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Relationship Breakdown: Informal and Legal Solutions

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ABSTRACTS

Rajnaara Akhtar

Religious-Only Marriages and Cohabitation; Deciphering Differences

Unregistered religious-only marriages are being problematized in mainstream discourse, and treated as a separate and special issue to be resolved by targeted legal reforms deterring such ceremonies. The underlying assumption is that reform is necessary in order to tackle the problem faced by disadvantaged Muslim women who may be left homeless and penniless on relationship breakdown. However, research conducted on this area reveals a plethora of underlying motivations for entering such relationships and the lack of any archetype. Nor are Muslim ceremonies the only ones that do not adhere to state marriage formalities. This paper argues that any law reform must be more generic and cover all families within informal cohabiting relationships. While Muslim couples may not view themselves as cohabitants, the law will treat them as such and in England and Wales, this means very limited family law protections are available. While religious-only Muslim weddings in many cases may be celebrated with pomp and ceremony, the lack of legal recognition means these become 'marriages in another form' and not 'cohabitation by another name'. However, these underlying differences should not dictate law reform proposals, and the focus should instead be on the negative legal outcomes experienced by those within such unofficial relationships.

This paper further argues that the point of departure between a cohabiting relationship and an informal religious-only marriage, is knowledge, and where one or both parties believed their marriage was legally recognised, it is argued that there should be recognition due to the lack of requisite intent *not* to comply with marriage formalities. In other words, one or both parties did not knowingly and wilfully fail to abide by the formalities as they subjectively

believed the singular Islamic religious ceremony they entered was recognised by the state.

Amin Al-Astewani
Arbitration as a Legal solution for Relationship Breakdown in the Muslim community: The Case of the Muslim Arbitration Tribunal

This paper advocates the use of Arbitration as a legal solution for relationship breakdown in the Muslim community, using the Muslim Arbitration Tribunal as a model. Formed in 2007 by Faizul Aqtab Siddique, the Muslim Arbitration Tribunal is the first of its kind and marks a pioneering move by the British Muslim community to make use of a legislative framework offered by the Arbitration Act 1996. When the first major Muslim migration to Britain occurred after the second world-war, large numbers of Muslims who settled in Britain in the 1950s and 1960s established informal mechanisms to resolve marital disputes within their community. Unlike other Muslim religious scholars involved in such dispute-resolution during this period, Siddique was a practicing barrister and aware that the Arbitration Act 1996 provided a legal framework which he could utilise to greatly enhance his work, leading to the founding of the Muslim Arbitration Tribunal.

This paper outlines the transformational impact of the Arbitration Act on religious tribunals, enabling legitimacy in the eyes of both the Muslim community and the English courts. It then critically assesses the value of Arbitration as a legal solution to relationship breakdown in light of important recent developments such as the launch of the Family Law Arbitration Scheme and the important precedent established by the 2013 case of *AI v MT* (2013) involving the resolution of a marital dispute by a religious tribunal.

Anne Barlow
Modern marriage myths - the dichotomy between expectations of legal rationality and 'lived law' experiences in the 21st century

The common law marriage myth is alive and well among many cohabitants yet those who have married according to religious rites but whose marriages are not recognised in law may also be similarly subject to a myth borne of their beliefs and values of what the law will recognise as a 'valid relationship' worthy of legal rights and obligations. This paper will explore the differences and similarities between these two myths and consider how far legal

perceptions and consciousness are driven by 'lived experience' and assumption.

Felicity Belton
The view from the North: Recognition and inclusivity upon marriage and the resultant access to legal protections on divorce

The breakdown of a marriage is foreseeable and legal rights for the parties, when this occurs, are enshrined in law. However, access to these rights requires legal recognition of the marriage. In England, marriages that do not fulfil certain requirements of the *Marriage Act 1949* are excluded. Consequently, couples facing the breakdown of certain religious marriages or the breakdown of a belief marriage are unable to access the legal rights available to other married couples. This position, given the UK's international obligations (e.g. Articles 8, 9 & 12 of the European Convention of Human Rights) is unsustainable. At present English marriage laws are based on an established church, overt recognition of a limited number of religions, constricting control over the location and personnel conducting weddings and non-recognition of belief/non-religion wedding ceremonies. Given the diversity of religions present in England and the increasing number of people who are not affiliated to any religion, the legislation is no longer fit for purpose and the inequality of access to justice that it creates should be addressed. This paper will argue that the marriage laws in Scotland provide a working template to address these problems. That the Scottish approach provides an inclusive system both at the commencement and end of a marriage, whilst still maintaining existing protections for established marital practice. This paper suggests adoption of similar legislative provisions to those contained in the *Marriage (Scotland) Act 1977* regarding who can solemnise a marriage, where it can take place and recognition of religious and belief organisations. Thus facilitating a true reflection of society's needs and aspirations particularly in connection with minority religions and the growing number of people that identify as non-religious.

