

Muslim Marriage (Non)Recognition: Implications and Possible Solutions

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Abstract:

Differences between traditional Muslim marriage practice and the statutory formalities required for entry into a legally recognised marriage in England and Wales have resulted in serious question-marks hanging over the legal status of a seemingly significant proportion of Muslim marriages. This article places the spotlight on the vulnerability of spouses who remain unaware of the lack of legal status which may attach to their marriage or who may have been misled by their spouse as to the latter's intention to obtain legal recognition for the marriage. The article first considers the statutory formalities required under English law for entry into a legally recognised marriage before drawing on the most up-to-date empirical research to highlight the apparently widespread non-compliance with the formalities within the Muslim community. The article then reflects on the various practical implications which may arise for parties to an unrecognised Muslim marriage before considering how the situation may be ameliorated.

Key words:

Muslim marriage; Islamic marriage; non-existent marriage; Marriage Act; Nikah ceremony

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Introduction

Notwithstanding that within western societies ‘personal relationships are increasingly perceived as a private issue’ (Hale, Pearl, Cooke and Monk, 2009, p63), state regulation of marriage continues to hold considerable importance. In light of the rights and responsibilities to which marriage gives rise, as Masson, Bailey-Harris and Probert (2008) explain, ‘it is important that there should be no uncertainty as to whether two persons have formalised such a relationship, either for the parties themselves or for the state’ (p13; see also Miles, Mody and Probert, 2015). However, for at least one important minority in England and Wales, it appears such legal certainty may be lacking.

It is becoming increasingly clear that, in particular, the differences between Muslim marriage practice and the statutory formalities required for entry into a legally recognised marriage in England and Wales have resulted in serious question marks hanging over the legal status of a seemingly significant proportion of Muslim marriages. Although some couples may have jointly and deliberately chosen to eschew the formalities and enter into a *religious* Muslim marriage only (not wishing to obtain *legal* marital status), it is ever more apparent that a potentially substantial number of Muslim spouses remain unaware of the lack of legal status which may attach to their marriage or may have been misled by their spouse as to the latter’s intention to obtain legal recognition for the marriage following the religious ceremony.¹ This article places the spotlight on the vulnerability of spouses in the second and third categories specifically and considers the practical implications which may arise where a Muslim religious marriage does not enjoy legal recognition.

Part I opens by outlining the ‘bizarre’ nature of English law governing entry into marriage (Eekelaar, 2013, p83).² It examines the disparity between traditional Muslim marriage practice in England and Wales on the one hand, and the legislative formalities required in the jurisdiction pursuant to the Marriage Act 1949 (as amended), on the other. It briefly considers the key judicial developments in the area and the emergence of the concept of a ‘non-existent marriage’, before drawing on the most up-to-date empirical research to highlight the apparently widespread non-compliance with the formalities within the Muslim community. Part II of the article then reflects on the various practical implications which may arise for parties to an unrecognised Muslim marriage, placing a special focus on the protections which may be available to financially weaker spouses, often women, on the breakdown of such relationships (the differential gender impact of the difficulties in this area are widely recognised, see Eekelaar, 2015; Le Grice, 2013; Talwar, 2010; Gilderson, 2008). Finally, Part III investigates a number of initiatives which seek to encourage increased compliance with the formalities before turning to analyse possible avenues for legislative reform.

Part I: English marriage law and traditional Muslim marriage practice

Pursuant to the Marriage Act 1949 (as amended), four main categories of marriage ceremony enjoy legal recognition: civil marriage ceremonies; marriages contracted according to the rites of the Church of England or Wales; marriages contracted according to Quaker and Jewish traditions; and marriages conducted in other non-Anglican religious ceremonies. Where parties wish to conduct a

marriage ceremony according to the requirements of any faith in this fourth and final category, the marriage will not receive legal recognition unless specific preliminaries have occurred and formalities as to the ceremony itself have been complied with: notably, the marriage must take place in a premises registered for the purposes of marriage³ and there must be present a registrar of marriages or an authorised person.⁴

Muslim marriage ceremonies, known as *nikah* ceremonies, fall into this 'catch all' category. However, traditional *nikah* ceremonies differ significantly from the Western or, perhaps, Christian conception of a marriage ceremony which informed the development of the formalities encapsulated in the 1949 Act (see Mair, 2013).⁵ Muslim marriage, it has been observed, 'whilst carrying the sanction and blessing of the religion, cannot be considered a sacred ceremony' (al Faruqi, 1985, referenced in Scott and Warren, 2007, p466). Therefore, a *nikah* ceremony does not necessitate the involvement of any specific authority figure or clergy (such as an imam) nor is it required to take place in any special location (such as a mosque). The ceremony simply requires an agreement between a man and a woman which is embodied in a contract and expressed publicly in the presence of witnesses.⁶ The validity of the *nikah* does not depend on the performance of any recorded ceremony or documentation. Consent, capacity and witnesses are the only requisites to make the contract binding (Arshad, 2010, p48). Given the potential disparity, therefore, between the legal formalities required by law and traditional Muslim marriage practice, serious practical questions arise. If, as English law dictates, a legally recognised marriage may only be created where the statutory formalities are met, what is the status of a Muslim marriage which fails to comply with these standards?

Initial efforts to answer this question gave rise to considerable confusion (Gaffney-Rhys, 2010, 356; Probert, 2002, p398-403). Much of this ambiguity was attributable to the failure of the Marriage Act 1949 to provide comprehensive guidance as to when a marriage would be valid and when it would be void. Nevertheless, over the years, a body of case law steadily emerged which appeared to present a clear line of authority. It became evident that where a marriage did not fall within the scope of the Marriage Act, and the ceremony, in particular, was such that it bore little resemblance to an ordinary marriage ceremony in England and Wales, a resultant 'marriage' would not be deemed 'void' but rather 'non-existent' (see Jackson, 1969; Probert, 2013).⁷

However, more recent case law seemed to suggest a shift in direction with a more nuanced approach, affording greater weight to the intentions of the parties, appearing to surface. Bodey J in the High Court decision of *Hudson v Leigh* purported to provide a framework for determining if a non-compliant ceremony gave rise to a non-existent marriage or a void marriage.⁸ He listed a number of factors which ought to be taken into account in this regard. These included:

- a) whether the ceremony purported to be a lawful marriage;
- b) whether it bore enough of the hallmarks of marriage;
- c) whether the key participants, especially the officiating official, believed, intended and understood the ceremony as giving rise to the status of a lawful marriage; and
- d) the reasonable perceptions, understandings and belief of those in attendance.⁹

In a seemingly novel approach, Bodey J suggested that *all* of the factors should be considered, as the application of one factor alone may not suffice to accurately characterise the marriage.¹⁰ These comments were subsequently endorsed by the Court of Appeal.

