Informal Muslim Marriages: Regulations and Contestations

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Introduction

This special issue of the OJLR focuses on informal religious-only marriages occurring within Muslim communities in various jurisdictions with differing traditions of marriage and state regulation. It is widely accepted that religious marriages are entered by Muslims seeking to embark on a religiously lawful intimate relationship.[1] In general, a religious-only marriage usually[2] results in the parties not benefitting from state legal protections available to legally recognized spouses. This is an issue, to varying degrees, in all five of the jurisdictions considered in this issue, whether Muslim-minority (England and Wales, Italy, Malta, and Finland) or Muslim-majority (Tunisia).

The contributions to this special issue were presented at a two-day symposium titled *Unregistered Muslim Marriages—Regulations and Contestations*. This was organized by Rajnaara Akhtar and Annelies Moors and held in April 2017 at De Montfort University in Leicester, in conjunction with the University of Amsterdam.[3] The articles in this volume not only explore the legal framework regulating marriages but also incorporate empirical research findings to explore the individual lived realities of couples entering these relationships, their eventual treatment by the state, and the multifaceted dynamism in between these markers. In this regard, we continue discussions relating to the tripartite dynamic between the individual, the mosque, and the state presented in a concurrent jointly co-edited special journal issue based around the same theme.[4]

The contributors employ a diverse range of research methodologies and methods. Methodologies include discourse analysis, multi-sited ethnography, and phenomenological approaches. Methods include interviews with imams and their assistants, marriage registrars, solicitors, Shariah Council 'judges', state court judges, counsellors, religious scholars, cultural mediators, diplomatic personnel, and with individual Muslims; focus groups exploring individual views and collective discourses; document analysis; and observation of family court sessions and 'reconciliation meetings'. These provide rich and unique sources of data and truly unique considerations of the issues.

The articles also approach the issues from a multitude of lenses. Probert and Saleem[5] analyse the legal treatment of Islamic marriage ceremonies in England and Wales, setting out the scope for couples to enter into a religious marriage that is also legally binding or to combine civil and religious elements. At the same time, they note that there may be a variety of reasons why couples do not marry in accordance with the required formalities, and undertake a detailed examination of the consequences if a marriage ceremony does not comply with the law. A marriage that does not comply precisely with the legal framework may still be valid if the formal requirement that was omitted was a minor one, or if the parties complied with at least some of the required formalities and their failure to comply with the remainder was accidental. By contrast, if, having complied with at least some of the required formalities, they 'knowingly and willfully' failed to comply with the remainder, the marriage will be void.[6] This at least gives the court the power to grant a decree of nullity and to make orders for financial provision as on divorce. However, if the marriage is conducted outside the legal framework altogether, it will be a non-marriage,[7] and no such powers to order that one party make provision for the other exist. Given the recent proposals to criminalize those conducting marriages outside the legal framework,[8] they also undertake an in-depth examination of the existing criminal offences, and demonstrate that such offences may already be committed by those in particular positions of authority involved in religious-only ceremonies. They conclude by setting out the range of options for reform.

Uddin[9] explores the causes and motivations for religious-only marriages and the impact on dispute resolution and religious divorce. Through engaging with a wide variety of actors in the process, he finds the continued

existence of strong normative cultural and religious influence. These establish social norms which reinforce the need for a *nikah* for a valid religious marriage. He contends that a valid *nikah* marriage requires the fulfilment of three basic elements—offer and acceptance, witnesses and a *mahr*;[10] it is the absence of the *mahr* from civil marriage ceremonies that means these non-religious ceremonies lack the potential to fulfil the dual purpose of being state recognized as well as religiously recognized by the majority of Muslims in England and Wales. While religious edicts have been issued confirming that a civil ceremony is sufficient, these have had little traction. Other forms of reform, such as *talaq tafwid*, or the delegated right to divorce to the wife, have similarly lacked acceptance, despite this becoming a norm within the *nikah* contract in some Muslim majority jurisdictions. This perhaps indicates a lack of awareness and/or empowerment of women in some Muslim communities, wherein the marriage formalities are largely negotiated by 'elders'.

