3 Wellbeing, law, and marriage

Recognition of *Nikāh* in multicultural Britain and the Finnish welfare state

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Introduction

Enhancing the wellbeing of individuals is currently understood as a central concern of contemporary family law in liberal European states (see e.g. Eekelaar, 2013). Previous studies on Muslim marriages and law (see e.g. Jänterä-Jareborg, 2014b; Liversage, 2014; Bredal and Wærstad, 2014; Grillo, 2015; Vora, 2016a) took place within the broader framework of legal engineering in a welfare state. In this chapter we examine the legal recognition of *nikāḥ*, the religiously valid Muslim marriage, from the perspective of wellbeing – a concept which has received only scant attention in socio-legal literature. We study *nikāḥ* in England and Finland and draw on our earlier work on the legal recognition of *nikāḥ* in these two local contexts. We explore, in particular, if and how a multidimensional understanding of wellbeing – such as the heuristic model developed in this volume following White's (2009; 2010; 2015) approach – might help us better understand and map the complex outcomes of law for transnational Muslim families.

The marriages discussed in this chapter are 'transnational' to a varying extent and in different senses. On the one hand, the *nikāḥ,* an Islamic marriage, can be understood as a transnational institution in the sense that it is shaped by laws, norms, and cultural practices that transcend one nation-state (Bowen, 2004; Lecoyer, 2017). On the other hand, some – but not all – of the marriages that our analysis draws on are transnational in the sense that they were solemnized abroad or the spouses live in different states, which, depending on the particulars of the case, either results in a more straightforward recognition of the *nikāḥ* or in a more complex situation (Al-Sharmani, Tiilikainen and Mustasaari, 2017). The 'transnational-religious' and 'transnational-foreign' elements of these marriages contribute, in different ways, to how the issue of the *nikāḥ* comes to be framed as a minority issue.

We begin by introducing the research context and background informing our analysis. Then we describe the legal recognition of *nikāḥ* in England and Finland. These two contexts offer interesting insights as their family law systems have some significant differences regarding what happens if the legal

norms of the jurisdiction are not followed when a marriage is solemnized. In some jurisdictions failure to comply with the legal norms renders the marriage non-existent, whereas in others such a failure has the effect of a void marriage.

English law has traditionally operated with the concepts of valid and void marriage, and the concept of non-marriage has only begun to emerge in the case law since 1997. While a conceptual difference is difficult to draw between a void and a non-marriage, the difference is significant in terms of consequences (Probert, 2013). When a marriage is declared void, financial orders available are the same as in a case of divorce, whereas holding the relationship to be a non-marriage means that no financial remedies can be used; the marriage simply never existed in legal terms. We focus on the concept of non-marriage as developed in the English case law and argue, based on Vora's extensive research in the field, that following the new case law there is currently a default form of marriage which reflects the Christian form of marriage and results in discrimination against ethnic minority women.

Finnish law, on the contrary, does not acknowledge the institution of a void or voidable marriage. A marriage either exists or does not; a failure to comply with the norms considered constitutive of the marriage render it non-existent. After looking at the legal framework in which Muslim marriages are solemnized in Finland, we note that issues concerning the validity of Muslim marriages are yet to emerge in Finnish courts. However, previous research (Mustasaari and Al-Sharmani, 2018) indicates possible hidden problems connected with legal recognition of Muslim marriages. Muslim marriages seem to appear in Finnish legal proceedings particularly in relation to migration and transnational family lives.

By putting together our findings from these two local contexts, we examine the wellbeing concerns that arise from the contemporary legislation in the two countries. The comparative approach we adopt in this chapter will enable us to see how the broader local legal context affects and shapes the ways in which legal norms can contribute to the wellbeing of families who belong to minority religions and transnational families. In the final part of the chapter we examine the concept of wellbeing and the relationship between recognition and civic inclusion. We conclude that the real quest is making the legal system inclusive to the extent that all citizens would feel it as relevant to their lives and identities.

Research context and background

We both have studied Muslim marriages in our own local contexts using slightly different approaches and collecting different kinds of research material. In this chapter we draw on these studies, acknowledging, however, the differences between our materials. Vora's previous research focused on examining the conundrum of Muslim unregistered marriages in England and why some citizens are getting married outside the legal framework (Vora, 2016a).

The study was a pluralistic investigation of English law, using the case study of marriages of Muslims from the Indian subcontinent. This research was one of the first detailed investigations concerning non-legal marriages, and although the study was not intended to be exhaustive, it marked an important beginning in what is a difficult area to study. Despite the small size of the interviewed sample (ten women), the study produced insightful findings regarding why such marital arrangements are entered into, but also how and why they come about. Overall, Vora's study shed light on the wider socio-legal reality of British Muslim women in unregistered marriages.

