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The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom

VISHAL VORA

Abstract

It is argued that the concept of non-marriage, referring to religious marriages that are neither valid or void, and incomplete in terms of adhering to the formalities of marriage—must be recognised in law. However, the application of this category, in recent years, especially to British Muslim nikah-only marriages seems "inappropriate", especially when the factual matrix is taken into account. This article will analyse the current usage of non-marriage declarations by the English court and make the case for reverting back to the position taken by Justice Bodey in the case of Hudson v Leigh (Status of non-marriage) [2009] EWHC 1306 (Fam), which has more recently been the position taken in Akhter v Khan [2018] EWFC 54. Empirical research continues to demonstrate that for British Muslims, the traditional form of religious marriage remains vital not only for the partners themselves, but for their families and extended community network. For any proposed changes to marriage laws to be effective, the issue of what is meaningful to all those involved must be taken into account. This article suggests that, in the interim, a simple mechanism in the form of cohabitation rights recognition could put an end to the injustices and indeed the advantageous status that non-marriage affords one party during martial breakdown.

Keywords: *Muslim marriage; nikah; Marriage Act; religious marriage; non-marriage; void marriage*

Introduction

Akhter v Khan[1] was appealed in Feb 2020, The 2018 case of Akhter v Khan [see note 63 relating to the appeal judgment citation] was the latest case in a steadily increasing body of case law concerning the issue of an unregistered Muslim marriage that was conducted in England. In such cases, one party,—usually the "wife"—must defend her position as a married woman following the breakdown of her marriage. By defend, we mean that this party has to prove to a court that she was in fact married and this was a legally recognised

Vishal Vora is a research fellow at the Department of Law and Anthropology, Max Planck Institute for Social Anthropology in Halle (Saale), Germany. He completed his PhD in Law at the School of Oriental and African Studies, University of London. His research focuses on Islamic and Hindu marriage and divorce practices in Britain, examining the relationship between religion and state, and community identity and multiculturalism. He often provides expert witness reports for the courts in family law cases.

form of marriage, in order to obtain the protections of marriage, at the point of marital breakdown. The corresponding party, usually the "husband", in such cases maintains they were never actually "married", at least in the eyes of English law. This is despite their having undergone a public marriage ceremony, to which they have consented, which is conducted by an official person and witnesses by others; and which means that they are accepted as being married by their friends and family. Usually, in such cases the parties would have lived as husband and wife in a monogamous relationship for a significant period of time and had children together. It seems an odd position to take, as certainty of marriage has been clear since the introduction of Lord Hardwicke's Act in 1753.[2] It [Lord Hardwicke's Act] was intended to present clandestine and irregular marriages. The regulatory system of recognition of marriage exists and there will be some ceremonies that wherever and however performed, cannot simply be recognised. Doing so would effectively deregulate marriage and undermind the need for certainty in the interests of the parties and also in the public interest. Intention alone cannot convert a non-qualifying marriage into one which is within scope of the 1949 Act. Why then are some members of the British Muslim communities questioning their status of marriage at the point of divorce? Is the answer so simple that it has been overlooked?

How to get Married in England and Wales

Opposite sex marriage is governed by the Marriage Act 1949, which sets out the formalities required to effect a marriage according to the rites of the Church of England and also the formalities required to effect a marriage otherwise. Getting married in England and Wales is not difficult; the formalities of marriage are clear and straightforward, and the rules relating to marriage are published on all local authorities' websites. Furthermore, getting married via a civil ceremony is cheap—less than £100. But this type of ceremony is administrative in nature, conducted by a statutory officer of registration responsible for recording births, marriages and deaths. Such a civil marriage can for many British Muslims, not feel like a real marriage, as it is entirely non-religious. A celebration of marriage offers British Muslims the opportunity to remember, reaffirm and recommit to traditions and beliefs from their inherited culture.[3] Marriage for Muslims is aspirational and ultimately mandatory, in order to have intimate relations and raise children. Celebrating marriage through a traditional ceremony is real, and it communicates status throughout the couple's community relations. Ultimately, this form of marriage will always be of greater value versus signing a piece of paper in a civil registry office.[4]

Taking the wishes of couples into account, such a civil celebration is not the only route to marriage, couples can also have a choice of the form that their marriage ceremony might take; they can opt either for a more flamboyant civil ceremony, or religious marriage ceremony, and celebrate them at a variety of venues.

There are two other routes into marriage. The first is *via* a religious Anglican ceremony and the required preliminaries, of which there are three: either the calling of banns[5] on three successive Sundays, obtaining a common licence or obtaining a special licence. The second route into marriage is via a civil ceremony. Civil marriages can be held on approved premises,[6] preceded by the civil formality of giving notice. Couples can also opt for combination of the two—compliance with civil preliminaries followed by a religious marriage. This category applies to Jews and Quakers predominately but also to the Church of England. Other religious groups are able to marry their members via this method by holding their ceremonies in their place of religious worship, which is also registered for the solemnisation of marriages.

As such, we see that there are several routes into legal marriage in England and Wales with different options based upon whether a religious or civil ceremony is chosen and furthermore, different religions are treated differently. However, there is an underlining theme to the differing options, that is some formality in the form of giving notice. The bottom line is that for a marriage to be legally enforceable, it is necessary for it be celebrated within a prescribed building and that an authorised person conducts the marriage ceremony; nevertheless, Jewish and Quaker marriages are not privy to this restriction of place and can be conducted anywhere, since they have been exempted from the Clandestine Marriages Act 1753.

