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Unregistered Muslim Marriages in the UK; Examining Normative Influences Shaping Choice of Legal Protection

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Introduction

Unregistered marriages are reportedly on the rise within Muslim communities in Europe.²

Such unions are the outcome of couples performing a religious ceremony of marriage which does not adhere to the requisite legislative instruments advancing state recognition of an official marriage with subsequent rights and responsibilities attached to and protected by the law. This chapter focuses on the seemingly autonomous decision made by a couple choosing to enter into an unregistered marriage; how such a family arrangement is constructed *vis a vis* the practices in wider society, namely cohabitation; and the implications of legal intervention for personal autonomy.

Marriage and the family remains very much central to Muslim communities, reflective of its historic positioning as ‘central to the development of law in Islamic lands’.³ Normative religious influences ensure that Muslim couples entering unregistered marriages are abiding by religious formalities, and many weddings are celebrated with the pomp, ceremony and

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² Grillo, R. (2015) *Muslim Families, Politics and the Law; A Legal Industry in Multicultural Britain*. Cultural Diversity and the Law. Ashgate, Moors, A. (2013) ‘Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands’ in M.S. Berger (ed.), *Applying Shariah in the West. Facts, Fears and the Future of Islamic Rules on Family Relations in the West*, Leiden, Leiden University Press, pp141-164, Akhtar, R (2015) ‘Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights’, in Miles, J., Mody, P. and Probert R, *Marriage Rites and Rights*, Hart Publishing, pp.167-92

³ Khaddury, M. (1977-1978) ‘Marriage in Islamic Law: The Modernists Viewpoints’. 26 *The American Journal of Comparative Law*, 213

grandeur associated with any publicly celebrated nuptials. The decision to remain unregistered places them beyond the reach of the state and its family law infrastructure, yet couples continue to exercise their autonomy and negotiate between religion, law and culture culminating in this family arrangement. The outcome is a precarious relationship, assumed to be regulated by Islamic legal traditions, yet these are largely unenforceable in the jurisdiction and thus voluntary⁴ and reliant on goodwill and social pressures for implementation. In England and Wales, the relationship arising from an unregistered marriage can be closely associated with cohabiting couples, who have few guaranteed legal rights arising from the relationship, regardless of its duration.⁵ As outlined by Probert *et al*, ‘Cohabitants have no obligation to support each other financially, either during their relationship or upon its end, and the courts have no power to transfer assets between them.’⁶ There are obvious correlations between these two relationship types, and both are the outcome of autonomous decision making of the parties who enter them, no doubt prompted by a range of personal beliefs, factors and influences. However, Muslim unregistered marriages are treated as conceptually problematic for a number of reasons, resulting in calls for legal interventions to challenge their position, and restrict couples from entering them. One such call comes from the Register Our Marriage (ROM) project which is campaigning for mandatory registration of all religious marriages, although the project focuses on Muslim marriages.⁷ ROM goes so far as to question whether criminal sanctions should be imposed upon religious ministers performing religious marriages.⁸ The intervention is said to be required for the purposes of

⁴ Douglas . G. *et al* (2013) ‘Britain’s Religious Tribunals: Joint Governance in Practice’. Oxford Journal of Legal Studies, Vol. 33, No.2, pp.263-291, at 269.

⁵ Barlow, A. *et al* (2005), *Cohabitation, Marriage and the Law, Social Change and Legal Reform in the 21st Century*, Hart Publishing, Oxford and Portland, Oregon, at 1-3.

⁶ Herring, J., Probert, R. and Gilmore, S. (2015) *Great debates in Family law*. 2nd Edition. Palgrave, at 176

⁷ Khan, A. (2016) ‘Register Our Marriage (Rom) Campaign on Unregistered Muslim Marriages.’ Briefing by Aina Khan

⁸ As is the case in the Netherlands.

protecting vulnerable parties on relationship breakdown. Notably, it does not call for the law to accommodate such relationships (both unregistered marriages and cohabitation), by expanding the legal rights which these couples can benefit from. Calls for modernisation in the law have also been made by The Law Commission of England and Wales, which conducted a comprehensive review of family law in 2015 and concluded that one of the three main grounds supporting the need for law reform is the rise in ‘religious-only’ marriages.⁹ However, the Law Commission recognised the lack of empirical evidences in the area, and has not yet defined its proposed parameters for intervention.

Historically, cohabiting couples have remained beyond family law’s legal provisions, and this is arguably one of the precursors to unregistered marriages. Both relationships are a manifestation of autonomous negotiation taking place at a personal and social level, and while some decisions may be more informed than others, it is pertinent to investigate the underlying motivations which lead to calls for legal interventions for one relationship type, while the other benefits from a parliamentary Bill which consequently reinforces the right to such a family arrangement.¹⁰ The Cohabitation Rights Bill sought to widen the legal safeguards in place for non-married couples as a solution to the legal quagmire they can often find themselves in.

This chapter will analyse unregistered marriages and cohabitation in order to deduce the extent of parallels and divergence between the two. The focus of the discourse shall be the question of autonomy, exploring whether and to what extent, the arrangement of unregistered marriages foster and/or inhibit the individual’s personal autonomy. The analysis will converge on the question of unregistered Muslim marriages in England and Wales, as

⁹ The Law Commission, *Getting Married, A Scoping Paper*, 17 December 2015, at 17.

¹⁰ Cohabitation Rights Bill 2015-2016

contrasted with the legal position of cohabiting couples, and identify any associated disparities between these family arrangements. These two seemingly autonomous practices have received widely differing social and political responses, with proposed legal interventions being advocated for the former, while autonomy remains safeguarded for the latter. This gives rise to a number of pertinent questions, namely, how do the outcome of these two family arrangements differ from one another, and do these disparities warrant distinctive legal responses? Alternatively, should all family arrangements be protected and safeguarded by the state in the best interests of the parties in light of new cultural norms derived from autonomous decision making by individual citizens?

The question of autonomy has been explored in detail elsewhere in this volume. For the purposes of this chapter, autonomy refers to the individual right in law and policy, to self-govern where personal family arrangements are concerned. At present in England and Wales, a couple can autonomously decide to marry, cohabit, enter any other form of religious or non-religious marriage ceremony, or choose not to live together. The law protects parties who enter a state recognised ceremony of marriage from factors such as duress or lack of consent in entering the marriage. For those in other relationship types, there are limited safeguards against such coercion. However, the decision to exclude the state from the relationship can be defined as a form of self-governance in family arrangement, and entirely permitted in both law and culture. The question of whether parallels can be drawn between the normative religious influences which prompt unregistered marriages and other influences precipitating cohabitation arises, as well as rights and avenues for dispute resolution, which will be explored further. Arguments advocating legal intervention concerning unregistered marriages will be explored in light of the lack rights vested in cohabiting couples by the law, and the impact on vulnerable parties. Finally, consideration of these pertinent issues will revolve around the idea of a developing 'culture' amongst British Muslims and the wider

increase in cohabitation, and its impact on the decision to register and thereby choose state legal protection through the medium of family law.

Marriage and Cohabitation

Marriage, as defined by the state, has a long historic tradition. It has been almost 150 years since Lord Penzance's¹¹ famed definition of marriage was first espoused, in which he pronounced that marriage in the Christian tradition (and therefore state context) occupied certain defined parameters. He stated:

I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

In considering Lord Penzance's definition of marriage, all that appears to remain integral today is that it is a 'voluntary union'. In England and Wales, no longer is marriage vested with the attributes of being between a man and a woman;¹² while optimists consider it to be for life, statistics reflect that in 42 per cent of cases, it is for a limited time-span.¹³ Clearly Lord Penzance was advocating a Christian-centric narrative in which little was left amorphous. He portrayed the institution of marriage as one which could only be entered into by defined individuals - a man and a woman - elevated and protected, 'to the exclusion of all others'.¹⁴ While the accuracy and relevance of this definition has been critiqued by numerous

¹¹ *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130

¹² The Marriage (Same Sex Couples) Act 2013 states that 'Marriage of same sex couples of lawful'. This was preceded by the Civil Partnership Act 2004 which granted same sex civil partnerships rights which were similar to those within a civil marriage.

