


# Islam, Marriage Law and the Legal Framework of England and Wales

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**Abstract:** This article examines Islam in Contemporary England and Wales, and asks what issues faced by Muslims may reveal about the legal landscape more widely, using Marriage Law as a case study. It opens with an overview of Religion, Islam and the Legal Framework in England and Wales, before addressing the modern law on the solemnisation of marriages and current proposals for reform. It then moves to examine the conscious choice of some Muslims to enter into purely religious marriages, and discusses what this reveals about Muslim communities and

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the overarching legal framework. In the concluding section, the piece then addresses what can be learnt about two observable realities from Marriage Law: 1) the continued problematisation of Muslims and Muslim Communities in popular and academic perception, and 2) the significance of unregistered religious marriages for other voluntary adult partnerships outside of the system of state registration

**Keywords:** religion; marriage; islam; constitutional culture; United Kingdom.

**Summary:** 1. INTRODUCTION. 2. ISLAM IN CONTEMPORARY ENGLAND AND WALES. 3. RELIGION, ISLAM AND THE LEGAL FRAMEWORK IN ENGLAND AND WALES. 4. MODERN LAW ON THE SOLEMNISATION OF MARRIAGES. 5. PROPOSALS FOR REFORM. 5.1. The dangers of too readily recognising relationships as legally binding marriages. 5.2. The conscious choice of some Muslims to enter into purely religious marriages. 6. MUSLIM COMMUNITIES AND THE WIDER LEGAL FRAMEWORK. 6.1. Noor. 6.2. Holly. 7. ANALYSIS AND CONCLUSIONS. 7.1. The Continued Problematisation of Muslims and Muslim Communities. 7.2. Unregistered Marriages-A Tangible Problem. 8. BIBLIOGRAPHY.

## 1. INTRODUCTION

The English and Welsh nations belong to the diverse society which makes up the contemporary United Kingdom.<sup>1</sup> The richness and variety of ethnicities, languages and cultures nested within modern Britain are justly a source of pride for many individuals and communities.<sup>2</sup> Nevertheless, it would be absurd to pretend that this Northern European setting basks in utopia, while citizens exchange in exclusively harmonious and creative dialogue. Lamentably, here as elsewhere, there are seams of racism and prejudice, both conscious and unconscious,<sup>3</sup> as well as the taint of Islamophobia infecting European culture more widely.<sup>4</sup>

It is also important to bear in mind that alongside these negative and discriminatory realities, there are legitimate debates about optimal approaches to adapting legal provisions and mechanisms to meet the needs of an ever-changing society. Reforming the law is rarely straightforward in any setting, because most problems are multifaceted and the range of available solutions often present competing advantages and drawbacks, rather than a single clear and obvious path. Regulatory structures crafted in previous

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<sup>1</sup> HARGREAVES, J., KESSLER, E., IZAMOJE, D. AND SYMON, A., *How We Get Along: The Diversity Study of England and Wales 2020*, The Woolf Institute, Cambridge, 2020.

<sup>2</sup> KHAN, A', "Ethnic Diversity Makes Britain's Culture Great: It would be a disaster if we lost it", *The Guardian*, 10/7/2019, (<https://www.theguardian.com/commentisfree/2019/jul/10/diversity-uk-britain-culture-arts-sport>, consulta: 22/10/2022).

<sup>3</sup> PITCHER, B., *The Politics of Multiculturalism: Race and Racism in Contemporary Britain*, Springer, London, 2009.

<sup>4</sup> JONES, S. AND UNSWORTH, A., *The Dinner Table Prejudice: Islamophobia in Contemporary Britain*, University of Birmingham, Birmingham, 2022.

centuries did not take account of the requirements of Muslim communities, because the religious demographics of their time had not generated sufficient pressure to do so. Equally, they did not consider the practical issues raised by a host of other aspects of life in the 2020s, such as: legally and socially entrenched commitments to gender equality and respect for LGBTQ+ rights,<sup>5</sup> widespread cohabitation outside of marriage,<sup>6</sup> obligations within international legal instruments,<sup>7</sup> current understandings of children's rights,<sup>8</sup> animal welfare,<sup>9</sup> or medicine and mental health.<sup>10</sup> As the very term “legal framework” implies, laws and their interpretation form part of an interconnected network of rules and norms, and shaking one part of the spider's web will send shockwaves through the whole. As a consequence, updating the law to deal with one set of demands must be done in a manner which is mindful of other necessary or desirable considerations. Bringing legal provisions to date in order to take account of a shifting religious landscape must take place alongside reforms needed to accommodate other social changes.

In light of this complexity, the interaction between legal reform and the needs of Islamic communities living within England and Welsh society is highly intricate, especially since, as discussed below, there is immense diversity amongst people who regard themselves as Muslims, and religion or worldview is only one element of the multifaceted identity experienced by human beings.<sup>11</sup>

This study aims to explore one particular aspect of that complexity, examining the current debate around the solemnisation of marriages, and the desperate need to reform such a creaking machinery from the eighteenth and nineteenth centuries. Furthermore, the implications which this framework has for religious marriages without civil effects must be also be taken into consideration.<sup>12</sup>

In order to do so, we shall begin our discussion with an overview of the social context within which this legal challenge is embedded, before moving on to examine the relevant law. We shall then provide a brief reprisal of the macro level legal framework, setting out the overarching protections of religious freedom presently in place, and then proceed to drill down into the detailed discussions around Wedding Law and Registration. Our

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<sup>5</sup> Equality Act 2010.

<sup>6</sup> HILL, A., “Cohabiting Couples Fastest Growing Family Type Say ONS”, *The Guardian*, 7/8/2019, (<https://www.theguardian.com/uk-news/2019/aug/07/cohabiting-couples-fastest-growing-family-type-ons#:~:text=More%20than%20two%2Dthirds%20of,%25%2C%20equating%20to%203.4%20million,consulta:17/10/2022>).

<sup>7</sup> European Convention on Human Rights 1950, incorporated into United Kingdom domestic law by Human Rights Act 1998.

<sup>8</sup> United Nations Convention on the Rights of the Child 1989.

<sup>9</sup> Animal Welfare Act 2006.

<sup>10</sup> BARTLETT, P. AND WRIGHT, D. (eds), *Outside of the Walls of the Asylum: The History of Care in the Community 1750-2000*, Bloomsbury, London, 1999.

<sup>11</sup> CHOUDHRY, S., *Multifaceted Identity of Interethnic Young People: Chameleon Identities*, Routledge, London, 2010, pág. 18.

<sup>12</sup> Law Commission of England and Wales, “A New Weddings Law: Report”, 19/7/22, (<https://www.lawcom.gov.uk/project/weddings/consulta:30/09/2022>).

ultimate goal is not only to offer some reflections on the specific debate around how best to reshape the legal arrangements on marriage recognition, but also to ask whether insights from this conversation can shed light on broader questions relating to Muslim communities and secular law. Through two hypothetical examples of young women in contemporary England and Wales, one Muslim and one non-religious, but both in partnerships outside of the framework of state registration, we inquire what wider lessons can be learned.

## 2. ISLAM IN CONTEMPORARY ENGLAND AND WALES

Islam is currently the largest single minority religious group in England and Wales, with approximately 2.7 million people identifying as Muslim in these nations in the 2011 census.<sup>13</sup> It is expected that this number will have risen in the intervening decade, although data from the 2021 census is not yet fully available. It is crucial to stress, however, that there is immense diversity between and within Muslim communities, a point which is often obscured in the media and popular discourse.<sup>14</sup> As would be expected from any major religion, there are a variety of branches, differentiated by their history and stance towards doctrinal questions.<sup>15</sup>

Moreover, since its inception Islam has been a proselytising religion and not an ethno-religious group, and Muslims in England and Wales come from a variety of racial and cultural backgrounds.<sup>16</sup> Just over two thirds of the Muslim population are of South Asian or British South Asian descent (Pakistani, Bangladeshi and Indian), while 10 % self-identified as black, 8% as white, 6% Arab and the remaining 8% opted for “Other” in the last Government census.<sup>17</sup> The categories made available to those completing the survey were extremely broad, and each of the groups offered encompasses a wide variety of subgroups, with vastly different cultural and linguistic backgrounds.

This variation would be significant in any context, but in a paradigm in which social structures and behaviour expectations are being examined, it is absolutely key. The borderline between religion and culture is notoriously porous,<sup>18</sup> and the very division

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<sup>13</sup> Office for National Statistics, “Exploring Religion in England and Wales: February 2020” , ONS, London, 2020 (<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/exploringreligioninenglandandwales/february2020#size-of-the-religious-populations>, consulta: 18/10/2022). The processing of data from the 2021 census was severely delayed by the Covid 19 pandemic, and more recent Government statistics are not available at the time of writing.