The Law of Marriage (Marriage Act 1949)

The 1949 Act is the result of a series of consolidating amendments of the Acts which have preceded it.[7] It has therefore been constructed on a piecemeal basis but is still said to carry the legacy of the eighteenth century in the sense that it has not reformed to take into account changes in modern society.[8] The current marriage law is contained with the 1949 Act and focuses on the place of marriage and the person who conducts it. The bulk and structure of this Act is based largely on Christian marital practices, although it has recognised other religions. In particular Part II of the 1949 Act deals with current rules on marriage according to the Church of England and Part III deals with alternative ways of getting married, authorised by superintendent registrar's certificates. In particular, the Act stipulates that the marriage needs to take place in the presence of a registrar or authorised person[9] (if the marriage is being solemnised in a registered building). Additionally, there needs to be two witnesses to the marriage and so far as possible the ceremony should be open to the public.[10]

Under all routes to marriage, there are two core requirements in the marriage formalities according to this Act. They are: (i) a particular prescribed place of marriage—be it a place of worship or approved building, and (ii) the presence of an authorised person or registrar. A valid legal marriage for British Muslims cannot take place without these two essential elements.

Failure to Meet the Formalities of Marriage

How does the law treat marriages that have failed to meet the required formalities, either regarding the preliminaries to marriage or the marriage ceremony itself, or both? The 1949 Act does not contain any guidance as to when such a marriage lacking in formalities should be considered valid and when it should be considered void. A marriage will be considered void if the parties "knowingly and wilfully"[11] fail to comply with the formalities; however, in the case of innocent failure, it is up to the courts to judge how far a ceremony was from the intended and prescribed form. The lack of status given to "incomplete" marriages, for a lack of compliance with the formalities, can differ greatly. The case law does not provide a uniform answer nor certainty.

Void Marriages and Non-marriages—What is the (Simple) Distinction?

When the question of validity of marriage, arises, as described in the case cited at the beginning of this article,[12] there are generally two options for the court to take. In the first option, if the marriage is considered void, it is deemed invalid in law, yet financial remedy claims can still be made.[13] Such remedies include all the usual orders available

to divorcing couples that have a valid marriage, for example, annual payments, including lump sums, property and pension sharing.

In the second option, the courts have to make a declaration of non-marriage, short for non-existent marriage. This is a court-developed concept; there is no mention of such a status in statute. A non-marriage gives the court the power to exercise its discretion and declare a particular ceremony of marriage as so far removed from the normal meaning of marriage that is simply does not exist. Although it has been argued that a marriage that is not void can only be deemed valid, the concept of non-marriage—one that sits below the status of being void, it has absolutely no standing whatsoever—has become widely accepted. In law there will be situations in which non-marriages do exist as a concept in contrast to void ones, for example, those marriages performed on stage, television or film, or between children pretending to marry.

Joseph Jackson makes reference to non-existent marriages in contrast to voidable or void marriages: "private and secret declaration of consent does not create any kind of marriage, even a void one"[14] Therefore should a marriage fail to be recognised by the law and deemed a non-marriage, the parties are excluded from making any applications for financial remedies, unlike a couple to a void marriage. The concept of non-marriage has been criticised for not having been approved by the Supreme Court, placing doubt on its existence.[15] Only a very thin line divides such marriages from being determined as either void or as community-based non-marriage events.

The British Muslim's Marriage Conundrum

In the past decade, there have been six reported court cases of unregistered Muslim marriages involving British Muslims.[16] This is alarming as much as it is interesting. What is causing such fundamental questions concerning the legal validity of Muslim marriage? While the current legal provisions concerning marriage are somewhat confusing, in the sense that they offer a variety of routes to getting married, clear and concise information is widely available. Furthermore, this issue does not seem to affect other religious communities in Britain, even those that are relatively similar in profile and age—the British Hindus[17] or British Sikhs, for example.

This conundrum is further puzzling as unregistered Muslim marriages began to surface as a prominent legal issue in the mid-1980s. The prevalence of unregistered marriages has been cited as a primary reason for setting up *shariah* councils in the UK.[18] However, owing to the migration history of this broad community, the first Muslim arrivals in the UK largely ensured the rules of marriage registration were in full compliance, to obtain the visas and satisfy border control.[19] With a maturing and, by now, predominantly British-born Muslim population, marriages are increasingly taking place internally (with partners from Britain) and therefore the need to comply with border control is less.

The recent survey commissioned by True Vision Aire on the issue of unregistered Muslim marriages in Britain, was featured in a prominent Channel Four documentary on the topic in 2017.[20] In the documentary 901 married Muslim women were asked a variety of questions relating to their marriages. They were asked where their marriage ceremony took place and, who conducted it. It also sought to capture their views on the legality of the traditional Muslim marriage, the *nikah*, in English law. The findings of the survey make for interesting reading because it is the first time such results have been collated from a relatively large sample. Muslim female researchers undertook the data collection. Respondents were solicited at events and venues across UK cities where the

Muslims population is above 20%. All responses were anonymous. The cities included: Birmingham, Bradford, Bristol, Cambridge, Cardiff, Glasgow, Gloucester, Leicester, London, Manchester, Newcastle, Oxford, Preston, Stockport, Stoke on Trent. The survey was not perfect in its method: one major drawback of this approach is that surveys with closed-ended questions may have a lower validity rate than other question types and selection bias is another potential concern. The survey used a snowballing technique: a method that yields a sample based on referrals made by people who share or know others who present research interest, in this case, other married people from within the community who have encountered relevant issues. Most snowball samples will be biased and do not allow claims to be made at a generality, instead, they tend to be biased towards the inclusion of individuals with similar experiences, thus there may be some over-emphasis in the results.