Mustasaari has studied how state law deals with the plurality of normative systems and cultural practices, examining Muslim marriage practices in Finland as well as the regulation of transnational families in the intersecting fields of family law, private international law, and migration law (Mustasaari and Al-Sharmani, 2018; Mustasaari, 2017). In the context of this study, Mustasaari and Al-Sharmani have been conducting collaborative research on marriage practices and registration of marriage among Finnish Muslims from the interrelated perspectives of mosques, individuals, and the state (Mustasaari and Al-Sharmani, 2018). In this collaborative study various sets of data were collected, including: interviews with imams and their assistants in eight Helsinki-based mosques, interviews with state officials at the local registration office, and decisions and documents concerning the recognition of marriage in local register offices and courts. In addition, selected Muslim women and men were interviewed.[2]

In the English context, Vora collected material directly from women in non-legal marriages, and the data collected focused very much on the personal experiences of the ten respondents with regard to the difficulties they faced as a consequence of their non-legal marriages. In the Finnish context, Mustasaari aimed to map the different ways in which legality of marriage becomes constructed in the discourses of different actors.

While both Finland and England are examples of Western-European welfare states and are to a large extent bound to the same international and regional treaties, such as the European Convention on Human Rights, these local contexts also differ in many respects. Muslim populations in these two countries are different with respect to size, history, and the communities' ethno-cultural backgrounds. Moreover, important differences exist between the two countries regarding both the welfare model and the legal system. The United Kingdom is often considered as an example of a liberal welfare state, whereas Finland represents a social democratic model of a welfare state (Esping-Andersen, 1990). In terms of the legal system, the UK follows a common law legal tradition and Finland belongs to the civil law tradition, and at the level of specific laws and policies, such as the regulation of intimate relationships, even more variation between the two countries can be found, such as the stark difference in the ways in which Finnish and English law deal with the conceptual distinctions between valid, void, and non-existing

marriages. Thus, our comparative observations highlight how the challenges and solutions in the two contexts are different.

Muslim marriages in English law

Changing marriage practices and evolving case law

Marriage is an important milestone in one's life. Moreover, some communities continue to hold marriage as a mandatory requirement, despite the increasing trend of cohabitation in wider British society.[3] For example, in order for a British Muslim couple of South Asian background to live together and be accepted by their community, they must marry; cohabitation is not permitted by their faith beliefs. It is not acceptable religiously and socially, at least in a public and open form. However, many of the British Muslim women who are married according to their religious beliefs may be unaware of the fact that their marriage may lack legal recognition in the jurisdiction of England and Wales.[4] In such cases, in the event of marital breakdown, there would be no financial remedy available for these women as the law would treat the couple as mere cohabitees and English law provides no cohabitee rights. Reasons for the current situation are twofold. On the one hand, it seems that the marriage practices among British Muslims of South Asian background have changed (Vora, 2016a). On the other hand, the English marriage law is outdated and in recent case law Muslim marriages have often been classified as *non-marriages*.

For the first-generation British Muslims of South Asian background, their marriages and migration to the UK were often interconnected processes. They were thus keen to secure the legality of their marriages through obtaining the necessary documentary evidence. However, for the subsequent British-born generations this need to comply with the law has faded, as marriage, for them, is no longer connected to migration. Instead, young Muslim couples want to use the opportunity of marriage to celebrate their inherited culture by remembering and reaffirming traditions and beliefs from 'home' (Macfarlane, 2012, p.40) and as such, getting married in a traditional ceremony is much more meaningful to them than simply signing a functionary piece of paper in a civil ceremony of marriage. In addition, the analysis of interview data in Vora's doctoral research (Vora, 2016a) revealed that among the young people of South Asian descent marriages were being entered into without necessarily understanding or appreciating the perils of failing to comply with the required formalities of marriage.

Cultural and religious diversity of marriage practices is a fact in contemporary British society. The English marriage law, which was first put on the statute books in 1753 and which in its current form is from 1949, was never envisaged to deal with the increased levels of cultural diversity present in society today. The current Marriage Act of 1949 regulates how to marry: for example, it is important for the state, through their agent – the superintendent registrar – to ensure that those parties wishing to marry are legally

entitled to do so and that the marriage will result in a legally binding union. The Marriage Act 1949 sets out the formalities required to effect a marriage according to the rites of the Church of England and the formalities required to effect a marriage otherwise. It allows for several routes to marriage such as marrying in a register office, in a 'registered building' (for religious worship), and on 'approved premises' (hotels, restaurants and the like for civil ceremonies). The current Act is the result of a series of consolidating amendments, on a piecemeal basis; it is reactive in nature, designed to cope with the stresses of the time. As a result, the current Marriage Act is complex and sometimes tricky to navigate, which is compounded by changes in customary practices of minority ethnic groups such as the British Muslims.

According to English law, to effect a valid marriage, the formalities as set out by the Marriage Act 1949 must be followed. The law has another category, *void*, for marriages that do not comply with the legal requirements as set out in the Matrimonial Causes Act 1973, Section 11. While the categories of valid and void were the only ones that were thought to be needed, what some Muslim couples are facing today is the classification of their marriage as not existing; instead of being deemed void, a *nikāḥ* marriage that does not meet the requirements of the law risks being deemed a non-marriage. This can have quite severe consequences. Should a marriage fail to be recognized by the law and deemed a non-marriage, the parties are excluded from making any applications for financial remedies, for example, those dealing with the matrimonial home and other assets such as savings, pensions, and whether spousal support (alimony) will be paid. This is unlike the case for parties to a void marriage who are entitled to apply to the court for financial relief. Although the exact difference between a voidable or void marriage and a non-marriage is far from clear, the conceptual difference can be located in the elements that are considered constitutive of a marriage (Jackson, 1969). For example, according to Joseph Jackson (1969, p.86), "private and secret declaration of consent does not create any kind of marriage, even a void one".