<sup>14</sup> CHAMBERS, C., PHILLIPS, R., ALI, N., HOPKINS, P. AND PANDE, R., “Sexual misery’ or ‘happy British Muslims’?, Contemporary depictions of Muslim sexuality”, *Ethnicities*, 19(1), 2019, págs. 66-94.

<sup>15</sup> KHURI, F., *Imams and Emirs: State, Religion and Sects in Islam*, Saqi Books, London, 2014.

<sup>16</sup> ADOGAME, A. AND SHANKAR, S., *Religion on the Move: New Dynamics of Religious Expansion in a Globalising World* , Brill, Leiden, 2012, pág. 162.

<sup>17</sup> Muslim Council of Britain, “British Muslims in Numbers Briefing”, 9/5/2016, (<https://mcb.org.uk/resources/> consulta: 1/11/2022).

<sup>18</sup> ABDULLA, M., “Culture, Religion, and Freedom of Religion or Belief”, *The Review of Faith & International Affairs*, 16:4, 2018, págs. 102-115.

itself is reliant upon an understanding of “religion” rooted in orthodoxy, rather than orthopraxy, which in turn stems from a Christian/Post Christian paradigm.<sup>19</sup> As Vickers has demonstrated writing in the context of Equality Law, an emphasis on orthodoxy when defining religion for legal purposes works to the detriment of communities whose faith is centred around praxis, rather than an affirmation of abstract ideas.<sup>20</sup> Although this construction of religion is less exclusionary towards Islam than some other religious traditions, for example the Dharmic faiths, it undoubtedly has a detrimental impact when it comes to individuals and groups arguing that cultural practices are intrinsic to living out their religion.

It is also important, for our current purposes, to highlight that Muslim individuals from different cultural contexts may experience and manifest their faith differently. There is diversity within Islam rooted in cultural variation, as well as theological debate, and this divergence cannot rationally be dismissed as something entirely extrinsic to religion. Consequently, legal regulations intended to provide for the needs of “Muslims” in respect to matters such as marriage registration need to be drafted in a sufficiently broadly and nuanced manner to at least take account of differing practices with regard to matters like pre-marital agreements and wedding venues.

This is not to imply that state authorities must necessarily facilitate all activities and traditions of differing communities within a plural society, as there may, on occasions, be sound policy reasons for deciding not to tailor the law to enable particular forms of social arrangements (either because these carry an intrinsic risk of comprising the rights of vulnerable people, or because there are other countervailing considerations which simply make accommodation impractical, e.g. the need for accurate record keeping in respect of marriage registration). Nonetheless, there should at least be a reasoned consideration based on an accurate understanding of the reality of grassroots community life, as opposed to allowing the diabolism of legal and administrative machinery to unintentionally, but unnecessarily, trample on the needs and preferences of citizens with its large and oblivious feet.

Furthermore, not only do particular Muslim communities have varying characteristics, the individuals who make up particular groups are, of course, also extremely diverse. For example, the experience of an adult male aged forty-five with no disabilities who has lived his entire life in England, may be radically different from that of an eighty-five year old woman who uses a wheel-chair, or a fourteen year old girl who recently arrived in the country as a refugee. In the past, public authorities in England and Wales have fallen into the trap of engaging in dialogue with some *sections* of a particular community, and interpreted this as the voice of the community as a whole.<sup>21</sup>

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<sup>19</sup> MIDDLETON, N., *Jesus and Women*, Lutterworth Press, London, 2022, pág. 163.

<sup>20</sup> VICKERS, L., “The Relationship Between Religious Diversity and Secular Models: An Equality Based Perspective”, in FOBLETS, M., ALIDADI, K., NIELSEN, J. AND YANASMAYAN, Z. (eds), *Belief, Law and Politics: What Future for a Secular Europe*, Routledge, London, 2014, págs. 123-130, 124.

<sup>21</sup> Muslim Women Network UK, “Unheard Voices: The Sexual Exploitation of Asian Girls and Young Women”, September 2013, (<https://www.mwnuk.co.uk/reports.php>, consulta: 9/11/1022).

Hearing the voices of minorities within minorities is a highly complex endeavour, but vital in any society with a serious commitment to human rights. Those exercising power within communities and purporting to speak for others may inadvertently, or cynically, misrepresent the perspective of some members, especially if their priorities do not align. Although it is, without doubt, critical not to feed into damaging stereotypes of Muslim women being oppressed and side-lined, as commentators like ELVER rightly assert,<sup>22</sup> recognising the multifaceted nature of human communities, as well as the need to access different constituent parts when engaging in dialogue, is the polar opposite of proceeding on the basis of narratives driven by an external perspective and predetermined agenda.

It is also significant that gender is only one relevant factor in assessing the plurality of interests within a community. Inevitably, because clashes around Islamic dress and veiling have been so prominent in both legal and political discourse in recent decades, issues around the rights and agency of women are at the forefront of our collective consciousness when approaching questions of law and Islam, especially against a family backdrop.<sup>23</sup> However, while the key importance of gender is in no sense denied, it is by no means the unique differentiating criterion which may place individuals in a minority position within their wider community: characteristics such as age, disability and sexuality may also have a similar impact.

In essence, the profile of Muslims living within England and Wales is remarkably diverse, at both a communal and an individual level, and sweeping generalisations are, therefore, very unhelpful. Nevertheless, Islam is a significant religious presence within contemporary society, and a legal system which is responsive to social needs must take adequate and nuanced account of large groupings, because the kaleidoscope of cultures and traditions within English and Welsh Islam does not erase points of commonality. For instance, the aspects of shared concerns and aspirations allow umbrella organisations like the Muslim Council of Britain (“MBC”) to represent over five hundred constituent groups.<sup>24</sup> being the MBC one fundamental vehicle to provide collective input into Government consultations over law reform, in areas as diverse as hate crime and responses to Covid 19.<sup>25</sup>

To sum up, even though we have highlighted the importance of caution in interpreting collective expressions, and complexity of the granular detail with regard to English and Welsh Islam, the significance of overarching structures and the macro picture should not be discounted. Moreover, it is vital to highlight that questions around Islam and the legal framework do necessarily operate in the wider backdrop of constitutional arrangements

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<sup>22</sup> ELVER, H., *The Headscarf Controversy: Secularism and Freedom of Religion*, Oxford University Press, Oxford, 2014, págs. 1-71.

<sup>23</sup> See, for example: *Osmanoğlu and Kocabaş v Switzerland* [2017] ECHR 14; *SAS v France* [2014] ECHR 695; *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15.

<sup>24</sup> Muslim Council of Britain, “Who Are We?”, (<https://mcb.org.uk/about/>, consulta: 30/10/2022).

<sup>25</sup> Muslim Council of Britain, “Consultation Submissions” (<https://mcb.org.uk/consultations-and-submissions/> consulta: 13/11/2022).

and culture, and precisely for this reason, we shall briefly reprise the legal structures in place, before going to look in detail at the arrangements for the solemnisation of marriage.

### 3. RELIGION, ISLAM AND THE LEGAL FRAMEWORK IN ENGLAND AND WALES

England and Wales are obviously constituent parts of the United Kingdom, and as such are subject to the constitutional law of that State. The Human Rights Act 1998 incorporated the provisions of the European Convention on Human Rights into domestic law, whilst guaranteeing the absolute right to hold religious beliefs, and a right to manifest such convictions which may only be subject to such limitations as are:

*“prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”*<sup>26</sup>

Furthermore, it is well established that the right to live our beliefs is not contingent upon an individual demonstrating that their interpretation of the faith or ideology in question is mainstream, or even recognised as legitimate by a minority of adherents to the same creed.<sup>27</sup> Provided that the beliefs are sincerely held, and of a serious and profound nature, they will come within the ambit of Article 9.<sup>28</sup> On the positive side, this means that an individual Muslim will not be required to demonstrate that their personal religious practice conforms to any external set of norms.

Less happily, this mindset ties protection of religious freedom to a cerebral conviction, which as noted above, springs from Western European thought patterns emerging from the era of Reformations and the Enlightenment. Neither the architects of the ECHR, nor the judges who have nurtured its evolving interpretation, adequately addressed the question of how Article 9 relates to adults whose mental capacity is impaired, nor children and young people whose decision-making competence and sense of identity remain inchoate.<sup>29</sup> In addition, both domestic and Strasbourg judges have been reluctant to stretch the boundaries of the Article, to accommodate cultural and social practices not directly linked to religion or philosophy in a form which can be clearly or easily articulated.<sup>30</sup> For instance, in *Jones v UK* the applicant challenged a refusal by the local council to permit him to erect a gravestone for his daughter which included a photograph, and he failed to convince the European Court of Human Rights that honouring such an image was an action related to his religious faith. By the same token, members of the judiciary may be

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<sup>26</sup> Art 9:2 European Convention on Human Rights.