Some of the survey's findings were as follows: 60% (of the 901 respondents) did not have a civil marriage, meaning they were not legally married and instead had only conducted a *nikah* marriage. Within this group, a minority (28%) were unaware of their lack of status. As Prakash Shah writes, "Of the total 901 women surveyed, something like 152 had not registered their marriages while being unaware that their *nikah* was not valid under the official English law."[21] This amounts to around 17% of all respondents not being aware of their lack of status. Instead, a majority of respondents only having a *nikah* marriage, 66% were actively aware of their lack of status. A conscious decision had been taken to disengage with the law for the purpose of marriage. These citizens were exercising free choice.

It would have been useful to examine to what extent this choice was based on informed consent, that is, an equal understanding between the parties as to what exactly not having a legal marriage means/meant for them. As noted at the beginning of this article, the implications of having religious-only marriages can often have uneven implications for both parties and can impact detrimentally on the weaker one, which is often the wife. What can the weaker parties, usually the wives, do upon discovering their marriage is not legal? I had several such case studies in my doctoral research and it was reported to me that it was impossible to compel the husband to go through a legal marriage. Women in such "marriages" are truly trapped in situations where the "husbands" are able to enjoy the benefits of married life without any of the financial burdens associated with its breakdown. This is most dangerous for women who do not hold assets, such as their house, car, and business in their own name. They are vulnerable and this vulnerability is used. They are not able to get recourse or remedy from the courts and so are left with no choice but to seek some kind of remedy from the *shariah* councils, who at the very least are able to provide them with a religious divorce and in some cases, limited financial remedy.

With that said however, inflated figures of unregistered Muslim marriages have been used in recent years to push for legal change. The most recent attempt come from the Register Our Marriage campaign[22] which cites a figure as high as 80% of all Muslim marriages in the U.K may be unregistered.[23] However, this claim is not corroborated by the recent Channel Four survey results.[24] Given the reported cases over the past decade, in contemporary Britain there does exist an issue with a small number of British Muslims getting married outside the parameters of the law. We must ask the question of why some British citizens are not taking advantage of the current registration process, even though it is relatively simple and affordable. Marriage for British South Asians in general, is an aspiration: it is an important milestone and one that is important not just for the couple but also for the two families. Especially when other British South Asian groups, the Hindus in particular, are able to follow the rules regarding marriages and utilise the differing options available to

them, notably by registering their places of worship for marriages as well as their other buildings under the approved building scheme. Other comparable communities in Britain have adapted their marital practices and non-compliance with the Marriage Act 1949 has not been a reported issue. Thus, while non-marriage does appear as an issue for other religious communities in Britain, it has been particularly pertinent for Muslims.

Possible Reasons for the Muslim Marriage Conundrum

Turning to the observation made above, some British Muslims are not engaging with the marriage law. What could be the cause for this? Any reasonable answer will be highly complex, and no doubt there will be multiple explanations. However, based on my own findings from my doctoral research earlier,[25] there are two likely explanations for this. One is that young couples who cannot otherwise date or have relationships within the parameters of their social norms and religious beliefs, may wish to have "trial" marriages as religious-only contracts akin to "starter marriages". The other is that fewer marriages involve migration, with British Muslims marrying other UK citizens of the same religion, meaning that some of the legal necessities encouraging registration have dissipated.

But there is another simple motive for unregistered Muslim marriages, especially for those marriages that fall into the category of being conducted without the full informed consent of the parties concerned. These cases appear to show that such a conscious choice is made by the husband to prevent the wife from claiming marital assets in the event of relationship breakdown. In such cases, British Muslim men opt to live as cohabitees (but with an Islamically valid blessing to comply with religious obligations and avoid the sinful status of *haram*) so that they can safeguard their financial interests and prevent a fair division of assets in the event of relationship breakdown. It is a religious convenience offered to them under classical Islamic principles but incompatible with the general principles of equality.

Whilst such cases are relatively small in number, they nevertheless result in the court having to deal with a complex situation, as the law states that a marriage will only be void, for a failure to undertake the relevant formalities (of marriage) where the parties "knowingly and wilfully" did so.[26] If the couple did not comply with the formalities, then it cannot be presumed they were completed. And as the case law below will further demonstrate, such incomplete Muslim marriages (in the sense of a lack of compliance with formalities) are more likely to be considered non-marriages versus void marriages by courts. Although the concept of non-marriage has been questioned, under the current law such a situation makes safeguarding those in such marriages exceedingly difficult. Where does the balance lie in upholding non-compliant marriage that is entered into in good faith versus declaring such relationships as non-existent? Can case law provide an answer or is something else required for a workable solution?