¹³ Office for National Statistics, 9 February 2013. Available online at <http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/sty-what-percentage-of-marriages-end-in-divorce.html>

¹⁴ Lord Penzance described marriage as a 'union for life' which was not reflective of the reality even in 1866, and this element of his definition will not be considered in any detail here as it remains defective.

academics,¹⁵ and most recently elements of it have been challenged in the UK by legislation which permits same gender civil unions,¹⁶ it still remains a commonly recognised description.¹⁷

Registration of a marriage under English law takes two potential forms. Anglican religious ceremonies are a distinct category and do not require a separate registration. For any non-Anglican religious ceremony to be recognised by the state, and this extends far beyond Muslim marriages to Roman Catholic, Baptist, Methodist, Hindu and Sikh marriages; a separate civil ceremony must be entered unless they are conducted in a place solemnised for the performance of wedding ceremonies.¹⁸ Where buildings are not solemnised for the performance of a registered marriage, any ceremony of marriage remains unregistered and therefore unrecognised by the state and the resultant relationship is not one over which the state can exercise jurisdiction in the same manner as a recognised marriage which conforms with the requisite state legislation.

Where family arrangements are concerned, there is a tangible departure occurring from the state's Christian-centric narrative of marriage. In the post-modern world, multiculturalism and a decline in religious faith has presented many challenges for the state. Statistics from the recent census reveal the growing move away from the traditional family arrangement of marriage, towards a less formal and less secure structure. Cohabitation is the fastest growing family type in England and Wales,¹⁹ no doubt mirrored in much of the Western world. The

¹⁵ For example, Probert, R. 'Hyde v Hyde: defining or defending marriage?' in *Child and Family Law Quarterly*, Vol. 19, No 3, pp 322-336; Poulter, S. 'Hyde v Hyde - A Reappraisal, (1976) *International and Comparative Law Quarterly*, 475

¹⁶ The Marriage (Same Sex Couples) Act 2013

¹⁷ Poulter, S. 'The Definition of Marriage in English Law', (1979) 42 *Modern Law Review*, 409

¹⁸ The Places of Worship Registration Act 1855, and the Marriages Act 1949

¹⁹ Office of National Statistics, Families and Households, 2013

question of 'what is cohabitation' is not as straightforward as one would assume. Probert²⁰ defines cohabitation as a 'non-marital co-residential relationship',²¹ and outlines the difficulties surrounding the conceptual notion of cohabitation, due to the multifarious range of relationships which may be covered. Thus, those who commit bigamy or otherwise enter a ceremony of marriage, which falls short of the state's legal requirements, will be deemed cohabitantes as a default position resulting from the lack of recognition of their 'marriage'.²² However, Probert views such relationships as distinct from other cohabitantes, as their decision to undertake a ceremony of marriage, illegal or invalid though it was, sets them apart from those who 'set up home without such preliminaries'.²³ The distinction is drawn on the basis that cohabitation may not be deemed an acceptable option to those who choose to undergo (invalid) marriage ceremonies. This poses interesting questions where unregistered marriages are concerned. These couples do not undergo formal civil ceremonies and they do not intend to be recognised by the law (where they are fully cognisant of the nature of the 'marriage'), however, cohabitation is not deemed an acceptable family arrangement from a normative religious perspective. Therefore, there is a binary division between marriage and cohabitation for these couples, and they are in fact consciously entering both arrangements within a distinct conceptual framework - a marriage as far as the religious community is concerned, and cohabitation as far as the wider public is concerned. This autonomous negotiation between two distinct cultures has thus resulted in an arrangement which satisfies the constituent elements of both. Thus, it can be argued that Muslim couples are formulating

²⁰ Probert, R (2012) *The Changing Legal Regulation of Cohabitation, From Fornicators to Family 1600-2010*, Cambridge University Press

²¹ *Ibid*, at 5.

²² *Ibid*, at 4.

²³ *Ibid*.

a new culture, which reflects their embeddedness in the British communities of which they are a part, and influenced by normative religious customs.

As with unregistered marriages, Cohabitation may have a number of underlying motivations including acting as a ‘prelude to marriage’,²⁴ as a variety of marriage where it is viewed as a ‘do it yourself’ marriage²⁵ or as an alternative to marriage.²⁶ It is estimated that by 2033, the number of cohabiting couples in England and Wales will reach 3.8 million – thus accounting for a quarter of all couples.²⁷ As pointed out by Wood *et al*, despite legally recognised marriages being the most common form of relationship, the numbers of cohabiting couples mean that this issue is one that is significant and must be acknowledged by the law.²⁸ This new cultural norm is something which supports the perpetuation of unregistered marriages, as this relationship type allows a couple to live together without state recognition. Similarly, unregistered marriages occur within a distinct normative framework and are performed singularly as part of the Islamic traditions, with cohabitation as the outcome. The resultant gap in provision of legal protections for both of these family arrangements has the same potential legal consequences for the couples. Before examining the legal position further, the issue of personal autonomy and unregistered marriages will be explored.

Unregistered Muslim marriages and personal autonomy

The registration of a marriage in most Muslim-majority jurisdictions around the world is a phenomenon located within the modern state legislative practices. Unregistered marriages

²⁴ Barlow, A. et al (2005), *Cohabitation, Marriage and the Law*, Hart Publishing, Oxford and Portland, Oregon, at 65.

²⁵ *Ibid* at 68.

²⁶ *Ibid*, at 72.

²⁷ Wood, H. et al (2015), *Cohabitation, Law, Practice and Precedents*. 6th Edition. Published by Family Law, Jordans Publishing Ltd, at lvxiii.

²⁸ *Ibid*.

were however the norm prior to the emergence of the modern nation states.²⁹ From Indonesia to Pakistan, and Jordan to Morocco, the move towards formal registration of marriages occurred over transitional periods. In many of these locations, unofficial, unrecognised and unregistered marriages, much like those unregistered Muslims marriages in the UK, continue to occur, presenting parallel problems. In the case of Indonesia, where the demographic split is 87% Muslims and 13% other³⁰, unregistered marriages are not recognised and the procedures for registering differ according to the religious affiliation of the bride and groom. All non-Muslim weddings require separate civil registration. Muslim weddings require registration before the religious ceremonies.³¹ Each European state has its own historic developments which culminated in the registration of marriages. In England, Lord Hardwick's Marriage Act of 1753 established the correct form for a marriage ceremony to be recognised, eliminating the centuries old Canon Law governance. The French revolution on the other hand secularised the marriage ceremony requiring the civil ceremony for state recognition. Muslim majority jurisdictions have followed course in more relatively recent times.

In England and Wales, the importance of registration is closely linked to the legal protections the law offers to a married couple, who form the 'ideal' family unit.³² From guaranteed rights

²⁹ Moors, A. (2013) 'Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands' in M.S. Berger (ed.), *Applying Shariah in the West. Facts, Fears and the Future of Islamic Rules on Family Relations in the West*, Leiden, Leiden University Press, pp141.64, at 142.