There is no mention of 'non-marriage' in the Marriage Act 1949. The concept is a court-developed one, which is why it has been criticized for not having been approved by the Supreme Court, placing doubt on its existence (Le Grice, 2013, p.1278). The category of non-marriage gives the court the power to exercise its discretion and declare a particular ceremony of marriage a non-existent marriage. Some argue the law remains unclear (Law Commission, 1973, paragraph 120; also quoted in the seminal case of *MA v. JA* and the Attorney General 2012, paragraph 86); however, based on recent case law it would appear to be the opposite. When an Islamic ceremony of marriage is conducted without the corresponding civil registration it often amounts to a non-existing marriage, not even an invalid one that might be later ruled to be void. While it is right that the state should have a hand in regulating relationships (both validating and denying), as they result in financial and other obligations, legal cases show that the current usage of non-marriage is being stretched far beyond what the concept was originally intended to cover.

Two reported legal cases illuminate the potentially discriminatory impact of current legal constructions of marriage. The first case, Gereis v. Yagoub (1997), concerned a religious ceremony of marriage that took place in a Coptic Christian Orthodox church that was not registered for the solemnization of marriages and the priest who conducted the marriage was not authorized to do so. This case was the first to set out the fact that external appearances of a marriage ceremony are deemed very important by the English law when marriages in contravention of the Marriage Act 1949 are conducted. There was much emphasis on the form of marriage in this case, it being Christian and therefore more recognizable than other forms of marriage.

The priest advised both parties to have a corresponding civil ceremony of marriage, which they failed to do. The marriage broke down after 14 months at which point the wife presented a petition for dissolution. This was met with the answer that no lawful marriage existed for the court to dissolve. The matter got to the High Court and it was found that the ceremony was within the provisions of the Marriage Act 1949, but that the marriage was void. This was because both parties had 'knowingly and wilfully' married under the provisions of Part III of the Act without complying with the required formalities. The marriage was dissolved by way of nullity.

In this case a distinction was drawn between void marriages and cases where there was no marriage at all (Gereis v. Yagoub, 1997, p.857). An example of the latter could arise when two parties undergo a ceremony of engagement or when a marriage conducted in Britain was polygamous. It was held that the marriage in question was neither of these examples as it was a valid marriage according to the religion of the parties and

> as it was an ordinary Christian marriage, it was something that this court could recognise as being something that the court could consider, even though, because the requirements of the Marriage Act had not been complied with, it was a void marriage (Gereis v. Yagoub, 1997).

In particular, the marriage was considered by the presiding judge to have hallmarks of a Christian marriage in that it was one that was intended to be monogamous and for life. The judge, furthermore, commented on the couple's behaviour post marriage; they cohabited after the ceremony whereas they had not before and they engaged in sexual intercourse, which they had not before. The judge said:

> I am satisfied that those who attended the ceremony clearly assumed that they were attending an ordinary Christian marriage … and that what happened gave all the appearance of and had the hallmarks of a marriage that would be recognised as a marriage but for the requirements of the Marriage Act (Gereis v. Yagoub, 1997, p.858).

The decision in this case has been criticized for being "a value judgement as to what an English ceremony of marriage entails and how closely the disputed ceremony resembles it" (Probert, 2002, p.403). The next case contrasts the position taken in Gereis, as it demonstrates that the outward and Christian-like appearance of marriage continues to be an important element of escaping the classification of non-marriage.

The case of Dukali v. Lamrani (2012) concerned a Moroccan couple, both Muslims, who entered into what they both believed to be a valid and legal civil ceremony of marriage at the Moroccan Consulate in London. A Moroccan notary conducted their marriage, as they specifically wanted a legal marriage and not a religious one. The marriage was celebrated with close family and friends, in the usual manner. Following the marriage, a property, the matrimonial home, was purchased in the husband's name. The couple had a child shortly after marriage and the relationship broke down about seven years later, causing the wife to petition for divorce. This prompted the husband to issue a parallel petition for divorce in Morocco. The Moroccan divorce made a very modest financial provision for the wife. The wife argued that she had a right to apply for financial relief following an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984.

The husband opposed her application on two grounds, first because there was no marriage suitable for recognition in England and Wales to dissolve, and secondly because he said the Moroccan divorce should not be recognized in this jurisdiction. The High Court gave judgement and had to decide if the wife could establish there had been a marriage within the wording of section 12(1)(a) of the 1984 Act and, if so, was the Moroccan divorce recognizable in England and Wales as required by s12(1)(b)?

The judge found the marriage was not valid due to the wholesale failure to comply with the formal requirements of English law. In other words, since the marriage was not recognized under the Marriage Act 1949, it was declared to be a non-marriage. Furthermore, the judge was not persuaded to apply a presumption of marriage as he was not shown any authority where the presumption had been applied after the parties lived together as man and wife for a period anywhere near as long or as short as seven or eight years. He was unwilling to suggest how long parties need to have cohabited before such a presumption may apply but considered that a longer period than seven or eight years was needed. Accordingly, the marriage was judged to be a non-marriage, and the wife was enjoined from applying for any financial orders under Part III of the 1984 Act.