Yet although it was hoped in the immediate aftermath of this decision that the apparently new, broader, test would afford greater scope to the court to find Muslim marriages void as opposed to non-existent (Gaffney-Rhys, 2010), such a development has thus far failed to materialise (Gaffney-Rhys, 2013).¹¹ Rather, as Bevan (2013) argues, a ‘hierarchy’ approach has taken root since the decision in *Hudson*, with the importance of purported compliance with the statutory formalities remaining the predominant concern (p90).¹² Thus, it now appears reasonably well settled that if a *nikah* ceremony takes place in England and Wales, in a premises which is not registered for the purposes of marriage and without a registrar of marriages or an authorised person present, it will most likely give rise to a non-existent marriage.¹³ In such circumstances, the parties are required to undergo an additional civil marriage ceremony to create a legally binding union. Unfortunately, however, empirical research appears to highlight the failure of an important portion of the community to take such positive action, with a seemingly significant number of marriages remaining, unrecognised – so-called ‘*nikah*-only’ – marriages.

In 2001, the findings of a study of 287 divorce case files from the Muslim Law (Shariah) Council were reported by Shah-Kazemi. She discovered that approximately 27% of the files investigated appeared not to have a recognized civil marriage in the UK, the couple having married in the jurisdiction with a *nikah* ceremony but without an accompanying civil marriage (p31). Moreover, 5 of the 21 interviewees engaged in the study did not have a valid marriage according to English civil law. Soon after, Bano (2004) reported that a mere 9 of the 25 women interviewed as part of her research had a registered civil marriage (p221). More recently, using divorce (and annulment) as a case study, empirical research was conducted by Douglas, Doe, Gilliat-Ray, Sandberg and Khan (2012) which drew on the findings of a small qualitative study of three religious tribunals. Here, more than half of the hearings observed (14 of 27) in the participating Sharia council, the Birmingham Central Mosque, involved couples with an unrecognised *nikah*-only marriage (p144). A significant proportion of *nikah*-only Muslim marriages have also been recorded in PhD research which is currently being undertaken in the area,¹⁴ while a leading practitioner in the field has suggested that the figure of unrecognised marriages may even be as high as 80% in certain districts (Khan, 2015). Whatever the real figure, it is clear from both the caselaw and from recent empirical research that a not insignificant proportion of Muslim marriages conducted in the jurisdiction remain unrecognised under the law of England and Wales.

Moreover, the confusion as to legal marital status and the vulnerability of spouses who wish to obtain such legal recognition for their marriage (contrary to the wishes of their spouse) are also increasingly obvious. Although unable to provide exact figures, Shah Kazemi (2001) noted the presence of women approaching the Muslim Law (Shariah) Council in her research who ‘may not have known that their Muslim marriages did not accord them the status of married women’ (p71-72). This lack of awareness was also reflected in the Ministry of Justice’s Muslim Marriage Working Group’s Final Report (2012, p1, 3; for discussion of the Working Group, see Grillo, 2015, p46-47) and in Vora’s recent research in the area.¹⁵ Eight of the 10 interviewees approached in the latter’s study appeared to believe their *nikah*-only marriage was legally binding with only two interviewees having consciously chosen to avoid legal recognition (moreover, the difficulties in this area appear to extend across the socio-economic spectrum, see Shah-Kazemi, 2001, 18).¹⁶ By contrast, of the 16 *nikah*-only marriages Bano (2004) studied, two couples agreed to forego legal recognition (for financial reasons) with only a further two wives wrongly believing their marriage was legally recognised (p222-223).

The remaining 12 wives, she noted, appeared to be 'intentionally misled' and had 'expected their marriages to be formalised' (with subsequent registration) (p22-223). Such formalisation never materialised.

Part II: Implications of entering an unrecognised, *nikah*-only, marriage in England and Wales

❖ Marital breakdown

In the words of Parker J, the consequences of entering an unrecognised, *nikah*-only, marriage are 'very serious' for the parties involved.¹⁷ Arguably, the greatest vulnerability arises in the context of marital breakdown. As the couple are not viewed as *legally* married, they do not enjoy a *legal* right to divorce under English law and, thus, financially weaker spouses enjoy no consequential right to make an application for financial provision under the Matrimonial Causes Act 1973.¹⁸ Moreover, although parties to a void marriage may apply for ancillary relief under sections 23 and 24 of 1973 Act, such applications may *not* be made by parties to a *nikah*-only, legally non-existent, marriages.¹⁹ Therefore, the question arises: What financial remedies, if any, may a financially weaker party to an unrecognised marriage seek on the breakdown of the relationship?

From a civil law perspective, parties to an unrecognised Muslim marriage are essentially confined to a status on relationship breakdown akin to that of cohabitants (see Law Commission, 2007, p44-45). Unlike many other jurisdictions,²⁰ however, in England and Wales, such status provides little protection. Despite the prevalence of the 'common law marriage myth' (Barlow, Burgoyne, Clery and Smithson, 2008), and the proposals for reform advanced by the Law Commission in 2007, there remains no legislative scheme in place in the jurisdiction specifically designed to offset the financial consequences of breakdown in a cohabiting relationship. Thus, parties to a non-existent Muslim marriage, akin to other cohabitants, remain in a vulnerable position.

Yet notwithstanding the lack of cohabitation legislation, two alternative civil law remedies may potentially aid financially weaker 'spouses' in such circumstances. First, a financially weaker party may make an application under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) for equitable relief in relation to property pursuant to the doctrine of the common intention constructive trust or the doctrine of proprietary estoppel.²¹ Second, parties to a Muslim marriage, specifically, may choose to seek relief under contract law. As Akhtar (2013) notes, 'The Qur'an endorses marriage... but it is considered a *contract* and *not a sacrament*' (p63, emphasis added). At civil law, parties to a Muslim marriage have a quasi-contractual relationship and the courts have considered a *nikah* contract a 'straightforward contract to be taken at face value and enforced' (Bowen, 2010, p424). From a financial perspective, this may be important on the breakdown of the relationship as an 'essential' element in a Muslim marriage contract (Esposito, 1982, p24) is the inclusion of a payment (akin to an Islamic dowry), known as the *mahr*, which is payable by the husband to the wife. In *Uddin v Choudhury & Ors*, the Court of Appeal considered a case where the couple were married in a *nikah*-only marriage (discussed in Bowen, 2010).²² Subsequently, when the couple divorced under Sharia law, a dispute ensued in relation to the payment of the *mahr* and the gifts made on the marriage. Mummery LJ took a contractual approach and held the contract, insofar as it related to the *mahr*, was a *valid contract* and had gained 'legal effect' due to the marriage ceremony. He held:

