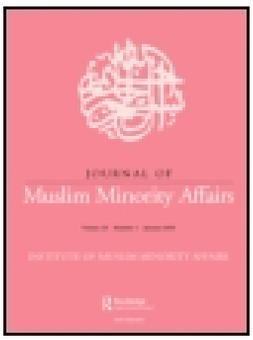

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Islamic Marriage and Divorce in the United Kingdom: The Case for a New Paradigm

AMRA BONE

Abstract

In 2008, the Archbishop of Canterbury Rowan Williams made a speech which ignited a fervent debate over Islamic divorce and the role of the shari'a *councils in the United Kingdom by suggesting that English law could accommodate aspects of Islamic Law. The crux of the debate has been that Muslim women are left vulnerable through the common practice of not registering* nikah *unions as marriages, which has led some to suggest registration should become a legal requirement. While this would provide them some legal protection, there are features of a legally enforceable* nikah *that provide women with rights such as the protection of their wealth, which go beyond the provisions of the current English marriage contract. There is understandable resistance to changing the nature of marriage in English law which, while historically fluid, is rooted in a Christian framework. In this paper a new paradigm is developed to overcome these concerns. It is proposed here that the institution of marriage should incorporate* nikah *as a separate and different form of contractual union, just as civil partnership was originally formulated to provide a form of marriage union tailored to the specific needs of same sex couples.*

Keywords: *British Muslims; marriage contract;* shari'a*;* nikah *union; Muslim divorce*

Introduction

The catalyst that ignited the current discussions and debates over the place of *shari'a* in English law was a speech made in 2008 by the then Archbishop of Canterbury, Rowan Williams, in which he suggested that aspects of Islamic *shari'a* could be incorporated within the English Legal System: Must we accommodate Islam or not as Christians?

> … it might be possible to think in terms of what [the legal theorist Ayelet Shachar] calls 'transformative accommodation': a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that 'power-holders' are forced to compete for the loyalty of their shared constituents.
>
> … It is uncomfortably true that this introduces into our thinking about law what some would see as a 'market' element, a competition for loyalty as Shachar admits. But if what we want socially is a pattern of relations in which a plurality

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> of diverse and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable.[1]

While the Archbishop's speech sparked a fierce and acrimonious debate, Williams' comments were far from being unfounded as both English law and *shari'a* have developed and adapted over centuries. Stephen Hockman, QC,[2] has referred to English law's position as being "renowned for its flexibility and adaptability"[3]; while Islamic scholar Hashim Kamali has referred to "a principle of the *shari'a* itself to the effect that the rules of *shari'a* may change in response to the exigencies of time and circumstance".[4] With such flexibility in both legal traditions, there should be an approach that can bring the two legal systems together harmoniously for the benefit of the British community.

This paper proposes a new paradigm which has not previously been articulated and questions whether there is in fact a need for an alternative form of jurisdiction or parallel system of justice—the principal fear that Rowan Williams' address raised that became the focus of many articles and the media. Previous proposals for the registration of Islamic marriage known as *nikah* and its dissolution, by equating it with the current concept of civil marriage, simply undermine the *nikah*; they break its inherent coherence, balance, justice and integrity and open it to abuse and misunderstanding within the English legislative system. The proposal is therefore to establish a new form of marital union, which I term "*Nikah* Union", that is founded on the institution of *nikah* which has existed for the past 1400 years. I explore how this may manifest in practice within a framework of civil laws, and examine the possibility of developing a model of a new marital union and procedures for its dissolution that upholds English Family Law while maintaining the intrinsic integrity of the *shari'a*. Such a contract could be tailored to reflect the particular characteristics of British society as has been done in many Muslim majority countries. Through this, balance can be maintained whilst simultaneously making justice and equity transparent and in accordance with the wishes of each individual couple as they enter into their marital unions.

The choice of terminology for this topic under discussion is critical. The words "marriage" and "divorce" are commonly used in the context of Islam and British Muslim communities; however, my concern here is with the crucial differences between the established civil marriage and *nikah*. I will therefore use "marriage" only to refer to the existent civil marriage and *nikah* to refer to Islamic marriage and use "marital union" and its "dissolution" as the generic all-encompassing terms.

I begin by highlighting why there is a need for a new terminology for marital union in the United Kingdom, elucidating the present problems, dilemmas and the issues faced by Muslims in general and Muslim women in particular. This leads to an exploration of the differences between *nikah* and marriage and since each has its own requirements and characteristics that impact upon their dissolution, this too is described. Finally, I analyse how the establishment of a new form of marital union, or "*nikah* union", can address those problems. *Nikah* Union will remain alongside marriage and civil partnerships as forms of marital unions. This approach provides flexibility and choice for all people Muslims and non-Muslims alike to opt for a form of marital union that is most appropriate to their relationship. To elaborate every detail of law and process that would be required is beyond the scope of this paper. What I strive to do however, is to propose the new paradigm in concept and a possible way forward.

Why is There a Need for a New Paradigm?

Archbishop Williams' statement above was a reasonable judgement evidencing his deeper knowledge of both legal traditions. However, his speech brought to the surface all the hidden fears, bigotry, xenophobia and prejudice that today marks much public debate on Islam, Muslims and *shari'a*. A number of key issues have been highlighted by numerous TV, radio and newspaper articles on subjects including:

- the increasing number of unregistered Muslim marital unions among the Muslim communities, which have left vulnerable Muslim women without the protection of the law, particularly at the time of divorce;
- that Muslims have been accused of setting up parallel legal systems to resolve their family issues of marriage and divorce through voluntary bodies known as *shari'a* councils. This is presented as evidence for Muslims not wanting to integrate into the existing legal system. Since *shari'a* is accused of being discriminatory against women, it is assumed they are not treated equally and hence do not receive justice;
- Polygyny is also highlighted as an issue. It has been suggested that there is an increasing number of polygamous marriages particularly among younger members of the Muslim communities which is again seen as a source of abuse and neglect for vulnerable Muslim women. This is then linked to the issue of marriage registration as compulsory registration would, in theory, eliminate polygyny as any man engaging in a polygynous marriage would be prosecuted under the existing law of bigamy in Britain.