The two cases discussed above demonstrate that currently legal authorities remain inconsistent as to how marriages are deemed either void or non-existent. It is clear that the marriage in the case of Dukali does not fit into the definition of a non-marriage as given by Joseph Jackson. In fact, it is more in line with marriage than is the case of Gereis in terms of hallmarks of

marriage: the couple, the official, and the guests all assumed they were attending and witnessing a marriage.

Towards more inclusive recognition through cohabitation law?

Disregarding religiously valid marriages and giving them absolutely no legal effect is a form of disrespect and currently constitutes a form of discrimination. Divorcing ethnic minority women feel the negative consequences the most as the case law indicates that a non-Christian ceremony of marriage is much more likely to be declared non-marriage than a Christian one. This is because non-Christian ceremonies of marriage are unlikely to bear enough hallmarks of what English law considers to be a valid form of marriage (see further Bevan, 2013). The problems relating to non-recognition of *nikāḥ* in English law represent a typical welfare concern; instead of simply relying on the doctrinal construction of marriage as a legal status, addressing this concern requires that the impact of the law on the wellbeing of individuals belonging to minorities is paid due respect. It seems that English law, for the moment, is unwilling to accept that a Muslim ceremony of marriage provides enough evidence to avoid the pitfalls of at least void marriage. Prior to the application of non-marriage such incomplete marriages would have been classified as simply void, and yet would have carried the same financial obligations as a valid marriage. Strikingly, half of the respondents featured in Vora's doctoral research (Vora, 2016a) entered *nikāḥ* marriages without informed consent concerning their legal validity.

As parties to unregistered marriages are considered cohabitees from a legal perspective, a starting solution might be found in the law of cohabitation (Vora, 2016a; 2016b; 2016c). In any case, regulation of the rights of cohabiting couples currently requires a reform of the law, as, contrary to the prevalent belief, English law does not provide cohabiting couples rights comparable to marriage.[5] A Law Commission report from 2007 on the subject of cohabitation rights made recommendations to provide financial remedies to cohabitants on relationship breakdown, redressing the economic differences incurred during the course of the relationship.[6] Calls for the law to cater to a wider variety of relationships have also been made in the Supreme Court.[7] More nuanced cohabitation provisions would help provide British Muslims in unregistered marriages, especially wives, with the protective framework they need. While the status of cohabitation would presumably be unsatisfactory in principle for many Muslim couples, those in potential or actual non-marriages might still benefit from the legal recognition that could then be afforded to their relationship.

At present, all cohabiting relationships that are not marriages (or same sex civil partnerships) are considered to be cohabitation. Such a single form of classification is crude, as it fails to take into account the circumstances and background of the couples. Based on the research findings on British Muslims in unregistered marriages, Vora (2016b) proposed a model of cohabitation

that would include those persons who have entered religiously valid marriages that are not legally recognized. Vora's tiered model of cohabitation focuses on creating different categories of cohabitees in line with the realities of present day society (Vora, 2016a; Vora, 2016b, p.97). It seems unlikely that a young couple who have been cohabiting for 18 months are in the same position as another couple with children who have been cohabiting for the past 15 years. Furthermore, there are those parties who may have married without completing all the formalities of marriage who may not consider themselves as cohabitees at all. And if a consenting Muslim couple wished to opt out and forego the automatic protections that come with marriage, such a provision should be made available to them, as long as such a decision was made with a comprehensive awareness of the consequences.

A tiered model of cohabitation allows for relationships to be better classified on the basis of circumstances and facts. Introducing such a tiered model (Vora, 2016a) is a starting point for discussion and it is appreciated that such bright-line indicators will not resolve all cases: there will of course be those that fall in between the proposed tiers. However, it is argued that, if the status of cohabitees was recognized within a relatively short period of time, the recurrence of unregistered Muslim marriages would be greatly reduced. At the very least, the number of such marriages being deemed non-marriages would fall because the financial incentives not to legalize would no longer be attractive to husbands or wives. Furthermore, the finding of non-marriage would also decline and revert back to its originally intended limited application.

Reforming the law on cohabitation with a view to cultural and religious pluralism would address one aspect of British Muslim couples', especially women's, wellbeing – that is, the material concerns relating to divorce. Should cohabitation reform occur in England and Wales, the due marital obligations for British Muslims in unregistered marriages will be forthcoming, or at the very least, enforceable by the courts. However, as a solution cohabitation rights alone are insufficient. Such a mechanism still results in not accepting what is a religiously valid form of marriage, the *nikāḥ,* as being legally binding and this denial seems to be based on elements of the marriage ceremony that are not adjustable to the external appearances.

Human beings are culturally embedded, and they place a great deal of value on their cultural identity (Parekh, 2005). Viewed through the lens of marriage, culture for many is inescapable, and as such, a value judgement should not be made. South Asian identity formation, generally speaking, has become increasingly ethno-religious in character (Modood, 2017, p.187), and getting married in a non-religious ceremony can prove to be meaningless for the parties. Social recognition is central to identity (Taylor, 1994). The social recognition of marriage practices, that is, allowing citizens to get married in a way that is meaningful to them, is essential to the experience of wellbeing particularly in the relational and normative dimensions. Ultimately, while citizenship is about rights, these rights can only be used by citizens when they feel as if they belong, and are welcomed and accepted. Speaking especially of

the British context, the multi-dimensional concept of wellbeing could counter the narrow race-oriented definition of what it means to be British in which 'everyone is British but some are more British than others'.