Case Law: Void and Non-marriage

In the case of Hudson v Leigh of 2009,[27] the concept of non-existent marriage presented Justice Bodey with the opportunity to provide judicial guidance on how and where to draw the dividing line between a void marriage and a non-marriage. This case concerned a cohabiting couple with one child. The wife was a devout Christian and the husband identified himself as an atheist Jew. Approximately two years following the birth of their child, they decided to get married. The wife wished to have a religious marriage

but the husband wanted a civil one. It was therefore decided after much discussion for the couple to be married through a religious ceremony in South Africa where the wife had mainly lived for a period of the relationship, which would then be followed by a civil marriage in England.

A Christian minister celebrated the South African wedding. During the religious ceremony the Minister, as instructed by the couple, omitted the legal formalities from his service: there was no signing of the marriage register and he did not complete the appropriate registration that would be normally required to effect a legal marriage.[28] However there was an exchange of rings followed by the words, "I give you this ring as a sign of our marriage".[29] On the morning of the religious marriage ceremony the parties signed a prenuptial agreement stipulating the intention of the marriage to effectively have two distinct parts: the South African religious ceremony, followed by the London civil marriage approximately six weeks later. Before the date for the civil marriage in London was fixed, however, the relationship broke down. The matter proceeded to court to ascertain the legal effect of the South African religious ceremony and whether or not the wife was entitled to claim financial relief (handling money and property when a relationship ends) from her husband, *via* either a valid or void marriage or alternatively by a decree of nullity.

Justice Bodey was persuaded by the positive intention of all three key participants—the wife, the husband and the minister—in not wishing to effect a legal marriage.[30] The formal validity of the marriage was governed by South African law and it was held that if the ceremony was to have effected a marriage at all, it would result in a void marriage. This was due in part for failing to comply with all the formalities. The husband's expert called this "compound non-compliance".[31] It was held that the South African marriage ceremony did not create the status of marriage between the parties and following this there was no application for financial relief arising from this non-marriage.

In reaching this decision, Justice Bodey offered some limited guidance to the matter of such non-marriage but refused an outright test, as he remained unconvinced there could be a single formulation. His four factors of guidance were to ask the following:

(a) Whether the ceremony or the event set out or purported to be a lawful marriage;
(b) Whether it bore all or enough of the hallmarks of marriage;
(c) Whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and
(d) The reasonable perceptions, understandings and beliefs of those in attendance.[32]

Justice Bodey was careful to set down a broad disclaimer along with these four factors. He acknowledged the limitations of his judgment: it was case specific, and he said "the factors listed should be taken account of but not exhaustively."[33] In other words, the issues in the case should be taken into account on a case-by-case basis, merely a framework to begin evaluation of the specific circumstances of a case. The four factors can only be considered as judicial guidance and not broad guidance, clarifying the law on non-marriage.

The four factors in determining whether a marriage ceremony gives the status of marriage to the parties reveal pressure points relating to the ceremony and the actions of the parties. Nonetheless judging whether the marriage can be deemed to have complied with enough or all of the requirements of marriage as set down by English law can be problematic. The legislation does not expressly state the consequences of failing to comply with

requirements of marriage, it very much depends on the subjective state of mind of the parties. This has led to considerable uncertainty in this area, it is difficult to delineate the boundary between non-marriage and valid marriages. [34] Hence the four determining factors are as follows:

> *Factor (a):* whether the ceremony or event was purported or intended to be a lawful marriage. What is considered to be a lawful ceremony of marriage greatly depends on the type of ceremony in question; as demonstrated previously, a Christian ceremony seems to be better placed to meet this criterion versus a non-Christian one, because it will be more likely to be purported as a lawful marriage.
> *Factor (b):* whether it bore all or enough of the hallmarks of marriage. A warning was given against the over reliance on the 'hallmarks of marriage' as in many cases it is not a satisfactory test,[35] because the true intention and belief of the parties will be difficult to ascertain and perhaps also unreliable to trust. This factor may be understood as allowing for non-Christian ceremonies of marriage to escape the status of non-marriage and seems to remove the benchmark for a valid marriage to be exclusively a Christian one.
> *Factor (c):* whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage. The intentions alone of the parties cannot convert a marriage, which is wholly non-compliant with the 1949 Act into a valid or void marriage.
> *Factor (d):* the reasonable perceptions, understandings and beliefs of those in attendance. The understanding of those attending a wedding were considered to be a relevant consideration however also like factor (c) not decisive in converting a marriage from being non-compliant to compliant with the 1949 Act.

Examining Justice Bodey's four factors can be said to have been the first step in providing some form of judicial guidance regarding the law of non-marriage. Through the application of these four factors, it was remarked they should better protect minority ethnic groups who engage in a religious-only form of marriage, and who do not realise that additional steps are required for them to have the full protection as a married person.[36]

Efficacy of Hudson v Leigh Guidance for non-Christian Marriages

In the case of Dukali v Lamrani of 2012,[37] a Moroccan couple, both of whom were Muslim, entered into what they both believed to be a civil ceremony of marriage at the Moroccan Consulate in London. A notary conducted their marriage, as they specifically wanted a legal marriage and not a religious one. Following this marriage ceremony, a property—the matrimonial home—was purchased and conveyed in the husband's sole name. The couple had a child shortly after marriage. The relationship broke down about seven years later and the wife petitioned for divorce. This prompted the husband to issue a parallel petition for divorce in Morocco. The Moroccan divorce made a very modest financial provision for the wife. The wife argued that she had a right to apply for financial relief following an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984 (the 1984 Act). The husband opposed her application for two reasons: firstly, because there was no marriage capable of recognition in England and Wales, and secondly, because he said that the Moroccan divorce should not be recognised in this jurisdiction. Justice Holman gave judgment and had to

decide if the wife could establish there had been a marriage within the wording of section 12(1)(a) of the 1984 Act, and if so, whether the Moroccan divorce was recognisable in England and Wales as required by s12(1)(b).