³⁰ 2010 census

³¹ van Huis, S. and Wirastri, T. 'Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws'. *Australian Journal of Asian Law*; 2012, Vol. 13 Issue 1, p1-17

³² *Supporting Families* (Home Office, 1998) London. The National Archives:

<http://webarchive.nationalarchives.gov.uk/+http://www.nationalarchives.gov.uk/ERORRecords/HO/421/2/P2/ACU/SUPPFAM.HTM> (Last visited 1 June 2016)

to inheritance,³³ shared matrimonial property,³⁴ and financial protections; a registered marriage provides numerous safeguards to the family unit. Those entering an unregistered marriage may well expect that these rights arise, as do many co-habiting couples who labour under the false premise of the existence of the ‘common law’ spouse.³⁵ However, the reality is that the end of an unregistered marriage can mean the vulnerable party is left without recourse to any financial remedies, regardless of how long the marriage lasted, except in certain circumstances.

The lack of registration is an issue mirrored in numerous jurisdictions, including for example in the Netherlands³⁶ and Egypt. Moors³⁷ uses the term ‘*urfi*’ or ‘tradition’ to describe temporary unregistered marriages seen widely in Egypt, which provide young people with a means by which they can enter into a sexual relationship with each other without long-term marital commitments. Anecdotal evidences from young Muslims in Britain appear to suggest that unregistered marriage ceremonies are similarly entered into during periods of ‘engagement’ during which families do not support the religious *nikkah* ceremony taking place, but the couple are less inclined to wait for their wedding night before commencing a physical relationship. Normative religious influences are powerful in both scenarios, as the individual faithful Muslims do not wish to transgress ‘God’s laws’ by entering into such relationships outside of the marriage bond, yet in the Egyptian example, they do not wish to adhere to the marriage for life either. It should be noted that such temporary unions are not

³³ Administration of Estates Act 1925, S.46 (Intestacy)

³⁴ Matrimonial Causes Act 1973, S.24

³⁵ Probert, R (2012) at 198-217

³⁶ See for example: van der Leun, J. & Leupen, A (2009) *Informeel huwelijk in Nederland; een exploratieve studie*. Leiden: Universiteit Leiden, Leiden Law School (Translation)

³⁷ Moors, A. (2013) ‘Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands’ in M.S. Berger (ed.), *Applying Shariah in the West. Facts, Fears and the Future of Islamic Rules on Family Relations in the West*, Leiden, Leiden University Press, pp141.64, at 143.

considered valid, but rather voidable or void dependent on the Islamic scholarly opinion being adhered to. For those who do not wish to be bound by a marriage for life, there are interesting parallels which can be drawn with the trends which surrounded the increase in cohabitation in Britain in the 1970's. Probert identifies one group within society – students – who took advantage of the freedoms offered by moving out of their homes at a relatively early age and being able to cohabit without parental knowledge.³⁸ Similarly, young Muslims may be entering unregistered marriages without parental knowledge, in order to bridge the gap between conservative religious ideals of a sexual relationship only occurring within marriage, and wider cultural norms of cohabiting, sexual liberalism, or entering a sexual relationship without it constituting a marriage for life. In both cases, autonomous navigation between competing interests are apparent.

An empirical study using a modest sample was conducted by this writer in 2015,³⁹ involving 20 participants who were engaged in unregistered marriages and it revealed some interesting facts about the nature of this family arrangement. Within the sample of 20, the duration of the marriages were seen to vary from one year, to 15 years in one case. There was no pattern and appeared to reflect individual autonomy in decision making surrounding the form that their marriage should take. These wedding celebrations ranged in expense from a few hundred pounds to £35,000 in one case. Hundreds of people celebrated as guests at the weddings, and the ceremonial aspects reflected a mixture of normative religious influences, and popular cultural trends such as music and dancing. The religious ceremony of the *nikkah* was identified as one of the most important aspects of the day, with the other being to celebrate the nuptials with friends and family. Thus, the ceremony of marriage, and the presence of loved ones were key features, much like any other recognised ceremony of marriage. It was

³⁸ Probert (2012) at 189.

³⁹ See Akhtar, R (2015)

also clear from responses by participants that pomp and ceremony were often important facets to the big day, despite the fact that there were no subsequent legal rights arising between the couple. Penetrating the underlying reasons proved difficult, as most of the participants simply stated that a civil ceremony had not been a priority while the grand celebration of wedding rites were being planned. A significantly reduced focus on the civil ceremony seemed to be linked to the idea that the validity of the marriage according to Islamic rites would not be impacted upon at all in the absence of a civil ceremony. The participant's understanding of their legal positions was not explored in the study as the sample was relatively modest and as an initial foray in to the field, it was deemed to be inappropriate to tackle this potentially problematic factor without adequate opportunity to explain the legal ramifications and deal with any resultant concerns which may arise for the participants.

Thus, a lack of time and priority are reasons why a marriage may remain unregistered in the UK, however, it is clear that these autonomous actions may have an array of underlying motivations. Moors presents the case study of Egyptian couples entering into unregistered (and perhaps temporary) marriages,⁴⁰ where the women are older, more mobile and better educated than the younger Egyptian men they marry.⁴¹ In these examples, the women are often nationals of 'Western' states, and they do not 'aspire to a 'real' marriage',⁴² thus the decision to enter into the relationship is very much an autonomous exercise of balancing various personal interests such as the desire to enter a sexual relationship, perhaps even for a holiday period, while not transgressing Islamic traditions. Thus, a holiday romance⁴³ may

⁴⁰ Moors (2013) at 146-147

⁴¹ Magued, O. & Laila, S. (2003) 'Age discrepant marriages in Egypt' in: Nicholas Hopkins (ed.), *The new Arab family*, Cairo: The American University in [Cairo] Cairo Press

⁴² Moors (2013) at 146

⁴³ The legitimacy of temporary or 'urfi' marriages is debatable within Islamic jurisprudence, however, this discussion goes beyond the scope of this chapter.

well entail an unregistered marriage for a Muslim couple, without any rights attached to it. Yet, this would be fully reflective of their expectations in entering the union.

Alternately, the high costs associated with getting married mean that it is unattainable for many young people, and so an unregistered (and perhaps secretive) marriage enables a sexual relationship to begin, which may go on to be formalised later when the couple are in a financial position to marry officially. This conflict between religious ideals and community norms means that the option of unregistered marriages for young people provides an indispensable possibility for fulfilling basic sexual needs while adhering to their faith. These various scenarios presents a complex picture of the nuanced material considerations which potentially surround unregistered marriages.

Cohabitants and the law

In England and Wales, the legal position for unregistered and cohabiting couples is the same. The law has varied in its approaches dependent on the facts at hand in each individual case. There is a spectrum of rights associated with cohabitants, the most common of which is the absence of any rights at all.⁴⁴ It can be concluded that there are in fact no *guaranteed* rights, but it appears to be very much at the court's discretion. Despite this fact, there are myths abound as to the rights associated with cohabitation, including the oft cited 'common law spouse'. The idea of the common law spouse emerged when legislative changes were discussed in the 1970's.⁴⁵ It has since then continued as a powerful myth, with anecdotal evidences including the option of 'common law spouse' being part of insurance application forms today under 'relationship' status. In actual fact, there are no rights attributable to a 'common law'

⁴⁴ Wood, H. et al (2015), *Cohabitation, Law, Practice and Precedents*. 6th Edition. Published by Family Law, Jordans Publishing Ltd, at lvxiii.

⁴⁵ Probert (2012), at 185.

spouse, as there is no legal recognition of this term. Barlow and James⁴⁶ summarise the position as follows:

On relationship breakdown, there is certainly no 'divorce-law equivalent' for cohabiting couples. There is no duty to pay maintenance to a former cohabitant, nor to redistribute property between the partners according to family law principles when cohabiting partners separate. Instead, strict property law normally applies. This is the case even where one partner was totally financially dependant on the other during a long-term relationship and/or the other partner has gained advantage from the domestic and or child care services provided.⁴⁷

The issue of property where cohabitees are concerned is complex and dependent on a number of factors. No automatic property right is inferred; unlike with a married couple, and property interests would have to be registered by way of a trust. The only exceptions are where both parties made a financial contribution to the purchase of the property, or there was an express agreement (whether formal or informal), that the other party would have a property right and the latter relied upon this to such an extent that it would be deemed 'inequitable' not to give effect to it.⁴⁸ This was deemed to be a constructive trust. The absence of such a contribution would only in limited circumstances give rise to a property interest, such as the case of *Cooke v Head*⁴⁹ which related to a dispute over a bungalow built by the couple on land they acquired. In this case, the female partner had contributed to the mortgage and also undertook physical labour on the site, helping to demolish parts of the building, working with cement and

⁴⁶ Barlow, A. & James, G. (2004) 'Regulating Marriage and Cohabitation in 21st Century Britain'. *The Modern Law Review*, Volume 67, No.2

⁴⁷ *Ibid*, at 148.

