Unregistered marriages – time to register calls for law reform?

By Fatimah Basama

Planning a dream wedding can be hugely stressful at the best of times. At the worst of times, however, the dream can turn to a nightmare for some Muslim women who may later realise that their marriage is not recognised as valid under English law.

The issue is far from novel, having been debated widely in the legal domain for several years. For example, the Law Commission wrote a scoping paper in December 2015 recommending a review of some aspects of the law (more precisely the formalities) of getting married. Sadly, in early November 2017, the Government announced that, despite many responses supporting marriage law reform, now would “not [be] the right time” for a full review of marriage law.

Channel 4’s recent documentary, “The Truth About Muslim Marriage”, has however extended the debate to the public sphere. Presented by Dr Myriam Francois, a prominent Muslim academic, it looked at the issue of unregistered marriages from the Muslim perspective in particular, considering the potentially devastating impact of such marriages upon those in the Muslim community (many members of which may believe they are married in the eyes of the law as well as God). The documentary looked at the status of Muslim religious marriages within the wider English legal system, and revealed surprising (and somewhat shocking) statistics relating to the potential number of unregistered Muslim marriages in England. Research conducted of 900 Muslim women for the documentary highlighted that, whilst the issue is not strictly a “Muslim problem”, there is particular prevalence of the issue within the Muslim community, and argued that reform of current marriage laws are needed to bring laws in line with our changing society.

English marriage law is currently found in the Marriage Act 1949, a statute governing the formalities and requirements of a marriage in order for it to be legally binding. A marriage will have no standing in law, and the parties will not generate the same legal rights and claims afforded to their legally married counterparts, if the legislative requirements are not met. The statute is surprisingly dense and historic; for example, formalities differ according to whether the marriage is conducted according to the Rites of the Church of England (Part II of the Act) or is a registered marriage conducted under the Superintendent Registrar’s certificate (Part III of the Act).

Dealing with a purely civil ceremony (Part III), a marriage will only be binding if:
a. Each party is at least 16 years old;
b. The parties are not related to certain close degrees (whether known to them or not), although cousins and some other family members are allowed to marry;
c. Sufficient notice has been given – at least 28 days must be given to the Registry Office before the marriage can go ahead, with both parties needing to have been resident in England or Wales for at least seven days before giving notice;
d. The marriage must be formally entered into the Marriage Register, which must be signed by both parties, the two adult witnesses, the person who conducted the ceremony and, if that person is not authorised to register marriages, the person who is registering the marriage;
e. It is public in that any member of the public is entitled to attend marriage. Marriage is a public event and has public status;
f. The marriage takes place in a registered building – this could be a Registry Office, registered premises such as a hotel, or a registered religious building (churches, synagogues, or Meeting Houses for those of the Quaker faith being automatically considered to be registered buildings); and
g. The marriage is conducted by an authorised official – either a Registrar (who is authorised to register the marriage in the district), a religious figure who has a special licence authorising them to conduct marriages, or, if conducted by an unauthorised religious figure, the ceremony is attended by a Registrar.

If the marriage ceremony does not satisfy the listed formalities, it will not be binding and a separate and additional civil ceremony is needed in order for the marriage to have civil law status. It is for reasons (e) to (g) that the problem is particularly prevalent in the Muslim community, as ceremonies often fall short of meeting the requisite formalities. Muslim weddings often take place at a family home, mosque (which may not be, and is not required to be, registered) or an unregistered banqueting suite, thus failing to meet the “registered building” requirement. In addition, a Muslim couple may consider their religious marriage, the Nikah, to be the most important aspect of their wedding given that it brings them together as a married couple in the eyes of God, such couples perhaps therefore placing less importance on the need to formalise their marriage in accordance with legal requirements.

The concern is around the number of individuals (reported by the Channel 4 documentary to be two-thirds of those interviewed) who simply did not realise their religious marriage would not be considered legally binding. This may be on the presumption that the fact that it is religiously binding and had been conducted in accordance with religious rites would automatically qualify it to be a legally binding marriage. Other research in academic studies indicates, amongst the various reasons for the current problem, some spouses thought the fact that the wedding occurred, for example, in a hotel which was registered for weddings, meant their marriage was legal, even if not performed by an authorised person.

Even more worryingly, often (but not always) it was the woman in the relationship who misunderstood the status of their marriage, with some men being aware of it not being valid in law. Research has also found cases of some Imams being aware that the ceremony did
not represent a valid marriage in law but not informing one or both participants of this. However, possibly more frequently, the issue has instead been that the Imam responsible for conducting the marriage ceremony was not aware that the religious ceremony would not carry legal status.

As a result, many individuals do not realise that they need to undertake a separate civil ceremony in order to be considered married in the eyes of the law.

This has a number of potentially serious consequences, particularly for those who face the breakdown of their marriage without the protection of the law and, in particular, the financial claims generated by spouses upon the conclusion of a marriage. The starting point in English law in respect of financial matters upon divorce is the equal division of assets, with possible deviation generally based on the needs of one of the parties which might justify a departure from equality. A financial settlement or order would take into account the entirety of the marital assets, with possible income provision for spousal maintenance where one of the parties requires ongoing financial support, together with child maintenance normally above the basic amount calculated under the Child Maintenance Service scheme.