<sup>27</sup> *Eweida v UK* [2013] ECHR 37.

<sup>28</sup> *R (Williamson) v Secretary of State for Education* [2005] UKHL 15.

<sup>29</sup> GARCÍA OLIVA, J. AND HALL, H., “Religious Decision Making and the Capacity of Children in the United Kingdom”, *Laicidad y Libertades*, 2013, págs. 137-170.

<sup>30</sup> *Jones v UK* [2005] ECHR App No. 42639/04.

cautious in permitting cultural elements of wedding practice which do not obviously relate to religion to come within Article 9.

Needless to say, it is true that the right to private and family life may assist potential applicants in all of these situations, as both children and adults with impaired capacity, as well as individuals wanting protection and recognition for cultural practices not demonstrably religious in nature, may seek refuge in the ample scope of Article 8.<sup>31</sup> However, in doing so they are no longer directly asserting their right to religious freedom, but something far more amorphous, and possibly easier to justifiably de-prioritise or limit as a result.

In respect of cultural practices which appear to have some link to faith, broadly defined, it is also important to bear in mind the Common Law, and the Constitutional Culture of the United Kingdom, and in the case of England and Wales specifically, there is the ongoing influence of Anglican establishment.<sup>32</sup> This has produced both a socio-political and a judicial trend towards respect for religion and a predisposition towards an enabling approach to faith and conscience as a default position.

The socio-political arm of this phenomenon stems from the nature of the Henrician Reformation and its aftermath,<sup>33</sup> and we shall need to refer to these historical events, however briefly. The break with Rome was triggered by the dynastic ambition of the monarch, rather than a groundswell of popular feeling or campaigning by the elite intelligentsia, leading to an ongoing struggle between factions fired by genuine Protestant fervour, who wanted radical reform, and those who embraced a more Catholic understanding of sacraments, ritual and ecclesiology.

Almost two hundred years of chaos and conflict ensued, interspersed by periods of relative stability, and by the beginning of the eighteenth century the appetite for bloodshed was waning. By this time a State Church which supported temporal authorities was entrenched, and in a world in which religion and politics were still indivisibly fused, a refusal to participate in its rites called into question the loyalty to the Crown.<sup>34</sup> Furthermore, access to a plethora of lucrative and prestigious personal and professional opportunities was contingent upon professing the Anglican religion, and law, Parliament, the universities, military/naval service as an officer and obviously the Church were closed to those who would not conform, and marriage prospects were significantly reduced. In light of all of this, there was a powerful incentive for both individuals and families to

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<sup>31</sup> BURBERGS, M., "How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in which New Rights are Born", in Gerards, J. and Brems, E. (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, Cambridge, 2013, págs. 315-329.

<sup>32</sup> GARCÍA OLIVA, J. AND HALL, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain*, Routledge: Abingdon, 2018.

<sup>33</sup> DUFFY, E., *The Stripping of the Altars: Traditional Religion in England 1400-1580*, Yale University Press, New Haven, 2005.

<sup>34</sup> COUDERT, A., *Religion, Magic and Science in Early Modern Europe and America*, ACB Clio, London, 2011, pág. 138.



squeeze their religious scruples to fit through the church door, and to tolerate some coreligionists whose views they found objectionable. Thus, a form of tolerance grounded in pragmatism found its way into the prevailing culture.

The more positive legal dimension of respect for religious diversity came later, and by the close of the eighteenth century, and increasingly into the nineteenth, it was becoming unacceptable to subject citizens to detrimental burdens on the basis of their religion. England and Wales had not experienced a revolution on British soil after 1688, and the response to religious inequality was both haphazard and conciliatory.<sup>35</sup> in broad terms, the Church of England did not lose its privileges, but gradually other groups came to share in them. Religious accommodation was increased, rather than retrenched, as a means of reducing differential treatment between faiths. Interestingly, no area of the legal system more beautifully exemplifies this than Marriage Law, as we shall shortly explore.

In the twenty first century the establishment relationship between the Church and State has not yet been dismantled, and despite the fact that in Wales the Church was formally disestablished in the early twentieth century, in response to national feeling about the imposition of an English institution,<sup>36</sup> as purely theological concern,<sup>37</sup> it remained established for a number of key legal purposes, including Marriage Law. Commentators like DOE have applied the label “quasi-established” to the Church in Wales as a result.<sup>38</sup> Given that the case study into which we shall delve relates to the law governing weddings, it is appropriate to treat the whole jurisdiction under consideration (England and Wales) as having an established Church, as substantially the same rules are in place for solemnisation of Anglican marriages in both nations.

Alongside the social and political impact for Establishment in fostering pragmatic tolerance, the legal realm of Constitutional Culture has also been moulded by Church-State relations. From the Reformation onwards, it was axiomatic that the law should support the teachings and operation of the Church of England,<sup>39</sup> but when treating some citizens less favourably on the basis of spiritual convictions became less tenable, the solution was to move from supporting the practice of Anglican religion to supporting religion in general terms. Moreover, this was followed by a small and easy step, moving from positive judicial and legislative treatment of religion to positive judicial and legislative stance towards all matters of conscience.

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<sup>35</sup> INNES, J., “People and Power in British Politics to 1850”, in INNES, J. AND PHILIP, M. (eds), *Re-Imagining Democracy in the Age of Revolutions*, Oxford University Press, Oxford, 2015, págs. 129-148.

<sup>36</sup> GAINER, J., “The Road to Disestablishment”, in DOE, N., *A New History of the Church in Wales: Governance and Ministry, Theology and Society*, Cambridge University Press, Cambridge, 2020, págs. 27-44.

<sup>37</sup> Welsh Church Act 1914.

<sup>38</sup> DOE, N., *The Law of the Church in Wales*, University of Wales Press, Cardiff, 2002, pág. 11.

<sup>39</sup> PICTON, H., *A Short History of the Church of England: From the Reformation to the Present Day*, Cambridge Scholars Publishing, Cambridge, 2015, págs. 17-64.

For example, deference towards religion saw the law bend at an early date to exempt Quakers from military service,<sup>40</sup> and during the First World War Parliament accepted that the position of all pacifists should be recognised, whether their objections to the war stemmed from religious or philosophical convictions.<sup>41</sup> By the early twentieth century, the prevailing Constitutional Culture in England and Wales was of positive regard for religion and conscience, and an expansive interpretation of the same. Provided that beliefs were sincerely held, it did not matter whether they were deemed eccentric or countercultural, and the legal system accepted that citizens should be free to live according to their personal creed, without molestation from the State. This explains exceptions within Criminal Law, keeping activities like ritual male circumcision and religious mortification licit, when comparable assaults for non-religious purposes were proscribed, regardless of purported consent.<sup>42</sup>

This expansive and libertarian approach partly justifies why the United Kingdom did not seek to enter into formal agreements with religious denominations, in a comparable manner to jurisdictions like Spain, which signed an international treaty with the Holy See in 1978<sup>43</sup> and gave other religious groups the possibility of making similar arrangements via a statutory provision.<sup>44</sup> It opted instead to give citizens space to pursue their own inclinations, and did not worry unduly as to whether or not they capitalised on the opportunity, nor whether the framework as a whole was coherent or efficient.

In short, in the eighteenth century, the State gave the two most prominent religious minorities of the time considerable scope to manage their own affairs, recognising marriage according to the rites of the Jews and the Quakers. Then subsequently public authorities allowed for civil marriage, and later still provided separate legal machinery for other faith groups to opt into a system of solemnising weddings with effects in Civil Law.<sup>45</sup> This piecemeal and essentially reactive mode of law reform, combined with an historically libertarian approach to social organisation, helps to understand how England and Wales have arrived in the contemporary era with a labyrinthine system of Wedding Law. We shall now look at the modern provisions in detail, and explore their implications for Muslim communities.

#### **4. MODERN LAW ON THE SOLEMNISATION OF MARRIAGES**

England and Wales currently have four separate routes to achieving a marriage recognised in Civil Law:

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<sup>40</sup> Militia Ballot Act 1757.

<sup>41</sup> Military Service Act 1916.

<sup>42</sup> *R v Brown* [1993] UKHL 19.

<sup>43</sup> MARTINEZ TORRÓN, J., *Religion and Law in Spain*, Kluwer, 2<sup>nd</sup> edición, 2018, para 68.

<sup>44</sup> Ley Orgánica Libertad Religiosa (7/1980) Art 7.

<sup>45</sup> GARCÍA OLIVA, J. AND HALL, H., *Law, Religion and the Constitution: Balancing Beliefs...*, op.cit., págs. 171-175.

