marriages of British Subjects Solemnised Abroad, Circular T 12392/12392/376 (Foreign Office to His Majesty's Consular Officers), 14 January 1932, E/3, 1383/34/637).

27 TNA, FO 671/531, Allan Archer (British Consul, British Embassy Peking) to Anthony Eden (Secretary of State for Foreign Affairs), 3 November 1937, Consular No.13 (12/91/37), 918/E.3, p. [1].

28 Ibidem, p. 2.

those same British subjects.[29] In the specific case, moreover, the ethnic question of Hormi Nusserwanji Pavri was an additional matter. Being of Parsi origin, his first marriage had to be consistent with the provisions of the matrimonial legislation relating to the Parsis of the Raj and therefore with the Parsi Marriage and Divorce Act of 1865 to be recognized as valid.[30] Archer continued in his letter: "*In these circumstances the validity of the marriage on the 4th August 1919 for the purposes of registering the births of the two sons may depend on Indian Parsee Law, and I have the honour to request your instructions as to whether the births can now be registered, and if the answer is in the affirmative, your special authority to do so in the case of the son born on the 28th November 1920, in view of the fact that over seven years have elapsed since the birth*".[31]

THE FOREIGN OFFICE'S ANSWER

The Foreign Office's answer, written by Nevile Bland, to Archer's questions was sent on 31 January 1938.[32] Secretary Eden confirmed the validity, for the English Common Law, of the Catholic marriage and therefore the consequent registration of his wife and daughter "*as British subjects*".[33] The case of the previous marriage was different: "*As regards the validity of Mr. Pavri's marriage which is alleged to have taken place in 1919 in accordance with Chinese custom I am to explain that the view held by the Secretary of State for India and by the Government of India is that the ceremony was not valid, unless it was valid in any*

29 Extraterritorial rights were granted to British subjects in China until World War II. With the Anglo-Chinese treaty of 11 January 1943, signed in Ch'ung-ch'ing, it was established, in article 2, that "*All those provisions of treaties or agreements in force between His Majesty The King and His Excellency the President of the National Government of the Republic of China which authorize His Majesty or his representatives to exercise jurisdiction over nationals or companies of His Majesty in the territory of the Republic of China are hereby abrogated. The nationals and companies of His Majesty The King shall be subject in the territory of the Republic of China to the jurisdiction of the Government of the Republic of China, in accordance with the principles of international law and practice*". Full text of the treaty: *Treaty between His Majesty in respect of the United Kingdom and India and His Excellency the President of the National Government of the Republic of China for the Relinquishment of Extra-Territorial Rights in China and the Regulations of Related Matters (with exchange of notes and agreed minute)*, Chungking, January 11, 1943 [Ratifications exchanged at Chungking, May 20, 1943], Treaty Series No. 2 (1943), Cmd. 6456, London 1943. For a further analysis of the extraterritorial rights of foreign nationals in China see, inter alia, F. E. HINCKLEY, *Extraterritoriality in China*, in: The Annals of the American Academy of Political and Social Science, Vol. 39, China: Social and Economic Conditions, January 1912, pp. 97–108.

30 The first Parsi Marriage and Divorce Act dates back to 1865: The Parsee Marriage and Divorce Act 1865 (Act No. XV of 1865). In 1936, the Parsi Marriage and Divorce Act (India Act III of 1936) was approved.

31 TNA, FO 671/531, Allan Archer (British Consul, British Embassy Peking) to Anthony Eden (Secretary of State for Foreign Affairs), 3 November 1937, Consular No.13 (12/91/37), 918/E.3, pp. 2–3.

32 TNA, FO 671/531, Foreign Office to H.A.F.B. Archer, 31 January 1938, No. 2 (T 1106/1106/378), Consular No.13 (12/91/37), 918/E.3, pp. [1] –2.