Akhtar[11] investigates whether religious-only marriages display signs of isolation or integration, utilizing the theoretical framework of liminality to trace the transitioning relationship norms of Muslims in England. Her use of focus group data to explore English narratives provides rich evidence of individual and group negotiations on marriage norms. In the context of rising numbers of informal family relationships, Muslim religious-only marriages are explored in the light of cohabiting relationship norms. Akhtar concludes that the former are in fact marriages in another form, rather than cohabitation in another name. This is due to the manner in which the relationship is celebrated at the outset (wedding party) and the way in which the couple will self-identify. These elements are largely absent with cohabiting couples.

Mustasaari and Al-Sharmani[12] focus on Muslim marriages in Finland and the juncture between mosques, individuals and the state. In particular, they focus on how marriage is construed as both a civil and as a religious institution and the resultant impact on the legality or otherwise of the union. Far from presenting a homogenous identity of those marrying, various and varying intersecting identity traits such as gender and ethnicity impact on legal recognition in different ways.

In the only article in this volume to examine the issues in a Muslim-majority country, Voorhoeve[13] looks to the Tunisian legal treatment of unregistered religious only marriages and the rise of the *urfi* marriage in the wake of the 'Arab Spring' in 2011. These marriages are largely concluded by young adult students, without either the knowledge of families or the involvement of state civil authorities. This again represents the differing priorities of the state and of certain groups of individuals whose relationship norms ostensibly challenge state ideals of secularism, modernity, and women's rights. Those entering *urfi* marriages seek religious validity for their intimate relationship and their religious conviction is the underlying motivation. In Tunisia, this is deemed to offend the secular state which only identifies one form of legitimate marriage—the one that is civilly registered. Despite the differing context, the legal and political arguments in some ways mirror European debates which denigrate religious-only marriages.

Sadegh and Zammit[14] focus on Maltese Muslim marriages, often closely intertwined with the state's post-Catholic legacy. Maltese marriage law has evolved over time but remains firmly connected to Canon Law, leaving it to individuals to navigate the state and their own religious ideals in order to achieve legally recognized marriage status. The interesting cross-cultural/dual religious aspect of the ceremony of marriage between Claire and Anwar exemplifies new challenges for (partly) Muslim marriages in Europe, requiring cross-cultural translation and brokerage. The transitions in marriage norms, and the adaptation of church marriage norms in Muslim marriages are an added indication of merging cultures marking the celebration of marriages.

Sona[15] focuses on Italy and presents data from extensive fieldwork engaging Muslim marriages and the civil/religious interplay over a 10-year period. Providing evidence of the various forms of transitions in relationship norms, in this context there is an added weight given to mosques and individual agency. The religious-only marriage is called a 'mosque marriage', putting the religious institutions at the centre of the issue. This form of marriage is identified along various pathways, and in the wider context of transnational and geopolitical viewpoints.

The articles outlined briefly above provide a complex and woven narrative relating to Muslim religious-only marriages. The tripartite consideration of the state, the mosque and the individual remain the key elements for discussion.

1. Unregistered ' religious- only' marriages and state law

The public/private dichotomy that surrounds current debates about marriage is nothing new.[16] Marriage and family are considered to be the bedrock of many societies through the ages, and the law in modern nation states seeks to regulate these relationships and uphold certain rights. Islamic family law within Muslim majority jurisdictions is far from homogenous,[17] but can be described as representing an expression of religious identity leading to the adoption of normative practices in entering and exiting a marriage.[18] Therefore, it is unsurprising that in settings where Muslims are a minority group, wherein Muslims hail from a range of lands of ethnic origin, there is considerable diversity in approaches to marriage in the new settings. State and political apprehension about the operation of 'Shariah law' misses the crucial point that there is no single doctrine or set of rules to be applied, any more than there is a single body of 'Christian' laws.