- 1) Marriage according to the rites of the Church of England or Church in Wales. Anglican clergy have a duty to solemnise opposite sex marriages for anyone living within their parish if they request to do so,<sup>46</sup> as long as they do not have a former spouse still living.<sup>47</sup> Anglican clergy are free to marry divorcees if their conscience allows them to do so, but it is not a legal obligation.<sup>48</sup> Neither the Church in Wales nor the Church of England conduct same sex marriages,<sup>49</sup> although the Church in Wales will bless same sex couples after a civil marriage has taken place.<sup>50</sup>
- 2) Marriages according to Jewish or Quaker rites.<sup>51</sup>
- 3) Civil marriages conducted by a registrar with no religious character.<sup>52</sup>
- 4) Other religious marriages of faith groups in question which have opted into the legal framework for doing so.

Islamic marriages will be legally binding if they come within category number four. In order to opt-in a religious community needs a building which is registered both as a place of worship under the Places of Worship Registration Act 1855, and registered by the Registrar General for the solemnisation of marriages.<sup>53</sup> In addition, legally binding marriages must either be carried out in the presence of a registrar, or an “authorised person”, which would ordinarily be a minister of the relevant denomination.<sup>54</sup>

This means that in practical terms, faith groups wishing to conduct marriages binding at Civil Law need to have a building, which is a potential obstacle for small religious fellowships with limited resources, who may hire or share premises. It is also, it goes without saying, problematic for faiths for whom worship generally takes place outdoors or in private spaces as a matter of conscious choice and spiritual preference, as is the case

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<sup>46</sup> Faculty Office of the Archbishop of Canterbury, “A Guide to the Law for Clergy” (1999); see also *Davis v Black* (1841) 1 QB 900.

<sup>47</sup> Matrimonial Causes Act 1965, s. 8(2): ‘No clergyman of the Church of England or the Church in Wales shall be compelled – (a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or (b) to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister’.

<sup>48</sup> GARCÍA OLIVA, J. AND HALL, H., *Law, Religion and the Constitution: Balancing Beliefs...*, op.cit., págs. 171-180.

<sup>49</sup> See Marriage (Same Sex Couples) Act 2013, ss. 2,3 and 8. It was agreed prior to the introduction of same sex marriage that neither the Church of England nor the Church in Wales would be compelled to conduct same sex marriages, but the two Anglican provinces were empowered to decide independently whether and when they wished to do so.

<sup>50</sup> Church in Wales, “Church Approves Blessing for Same Sex Partnerships”, 6/9/2021, (<https://www.churchinwales.org.uk/en/news-and-events/church-approves-blessing-service-same-sex-partnerships/> consulta: 27/10/2022).

<sup>51</sup> Marriage Act 1949, s. 26(1) (as amended by the Marriage Act 1983, Sch. 1, and the Marriage Act 1994, s. 1(1)).

<sup>52</sup> Marriage Act 1949, ss. 45, 45A, 46, 46A, 46B.

<sup>53</sup> Marriage Act 1949, ss. 41–42 (as amended by the Marriage Acts Amendment Act 1958 s. 1(1) and the Marriage (Registration of Buildings) Act 1990 s. 1(1)).

<sup>54</sup> Marriage Act 1949, s. 2.

for some Pagan groups.<sup>55</sup> Once again, this illustrates that the current provisions are haphazard in their nature, and exclusive by action rather than design.

The truth is that it is currently easier for Muslim communities to opt into the legal arrangements for solemnising marriages than the system is for some other groups, because the Muslim practice of arranging their collective spiritual life around a building happens to fit more easily with the pre-existing Christian paradigm. We are at pains to stress that this does not reflect any conscious bias towards Islam or animus against Paganism, but it does demonstrate that elements of shared history and intercultural exchange have practical implications for the height of barriers to participation and the ease with which they can be surmounted. Moreover, the demand for a building is not per se problematic, because it is a resource which Muslim communities generally desire to have in any event,<sup>56</sup> but the two-step registration requirement is undoubtedly a layer of administrative aggravation which could be reduced.

Alongside the need for a building, the community needs to arrange for a representative to be certified as an “authorised person”, being this process again linked to the building, as the appointment is made by two trustees of the premises in question.<sup>57</sup> They must complete a short two-page form which can be emailed or posted to the General Register Office,<sup>58</sup> there is no pay fee payable, and the Government website contains detailed guidance in language which can be understood by someone without legal training.<sup>59</sup>

It is helpful to explain that the administration is of comparable complexity to applying for a British passport for an individual born in the UK and having citizenship, and considerably more straightforward than a passport application for anyone not in that situation. It is also without the expense of £75.50 chargeable for an online passport application,<sup>60</sup> and it sits well within the realms of the type of administrative interaction which adults in the general population routinely engage in. This point will be relevant for our discussion below in respect of unregistered marriages, and what factors may be leading causes to their continued prevalence, particularly within Islamic contexts. The comparatively easy procedure to register buildings and appoint authorised persons seems to suggest that increasing the buy-in to state arrangements will not be achieved purely by

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<sup>55</sup> STRMISKA, M., *Modern Paganism in World Cultures: Comparative Perspectives*, ABC CLIO, London, 2005, pág. 40.

<sup>56</sup> GILLIAT-RAY, S., *Muslims in Britain: An Introduction*, Cambridge University Press, Cambridge, 2010, págs. 181-205.

<sup>57</sup> H M Government, “Marriage Ceremonies”, 4/5/2021, (<https://www.gov.uk/government/publications/marriage-registration-guidance-for-authorised-persons/marriage-registration-guidance#authorised-persons>, consulta 6/11/2022).

<sup>58</sup> H M Government, “Guidance Letter for Certificate of Appointment”, 19/5/2021, (<https://www.gov.uk/government/publications/guidance-letter-for-the-certificate-of-appointment>, consulta: 6/11/2022).

<sup>59</sup> H M Government, “Equality Rights and Citizenship”, (<https://www.gov.uk/society-and-culture/equality-rights-and-citizenship>, consulta: 6/11/2022).

<sup>60</sup> HM Government, “Passport Fees”, (<https://www.gov.uk/passport-fees>, consulta: 6/11/2022).

reducing administrative burdens at a community level, particularly as these do not appear to be especially onerous.

The authorised person is responsible for: 1) Ensuring that the required legal preliminaries have been completed before a wedding ceremony takes place; 2) Making sure that the marriage is solemnised in accordance with the legislation in force and that the necessary records are properly completed; 3) Guaranteeing that the records are submitted to the Superintendent Registrar within the required timeframe.<sup>61</sup>

It should also be stressed that it is not surprising that these duties are more demanding than the steps which building trustees must make in order to appoint an authorised person, due to the importance of these formalities. Moreover, a failure to properly carry out the functions of an authorised person can lead to a criminal sanction, including imprisonment in the most serious cases,<sup>62</sup> and it would be conceivable, consequently, that some communities refrain from opting into the legal arrangements for carrying out marriages with civil effects, because neither the Imam nor other representatives are willing to take on this responsibility.

The number of unregistered Muslim marriages taking place within England and Wales is a source of concern both to the Government<sup>63</sup> and groups like the Muslim Women's Network UK,<sup>64</sup> but by definition, unregistered marriages do not appear on official statistics, and obtaining precise numbers is challenging. However, it is telling that in 2010 there were only 200 Muslim marriages recorded in place of worship, against a backdrop of 2,706,066 Muslims in the 2011 census.<sup>65</sup> This situation is worrying since the framework within England and Wales does not provide cohabitantes with any financial relief or protection, so economically vulnerable individuals living in unregistered marriages will have no recourse in secular law if the relationship breaks down. In addition to that, statistically, women are more likely to be financially dependent on their partners, especially if they live in a cultural context in which they are expected to shoulder the burden of unpaid domestic care for children and elderly relatives. Whilst this is not true for all Muslim women, it applies in many cases, for example in respect of those from South Asian backgrounds.<sup>66</sup>

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<sup>61</sup> H M Government "Authorised Persons: Advice for Marriage Ceremonies", 7/7/2021, (<https://www.gov.uk/government/publications/a-guide-for-authorized-persons>, consulta: 12/11/2022).

<sup>62</sup> Marriage Act 1949, s.76.

<sup>63</sup> House of Commons Library Briefing Paper No. 08747, "Islamic Marriage and Divorce in England and Wales", 18/2/2020.

<sup>64</sup> TALWAR, D., "Wedding Trouble as UK Muslim Marriages Not Recognised", *MWNUK*, 3/2/2010, ([https://www.mwnuk.co.uk/Wedding\\_trouble\\_as\\_UK\\_Muslim\\_marriages\\_not\\_recognised\\_49\\_news.php](https://www.mwnuk.co.uk/Wedding_trouble_as_UK_Muslim_marriages_not_recognised_49_news.php), consulta: 12/11/2022).

