CHAPTER 6: RECOGNITION OF MUSLIM MARRIAGE CEREMONIES IN IRELAND: AN ANALYSIS

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Introduction

In light of the differences between the statutory formalities required for entry into a legally recognised marriage in many common law jurisdictions and traditional Muslim marriage practice, doubts have been raised as to the legal status of a potentially significant number of Muslim marriages undertaken in the Western World. Mounting attention has been drawn to the issue over the past 20 years, particularly in England and Wales.¹ In 2001, Shah-Kazemi reported that approximately 27% of the 287 divorce case files from the Muslim Law (Shariah) Council which she investigated appeared not to have a recognized civil marriage in the UK.² Bano’s research shortly after again highlighted the extent of the problem in England and Wales. She reported that almost two-thirds of the women she interviewed were not party to a legally recognised marriage.³ Since then, empirical research undertaken by Douglas et al, showed that just over 50% of the hearings observed in the Birmingham Central Mosque, involved

¹ Pursuant to the Marriage Act 1949 (as amended), there are four main categories of marriage ceremony which enjoy legal recognition in England and Wales: 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. In this 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. In particular, the marriage must take place in a registered premises and there must be present a registrar of marriages or authorised person. As will be outlined below, many Muslim marriages do not meet these minimum requirements. The consequences of this are particularly severe in a Muslim context as a non-compliant marriage in England and Wales is likely to be considered ‘non-existent’, see Kathryn O’Sullivan and Leyla Jackson, ‘Muslim Marriage (Non)-Recognition: Implications and Possible Solutions’ (2017) 39(1) JSWFL 22-41 for more.

² Sonia Shah-Kazemi, Untying the Knot, Muslim Women, Divorce and the Shariah (Nuffield Foundation, 2001) 31. In addition, one in four of those interviewed as part of the project did not appear to have a legally recognised marriage under the law of England and Wales.


couples with an unrecognised Muslim marriage.4 These studies – and the activity of leading practitioner activists in the field, notably Aina Khan OBE5 – have resulted in ever greater attention being focused on the issue with the discourse moving from the academic6 into the public sphere.7

Although much of the discussion focused on the civil recognition of Muslim marriages does spring from England and Wales, the issue is by no means confined to that jurisdiction. Research has also been conducted on the extent to which Muslim marriages are securing legal recognition in North America and elsewhere in Europe with similar concerns raised.8 Unfortunately, however, notwithstanding that Islam is now the third largest and one of the fastest growing religions in Ireland, there has been no in-depth exploration as to whether, or to what extent, non-state registered marriages – so called nikah-only marriages – may be taking place within the jurisdiction.9

While some couples may jointly and knowingly chose to enter into a religious Muslim marriage only,10 particular concerns surround the potential for Muslim ‘spouses’ to unwittingly be party to a marriage which enjoys no legal status. Concern has also been raised for those who may have been misled by

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4 Gillian Douglas et al, ‘The role of religious tribunals in regulating marriage and divorce’ (2012) 24(2) CFLQ 139. This equated to 14 of the 27 hearings observed.
8 For North America, see Julie Macfarlane, Understanding trends in American Muslim Divorce and Marriage: A Discussion Guide for Families and Communities (ISPUSU, 2012). However, note, this research found that the rate at which marriages were recognised varied from community to community, with different practices and awareness as to the importance of securing legal recognition varying considerably. For European research see, for example, the work of Mahmoud Jaraba (Max Planck Institute for Social Anthropology) who presented a paper entitled ‘How Local Muslim Communities Dissolve Unregistered Islamic Marriage (nikāh) in Germany?’ at the University of Birmingham’s Europe’s New Migrants: Marriage Practices and Policies conference in April 2018.
9 The only contribution to date broadly referencing Muslim marriage in Ireland was Mairead Enright, ““Preferring the Stranger?” Towards an Irish Approach to Muslim Divorce Practice’ (2013) Ir Jur 49(1) 65. Little specific analysis has emerged in the interim.
10 See Rajnaara C. Akhtar ‘Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights’ in Joanna Miles, Perveez Mody and Rebecca Probert (eds) Marriage Rites and Rights (2015 Hart) 193-210 which focuses on the reasons why parties might be consciously party to an unregistered marriage.

their ‘spouse’ as to the latter’s intention to secure legal recognition for the marriage following the religious ceremony.\footnote{11 See O’Sullivan and Jackson (n 1).}

Whether such issues are liable to arise in Ireland remains under-investigated with little meaningful research conducted on the topic to date. The dearth of knowledge in this area is regrettable not only for the parties to potentially legally invalid marriages but also for the State. As Poulter suggests, ‘[i]n a modern industrial society it is vitally important for a state to have accurate information about which of its members are married and which are not’.\footnote{12 Sebastian Poulter, English law and ethnic minority customs (Butterworths, 1986) p33.}

This chapter attempts to go some way towards bridging the current gaps in knowledge in this area by offering an exploration of the recognition of Muslim marriage ceremonies in Ireland. The discussion is informed by available, albeit limited, data on Muslim marriage practice in Ireland and an investigation of both the legal formalities for marriage in Ireland and the consequences of non-compliance with such formalities. The chapter is broken into five main parts. Providing the broader context for the discussion which follows, Part I highlights the importance of marriage and the marital family under Irish law. It considers the way in which marriage law has evolved in the jurisdiction and the different types of marriage which may now be entered into. Part II details the formalities required for entry into a legally recognised religious marriage in Ireland and the implications of failure to meet these formalities. Considering this legislative framework in light of traditional Muslim marriage practice, Part III then seeks to gauge the likelihood of Muslim marriages conducted in Ireland securing legal recognition. In light of the emerging potential for a marriage to be unrecognised, Part IV briefly considers the implications of failing to secure legal status for a marriage under Irish law before Part V asks where to next.