There was no ceremony which was recognised by English law, but it was a valid ceremony so far as the parties were agreed and it was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry.²³

Nevertheless, these civil law remedies, while potentially useful in an apposite case, may be of limited practical value. Although a financially weaker party may make an application for relief under TOLATA where title to the family home, for instance, is held in the other spouse's name, difficulties may still be encountered for many applicants in establishing the necessary requirements for a successful claim in estoppel or demonstrating a common intention to share ownership capable of generating a constructive trust in the absence of at least indirect financial contributions. (Considering the sole legal owner case law since *Jones v Kernott*²⁴, Sloan, 2015 noted 'Jones has not ... had a conspicuous influence on the *outcome* of the cases' when compared to the former position under *Lloyds Bank plc v Rosset*²⁵ which had required direct financial contributions to give rise to an inferred common intention to share ownership). Furthermore, the ability to take an action under contract law is only of benefit where the *mahr* has not been paid in full and is of a clearly defined monetary value, sufficiently large to justify, in financial terms, the instigation of litigation (Hassan, 1999 notes the *mahr* could be 'the giving of a copy of the *Holy Quran*, a sum of money, the payment of the wife's education in the future or, indeed, the giving of certain jewellery'; see also Akhtar, 2013).²⁶ Equally, pursuing a contractual claim may be hampered by Muslim religious practice which does not require a written *nikah* contract nor the inclusion of any specific details in such contracts where present. Moreover, anecdotal evidence suggests that the costs and stress associated with pursuing legal action (combined with an apparent suspicion of the legal system in some cases) deter many parties to a Muslim marriage from instigating civil litigation on relationship breakdown. The lack of experienced legal practitioners with an understanding of Muslim marriage practice has also been highlighted (Shah-Kazemi, 2001, p29-30, 53-55).

In this context, given the lack of civil recognition for religious Muslim marriages that do not comply with the statutory formalities and the often weak legal protection for financially vulnerable parties to such marriages on relationship breakdown, non-legal, unofficial, religious fora which seek to regulate relationship breakdown, namely Sharia councils, appear to be growing in popularity (see Ahmed and Calderwood Norton, 2012; Sardar Ali, 2013). It is estimated that there are currently 80-85 such councils operating in the United Kingdom (Bano, 2004, p117). One of the 'main' reasons for the existence of Sharia councils is their role in providing an exit for women from Muslim marriages (Sardar Ali, 2013, p132; see also Moore, 2010, p117; Bano 2012). In this regard, notwithstanding that there does appear to be a lack of uniformity in how Sharia councils operate (Ahmed and Calderwood Norton, 2012, p382; see also Macfarlane, 2012, p35), in addition to granting religious divorce, some Sharia councils may also pronounce on the financial entitlements of a woman on religious divorce under Sharia law (cf, Douglas et al, 2012).

Pursuant to Sharia law, where a husband makes a declaration of divorce, known as *talaq*, he must make specified financial provision for his wife:

- First, he must provide maintenance, known as *nafaqa*, generally considered to be that which would be reasonable in all the circumstances during the *iddat* period. This usually covers three months or, if the wife is pregnant, until the delivery of the child (Esposito, 1982, p4).

- Second, he must provide maintenance to his wife for as long as she is still breastfeeding up to a maximum of two years.
- Third, and perhaps most significantly, he must ensure payment to his wife of the *mahr* if it has not already been paid.

If a husband has not made such provision for his wife, it may be 'ordered' by a Sharia council. In addition to the obvious cost effectiveness of utilising such informal and unofficial councils for the provision of at least some financial assistance on religious divorce, anecdotal evidence suggests compliance with such orders appears to be ensured in many cases by community and religious, if not legal, pressures (*cf* Khan, 2014).

However, the declaration of *talaq* by a husband is only one way in which a Muslim marriage may come to an end. Depending on the form of divorce used to terminate a marriage, the remedies available under Sharia law will vary substantially. A number of important alternatives exist. Although relatively uncommon, if a couple agree to divorce by mutual agreement without attributing fault in what is known as *mubarat*, while a wife will not be entitled to maintenance, she will be entitled to retain any *mahr* already paid (Esposito, 1982, p33-34). Equally, if there is a clause in the *nikah* contract delegating a husband's right of divorce to his wife, known as a *talaq-e-tafweed*, and she exercises this clause, although she again may not receive maintenance, she will similarly be entitled to retain any portion of the *mahr* already paid (Mehdi, 2012, p226). Unfortunately, however, it appears the inclusion of such clauses is not especially widespread in England and Wales and the ability to terminate a marriage in this manner seems available to few women in the jurisdiction (see Sardar Ali, 2013, p118-119; Carroll, 1982). Thus, most women who wish to initiate a divorce are required to do so in the absence of such a delegated right and potentially without their husband's consent to *mubarat*.

In such circumstances, wives appear to have two main options. First, a wife may choose to approach an Islamic authority (Sharia council or imam) to seek a 'judicial' dissolution of the marriage in a fault-based divorce known as *faskh*. Where granted, the wife is entitled to obtain full payment of the *mahr* and maintenance. Although at first blush, this route appears to afford wives much needed financial protection on the termination of a marriage, it has been noted that the schools of Sharia law 'differ considerably in the number and kinds of grounds available to women who wish to divorce', with certain schools adopting quite a restrictive approach (Esposito, 1982, p34-35). Consequently, grounds for such divorce are often 'difficult to prove' (Esposito, 1982, p34-35) and cases where Sharia councils are known to declare a *faskh* are 'very low' (Sardar Ali, 2013, p133, note107; see also Carroll, 1998) Indeed Shah Kazemi (2001) noted on the basis of her research, as far as the Muslim Law (Shariah) Council were concerned, it was 'preferable by far that the man acts to terminate his marriage, rather than the organisation having to make a judicial intervention to dissolve the *nikah*' (p37).

The most common manner, therefore, in which a wife may terminate her marriage is through the use of a *khulla* divorce. This form of divorce is based on the repudiation of the marriage contract on the part of the wife and has significant financial implications. A wife obtaining a *khulla* is usually required to forego the *mahr* or, in some cases, return any portion of the *mahr* already advanced (Pearl and Menski, 1998, p283-284). Moreover, she has no entitlement to any maintenance and may effectively be required to buy her way out of the marriage.

Thus, having regard to the inadequate legal protections, offset only slightly by the limited protection afforded by the Sharia councils, it is clear that financially weaker parties to a unrecognised Muslim marriage, particularly women, may be left in quite a vulnerable financial position on the breakdown of the relationship.

❖ *Other implications*

Notwithstanding the obvious vulnerability of financially weaker spouses on relationship breakdown, it is increasingly clear that the implications of entering a Muslim *nikah*-only marriage and not obtaining civil legal marital status also present difficulties in a number of other contexts.