This contrasts sharply with the position of cohabitants. Despite ongoing lobbying for legal recognition of cohabitants' rights, English law does not currently provide any safeguards for cohabitants upon a relationship breakdown, with no concept of "de facto" or "common law marriage" as found in other jurisdictions such as Australia. As a result, Muslim couples who have a religious ceremony alone have no legal financial claims generated by the religious marriage itself and will be limited to relying on civil claims only, such as an application under the Trusts of Land and Appointment of Trustees Act 1996 to ask the Court to decide upon the division of any property owned or lived in by the parties, and/or Schedule 1 of the Children Act 1989 to ask the Court to make an order for the provision of capital to house the children, and ongoing financial support to meet, for example, the children’s educational needs.

This is particularly concerning in cases of acrimonious divorces, with Muslims in these situations, sadly often women with primary responsibility for the parties’ children, often being left with little or no legal entitlement to financial provision upon the breakdown of their religious marriage outside the realms of the limited civil framework and the Child Maintenance Service for provision of child maintenance. Whilst they may have some limited provision by way of their religious marriage contract, there is no legal mechanism for enforcing this entitlement and they will need to rely instead on assistance from their Sharia Council and upon their spouse's own sense of moral and religious duty in order to do so. Understandably, many both within and outside of the Muslim community are concerned about the precariousness of this scenario for very many women across the country who only realise their vulnerability too late, when their marriage has already broken down.

So, what can be done to remedy the situation? Dr Francois highlighted the prominent "Register Our Marriage" campaign spearheaded by Aina Khan, a family lawyer specialising in issues affecting the Muslim community, who has strongly advocated for one solution in
particular. She calls for compulsory registration of religious marriages in order to safeguard those affected by the issue. This could come about through better education of Imams, as prominent religious community members, and of community members themselves, to ensure that couples understand the importance of registering their religious marriages. Many consider that it would further be best practice, and a duty to a couple being married, for an Imam to inform them that the intended ceremony is not valid as a legal wedding, so as to recognise the fundamental status of marriage in law, society and religion. It may be the case that the Muslim Council of Great Britain could work to make it a requirement that all Imams have training in the legal formalities of marriage and in how to discuss these with marrying couples in order to ensure consistency of approach.

Ms Khan has also recommended a change in the law to require a civil marriage to have been undertaken in each and every case before a religious marriage may take place, with a requirement to be placed upon the religious leader conducting the religious marriage to ensure that this is the case or otherwise decline to take forward a religious marriage. She has emphasised that this is the law in many other nations, including a number of EU countries which have a similarly cosmopolitan society, which have tailored their legal systems accordingly. There are, however, some arguments that this may have limited prospects of success without ownership being taken by Imams themselves to ensure that parties have had the requisite civil ceremony before undertaking their religious marriage. It remains to be seen whether a reform in this way could pave the way to solving the current issue of non-registration but introducing the notion as a policy could prove a fundamental first step in the right direction.

There are a number of alternative changes which could be put in place. One solution might be to require mosques to be registered for the purposes of conducting weddings where some may have previously been unwilling. An alternative reform would be the abolition of the requirement for the ceremony to take place inside a registered building, and instead a movement towards placing the emphasis on the person who is responsible for conducting the ceremony. This focus on the "celebrant" is found around the world, including Scotland and Australia, and would remove altogether the requirement for a wedding to take place in a registered building, catering not only to the Muslim community and the wide range of locations of their religious marriages, but also those of other faiths and members of wider society who might look for greater flexibility as to where they can marry.

Of course, the focus on the "celebrant" would mean that religious leaders conducting ceremonies would need to satisfy certain requirements in order to become a "celebrant", or allow a civil signing of the register as a separate part of the overall ceremony conducted by the celebrant as occurs in other faith communities. This reform, together with a change in approach to include better education of religious leaders and emphasising duties of these leaders to disseminate this vitally important information amongst those marrying, would hopefully go a considerable way towards solving the current problem.

The issue is vast and throws up many other considerations beyond the scope of this article, such as how the law can accommodate those who may want a religious marriage only
without the civil status. It is in any case undeniably a positive step that the conversation has now become a live debate. However, in order for the conversation to have a purpose, this must now translate into practical action to ensure that those vulnerable individuals of our society are protected from falling foul of the current regime.

**Fatimah Basama** is a solicitor at iFLG. She undertakes a varied caseload but primarily deals with financial issues arising from the breakdown of a relationship. As well as managing her own caseload Fatimah regularly works as a team member in complex financial cases and those with cross-jurisdictional issues. Fatimah also handles cases involving child contact and residence as well as cases where permission is required to leave the country to live permanently in another country, where a specific issue is required from the court in the best interests of a child. If a case is possible of being resolved outside the courtroom, Fatimah will discuss various alternative dispute resolution options with her clients. Fatimah is particularly sensitive when acting for clients for whom religion and culture plays a significant part in family life.