33 Ibidem, p. [1].

case as having been duly solemnised according to the local law then in force".[34] In particular, moreover, the issue of extraterritoriality enjoyed by British subjects in China had to be considered: the validity of the marriage was therefore subject to international law (to the treaties between the United Kingdom and China) and to Indian legal rules. As for the latter, specific reference had to be made to those rules that governed the marriage of the Parsi subjects in the Empire: "*With regard to this latter point Mr. Eden is advised that the local Chinese law is irrelevant in the present case because the effect of extraterritoriality is to remove British subjects from the operation of that law. Consequently, when a British subject marries in China, the* lex loci contractus *for the purpose of that marriage is the law which is applicable to British subjects under the China Order in Council. This is interpreted to mean, in the case of Indian British subjects, the internal law of India. It would therefore seem that, as the alleged marriage was not a valid form of marriage according to the law of the Parsees in India, it cannot be recognised as a valid marriage, and the children, born before the 27th November 1934, cannot be regarded as British subjects or their births be registered as such*".[35]

By closing the letter, however, the Foreign Office pointed out "*that legislation is in contemplation for the amendment of the British Nationality and Status of Aliens Act in certain respects, and among them the points under discussion in this connexion is a proposal to insert a provision whereby children born out of wedlock and subsequently legitimated by the marriage of their parents would be deemed to be British subjects if they would have been British subjects had they been born in wedlock. If this provision passes into law it may be possible to recognise as British subjects the children of Mr. Pavri born before the 27th November 1934, having regard to the marriage of the parents on that date according to the rites of the Roman Catholic Church*".[36]

THE COMPARISON WITH OTHER INDIAN COMMUNITIES: INSTRUCTIONS TO THE CONSULS OF SIR ARCHIBALD CLARK KERR

At this point, the reading of a subsequent circular despatch sent to the consuls in China[37] is also interesting. The document is dated 13 September 1938 and signed by Sir

34 Ibidem.

35 Ibidem, pp. [1]–2.

36 Ibidem, p. 2. The new British Nationality Act was approved, however, in 1948, after Indian independence. According to the section 23: "*(1) A person born out of wedlock and legitimated by the subsequent marriage of his parents shall, as from the date of the marriage or of the commencement of this Act, whichever is later, be treated, for the purpose of determining whether he is a citizen of the United Kingdom and Colonies, or was a British subject immediately before the commencement of this Act, as if he had been born legitimate. (2) A person shall be deemed for the purposes of this section to have been legitimated by the subsequent marriage of his parents if by the law of the place in which his father was domiciled at the time of the marriage the marriage operated immediately or subsequently to legitimate him, and not otherwise*". Full text: British Nationality Act, 1948. 11 & 12 Geo. 6. Ch. 56, Printed in England by J A Dole, Controller and Chief Executive of Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament, Reprinted in the Standard Parliamentary Page Size.

37 TNA, FO 671/531, British Embassy, Shanghai, Circular Despatch to Consuls no. 57, 13 September 1938, 924/E/3, pp. [1]–2.

Archibald Clark Kerr, at the time British ambassador to China.[38] The document was sent along with copies of communications between Archer and the Foreign Office analysed so far.[39] This shows on the one hand the novelty and singularity of the case. On the other hand, it became meaningful for any future interpretations. In particular, in addition to summarizing the situation, Sir Archibald stressed the comparison with other Indian communities, and in particular with the Islamic one.[40] Indeed, from the point of view of the English Common Law, if the case had involved a Muslim subject, then the Chinese marriage would have been sufficient to extend the nationality rights to the other two children as well: "*The effect of the Foreign Office ruling in this case is that since British subjects have extraterritorial rights in China, the test which must be applied to decide whether their marriage is valid or not is whether the marriage would be valid according to their own native law. In the case of British Indian subjects, confusion has arisen because the law which applies to their marriages varies according to.* [sic] *their caste, race or religion. In the case of Mahommedans it would seem that the marriage laws require only an informal ceremony, and a ceremony which would be good enough to fulfil the requirements of Chinese Law would also fulfil the requirements of Indian Law, and even a ceremony might be valid according to Indian Mohammedan law although not sufficiently formal to satisfy Chinese law and custom*".[41] The case of a Parsi was different since his religious tradition first and then the consequent juridical status instead provided for a more complex marriage before a Zoroastrian priest: "*In the case of Parsees, however, a monogamous race, it appears that a marriage must be properly performed before a Parsee priest, and a mere informal declaration of intention to marry before friends would not be sufficient*".[42] Indeed, according to Section 3 of The Parsee Marriage and Divorce Act of 1865 (still in effect in 1919, when the 'first' marriage was celebrated): "*No marriage contracted after the commencement of this Act shall be valid* [...] *unless such marriage shall be solemnized according to the Parsee form or ceremony called "Ásírvád" by a Parsee Priest in the presence of two Parsee witnesses independently of such officiating Priest*".[43]