Similarly, not all state institutions approach the legality of marriage in the same way. Furthermore, when contested, family law judges have proven themselves very resourceful in extending, expanding, and limiting legal definitions according to the needs and facts of the cases at hand.[19] In the recent English case of *Akhter v Khan*,[20] the judge drew on human rights conventions to justify categorizing a religious-only marriage as void—with the potential for financial provision to be ordered—rather than non-existent, despite the fact that the parties were aware that their marriage was not legally recognized. Similarly, in examples from Tunisia, judges are using their discretion to recognize unregistered marriages that were entered decades before the state's Family Law Code came into force.[21] In Malta, there is an 'extra-legal space' between official and unofficial marriages, and between legally recognized and unlawful marriages.[22] And in Italy, between 2009 and 2011, there was a ban on civil marriages for those non-Europeans who were unable to prove a two-year period of regular settlement within a European Member State prior to the marriage.[23] This was later repealed for its lack of constitutionalism, but in the meantime gave rise to a number of resourceful methods of circumvention.

Legal marriages are often complex. The Finnish context is similar to the English one in some respects and no penalty exists for the conclusion of religious-only Muslim marriages. The *maistraatti*[24] is the central state authority responsible for registration of marriages; however, the legality of the marriage can be contested for various purposes, eg paternity.[25] Transnational marriages in particular give rise to differing discourses on legality. In Italy, on the other hand, the Italian Civil Code recognizes religious-only marriages which conform to certain formalities as civilly valid.[26] However, this legal option has not been utilized by Italy's Muslim communities and no Muslim religious minister has applied to fulfil this dual role in performing marriages, possibly due to the stringent prerequisite requirements.[27]

An added complexity is presented by marriages with transnational dimensions, particularly where the parties have to rely on a less stable state for the provision of certain mandatory documents to prove their eligibility to marry. For example, the death of a spouse in a war-torn region may mean no death certificate can be produced. The state's marriage apparatus then have the complex job of navigating this minefield. This is not limited to the Muslim-minority legal settings, but also includes Muslim-majority contexts such as Tunisia. As Voorhoeve[28] sets out, failure to comply with the 1957 Code of Civil Status in registering marriages results in criminal punishment of 3 months' imprisonment and the marriages are null and void. The Code also abolished polygamy, with a prison term of one year for those engaging in such practices. These harsh penalties were intended to give the law power and help modernize the family law regime, however, as with all other legal settings, they remain largely reliant on sympathetic judges for enforcement. Therefore, those who now engage in religious marriages are seen as willfully flouting Tunisia's modern and equality-driven family laws. However, the key question here is whether the state has a role in policing private relationships, and this question is the same whether in Tunisia or Europe.

The difficulty with state involvement in what was concluded as an informal marriage and intended to be so, is that the couple never intended to be formally married. The public/private dichotomy may arise from misconstrued notions of marriage as a private affair, whereas the obligations arising from this are enforceable only by the state making it very much a public affair. Uddin[29] found that Muslim participants avoided professional mediation, viewing family disputes as a private matter. This also results in a lack of access to comprehensive data sets as privately performed *nikahs* cannot be traced. However, the key issue is that the expectations of

the relationship can be challenged by state involvement. On the other hand, Italy's shameful attempt to limit marriages for non-European Union nationals resulted in diplomatic interventions with embassies allowing the performance of religious-only marriages on their premises, which they would then recognize and as a result would compel recognition by the Italian state.[30] This demonstrates the extent to which the state plays a pivotal part in preventing and enabling marriages to be entered and/or recognized.

Proposed 'solutions' to the 'problem' of unregistered religious-only marriages which involve forced registration or other coercive measures undermine individual liberty and are contrary to the values of liberal democracies. The suggestion of criminalizing the imams who are conducting them[31] has drawn particularly sharp criticism, not least because it only pays attention to the 'paradigm case of unregistered marriages'[32] involving a poor disadvantaged female spouse and empowered male breadwinning spouse which results in the 'wife' being left homeless and penniless upon relationship breakdown. Therefore, pertinent questions arise about states which allow cohabitation yet seek to restrict religious-only marriages.

2. Unregistered ' religious- only' marriages and mosques

Some of the common criticisms of Muslim religious bodies which mediate marriage disputes are that they discriminate against women, undermine shared values and cause social harm.[33] However, these concerns are not unique to these settings. The case of Tunisia's family law reforms, dating back to 1957, are interwoven with the state's political changes and turmoil.[34] Similarly in Malta, marriage laws were adapted in relatively recent times to move from secular non-religious ceremonies, to special privileges being adopted for the Catholic Church in the 1990s.[35] Therefore, the agenda set by political realities often subsume the needs of individuals and couples where marriage and families are concerned. Muslim religious-only marriages are no different.