<sup>65</sup> House of Commons Library Briefing Paper No. 08747, "Islamic Marriage and Divorce in England and Wales", 18/2/2020, para 2.2.

<sup>66</sup> ALSTON, M., *Women, Political Struggles and Gender Equality in South Asia*, Palgrave Macmillan, London, 2014.

The absence of any protection from civil courts in the event of a marriage ending, and less favourable access even to arrangements regulating occupation of the family home in situations of domestic abuse, have the potential to trap women in unhappy unions, and at worst in situations of ongoing physical and emotional harm.<sup>67</sup> This dynamic also heightens the risk of children being exposed to unhealthy and sometimes actively dangerous domestic environments, when mothers are unable to escape toxic situations.

Furthermore, whilst it is imperative to address the most problematic scenarios, it is also key to remember that individuals are entitled by Human Rights Law to expect more from life and the legal system than bare physical and mental security.<sup>68</sup>

As the Supreme Court stressed in the now infamous case of *Owens v Owens*, denying a person a viable exit strategy from an undesired marriage is a significant interference with their Article 8 right to private and family life.<sup>69</sup> At the time of the litigation, it was still possible to defend a divorce in England and Wales, and a petitioner had to demonstrate irretrievable breakdown of the marriage plus one of the five facts set out in legislation.<sup>70</sup> The husband challenged his wife's assertion that his behaviour was such that it would be unreasonable to expect her to continue to live with him. The court reluctantly agreed that the required threshold of seriousness in respect of behaviour had not been met, and lacking an alternative fact on which to rely, the wife was unable to obtain a divorce.

There was justifiable outcry at the decision, as CARROLL AND POLLOCK'S article for the Law Society attests.<sup>71</sup> The case provided further impetus to the very belated introduction of no-fault divorce, but for our purposes it raises a serious question. If legal structures which transform a voluntary adult partnership into an involuntary adult partnership are incompatible with Article 8, is the absence of remedies for women seeking to exit religious only marriages compliant with the ECHR?

Certainly, the failure to capture the overwhelming majority of Islamic ceremonies is a disturbing feature of the present law on marriage formation, and it is one that the Law Commission have raised in their recent report, calling for a root and branch overhaul of the regulation of solemnising marriages. Given the significance of the Law Commission, as an independent body created with the aim of keeping the law of England and Wales under review, as well as recommending reform where appropriate, it is useful for us to address these proposed changes.<sup>72</sup>

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<sup>67</sup> Family Law Act 1996, ss. 33-41.

<sup>68</sup> ECHR Articles 8 and 12.

<sup>69</sup> *Owens v Owens* per Lord Wilson, [2018] UKSC 41 para 29.

<sup>70</sup> As the law was at the time, Matrimonial Causes Act 1973, s. 1(2), although this provision of the statute has now been repealed.

<sup>71</sup> CARROLL, J., AND POLLOCK, J., "Owens v Owens: Unreasonable Law not Unreasonable Behaviour?", *The Law Society*, 25/7/2015.

<sup>72</sup> The Law Commission, "Welcome", (<https://www.lawcom.gov.uk/#:~:text=The%20Law%20Commission%20is%20the,modern,consulta:20/10/2022>)

## 5. PROPOSALS FOR REFORM

Of the proposals being made, the following suggestions have particular relevance for the context of Islamic marriages:

- 1) Regulation of officiants, rather than the location.
- 2) Universal rules for all weddings.
- 3) Recognition of a far wider range of wedding venues, including private homes.
- 4) Permitting religious ceremonies in places other than places of worship, and dispensing with the need to include certain prescribed words within the rites.<sup>73</sup>

Undoubtedly, some dimensions of this report are positive and they should be highlighted, in particular: 1) the expansion of available venues, combined with dispensing with requirements for a specific verbal formula; and 2) the harmonisation of rules on the solemnisation of marriage. In respect of the first, as discussed at length above, there is huge variation within Islam in England and Wales. By no means all couples wish to celebrate their marriage in a mosque, and homes are considered traditional in some communities, whilst others prefer large community venues like sports halls or even museums. Moreover, some groups prefer gender separate arrangements, and will want facilities which permit this.<sup>74</sup>

Therefore, flexibility in terms of location, combined with freedom with regard to the wording of undertakings, would potentially allow for a greater variety of Islamic weddings to slot comfortably within the Civil Law structure. This would be a desirable development, as amongst other reasons it would potentially bring perceptions of many couples, and in particular brides, into line with reality. It is not surprise that non-lawyers find difficult to understand that an event which has the outward dressings of marriage in accordance with their cultural expectations, and during which papers are signed, does not in fact generate a legally binding relationship,<sup>75</sup> and as PATEL convincingly argues, many Muslims in England and Wales currently assume that their Nikah (Islamic marriage contract) will generate a relationship binding in Civil Law.<sup>76</sup>

Nonetheless, for a variety of reasons, it would be both dangerous and irrational to assume that even a wholesale acceptance of the Law Commission proposals (itself far from a political certainty) would resolve the social problems currently generated by non-registered Islamic marriages, and there are two principal reasons for ongoing concern: 1) The dangers of too readily recognising relationships as binding marriages; and 2) The conscious choice of some Muslims to enter into purely religious marriages. We shall

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<sup>73</sup> Law Commission, “Weddings”, (<https://www.lawcom.gov.uk/project/weddings/> consulta: 9/11/2022).

<sup>74</sup> New York Times, “For Some Muslim Wedding Couples Gender-Separate Weddings Are the Norm”, 20/4/2020 , (<https://www.nytimes.com/2020/09/23/fashion/weddings/for-some-muslim-couples-gender-separate-weddings-are-the-norm.html>, consulta: 9/11/2022).

<sup>75</sup> VORA, V., “Unregistered Muslim Marriages in the United Kingdom”, in Oberauer, N., *Legal Pluralism in Islamic Contexts*, Brill, Leiden, 2019, págs. 43-62, 55.

<sup>76</sup> PATEL, S., “The Big Islamic Nikah Myth”, *Family Law*, 9/7/2014, ([https://www.familylaw.co.uk/news\\_and\\_comment/the-big-islamic-nikah-myth](https://www.familylaw.co.uk/news_and_comment/the-big-islamic-nikah-myth), consulta: 5/11/2022).

discuss both of these realities, before considering what our findings can tell us about Islam and the secular legal framework more broadly.

### **5.1. The dangers of too readily recognising relationships as legally binding marriages**

As PROBERT has demonstrated in her recent and masterful examination of the history of English Marriage Law, debates around record keeping, registration and the need for certainty are nothing new,<sup>77</sup> and given the implications of marital status, it is essential to have clear and verifiable evidence of whether or not a binding marriage has taken place. In England and Wales, marriage is a zero sum game, in that it is frequently a determining factor in disputes around property or relationship breakdowns and death. If a cohabitee dies, their partner can expect nothing as of right unless provision has been made in a will (although if the cohabitation has lasted more than two years, courts do have some discretion).<sup>78</sup> All things considered, accurate record keeping is essential if chaos and acrimony over finance and property are to be avoided.

Of even more pressing concern, legal rules around pre-marriage and marriage formalities exist in part to tackle the evils of predatory marriage and forced marriage. A reliable representative of the public authorities needs to be present in order to take all reasonable steps to ensure that the parties are giving their genuine and informed consent. Forced marriage<sup>79</sup> is recognised as a serious social problem within England and Wales at the current time,<sup>80</sup> and although by no means confined to Islamic contexts, most certainly it is an ongoing evil within some subgroups of some communities.<sup>81</sup>

There are a number of legal provisions, both civil and criminal, targeted at eradicating this practice as well as punishing those culpable of this form of abusive and demeaning treatment,<sup>82</sup> and given the significance of religious marriages for many individuals in the jurisdiction, and the families and communities within which they live, criminal sanctions for forced marriages apply whether or not the ceremony generated or was intended to generate a relationship binding in Civil Law.<sup>83</sup> This is a rational and necessary approach, particularly bearing in mind the current prevalence of purely religious ceremonies. Nevertheless, whilst acknowledging that forced marriages must be robustly addressed whatever the legal status of the ceremony, it remains true that in weddings with civil

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<sup>77</sup> PROBERT, R., *Tying the Knot*, Cambridge University Press, Cambridge, 2021, págs. 1-146.

<sup>78</sup> Inheritance (Provision for Family and Dependents) Act 1975.

<sup>79</sup> H M Government, “Forced Marriage: Guidance”, (<https://www.gov.uk/guidance/forced-marriage>, consulta: 4/11.2022).

<sup>80</sup> JULIOS, C., *Forced Marriage and Honour Killings in Britain*, Taylor and Francis, London, 2016.