First, the lack of civil recognition may have grave consequences in relation to pension entitlements. In *Chief Adjudication Officer v Kirpal Kaur Bath*, this issue arose before the Court of Appeal.²⁷ There, despite having undergone a formal, albeit unregistered, marriage ceremony in a Sikh temple many years previous, the Department of Social Security concluded that the respondent surviving 'spouse's' religious marriage was not legally recognised for the purpose of English law due to its non-compliance with the Marriage Act 1949. Therefore, she was not a 'widow' within the meaning of section 38 of the Social Security and Benefits Act 1992 and was not entitled to widow's benefit. Although the Court of Appeal subsequently held on the facts of the case that the wife was entitled to the payment, largely on the basis that there was insufficient evidence to rebut the presumption of marriage from long cohabitation, the case nonetheless illustrates the practical difficulties which may equally arise for parties to a 'non-existent' Muslim marriage.²⁸ (The role of this presumption has given rise to considerable academic debate. See Shah, 2014; cf Probert, 2002)

Second, parties to a Muslim *nikah*-only marriage will not be considered 'spouses' for the purposes of succession law.²⁹ On intestacy, they will not benefit from the generous provision from an intestate estate guaranteed for surviving spouses pursuant to section 46 of the Administration of Estates Act 1925.³⁰ Although under the Inheritance (Provision for Family and Dependants) Act 1975, they may be able to seek discretionary provision on intestacy or may be able to challenge the distribution under a will if either testate or intestate distribution of the estate fails to make 'reasonable financial provision' for them,³¹ in the absence of an *entitlement* to a share of the estate financially weaker spouses, in particular, may be very reluctant to initiate litigation.³²

Third, a 'husband' in an unrecognised *nikah*-only marriage will not automatically enjoy parental responsibility for children born of the religious marriage pursuant to section 2(1) of the Children's Act 1989. The complications which can arise in such circumstances were 'graphically illustrated'³³ in *AAA v ASH*.³⁴ Here, a father was found not to have 'rights of custody' for his child (who had been removed to the Netherlands by the child's mother) under the Hague Convention as he did not enjoy parental responsibility for the child under English law. Although the mother and the father of the child had been married in a Muslim marriage ceremony, and the father had registered the child's birth in England as a *married* father relying on a *nikah* certificate, Sumner J held the birth had been invalidly registered as the applicant was an *unmarried* father for the purposes of the 1989 Act.³⁵ Moreover, the court highlighted that section 1(1) of the Legitimacy Act 1976, which provides separate provision for children of void marriages, did not apply as the Muslim marriage in question was neither a void nor a voidable marriage. Rather, he held, 'It is a non-marriage. As such by itself, whatever its significance to the parents, it gives rise to no rights nor is it recognised in English law.'³⁶

❖ Conclusion

It is clear, therefore, that Muslim spouses may be left in a very precarious position under the law of England and Wales in a variety of contexts when party to an unrecognised *nikah*-only marriage. In light of this vulnerability it is widely considered action ought to be taken. Building on this analysis, let us now consider what shape this action ought to take.

Part III: Initiatives and proposals for reform

In seeking to respond to the potential vulnerability of parties to an unrecognised Muslim marriage, various proposals have been advanced. Calls have been made for the introduction of cohabitation legislation to regulate the financial consequences of relationship breakdown for financially weaker cohabitants and thus, by extension, parties to an unrecognised marriage.³⁷ Judicial activism removing the concept of non-marriage (Le Grice, 2013) or the adoption a more intention-based approach in determining marriage validity has been encouraged (Leong, 2000; Lowe and Douglas, 2007, p75; cf, Probert, 2013). Proposals for the development of the existing law on nullity to permit financial relief to be sought on 'invalid marriages', making particular reference to Muslim marriages, have also been mooted (Read, 2012).³⁸ Yet, despite this plethora of possible responses, it is submitted the challenges in this area would be more aptly resolved by initiatives to ensure Muslim marriages are deemed *valid*, rather than seeking to merely 'upgrade' such marriages to 'void' status or to address certain implications of the current unsatisfactory situation.

In considering the types of initiatives or measures for reform which ought to be considered, however, it is important to bear in mind the specific social and religious context in which Muslim marriage takes place. Having regard to this context, let us now consider a number of initiatives and proposals which may encourage or facilitate the greater legal recognition of Muslim marriages.

❖ Awareness-raising campaigns

Undoubtedly, some Muslim couples are aware of the statutory formalities required for a legally recognised marriage and jointly elect to eschew such formalities and avoid legal recognition by entering a *nikah*-only marriage.³⁹ Nevertheless, as noted above, it is well accepted that seemingly important factor in the lower level of civil marriage registration evident in the Muslim community is the lack of awareness among many members as to the formalities required for a legally recognised marriage and the confusion as to the actual legal status of *nikah*-only marriages conducted in England and Wales. Thus, efforts to highlight the legal formalities for marriage are required (see Gaffney-Rhys, 2013; Douglas, Doe, Sandberg, Gilliat-Ray and Khan, 2013, p199, note16; Warraich and Balchin, 2006). The Ministry of Justice's Muslim Marriage Working Group concluded in 2012 that community and local engagement in the form, for example, of outreach meetings ought to be prioritised (p6-7). The awareness-raising initiatives carried out by the Ministry of Justice have since been taken on by Aina Khan's campaign group, 'Register Our Marriage', which has received widespread support from a number of important stakeholders and interested parties including leading Muslim organisations, women's groups, members of the judiciary and legal profession, academics and parliamentarians.

Yet, whether such awareness-raising initiatives will be sufficient without more to produce a significant increase in the level of registered marriages remains doubtful. Efforts in this regard to

date have, unfortunately, failed to produce a substantial positive effect (similar difficulties have been encountered in other public information campaigns, see for example the efforts to debunk the 'common law marriage myth' discussed in Barlow et al, 2008). Although information pamphlets on how to validly marry are carried by many support services and numerous websites provide easily accessible information on the topic,⁴⁰ none of these resources appear to have stemmed the tide of unrecognised *nikah*-only marriages (see Warraich and Balchin, 2006, p31).

Arguably one of the strongest community initiatives came in August 2008 with the launch by the Muslim Institute of a more modern standard Muslim marriage contract which it was hoped would 'change the face of British Muslim family life' (Rahman, 2008). The proposed contract, which sought to reflect a 'consensus effort to protect the rights of both parties' to a Muslim *nikah* was drafted after 'lengthy consultations' with religious leaders, community organisations and women's groups across the country.⁴¹ Cognisant of the seemingly widespread failure to ensure civil registration of Muslim marriages, the contract and associated guidelines afforded prominence throughout to the need for such registration.⁴² The contract was supported by key stakeholders in the Muslim community including the Imams & Mosques Council (UK), The Muslim Law Council UK, the Utrujj Foundation, the Muslim Council of Britain, the Muslim Parliament of Great Britain, the City Circle, the Muslim Women's Network-UK, the Fatima Network and the Muslim Community Helpline. However, despite this positive endorsement and extensive promotion, it seems it has 'achieved little' with 'few people' even aware of its existence (Quereshi, 2011).