The reform of cohabitation rights discussed above is a step towards allowing such a purpose to come into view, although we appreciate that, with respect to unregistered Muslim marriages in the English and Welsh context, it merely seeks to provide an interim solution. A real challenge is to consider the fundamental question of whether the current English law on marriage allows people in our culturally diverse society to form relationships that are meaningful to them, while still in compliance with the statutory framework.

The legal case of Dukali discussed earlier certainly seems to be making a value judgement on what can and cannot be called a marriage. In balancing the functional over form, a middle ground needs to be found, or even created, that allows *all* citizens equality concerning relationships. A fuller solution under the rubric of wellbeing lies in focusing on relationships, with all their diversity. This means reforms both in the Marriage Act and cohabitation rights.

Muslim marriages in Finnish law

Marriage as a case of joint governance

Contrary to the British context, cases concerning disputes about the legal validity of a Muslim marriage (or some other religious marriage) solemnized in Finland have not been reported in the courts. Presumably the reasons for this are many, starting with the demographic fact that the Muslim community in Finland is rather small and heterogeneous. The estimated number of Muslims in Finland is around 80,000. Generally speaking, the Muslim population is socioeconomically disadvantaged compared to the majority of Finns as many of them arrived as asylum seekers and refugees. It is possible that their divorce-related disputes merely have not reached courts because in only a few cases is the economic interest involved considerable enough to make a legal dispute worthwhile. Comparative observations from Sweden, where the number of Muslims is significantly higher, indicate, however, that the size of the community is not the only relevant factor explaining why these legal disputes have not emerged in courts – perhaps not even the most significant.

Despite the large numbers of Muslims in Sweden, there are no cases in which the legal recognition of *nikāḥ* has been disputed in a court. By contrast, other types of cases involving Islamic family law, for example, disputes about Islamic dower, *mahr*, have emerged in Swedish (but not in Finnish) courts. This suggests that legal and institutional factors are important. What is common between Sweden and Finland is their legal framework regarding both the solemnization of marriage and the elements considered constitutive for marriage. Furthermore, both countries have exhaustive population register systems, and their welfare systems are similar.

Unlike in several other European states (see for example Grillo, 2015; Moors and Vroom-Najem in this volume), neither Swedish nor Finnish law includes provisions that would somehow penalize religious-only marriages or, for example, require that a civil marriage be concluded prior to a religious one. Marriages are, rather, governed through a system of *joint governance*; both certain state officials and religious communities can solemnize legally valid marriages, either in religious or civil ceremonies.

Marriage is the most important legally recognized relationship form, as it provides the couple with extensive rights and obligations towards each other, including the right and obligation to maintenance during the marriage and remedies in the event of its dissolution. A marriage is conducted with an act of solemnization, which is a legally regulated procedure involving the couple, witnesses and a third person who has the legal competence to conduct the formula of the marriage. The 1929 Marriage Act (234/1929) lays down the basic requirements concerning the solemnization of marriage as well as the process of divorce and financial implications of marriage and divorce.[8] Historically, only Christian churches were in a position to solemnize marriages; the mandate was given to state and other religious communities only in the early 20th century. The 1929 Marriage Act gave all religious communities the right to solemnize marriages, provided that they had been granted a permit for this from the government. Following the constitutional reform in 2000 and the generally increased awareness that the legal framework concerning any delegation of public authority to private actors had to be established with detailed regulations and supervision in place, a specific law was passed in 2008 on the Performing of Marriage Ceremonies (*Laki vihkimisoikeudesta*, 2008/571). In the 2008 Act, the mandate or licence to solemnize marriages was made personal and attached to membership in a religious community that needs to be registered according to the 2003 Freedom of Religion Act (*Uskonnonvapauslaki* 453/2003). The local register office is the state authority responsible for granting, upon request, a licence to solemnize marriages, as well as for supervising that this mandate is used in accordance with the law.

A marriage solemnized by a licensed person is immediately legally valid without further acts of registration, although the marriage certificate needs to be presented to the local register office so that it can be entered into the population register. According to the statistics, in each of the 17 registered Muslim religious communities, one or more members are currently licensed to solemnize marriages (Maistraatti, 2017). The fact that the legal validity of the marriage is attached to the competence of the person conducting the marriage seems to work against claims of alleged non-marriages. It also offers a form of recognition of religious identity by recognizing the significant role of religious communities in the solemnization of marriages, which contributes to an inclusive understanding of citizenship which embraces religious belonging (see also Al-Sharmani in this volume).

A hidden issue of non-marriage?