<sup>81</sup> BOWEN, J., *On British Islam: Religion, Law and Everyday Practice in Sharia Councils*, Princeton University Press, Princeton, 2016, pág. 69.

<sup>82</sup> Forced Marriage (Civil Protection) Act 2007; Anti-Social Behaviour Crime and Policing Act 2014.

<sup>83</sup> Anti-Social Behaviour Crime and Policing Act 2014, s.121(4).



consequences, the state representative must provide an additional layer of protection, and it would be illogical to water down those obligations in a way which weakened this safeguard.

For all of these reasons, regardless of the form of any legal restructuring, it is going to be imperative to impose hefty requirements for administrative compliance on persons overseeing wedding ceremonies, and back these up with punitive criminal sanctions, and inevitably, as a result, many individuals within local Islamic communities will continue to display reticence about taking on this responsibility. Even though, as discussed above, the steps demanded of a mosque desiring to opt into performing legally binding marriages are not especially onerous, far more legal pressure is laid upon the authorised person, and it is very difficult to imagine how this could not continue to be the case in any alternative system, meaning that in practice the uptake might remain disappointingly low.

Vora argues that the experience of a celebrant-based system in Scotland has shown the potential for a greater recognition of religious marriages, and thereby stronger protection for individual citizens, especially women.<sup>84</sup> However, as commentators like STURROCK prove, the problem of unregistered Muslim marriage is also a cause of concern north of the border,<sup>85</sup> and we face here the problem of comparing apples and oranges. Scotland is indeed a radically different context both legally and socially, the legal framework dealing with voluntary adult partnerships is by no means isomorphic to that in place in England, and the Muslim population is far smaller (at around 75,000).<sup>86</sup> Moreover, the Scottish society has a completely distinct Constitutional Culture, especially with regard to religious matters, and in all honesty, a celebrant based model has not been a magic wand in regard to religious marriage registration in Scotland. Importantly, even if it had, caution should be exercised in assuming that a similar change would be witnessed in England were it to follow a comparable path.

We are not suggesting, however, that moving to a celebrant-based model would not be a positive move for England and Wales, because the change makes coherent sense, and it is difficult to see how a new Marriage Law allowing ceremonies in a wide variety of venues could operate on any other basis. Our contention is rather than such a development will not necessarily trigger a paradigm shift in Islamic marriage registration, given the possibility of continued reluctance to participate from those who would carry the can for ensuring compliance with formalities.

The consideration that not all Muslims find themselves outside the Civil Law framework by accident also relates to our second concern, viz the conscious choice of some Muslims to enter into purely religious marriages.

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<sup>84</sup> VORA, V., “Unregistered Muslim Marriages in the United Kingdom”, op.cit., págs. 43-62.

<sup>85</sup> Sturrock, G., “Islamic Marriage and Divorce in Scotland: Will the English decision in Akhter v Khan change the position?”, *Family Law*, 24/10/2018, ([https://www.familylaw.co.uk/news\\_and\\_comment/islamic-marriage-and-divorce-in-scotland-will-the-english-decision-of-akhter-v-khan-change-the-position](https://www.familylaw.co.uk/news_and_comment/islamic-marriage-and-divorce-in-scotland-will-the-english-decision-of-akhter-v-khan-change-the-position), consulta: 9/11/2022).

<sup>86</sup> Elyshayyal, K., *Scottish Muslims in Numbers: Understanding Scotland's Muslim Population through the 2011 census*, University of Edinburgh, Edinburgh, 2011.

## 5.2. The conscious choice of some Muslims to enter into purely religious marriages

SANDBERG contends that “*unregistered religious marriages are not always problematic. Where they result from a free and deliberate choice then the decision not to comply with legal formalities should be respected.*”<sup>87</sup>

There are really two assertions wrapped within this comment. There is the claim that not all unregistered marriages are the result of either ignorance of required formalities or practical barriers to meeting these, and the subsequent contention that free and deliberate choices should be respected.

The first point is demonstrably true, as is backed by the incontrovertible evidence that some Muslims are indeed fully aware that their Islamic marriage is not binding in Civil Law.<sup>88</sup> The reasons behind this choice are immensely varied. In some cases, it may be a socially acceptable manner to cohabit, and the lack of Civil Law ties is seen as a positive benefit by both parties; even though this is not to imply that religious marriage and secular cohabitation are coterminous for any or all purposes. In fact, as AKHTAR demonstrates, there are crucial differences in terms of social expectations in many cases.<sup>89</sup> Yet having acknowledged this, there are undoubtedly instances in which some young couples may enter into a religious only marriage without intending it necessarily to be a lifetime commitment, or to become financially or practically dependent upon one another from the outset. There are a plethora of cultural traditions and viewpoints upon human relationships, as upon every other topic, within Islam in England and Wales.

Conversely, some couples may decide that as a matter of principle, they would prefer any divorce or dispute to be subject only to the jurisdiction of religious authorities. Given the uncertain status of prenuptial agreements in England and Wales, and the uncontested discretion still vested in judges as to whether to follow their terms, the surest way of achieving this end is to avoid a civil marriage.<sup>90</sup>

In both of these scenarios, the libertarian stance of Sandberg is completely justifiable, as there appears to be no reason for the State to impose external norms or values on the couple in question. Nonetheless, religious only marriages should only be endorsed as a legitimate option if they resulted from a free and deliberate choice, and regrettably, this is not always the case, as the much-discussed case of *Akhter v Khan*<sup>91</sup> powerfully illustrates. In this litigation, a couple entered into a religious only marriage, with the promise that a civil ceremony would follow, but the husband refused to honour his

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<sup>87</sup> SANDBERG, R., “Marital Problems: The Law Commission’s Consultation Paper and “non-qualifying” Wedding Ceremonies”, *Ecclesiastical Law Journal*, 23(2), 2021, págs. 140-159, 158.

<sup>88</sup> *Akhter v Khan* [2020] EWCA Civ 22.

<sup>89</sup> AKHTAR, R., “Religious Only Marriages: Cohabitation: Deciphering Difference”, in AKHTAR, R., NASH, P. AND PROBERT, R., *Cohabitation and Religious Marriage: Status, Similarities and Solutions*, Bristol University Press, Bristol, 2020, págs. 69-85.

<sup>90</sup> *Radmacher v Granatino* [2010] UKSC 42

<sup>91</sup> *Akhter v Khan* [2018] EWFC 54

commitment, despite years of pleading from the wife, who was acutely aware of her precarious position in Civil Law.

Although the husband was abusive, the relationship endured for years, and children were born to the couple. When the wife finally decided that she could tolerate the situation no longer, she attempted to seek financial relief through the secular courts. The first instance judge adopted a highly creative interpretation of the Matrimonial Causes Act s11(a)(iii):

*“the parties have intermarried in disregard of certain requirements as to the formation of marriage);”*

The judge took the view that the Islamic ceremony had been understood by the wife to be part of a broader agreement, and that she had done everything in her power to comply with the requirements of the Matrimonial Causes Act 1973. This meant that her conduct fell within the terms of s.11 and her intended marriage was void. Whilst this might not sound like a victory, given that a void marriage for the purposes of English and Welsh law is void *ab initio*, and has no presence in law *as a marriage*, it does have effect as a *void marriage*,<sup>92</sup> and this is not insignificant. The acknowledgement of a void marriage opens the door to the same financial relief provisions which apply to a voidable marriage and divorce,<sup>93</sup> and if religious only marriages could generate void marriages, at least some vulnerable parties to such unions could come within the ambit of Civil Law protection as a result.

The case caused considerable consternation, and was firmly reversed by the Court of Appeal, which found that *both* parties had to be attempting to contract a marriage binding in Civil Law for s.11 of the Matrimonial Causes Act to apply.<sup>94</sup> The legislation bites where the parties have married in disregard *“of certain requirements”*, whereas here they had failed to comply with *any* of the necessary steps to achieve a civil marriage.

A minority of commentators were critical of the conclusion arrived at by the Court of Appeal. For example, ARSHAD argued that it constituted a step backwards for vulnerable women.<sup>95</sup> Equally, CUMMINGS maintained that the justification of individuals entering and remaining within unregistered marriages as a matter of free choice was flimsy, taking into consideration the precarious situation in which many religiously married wives from minority communities find themselves.<sup>96</sup>

Nonetheless, the broad consensus was that the analysis was correct in legal terms, and that it was not for the judiciary to effectively legislate through the backdoor, however

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<sup>92</sup> *Hudson v Leigh* [2009] EWCH 1306.

<sup>93</sup> Matrimonial Causes Act 1973, s. 23.

<sup>94</sup> *Akhter v Khan* [2020] EWCA Civ 22.

<sup>95</sup> ARSHAD, R., “From Void Marriage to No Marriage: A Step Back for. Minority Women”, *Family Law*, 2020, pág. 767.