⁴⁸ *Gissing v Gissing* [1971] AC 886

⁴⁹ [1972] 1 WLR 518

painting, etc. It was clear that the Lords in this case felt it would be inequitable to deprive her of a financial interest in the property, but in the absence of rights for cohabitees, Lord Denning creatively took a wide view of the factors of significance. These included any statements made to third parties which reflected the parties intentions; the way in which they saved for the property; how mortgage instalments were paid; the amount of direct cash contributions made by each of them; the actual amount of the work each had undertaken on the property and the nature of this work; and the part that each party played in planning and designing the house.⁵⁰ In this case, Ms Cooke was awarded one-third of the property and the case signified the court's willingness to treat the couple more equitably with a closer alignment with married couples. However, it should be noted that her contribution to the physical building works was deemed 'quite unusual.. for a woman', and thus added to the burden of contribution expected. It is unlikely that most female cohabitees would make this type of physical contribution. This case demonstrates that the court's have for some decades recognised the inequity that can arise from the lack of legal protections afforded to cohabiting couples, however, the burden of proof is set so high that it becomes unattainable for many. Further, it should be noted that the costs, time and knowledge required to bring such proceedings places it beyond the reach of many cohabitees.

The decision in *Cooke v Head* can be contrasted with the case of *Burns v Burns*⁵¹ in which the courts concluded that following a 19 year relationship, despite contributions being made to raising children and paying bills, etc., the female cohabitee failed to establish a 'common intention' between her and her partner which would give rise to a trust in the property in her favour. Thus, she walked away destitute - something that would be inconceivable for a

⁵⁰ Ibid.

⁵¹ *Burns v Burns* [1984] CH 317.

married couple. Case law surrounding cohabitation is complex and uncertain. The judiciary approaches each case based on its facts, and as a result, the area of cohabitee rights is a quagmire. Lawyers advising cohabitants operate in a field that is multifaceted and dependent largely on the cohabitants pre-existing knowledge of law and practice, ensuring that they construct their relationship/property interests in a manner that protects legal and beneficial interests. Indeed, one of the most comprehensive volumes on cohabitation rights by Woods *et al* runs to some 756 pages,⁵² reflecting the complex nature of the area due to the lack of legislation. This uncertain legal position is identical for unregistered marriages, as these couples are also cohabitees in the site of the law.

The lack of legal redress for the inequitable treatment of cohabitees is very much policy driven. Since the 1990's, governments have continued to espouse the virtues of marriage, as recognised by the law, as being the ideal model for raising children.⁵³ While cohabitation has been largely ignored by the legislature, it has been the judiciary who has developed creative solutions to attempt to tackle unfairness, however, in most cases inequity reigned supreme. The Law Commission has advocated legal reform and recommended a statutory scheme designed specifically for cohabitants, however, no such legislation has been approved.⁵⁴ The solution has been increasingly located within private orderings, such as cohabitation agreements. This is something which remains open to all couples who choose not to register their relationship as a marriage. This option is available to both cohabiting and unregistered couples, but once again it requires knowledge, time and financial means to obtain legal advice and pay for the drafting of the agreement. Furthermore, the likelihood of such contracts being upheld

⁵² Woods et al

⁵³ *Supporting Families* (Home Office, 1998) London.

⁵⁴ *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007) The Law Commission No 307

are yet to be tested,⁵⁵ and as cohabitees are considered as the least likely to enter formal legal arrangements,⁵⁶ it may prove to be a red herring. However, such an arrangement does provide a solution to the oft-cited problem of vulnerable women exploited within unregistered marriages.

Protecting vulnerable spouses in unregistered marriages?

Women are often perceived to be the vulnerable spouse where unregistered marriages are concerned. This gendered assumption is substantiated by evidences which support the contention that in most families with children, women are the partners who sacrifice their careers in order to care for the children.⁵⁷ A woman's ability to recover her economic position following this career break is severely limited,⁵⁸ leaving many women in the vulnerable financial positions outside of the family unit where the partnership with the breadwinning spouse ensures her sacrifices are compensated.⁵⁹

Where unregistered marriages in England and Wales are concerned, this potential vulnerability of the spouse has been the focal point of contention. Where each party to the marriage understands their limited legal rights by remaining unregistered, and continues to embark on a relationship without any form of coercion or duress, they are exercising

⁵⁵ Probert (2012) at 259

⁵⁶ *ibid.*

⁵⁷ Fawcett Society (2010) *Keeping Mum*, London, Fawcett Society

⁵⁸ Dex, S., Ward, K. & Joshi, H. (2006) *Changes in Women's Occupations and Occupational Mobility over 25 Years*. London: Centre for Longitudinal Studies.

⁵⁹ In the English case of *Miller v Miller; McFarlane v McFarlane* [2010] UKHL 24, heard before the House of Lords, the judiciary in fact ruled in the case of Mrs Miller, who had sacrificed a high earning career in the city to care for the children, that she was entitled to compensation payments from the husband (which was eventually settled at 1/3 of his annual income of over £1 million, until he reached retirement). This was in recognition of a joint decision made by them that she would stop working during the course of their marriage, for which she should not have to pay a financial penalty for following divorce. However, this 'compensation' element for distribution of assets on breakdown of a marriage has been severely restricted to specific circumstances.

autonomy in decision making and therefore any forced intervention becomes highly questionable. After all, despite the public performance of a marriage ceremony which may have been undertaken, the couple are adults who, much like cohabiting couples, are exercising their free will. The question arises of at what point the state should intervene and impose its own framework to override this autonomy? The assumed vulnerability of the female spouse, which may appear to be supported by real as well as sensationalised evidences,⁶⁰ may be nurturing gendered stereotypes about Muslim women and their subservience to Muslim men. However, as evidenced by Moors,⁶¹ Muslim women may be instigators of such marriages, and the arrangements may in fact suit them better. The empirical evidences gathered by this writer also suggest that some women are autonomously making the decision not to register as they perceive the informal *nikkah* as being the only necessary element to the formation of the religiously sanctioned marital relationship.⁶² A government initiated Muslim Marriage Working Group (MMWG) set up in 2012 also identified a diverse list of potential factors precipitating the decision not to register.⁶³ While they identified the potential lack of knowledge about the benefits of registration undermining the perceived need to undertake this step, the more numerous theories propounded related to cost, convenience and priorities, all of which reflect autonomous actions in the context of

⁶⁰ Numerous newspaper reports in December 2015 pre-empting the publication of a book based on the doctoral thesis by Zee, M.E. (2015) *Choosing Sharia? Multiculturalism, Islamic Fundamentalism and British Sharia Councils*. The reports based on Zee's findings suggest that 'Britain risks having an 'alternative legal system that discriminates against women', and are based on a sum total of 15 hours spent by Zee at 2 *Shariah* Councils in the UK. The stories wholly failed to take into account other studies which contested these claims.

⁶¹ Moors (2013) at 146

⁶² Akhtar (2015) at 173-176

⁶³ MMWG Report 2012.

their lived realities. While the wisdom of decisions may be questioned, the suitability of legal interventions needs to be considered in light of competing rights.