Moreover, in circumstances where public awareness campaigns are successful and highlight for a couple the possible lack of legal recognition afforded to their marriage, it may still be in the interest of one party for the marriage to remain unrecognised:

- a) To avoid civil financial implications if the marriage should fail. As the Muslim Marriage Working Group (2012) observed, 'men may be choosing not to register the marriage... in order to avoid what they perceive to be a risk of loss of rights over the property if there is a divorce' (p4); or
- b) To facilitate the practice of polygamy without fear of criminal liability (see Gaffney-Rhys, 2013). However, it cannot be assumed that non-registration is chosen to avoid these consequences in the majority of cases. Shah-Kazemi (2001), noted only a 'very small minority of cases', 1.2%, of total case-files and interviews, concerned polygamous unions (p31). Nevertheless, it is possible that there may be under-reporting of such practices in England and Wales as higher figures have been recorded in North America (see Macfarlane, 2012, p39).

In these circumstances, even with increased awareness of the true legal status of a marriage by one or both parties, the power balance in the couple, combined with the advantages of non-recognition particularly for the financially stronger spouse, may play a more dominant role than mere lack of awareness in preventing a legal marriage occurring (see Bano, 2004, p222-223). Thus, notwithstanding the undoubted necessity to raise awareness of the need to comply with the statutory formalities, and to encourage action in this regard, it is doubtful if such initiatives would, without more, ultimately resolve all the difficulties which currently persist.

❖ Registration of Mosques

A second important factor which may also contribute to the decidedly lower levels of legally recognised Muslim marriages is the limited number of mosques approved for the solemnization of marriage. Pursuant to the Places of Worship Registration Act 1855 and section 41 of the Marriage Act 1949, a building or room(s) used by a religious congregation may be registered for religious worship and the solemnisation of marriage. However, despite the simplification of procedures to facilitate registration, relatively few mosques have sought to be registered. Although approximately 930 mosques are certified as places of worship, only 205 are registered for marriage.⁴³ As a result, the likelihood of both the civil and religious ceremonies taking place simultaneously appears substantially lower in the Muslim community than for other non-Anglican religions. A practical method of increasing the number of Muslim marriages recognised by English law would, therefore, appear to be facilitating and encouraging the greater registration of mosques for the solemnisation of marriage (see Muslim Marriage Working Group, 2012; Sardah Ali, 2013, p134).⁴⁴

Again, however, despite its apparent simplicity, this possible solution may not be as effective in practice as it first appears (see Grillo, 2015; Grillo, 2012, p211-216). A major factor in explaining the limited number of mosques registered for the solemnisation of marriage is the absence of demand for registered premises among prospective spouses. While some of this lack of pressure is likely attributable to the gap in awareness as to the formalities required for a legally recognised marriage among the wider community, other more difficult explanations may also contribute. First, it is not necessary to hold a Muslim marriage ceremony in a mosque. As illustrated in the caselaw⁴⁵ and in a number of recent empirical studies, customary practice means that Muslim marriage ceremonies are equally as likely to take place in a restaurant, hotel or home (see Gaffney-Rhys, 2010). A second contributing factor appears to be the suspicion with which the State and, by association, a seemingly State-sanctioned mosque, could be held by the wider community. It has been suggested, anecdotally, that registered mosques could be viewed with distrust by members of the community and, therefore, be viewed less favourably for religious purposes than their unregistered counterparts.⁴⁶ (Bano, 2012, undertook a telephone survey of 30 Sharia councils and noted at p24 the distrust with which the State is held; anecdotal evidence suggests this distrust also mitigates against mosques seeking statutory approval for the solemnisation of marriage; see further Eekelaar, 2015, p8). Third, as noted above, a certain cohort of Muslim spouses (either jointly or individually) consciously wish to avoid civil marriage recognition, again reducing the demand for registered mosques.

Therefore, notwithstanding the importance of increasing awareness among Muslim religious leaders of the need for registration of mosques as locations for the solemnisation of marriage, and raising public awareness of the formalities required for civil marriage in the jurisdiction, it is increasingly clear that more fundamental action may be required to adequately address the complex issues which arise in this area.

❖ *Reform of the Marriage Act*

The most direct way in which the civil recognition of Muslim marriages could be better ensured would undoubtedly involve reform of the Marriage Act. Given the scoping exercise currently being undertaken by the Law Commission on marriage law,⁴⁷ as well as the significant support for amendment of the law in this area,⁴⁸ it is possible such reform may soon be on the political agenda.

However, although there is strong consensus that legislative reform is required, the exact direction this ought to take remains subject to considerable debate.

One potential, albeit arguably drastic, solution could be to adopt a continental model of marriage regulation whereby only civil marriages effected by a public official would be permitted. Religious ceremonies could take place subsequently but they would not have legal standing. Such reform was proposed by a Working Party of the Law Commission as long ago as 1973 as being the 'simplest and most effective' antidote to the complexity of the Marriage Act (see also Cretney, 2003, 24-28). However, notwithstanding the obvious simplicity and attractiveness of such an approach, the Commission concluded such reform would likely be unpopular with the churches. It is submitted such reform would appear equally unlikely today and could arguably be interpreted as an overly authoritarian incursion on marriage regulation in the jurisdiction.⁴⁹

Alternatively, having regard to the special provisions/exceptions afforded by the Marriage Act 1949 to several religions including Church of England, Jewish and Quaker marriages, proposals have also been advanced for the amendment of the Marriage Act, allowing the *nikah* ceremony to become a legally recognized form of marriage (Shah, 2013, p144-156). Similarly, in a slightly more 'radical' solution, it has also been suggested that if any ceremony, such as a *nikah* ceremony, is acceptable within the religion concerned, that ought to be considered sufficient to give rise to a legal marriage (Eekelaar, 2013 who proposes that perhaps the law ought to recognise ceremonies that have significance to the parties). On one hand, the benefits of either reform appear clear. Recognising the pluralistic nature of society, such reform would present a more inclusive approach to marriage recognition and would likely be welcomed by members of the Muslim community. These proposals for reform would, if framed correctly, appear to reduce the risk of polygamous marriages and address concerns about *nikah* ceremonies being conducted with parties under the age of legal capacity (see Grillo, 2015, p53).⁵⁰ However, on the other hand, either reform would perhaps be likely to increase the risk of pushing polygamous marriages underground and, in any event, would seem doubtful to be introduced given their politically sensitive nature: the former solution would undoubtedly elicit polarised views within the electorate (see Grillo, 2015, chapter 1 who highlights the social and political tensions at play; see also Warraich and Balchin, 2006, p91; Gohir, 2015),⁵¹ and open up the floodgates to many other religions or religious bodies who would legitimately feel entitled to seek such special provision for their own denomination;⁵² the latter proposal would possibly exacerbate the difficulties in determining what constitutes a religion worthy of inclusion and could potentially lead to undesirable results (see Eekelaar, 2013). In perhaps solving one problem, a host of new issues would be liable to emerge. Alternative options for reform ought, therefore, to be considered.