<sup>96</sup> CUMMINGS, T., “Akhter v Khan: Recognising (or not recognising) religious marriages in the UK”, *Oxford Human Rights Hub*, 7/3/2020, (<https://ohrh.law.ox.ac.uk/akhter-v-khan-recognising-or-not-recognising-religious-marriages-in-the-uk/> consulta: 28/10/2022).

lamentable the state of the law.<sup>97</sup> All scholars agreed that wider legal reform was necessary to address the problem of high numbers of religious only marriages going unregistered, a conclusion that we would not dispute. It is certain that a significant proportion of Islamic marriages remain without force in Civil Law entirely because the parties do not appreciate that their relationship has not been registered, or are unaware of the implications of this status, but the slightly ironic point is that *Akhter v Khan* was categorically not an example of this type of situation.

Precisely because *Akhter v Khan* was atypical, the solution which this case offered would at best have been a tiny sticking plaster for a gaping wound. Even if the law of nullity had been permitted to ride to the rescue on those facts, it would have had limited wider application. The wife in *Akhter v Khan* was all too acutely aware of the parlous position in which she had been left, hence the repeated attempts to persuade her husband to follow through on his promise, which were the foundation of her claim. If the wife had been oblivious to the fact that her religious marriage had existence in Civil Law, she would not have campaigned for a civil ceremony, and therefore could not have been said to have made an effort to have complied with the required formalities.

The real problem which *Akhter v Khan* actually raises is that of one party consciously exploits the other, and deliberately avoids a civil marriage, and against this backdrop, key questions must be tackled. On the one hand, it is avowedly not the function of the law to force individuals to behave kindly or honourably, at least if we adopt a positivist separation of law and morals, which is the general trend within Common Law paradigms,<sup>98</sup> but on the other hand we are also compelled to ask at what point conduct becomes so harmful or dishonest as to demand a legal response.

Having raised broad and overarching questions, it is natural to move to the consideration of Islam and the legal framework more generally: what can this conundrum of Marriage Law tell us about the bigger picture? We are almost reaching the end of our journey.

## 6. MUSLIM COMMUNITIES AND THE WIDER LEGAL FRAMEWORK

In asking whether Marriage Law reveals any overarching features about Muslim communities and the legal framework, it may be helpful to consider the circumstances of two imaginary women: Noor and Holly.

### 6.1. Noor

Noor entered into an arranged marriage with Ahmad at the age of nineteen. Although her parents took the lead in making arrangements, Noor did not feel that she was in any sense

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<sup>97</sup> PATEL, S., “AKHTER V KHAN: The law is clarified by reform needed”, *Shoosmiths*, 19/2/2020, (<https://www.shoosmiths.co.uk/insights/legal-updates/akhter-v-khan-the-law-is-clarified-but-reform-is-needed>, consulta: 28/10/2022); BAILEY HARRIS, R., “Marriage H M Attorney General v Akhter, Khan and Others”, *Family Law*, April 50, 2020, págs. 442-445.

<sup>98</sup> HART, H., “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, 71(4), 1958, págs. 593-629.

forced, and initially found Ahmad funny and charming. Noor had a cousin studying law, and realised that her Islamic wedding had not generated a civil marriage, but whenever she tried to raise this with Ahmad, he brushed it off and joked about her wanting a divorce already.

After about a year of marriage, Noor had her first baby and the relationship began to deteriorate. Ahmad was not inclined to give up his social life or pull his weight looking after their daughter, and had begun to spend money on marijuana. Whenever Noor tried to discuss these issues, Ahmad became verbally abusive. Noor's parents and the wider community were neither supportive nor encouraging when she raised the possibility of leaving him, so fearing the stigma of a failed marriage, and daunted at the thought of trying to cope alone with an infant, Noor opted to stay. She knew that if she remained with her husband, her mother and sister would continue to help with the baby, and she went on to have another two children before discovering that Ahmad was having an affair.

Noor is now more desperate than ever to end her relationship with Ahmad, but the house is in his sole name. She has no job and no income of her own, no higher education and very little work experience on her C.V.

## **6.2. Holly**

Holly was shy as a teenager, and often struggled academically due to having ADHD and a chaotic home environment. Her mother, Tracey, suffered from depression and also had an on/off relationship with an abusive and controlling partner. Holly met her partner Liam at school, and had her first baby at 17. The couple agreed to get married and find their own place as soon as they had saved up enough money. However, they moved in with Liam's mother as a temporary arrangement.

The "temporary arrangement" lasted for six years, during which time Holly had another two children, and whenever she brought up marriage, Liam always found an excuse to put off setting a date. She was worried and disappointed, but felt unable to push the issue. All of her close friends had partners and she feared that they would treat her differently if she was single. As time went on Liam became increasingly cold and distant, and eventually Holly found messages texts from another woman on his phone. She now wants to leave, but has no home of her own and would not now be welcomed with her mother. Regrettably, Holly has no independent income, work experience or qualifications.

## **7. ANALYSIS AND CONCLUSIONS**

The implication is not that these two women are in identical situation. Indeed, while there are undoubtedly parallels, there also key differences. Secular cohabitation and religious marriage are not interchangeable in practical or cultural terms, however they are both relationships outside of the framework or registered partnerships. Each of these two hypothetical women stayed in situations in circumstances which further entrenched the obstacles to them leaving and living independent lives, and did so in part because of the social pressures to which they were subject. Moreover, each had unique circumstances which heightened their vulnerability.

Commentators like SANDBERG have already observed that the appropriate response to the challenges of non-registered religious marriages lies in an assessment of the landscape of adult partnerships more widely, and we would endorse this.<sup>99</sup> Nevertheless, we would push this a stage further, and ask what this crying need for focus on the bigger picture tells us about the legal framework in England and Wales and Islam. Our contention is that it reveals two realities: 1) The continued problematisation of Muslims and Muslim communities; and 2) The power of a religious identity and accompanying institutions to crystallise a problem in a way conducive to seeking solutions.

### **7.1. The Continued Problematisation of Muslims and Muslim Communities**

In the first part of this article, we were at pains to draw out in detail the critical importance of context, and the diversity of Islam within contemporary England and Wales. It is telling that in both popular and academic discourse there has been so much focus on “unregistered Muslim marriages”, and also failure of the legal system to recognise Islamic marriages. We have some qualms about this approach, as it either casts Muslims and Muslim communities in a negative light as somehow complicated or even deviant, or it depicts the relationship between Islam and Civil Law as necessarily and intrinsically problematic.

Whilst we do not deny that cultural and religious pressures can generate a particular form of vulnerability of parties to unregistered marriages, especially female ones, it is also the case that these problems reflect wider trends within English and Welsh society. Unquestionably, issues may manifest themselves in a distinctive way in some Muslim contexts, but themes around the economic vulnerability of women who become the primary carers of children, especially at a young age, pressure to fulfil certain roles and romantic ideals, and the long term consequences of unfinished or interrupted education are not, in any sense, “Muslim issues”.

When the background mood music of European Islamophobia is taken into account, it is troubling that the problems of unregistered Islamic marriages are foregrounded, given that these questions could equally, and arguably much more rationally, be cast as the particular ways in which Muslim communities experience wider social problems. The stark truth is that rather than challenges of or for English and Welsh Muslims, most of these issues are in fact examples of a specific incarnation of universal challenges. The flip side of the coin, however, is the ability of a religious context to crystallise a problem.

### **7.2. Unregistered Marriages-A Tangible Problem**

As stated, although there is a highly discriminatory angle to the depiction of the problems flowing from some unregistered marriages as Islamic in nature, there is also a positive aspect to this. The importance which the British Constitutional Culture continues to place on religious practice means that a lack of recognition for religious marriages is deemed

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<sup>99</sup> SANDBERG, R., “Marital Problems: The Law Commission’s Consultation Paper and “non-qualifying” Wedding Ceremonies”, op.cit., págs. 140-159, 158-159.

inherently concerning by judges and commentators alike.<sup>100</sup> It is perceived as an unsatisfactory solution which demands investigation and action.

Furthermore, the religious, Islamic setting gives shape and form to damaging realities which remain amorphous in other paradigms, and therefore, difficult to confront. In our examples, Noor was trapped by social pressures and personal vulnerability into relying on unenforceable promises made by a partner, and exactly the same was true of Holly, but she lacked the formality and substance afforded by a religious ceremony.

Now, as in the past, it can be easier for religious individuals to assert rights and needs flowing from their faith, than it is for their non-religious neighbours to assert rights and needs which stem from their own personal beliefs, priorities and context. The call for parity of treatment between citizens could, once again, mean that vindicating the rights of faith communities leads to championing rights more widely. If religious relationships outside of the system of state registered partnerships warrant at least consideration for legal recognition in some form, then the same must be true of non-religious relationships outside of the same framework.