38 Ibidem.

39 Ibidem.

40 Ibidem.

41 Ibidem.

42 Ibidem, p. 2.

43 Full text of the Parsee Marriage and Divorce Act of 1865 (Act No. XV of 1865) in: *A collection of the acts passed by the Governor General of India in Council in the year 1865*, Calcutta 1865, pp. 219–229. On this act, see: F. A. RÁNÁ, *Parsi Law: containing the law applicable to Parsis as regards succession and inheritance, marriage and divorce, &c.*, Bombay 1902, pp. 43–70. The rule relating to the presence of the priest and witnesses was confirmed by section 3 of The Parsi Marriage and Divorce Act of 1936 (Act No. III of 1936): "*No marriage shall be valid if* [...] *such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest*". Full text of the act in: *A collection of the acts of the Indian Legislature for the year 1936*, Delhi 1937. For a broader comparison and an analysis of the historical and social context of the two acts, see: SHARAFI, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*, pp. 165–192.

CONCLUSIONS AND PERSPECTIVES

The meeting with the West and then in particular with the East India Company and therefore with the British Empire represented for the Parsis of India a new definition of their religious, cultural and legal space. Obviously, the impact affected both the community, but also the life paths of individuals whose rights and duties conformed to those of the subjects of His British Majesty.

This particular — and certainly rare — case of 1937–1938 helps to better frame different aspects of the issue of extraterritoriality of British subjects in the Republic of China. In broader terms, it is also possible to understand more closely the status of Indian subjects — and specifically a Parsi subject — within the Empire. In this case, the Raj's legislation relating to marriages and divorces — and which was later inherited and replaced or simply amended by the institutions of independent India[44] — had to be balanced within a wider socio-cultural space.

The study highlights the complexity and attempt of British diplomacy to adapt the relationship between the Anglo-Indian legal norms and the religious traditions of India even outside the subcontinent in the framework of the extraterritorial rights guaranteed to British subjects in the Chinese Republic. Laws and interventions designed for the specificity of the various Indian communities had to be interpreted in a country, such as China, which was somehow the landing point of longer commercial and political interests.

Furthermore, as mentioned in the correspondence, the modern Parsi law, on which the marriage acts of the Parsis of the Raj were based, however, added further elements of rigidity and difficulty.

The documentation analysed in this work does not allow to define the perspective of the Parsi community (in China and, perhaps, in India) in this case. Indeed, as explained in the introduction, this was not the goal. As expected, correspondence and documents of the Foreign Office focused on legal issues relating to citizenship and recognition of marriage under the English Common Law, Indian legislation and within the context of extraterritorial rights guaranteed to British subjects. If it will be possible to access the internal documentation of the Parsi Chinese anjoman of the time, a broader research could instead contribute and also analyse the position of the community thus further contributing to the religious and historical debate.

44 Specifically, for the Parsi community: The Parsi Marriage and Divorce (Amendment) Act, 1988 (No. 5 of 1988). The Parsi Marriage and Divorce Act had already been amended in the British era with the Parsi Marriage and Divorce (Amendment) Act, 1940 (No. XIV of 1940).