Arguably a more politically-palatable and likely avenue for reform could be found in the amendment of the formalities required for a legally recognised marriage. As Probert (2013) has highlighted, although pursuant to the Marriage Act 1949 as presently applied, varying weight is afforded to different elements of the marriage ceremony, special significance appears to be placed on the place of celebration, specifically (p322). On the basis of her research, Probert found no wedding which had been celebrated in a location that was authorized for marriages to take place had ever resulted in a non-marriage (p322). By contrast, much less focus appeared to be placed on the status of the officiant of the ceremony. Indeed, she notes, in many of the key cases 'we are simply not told

whether the person who conducted the ceremony was an authorized person or not: clearly this is not a factor on which the courts have wished to rest the validity of a marriage' (p327).

Yet, notwithstanding the importance attributed to the location of celebration in current judicial practice, whether such significance ought to be afforded to this aspect of the ceremony is questionable. Eekelaar (2015) has argued the 'strategy of controlling the place of religious marriage celebration is misplaced' (p11). Highlighting that such limitations are not applied to Jewish and Quaker ceremonies (assuming that the preliminary formalities have been met, an authorized celebrant is present and proper records exist), he adds: 'The administration and costs involved in satisfying these [place of celebration] requirements are unnecessary and could be a deterrent to compliance by some religious communities' (2015, p11; see also Gaffney-Rhys, 2013). Moreover, it is highly doubtful if any argument can be sustained which dictates the need for such control over location on the basis of public policy. Although, as noted, the state has a legitimate interest in regulating entry into marriage, a number of jurisdictions have achieved this end without restricting the location of marriage in the manner currently employed in England and Wales.

Pursuant to the Marriage (Scotland) Act 1977, religious ceremonies can be performed by anyone who has been legally authorised to sanction the marriage, irrespective of location. Non-civil marriages may thus be solemnized by a 'minister, clergyman, pastor, or priest or other celebrant of a religious or belief body'.⁵³ In this manner, imams can become registered to conduct legally binding *nikah* ceremonies: marriages conducted by such an imam would be legally recognised without the need to ensure the ceremony took place in a registered premises. Moreover, section 23A of the Marriage (Scotland) Act 1977 provides a marriage will not be invalidated by non-compliance with formalities, as long as both parties were present at the ceremony and the marriage was duly registered.⁵⁴ Although parties are not obliged to enter into a civil marriage,⁵⁵ section 24(1)(d) ensures it is an offence for any person who is not an approved celebrant or an authorized registrar to conduct a marriage ceremony in such a way as to lead the parties to the marriage to believe that they are solemnizing a valid marriage and, if found guilty of such an offence, could be liable to a fine and/or imprisonment. Thus, while it may be possible for unregistered imams in Scotland to conduct unregistered *nikah*-only ceremonies, they must make it explicitly clear to both parties that they are not entering a legally binding marriage.⁵⁶ In this manner, the emphasis is placed on the celebrant to inform the couple as to their legal status, thereby providing a potentially important safeguard for prospective spouses.⁵⁷

It appears there is considerable backing in England and Wales among academics and the public alike for such an approach, shifting the focus from the prioritisation of the place of solemnisation to an officiant-oriented system for the regulation of civil marriage (see Eekelaar, 2015; Warraich and Balchin, 2006, p92; HMSO, 2003). In 1999, the Registrar General for England and Wales published a consultation document entitled *Registration: Modernising a Vital Service*. Among other issues, it sought views on the restrictions that ought to apply to marriage ceremonies and received almost 1,000 responses (ONS, 2003, para1.1.6). Eighty percent of respondents felt that people should be able to marry anywhere or at least that a greater choice of venues should be provided (ONS, 2003, para3.4.25 and 3.4.78).

Admittedly, such reform would not constitute a silver bullet. Despite its obvious attractiveness, reform on this basis would not eradicate all the issues associated with Muslim marriage. Although

usually present, valid Muslim marriage ceremonies are not dependent on the presence of an imam or other authority figure. Moreover, the ability of nefarious spouses to remain under the legal radar and not pursue civil marital recognition (contrary to the wishes of the other spouse) would remain, allowing them to avoid the legal implications associated with marriage.⁵⁸ Therefore, to ensure maximum effectiveness, it is argued such reform ought to be introduced in conjunction with cohabitation legislation to ensure the financial incentives of avoiding registration are removed.⁵⁹ While the possibility of religious polygamous marriages would continue, the financial liability which could be incurred on the breakdown of such relationships may act as a deterrent.⁶⁰

It is contended the adoption of an officiant-oriented scheme would significantly enhance the possibility of Muslim spouses entering a legally recognised marriage and would more appropriately respond to the practice of a wide cohort of the population. Across the common law world, the strengths of such an approach are widely recognised. In supporting comparable reform, the model was described by the Law Reform Commission in Northern Ireland (2000) as a 'sensible, workable and coherent system' (p35). Likewise, officiant-oriented systems are applied in Australia,⁶¹ Canada⁶² and several states in the USA. Indeed, in 2002, the Office of National Statistics in England and Wales itself noted:

'The Government believes that the celebrant based system is more flexible and responsive to the couples needs and circumstances. It also brings considerable administrative simplicity in line with the Government's commitment to deregulation and modernisation, but provides appropriate safeguards for this important change in individuals legal status.' (para 3.21)

The merits of such reform have not diminished in the interim and it is submitted such reform ought to be considered as a priority.

Conclusion

The increasing number of marriages being celebrated in England and Wales without official sanction, 'generally although not exclusively among ethnic minorities' (Herring, Probert and Gilmore, 2012, p151) is attracting more and more attention. In the Muslim community, this issue appears, arguably, at its most extreme. According to the 2011 Census, Islam is now the biggest minority religion in England and Wales with 2.7 million followers, representing a considerable 4.8% of the population (ONS, 2013). However, it is clear that there are major differences between traditional Muslim marriage practice in the jurisdiction and the legislative formalities required for a legally recognised marriage. This disparity results in a potentially significant proportion of the community in England and Wales remaining in religious marriages which attract no civil recognition. The challenges associated with lack of civil recognition are severe, particularly for financially weaker spouses, yet it appears probable that the extent of the problem will only worsen. Having regard to the 'younger demographic of the Muslim community', the Ministry of Justice's Muslim Marriage Working Group recently noted the numbers of unregistered marriages are, in fact, 'likely to increase' (2012, p2; in the 2011 Census, 48percent of Muslims were aged under 25, see ONS, 2013 p2).