These issues all contribute to the questioning of British Muslims' loyalty to UK society, raising suspicion towards Muslim communities and fuelling Islamophobia. As Prakash Shah observes:

> The moral deficiency of those who subscribe to non-Christian religions is a well-established – and still endemic – theme in Western culture. Those who follow 'false religions' are morally suspect and, since it is assumed that action follows doctrine, their actions bear out the falsity of their doctrines. Modern secularism, although it purports to transcend the bias of particular religions, has not abandoned this theme, and it survives and reproduces through other, ostensibly non-religious, secular tests.[5]

The registration of Muslim marital unions has thus become a central issue that is problematic, both because Muslims are not currently availing themselves of the protections of civil law and because of the secondary effect of emphasising the divisions in society that have led to the alienation and resentment of Muslim communities. There is no doubt that some of these issues raise legitimate concerns about the protection of women and these concerns are also shared by Muslims.

The report published in February 2018 of the "Independent Review into the Application of Shari'a Law in England and Wales"[6] focussed almost entirely on marriage and its dissolution. The two concerns it sought to address were the lack of legal recourse available to Muslim women in unregistered *nikah*s and the role of *Shari'a* councils which was perceived by some to be taking the form of a parallel legal system that failed to give equal rights to women.

The first recommendation of The Independent Review was to make it illegal to conduct a *nikah* without either simultaneously or previously registering a civil marriage. This is problematic for a number of reasons:

- Firstly, Islam does not a have a priesthood that could be called to account. While it is common for a mosque *imam* to conduct a *nikah*, this is not required, and many marriages are conducted by friends or relatives.
- Secondly, a mosque is not regarded as a consecrated space. Muslims are not required to conduct their marriage in the mosque. Ian Edge offers the "purely civil" nature of a *nikah* union as an explanation for Muslims being willing to hold a wedding outside a mosque.[7] This also shows a lack of understanding of the nature of a mosque, which is not a "consecrated" prayer space in the Christian sense. Muslims do not typically hold a wedding in a place of worship, so weddings commonly take place in community centres, banquet halls and even in private homes.[8]

Nash also reiterates the common misunderstanding that a major barrier to *nikah* registration is the lack of mosques that are registered for conducting marriages. Government statistics now show that there are now 1,360 Mosques registered for the conduct of civil marriages in UK.[9] When compared with the total number of mosques in the UK which in 2017 was reported as 1,975[10] and we find that 69% are registered for conducting marriages. This can be compared to the number of mosques with facilities for women which stands at 72%[11] and we see that the vast majority of mosques that are capable of hosting a wedding are now registered. This has not however reduced the incidence of unregistered marriages.

The Report also suggests that enforcing marriage registration would gradually reduce the need for the *shari'a* councils, which would eventually become obsolete. However, while some councils are happy to "fast-track" the dissolution of a *nikah* where a decree absolute has been issued by the civil courts, there is an overwhelming consensus among scholars who do not consider the civil dissolution to be adequate.

The second recommendation of the Report is for a campaign to be launched to educate Muslim men and women about their rights and responsibilities. This can only be beneficial, but it might not lead to as many registrations as the Report's committee supposes for the reasons stated above.

Finally, the Report recommends the creation of a government regulatory body to oversee the work of the *shari'a* councils to ensure they operate within the spirit and letter of civil law. An analogy here is made to OFSTED, the regulatory body that oversees the running of schools. However, this is a most unfortunate comparison given that organisation's current attitude towards religious institutions which many see as highly discriminatory and thus this is not likely to win support from the Muslim communities.

Unregistered marriages are not a new phenomenon in the UK Prior to the introduction of the civil marriage, a church wedding was far too expensive for most of the population, so simple ceremonies would be held within the community to acknowledge a wedding which would then not be subject to the protection and enforcement of the state. Even after civil marriages were introduced, common-law marriages have persisted to the present day. These have no standing in law although this is not always understood. In addition to the cost of a marriage, the constraints, time and cost of civil divorce have also provided a strong incentive for couples to choose not to register their marriage.

Unregistered *nikah*s have probably been taking place since the first Muslim settlers arrived in Liverpool. However a key legal case took place in 1965 when a Birmingham Imam was taken to court for solemnising a marriage in a private house that was not a registered building. His defence was that he never represented the marriage as a registered marriage in British law, but merely as a *nikah* and on this basis his prosecution

was overturned on appeal. This set a precedent for the legality of unregistered *nikah*s in the UK.[12]

Just as non-Muslims have found divorce a difficult and expensive process, so too Muslims are aware that civil divorce is difficult and expensive, and there is a perception that women are "unduly favoured" in the divorce settlements.

The large and fast expanding Muslim community in Britain is a rapidly changing context. In an article published in the *Huffington Post* (28/02/2018), Rachael Moss cites a survey by the Office for National Statistics[13] which indicates that marriage rates for heterosexual couples are the lowest on record.[14] Non-Muslims may choose to live together, not officially getting married or registering their partnership; thus it is therefore hardly surprising that so many Muslims too are choosing not to register their *nikah* unions.

A group led by solicitor and specialist in family law Aina Khan[15] has championed the registration of all Muslim marital unions as "marriages" through her campaign "Register Our Marriage" (ROM). This educational campaign was clearly worthwhile as everyone should understand the full ramifications before choosing to register or not to register. Khan is now campaigning for all minority religious marital unions to be automatically registered as marriages unless one specifically opts out from the system. This may be beneficial for some faiths, that is for them to decide, but it is not an acceptable approach for the Islamic Nikah as it will not resolve the current issues.