Kathryn O'Sullivan & Susan Leahy
Relationship Breakdown and Irish Law – An alternative perspective

Irish family law has been described as "one of the most rapidly developing in Europe" (Scherpe, 2012). When considering relationship breakdown where a marriage is not recognised by the State's legal system, two areas of (relatively) recent reforms of Irish family law are of particular relevance. First, unlike our

near neighbours across the Irish Sea, the law governing entry into marriage was radically reformed in Ireland with the enactment of the Civil Registration Act 2004 (as amended). The latter sought to introduce a modern and streamlined system for the legal recognition of a wide variety of marriages conducted in the jurisdiction. Thus, the likelihood of a religious marriage being recognised in Ireland is arguably higher than in other jurisdictions where the formalities for marriage are more complex. Second, cognisant of the significant growth in unmarried cohabitation across the country, the Irish legislature introduced a redress scheme for non-marital cohabitants in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. This scheme may offer legal protections to individuals who find that their marriage is not recognised by the State but who are cohabiting for a long enough period to qualify for protection under the Act. However, while these reforms were undoubtedly important measures to increase the likelihood that a religious marriage will be recognised by the State and to offer protection for financially vulnerable parties where a marriage is not so recognised, their practical impact remains largely untested in this jurisdiction. This paper will explore the Irish law relating to both marriage formation and recognition of cohabitants' rights to determine the extent to which the current legal framework can offer protection to individuals who are parties to marriage which are or have the potential to be refused recognition by the legal system.

Joanna Miles
Non-marriage and cohabitation law: an awkward alignment?

This paper will consider the laws that govern in England & Wales in the event of the breakdown of a non-formalised conjugal relationship to determine the destination of the parties' property and other financial resources, and potential reform in this arena. Statute-based financial remedies are available between spouses and civil partners in divorce/dissolution, judicial separation and nullity proceedings (i.e. including between couples to marriages and CPs that were void *ab initio*). These permit the courts to make substantial adjustments to the parties' ordinary property rights and pension entitlements, and to require regular payments of financial support for the benefit of the adult party-recipient. By contrast, couples who are not married – including parties to non-marriages, as well as informal cohabitants – enjoy very few statutory remedies, save those applicable for the benefit of their children. Instead, the economic implications of the breakdown of these relationships is governed very largely by the general laws of property, trusts and contract, under which the courts have no general adjustive powers, and no power at all

in relation to pension rights. Whilst Scotland and Ireland have joined many other jurisdictions (particularly in the common law world) in providing some financial remedies on relationship breakdown between cohabitants, reform in England & Wales remains distant, despite recommendations by the Law Commission in 2007. The Law Commission was cognisant that non-marriage cases fell within the scope of their project. The alignment of non-marriages with cohabitation generally may appear somewhat jarring: the Commission noted the qualitative difference of those relationships from the general run of cohabitants, the non-married partners having made a commitment to each other, albeit not one recognised by the civil law. The existence of that commitment disrupts the ordinary debates surrounding cohabitation reform, in which the apparent lack of commitment between de facto couples is commonly deployed to resist reform.

Zainab Naqvi
Nikah at the Margins: The Unregistered Nikah in the UK – A Tool for Empowerment?

The paper offers a critical discussion of the ways that women use the unregistered Nikah to disrupt dominant cultural and social stigmas towards divorce and polygyny and empower themselves. The favoured legal solution therefore is that Muslim Nikah ceremonies be subject to a 'mutual opt-out' of registration to continue to facilitate women's autonomy at the time of the ceremony. If an unregistered marriage breaks down, there should be the option to obtain retrospective recognition.

Patrick Nash
'Regrettably it is not that simple': Towards a Minimalistic Law of Marriage

This paper will provide a big picture view of stakeholder interests and strategic options in the field of marriage law reform. It begins by identifying the main stakeholders - the state, British Muslims and society at large – and their respective interests in marriage law reform. The problems faced by Muslim couples and the retention of state involvement from formation to dissolution are noted as being particularly important considerations. The strategic objectives of law reform concerning the formation and dissolution of intimate relationships are identified and discussed, namely the maintenance of English law's integrity, the creation of an objective standard for what constitutes a valid marriage and, crucially, an attractive and viable solution. Finally, the paper will briefly survey the potential options for reforming the

law to ensure these objectives are met: abolishing or tightly regulating religious bodies practising alternative dispute resolution (ADR); reforming cohabitation law to recognise Islamic marriages; and modernising the formalities which govern the entry into legally recognised relationships. The pros, cons and likely obstacles to each alternative will be assessed and then the case made for marriage formalities reform as being the best way forward.