In this environment, it is submitted the need for action, specifically legislative reform of the requirements for entry into a valid marriage, is acute. As Harris-Short and Miles, among others, observe, the 'rationalization and simplification of the law in this area is long overdue' (2012, p65). Indeed, as Probert concluded in 2002, 'the law on marriage should be shaped to meet the needs of

the community in the twenty-first century, rather than the legacy of the eighteenth' (p419). Well over a decade on, the need for such reform remains pressing. The alteration of the law in this area, moving to an officiant-oriented system would, particularly if accompanied by the introduction of legislation facilitating the provision of financial relief on the breakdown of a cohabiting relationship, certainly represent a welcome development and ensure a greater protection of potentially vulnerable members of the community.

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¹ Discussed below.

² Note all references to the 'English' law refer to the law of England and Wales.

³ The Registrar General may register a building certified as a place of worship, for the solemnisation of marriages. See sections 41 to 44 of the Marriage Act 1949 (as amended).

⁴ See section 44(2) of the Marriage Act 1949 (as amended). Note, the marriage may be in any form, provided that at some point in the ceremony, a declaration is made similar to that undertaken in a civil ceremony, see sections 44(1) and 44(3). Two witnesses must also be present.

⁵ For an overview of the history of the formalities required for marriage, including an overview of the Clandestine Marriages Act 1753 (Lord Hardwicke's Act) see, Probert, 2004.

⁶ The marriage agreement must state the *mahr* or dowry, discussed below, the signatures of the participants and witnesses, and any other terms agreed upon by the parties. It does not have to be in writing.

⁷ This distinction can have serious implications, see below. One of the earliest decisions attributing this status to a Muslim marriage was *R v Bham* [1966] 1 QB 159. Subsequent case law on the point of non-marriage include *Gereis v Yagoub* [1997] 1 FLR 854 which emphasized the importance of the appearance of the ceremony. As the ceremony in question did bear the hallmarks of an 'ordinary Christian marriage', the marriage was held to be void. In *A-M v A-M (Divorce Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6, a Muslim marriage ceremony was again not considered sufficient for the purposes of creating a legal marriage. However, the court was able to rely on the presumption of marriage in the circumstances..

⁸ *Hudson v Lee (Status of Non-Marriage)*[2009] EWCA Civ 1442

⁹ *Hudson v Lee (Status of Non-Marriage)*[2009] EWCA Civ 1442 at [78]. This was stated to be a non-exhaustive list.

¹⁰ *Hudson v Lee (Status of Non-Marriage)*[2009] EWCA Civ 1442 at [77].

¹¹ See *Al-Saedy v Musawi (Presumption of Marriage)* [2010] EWHC 3293 (Fam); *El Gamal v Al-Maktoum* [2012] 2 FLR 387; *Dukali v Lamani (Attorney-General Intervening)* [2012] EWHC 1748 (Fam); *Sharbatly v Shagroon* [2012] EWCA Civ 1507. However, see also *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam). For academic commentary, see Gaffney-Rhys' 'Am I married? Three Recent Case Studies on the Effect of Non-Compliant Marriage Ceremonies' (2013) IFL 58.

¹² He cites *El Gamal v Al-Maktoum* [2012] 2 FLR 387 and *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam) in support of this claim.

¹³ Where one of the formalities is met with the other missing, the outcome may vary, see below. Note also, adding to the confusion, if a couple marry in a religious ceremony outside of the jurisdiction, in a form recognized by the law of that country (*lex loci celebrationis*) and each party has the capacity to marry, the marriage will be recognized under the law of England and Wales.

¹⁴ Rehana Parveen, PhD candidate at the University of Birmingham, has recently carried our research in this area as yet unpublished. Of 100 Sharia council case files she has investigated, approximately 29% of marriages included were unregistered, *nikah*-only, marriages.

¹⁵ Vishal Vora, PhD candidate at SOAS, reported the findings of his empirical research at the Muslim Marriage Conundrum Symposium held at the IALS, London, 9 May 2015.

¹⁶ Interestingly, in *AAA v ASH* [2009] EWHC 636 (Fam) para 48, the court appeared to infer knowledge of the legal status of a Muslim marriage to a husband in light of his professional status.

¹⁷ *R v M* [2011] EWHC 2132 (Fam) at [17].

¹⁸ Pursuant to the Matrimonial Causes Act 1973, the courts are afforded a wide discretion to redistribute assets between spouses on divorce and make financial provision for the financially weaker party.

¹⁹ Note children, if present, may be supported through Schedule 1 of the Children Act 1989.

²⁰ In several jurisdictions legislative schemes have been enacted to regulate the financial consequences at the breakdown of cohabitant relationships, see among others Australia, Canada, Scotland and Ireland.

²¹ Vishal Vora, PhD candidate at SOAS, reported the findings of his empirical research at the Muslim Marriage Conundrum Symposium held at the IALS, London, 9 May 2015. Half of the interviewees in his study (five out of 10) recorded that the family home was purchased and transferred into the husband's sole name notwithstanding that the wife contributed sometimes all of the deposit money. Such factual circumstances may generate a beneficial interest in the property under the common intention constructive trust.

²² [2009] EWCA Civ 1205.

²³ [2009] EWCA Civ 1205 at [11].

²⁴ [2011] UKSC 53

²⁵ [1990] UKHL 14

²⁶ Even where it is a monetary sum, inflation may render the *mahr* of limited value at the point of relationship breakdown.

²⁷ [2000] 1 FLR 8.

²⁸ As explain in *AAA v ASH* [2009] EWHC 636 (Fam) at [70], this presumption can arise ‘after cohabitation for a significant period, a marriage ceremony, and evidence that the parties and others regarded them as man and wife’.

²⁹ Nor will they be considered ‘next of kin’.

³⁰ Where a deceased is survived by a spouse and no children, the spouse takes the entire estate. Where a deceased is survived by a spouse and children, the surviving spouse is entitled to a statutory legacy, currently valued at £250,000, in addition to a half share in the remainder of the estate. See *Al-Midani v Al-Midani* [1999] 1 Lloyd’s Rep 923 where the Islamic Sharia Council of London had ordered that a female beneficiary was entitled to only half the share of the male beneficiary to an estate under the rules of Sharia law.

³¹ See section 1(1A) or section 1(1)(e) of the 1975 Act.