Those who promote the registration of Muslim *nikah*s as "marriages" using the existing form of marital union, highlight that for many poor and uneducated women state registration would give them significantly more rights and would result in them receiving a more equitable divorce settlement. However, as Akhtar highlights in a 2018 paper,[16] there are now many more religious marriages that do not fit the crude stereotype (what she calls the "paradigm case") of uneducated vulnerable Muslim women, but instead apply to successful businesswomen, legal professionals, doctors, lawyers, etc. For them, civil registration would actually be detrimental, and they may have consciously chosen to avoid civil registration just as some non-Muslims may choose to simply live together with their partner to protect their assets. To force such people to register their unions when there is no such coercion for those who merely choose to live together would be highly discriminatory. In her paper, Akhtar expands on this highlighting the many different reasons why couples currently choose to engage in a *nikah* without civil registration.

The problem with these various approaches is that they fail to recognise the fundamental differences between the two forms of marriage. As Shah warns:

> A *nikah* is indeed not the same as a Western marriage; but should the way in which Muslim communities understand the former simply be dismissed or be assimilated into Western norms? Universalised Western assumptions appear to be hampering people in deciding what forms of complex relationships are appropriate for them.[17]

One reason for proposing a new paradigm in the form of a "*nikah* union" is that *nikah* has a different set of explicit and implied contractual relationships compared to the current UK civil marriage. Thus, when a couple register their Islamic marriage, they are entering into a second concurrent contractual arrangement that, in some areas, conflicts with the original contract they signed. Furthermore, the original contract, which is foremost in the minds of a Muslim couple, remains unprotected by law.

The *nikah* is often dubbed as marriage by both Muslims and non-Muslims alike however the understanding of the meaning varies in the minds of people. The two con-

tracts certainly have many areas of commonality, although there are significant differences, as will be demonstrated.

What is *Nikah*?

The Arabic word "nikāḥ" has literal meanings of joining, ejaculation and sexual intercourse. It is thus a contract whose purpose is, at least in part to render permissible sexual relations. Nyazee,[18] an Islamic scholar, explains that in legal jargon the *nikah* union has as its purpose *milk mut'ah* meaning that the husband gains exclusive physical access to his wife. This term is framed in the language of ownership (*milk* is the Arabic term for ownership) which naturally raises concern, however, Nyazee highlights that *milk mut'ah* is importantly distinct from *milk 'ayn*, which is ownership of the corpus itself which is the language used to define the relationship between master and slave. In fact, *shari'a* required men to free their slaves prior to marrying them precisely because of the important distinction between these two types of relationships.

The *nikah* union I am proposing is based on the institution of *nikah* which needs to be understood in some detail. It is important to identify which features are important to the Muslim community so that what is introduced into English law can be accepted by the majority.

Nikah is a form of marital contract which is neither totally secular nor purely religious. It is simultaneously a civil contract and a divine institution,[19] established by the Prophet Muḥammad ﷺ and rooted in explicit verses of the Qur'ān. Comprehending this distinction has been a challenge for many commentators. *The Independent Review*, previously mentioned, predicates its recommendations on the understanding that Muslims require a "religious ceremony" but that a secular contract in the form of a civil marriage can function in parallel with this. For Muslims however the religious dimension comes not from some form of ceremony or ritual but from adherence to and conformity with the principles of *shari'a*.

While a *nikah* contract is very flexible, it has some required features which have remained prevalent in Muslim societies for the past 1400 years and are as follows:

- Free consent of both parties
- A freely given gift from the groom to the bride, known as *mahr*
- The intention of the permanence of marriage
- The bride should typically be represented by a *wali* or guardian (see below)
- There should be a minimum of two male witnesses to the *nikah* ceremony
- There should be no burden on the family of the bride with respect to the cost of the *nikah* union and its celebration

In addition, there are certain accepted implications of the contract based on the Qur'ān and Sunnah:

- The husband has no right over the *mahr* that is agreed upon
- The husband has no right over the wife's pre-existing wealth
- The husband has no right over any wealth the wife obtains during the marriage
- The husband is solely responsible for protecting, maintaining, and providing for the wife and any children throughout the marriage and where he has the means this must be to the level the wife was previously accustomed to.

Beyond these principles there are very few restrictions on how a couple choose to live as a family. A woman can work, and most Muslim women do. A woman can choose to contribute towards a house or car or any other expenses if she wishes. There have been scholars in the past who have considered certain roles to be prescribed; however, this can be seen to be influenced more by their own cultural and social norms than by the core texts of Islam. This does not make their opinions false in their own context as the Qur'ān refers on many occasions to "what is known to be good" meaning what is customarily accepted, but it does mean that their views are not necessarily shared by Muslims in the UK today.

In addition to these unanimously agreed upon principles there is great flexibility in the *nikah* contract to expressly state other obligations. For instance, the bride may insist on a clause requiring the husband to consult or seek her permission before entering into another marriage or totally barring him from taking another wife. She may demand the authority to unilaterally declare the marriage dissolved, or she may make financial conditions such as the family home to be purchased in her name, etc. If any such conditions are subsequently broken, they can be used as legitimate grounds for the dissolution of the *nikah*.[20]

Islam did not develop in a vacuum, but was first developed and formulated from a legal standpoint in the context of Arabian society. In that society, women were undoubtedly considered vulnerable to abuse and oppression. To be protected, a woman needed a family to support her, meaning either a guardian or a husband. Contrary to the notion espoused by literalists, while the principles of *sharia* set out in the Qur'ān and the Prophet's *ḥadīth* are immutable, the detailed interpretation of that law has evolved over centuries to cater to the needs of diverse and developing communities across the globe through the process of *ijtihad*, judicial reasoning, a feature that it may be said to share with English Law.