Compared to the legal framework of England and Wales, Finnish law deals with the legality and validity of marriage differently. The institution of void marriage does not exist in Finnish law. According to Finnish law, elements constitutive of a marriage are: 1) that it is solemnized by a person with a competence to solemnize marriages, 2) that both of the spouses-to-be are present simultaneously at the ceremony, and 3) that the person solemnizing the marriage asks consent to the marriage directly on that occasion and individually from each spouse-to-be.[9] In principle, a failure to comply with these provisions will render a marriage non-existent. In comparison, a failure to follow other legal requirements, such as statutory impediments to marriage, do not render the marriage non-existent.[10]

Marriage customs followed by some Muslims may be potentially problematic from the perspective of legal validity (Mustasaari and Al-Sharmani, 2018). According to the majority schools of Islamic jurisprudence, the marriage contract is concluded through the following constitutive elements: the consent of both parties actualized through the act of the bride's offer (*ijāb*) to enter into the marriage and the groom's acceptance (*qubūl*), and the presence of the bride's guardian (father), the two witnesses, and the agreed upon dower. In some Muslim communities the custom is that the bride delegates her role in the ceremony to her guardian and hence is not physically present during the officiation of the marriage contract. This is problematic in the legal view; in order to effect a legally valid marriage, both partners are required to be simultaneously present to express their consent to the marriage before being declared married. While cases in which these marriages have been claimed to be non-marriages have not been reported in courts, the concern is real and has also been voiced in the Swedish context (Jänterä-Jareborg, 2014a, p.98).

The registration of the marriage and the question of its legal validity are, in principle, separate issues. On the one hand, even an unregistered but properly solemnized marriage is a legally valid marriage. On the other hand, the registration of the marriage alone does not guarantee that it is legally valid. With no precedents, it is difficult to predict how claims of non-existence of the marriage would in actual fact turn out in Finnish courts. The registration entries concerning the couple in the Finnish population register would, however, be the starting point.

The Finnish population register is an exhaustive database including a variety of personal data, such as civil status, permanent residence, and family relations. The Finnish state collects information for the population register at several sites, and the registration of information is based on statutory notifications made by both private individuals and public authorities. Any non-compliance with the register concerning the marriage status is likely to be noted by individuals themselves or by officials, as the information in the population register system is used throughout Finnish society's information services, governance, and public administration, for example, in taxation and

judicial administration. The information contained in the population register is considered publicly reliable, so anyone claiming that the registration entry in the population register is incorrect will need to provide strong evidence. The exhaustive population register and its extensive use by nearly all public authorities might be what in practice prevents non-marriages most efficiently, as it increases awareness of the legal status and effectively limits disputes over it.

Couples sometimes try to register Islamic marriage certificates that lack the constitutive formal requirements of the law. For example, the marriage certificate may have been issued by an imam who does not hold a licence to solemnize marriages (Mustasaari and Al-Sharmani, 2018). Problems could potentially arise if the registration of the marriage is delayed or if one of the spouses mistakenly assumes the marriage is registered.

Even though the legal validity of Muslim or other religious marriages has not emerged as a burning legal issue in courts, three types of potential problems can be connected to legal recognition and regulation of some Muslim marriages (Mustasaari and Al-Sharmani, 2018). The first type, explained above, is about the validity and legal existence of a marriage conducted according to cultural norms and customs that do not comply with the provisions of the Marriage Act. As a result, the marriage may, in theory, be declared non-existent in spite of its being properly registered. The other two issues have less to do with cultural or religious plurality and more with the transnational element of family life.

Since most Muslim families in Finland currently have a recent history of migration, the issues relevant to migrant marriages often overlap with Muslim marriages, emphasizing the complex nature of the intersection of religious law and family relationships. In the Finnish context, Muslim marriages typically become contested not so much because they are religious or Muslim marriages but because there is a transnational element involved in these cases (Mustasaari and Al-Sharmani, 2018). A marriage has legal implications in several different contexts, such as financial relations between partners, immigration law, and the legal relations between parents and children. A marriage, particularly a marriage conducted abroad, may be recognized or have legal implications in one context but be refused in another. Thus, the second problem regarding marriage practices has to do with these 'limping statuses' and whether or not people actually are aware of the contested status of these relationships.

One of these contexts where marriage has significant legal implications is the process of establishing the paternity of a child because of the statutory link between the marital status of the mother and the establishment of paternity. A review of paternity cases and files in the local register offices and courts showed that there were cases in which the mother had been in a transnational marriage which had not been dissolved legally, although the individuals had obviously thought that the marriage had ended. In these cases, the mother had remarried in a religious ceremony, although the marriage was not solemnized by a state-licensed member of a religious

community. The legal non-recognition of the marriage only became an issue after a child was born in the new marriage. Since the previous marriage was still legally in force, the previous husband was automatically registered as the *de jure* father of the child.

For example, typical of the Somali cases was that the mother of the child had married a man abroad, but the husband had not been based in Finland for years. Later the mother had divorced and remarried religiously but this new marriage was unofficial. The previous marriage thus existed in the register. The new, religiously married husband and biological father of the child could only be registered as the father after the *de jure* paternity of the previous husband was annulled. The process of annulment of paternity and divorce in these cases was often a complex process. From the perspective of Muslim marriages, the question the study raises is why these individuals had left their divorces and new marriages unregistered. Was it because they were not aware of the 'limping' legal statuses of the previous marriage and the new religious marriage, or did they feel that state law on marriage had little relevance to their lives? This points out an important research gap relating to Muslim families, religious plurality, and transnational family lives in contemporary Finnish society.