The role played by mosques and religious institutions is diverse and depends on multiple factors, including whether they view their role as formal or informal, and whether they are adapting transitional cultural norms. In the Italian case, there is scope for imams to become registered to perform the dual religious and civil ceremonies concurrently, but onerous prerequisites to registration for this role have resulted in the complete absence of Muslim ministers performing this function. In England and Wales, mosques can be registered for the purpose of marriage and can nominate an authorized person to register the marriage in place of the civil registrar, yet only one in 10 mosques provide such a service.[36]

In Finland, Mustasaari and Al-Sharmani found that certain mosques, such as Finnish Somali mosques, were promoting registration of religious marriages from both a religious and ethical standpoint.[37] Indeed, three of the mosques included in their study had a policy of only concluding legally valid religious marriages. Those couples who were impeded from formally marrying, for example due to a lack of documentation, would be referred to individual imams or smaller mosques who could conclude a *nikah*. Thus, the larger and well-established mosques position themselves as formal institutions, while the individual imams and smaller/newer mosques provide a service within the informal setting. This is in contrast to England and Wales, where the majority of mosques do not seem to perceive themselves as having a formal public role.

The question of why and how much influence mosques have in retaining cultural norms from their lands of origin—or, perhaps more correctly, the cultural norms which have developed in the new contexts and failed to modernize in line with developments in the states of origin, also arises. While steps have been taken to modernize the marriage ceremony, especially when performed in the new European context, the idea that it is possible to dispense with the *mahr* has failed to gain traction.[38] In the Maltese example of Claire and Anwar,[39] a dual ceremony was engaged in despite the bride not being Muslim. Sadegh and Zammit question why a civil ceremony in this case of an inter-religious marriage was not deemed sufficient. It was clear that the bride in this case was primarily concerned with the status of her relationship in the eyes of God, while other actors involved including family members and the imam, worked hard to present a ceremony which conformed as closely as possible with Maltese Catholic expectation and norms.

In Malta, where only one single mosque is thought to be officially recognized, the Malta Islamic Centre is dependent on the role of its lead preacher imam Elsadi in concluding religious marriages. While these are

not recognized as valid by the state, they may be relied upon by state institutions for various purposes.[40] These include the case where an asylum seeker wishes to establish a marital relationship with another person—the religious marriage documentation would be accepted in helping family reunification for those individuals.

Transitional norms can be further seen in the Finnish context, where emerging discourses have created a hierarchy of Muslim marriages, with those that are registered with the state occupying the prime position.[41] Thus, the transitions here are partly driven by a reform in Islamic family law practices which are no doubt caused by the new context in which these norms are being applied and upheld and their engagement with a new state. For more established Muslim communities, these new practices are tied very much to notions of integration and membership of Finnish society. However, the difference in migratory patterns results in differing practices amongst newer arrivals that are yet to undergo this transition.

3. Unregistered ' religious- only' marriages and individuals

Outside Muslim majority contexts, we are witnessing individual and group negotiation of normative religious practices. The theoretical framework of liminality utilized by Akhtar[42] reveals a discourse of emerging cultural norms, couched in terms of the wider accepted European relationship norm of cohabitation.[43] The popularity of religious-only marriages in jurisdictions where cohabitation is common contrasts sharply with the general lack of such marriages in Muslim-majority contexts where cohabitation remains exceptional. Those entering religious-only marriages do not display a homogenous group identity, much like those who cohabit without going through any kind of marriage ceremony.[44] Furthermore, women in religious-only marriages face the same difficulties as those in cohabiting relationships labouring under the mistaken assumption of legal protection.[45] Akhtar argues the dominant message of society's acceptance of cohabitation is being internalized, but at the same time religious norms require performance of the *nikah*. Muslim couples are thus displaying a process of internalization, adaptation and integration.[46] Political discontent with unregistered Muslim marriages, and the resultant proposed legal solutions involving varying degrees of enforced registration are undermined when analysed in the context of the lack of regulation for cohabiting couples.