Justice Holman found that the marriage was not valid due to the wholesale failure to comply with the formal requirements of English law.[38] The marriage was not void due to it not being a marriage under the 1949 Act, and therefore it was declared to be a non-marriage. Furthermore, the judge was not persuaded to apply a presumption of marriage, since he was not shown any authority where the presumption had been applied after the parties lived together as man and wife for a period anywhere near or as short as seven or eight years.[39] The judge was unwilling to suggest for how long parties need to have cohabited before such a presumption may apply, but he considered that a longer period than seven or eight years, the length of the couple's relationship, was needed. Accordingly, the wife was refused leave to apply for any financial orders under Part III of the 1984 Act because the marriage, being a non-marriage, did not meet the meaning of that word where it appears in section 12(1)(a) of the 1984 Act. Despite the lived reality demonstrated by this couple, the marriage was deemed to be a non-marriage. The court was not able to grant any financial remedy to the wife, the parties were treated as if they were strangers.

Role of Intention when Evaluating Validity of Marriage

Despite the judicial guidance given in the case of Hudson v Leigh, the Dukali v Lamrani case resulted in a non-marriage. Although the Bodey factors (as described above in the case of Hudson v Leigh) were non-exhaustive, they were interpreted to mean that they all held equal or similar weight when determining the existence of a marriage, without focus on the external appearance of a ceremony. In Dukali v Lamrani[40] case intention was very strongly held equally between both parties and the staff of the Consulate where the marriage took place.[41] In determining the existence of a marriage, therefore, the case raised the issue of whether the law should focus on the *external appearance* of the marriage or instead focus on the *intention* of the parties.[42]

The court however held that since the mother did not take any steps to ascertain the formal requirements of marriage, it could not be accepted that her belief or intent was that the ceremony would be valid. The judge held that he had no doubt that intention was relevant to the status achieved or not achieved by a questionable ceremony of marriage; however, it was "one of the many considerations which need to be taken into account."[43] He went on to say that intention is "particularly relevant in unusual circumstances where the parties did not intend to create a valid marriage, or where they realised for some reason they would not be able to do so".[44] In giving further support for the hierarchy model, it was the judge's opinion that the converse does not apply:

> … Where no or minimal steps are taken to comply with the Marriage Acts, hope and intention of the parties does not create a valid marriage and so the marriage does not set out or purport to be a marriage under those Acts, that it nevertheless suffices if the participants hopefully intended, or believed, that the ceremony would create one.[45]

Furthermore, in Dukali v Lamrani,[46] confirming the parties' intentions and beliefs regarding the validity of their marriage was the fact that the ceremony took place in an official building, the Moroccan Consulate in London. The wife said in her statement dated 23 December 2011:

> … The venue for the marriage was always agreed by me, [the husband] and both our parents and was intended to be a proper civil marriage in the fullest sense. I would not have agreed to the marriage if it had been a religious only marriage … I can confirm that as far as either of our families were aware as was I and [the husband] that the marriage was a valid civil ceremony … [47]

The ceremony itself was a very public affair. Further, it was also the intention of the husband to create a legal marriage, and his view only changed upon receiving legal advice calling into doubt the legal nature of his marriage.

Despite Dukali v Lamrani meeting a somewhat higher threshold in terms of the external Hudson v Leigh factors, still little if indeed any weight was given to the intentions of the parties. A presumption of marriage did not apply in the case of Dukali v Lamrani[48]; however, the judge did not set down an actual figure in terms of number of years of cohabitation required. Justice Holman said: "Whilst I firmly eschew any attempt to suggest how long parties must have lived together as man and wife before the presumption may arise, I consider that a longer period than seven or eight years must be required."[49] In a contemporary context, what purpose does length of cohabitation play, when it comes to applying a presumption of marriage to religious marriages? The couple would obtain the repute of marriage upon completion of their religious ceremony by passing the need for a particular period of having been married. The presumption of marriage doctrine poses many difficulties, and it is not surprising that to date such a threshold as to length of marriage has not been established through case law, as doing so may lead to insufficient flexibility in its application.

In order for it to efficiently operate in a modern context, a marriage should also be capable of being presumed based on a logical duration. For example, the present median duration of marriage ending in divorce using the latest statistics available is 11.5 years.[50] In divorce cases, a commensurate length of marriage should be acceptable, in any case the significance of cohabitation should be used versus the length. Although the role of cohabitation as a marker of marriage has been questioned for religious communities such as British Muslims, since non-married cohabitation is prohibited by religious law (considered sinful- *haram*), in cases such as these it does a have a role to play. Dukali[51] seemed particularly unfairly decided on the facts, and the presumption of marriage argument failed.