The third problem is the limited access to marriage of a particular group of transnational migrants. The right to marry can be extremely restricted for those with precarious residence statuses and restricted access to legal documents from their countries of origin. Several interlocutors in the study by Mustasaari and Al-Sharmani (2018), both in mosques and local register offices, spoke of asylum seekers often not being able to access legally valid and recognized marriages due to problems with obtaining the required legalized documents which prove that the person has the right to marry. If these documents were not available for some reason, for example because the person could not contact the state authorities of his or her country of origin, the only way to conduct a marriage was in a religious ceremony. Thus a religious-only marriage was in fact the only form of marriage available to them (Mustasaari and Al-Sharmani, 2018). It seems unfair that these marriages lack any form of legal recognition.

From the outset it seems that Finnish law is rather responsive to the wellbeing of culturally and religiously diverse families. The legal system embraces religious belonging by legally recognizing religious solemnization of marriages, which enhances material protection within the relationship, and supports relationships by providing public recognition. Furthermore, the legal system supports the normative dimension of wellbeing by ensuring that a marriage can be solemnized and celebrated in a meaningful way according to the cultural and religious norms of the couple. Despite these positive aspects, research indicates that the wellbeing and needs of some families are excluded. From the wellbeing perspective it is pivotal that these experiences are not perceived as marginal and isolated from the general issues in family policy.

Scholars have noted the need to find alternatives to the model which attaches the legal implications, rights, and duties almost exclusively to the status of marriage (e.g. Pylkkänen, 2012) as well as the need to move from formal status norms towards relationship recognition (e.g. Hart, 2016). The introduction of cohabitation rights in 2011, as modest as these rights may be, does reflect the changing family forms in Finnish society as well as the attempts of the legislature to secure the interests of vulnerable individuals who live in unregistered relationships (Lötjönen, 2010).[11] The next step in cohabitation law might well be towards better recognition of diversity of relationships, cultural and religious identities, and individual situations. In this context, the differentiated model of cohabitation as suggested by Vora (2016b; 2016c) offers an interesting point for reflection, as it would allow different obligations being attached to different forms of family life. Vora's model could, in particular, offer tools to address concerns relating to relationship recognition in a transnational context.[12]

Conclusion: Rethinking the nexus between legal recognition of Muslim marriages and wellbeing

In the prevailing theory of liberal individualism, legal subjects are viewed as self-sufficient persons whose culture is legally speaking irrelevant, and prescriptive ideas about free agency and equal bargaining power are attached to legal rules concerning marriage and other relationships. As White (2015) notes, underlying ontologies, such as assumptions about personhood, are important to how accounts of wellbeing are produced. To look at 'wellbeing' first and foremost as a relational concept requires a relational approach to law (e.g. Nedelsky, 2011). Rather than looking at wellbeing as something that law delivers, we should look at how law, in different ways, affects processes in which people engage with the different structures of their environment (introduction in this volume). The focus on wellbeing highlights the inadequacies of applying a general framework of contract to intimate relationships, which leads to the privatizing of whatever harm individuals suffer due to power imbalances in their intimate relationships.

Enhancing wellbeing, which modern family law increasingly claims to do, requires viewing individuals as relational, cultural, gendered, and in many ways differently positioned. This echoes a multicultural position in terms of recognizing identities (Parekh, 2005; Estin, 2008; Taylor, 1994). In accordance with this view, the legal framework should be understood as one that seeks to enhance wellbeing both individually, by creating obligations within the family, and collectively, by levelling the different imbalances prevailing in relations between different groups in society, including minority–majority as well as gender relations.

Our analysis suggests that promoting wellbeing as the main justification for family law requires that, while formalities continue to be necessary for a marriage to happen, we should also develop other means of recognizing

relationships. We noted that the 'transnational-religious' and 'transnational-foreign' elements of the studied marriages contributed, in different ways, to how the issue of the *nikāḥ* came to be framed as a minority issue.

In the UK, in earlier decades virtually all *nikāḥ* marriages were transnational involving cross-border mobility and migration. The strict requirements of the law were met as these marriages were considered valid foreign marriages. With subsequent British-born generations, the marriages are decreasingly transnational in the traditional cross-border sense. Instead, these marriages are transnational as regulated by transnational religious norms and laws that are not recognized by the courts. We highlighted the disadvantageous position in which some British citizens find themselves compared to others when it comes to marriage formalities and their lack of engagement with the law.

English law under the current legislative framework views non-Christian marriage in a way that can be considered discriminatory. As such it fails to deliver wellbeing at the material and relational levels to some citizens who think their marriages are recognized by the law and that they can rely on its protective mechanisms. To view other religious marriages, not only Islamic ceremonies, as less real than Christian marriages implies that some religious ethics are excluded while others are seen as complying with the law. This signals a failure to enhance wellbeing even in the ethical dimension of the concept. Moreover, the harsh consequences of non-recognition are primarily experienced by minority women in the most vulnerable positions. This makes little sense, especially given that it is the vulnerable whose wellbeing is the official justification for interfering with relations in the private sphere.

At best, religious marriages should be considered void instead of non-existent. Public policy guidance (Law Commission, 1984) has dictated the preservation of the institution of marriage. This means recognizing the rights of citizens making up our plural society without altering the concept of what marriage is. This need not mean that the concept of non-marriage is completely abandoned. There will be situations where the category of non-marriage will be required, but it needs to be reserved for those cases where significant public concerns demand that the relationship is not recognized as existing in any form (even as void) – namely marriages in fiction and ceremonies between very young children. After all, this was what the concept originally intended.