Rehana Parveen
From Regulating Marriage Ceremonies to Recognising Marriage Ceremonies

English law has developed a complex set of rules and regulations to determine what types of marriage ceremonies are granted the legal status of 'marriage'. Any failures to fulfil these legal requirements have led to confusing outcomes as courts grapple with the consequences of non-compliance. The current rules and regulations are not reflective of the diverse ways in which members of Britain's multi-cultural, multi-ethnic, multi-religious and non-religious society enter into marriages. Muslims in particular have been highlighted as a community who are increasingly undertaking marriage ceremonies that do not comply with the requirements of English law and thus Muslims couples are often held to be parties to a 'non-marriage'. In the case of Muslims it is proposed that Muslims themselves determine when and how they marry and the state's interest is protected by a post ceremony registration system, not unlike the registration of a birth or death. A liberal state should not be regulating the ceremonial aspects of a marriage; rather its interest lies in recognising a marriage and providing protection to its citizens against harm or other vulnerabilities. Such protection can be achieved without the policing of the marriage ceremony itself.

Rebecca Probert
Outside the law: when is a wedding not a marriage?

In recent months the question of when a marriage should be valid, when it should be categorised as void, and when it will not be recognised at all, has attracted considerable attention. However, the key problem with much of the commentary and many of the cases is the failure to engage with the actual terms of the Marriage Act 1949. Whether or not a marriage is void depends on whether the conditions set out in either section 25 (for Anglican marriages) or 49 (for all other marriages) have been met. Ever since 1823, a marriage has only been void if the parties 'knowingly and wilfully' flout certain formal requirements (broadly those relating to notice, the place of marriage, and the

presence of a person authorised to register the marriage). At the same time, the possibility of a marriage being void only arises if the parties 'intermarry under the provisions of... [the] Act.' This indicates that there has to be some engagement with the terms of the Act before the knowledge of the parties is even relevant, and that there will be some wedding ceremonies that are simply not recognized as marriages under English law. This paper provides a historical overview of the evolution of the law and the recognition of different forms of marriage ceremony to explain why the concept of a 'non-marriage', while unattractive, is nevertheless a necessary one under the current state of the law. It advocates legal reform to make it easier to have a legally-binding marriage ceremony and greater clarity as to the minimum needed for a marriage to be recognized.

Shabana Saleem
Role of the State: Advance or Retreat?

The State is navigating an increasingly complex matrix of socio-political and economic considerations that are, in some ways, paralysing its ability to move decisively in the area of legal reform in family matters. The State once had a clear policy of promoting and regulating marriage but the law is now so out of touch there are signs the common law is having to place a greater focus on human rights and the interests of children. The reliance on human rights arguments is a creative (if somewhat isolated and solitary) attempt to depart from established law. This paper examines the reliance on Article 6, 8 and 12 of the ECHR in recent family case law. The societal-values that the State is establishing and/or cementing through its willingness or unwillingness to depart from established law is considered as follows: The primary and overriding view to protect the interests of the child as conveyed in the Supreme Court of Siobhan Mclaughlin for Judicial Review (Northern Ireland) [2018] UKSC 48 held that the government's refusal to pay widowed parents' benefit breached the children's rights, conferring rights to cohabitants that are ordinarily the preserve of the married. The secondary consideration of promoting and regulating marriage as evidenced by the judgments of *Owens v Owens [2018] UKSC 41* and the High Court case of *Akhter v Khan and the Attorney General [2018] EWFC 54*. This paper distils the reliance on human rights arguments, both successful and unsuccessful, to consider the current position of the State following the breakdown of a relationship. The primary case study of this paper will be the latest chapter in the tale of religious marriages in which Mr Justice Williams valiantly (although dubiously) relies on the need to safeguard the human right to family life to confer legal

significance to an otherwise legally invalid religious ceremony. It is a judgment that is difficult to reconcile with past judgments. The outcome of this seminal judgment is likely to have broader implications for the legal position of couples cohabiting following a religious ceremony.