**Part I: Marriage and the Marital Family in Irish Law**

At a constitutional level, marriage and the marital family enjoy a privileged position in Ireland. Article 41.3.1° of the Irish Constitution of 1937, *Bunreacht na hÉireann*, specifically provides, ‘The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.’\footnote{13 Emphasis added. Following the 34th Amendment to the Constitution, Article 41.4 now also provides ‘Marriage may be contracted in accordance with law by two persons without distinction as to their sex.’} Moreover, through Article 41.1.1°, the State recognises this constitutional marital family, ‘as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law’. It further ‘guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State’.\footnote{14 Article 41.1.2°.} Given

this importance attributed to marriage, it is perhaps unsurprising that the right to marry has been recognised as an unenumerated right under the Irish Constitution.\(^{15}\) The Constitution does not, however, provide any detail on the precise formalities required for entry into a legally recognised marriage leaving such matters to the legislature.

Historically, the Irish laws regulating the formalities for marriage have been notoriously convoluted. Indeed, commenting in the mid-1990s, Shatter described the law in this area as ‘complex and obscure, being contained in a labyrinth of statutes stretching from 1844’.\(^{16}\) Until the passing of the Family Law Act 1995, the formalities for civil marriage or religious marriage – *other than Roman Catholic marriage* – hailed primarily from the Marriages (Ireland) Act 1844, as amended by the Registration of Marriages (Ireland) Act 1863.\(^{17}\) The legal validity Roman Catholic marriages, specifically, was governed by the common law.\(^{18}\) It was not until the enactment of the Family Law Act 1995 that the formal requirements for *all* marriages solemnised in the State were finally codified.\(^{19}\) The Civil Registration Act 2004 ultimately repealed and replaced all of the existing rules relating to marriage formalities, creating a more streamlined and straightforward process.

Pursuant to the Civil Registration Act 2004 (as amended), three types of marriage are recognised under Irish law. First, parties may enter into a civil marriage. Civil marriages are conducted by the Irish State, specifically by registrars employed by the Health Service Executive. Second, as will be discussed below, parties may enter into a religious marriage solemnised by registered members of religious bodies. Although as originally enacted, civil and religious marriages were the only categories of marriage

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\(^{15}\) This constitutional right was first recognised in *Donovan v Minister for Justice* [1951] 85 ILTR 134. For more on the history of the right to marry, see O’Shea and O’Shea *v Ireland and the AG* [2007] 2 IR 313. Note, in the absence of a constitutional or statutory definition of marriage, it has been left to the courts to define. Although the *Inter-Departmental Committee on Reform of Marriage Law* (Discussion Paper No. 5-September 2004) recommended the introduction of a legislative definition of marriage, none has been forthcoming.


\(^{17}\) Although Ireland secured its independence from Britain in 1922, the pre-existing marriage law was carried over. As Deirdre McGowan, ‘Governed by Marriage Law’ (2016) 25(3) Soc and Leg Stud 311, 314 explains: ‘When Ireland gained independence from Britain in 1922, it inherited a body of marriage law built upon the political concerns of a colonial power, and the ecclesiastical rules of a church with few Irish adherents.’

\(^{18}\) Shatter notes that canon law (decree of the Council of Trent 1563) governed the Roman Catholic’s recognition of a marriage as valid but it was not relevant to the formalities required by common law, canon law and common law having ‘gone their separate ways’ after the Reformation: Shatter (n 16) 158. Notwithstanding that Article 41 pledged to protect the institution of marriage ‘upon which the Family is founded’, McGowan (n 17) at 314 notes that ‘in practice the regulation of the marriage relationship itself was left entirely within the authority of the various churches’.

\(^{19}\) For more detail on the framework introduced by the 1995 Act, see Louise Crowley, *Family Law* (Round Hall, 2013), 52-53.
Part II: Marriage Registration Formalities

To be legally married in Ireland, both parties must be eighteen years of age.\(^{21}\) The preliminaries for legal marriage in Irish law centre upon compliance with the formal notice requirements. Section 46(1)(a) of the 2004 Act provides that a marriage solemnised in the State, after the commencement of the Act,\(^ {22}\) between persons of any age shall not be valid in law unless the intending spouses provide written notice of their intention to marry not less than three months prior to the date on which the marriage is to be solemnised.\(^ {23}\) This notice must be delivered by both parties in person.\(^ {24}\) The parties must also present themselves at the registrar’s office not less than five days (or such lesser number of days as may be determined by that registrar) before the date of the marriage and make and sign a declaration in the presence of the registrar that there is no impediment to the marriage.\(^ {25}\) These requirements are ‘substantive requirements for marriage’\(^ {26}\), meaning that their non-observance will legally invalidate the marriage.