In the Finnish context, non-marriage is not a burning legal issue, although it is possible that there are some hidden cases of non-marriage. We identified other concerns, which often had to do with transnational family situations, limping statuses, or precarious residence statuses. In the Finnish context then, it was the 'transnational-foreign' element in relationships that posed problems to how marriages, but also other relationships, became problematized in different legal discourses. Given the increasing plurality of normative frameworks, marriage customs and ceremonies, it is possible that courts or the legislature will increasingly be faced with questions about the validity or

existence of Muslim marriages. The actors in the field, the legislature, courts and legal scholars, might be wise to reconsider the requirements considered constitutive of marriage in a contemporary culturally plural society.

While the material dimensions of wellbeing are connected with redistribution, the claims for due recognition of identities are essentially connected with the relational and ethical dimensions. The relational dimension of wellbeing is focal for intimate citizenship (Roseneil, 2010), which includes the freedom and ability to live selfhood in a wide range of close relationships with respect and recognition from state and community. Furthermore, the ethical dimension of wellbeing is also central to intimate citizenship, which is shaped by the laws, policies, and cultures that prescribe and regulate intimate life in ways that are impacted by other hierarchies and social norms (ibid.).

We need much more knowledge of how people actually understand and negotiate the different meanings of marriage. The question we need to address in future research, in English as well as Finnish societies, is why some citizens do not use the law to validate their relationships, even when it seems quite straightforward to do so. What else is at play?

Notes

1 Authors' names appear in alphabetical order to indicate equal contribution.
2 In the Finnish context, Mustasaari and Al-Sharmani conducted eight tape-recorded interviews with imams and other individuals affiliated with mosques and four tape-recorded interviews with individual Muslim women. Five tape-recorded interviews were conducted with staff at local register offices. The analysis is also informed by unrecorded interviews and informal discussions with lawyers at the public legal aid service, child supervisors, and NGOs. Furthermore, cases and documents were investigated in four local register offices and three district courts. For a detailed description of the data, see Mustasaari, 2017.
3 The cohabiting couple family is currently the second largest family type in the UK (Office of National Statistics, 2017).
4 Finding precise figures for the incidence of unregistered Muslim marriage is difficult. However, the most recent large-scale survey (of 901 respondents) in the UK conducted by Channel 4 (Hall, 2017) put the total number of unregistered marriages at 16.8%. This figure represents those British Muslim women who are married in accordance with their religious beliefs but not within the parameters of English marriage law.
5 According to the myth of 'common law marriage', an unmarried cohabiting couple will, through the passage of time, acquire legal marriage-like rights. This misbelief is presumably traceable to the 1970s media usage of the term (Probert, 2008, p.22).
6 An opt-out provision was also proposed, giving couples the ability not to be bound by the proposals. On the face of it, the scheme appeared a little complex in terms of determining what exactly would be a qualifying contribution, as couples rarely keep accounts of such matters in the real world. In providing a comprehensive mechanism that was based on the economic impact of cohabitation, the Law Commission sought to make the financial consequences of ending a cohabitation relationship vastly different from that of a marriage (Law Commission, 2007).
7 In the Supreme Court case of Gow v. Grant (2012) which concerned a mature Scottish couple's finances on separation, Lady Hale (now Head of the Supreme

Court), agreeing with the lead judgement of Lord Hope, proceeded to give several important lessons that England and Wales may benefit from. She remarked there is a need for such remedies in England and Wales as the law at present is uncertain, which can result in injustices.

8 The 1929 Marriage Act replaced the 1734 law on marriage and thus modernized Finnish relationship regulation, introducing, for example, legal equality between husband and wife. The Act has been reformed on several occasions. For example, the no-fault divorce was introduced in 1988 and same-sex marriage in 2017.

9 However, using the Finnish language in the ceremony is not considered constitutive for the marriage. The Swedish interpretation, for example, is that the official part of the ceremony needs to be in Swedish in order for the marriage to be properly legally solemnized.

10 For example, a marriage may have been solemnized despite one of the spouses being already married. In this case, the latter marriage exists as a valid marriage but may have the consequence of divorce; if the spouses do not file for divorce on their own initiative, the public prosecutor will initiate divorce proceedings.

11 The Act on the Dissolution of the Household of Cohabiting Partners (26/2011) improved the protection of cohabiting partners by providing the cohabiting partners with the right to initiate legal proceedings in which the property of the couple is separated (S 4); establishing a presumption of co-ownership according to which a moveable object is considered jointly owned unless it can be shown otherwise (S 6); and giving the partners the right to compensation for their contributions to the shared household (S 8). A relationship is a 'cohabiting partnership' when the partners live in a relationship (cohabiting partnership) in a shared household; and they either have lived in a shared household for at least five years or have a joint child or joint parental responsibility for a child. In the debates over the new law it was considered important that a distinction was maintained between marriage and cohabiting partnership and that the property rights of individuals were not interfered with by the new law. As a result, cohabiting partnership grants partners only limited rights compared to marriage.

12 For example, a religious marriage conducted by an asylum seeker could result in a legally recognizable relationship with marriage-like obligations, such as maintenance, being binding *inter partes*, between the spouses. Or a religious marriage recognized as spousal cohabitation could be taken into account in paternity proceedings as overruling the *pater est* presumption at least in cases where the whereabouts of the mother's registered husband are unknown.

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