The free consent of both parties is stipulated as a requirement which was not always the case in the earlier pagan tribal customs, where men would give or sell their daughters to each other. In this context, it is understandable that the role of the father or guardian in executing the marriage contract (*nikah*) as the *wali* was explicitly described. The support of a *wali* or guardian/representative of the bride was, according to one *ḥadīth*,[21] a prerequisite for *nikah* marriage, and this was accepted by three of the four Sunni schools as a necessity for all situations. Only the Hanafi school provided any flexibility in suggesting this requirement was only for a young virgin, whereas an older woman who had already been married before did not require a *wali*. This concession could in theory be extended in the modern context were it to be accepted that even young women no longer require the support and guardianship of a *wali* given the provisions of the welfare state. (In the *ḥadīth*, it is said that for one without a *wali* the ruler takes this role, but in our context, it could be argued that the welfare state may be considered to be the "ruler"). For non-Hanafis, however, a *wali* for the bride is considered to be essential.

The British concept of marriage has also not been static. Popular understanding has changed as society has increasingly recognised the equality of men and women, and this has also impacted on the nature of the marriage contract. Marriage in the United Kingdom began as a Christian formulation and has since been adapted to include secular unions. Prior to the development of the Protestant churches, Catholicism and its canon law defined the nature of marriage for all Christians. The text, *Decretum*, which was written by the twelfth-century monk Gratian, declared marriage to be initiated by the free consent of each party and to be consummated by sexual intercourse.[22] This document arose out of the consideration of a number of Roman and Germanic

customs and may be seen as a compromise between them. A subsequent revision of *Decretum*[23] made consent of the bride's father and family an additional requirement which formalised the notion of the bride being "given away", which has become a norm in Christian weddings to the present day. This latter condition has now been dropped from civil marriages as a part of the measures to render the parties to the marriage more equal; however, the concept of a legal guardian remains present for pre-adulthood males or females, at ages of 16 or 17 years old.

The above discussion highlights a distinction between marriage in English law and what would be required in a *nikah* union. However, satisfying the needs of the Muslim community would be, in this instance, very simple. The provision within the contract to specify the bride's *wali* would enable those who believe it to be necessary for the marriage to be legitimate to complete the contract to their satisfaction.

Another aspect of *nikah* is the bridal gift which the Qur'ān terms the *niḥlat*.[24] This is an essential feature of the contract. The *niḥlat*, or *mahr* as it is more commonly referred to, is money or property that the husband gifts to his wife and to finalise the *nikah* and subsequently has no right over it; and, in the event that the *nikah* is dissolved, the bride would retain it as a form of security for herself.

Dowry in the British context was more commonly a sum of money or property that was given by the bride's family to persuade the groom to accept her in marriage. This has largely disappeared as a custom, and is not a feature of a British civil marriage. Taken in isolation it may seem to outsiders that the *mahr* is an aspect of *nikah* that can be dispensed with in our context, however, its fundamental importance becomes more evident when the methods of dissolution are considered. In the case of *nikah*, the *mahr* is specified clearly in the *nikah* contract or *aqd nikah*.[25]

Dissolution of the *Nikah* Union

The nikah union with its new features and characteristics in the British context would also require a mechanism by which it can be dissolved. Therefore, some discussion of the processes of dissolution for *nikah* is needed.

The *mahr* stated in the *nikah* contract fundamentally changes the way in which equity in the financial resolution is determined at the time of marital dissolution, making the *nikah* significantly different to marriage. In addition, the expectation that the husband should support his wife even if she is independently wealthy has a major impact. For instance, in the case a couple where both are professionals, the failure of the husband to support his wife with clothes, food and a place to live could provide grounds for divorce as an example of neglect. This is quite different to the case of a couple joined in a "marriage".

Navigating these differences would be difficult for the family court judges unless they have received specific training; thus, it would make sense for them to be partnered with a Muslim scholar who has in-depth knowledge of *nikah*.

The dissolution of a *nikah* is described in the Prophetic *hadīth* as the most disliked of all lawful acts.[26] Despite this it is understood to be far better than maintaining a dysfunctional or abusive marriage which is itself sinful and can lead to the major sin of adultery: "And if husband and wife do separate, God shall provide for each of them out of His abundance: for God is indeed infinite, wise".[27]

Such a dissolution is quicker, easier and cheaper than the process of divorce through the English family courts and can take place at any time after the *nikah* has been established; even on the same day!

There is a common perception that Muslim men can dissolve their *nikah* contract with a simple verbal declaration, but that a woman must negotiate dissolution through a court or council and will have to give up any dower she has received. The procedures for dissolution *are* indeed different for men and women; however, the woman is neither required to obtain the husband's cooperation nor will she necessarily be required to return the *mahr*.

In the case of a man choosing to dissolve his marriage he is able to do so unilaterally. However, in doing so he becomes liable for any unpaid *mahr*, loses any right over any gifts, must return any money loaned to him by his wife and is required to provide some maintenance in accordance with what is understood to be fair and just in the society.[28] This process is termed *talaq*. Following dissolution of nikah by *talaq*, the couple can then agree to resume their *nikah* with no formalities if this happens during the wife's next 3 menstrual cycles or with a new *nikah* contract if that period has expired. To prevent this being treated lightly, however, this *nikah* can only be renewed twice. Upon a third *talaq*, the union is considered irrevocably dissolved, at which time the couple can only engage in a new *nikah* after the divorced wife has contracted and consummated a new marriage with someone other than her previous husband and then this marriage has been dissolved by death or divorce.