Exploring the Dutch jurisdiction and unregistered marriages, Rutten⁶⁴ further proposes that the decision may be precipitated by a desire to remain outside of the formal recognised arrangement due to an array of economic reasons such as social security provisions, for example surviving spouse pensions claims which would come to an end upon remarriage. While non-religious couples in such instances would simply cohabit, religiously observant Muslim couples would feel compelled to sanctify their relationship in the eyes of God, and therefore enter an unregistered marriage, the effect of which is cohabitation. Other economic factors may include the desire by one party to avoid financial obligations on breakdown of the marriage, or for the avoidance of tax in some way.⁶⁵ Far less suspicious motivations may link to the formalities of marriage such as the requirement of specific identity documentation being presented. For migrant, for example, these documents may not be accessible placing registered marriages firmly out of reach.

The emergence of new cultures are also reflected in the changing circumstances of Muslim marriages. For example, the reduction in transnational relationships evidenced by the rise in the numbers of young Muslims marrying partners from within the UK. Compelling immigration related objectives for registering a marriage are no longer present, and thus this may also provide an explanation. The MMWG interestingly note:

‘Young Muslims appear to be more likely to not register their marriages. This would seem to be less the result of parental pressure and owe more to the strengths of Muslim culture, cultural change and peer group norms. In some cases, the first

⁶⁴ Rutten, S. (2010) ‘Protection of Spouses in Informal Marriages by Human Rights’. 6 *Utrecht Law Review*, pp77-92.

⁶⁵ Idib, at 79.

religious marriage may be an experimental union of partners not ready for commitment, with the parties to the marriage still living at home. In some cases the women may see religious marriages as testing out the relationship.’⁶⁶

This portrayal of autonomy and liberated decision-making should be tempered with recognition of vulnerabilities where social consequences may impact more greatly on one gender than another, or the parties are in a position of unequal bargaining power. For example, within Iranian society, the *urfi* marriages have been critiqued by women’s organisations for being a threat to the family and to women.⁶⁷ In societies which remain highly traditional, the gendered impact is going to be graver for women than men who enter unregistered marriages. Where these are temporary, the woman who is publicly no longer a virgin will be disadvantaged when it comes to entering a socially accepted permanent marriage. In the UK context, this may still remain an issue within traditional Muslim communities with similar values. Financial vulnerabilities may result in the spouse who is better off being unwilling to enter a registered marriage, thus placing the other party in a vulnerable position. On breakdown, the partner’s position can potentially change from being in a secure family unit with a home and high standard of living, to being homeless with no protections overnight,⁶⁸ however, as outlined above, this vulnerability is identical for cohabiting couple. Further, the decision to enter an unregistered marriage may have been impacted on by purely external factors, such as the ‘reputation’ of the individuals involved, leading to parental pressures to enter into an unregistered *nikkah* while the couple explore their relationship. This would ensure that community and religious norms are adhered to, yet

⁶⁶ Muslim Marriage Working Group (2012) *Report of Working Group*, at 4.

⁶⁷ Moors (2013) at 147

⁶⁸ Examples such as this have been used in what documentaries purportedly focused on Muslim women in Britain and the dangers posed by Shariah Councils, such as *Panorama: Secrets of Britain’s Shariah Councils*. April 2013.

the pressures can be said to infringe on the autonomy of the couple where purely social, and compel the couple to 'marry' when they 'do not feel ready'.⁶⁹

A lack of empirical studies into the prevalence of unregistered marriages means that its pervasiveness remains un-quantified, however, scholars working in the area agree that it is on the rise.⁷⁰ The ROM campaign cites 80 per cent of Muslim marriages as being unregistered, however this is based on anecdotal evidences grounded on a divorce practitioners experience,⁷¹ and highly unlikely. A recent PhD study identified XX% based on empirical research conducted in London.⁷² It is apparent that cohabiting couples face the same legal uncertainties that unregistered marriage gives rise to, resulting in manifest inequity in the distribution of property and the protection of partners. Far from being a singular issue for unregistered Muslim marriages, the gendered inequality is something that is seen on a much wider scale. As detailed above, in cohabiting couples, it is often the female partner that is left without rights and faced with no recompense for her time, labour and financial contribution to her cohabiting household. This brings into question the singling out of unregistered Muslim marriages for special treatment. It seems that the fairest and most palpable solution lies in legislation which protects cohabitees in all their guises, something which has been advocated at length in recent decades. The idea of 'couple regulation', as espoused by Barlow and James⁷³ advocates the protection of the 'function' rather than the 'form' of a relationship,⁷⁴ and seems a fairer approach to

⁶⁹ Moors (2013) at 155

⁷⁰ Grillo, R. (2015) *Muslim Families, Politics and the Law; A Legal Industry in Multicultural Britain*. Cultural Diversity and the Law. Ashgate. At 41

⁷¹ Ibid, at 42.

⁷² Qayyum, S. (2016) XXXXXXXX

⁷³ Barlow, A. & James, G. (2004) 'Regulating Marriage and Cohabitation in 21st Century Britain'. *The Modern Law Review*, Volume 67, No.2

⁷⁴ Ibid at 145.

the regulation of this fast growing family arrangement. This would ensure that couples are able to utilise the formal legal system when disputes arise, relying on a coherent set of legal rights. At present, unregistered marriage disputes often find themselves in parallel dispute resolution forums.

Unregistered Marriages, Cohabitation and Dispute Resolution

For unregistered marriages, dispute resolution is often located in unfair and unrepresentative ‘Shariah Councils’⁷⁵ which are accused of implementing unfair and discriminatory rules which disadvantage women.⁷⁶ Other criticisms of these councils have included their failure to respect the jurisdiction of the Family Courts, for example with custody matters, and for forcing (mainly) women to face their husbands in ‘mediation’ sessions, despite evidences of situations of domestic violence or other controlling behaviours.⁷⁷ The Shariah Council also penalise women as they are the main users of these courts and are required to pay hefty fees running into hundreds of pounds for their case to be heard. The case, more often than not, is that the husband will not pronounce the ‘*talaq*’ divorce. The absence of an authoritative Islamic legal system in the UK means that there is an unfair balance of power between the spouses. A husband can utter the word ‘*talaq*’ three times and he has pronounced a divorce signifying the end of the marriage.⁷⁸ The female on the other hand, unless she has reserved the right to a delegated *talaq*,⁷⁹ must approach a Shariah Council, or other religious scholar to

⁷⁵ AKhtar, R. (2013) *British Muslims and transformative processes of the Islamic legal traditions : negotiating law, culture and religion with specific reference to Islamic family law and faith based alternative dispute resolution*. PhD thesis, University of Warwick; Bano, S. (2012) *Muslim Women and Shari'ah Councils, Transcending the Boundaries of Community and Law*. London: Palgrave MacMillan.

⁷⁶ Baroness Cox has repeatedly tabled the Arbitration and Mediation Services (Equality) Bill to counter the operation of Shariah Councils on the basis of discriminatory practices.

⁷⁷ Ibid.

⁷⁸ Carroll, L. (1997), ‘Muslim Women and “Islamic Divorce” in England’, *Journal of Muslim Minority Affairs*, 17, pp. 97-115

⁷⁹ Known as the ‘*talaq-I'tafwid*’

validate her own instigation of a divorce. In many Muslim majority jurisdictions, there is usually a judicial process, much like in England and Wales, which provide safeguards against abuse of this process and greater parity between the husband and wife. In the UK context, the lack of such authority means that women can be severely disadvantaged, especially where their husbands refuse to pronounce the *talaq* themselves. This is also the case concerning Jewish women seeking to obtain the 'Get' under Rabbinical law.⁸⁰ This compels them to conduct proceedings to obtain the religious divorce before a Shariah Council;⁸¹ an unelected, unaccountable and unrepresentative body, which is conversely deemed authoritative in granting the divorce.⁸²

Such plural dispute resolution bodies have existed since the 1980's, and the intervening decades have seen increasing caseloads. As Douglas *et al* found,⁸³ of the 27 cases they observed at a Shariah Council, over half involved unregistered couples. These concerns surrounding dispute resolution can be seen in equal measure for cohabiting couples, albeit without the added dimension of inequality in doctrine which is seen as discriminating against Muslim women.