³² The challenges noted above in relation to pursuing a civil claim in equity or in contract law, such as stress and doubts over the State legal system, may also apply.

³³ *R v M* [2011] EWHC 2132 (Fam) per Parker J at [17].

³⁴ [2009] EWHC 636 (Fam).

³⁵ Although an unmarried father may acquire parental responsibility under section 4 of the Children Act 1989 or pursuant to section 111 of the Adoption and Children Act 2002, the father here had not followed the required procedures for his actual legal status.

³⁶ *AAA v ASH* [2009] EWHC 636 (Fam) at [32]. Neither did the father have inchoate rights of custody, see [84]-[99].

³⁷ See Vishal Vora, PhD candidate at SOAS, reported the findings of his empirical research at the Muslim Marriage Conundrum Symposium held at the IALS, London, 9 May 2015. Such reform was also suggested by a number of delegates at the SLSA Annual Conference 2015. As discussed below, although such reform would certainly be welcome, it arguably ought to feed into more direct initiatives targeted at better resolving the issues.

³⁸ See Read, ‘Resolution International Committee: Non- recognition of Islamic marriages in England and Wales’ (2012) IFL 452, 454.

³⁹ See above.

⁴⁰ See, for example,

<http://www.mwnuk.co.uk/Information_and_Advice_on_Muslim_Marriages_9_factsheets.php;

<http://muslimmarriagecontract.org>>Accessed 27 July 2015.

⁴¹ See <<http://www.muslimparliament.org.uk/release.htm>>Accessed 3 June 2015.

⁴² The Explanatory Notes opened stating: ‘For a Muslim marriage to be valid under the laws of England & Wales the marriage must be solemnised either at a mosque registered for the solemnisation of marriages or a civil wedding at a registry office must precede the nikah (Muslim marriage).’ See <<http://www.muslimparliament.org.uk/Documentation/Muslim%20Marriage%20Contract.pdf>>Accessed 3 June 2015. This sentence was repeated once again beneath the signatures of the parties, with a large box included on the certificate for the inclusion of the particulars of the civil marriage, again highlighting its importance. Note, a civil wedding could equally take place after the religious ceremony.

⁴³ ONS, *Area of occurrence, type of ceremony and previous marital status* (2011). This shows a slight increase from figures published for 2009 and 2010 which showed 899 mosques certified as places of worship, with 198 registered for marriage. See www.ons.gov.uk [Accessed 04 June 2015].

⁴⁴ It was also encouraged by the Muslim Parliament, see ‘Muslim Parliament proposes registration of Mosques and Marriages’ available at <www.muslimparliament.org.uk/registration.htm> accessed 03 June 2015

⁴⁵ *AM v AM* [2001] 2 FLR 6, *Al-Saedy v Musawi* [2010] EWHC 3293, *El Gamal v Al-Maktoum* [2012] 2 FLR 387; *Sharbatly v Shagroom* [2012] EWCA Civ 1507.

⁴⁶ Although a mosque may be certified as a place of worship, and thus already, so-to-speak, be ‘state-sanctioned’, it appears such certification does not provoke the same suspicion or distrust among some members of the community as registration for the solemnisation of marriage. In light of the civil implications of registered marriage, in particular, the state’s involvement in the mosque may be viewed as much more profound than would be the case if it was only certified as a place of worship. This may make it less attractive for all religious purposes. Where some members of the community are liable to view such registration in this way, mosque committees may be less likely to seek registration for the solemnisation of marriage thus impacting on the community as a whole.

⁴⁷ See <<http://lawcommission.justice.gov.uk/areas/marriage-law.htm>>Accessed 1 June 2015. The findings are due to be published by the end of 2015. See also, House of Commons: Written Statement (HCWS152) 18 December 2014.

⁴⁸ See below.

⁴⁹ Although such schemes are applied in secular continental jurisdictions such as France and Germany, the relationship between church and state in England and Wales, albeit perhaps weakening, has been traditionally been much stronger, particularly vis-à-vis marriage regulation.

⁵⁰ If the *nikah* was automatically recognized under the law of England and Wales, these practices could become criminalized, as opposed to the current position where an imam can conduct such a ceremony without it being legally valid.

⁵¹ Note the fear that recognising Sharia law (or practices) could constitute the legitimisation of the perceived gender discrimination inherent in the religion. See for example the debate which provoked the withdrawal by the Law Society of England and Wales of its practice note for members in drafting Sharia-compliant wills <http://www.lawsociety.org.uk/news/press-releases/law-society-withdraws-sharia-succession-principles-practice-note/> Accessed 27 August 2015.

⁵² The law in this regard appears to be in some flux, see *Hodkin v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77.

⁵³ Marriage (Scotland) Act 1977 ss.8(1)(ii) and 9(1)(b) as amended by section 12(2)(a)(ii) of the Marriage and Civil Partnership Act 2014. In this way, difficulties surrounding what constitutes a 'religious body' are overcome.

⁵⁴ Note comments in *Saleh v Saleh* [1987] SLT 633 suggest that section 23A could save a marriage even if the person who conducted the ceremony was not an approved celebrant.

⁵⁵ Thus polygamous religious marriages are still possible.

⁵⁶ If convicted, giving rise to a maximum sentence of 2 year imprisonment and, or a fine under s.24(1)(i) and (ii).

⁵⁷ This means that the information provided by mosques in Scotland is arguably likely to be better than that in England and Wales. For example, the website of the Glasgow Central Mosque makes it clear that that a *nikah* conducted by their imams, must also be a binding religious marriage under Scots law. See <<https://www.centralmosque.co.uk/marriage>>Accessed 4 June 2015. Registration would also be completed by the imam. **However, if an unregistered imam fails to warn a couple that they are not entering a legally binding marriage, although he may be sanctioned, as noted, the couple's marriage will remain unregistered. Nonetheless, the couple may be regarded as 'cohabitants' pursuant to the Family Law (Scotland) Act 2006 and benefit from provisions thereunder, for example, on relationship breakdown.**

⁵⁸ A continental approach akin to that described above would eliminate this possibility however, as noted, such reform is unlikely to be introduced.

⁵⁹ Note, the failure of the legislature in England and Wales to enact cohabitation legislation on relationship breakdown is in marked contrast to many other jurisdictions. In British Columbia, Canada, the Family Law Act 2011 recently extended its detailed property division scheme for marital spouses to common law spouses. Section 3 defines a spouse as a person who has lived with another person in a marriage-like relationship, for a continuous period of at least two years.

⁶⁰ See above also for the low level of polygamy recorded in England and Wales.

⁶¹ See the Marriage Act 1961.

⁶² This is dealt with at a provincial level, see for example the Marriage Act 1996 in British Columbia.