Once the registrar is satisfied that the requirements of section 46 have been complied with, a marriage registration form (MRF) will be completed by the registrar\(^ {27}\) and issued to the parties to the intended marriage.\(^ {28}\) The marriage cannot be solemnised unless the parties present the MRF to the individual who will solemnise the marriage so that s/he may examine it.\(^ {29}\) Immediately after the solemnisation of a marriage, the MRF must be signed by: (a) each of the parties to the marriage; (b) two witnesses...
to the solemnisation of the marriage, and; (c) the person who solemnised the marriage. The MRF must be returned to the registrar by either one of the parties to the marriage within one month of the ceremony. The registrar will then enter the marriage on the official register.

In relation to the ceremony itself, there are certain requirements which must be adhered to. First, the marriage must be solemnised by a registered solemniser. Where the solemniser is not a civil registrar, s/he must not solemnise a marriage unless s/he is a recognised by the relevant religious or secular body. A registered solemniser must not solemnise a marriage unless: both parties to the intended marriage are present; two persons over the age of 18 years are present to act as witnesses; the solemnisation takes place in a suitable venue and; the solemniser is satisfied that the parties to a marriage understand the nature of the marriage ceremony and the relevant declarations which must be made as part of the ceremony. With regard to the venue requirement, to be suitable for a marriage ceremony a venue must be a ‘place that is open to the public’, that is, a building that is open to the public, or a courtyard, garden, yard, field or piece of ground that is open to the public and lying near to and usually enjoyed with such a building. Within these limits, the venue for the ceremony is a matter for the religious body concerned and the parties themselves. There is no requirement that a venue for a religious marriage be registered with or approved by the civil authorities. A solemniser must ensure that the ceremony is in a form which is approved by an Ard-Chláraitheoir (Registrar General). The ceremony must also include certain declarations made by each of the parties in the presence of each other, the solemniser and the witnesses, namely that: neither party knows of any impediment to the marriage and; each accepts the other as his/her spouse. These requirements for the marriage ceremony are further stated to be ‘substantive requirements for marriage’. That is, they must be adhered to if the marriage is to be legally valid.

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30 Section 49(1).
31 Section 49(2).
32 Section 49(3). Once the marriage is registered, a civil marriage certificate may be issued.
33 Section 51(1).
34 Section 51(3)(c).
35 Section 51(2)(a).
36 Section 51(2)(b).
37 Section 51(2A).
38 Section 51(2)(d). These declarations are set out in section 51(4) and are described below.
39 Section 51(2A). See Leahy and O’Sullivan (n 20) for more.
40 For more general information, see http://www.welfare.ie/en/Pages/Getting_Married.aspx (accessed 31 March 2018).
41 Section 51(3)(a).
42 Section 51(3)(b).
43 Section 51(4)
44 Section 51(5)
The instinctive response to a marriage where the formalities have been breached would seem to be that the marriage is void as it has not complied with the legal requirements for civil marriage. If this were to occur, the marriage is deemed never to have existed. Under Irish nullity law, this would necessarily mean that the parties to this void marriage would not be entitled to any ancillary relief such as maintenance or property division.\(^{45}\) In Ireland, however, it is not fully settled that breach of formalities will always lead to a marriage being declared void. This supposition is based on the judgment in \(IE \text{ v } WE\), a case which was decided on the pre-2004 law. In that case, the parties married in a Lutheran church in Dublin which, at the date of the ceremony, was not registered for the celebration of marriages. In addition, no statutory licence or certificate was issued to authorise the ceremony and no banns were published. Unbeknownst to the parties to the marriage, their marriage had not complied with the legal formalities for marriage which prevailed at the time under section 49 of the Marriages (Ireland) Act 1844. Murphy J, however, held that this would not render the marriage void, noting that:

‘It seems...settled law that to invalidate a marriage for non-compliance with any of the provisions contained in s. 49....it is necessary to establish not only that there should have been a conscious disregard of the provisions of the section but that both parties to the apparent marriage should have been aware of the defect.’\(^{47}\)

Thus, it would seem that, under the pre-2004 law at least, non-compliance with the legal formalities for marriage will only render a marriage void where both parties were aware of the defect. This rule was subsequently approved in the later case of \(DC \text{ v } NM\) (falsely known as \(NC\))\(^{48}\).

The prevailing view amongst Irish commentators on family law is that the precedent set in \(IE\) remains good law. Crowley suggests that whilst non-compliance with age or notice requirements renders and marriage null and void (unless the relevant exemptions have been obtained from the courts), ‘[t]he general principle outside these requirements is that the non-observance of or a defect in any of the other prescribed formalities does not invalidate a marriage unless both parties were aware of it at the

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\(^{45}\) See below for more

\(^{46}\) [1985] ILRM 691.

\(^{47}\) Ibid, at 695.