As the Tide Turns? Two examples from Case Law

In the case of MA v JA of 2012,[52] an Islamic ceremony of marriage that took place in a mosque was found to be capable of creating a marriage under English law as judged by Justice Moylan (as he was then). The British parties were married in a religious building that was registered for the solemnisation of marriages under section 41 of the 1949 Act; it was conducted by an imam, rather than an authorised person under the section 43 of the 1949 Act; however, an authorised person was present during the ceremony. Justice Moylan found the ceremony to be one that was clearly a ceremony of marriage and the parties agreed to take each other as husband and wife.[53]

Following the ceremony, the husband asked the *imam* whether anything further was required of him and he was assured that they were married and nothing further needing doing. A contract of marriage was handed to them after which the parties lived together as a married couple. They have three children, and the marriage at the time of the court hearing was subsisting. The husband sought a declaration under section 55(a)

of the Family Law Act 1986 (the 1986 Act) that his marriage was a valid marriage at its inception. Justice Moylan accepted that the husband and wife both intended the ceremony to create a valid marriage under English law, even though the *imam* thought he was "only" conducting a religious ceremony.[54] Accordingly he found that the ceremony was sufficient to constitute a valid marriage under English law even though the parties had failed in the required preliminary formalities; i.e. giving notice to the superintendent registrar and lack of a certificate. In this case there was found to be indirect compliance with the 1949 Act in the fact that it took place on registered premises, in front of two witnesses and in front of an authorised person. Given this statutory compliance, oblique in places, the role of intention seemed to be given weight.

The more recent case of Akhter v Khan (2018)[55] concerned an 18 year-long marriage that was declared void by the English high court. Mr Akhter and Mrs Khan got married by *nikah* in 1998 and had four children together. However, both parties understood that their legal status as husband and wife was lacking, as they had never completed the civil registration of marriage. The civil registration was discussed several times. Mrs Khan, a solicitor herself, understood her situation and wanted to formalise her status, but owing to Mr Akhter's refusal, this never materialised. The family lived in the UAE for six years, and during this time they referred to themselves as husband and wife. Indeed, they were considered as legally married in the UAE. The marriage then broke down, and Mrs Akhter petitioned for divorce in the English courts. Then, the husband defended the petition on the basis that they were never legally married under English law. Mrs Khan's case was that her "marriage" should be presumed given the long cohabitation and reputation (UAE in particular) and thus should validate her status. In the alternative she argued that the marriage should be considered a void marriage and allow her a decree of nullity, thereby granting her access to the full range of financial remedies (such as the sale or transfer of property, lump sum order, maintenance order or pension sharing order) open to validly married couples. At all costs, she wanted to avoid the chasm of non-marriage.

Justice Williams adopted a flexible approach and made it clear from the very beginning that a non-marriage finding would be inappropriate, but made it clear the case was not recognising *nikah* marriage as valid under English law.[56] Instead he very much based his judgment on the factual matrix, taking a flexible approach to what could be considered within the remit of section 11 of the Matrimonial Causes Act 1973.

In MA v JA,[57] Justice Moylan carefully unpicked the facts, and the intention of the parties was given considerable weight, following direct and indirect compliance with the 1949 Act. The parties in this case thus avoided "manifold" non-compliance, as was seen in Dukali v Lamrani.[58] The Marriage Act 1949 does not contain any guidance as to when a marriage lacking in formalities will be valid and when it will be void, and in fact when it will be a non-marriage; this is for a judge to decide. But the external appearance of a ceremony is guiding; the current law continues to place emphasis on the external appearance of marriage.[59]

If the current law of marriage remains strictly limited in what it is able to accept as a valid marriage, does the current law meet the public interest in marriages being subject to certain formal requirements? In light of changes in society, namely the diversification of the British population, increased cohabitation, and decreasing marriage rates, is there compelling need for a change in the interpretation of what constitutes marriage?

Justice Moylan recently argued that:

> In my view this reflects the public interest, and I would add the interests of the parties to the marriage, that the rights and obligations consequent on marriage

> are provided to and imposed on all those who go through a ceremony of marriage which has taken place in this jurisdiction.[60]

This article began with the suggestion that it is not difficult to marry in England and Wales. However, it is clear to see the laws governing marriage have not been updated significantly in the past seventy years, and certainly do not reflect the diversity of contemporary Britain. The current law is unduly complex and out-dated. It places emphasis on the outward appearance of a marriage ceremony in order for a marriage to be held valid, should it fail to comply with the formalities. Although there has been some guidance in the form of case law, this has not assisted British Muslims who may fall foul of the marriage rules. On the basis of the factors provided for the Hudson case, their ceremonies of marriage seem very unlikely to escape non-marriage. However, a question needs to be kept in the foreground: should the law really be changed for one minority religious group, when all other such groups are able to follow the law, despite its complexity? The answer is probably no. Nevertheless, the law would most certainly benefit from an update, possibly incorporating other kinds of marriage, such as same-sex marriage. A move away from the historical roots in the canon law of the Church[61] and a re-evaluation of the buildings-based nature of defining marriage will benefit all of society, and not just one specific group.

Although there are two recent decisions showing a progressive approach to incomplete (as to formalities) marriages, in which the harsh consequences of a non-marriage declaration were avoided, they are niche in their particular facts and are unlikely to be applied to more general cases. Furthermore, the case of Akhter v Khan was overturned at appeal earlier this year.[62] The law of the land must apply, there was no ceremony that created a marriage, even a void one. The court noted the unfortunate expression that was coined "non-marriage". The focus should be on the ceremony and proposed "non-qualifying ceremony" to demonstrate those ceremonies that fall outside the statutory law.[63]

What Could be an Interim (or Ultimate) Solution(s)?