In the case of a woman choosing to dissolve her marriage, a different approach is required because of the *mahr*; which could be a substantial sum, and could lead women to marrying and divorcing men purely to obtain the money as *mahr*. When a woman initiates the process of dissolution she may, in the case of a no-fault dissolution, agree to return some or all of the *mahr* she received. This negotiated dissolution is termed *khul'a*. Under *khul'a* her other sources of wealth would remain hers alone and the husband would have no legitimate claim over them.

Where a woman seeks release from an abusive or neglectful union any such negotiation would be inappropriate so a court can choose to dissolve the *nikah* by *tafriq*/*faskh* in which case she is under no obligation to return any wealth.

It is also possible for a woman to dissolve her *nikah* unilaterally in the same way as a man. This is termed *talaq*-e-*tafweed* and her right to do so can be made a condition of the *nikah* or can be negotiated at any time during the marriage. The forms of dissolution described here highlight the impact of the *mahr* and illustrate why it is such an important component of *nikah*.

In Christianity, there has never been any corresponding method of dissolution as the Church has always asserted that marriage is a permanent union to be maintained until death. This provides a partial explanation as to why Muslims' need for "religious divorce" has not been understood by the wider society.

In the United Kingdom purely civil divorce began in 1670, some 17 years after the introduction of civil marriage. When divorce was first accepted, it was a provision available only to the rich elite as each divorce required a separate act of parliament and even then, petitioning wives were required to prove "aggravated" adultery which was defined as cruelty, desertion, bigamy, incest, sodomy or bestiality. Divorce litigation was moved to the civil courts in 1857 through the Matrimonial Causes Act.

The twentieth century brought about some significant reforms. In 1937 the grounds for divorce were extended from solely adultery to include ill-treatment, drunkenness, insanity and absence. One of the motivators for this change was that it was observed that the law had become a motive for committing adultery in order to secure a divorce.[29] In 1969 the Divorce Reform act allowed couples to cite marital breakdown as grounds of divorce; however, a truly no-fault divorce has not existed until the present day.[30]

The methods by which *nikah* and UK marriage unions are dissolved are thus rather different. However, an even greater area of difference lies in the divorce settlements determined by the courts. Both the UK civil courts and the *shari'a* courts of Muslim majority countries have as a principle the determination of equity. i.e. what is fair and just. In the English family courts, this is based upon the total wealth of the couple and the contribution each has made to the marital union. Thus, if the husband has worked while the wife has raised the children it may be that up to half of his wealth is given to the wife on dissolution of the marriage. By the same token, if it is in fact the wife that has been the principle bread-winner it may be that up to half of her wealth will be given to the husband. Here, the principle of the protection of the women's wealth under a *nikah* union generates a very different outcome. This was highlighted by the television programme *Celebrity Lives Shariah Style* which showed that, had the singer Madonna contracted a *nikah* rather than a marriage, the outcome of its dissolution would have been very different as she would have retained all of her wealth.[31]

John Bowen in his paper *Gender, Islam, and law*,[32] that was based upon research he conducted for the United Nations, examines the reality of Muslim asymmetrical dissolution of *nikah* in the light of the assertions that have commonly been made that it favours men over women. He studied groups from Tunisia, Indonesia and Iran to see if *shari'a* marriage dissolution really favoured the men in practice. In the case of *talaq*, a man's unilateral power to dissolve the marriage is offset by their legal obligation to pay any *mahr* owing so he focussed on the cases of *khul* that were brought before the courts. He found that;

> Beyond the question of statutory change, ethnographic studies show that, overall, judges have tended to interpret the legal framework in such a way as to favour women when possible, for example by using wide definitions of 'harm' (*darar*) done to a woman and narrow definitions of her 'disobedience' (*nushûz*), which is the basis of counter-claims sometimes made by husbands.[33]

Bowen references the work of Arzoo Osanloo[34] who observed that:

> … women become rights-bearing subjects, adept at formulating their cases in legal terms, precisely because they have to go through the courts to obtain a dissolution, whereas men, because they are assured that they have the right of unilateral dissolution, remain relatively ill-equipped to speak the language of the law. Women become more conversant in civil law and in a liberal subjectivity than do men. In other countries as well, ethnographic accounts of Islamic family courts show that women are actively manipulating the system to further their interests.[35] Bowen concludes that religious laws such as those embodied in *shari'a* often achieve equality though adapting legal practice rather than by creating an ostensibly equal legal framework, whereas 'secular legal systems may be more likely to exhibit the opposite tendency—namely, to proclaim formally equal rights and then to subvert those claims in practice'.[36]

In my own experience of working at the Shariah Council based in Birmingham Central Mosque, I have spoken to a number of well-educated Muslim women about why they did not choose to register their marriages, and a number have pointed out that their businesses would have been ruined and their personal assets would have been at risk had they gone through a UK civil divorce.

Different Forms of Marital Unions

In his lecture entitled "What Is Family Law? – Securing Social Justice for Children And Young People", Sir James Munby, President of The Family Division of The High Court And Head of Family Justice For England And Wales, states that:

> … in contemporary Britain the family takes an almost infinite variety of forms. Many marry according to the rites of non-Christian faiths. People live together as couples, married or not, and with partners who may not always be of the other sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent, by two parents or even by three parents. Their parents may or may not be their natural parents. They may be children of parents with very different religious, ethnic or national backgrounds. They may be the children of polygamous marriages. Their siblings may be only half-siblings or step-siblings. Some children are brought up by two parents of the same sex. Some children are conceived by artificial donor insemination … all of this poses enormous challenges for the law, as indeed for society at large. The law –family law – must adapt itself to these realities. It has, and it does, though the pace of the necessary change has, for much of the time, been maddeningly slow.[37]

A great concern for many has been the idea that recognising *nikah* would imply the legalisation of polygyny which is seen by many to potentially damage the rights and autonomy of women. Munby highlights that different forms of family life are a reality of modern Britain, so perhaps we need to question what approach will empower women rather than impinging upon their rights? Should women and men have the right to choose to live in polygamous unions?