Russell Sandberg
[ABSTRACT FORTHCOMING]

Sharon Thompson & Frank Cranmer
Marriage law in Northern Ireland

This paper is based on recent legal developments in Northern Ireland marriage law. Specifically, it will focus on marriage formalities pursuant to the Marriage (Northern Ireland) Order 2013 which have been radically reformed in the last 15 years. The influence of Northern Irish religious beliefs and culture has resulted, overall, in a legal landscape that is out of step with the rest of the United Kingdom, most notably in its refusal to introduce same-sex marriage. Paradoxically, however, we argue that in other respects the law of England and Wales remains antiquated in comparison with that of Northern Ireland. For instance, under the present marriage law in Northern Ireland (and in Scotland) it is far less likely that a situation like the Muslim marriage cases, *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam), could arise. Indeed, the differences between Northern Irish and English law in this area are especially clear when reflecting upon marriage formalities enshrined in the 2013 Order, which were recently scrutinised in the context of humanist weddings by the Court of Appeal in *Re Smyth, Judicial Review* [2018] NICA 25. In this paper, we will argue that this case represents an important turning-point in Northern Ireland marriage law by creating a precedent for couples to have legally valid humanist weddings. It is significant that the Court in this case appeared to reject the argument that humanist belief is not comparable to religious belief. This could support future challenges to the law in England and Wales, as with humanist weddings now legally recognised in Scotland, Ireland and Northern Ireland, England and Wales are the outliers in this regard. As a result, it will be interesting to see whether the outcome of *Smyth* could increase pressure for reform and influence the future of marriage law in England and Wales.

Islam Uddin
In pursuit of an Islamic divorce: a socio-legal examination of practices among British Muslims, informal and legal solutions

The law of England and Wales is a monolithic legal system, which recognises no parallel systems of personal law. Matters pertaining to marriage, divorce, and children are exclusively dealt with by the civil law which applies to all. Legislation such as the Marriage Act 1949 and the Matrimonial Causes Act 1973 stipulate the conditions for a valid marriage and divorce. Existing studies show that British Muslims follow customary norms from their country of origin and there is a need for religious marriage and divorce. However, couples who marry by nikah-only ceremonies in the UK are classed as cohabitees, and their nikah is seen as a 'non-marriage' or 'non-existent marriage', and therefore they have no recourse to civil law and its remedies during a relationship breakdown. Similarly, English law does not resolve religious divorce, leaving parties to seek alternative dispute resolution mechanisms. This paper explores the practices of Muslim marriages and Islamic divorce among British Muslims and draws on empirical data from a study examining the practices of Muslim family law in the UK. The research involved in-depth interviews with British Muslim women and interviews with professionals ranging from Imams, Shariah council judges, solicitors and counsellors; and observation of Shariah council hearings and analysis of its procedural documents. The findings provide a valuable insight into the intricacy of marriage and divorce practices among British Muslims and examine formal and informal dispute resolution mechanisms; dimensions of inequality, discrimination, agency, and access to justice in the use of Shariah councils; and the plurality of solutions formulated within Muslim communities. The findings reveal the complexities of the problems explored, and a multifaceted approach to pursuing an Islamic divorce, encompassing religion, culture and state law; with conclusions applicable to the British Muslim community and to a wider field of practitioners and policymakers.

Vishal Vora
The chasm of non-legal marriage; the case for moving away from 'non-marriage' declarations

In recent years there has been a preponderance of legal cases examining the issue of marriage validity, and with the developing case law, the use of non-marriage has shifted. The concept of non-marriage is being invoked ever more frequently by judges in cases concerning marriage validity yet the concept

remains a judicial invention, that has yet to be tested by the Supreme Court. This paper will examine the current usage of non-marriage declarations and make the case for reverting back the position taken by Bodey J in the case of Hudson v Leigh (Status of non-marriage) [2009] EWHC 1306 (Fam) – that the distinction between void and non-marriages need to considered on a case-by-case basis. I will argue that ceremonies of marriage cannot be non-marriages unless the parties know that they are playing at getting married. Non-marriage should be limited to its original use as summarised by Jackson's The Formation and Annulment of Marriage. The test does not require that ceremonies of marriage create or purport to create a valid marriage under the Marriage Act, but simply that they take place along with a public expression of marriage. Empirical research continues to demonstrate that for British South Asians (Muslims but the same also applies to Hindus), the traditional form of marriage remains vital not only to the partners, but to their families and extended community network. Any proposed changes to the marriage laws therefore must consider what is meaningful to all actors involved. The current law of marriage (in England and Wales) is complicated and out of date, with different rules for different religious groups. Whilst the need for non-marriage is clear and obvious, its use should also be rare. Its current liberal application is alarming, especially in the case of Islamic marriages that have been entered in good faith.