\(^{48}\) [1997] 2 IR 218. However, interestingly in that case, the judge distinguished \(IE\) on the facts. The couple in \(DC\) had married relying on a forged consent from the bride’s father. She was under 21 years of age and, under the law at the time, thus required the consent of her father to marry. Geoghegan J held that the relevant section was ‘directory only’ and the mere absence of a father’s consent could not invalidate a marriage. Consequently, this case suggests a certain hierarchy within the formalities of marriage under the regime which prevailed prior to the enactment of the 2004 legislation such that even a knowing breach of certain formalities may not have had any impact on the legal validity of a marriage. Commenting on the old law, Shatter (n 16) p 174 suggested that ‘[a]s a general rule, it is submitted that unless a defect is said expressly to invalidate a marriage, the marriage is completely valid’.\(^{48}\)
time of the ceremony’. However, there are problems with this line of argument. The age and notice requirements are rightly exempted from what we might call the ‘knowledge rule’ as section 46(4) clearly states that they are substantive requirements for marriage and a court exemption must be obtained to depart from them. However, section 51(5) similarly states that the requirements for solemnisation of marriages listed above (i.e. that the ceremony be performed by a registered solemniser, with both parties and witnesses present, in a public venue, where the relevant declarations are made) are also substantive requirements for a marriage. Thus, it would seem that the ‘knowledge rule’ similarly cannot apply where these requirements are not met. Ultimately, this question cannot be properly settled until a relevant case comes before the courts under the new law. Intuitively, it would seem that since the nomenclature ‘substantive’ is applied to all of these formalities, the legislative intent would appear to have been that they should all be treated equally and that non-compliance with any of these requirements would render a marriage void. Indeed, it is even open to question whether the ‘knowledge rule’ would be applied to a consideration of non-compliance for the formalities in the 2004 Act (as amended). The legal rules which prevailed at the time of the judgment in IE were notoriously more complex than the current legal position. Thus, judges may have less sympathy with a failure to comply with the formalities should a similar case fall for consideration under the current legal rules.

Consequently, for Muslim marriages which do not comply with the legal formalities for marriage, it is difficult to state with certainty whether they would be declared null and void or not. Certainly, there can be no doubt that where age or notice requirements were not met, the marriage could not be valid. However, there is potential for the same outcome where the solemnisation of the marriage does not comply with the formalities for solemnisation of marriage, for example, where a marriage is solemnised by an imam who was not a registered solemniser or where the venue used was not open to the public. Much here would depend on whether the courts opted to apply the precedent in IE or not. If IE were to be applied in this instance, it would offer some protection to Muslims who were not aware of the fact that their marriage ceremony did not comply with the formal legal requirements. However, at present, unfortunately, much uncertainty prevails in this area and it is difficult to predict what stance a court would take in this situation.

49 Crowley (n 19) 58.
Part III: Muslim Marriage in Ireland - Likelihood of Compliance with Formalities

While it may not be possible to answer definitively what the implications of failure to comply with the formalities will be, it is worthwhile considering the extent to which such formalities are being adhered to – insofar as such analysis is possible in the absence of empirical evidence.

It is clear that at least some Muslim marriages are securing legal status and the numbers, while small, were – at least until very recently – showing an upward trend. Although in 2012, 28 Muslim marriages were registered, 48 were registered in 2013.\textsuperscript{50} Forty-two were registered in 2014 with 89 registered in 2015.\textsuperscript{51} Inexplicably, a mere 22 Muslim marriages were registered in 2016.\textsuperscript{52} It must also be remembered that a Muslim couple could have a religious marriage ceremony either preceded or followed by a separate civil ceremony, and thus be recorded on official statistics as a civil ceremony only. How many such civil marriages take place within the Muslim community is impossible to state. Thus, while it would appear from the statistics that, at least until 2016, there was evidence of a positive trend in the registration of marriages, it may reasonably be questioned as to whether, in line with the experience of a number of jurisdictions, most notably in England and Wales, more marriages are being conducted which are, knowingly or otherwise, not securing legal recognition.\textsuperscript{53}

On one hand, the statutory formalities required in Ireland for legal entry into marriage are more user-friendly in a multicultural society than those in other jurisdictions.\textsuperscript{54} Seeking to be more inclusive of different marriage ceremonies, the legislation allows much more freedom to various religious bodies to conduct the ceremony according to the rites of their own religion. Unlike other jurisdictions including England and Wales, Muslim mosques in Ireland do not need to be registered for marriage ceremonies.\textsuperscript{55} Pursuant to the 2004 Act, the venue for the ceremony is a matter for the religious body.

\textsuperscript{50} Registrar General, Annual Report 2013, at point 39 available at https://www.welfare.ie/en/downloads/Registrar-General-Report-2013. Islamic marriage represented less than 0.25\% of all religious marriages registered in the state in 2013. Figures were included in the Registrar General’s report for 2013 but not for 2014.

\textsuperscript{51} Source: CSO request. There were only 114 Islamic marriages registered in Ireland between 2010 and 2013, see Registrar General, Annual Report 2013, at point 39, available at https://www.welfare.ie/en/downloads/Registrar-General-Report-2013.pdf. It is interesting to note that the Central Statistics Office, Marriages and Civil Partnership Statistical Reports, do not provide details of Islamic marriages undertaken. These marriages fall into the ‘other religious ceremonies’ category.

\textsuperscript{52} Source: CSO request. With sincere thanks to Ms. Margaret Hurley, Vital Statistics Section, Central Statistics Office for providing these figures.

\textsuperscript{53} Anecdotally, mediation practitioners in Ireland have reported experiences of couples party to a \textit{nikah}-only marriage approaching them on the breakdown of the relationship.

\textsuperscript{54} Serious concerns have been raised in England and Wales in relation to the Marriage Act 1949 (as amended) and its appropriateness in a multicultural society see the Law Commission for England and Wales, \textit{Getting Married: A scoping paper} (2015). See also John Eekelaar, ‘Marriage, religion and gender equality’ in Fareda Banda and Lisa Fishbayn Joffe (eds), \textit{Women’s Rights and Religious Law} (Routledge 2016); Eekelaar (n 6) above.