Cultural assimilation and personal autonomy; unregistered or cohabiting

The pluralism in reason and motivation evidenced in discourses around marriage can be seen equally in cohabitation, and this relationship type has steadily increased since the 1970's⁸⁴ and its current positioning provides evidence of a new cultural norm. As detailed above, it is at the intersection between the culture of cohabitation and normative Islamic religious

⁸⁰ Carroll (1997), at 100.

⁸¹ Douglas et al (2012), at 272.

⁸² Ali, S (2013) 'Authority and authenticity. Sharia councils, muslim women's rights and the English courts'. *Child & Family Law Quarterly*, Vol 25 (No 2), at p.113-137

⁸³ Douglas, G. et al (2012), at 272.

⁸⁴ *Ibid*, at 1

influences that one can locate unregistered marriages, and this is a newly emergent cultural norm amongst young Muslims. So what can be said about culture in this context?

Britain has long been hailed as a progressive multicultural society, a term defined by Modood⁸⁵ as “the recognition of group difference within the public sphere of laws, policies, democratic discourse and the terms of a shared citizenship and national identity.”⁸⁶ The term culture itself is difficult to define. From the seventeenth century to the first half of the twentieth century, the philosophical countenance of culture was very much in line with T.S. Eliot’s portrayal: “No culture has appeared or developed except together with a religion: according to the point of view of the observer, the culture will appear to be the product of the religion.”⁸⁷ However, this symbiosis between religion and culture has largely been discredited in modern times. The post-modern reality is that any given culture can be impacted upon by a multitude of religions, as well as political and social norms distinct from religious conviction. Perhaps Eliot was reflecting the Englishman’s worldview at his time, however, it is clear that globalised society is very different today and diversity is its key axiom. However, manifestations of culture remain a key feature of an individual’s identity.

The academic discourse on culture considers the issue from the community/society perspective as well as the individuals’ autonomous self-identification perspective. There exist palpable reservations about the use of the term ‘multiculturalism’ as an empirical description of societal diversity,⁸⁸ and yet a discussion about culture in any given European context can only be termed in such a rubric. There exist a diversity of cultures in which personal autonomy is greatly affected by normative influences, which can be traced to religio-cultural origins, as elucidated by Eliot. Where the Muslim community in Britain is concerned, the

⁸⁵ T. Modood, *Multiculturalism*, (2007) Polity Press

⁸⁶ *Ibid*, at 2.

⁸⁷ T.S. Eliot., *Notes Towards the Definition of Culture*,(1949) Harcourt, Brace and Co, New York, at 13

⁸⁸ R. Mehdi, et al, *Law and Religion in Multicultural Societies*, (2008) DJØF Publishing Copenhagen, at 17

social cultural perspective influences the issue of integration while the autonomous individual perspective provides the underlying adaptation process by virtue of which British Muslims are forming a new and unique culture, facilitated by the influence of personal autonomy in the application of religious narratives within their particular social settings. Thus, the interaction of knowledge of the British legal system and knowledge about Islamic family laws are being fused to give rise to a new culture, and unregistered marriages are a manifestation of this process. Theorists such as Menski⁸⁹ espoused a hybrid form of religious laws, which can be traced to migration patterns. However, the entrenchment of British Muslims and the growth in the numbers born in Britain, necessitate further investigations into religio-cultural manifestation. Thus it remains the case that “multiculturalism refers to a project that attempts to pluralise the terms through which subjects can understand their socio-cultural inter-relatedness against a core set of values about the importance of life.”⁹⁰ Contemporary discourse on British-born Muslims and culture must recognise the emergence of a new hybrid culture wherein British norms are amalgamated with Islamic cultural traditions through the exercise of personal autonomy. Tie⁹¹ elucidates an epistemological inference which “empowers subjects to entertain both their embeddedness within interpretative traditions and their capacity to alter the terms of their embeddedness”⁹² where multiculturalism is concerned. Using this approach, the subjects of multiculturalism “negotiate alterations in their self-perceptions, both within themselves as individuals and as collectives.”⁹³ This trans-cultural positioning allows for a multitude of factors which may impact on an individuals’ autonomous cultural self identification. It allows for the

⁸⁹ Pearl, D. & Menski, W. (1998) *Muslim Family Law*, (3rd Edn) London: Sweet and Maxwell, at 276

⁹⁰ Tie, W. (1999) *Legal Pluralism, Toward a Multicultural Conception of Law*. Ashgate Publishing, at 30.

⁹¹ *Ibid*, at 27

⁹² *Ibid*.

⁹³ *Ibid*. Tie summarises the theories of Charles Taylor and Frederick Jameson. C. Taylor, ‘The Politics of Recognition’, (1992), C. Taylor and A. Gutman, (Eds), *Multiculturalism and ‘The Politics of Recognition’*, Princeton University Press, Princeton. F. Jameson, *Sartre: The Origins of a Style*, (1961) Yale University Press.

contribution of plural moral and ethical frameworks which shape the cultural identity. Thus, focussing on the issue of marriage and registration of marriages, the question of cultural hybridity could be challenged by non-registration of marriages depending on the underlying motivations and normative influences affecting the decision not to register. It is apparent that the cohabiting norm facilitates the emerging cultural norm amongst British Muslims of unregistered marriages.

Cohabitation, much like unregistered marriages, have a number of underlying motivations including acting as a ‘prelude to marriage’,⁹⁴ as a variety of marriage where it is viewed as a ‘do it yourself’ marriage⁹⁵ or as an alternative to marriage.⁹⁶ This range of underlying motivations identified by empirical research undertaken by Ann Barlow and colleagues demonstrates the plurality of approaches to cohabitation. The same plurality exists of unregistered marriages, and empirical investigations support this assertion as outlined above. The underlying commonality is that in both instances, autonomous actions prompt the decision. The question then arises of how one can attract calls for legal intervention while the other does not? The Law Commission review of family law in 2015, which listed ‘religious only’ marriages as amongst the trends indicating the need for law reform, concluded that “the problems with the system are such that reform is not a simple matter of deciding whether any particular group should be able to conduct legally binding marriages. Rather, a thorough review of the law as a whole needs to be carried out in order to provide a system that is both more coherent and fair to all.”⁹⁷ Interestingly, of the other two underlying reasons supporting law reform, the first is the ‘demand for an alternative option’ by those who wish to enter into

⁹⁴ Barlow, A. et al (2005), *Cohabitation, Marriage and the Law*, Hart Publishing, Oxford and Portland, Oregon, at 65

⁹⁵ Ibid at 68

⁹⁶ Ibid, at 72

⁹⁷ The Law Commission, *Getting Married, A Scoping Paper*, 17 December 2015, at 18

marriages using ceremonies other than a civil or religious one.⁹⁸ This may be due to underlying belief systems or a simple preference for a ceremony that is more individually meaningful. The Law Commission reaches a logical and rational conclusion, which does not hasten towards legislation, but rather recognises the complexity and plurality which surrounds unregistered marriages, making an adequate solution equally complex. [17] [SEP]

For those who consciously and autonomously elect to enter an unregistered marriage, they are navigating between the culture of the society in which they are citizens and their religious norms, with what may be differing motivations, but with the outcome that they are deemed legitimately married in the eyes of their (religious) communities, while opting for a cohabiting family unit as far as the law is concerned. This intersection meets their religious needs, while simultaneously being an acceptable cultural position. Thus, unregistered marriages can in fact be argued as being the result of successful integration, whereby British norms have been fused with particular normative religious influences, allowing citizens to autonomously navigate between religious norms and British cultural norms.