In light of the previous reflections, both the weight of Common Law Constitutional Culture, and the force of Article 14 of the ECHR, coupled with Articles 8, 9 and 12, will require us to consider a similar safety-net for exploitative and abusive relationships outside of the state registration, whether or not they are Muslim.

Muslims living within England and Wales are not extrinsic to our wider society, and the interaction between Islam and legal framework reflects particular experiences of shared phenomena. This means that solutions, as well as problems, should also be seen as common property.

## 8. BIBLIOGRAPHY

ABDULLA, M., “Culture, Religion, and Freedom of Religion or Belief”, *The Review of Faith & International Affairs*, 16:4, 2018.

ADOGAME, A. AND SHANKAR, S., *Religion on the Move: New Dynamics of Religious Expansion in a Globalising World*, Brill, Leiden, 2012.

AKHTAR, R., “Religious Only Marriages: Cohabitation: Deciphering Difference”, in AKHTAR, R., NASH, P. AND PROBERT, R., *Cohabitation and Religious Marriage: Status, Similarities and Solutions*, Bristol University Press, Bristol, 2020.

ALSTON, M., *Women, Political Struggles and Gender Equality in South Asia*, Palgrave Macmillan, London, 2014.

ARSHAD, R., “From Void Marriage to No Marriage: A Step Back for. Minority Women”, *Family Law*, 2020, pág. 767.

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<sup>100</sup> Consider for instance, the refusal of the court in *Akhter v Khan* to apply the label “non-marriage” to religious marriage failing to come within the scope of nullity.

BAILEY HARRIS, R., “Marriage H M Attorney General v Akhter, Khan and Others”, *Family Law*, April 50, 2020.

BARTLETT, P. AND WRIGHT, D. (eds), *Outside of the Walls of the Asylum: The History of Care in the Community 1750-2000*, Bloomsbury, London, 1999.

BOWEN, J., *On British Islam: Religion, Law and Everyday Practice in Sharia Councils*, Princeton University Press, Princeton, 2016.

BURBERGS, M., “How the Right to Respect for Private and Family Life, Home and Correspondence Became the Nursery in which New Rights are Born”, in GERARDS, J. AND BREMS, E. (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, Cambridge, 2013

CARROLL, J., AND POLLOCK, J., “Owens v Owens: Unreasonable Law not Unreasonable Behaviour?”, *The Law Society*, 25/7/2015.

CHAMBERS, C., PHILLIPS, R., ALI, N., HOPKINS, P. AND PANDE, R., “Sexual misery’ or ‘happy British Muslims’?, Contemporary depictions of Muslim sexuality”, *Ethnicities*, 19(1), 2019, págs. 66-94.

CHOUDHRY, S., *Multifaceted Identity of Interethnic Young People: Chameleon Identities*, Routledge, London, 2010.

COUDERT, A., *Religion, Magic and Science in Early Modern Europe and America*, ACB Clio, London, 2011, pág. 138.

CUMMINGS, T., “Akhter v Khan: Recognising (or not recognising) religious marriages in the UK”, *Oxford Human Rights Hub*, 7/3/2020, (<https://ohrh.law.ox.ac.uk/akhter-v-khan-recognising-or-not-recognising-religious-marriages-in-the-uk/>)

DOE, N., *The Law of the Church in Wales*, University of Wales Press, Cardiff, 2002.

DUFFY, E., *The Stripping of the Altars: Traditional Religion in England 1400-1580*, Yale University Press, New Haven, 2005.

ELVER, H., *The Headscarf Controversy: Secularism and Freedom of Religion*, Oxford University Press, Oxford, 2014.

ELYSHAYYAL, K., *Scottish Muslims in Numbers: Understanding Scotland’s Muslim Population through the 2011 census*, University of Edinburgh, Edinburgh, 2011.

GAINER, J., “The Road to Disestablishment”, in DOE, N., *A New History of the Church in Wales: Governance and Ministry, Theology and Society*, Cambridge University Press, Cambridge, 2020.

GARCÍA OLIVA, J. AND HALL, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain*, Routledge: Abingdon, 2018.



GARCÍA OLIVA, J. AND HALL, H., “Religious Decision Making and the Capacity of Children in the United Kingdom”, *Laicidad y Libertades*, 2013.

GILLIAT-RAY, S., *Muslims in Britain: An Introduction*, Cambridge University Press, Cambridge, 2010, págs. 181-205.

HARGREAVES, J., KESSLER, E., IZAMOJE, D. AND SYMON, A., *How We Get Along: The Diversity Study of England and Wales 2020*, The Woolf Institute, Cambridge, 2020.

HART, H., “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, 71(4), 1958, págs. 593-629.

HILL, A., “Cohabiting Couples Fastest Growing Family Type Say ONS”, *The Guardian*, 7/8/2019, (<https://www.theguardian.com/uk-news/2019/aug/07/cohabiting-couples-fastest-growing-family-type-ons#:~:text=More%20than%20two%2Dthirds%20of,%25%2C%20equating%20to%203.4%20million, consulta: 17/10/2022>).

INNES, J., “People and Power in British Politics to 1850”, in INNES, J. AND PHILIP, M. (eds), *Re-Imagining Democracy in the Age of Revolutions*, Oxford University Press, Oxford, 2015.

JONES, S. AND UNSWORTH, A., *The Dinner Table Prejudice: Islamophobia in Contemporary Britain*, University of Birmingham, Birmingham, 2022.

JULIOS, C., *Forced Marriage and Honour Killings in Britain*, Taylor and Francis, London, 2016.

KHAN, A’, “Ethnic Diversity Makes Britain’s Culture Great: It would be a disaster if we lost it”, *The Guardian*, 10/7/2019, (<https://www.theguardian.com/commentisfree/2019/jul/10/diversity-uk-britain-culture-arts-sport, consulta: 22/10/2022>).

KHURI, F., *Imams and Emirs: State, Religion and Sects in Islam*, Saqi Books, London, 2014.

MARTINEZ TORRÓN, J., *Religion and Law in Spain*, Kluwer, 2<sup>nd</sup> edición, 2018.

MIDDLETON, N., *Jesus and Women*, Lutterworth Press, London, 2022.

Muslim Council of Britain, “British Muslims in Numbers Briefing”, 9/5/2016, (<https://mcb.org.uk/resources/ consulta: 1/11/2022>).

Muslim Women Network UK, “Unheard Voices: The Sexual Exploitation of Asian Girls and Young Women”, September 2013, (<https://www.mwnuk.co.uk/reports.php>)

PATEL, S., “Akhter v Khan: The law is clarified by reform needed”, *Shoosmiths*, 19/2/2020, (<https://www.shoosmiths.co.uk/insights/legal-updates/akhter-v-khan-the-law-is-clarified-but-reform-is-needed>)

PATEL, S., “The Big Islamic Nikah Myth”, *Family Law*, 9/7/2014, ([https://www.familylaw.co.uk/news\\_and\\_comment/the-big-islamic-nikah-myth](https://www.familylaw.co.uk/news_and_comment/the-big-islamic-nikah-myth))

PICTON, H., *A Short History of the Church of England: From the Reformation to the Present Day*, Cambridge Scholars Publishing, Cambridge, 2015.

PITCHER, B., *The Politics of Multiculturalism: Race and Racism in Contemporary Britain*, Springer, London, 2009.

PROBERT, R., *Tying the Knot*, Cambridge University Press, Cambridge, 2021.

SANDBERG, R., “Marital Problems: The Law Commission’s Consultation Paper and “non-qualifying” Wedding Ceremonies”, *Ecclesiastical Law Journal*, 23(2), 2021.

STURROCK, G., “Islamic Marriage and Divorce in Scotland: Will the English decision in *Akhter v Khan* change the position?”, *Family Law*, 24/10/2018, ([https://www.familylaw.co.uk/news\\_and\\_comment/islamic-marriage-and-divorce-in-scotland-will-the-english-decision-of-akhter-v-khan-change-the-position](https://www.familylaw.co.uk/news_and_comment/islamic-marriage-and-divorce-in-scotland-will-the-english-decision-of-akhter-v-khan-change-the-position))

STRMISKA, M., *Modern Paganism in World Cultures: Comparative Perspectives*, ABC CLIO, London, 2005, pág. 40.

VICKERS, L., “The Relationship Between Religious Diversity and Secular Models: An Equality Based Perspective”, in FOGLETS, M., ALIDADI, K., NIELSEN, J. AND YANASMAYAN, Z. (eds), *Belief, Law and Politics: What Future for a Secular Europe*, Routledge, London, 2014.

VORA, V., “Unregistered Muslim Marriages in the United Kingdom”, in Oberauer, N., *Legal Pluralism in Islamic Contexts*, Brill, Leiden, 2019.