\textsuperscript{55} In England and Wales, this requirement has proven quite problematic. Eekelaar (n 6) 84 citing Office of National Statistics, \textit{Marriages in England and Wales 2010, Area of Occurrence, Type of Ceremony and Denomination}, Tables 6 and 7 notes ‘that Muslims are unwilling to seek registration of their premises. For
Where the marriage takes place in a mosque, it is unlikely to create any difficulties. Equally, as per Muslim marriage practice, a marriage conducted in another public place such as a restaurant or hotel may also be considered to have met the formalities with the location being considered as within the providence of the religion. Moreover, although the legislation stipulates that, notwithstanding the religious bodies’ freedom to control the location of the ceremony, the location where the solemnisation takes place must be open to the public - thus appearing to render any ceremony in a private house, religiously acceptable as per Muslim tradition, in contravention of the formalities – where all other formalities are met, such a marriage might nevertheless be upheld using the precedent in IE v WE.

However, while the legislature ought to be commended on the modernisation of the legislation governing legal entry into marriage, difficulties do nevertheless remain. Intuitively, it stands to reason that public awareness of the formalities required for entry into marriage is of the utmost importance to ensure compliance. Nevertheless, doubts may be raised as to whether such awareness exists within the Muslim community. A cursory investigation of the leading websites of the Islamic community in Ireland highlights a serious lack of information pertaining to the requirements for a legally recognised Muslim marriage: none of the major websites appear to carry any information in relation to the legal formalities for marriage. Worse still is the extent to which false and misleading information appears online. According to the Central Statistics Office of Ireland website, the website of the US Embassy in Ireland and various other marriage information websites: ‘There is at present no provision for the civil registration of Muslim marriage ceremonies solemnised in the State.’

Within many religions, whether minority religions or otherwise, the solemniser due to conduct a marriage ceremony is likely a major source of information to prospective spouses on the formalities

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56 See for example the awareness-raising initiatives in England and Wales such as Khan (n 5) above.
57 A number of websites carry sections on marriage and the availability for marriage ceremonies but do not mention any reference to the civil requirements for example Islamic and Educational Centre of Ireland website http://www.islamiccentre.ie/services/marriage-nikah/ (01 February 2017); The Islamic Cultural Centre of Ireland website http://www.islamireland.ie/facilities-services/matrimonial/ (01 February 2017). The main Catholic websites do carry such information for their followers, eg http://www.accord.ie/services/getting-married/getting-married-in-the-catholic-church (01 February 2017).
to be completed to ensure legal recognition. The likelihood of religious solemnisers providing such information in relation to civil recognition appears, at first blush, to be bolstered by the legislation. Section 69(10)(c) of the 2004 Act provides that it is an offence for a person who is a registered solemniser to solemnise a marriage without a MRF having been given to him or her before the solemnisation for examination by him or her. However, it appears that at least six out of seven imams in Ireland are not legally registered to solemnise a Muslim marriage. While the Irish Council of Imams estimates that there are approximately 35 imams in Ireland,61 the official Register of Solemnisers records only five imams in the jurisdiction: two in Dublin, two in Cork and one in Galway.62 Moreover, although four imams were registered in September 2007 on the commencement of the Act, only one extra imam has been registered in the interim (in July 2015) notwithstanding that the community grew significantly during the same period.63 In addition, although almost half (47.3%) of all Irish Muslims were recorded in County Dublin alone in 2016,64 only two imams are recorded as registered solemnisers for this district.65

The limited number of registered solemnisers within the Muslim community presents a number of problems. First, the potential for Muslim marriages to be conducted in the absence of a registered solemniser as required pursuant to the Civil Registration Act 2004 (as amended), whether knowingly or otherwise, would appear high.66 Second, and arguably more importantly, pursuant to section 69(10)(b) of the 2004 Act, it is an offence for a person who is not a registered solemniser (within the meaning of Part 6), or the holder of a temporary authorisation under section 57, to conduct a marriage ceremony in such a way as to lead the parties to believe that he or she is solemnising a valid marriage.67 Although, to date, no caselaw has emerged to show precisely what behaviour might constitute ‘leading’ the parties to believe the marriage would be ‘valid’, if an unregistered solemniser

61 Although anecdotal evidence suggest the figure is likely to be higher as not all imams or Islamic associations are linked to the Irish Council of Imams.
63 Between 2006 and 2016, the Muslim community in Ireland almost doubled, increasing by 95%, see CSO, Census 2016 Profile 8: Religion Ethnicity and Irish Travellers (Dublin: Stationary Office, 2017), also available to view at http://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rnc/.
64 CSO, ibid. It noted that the Muslim community in Ireland is ‘highly concentrated in urban areas with only 2.1 per cent in rural areas’.
65 Moreover, as referenced elsewhere, the Irish Muslim community is noted for its diversity. Couples within each micro-community would presumably wish an imam from their sect to conduct the ceremony. This further arguably reduces the attractiveness of those imams who are registered from a different sect.
66 As noted above, what the implications of this non-compliance with the formalities would be, remains unclear.
67 Emphasis added. Also the fact it says ‘valid’ and not ‘legal’ is interesting – it might be religiously ‘valid’ if not legally ‘valid’.
sought an MRF this might be caught within the behaviour contemplated. On this interpretation, it would be much more advisable for such a solemniser to remain silent as to the formalities required for a religious marriage to secure simultaneous legal recognition. It would appear then reasonable to suggest that where an unregistered solemniser conducts the marriage ceremony, the risk of the marriage securing legal recognition is significantly higher.\textsuperscript{68}