A number of the research papers in this volume evidence the agency of individual Muslims who are making decisions based on the legal and cultural context in which they live, and in light of what suits their current circumstances. For example, Mustassari and Al-Sharmani's female interlocutor ended her second marriage after trialling it, due to the needs of her pre-existing children. These individual decisions however require negotiations with the normative meanings associated with such practices. The discourse for many Muslims is now couched in language such as 'choice', and 'independent' or 'informed' decisions, which brings it very much within the realms of a rights-based discourse.

The need for a religious marriage at the individual level can be prompted by a number of issues, as discussed by Sadegh and Zammit.[47] In the case of 'Samia' who was unable to conclude a legally recognized marriage in Malta, this was due to her husband still being married and the process of divorce taking years to complete. When they finally concluded the civil ceremony, it was merely the 'signing of an agreement' confirming their status as husband and wife, which was necessary to protect Samia from being deported. Other reasons for remaining unregistered might be trialling a relationship, or being a young couple unprepared for a legal marriage, not having adequate documentation to enter a formally recognized marriage, being formally married and simply choosing not to enter a legal marriage a second time, or vice versa, immigration concerns, or appeasing extended family by entering a religious marriage rather than 'merely dating'. These merely scratch the surface of the plethora of underlying motivations for religious-only marriages. These are very much individual negotiations. A study by Akhtar found that for many, the civil ceremony was simply not a priority while they planned and celebrated the rites of their (religious) wedding.[48]

In the case of dispute or eventual breakdown of the marriage through death or divorce, issues become more complex. The involvement of religious bodies such as Shariah Councils can be inconsistent with state law, but may also provide vulnerable women with a means of exiting limping marriages.[49] Thus, the individual decisions being made can be construed as a reflection of individual agency in new contexts where legal and

social space exists to allow these transitions and negotiations to take place. In conclusions, the 'flux' which Muslims currently find themselves in within Europe may continue to be linked to negotiations between religious norms and transitioning cultures. It is entirely possible that the differing patterns of migration and settlement will mean that, on the issue of marriages, this diverse group will remain in permanent flux.

[1]†††† Judith E Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press 2008) 41.

[2]†††† In England, the very recent case of *Akhter v Khan* [2018] EWHC 54, brought the issue of recognition of religious marriage cermeonies to the fore, with the judge deciding that this was indeed a void marriage enabling financial resolution between the parties.

[3]†††† At the University of Amsterdam, this research is part of the European Research Council-funded research project on 'Problematizing "Muslim Marriages": Ambiguities and Contestations', grant number 2013-AdG-324180.

[4]†††† Annelies Moors, Rajnaara Akhtar and Rebecca Probert, 'Contextualizing Islamic Religious-only Marriages' (2018) 6(3) Sociology of Islam.

[5]†††† Rebecca Probert and Shabana Saleem, 'The Legal Treatment of Islamic Marriage Ceremonies' (2018) 7(3) Oxford Journal of Law and Religion 376–400.

[6]†††† Matrimonial Causes Act 1973, s 11.

[7]†††† See eg *Hudson v Leigh* [2009] EWHC 1306 (Fam).

[8]†††† *The Independent Review into the Application of Sharia Law in England and Wales* (Home Office, Cm 9560, 2018).

[9]†††† Islam Uddin, 'Nikah-only Marriages: Causes, Motivations, and Their Impact on Dispute Resolution and Islamic Divorce Proceedings in England and Wales' (2018) 7(3) Oxford Journal of Law and Religion 401–426.

[10]†††† The requirement for a guardian for women is disputed. In addition, there are different schools of thought as to the effect of not registering the *mahr*.

[11]†††† Rajnaara **Akhtar**, 'Modern Traditions in Muslim Marriage Practices, Exploring English Narratives' (2018) 7(3) Oxford Journal of Law and Religion 427–454.

[12]†††† Sanna Mustasaari and Mulki Al-Sharmani, 'Between 'Official' and 'Unofficial': Discourses and Practices of Muslim Marriage Conclusion in Finland' (2018) 7(3) Oxford Journal of Law and Religion 455–478.

[13]†††† Maaike Voorhoeve, 'Law and Social Change in Tunisia: The Case of Unregistered Marriage' (2018) 7(3) Oxford Journal of Law and Religion 479–497.