There is no one solution, but what is needed is something that deters unregistered marriages from taking place, at least in their current form where they may be taken out without the informed consent of both parties. This is where the problem really lies, in the gap between understanding what a *nikah*-only marriage means versus the protection that a civil registration of marriage brings. Furthermore, any solution needs to offer a meaningful type of marriage ceremony and protections need to be automatic, with the burden being on the respondent party to prove otherwise.

In order to prevent unregistered Muslim marriages, I have previously proposed a solution, the fortification and classification of cohabitation law, in the form of a tier model.[64] A three-tier cohabitation classification approach incorporates the factual matrix of each individual case. Such an approach would be spilt as follows:

i ***Cohabitation*** would be defined by a short length relationship, a period less than two years, with few shared assets (if any), and no children;
ii ***De facto*** would entail those relationships subsisting for a period of at least two years, where the couple may have shared assets and have children and, on breakdown, similar factors as those for divorcing couples will apply when assessing the relevant financial orders applicable.
iii ***Spousal*** would be reserved for those who consider themselves as married because they have undergone a religiously valid ceremony of marriage

without completing the civil preliminaries. Under these circumstances, no duration requirement would be applicable.

The reasoning for these tiers is transparent: they take into account the decision of the parties in (i) and (ii) who have chosen not to marry. In terms of providing financial benefit in particular to those who fall under tier (ii), the model does not seek to treat them as if they actually had married, but seeks to relieve the unequal impact of the relationship based on the presence of children. Likewise, for those falling under tier (iii), there exists no prescribed duration of relationship, as the couple have chosen to get married by virtue of their religiously valid marriage ceremony.

But there are issues with this approach, as there are fundamental differences between cohabitees and those who have undergone a ceremony of marriage, *albeit* a non-legal one. Marriage as a defined entry point, tends to begin with a ceremony, usually public, and results in an exclusive and monogamous relationship. On the other hand, the same cannot be said for cohabitation. However, such an approach provides a platform on which to build a better solution and would serve as an interim solution, until wholesale marriage law reform is debated and enacted.

Conclusion

This research based on case studies establishes that a solution to the Muslim marriage conundrum is ultimately the reform of the current Marriage Act and the introduction of a celebrant-based system of marriage registration. Instead of relying on the parties getting married in a particular place, the responsibility of complying with the formalities of marriage should be placed on a professional person: the marriage celebrant. This person would be responsible for complying with the formalities of marriage, thereby providing the couple a professional and efficient service. Couples would be at liberty to get married wherever they wanted, including private homes. The institution of marriage would be protected, because a professional person would be responsible, in law, ensuring that the rules are abided by. But more importantly, couples would be engaging in a form of marriage that really meant something to them. The current political climate in Britain means that such reforms are not a priority, though the Law Commission is currently investigating law reform of weddings that will allow couples greater choice and a simpler statutory framework.[65] A detailed review including final report will be published in 2021.

The Channel Four survey mentioned above found that 86% of all respondents wanted their marriages to be legally recognised. This shows that, as British citizens, these Muslim women want their marital rights to be protected in law. It also demonstrates that the traditional *nikah* marriage for this group remains paramount, and there is no point in trying to shift this. Instead, what is needed is a mechanism that allows all British citizens to marry in the way that is meaningful to them.

NOTES

1. *Akhter v Khan* (2018) 54 EWFC. https://www.familylawpartners.co.uk/blog/recent-family-law-case-finds-islamic-marriage-falls-within-matrimonial-causes-act/ (accessed January 2020).
2. See, https://www.britannica.com/topic/Lord-Hardwickes-Act (accessed February 2020).
3. Julie Macfarlane, *Islamic Divorce in North America: A Shari'a Path in a Secular Society*, Oxford University Press, 2012, p. 498.