Viewed in this context, it might appear reasonable to suggest that one obvious solution could be to encourage more imams to become registered solemnisers thus better ensuring that spouses do not unwittingly fall foul of the formalities required for legal entry into marriage. However, in achieving this goal, section 69(10)(c) may actually prove counter-productive. As per Islamic tradition, both spouses may knowingly wish to enter a religious, non-legally binding, marriage. However, where a person who is a registered solemniser conducts such a ceremony they would appear to be left vulnerable to conviction. Their unavailability for such marriages would likely render them less attractive as solemnisers in the community.\textsuperscript{69} It is also possible that some imams may wish to avoid registration insofar as such engagement with the Irish State might be viewed with suspicion within some quarters of the community.\textsuperscript{70} The likelihood of the number of registered imams increasing significantly in the coming years would therefore appear small.

Part IV: Implications of Non-Recognition

As McGowan explains, the legal consequences of marital recognition ‘are so far-reaching as to be virtually impossible to catalogue’.\textsuperscript{71} By corollary, the implications of non-recognition are also extensive. Inevitably, the implications of non-recognition will be more severe depending on the particular couple involved and issues such as length of the putative marriage etc. In particular, non-recognition may have more adverse effects on women who may be in a financially vulnerable position on relationship breakdown due to, for example, having taken on a role of home-maker and/or primary caregiver for children, thereby limiting their own earning capacity.\textsuperscript{72} For this group, the inability to

\textsuperscript{68} Admittedly, an unregistered solemniser could tell the couple to have a separate civil marriage ceremony before or after the marriage ceremony, see below. However, whether this information is passed on and the extra step is taken by parties or not is unclear. Moreover, it is unknown to what extent there is in fact knowledge of the provisions of the Civil Registration Act 2004 (as amended) among imams in Ireland.

\textsuperscript{69} Although, as discussed below, if community expectations focus on registration, the demand for registered solemnisers should outweigh the advantages for imans of non-registration. Nevertheless, the market for unregistered solemnisers which may be likely to be reduced, is unlikely to disappear.

\textsuperscript{70} Similar suspicion has been highlighted in England and Wales, see Samia Bano, Exploratory Survey of Shariah Councils in England with Respect to Family Law (Ministry of Justice/University of Reading, 2012) 24. See also O’Sullivan and Jackson (n 1).

\textsuperscript{71} McGowan, (n 17) 312.

resort to the typical remedies available on martial breakdown (i.e. ancillary orders available in judicial separation and divorce proceedings) may have significant financial consequences. Although it is outside the scope of discussion here to fully articulate all the implications which arise when a marriage is deemed void for non-compliance with formalities, it is important to point to the primary effects of such non-recognition.

As noted above, where a marriage is declared legally void, ‘the parties are in effect strangers in law’ and thus ancillary orders such as maintenance or other property adjustment orders which are typically available on marriage breakdown are not applicable. Parties to a void marriage are also not considered to be spouses for the purposes of the Succession Act 1965. Surviving religious ‘spouses’ will therefore fail to enjoy an entitlement to a guaranteed legal right share or share on intestacy. Further, important protections against the unilateral disposition of the family home under the Family Home Protection Act 1976 will not apply. Finally, tax credits for married spouses will remain out of reach as will exemptions for spouses from inheritance tax.

Given the availability of legislative rights for cohabitants in Irish law it may appear that a declaration of nullity of marriage is not necessarily as serious a consequence as it would, perhaps, otherwise be thought: parties to a void marriage may, after all, still quality as cohabitants and thus seek ancillary orders under this regime instead. Section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 defines a ‘cohabitant’ as ‘one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other’. To be ‘qualified cohabitants’ for the purposes of the legislation the couple must have cohabited for five years or, where there are dependent children, for two years. It is likely that many separating couples whose Muslim marriage is deemed void would quality as ‘qualified cohabitants’. However, the scheme provided in the 2010 Act is a ‘redress scheme’ and, while

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73 Crowley (n 19) 718.
74 On testacy, a surviving spouse is entitled to one-third of the deceased spouse’s estate under section 111 of the 1965 Act. On intestacy, pursuant to section 67 they are entitled to two-thirds of the estate where the deceased is also survived by children or the entire estate where there are no surviving children. See below regarding the possible protection afforded by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
75 Note, however, they may potentially qualify for Family Home Relief under the Finance Act 2000.
76 Section 172(5) (emphasis added). Section 172(2) provides a list of considerations which a judge must take into account when determining whether the parties are qualified cohabitants. Since these are largely to ensure that the relationship is intimate and committed (similar to a marriage-like relationship), it is likely that parties to a legally void marriage will easily satisfy these criteria.
orders such as maintenance and property adjustment are available to cohabitants\textsuperscript{77}, they are not offered on the same terms as they are to spouses. Unlike with spouses who are automatically entitled to access ancillary relief on marital breakdown, a qualified cohabitant seeking orders under the regime in the 2010 Act must prove that they are financially dependent as a result of the relationship if they are to seek relief.\textsuperscript{78} Further, any relief granted must go no further than to relieve the financial dependency, thus limiting the extent to which orders may be granted for cohabitants. Consequently, while the cohabitants’ legislation may provide a fall-back for parties to a void marriage, the protection available does not equate to that which is available to spouses.