[14]†††† Ibtisam Sadegh and David E Zammit, 'Legitimizing a Muslim Marriage in Malta: Navigating Legal and Normative Structures' (2018) 7(3) Oxford Journal of Law and Religion 498–518.

[15]†††† Federica Sona, ''Mosque Marriages' and Nuptial Forms among Muslims in Italy' (2018) 7(3) Oxford Journal of Law and Religion 519–542.

[16]†††† Rebecca Probert 'When Are We Married? Void, Non-existent and Presumed Marriages' (2002) Legal Studies 398.

[17]†††† Abdullahi An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (Zed Books 2002).

[18]†††† Uddin (n 9).

[19]†††† Probert and Saleem (n 5).

[20]†††† [2018] EWHC 54.

[21]†††† Voorhoeve (n 13).

[22]†††† Sadegh and Zammit (n 14).

[23]†††† Sona (n 15).

[24]†††† Mustasaari and Al-Sharmani (n 12).

[25]†††† ibid.

[26]†††† Italian Civil Code, Royal Decree 16th March 1942, No 262, 'Approvazione del testo del Codice Civile', in Gazzetta Uffi-ciale, Edizione Straordinaria, 4 April 1942 No 79. See also Law No 1159 of 1929 and Royal Decree No 289 of 1930.

[27]†††† Sona (n 15).

[28]†††† Voorhoeve (n 13).

[29]†††† Uddin (n 9).

[30]†††† Sona (n 15).

[31]†††† *The Independent Review into the Application of Sharia Law in England and Wales*, February 2018.
<www.gov.uk/government/publications> accessed 6 August 2018.

[32]†††† Rajnaara Akhtar, 'Unregistered Muslim Marriages in the UK, Examining Normative Influences Shaping Choice of Legal Protection' in Marie-Claire Foblets, Michele Graziadei and Alison Dundes Renteln (eds), *Personal Autonomy in Plural Societies: A Principle and its Paradoxes* (Routledge 2018) 140–55.

[33]†††† Home Office, *Independent Review into Sharia Law Launched* (Home Office 2016)
<https://www.gov.uk/government/news/independent-review-into-sharia-law-launched> accessed 4 August 2018.

[34]†††† Voorhoeve (n 13).

[35]†††† Sadegh and Zammit (n 14).

[36]†††† Andy Hayward, 'Relationships between Adults: Marriage, Civil Partnerships and Cohabitation' in R Lamont (ed), *Family Law* (Oxford University Press 2018) 28. See also Rebecca Probert, 'A Uniform Marriage Law for England and Wales' (2018) 30(3) Child and Family Law Quarterly (forthcoming), which provides evidence that some mosques that are apparently registered for marriage no longer provide this service.

[37]†††† Mustasaari and Al-Sharmani (n 12).

[38]†††† Uddin (n 9).

[39]†††† Sadegh and Zammit (n 14).

[40]†††† ibid.

[41]†††† Mustasaari and Al-Sharmani (n 12).

[42]†††† Akhtar (n 11).

[43]†††† Kathleen Kiernan, 'Cohabitation in Western Europe' (1999) 96 Population Trends 25; N Sanchez Gassen and Brienna Perelli-Harris, 'The Increase In Cohabitation And The Role Of Union Status In Family Policies: A Comparison Of 12 European Countries' (2015) 25(4) Journal of European Social Policy 431.

[44]†††† See eg Carol Smart and Pippa Stevens, *Cohabitation Breakdown* (JRF 2000); Anne Barlow and Janet Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) 22(3) Child and Family Law Quarterly 328.

[45]†††† Akhtar (n 11).

[46]†††† ibid.

[47]†††† Sadegh and Zammit (n 14).

[48]†††† Rajnaara C Akhtar, 'Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Compromising Rights' in JK Miles, P Mody and R Probert (eds), *Marriage Rites and Rights* (Hart 2015) 174.

[49]†††† Farah Ahmed and Jane Calderwood Norton, 'Religious Tribunals, Religious Freedom and Concern for Vulnerable Women' (2012) 24(4) Child and Family Law Quarterly 363, 366.