4. Vishal Vora, "English Marriage Law Discriminates against Minorities – Celebrants Could Change That", *The Conversation*, http://theconversation.com/english-marriage-law-discriminates-against-minorities-celebrants-could-change-that-73943 (accessed 15 April 2018).
5. The "banns" of marriage, commonly known simply as the "banns" (from a Middle English word meaning "proclamation") are the public announcement in a Christian parish church or in the town council of an impending marriage between two specified persons. See, https://www.google.com/search?q=calling±banns±of±marriage&rlz=1C1CHBF_enUS752US752&oq=calling±of±banns&aqs=chrome.1.69i57j0l2.7786j0j7&sourceid=chrome&ie=UTF-8 (accessed February 2020).
6. Venues such as hotels, restaurants and stately homes, but to name a few are the sorts of places eligible to be licensed for civil ceremonies
7. The Law of Marriage Act, 1949, http://www.legislation.gov.uk/ukpga/1949/76/pdfs/ukpga_19490076_en.pdf (accessed February 2020).
8. Rebecca Probert, "When Are We Married? Void, Non-Existent and Presumed Marriages", *Legal Studies*, Vol. 22, 2002, pp. 398–419.
9. *Marriage Act 1949 s Section 43.*
10. *Ibid.*, Section 44(2).
11. *Ibid.*, Section 49.
12. *Akhter v Khan*, (n 1).
13. Upon obtaining a decree under section 11 of the Matrimonial Causes Act 1973, both parties have a resulting right to apply for financial orders under sections 23 and 24 of the same Act.
14. Joseph Jackson, *The Formation and Annulment of Marriage*, 2nd ed., Butterworths, 1969, p. 86.
15. Valentine Le Grice, "A Critique of Non-Marriage", *Family Law*, Vol. 43, 2013, p. 1278.
16. *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam); *Sharbatly v Shagroon* [2012] EWCA Civ 1507; *Dukali v Lamrani (Attorney General Intervening)* [2012] EWHC 1748 (Fam); *Al-Saedy v Musawi (Presumption of Marriage)* [2010] EWCA 3293 (Fam); *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam); *Akhter v Khan* (n 1).
17. *Gandhi v Patel* [2002] 1 FLR 603; the Hindu marriage in this case was deemed a non-marriage however this case can be distinguished as it was an inheritance matter.
18. "The Muslim Law (Shariah) Council UK" (*About the Muslim Law (Shariah) Council UK*), http://www.shariahcouncil.org/?page_id=23.
19. Roger Ballard, "Inside and Outside: Contrasting Perspectives on the Dynamics of Kinship and Marriage in Contemporary South Asian Transnational Networks", in *The Family in Question Immigrant and Ethnic Minorities in Multicultural Europe*, ed. Ralph Grillo, Amsterdam University Press, 2008.
20. "The Truth About Muslim Marriage" (2017), https://truevisiontv.com/films/details/295/the-truth-about-muslim-marriage (accessed 14 June 2019).
21. Prakash Shah, "Does Channel 4"s Documentary Provide the Truth about Muslim Marriage?" *Areo*, 7 December 2017, <https://areomagazine.com/2017/12/07/does-channel-4s-documentary-provide-the-truth-about-muslim-marriage/ (accessed 6 March 2018).
22. "Home | Register Our Marriage" (*Home | Register Our Marriage*), https://www.registerourmarriage.org (accessed 14 June 2019).
23. Kathryn O'Sullivan and Susan Leahy, "Recognition of Muslim Marriage Ceremonies in Ireland, An Analysis", in *Minority Religions under Irish Law: Islam in National and International Contex*t, ed. Kathryn O'Sullivan, Brill 2019, p. 109.
24. Anna Hall, "The Truth About Muslim Marriage – On Demand." *Channel 4*, http://www.channel4.com/programmes/the-truth-about-muslim-marriage/on-demand/64545-001 (accessed 6 March 2018).
25. Vishal Vora, "The Islamic Marriage Conundrum : Register or Recognize? The Legal Consequences of the Nikah in England and Wales", 2016.
26. Marriage Act, 1949, *op cit.*
27. *Hudson v Leigh (Status of Non-Marriage)* [2009] EWHC 1306 (Fam).
28. *Ibid.*, p. 22.
29. *Ibid.*, p. 21.
30. *Ibid.*, p. 76.
31. *Ibid.*, p. 39.
32. *Ibid.*, p. 77.
33. *Ibid.*, p. 79.
34. "Getting Married: A Scoping Paper" (Law Commission 2015) 54, 57.
35. Gaffney-Rhys, "Hudson v Leigh – the Concept of Non-Marriage", *op. cit.*, para 78.

36. *Ibid.*, p. 363.
37. Dukali v Lamrani (Attorney General Intervening) [2012] EWHC 1748 (Fam), *op. cit.*
38. *Ibid.*, p. 27.
39. *Ibid.*, p. 33.
40. *Ibid.*
41. *Ibid.*, p. 23.
42. Probert, "When Are We Married?", *op. cit.*, p. 398.
43. *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam), *op. cit.*, para 86.
44. *Ibid.*
45. *Ibid.*
46. *Dukali v Lamrani (Attorney General Intervening)* [2012] EWHC 1748 (Fam), op. cit.
47. *Ibid.*, 15 Wife's statement paragraph 5.
48. *Dukali v Lamrani (Attorney General Intervening)* [2012] EWHC 1748 (Fam), *op. cit.*
49. *Ibid.*, p. 33.
50. "Duration of Marriage at Divorce by Age of Wife at Marriage, 1957-2011" Table 4, http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/rft-divorces--age-at-marriage-and-cohort-analyses.xls (accessed 21 June 2019).
51. *Dukali v Lamrani (Attorney General Intervening)*[2012] EWHC 1748 (Fam), *op. cit.*
52. *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam). https://www.familylawweek.co.uk/site.aspx?i=ed99448 (accessed 21 June 2019).
53. *Ibid.*, p. 10.
54. *Ibid.*, p. 97.
55. *Akhter v Khan* (2018) 54, *op. cit.*
56. Ibid., para 5.
57. *MA v JA and the Attorney General*, *op. cit.*
58. *Dukali v Lamrani (Attorney General Intervening)*[2012] EWHC 1748 (Fam), *op. cit.* (n 15).
59. Probert, "When Are We Married?" *op. cit.*, p. 406.
60. The Hon Mr Justice Moylan, "The Approach of English Law to the Recognition of Islamic Marriages", *Family Law*, Vol. 46, 2016, p. 1.
61. "Getting Married: A Scoping Paper" (n 35) 32.
62. *Her Majesty's Attorney General v Akhter & Anor* EWCA Civ 122 (Court of Appeal).
63. *Ibid.*, para 64.
64. Vishal Vora, "The Problem of Unregistered Muslim Marriage: Questions and Solutions", *Family Law*, Vol. 46, 2016, p. 95.
65. "Weddings | Law Commission", https://www.lawcom.gov.uk/project/weddings/ (accessed 21 June 2019).