Parties to a void marriage who do not qualify for redress under the cohabitant legislation may pursue a claim in equity (for a beneficial interest under a purchase money resulting trust or relief under proprietary estoppel)\textsuperscript{79} or contract law (for enforcement of the mahr if already unpaid). However, such actions are costly and have proven unpopular in other common law jurisdictions, including England and Wales.\textsuperscript{80} Depending on the circumstances, relief may also be available under Sharia law on marriage breakdown\textsuperscript{81} but in the apparent absence of Sharia Councils in Ireland, the accessibility or otherwise of such remedies in this jurisdiction remains unknown.\textsuperscript{82} While it is possible local Muslim leaders may be fulfilling this role, there exists an absence of research on the topic to say definitively if such remedies are available in Ireland.

Part IV: A look to the future

In this context, the question may legitimately be asked: ‘Where to next?’. It is difficult to answer this question in the absence of empirical research on the issue. The gap in knowledge in this field in Ireland

\textsuperscript{77} Relief available under the 2010 Act includes orders for: property adjustment (s 174); compensatory maintenance (s 175), and; pension adjustment (s 187). Orders for provision from the estate of a deceased cohabitant are also available: s 194.

\textsuperscript{78} Section 173.

\textsuperscript{79} Determinations of questions regarding the ownership of property, for example, the equitable ownership under a purchase money resulting trust, are dealt with under section 36 of the Family Law Act 1995. Strangely, there is some evidence of ancillary orders being granted on nullity applications despite the absence of jurisdiction for this: Courts Service Annual Reports 2010–2012. However, this would seem to be the exception rather than the rule and an exploration of the extent to which ancillary relief is being granted by judges in this context is beyond the scope of discussion here. For further discussion, see Crowley (n 19) 719.

\textsuperscript{80} O’Sullivan and Jackson (n 1), 26–27.

\textsuperscript{81} Ibid, 27–28.

\textsuperscript{82} Even where a spouse is aware of their civil law rights and is in a financial position to pursue a civil action, they may nonetheless prefer to seek relief under Sharia law for religious reasons. In England and Wales, it has been noted the attraction of obtaining relief under Sharia law extended across the socio-economic spectrum. Shah-Kazemi, (n 2) noted at 18 that the women approaching the Sharia council in her research came from ‘a variety of ... backgrounds, ranging from qualified professional women... to those with minimal formal education’. For a recent of religious courts, including discussion of Sharia Councils in England and Wales, see Douglas et al, Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts (Report of a Research Study funded by the AHRC) (Cardiff University, June 2011).
is substantial. We do not know the answer to such fundamental questions as what percentage of religious Muslim marriages conducted in Ireland do not secure legal recognition nor the reasons why this may be happening. While it is possible that some members of the Muslim community in Ireland are purposely and jointly eschewing the formalities required for entry into a legally recognised marriage, it is equally possible that other ‘spouses’ may feel pressurised to enter such marriages in the hope legal recognition will be acquired thereafter. It also unclear to what extent there is even basic awareness of the precise formalities required to be met for a legally recognised marriage and the extent to which ‘spouses’ may unwittingly be party to an unrecognised Muslim marriage.

Unfortunately, a number of factors appear to militate against the ability to conduct such research in a meaningful and accurate manner. A key difficulty in conducting empirical research in Ireland is the very nature of the Muslim community in the jurisdiction. As has been reported – and as detailed in Chapter 4 – Muslim migration to Ireland has been ‘extremely diverse, without any particular ethnic or cultural group being predominant.’ Although most Muslims in Ireland are Sunni there are a number of different sects within this grouping, each sometimes with their own mosque. Geographically, the community also come from a very diverse range of regions. Despite originally coming from the Middle East and North Africa, more recent Muslim immigrants have originated in South and South-east Asia, sub-Saharan Africa and the Balkans. Moreover, although traditionally the Muslim community in Ireland composed ‘middle- and upper-class educated professionals—most of whom immigrated for educational reasons’, a ‘major transformation’ of the community has been observed with the arrival of labour migrants, refugees, and asylum seekers. On this point it has been observed:

‘This gap [between long established professionals and newly arriving refugees] is ... visible in various mosque communities where class distinctions based on social background and educational level are often maintained, with the communal mosque space providing the only forum for limited social interaction.’

83 This gap in empirical research leaves Ireland a long way behind jurisdictions such as England and Wales which have been conducting such research for approximately 20 years.