The normative influences of religious traditions interfacing with new cultures, are giving rise to newly emergent trends and patterns of behaviour, of which unregistered marriages is certainly one. This can be described as a new cultural reality for British and European Muslims, which has evolved over time. Certainly, Barlow *et al*⁹⁹ identified the shift in public opinion where marriage and cohabitation are concerned, stating that the significance of marriage has declined over time and cohabitation is increasingly becoming accepted and indeed practiced. They identified that in 2000, 25-34 year olds were the most likely to cohabit, and twice as many non-religious people were cohabiting than religious people.¹⁰⁰ It

⁹⁸ Ibid, at 11

⁹⁹ Barlow, A. et al (2005), *Cohabitation, Marriage and the Law*, Hart Publishing, Oxford and Portland, Oregon, at 15

¹⁰⁰ Ibid, at 16

is also of interest to note that they identified no significant educational, social or class differences between those choosing to marry and those cohabiting.¹⁰¹ The shift in public attitudes away from a moral judgement being attached to cohabitation, to it becoming a cultural norm, and one which was not attached closely or even loosely with the idea of marriage is an interesting shift. This is clearly a departure from religious norms and sensibilities surrounding sexual relationships outside of marriage.

Contrasted with Muslim couples, it is clear that there are major conceptual differences between cohabitation and the performance of unregistered marriages as the normative influence here is definitively of religious origin. The *nikkah* or Islamic marriage, is a religious ceremony deemed necessary for a couple to enter before embarking on a sexual relationship. This religious norm is highly coercive, and a study conducted previously by this author found that the *nikkah* and celebrating with loved ones were considered to be the most important considerations when celebrating nuptials. Registration was deemed unnecessary and unduly burdensome both in terms of time and expense.¹⁰² However, not all forms of unregistered marriages can be linked to British cultures, namely polygamy.

Polygamy

Monogamy is the established legal position in England and Wales, and polygamy is ruled a ‘felony’ by virtue of the text of a dated statute which prohibits marriage while already being married.¹⁰³ Within the Islamic legal traditions, the exclusivity of the marital relationship is not a feature, as the Qur’anic revelation from a period of war states that a man may marry up to four wives (but he is compelled to deal with them ‘justly’ obligating a balance of equal

¹⁰¹ Ibid, at 17

¹⁰² Akhtar, R. (2015)

¹⁰³ Section 57 Offences against the Persons Act 1861.

treatment, in the absence of which he can only legitimately marry one wife at a time).¹⁰⁴ The context to this revelation was the high numbers of orphans and widows left by war, who would need caring for.¹⁰⁵ This provides a clear variance between English law and the parameters for marriage within the Islamic traditions. This issue provides an additional facet to the discourse surrounding unregistered marriages, which shall be discussed in further detail below.

In considering Lord Penzance's definition of marriage as 'to the exclusion of all others'; this is certainly still the position within the statutes¹⁰⁶, however, challenges such as the Islamic polygamous marriages mean that the judiciary have been required to deliberate creatively when dealing with the outcome of such marriage's in the interests of protecting vulnerable parties left without recourse to support in the event of a breakdown in the marriage.¹⁰⁷ This relatively contemporary challenge does lend certain irony as the century and a half old case of *Hyde* itself dealt with polygamy in the Mormon context.¹⁰⁸ In that case, the court had refused to adjudicate on Mr Hyde's marriage, stating that 'An abhorrence of sexual relationships which did not conform to 'marriage' as the Judge Ordinary understood that term

¹⁰⁴ The Holy Quran, An-Nisa, Verse 3

¹⁰⁵ The question of Polygamy within Islamic law is complex. While it is referred to within the Quran, the context and parameters have led some scholars to conclude that it should be prohibited, and others who deem it permissible but with restrictions in place. See Khaddury, M. (1977-1978) 'Marriage in Islamic Law: The Modernists Viewpoints'. 26 *The American Journal of Comparative Law*, 213-218, at 216

¹⁰⁶ Section 57 Offences against the Persons Act 1861.

¹⁰⁷ Shah, P. (2003) 'Attitudes to Polygamy in English Law'. *International and Comparative Law Quarterly*. Vol. 52:2, pp 369 – 400

¹⁰⁸ Carroll, L. 'Recognition of polygamous marriages in English Matrimonial law: the statutory reversal of *Hyde v Hyde* in 1972', (2007) *Institute of Muslim Minority Affairs Journal*. Vol. 5:1, 81-98

in the context of Christian monogamy permeates the decision.¹⁰⁹ Thus, Mr Hyde's potentially polygamous marriage was deemed to be beyond the capacity of the courts.

Recent criticisms of unregistered Muslim marriages have cited polygamy as one of the underlying causes.¹¹⁰ Polygamous marriages are still not recognised *per se* within the UK; however, they are acknowledged.¹¹¹ The Immigration Act 1988 placed a ban on the entry of second or subsequent wives from polygamous unions having a right to join their spouse in the UK. However, Section 47 of the Matrimonial Cause Act 1973¹¹² provides: '(1) A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person.' This provision was intended to provide relief for vulnerable spouses upon the termination of the marriage,¹¹³ for example in the case of death of the spouse making financial contributions to the household. However, this was only intended to recognise polygamous marriages from jurisdictions which permitted such unions, as any polygamous marriages conducted within the UK would not be recognised.¹¹⁴ Further to this, any person

¹⁰⁹ Ibid, at 82.

¹¹⁰ Newspaper reports in October 2015 focused on claims made by Baroness Cox about 'Shariah marriage' in the UK, where she claimed men in polygamous marriages were having 'up to 20 children each'. 'Muslim Men having '20 children each' because of Polygamy, peer claims', in *The Telegraph*, 23 October 2015. These claims were not corroborated by evidences, and were rightfully questioned by many.

¹¹¹ The Matrimonial Proceedings (Polygamous Marriages) Act 1972 was enacted 'to enable matrimonial relief to be granted, and declarations concerning the validity of a marriage to be made, notwithstanding that the marriage in question was entered into under a law which permits polygamy'. This Act has largely been amended by subsequent legislation.

¹¹² Incorporating the Matrimonial Proceedings (Polygamous Marriages) Act 1972.

¹¹³ The lack of recognition of polygamous marriages prior to this was in fact protecting men within such unions from having any responsibility towards their wives.

¹¹⁴ Shah, P. 'Attitudes to polygamy in English Law', (2003) *International and Comparative Law*, 52, pp 359-400.

domiciled in the UK and conducting a polygamous marriage abroad would be barred from recognition of the marriage.¹¹⁵ However, an unregistered marriage would have no need for legal interventions from the state, and therefore polygamy becomes possible, and if newspaper headlines are to be believed, very probable.¹¹⁶

Unregistered Marriages in Human Rights Discourse

- The lack of recognition afforded to unregistered marriages raises a number of human rights implications. For couples who perform a marriage ceremony, consider themselves married, and conduct their lives as if married.
- Lack of resources to marry, but desire to enter into a sexual relationship in accordance with religious norms
- Holiday romance – unregistered and often temporary
- Women may be instigators

es in accordance with this belief, the question of discrimination potentially arises when the state excludes them from the protections available to registered married couples, by virtue of the lack of recognition of the relationship.¹¹⁷ The European Court of Human Rights (ECtHR) heard the case of *Muñoz Díaz v Spain* in 2009¹¹⁸ which involved an unregistered Roma marriage performed in 1971 in Spain, in accordance with the couple's Roma customs and traditions, resulting in a family unit recognised by the Roma community as a marriage. Upon the death of the husband 19 years later, the applicant claimed the 'survivors pension' in