In 2004, the Civil Partnership Act recognised the principle of establishing alternative forms of marital unions in law. The Act granted civil partnerships to same-sex couples in the United Kingdom with rights and responsibilities identical to civil marriage but avoided changing the nature of marriage itself which would have been widely opposed.[38] Until 2010, this remained forbidden in religious institutions. It is noteworthy that this change in legislation was passed to cater to a population which, according to The United Kingdom Office for National Statistics, numbered only 2.0% of the UK population aged 16 and over in 2016.[39] Given the general trend towards an increase in those who self-identify as homosexual over time this figure would have been lower at the time the law was passed. This suggests that legislators are willing to cater to a small minority, where they believe that this would increase equality in the society.

Same sex "marriage" was finally legalised through the *Marriage (Same Sex Couples) Act 2013*, which suggests that the orthodox Christian opposition to changing the nature of the marriage contract has now weakened.[40] In 2018, the government started the process of opening up civil partnerships to heterosexual partners who wanted to avoid the historical "baggage" associated with "marriage".

To address the potential for injustice towards women an important first step would be the registration of each and every marital union as it ensures all parties are aware of the situation and no man can take an additional wife without both she and the first wife being aware that they are to become part of a polygynous union. The right of the wife to veto any such union would also be important. Beyond that the state may choose to retain a veto where the husband cannot demonstrate the ability to support the whole family without relying upon handouts from the state through benefits etc.

Amongst the reasons I have heard women who have chosen to enter into polygynous unions cite for their decisions are:

- Women who would rather their husbands take another wife than divorcing them or taking a mistress.
- Women who would like a "part-time husband" that will allow them to enjoy the benefits of a family and a lawful sexual partner whilst still being able to pursue their interests such as further education or a career etc.

In a number of cases I have dealt with when adjudicating on the dissolution of *nikah*s, women have come to the council when they have discovered their husbands have either contracted another marriage without consulting or informing them or they have discovered that a pre-existing marriage had been concealed when they signed their *nikah* contract. In a number of instances, the women did not want to immediately dissolve their *nikah* contract, but rather they wanted the first wife to be aware of their *nikah* and to be treated equally.

Psychologist Nigel Barber, writing in *Psychology Today*, also challenges the popular notion that polygyny necessarily brings with it the abuse of women:

> Contrary to popular assumptions, multiple marriage has nothing to do with poverty, backwardness, or oppression of women (e.g. acceptance of wife-beating).[41]

He goes on to illustrate this by pointing out that in the USA the state of UTAH, famous for its polygyny promoting Mormons was the first to give women the vote, some 50 years before the rest of the USA.

While some women completely refuse to be part of a polygynous union, others have shown willingness to be part of an alternative family lifestyle. However, in my experience, preference for monogamy still remains popular among majority of Muslims.

The Impact of the New Paradigm on UK Civil Law

The concept of "marriage" in the UK has evolved over time, which challenges the often recounted assertion that it is inviolable, and religion has also had an impact on the law. There has been a considerable amount of hyperbole from both the media and politicians that Muslims are trying to place religion above English secular law. This is far from the truth. Russell Sandberg dispels this myth in his paper *Islam and English Law.*[42] He highlights the ongoing impact of the Anglican Church, which retains the authority to create church law that has the same status as acts of parliament. He further points out that the UK has already accepted certain aspects of law from other faiths:

- Islamic finance has been developed into a substantial market where, according to Ainley et al., English law is the preferred legal jurisdiction for many Islamic finance transactions[43]
- Islamic and Jewish slaughter is defined and protected for the production of *halal* and *kosher* meat
- Within family law, the Adoption and Children Act 2002 has introduced the concept of "special guardianship" as a means of parental responsibility as an alternative to adoption to provide a fostering relationship that takes account of the traditional Muslim prohibition on adoption.[44]

- The Divorce (Religious Marriages) Act 2002 was passed specifically to address the issue of chained women in the Jewish community. Through it a Jewish woman can apply to have a civil divorce delayed pending the provision of a *get* (Jewish religious divorce) from a Beth Din to prevent her being divorced in British law but still married in the eyes of the Jewish community.[45]

In fact, the paradigm I am proposing, whilst designed to meet the religious needs of the Muslim community, would from the perspective of the state, for all intents and purposes, be secular in nature since it has no specific form of what may be understood as "religious". As long as the main features of *nikah* are accommodated, the religious dimension would be satisfied for the Muslim communities. *Nikah*s could continue to take place in all different places according to the various cultures of the different Muslim communities; however, the main barriers inhibiting Muslims from registering their *nikah*s with the state will have been removed. In fact, through enabling the state to enforce the contracts, these *nikah* unions could be said to more fully satisfy the requirements of *shari'*a. A prime objective of *nikah* is to provide safety and security, particularly for women and children and without the backing of the state a *nikah* cannot fulfil its true purpose.

In my experience of working in the *shari'a* council, I have regularly faced the issue of individuals who are married religiously but not civilly or vice versa. This inconsistency would be removed through the establishment of the *nikah* union.