Cognisant of these divisions, Scharbrodt explained:

‘The term "Muslim community" is ... problematic. The actual diversity of Muslims in Ireland in terms of their ethnic, national, cultural, and linguistic backgrounds, their sectarian and ideological orientations, their different degrees of religious commitment, their educational levels, and their socioeconomic status would suggest the existence of various "Muslim communities."' 89

From a practical perspective, the diverse nature of the community poses a number of challenges for researchers keen to gain a better understanding of Muslim marriage practice in the Irish context. Research in various jurisdictions has highlighted that awareness of and compliance with statutory formalities is heavily influenced by community expectations. 90 Where the community is as fractured as appears to be the case in Ireland, Muslim marriage practice is likely to vary significantly micro-community to micro-community as differing norms, socio-legal and socio-economic considerations, as well as different normative religious influences, play an influential role. 91

However, it is arguable that the most appropriate answer to the ‘Where to next’ question may lie in this realisation of the nature of the Irish Muslim community and the role of community expectations. It is strongly arguable that much greater efforts need to be made to raise awareness within the Muslim communities themselves of the legal formalities for a legally recognised marriage and the benefits of securing such recognition. Conscious of the disadvantages of not marrying under civil law, 92 it has been observed that ‘the USA is witnessing increasing numbers of mosques and Muslim communities requiring imams to have proof of the civil marriage document of the couple before performing the nikah.’ 93 Reflecting this, on the basis of her research in North America, Macfarlane found:

89 Scharbrodt(2012) (n 84) 222. Consequently, he referenced the ‘Muslim population’ in Ireland. See also, Patsy McGarry, ‘What is it like to grow up Muslim in Ireland?’ Irish Times (Saturday, 28 January 2017) where Third Level Muslim student respondents also highlighted the diversity of the community.
91 In this context, painting an accurate picture of the various norms and expectations in relation to Muslim marriage practice existing within each micro-community would represent a major undertaking. It would also necessarily require the co-operation of and engagement with a large number of different Muslim communities in Ireland, a feat which has so far failed to be achieved. There is a sense that the Muslim community in Ireland is not merely diverse, but in some cases actually somewhat polarised, see Khan et al (n85) 113-138. See also McGarry (n 89) where Third Level Muslim student respondents highlighted the lack of unity within the community; see the comments of Shaykh Dr. Umar Al-Qadri on RTÉ television show The Meaning of Life (Season 13, Episode 5) (2016).
92 See below.
93 Sardah Ali (n 90) 119. It was noted ‘Such trends do not appear apparent in the UK.’
In 95% of cases ... both a nikah and a civil license were included in the marriage formalities (not necessarily at the same time). Most considered legal registration to be an obvious step, in order that they would be regarded as husband and wife in their jurisdiction. A significant number of imams will not afficiate at a nikah ceremony until the couple has already obtained a civil marriage license.  

On the other hand, highlighting that nikah-only marriages were more common in certain communities, Macfarlane noted this was attributed to ‘widespread alienation from and mistrust of the legal system’ while for others, it was considered more ‘passive’ than ‘reactive’ with ‘members of this community suggest that there is little advantage to registering a marriage, and that this is not generally a community expectation’. The perceived lack of understanding as to the importance and advantages of civil registration were also recently highlighted by Akhtar in England.

The need in an Irish context for increased efforts to raise awareness for the formalities required for legal entry into marriage, with an expectation of registration being set by the Muslim communities themselves, appears undeniable. As awareness of the formalities grow and community expectations around registration become embedded, the demand for more imams to register as solemnisers would likely rise – thus ensuring that more marriages would meet the statutory formalities laid down in the 2004 Act (as amended).

Admittedly, this solution is no silver bullet. Where such expectations are not encouraged by a particular micro-community, the vulnerability of parties (particularly women) to a nikah-only marriage will continue. Moreover, even where the expectations are set, although the market for unregistered marriages may fall, it is unlikely to disappear entirely. As a result, at least some imams will wish to remain unregistered to meet the needs of this particular cohort. However, even here, good practice can be encouraged. For example, where an unregistered imam is suspicious of coercion or any other situation where one spouse wishes to have legal recognition and the other does not, they could demand a civil marriage be undertaken before they celebrate the religious-only marriage. Equally, although there appears to be no positive legislative obligation placed on unregistered solemnisers to highlight to prospective spouses that the marriage will not be deemed legal, the adoption of such

94 Macfarlane, (n 90) 12 (emphasis added).
95 Macfarlane, ibid, 12-13 (emphasis added). See also Julie Macfarlane Islamic Divorce in North America (OUP, 2012) p44-45; 197-198.
96 Akhtar (n 10) 193-210.
97 See above.
98 Arguably, in light of religious and cultural context, the ability of those couples who jointly and knowingly wish to secure a religious marriage only to do so should continue.
practice would also aid in ensuring spouses are well informed of their status. Indeed, when considered in light of the rapidly growing nature of the Muslim community in Ireland and, especially, its young demographic, the need for such expectations and norms to be set would appear to be vital as we look to the future.

Conclusion

Despite the intense discussion on the topic in various common (and, increasingly, civil) law jurisdictions, issues regarding the status of Muslim marriages conducted within Ireland have attracted minimal attention. Notwithstanding the reasonably straightforward legislative framework applied in the jurisdiction under the Civil Registration Act 2004 (as amended), there appears to be a relatively small number of Muslim marriages registered over the past five years with the Central Statistics Office and a worrying lack of imams registered on the official Register of Solemnisers. The lack of easily accessible information and the abundance of misinformation in relation to the legal position of Muslim marriages in Ireland are major causes for concern. While in the absence of comprehensive empirical evidence on the issues, it appears likely that a potentially significant minority of Muslim marriages conducted in Ireland may not be securing legal status, it appears equally clear that the consequences for such Muslim ‘spouses’, particularly financially weaker ‘spouses’ whose marriages remain unrecognised, are severe. It is to be hoped that community awareness of the formalities is promoted and community expectations for the registration of marriages is encouraged.


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