¹¹⁵ Matrimonial Causes Act 1973, Section 11(d)

¹¹⁶ 'Young British Muslims are fuelling a rise in Sharia weddings and secret polygamous marriages, claims Islamic family lawyer', *Daily Mail*, 3 July 2015

¹¹⁷ Lucic, N. & Grigic, N. (2015) 'Marriage V. Cohabitation in the Legal Practice of the European Court of Human Rights', *Contemporary Legal and Economic Issues* 5 : 57-84, at 58

¹¹⁸ *Muñoz Díaz v Spain* [2009], Application No. 49151/07.

relation to the husbands social security payments made throughout the duration of their marriage. The state refused to grant her the pension as they it did not recognise the couples 1971 marriage as being valid, as it did not abide by the requisite legal requirement of the Civil Code 1971 (as amended), and the General Social Security Act 1994. Following a number of hearings at various levels of the national legal system, wherein the relationship was eventually concluded to be one of cohabitation and not marriage, the case was appealed to the ECtHR on the grounds of a breach of Article 14's prohibition of discrimination in conjunction with Article 1 of Protocol 1's right to peaceful enjoyment of possessions. Further, the breach of Article 14 in conjunction with a breach of Article 12's right to marry.

These arguments were advanced on the basis that Article 14 protected against discrimination on the grounds of race and social condition. It was put forward that by failing to recognise the Roma marriage, the state was discriminatory on the grounds of race as this form of marriage was the only one recognised within her community. Further, she argued her social condition was one of economic dependence which was not being recognised by the state in denying her access to the pension, and thus a breach of Article 1 of Protocol 1's right to peaceful enjoyment of possessions. The breach of Article 12 was claimed based on the state's failure to recognise the Roma marriage as valid despite the position this ceremony occupies within the community.

The state's argument was that it was the failure of the couple to enter a registered/recognised marriage which resulted in the denial of the pension, not any positive discrimination by the state. Further, the right to marry was not being infringed by the state as it imposed one set of regulations on *all* citizens equally. The court's verdict with a majority of 6 to 1, was that the state's refusal to 'recognise the applicant's entitlement to a survivor's pension constituted a difference in treatment in relation to the treatment afforded, by statute or case-law, to other

situations that must be considered equivalent in terms of the effects of good faith, such as belief in good faith in the existence of a marriage that is null and void.’¹¹⁹ Thus, the court identified a disproportionate difference in treatment in this case and awarded the wife the survivor’s pension on this point based on her good faith when she entering the marriage, and the state’s treatment of the relationship which gave rise to her reasonable expectation of entitlement. However, with regards to an Article 14 breach taken together with Article 12, they found no breach by the state occurred, as civil marriages were available in Spain without distinction between people since 1981.

This verdict was reinforced in the 2010 decision from the Grand Chamber in *Serife Yigit v Turkey*¹²⁰ involving an Islamic religious marriage in Turkey, in which the court upheld the position that there was no breach of Article 8 or 12, or Article 1 of Protocol 1. The marriage took place in 1976, and produced 6 children. The husband died in 2002 and following his death, the lack of registration of the marriage resulted in the state excluding the wife from obtaining pensions and health benefits which her husband had accrued. The state refused to recognise the religious marriage which remained unregistered for awarding ‘survivors benefit’, and the ECtHR held that it was the couple’s choice to live in a religious marriage only, and that they had in fact enjoyed peaceful family life within this union and therefore no breaches occurred.

The potential rights which a litigant may argue are being infringed could also include Article 9’s freedom of religion in the instance that they argue that their religious beliefs do not allow for any other form of marriage being entered. The fundamental rights which one may argue are being infringed by the state’s refusal to recognise a marriage conducted outside of it’s

¹¹⁹ Ibid, at para 65

¹²⁰ *Serife Yegit v. Turkey* [2010] ECtHR 1672 (GC) (No. 3976/05)

specified parameters are clearly wide. While the ECtHR has established that the state's uniform application of the law means these freedoms are in fact still intact, the situation gives rise to the question of potential infringement of autonomy. Perhaps one can argue that the state is placing a couple under duress and compelling them to adhere to a particular form of marriage. However, such arguments appear bound to fail unless a couple can demonstrate that the impact is greater upon them due to some fact, such as the migrant who does not have the correct identity documents to enter into a state recognised marriage, whose unregistered marriage is then discriminated against.

Despite these arguments, it is clear that the ECtHR's approach means that an unregistered marriage cannot be equated with a civil marriage on the basis of equality arguments, except in exceptional circumstances wherein reasonable expectations arose from the state's interactions with the couple. However, the latter scenario does not result in a civil marriage status being granted to the unregistered marriage. Arguments about religious freedoms and autonomy seem bound to fail, as within Europe, the legislative provisions in each state relating to the formulation of a valid marriage are equally imposed on all citizens in the relevant jurisdiction. Thus, unregistered marriages in the UK and elsewhere in Europe, will not attract human rights protections, and will be treated as cohabitation arrangements which are not recognised by the state, thus forsaking the state's legislative protections.

Conclusions

The institution of marriage is culturally universal. This union prevails across all land and terrain, differing in its manifestation according to local and regional norms. However, this family arrangement has faced challenge over the past 50 years. Differences no longer necessitate differing geographic boundaries and can in fact be observed within the same territory. All European jurisdictions have faced the question of multiculturalism and its impact on what can be conceived as cultural norms for their citizens. The nature of family

arrangements are also transforming internally without the influence of an external culture. The question of legalities surrounding unregistered marriages are mirrored for cohabiting couples. In England and Wales, a formal marriage has historically been the focal point of family law. Thus, legally recognised marriages are given special privileges and benefit from certain regulations. Cohabitees have been deliberately excluded from the framework in the interests of preserving the sanctity of marriage, something which recent successive governments in the UK have maintained. While married couples benefit from the Family Courts on relationship breakdown, cohabitees are left unprotected, regardless of the duration of the marriage. The impact can be colossal, as there is no duty to provide maintenance to cohabitants, and any interest in property which was jointly resided in or looked after will only be realised if there is a corresponding legal right within property deeds. While exceptions exists, the rule is that cohabitees would have to pursue property rights through channels other than the family courts, which is an expensive and painstaking process.

In considered the normative influences shaping the choice of legal protection Muslim couples afford themselves when they enter into unregistered, religiously sanctioned ceremonies of marriage, it is apparent that unregistered marriages appear to be a cultural trend amongst young Muslims with an array of potential underlying reasons and motivations being manifested. Influencing factors range from a lack of priority being given to civil registration, to a choice reflecting the short-term and potentially temporary nature of the relationship. Muslim couples are autonomously structuring their relationships in order to adhere to Islamic traditions of not engaging in sexual relationships outside of marriage, while not tying themselves into state recognised marriages with implications for maintenance and other potentially long-term consequences. Parallels can be drawn between such relationships and the choices of a cohabiting couple, however, complications arise where one or both spouses are labouring under the false belief that their marriage is recognised by the state and therefore they enjoy the protections of statutory family laws.

Where an unregistered spouse has attempted to claim Human rights protections in order to compel recognition of the marriage, it is clear from ECtHR case law that they are not protected. No discrimination in treatment can be identified by the state as the requisite requirements for recognition are imposed on all citizens of the state equally by the state, and no disadvantage has yet been identified and successfully argued.

The issue of unregistered marriages is not problematic when couched in terms of autonomous decision-making, as it has the same effect as cohabitation. However, in instances where the parties do not enjoy equal bargaining powers, or one or both parties are misinformed about the legal consequences to the extent that severe financial harm may occur on breakdown, the question of state intervention becomes conceivable. However, the issue of unregistered marriages still requires in-depth empirical investigation before any legal solutions can be proposed.

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