Finally, the integration of the UK legal systems with Muslim scholarship would enable any oppressive practices to be combated effectively and so ensure that marital unions are a tool that promotes equity and justice. This is in the true spirit *of shari'a* as expressed by the fourteenth-century scholar Ibn Al-Qayyim:

> Verily, the *shari'a* is founded upon wisdom and welfare for the servants in this life and the afterlife. In its entirety it is justice, mercy, benefit, and wisdom. Every matter which abandons justice for tyranny, mercy for cruelty, benefit for corruption, and wisdom for foolishness is not a part of the *shari'a*, even if it was introduced therein by an interpretation.[46]

The following points sum up the new paradigm. I have sought to express it in a way that most closely matches the particular needs of the UK context:

(1) A general principle of monogamy would apply although provision could be made for restricted polygyny under special circumstances.
(2) The *nikah* contract would provide optional clauses, such as the wife's right to give unilateral divorce and the prohibition of future polygynous unions.
(3) This new form of union should be available to all and not restricted to Muslims so that anyone who considers it to be more appropriate to them than the other existing or future forms of union can take advantage of this provision.
(4) Implicit in this new union and detailed in the contract should be the provision to protect the woman's wealth as described previously.
(5) Dissolution of the contract should not be constrained by time limitations such as those that are currently in place for "marriage". (e.g. initiating dissolution should be possible immediately).

Some Muslim women and indeed some men, may come forward to say that they believe that the asymmetrical union that is the *nikah* is not what they want. As Muslims they may be attached to the title of *nikah*, but feel that in their circumstances a relationship that

is completely equal is better. This can be accommodated by taking advantage of the flexibility in the *nikah* contract by for instance making the *mahr* small and including a clause for delegated *talaq* to allow the woman to unilaterally terminate the marriage. Women may also exercise their right to give up the protections on their wealth and instead choose to merge their wealth with their husband.[47]

Conclusion

The former high court Judge Sir James Munby has made many calls for reforming the present family court system. To facilitate this new *nikah* marital union, there would need to be a new body of law to address such unions that would be valid in both English law and the eyes of the Muslim community. Family law courts established for this purpose would need a full understanding of *shari'a* as it applies in the context of *nikah* as well as that of English family law. A simple google search on Muslim family law or *shari'a* in the UK reveals that there are already many mainstream legal practices that have added Islamic family law to their areas of expertise, so this would not be difficult to achieve. To satisfy the Muslim community that any dissolution was both civil and religious, each court would also need to be presided over by Muslim scholars. These new family courts could reasonably be formed using the experienced Muslim scholars currently serving the *shari'a* councils, some of whom are also qualified as legal professionals in the English judicial system. In the longer term, "doubly qualified" experts (i.e. those with qualifications in both *shari'a* and English Law) should be encourage and over time become the norm.

It is realistic to assume that, whatever provision is implemented, there will be dissenting voices from some in Muslim communities, as there are inevitably going to be restrictions and limitations. However, there is some kind of restriction and regulation in almost every Muslim nation, as these are essential to allow the judiciary to ensure that nobody's rights are infringed. The current family law court system is, according to many judges "on the brink of collapse". If Muslims are forced to simply register their *nikah*s as marriages, the volume of dissolutions that are currently being processed by the *shari'a* councils risk overwhelming it. If, however, a new *nikah* union is established with dedicated new system of courts for its dissolution, this will support and relieve the current system.

How would the new paradigm of *nikah* union address the issues highlighted at the start of the paper?

- The *nikah* union would eliminate the apparent conflict inherent in the registration of *nikah* as marriage by providing a registered form of marital contract that echoes the nature and legal premises of the *nikah*.
- The civil dissolution of those marital unions will correspond with the expectations both parties held at the time the contract was formed.
- Both vulnerable Muslim women and those who are wealthy and independent would gain appropriate protection under the law.
- The fundamental problem of non-registration of marital unions may have been either fully removed or at least dramatically reduced.
- The closer relationship between Muslim scholarship and civil lawyers and judges will create trust and respect among each other and their respective legal systems
- By integrating *nikah* union within the framework of English law, the fears of a parallel legal system for Muslims will be assuaged.

- By introducing a new form of marital union, the existing "marriage" contract would remain unchanged. This could therefore continue to be used by anyone, including Muslims who believe it to be a better fit for their chosen lifestyle.
- By creating a new form of marriage that is administered under the existing legislature no-one would be required to "choose the jurisdiction" under which they would like their union to be dissolved thus the fears that we would be creating a parallel system of justice which was provoked by Rowan Williams address would be allayed.

Finally, introducing the *nikah* union as a new form of marital union in the UK would address the current vulnerability of Muslim women whose *nikah*s are unenforceable by the state, and would extend the protection of civil law to Britain's largest religious minority. Implementing the *nikah* union as a registered marital union in the UK would go a long way towards providing the Muslim community with the equality of rights and opportunity that they deserve and that is championed by advocates of a pluralist liberal democracy.

NOTES

1. Robin Griffith-Jones, "The 'Unavoidable Adoption' of Shari'a Law – the Generation of a Media Storm", in *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*, ed. Robin Griffith-Jones, Cambridge: Cambridge University Press, 2013, p. 12.
2. Queen's Counsel – A Senior Barrister.
3. Stephen Hockman, "Introduction", in *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*, ed. Robin Griffith-Jones, Cambridge: Cambridge University Press, 2013, p. 2.
4. Mohammad Hashim Kamali, *Shari'ah Law: An Introduction*, Oxford: Oneworld Publications, 2008, p. 265.
5. Prakash Shah, "Judging Muslims", in *Islam and English Law*, ed. Griffith-Jones, *op. cit.*, pp. 144–156.
6. "Independent Review into the Application of Shari'a Law in England and Wales": https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf (accessed 15 February 2019).
7. Ian Edge, "Developments Towards Legal Pluralism?" in *Islam and English Law*, ed. Robin Griffith-Jones, *op. cit.*, pp. 116–143.
8. Independent Review into the Application of Shari'a Law in England and Wales', *op. cit.*
9. H.M. Passport Office, "Places of Worship Registered for Marriage", 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769076/Places_Of_Worship_03.01.2019.ods (accessed 15 February 2019).
10. Mehmood Naqshbandi, *UK Mosque Statistics*, 2017, https://www.muslimsinbritain.org/resources/masjid_report.pdf (accessed 15 February 2019).
11. *Ibid.*
12. Richard Freedland and Martin Lau, "The Shari'a and English Law: Identity and Justice for British Muslims", in *The Islamic Marriage Contract – Case Studies in Islamic Family Law*, eds. Asifa Quraishi and Frank E. Vogel, Cambridge, Massachusetts: Harvard University Press, 2008, p. 333.
13. Office for National Statistics, *Marriages in England and Wales – Office for National Statistics*, 2018, https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2015 (accessed 15 February 2019).
14. Rachel Moss, *Marriage Rates for Straight Couples are 'Lowest On Record', Survey Reveals*, 2018, https://www.huffingtonpost.co.uk/entry/fewer-straight-couples-are-choosing-to-get-married-than-ever-before_uk_5a968077e4b07dffeb6dd325/ (accessed 15 February 2019).
15. https://www.ainakhan.com/register-our-marriage/ (accessed 15 February 2019).
16. Rajnaara Akhtar, "Modern Traditions in Muslim Marriage Practices, Exploring English Narratives", in *Oxford Journal of Law and Religion*, Vol. 7, No. 3, 2018, pp. 427–454.
17. Prakash Shah, "Judging Muslims", in *Islam and English Law*, ed. Robin Griffith-Jones, *op. cit.*, pp. 144–156, 152.

18. Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law*, 2nd ed., Islamabad: Center for Excellence in Research, 2016, p. 33.
19. Hammudah Abdalati, *The Family Structure in Islam*, Indianapolis: American Trust Publications, 1977, pp. 58–59.
20. A number of such clauses are included in the *nikahnama*s (marriage contracts) of Pakistan and Bangladesh. The Muslim Family Laws Ordinance 1961 also introduced penalties including prison terms for failing to gain permission for a polygynous marriage, failing to register a marriage and failing to register a *talāq* (divorce), thus ensuring that all pertinent issues relating to marriage and divorce are both legally formalised and enforceable by the state.
21. "There is no marriage except with a *wali* (guardian) and the ruler is the *wali* of she who has no guardian". (Ḥadīth reported by Abu Dawud & others and classed as *ṣaḥīḥ*).
22. Anders Winroth, "Marital Consent in Gratian's Decretum", in *Readers, Texts and Compilers in the Earlier Middle Ages: Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl*, eds. Martin Brett and Kathleen G. Cushing, Aldershot: Ashgate Publishing, 2009, pp. 111–121 (113).
23. There is some dispute as to whether this was authored by the same monk or another.
24. Qur'an 4:4: "And give the women (on marriage) their dower as a free *gift* (emphasis mine); but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer".
25. In the Indian subcontinent this is more commonly known by the Urdu term *nikahnama*.
26. "Among lawful things, divorce is most hated by Allah" (Reported by Abu Dawud).
27. Qur'an 4:130.
28. Qur'an 65:1–2.
29. Roderick Phillips, *Untying the Knot*, 1st ed. Cambridge: Cambridge University Press, 1991, p. 193.
30. The No Fault Divorce Act is in the process of passing through parliament at the time of writing this article.
31. See the television programme, CSC, Celebrity Lives Sharia Style – PART1, https://www.youtube.com/watch?v=EFcCtvIDMGU (accessed 15 February 2019).
32. John R. Bowen, *Gender, Islam and law*, Helsinki: UNU-WIDER, 2017.
33. *Ibid.*, p. 9.
34. Arzoo Osanloo, *The Politics of Women's Rights in Iran*, Princeton, NJ: Princeton University Press, 2008.
35. Bowen, *Gender, Islam, and law*, *op. cit.*, p. 11.
36. *Ibid.*, p. 4.
37. James Munby, "What Is Family Law? – Securing Social Justice For Children And Young People", Lecture given at University of Liverpool on 30th May 2018 as part of the Eleanor Rathbone Social Justice Public Lecture Series.
38. https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/ (accessed 15 February 2019).
39. https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2016 (accessed 15 February 2019).
40. https://www.legislation.gov.uk/ukpga/2013/30/pdfs/ukpga_20130030_en.pdf (accessed 15 February 2019).
41. Nigel Barber, "The Wide World of Polygamy: We Hate It, Others Love It – Why Do Some Countries Like Polygamy?", 2009, https://www.psychologytoday.com/us/blog/the-human-beast/200902/the-wide-world-polygamy-we-hate-it-others-love-it (accessed 15 February 2019).
42. Russell Sandberg, "Islam and English Law", in *Law and Justice*, Vol. 164, 2010, pp. 27–44.
43. Michael Ainley, et al., *Islamic Finance in the UK: Regulation and Challenges*, London: Financial Services Authority, 2007, p. 7.
44. Werner Menski, "Law, Religion and Culture in Multicultural Britain", in *Law and Religion in Multicultural Societies* eds. Rubya Mehdi et al., Copenhagen: DJØF Publishing, 2008, p. 57.
45. Ian Edge, "Developments Towards Legal Pluralism?", in *Islam and English Law*, ed. Griffith-Jones, *op. cit.*, pp. 116–143 (131–132).
46. *I'lam Al-Muwaqqi'in 'an Rabb Al-Alamin.*
47. An example of how a more equal option can be implemented is available in Iranian law where one standard option available is to specify a 50:50 split of the couple's joint wealth if the husband dissolves the marriage by *talaq* and no fault on the wife's part is proven. Cassandra Balchin, "Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change", in *Wanted: Equality and Justice in the Muslim Family*, ed. Zainah Anwar, Jaya, Malaysia: Musawah, 2009, pp. 209–236 (221).