THE PLACE OF RELIGION IN FAMILY LAW:
A COMPARATIVE SEARCH
EUROPEAN FAMILY LAW SERIES

Published by the Organising Committee of the Commission on European Family Law

Prof. Katharina Boele-Woelki (Utrecht)
Prof. Frédérique Ferrand (Lyon)
Prof. Cristina González Beifuss (Barcelona)
Prof. Maarit Jänterä-Jareborg (Uppsala)
Prof. Nigel Lowe (Cardiff)
Prof. Dieter Martiny (Frankfurt/Oder)
Prof. Walter Pintens (Leuven)
THE PLACE OF RELIGION IN FAMILY LAW: A COMPARATIVE SEARCH

Edited by
Jane Mair
Esin Örücü

intersentia
Cambridge – Antwerp – Portland
PREFACE

The increasing role of religion in the growing international discussion on diversity and multiculturalism led us to inquire into the legal frameworks in which religion is approached in a number of jurisdictions in order to find out what the scope and impact of the principle of religious freedom is. This concern was specifically related to the legal parameters affecting the influence of religion in family life and law. How did European states deal with the increasing interest in religion and the role of religion in the predominantly secular family laws of our day?

Our curiosity as to the true picture of the extent of law tolerating, accommodating, reconciling or even merely recognising the existence of religions and traditions in the area of family relationships, led us first to organise a one day Workshop to search for the place of religion in family law in March 2010. A number of scholars from various jurisdictions and interests were invited to participate in this Workshop, which was supported by Seedcorn Funding from the Adam Smith Research Foundation, University of Glasgow. We had a series of short presentations in the morning followed by a round-table discussion in the afternoon with the aim of incorporating a broad range of interests and opinions and highlighting the various ways in which religion and religious belief may influence or affect family relationships.

When it came to the production of this volume, we decided to fill the remaining gaps, as we saw them, by inviting some additional contributions from other scholars known to be involved in this field. Thus this volume now has 12 essays covering jurisdictions from the secular states with predominantly Muslim populations to Catholic and Jewish societies with semi-secular legal systems; from secular to Catholic and Jewish states. The search is for the place of religion in each of these both in historical and contemporary contexts. We hope that a diversity of countries and regions, and a number of different approaches our contributors take, will reflect a useful picture of recent, as well as historical, developments. This collection of essays highlights the religious dimension of law, the legal dimension of religion and the interaction or otherwise between secular law and religion in the field of family law, and, at the same time, also considers practical and topical issues.

The final part of the volume is a general and comparative assessment of our findings.

Jane MAIR and Esin Örücü
30 March 2011
LIST OF AUTHORS

Prof. Masha Antokolskaia
Professor of Private and Family Law at VU University of Amsterdam, The Netherlands

Prof. Janeen M. Carruthers
Professor of Private Law, School of Law, University of Glasgow, Scotland

Prof. Elizabeth B. Crawford
Professor of International Private Law, School of Law, University of Glasgow, Scotland

Dr. Matthijs de Blois
Senior Lecturer at the Institute of Legal Theory, Department of Law, Utrecht University, The Netherlands

Dr. Ruth Farrugia
Advocate and Senior Lecturer in Civil Law, University of Malta, Malta

Dr. John Finlay
Senior Lecturer, School of Law, University of Glasgow, Scotland

Dr. Maebh Harding
Senior Lecturer, University of Portsmouth, England

Prof. Maarit Jänterä-Jareborg
Professor of Private International Law and International Civil Procedure at Uppsala University, Sweden; Former Dean of the Faculty of Law, Uppsala University, Sweden

Dr. Frankie McCarthy
Lecturer, School of Law, University of Glasgow, Scotland

Dr. Jane Mair
Senior Lecturer, School of Law, University of Glasgow, Scotland

Prof. Werner Menski
Professor of South Asian Laws, SOAS, University of London, England
List of authors

Prof. Kenneth McK. Norrie
School of Law, University of Strathclyde, Scotland

Prof. Esin Örücü
Professor Emerita of Comparative Law and Honorary Senior Research Fellow, University of Glasgow, Scotland; Professor Emerita of Comparative law, Erasmus University Rotterdam, The Netherlands

Dr. Michael Rosie
Senior Lecturer in Sociology; Deputy Director, Institute of Governance, School of Social and Political Science, University of Edinburgh, Scotland

Prof. Fran Wasoff
Emeritus Professor of Family Policies, Social Policy, School of Social and Political Science and Centre for Research on Families and Relationships, University of Edinburgh, Scotland
CONTENTS

Preface .................................................................................................................. v
List of authors ....................................................................................................... vii

INTRODUCTORY OVERVIEW

INTRODUCTION TO THE PLACE OF RELIGION IN FAMILY LAW:
A COMPARATIVE SEARCH
Esin Örücü ........................................................................................................ 3

PART ONE
ACCOMMODATING A PLACE FOR RELIGION? ................................. 13

ISLAMIC LAW IN BRITISH COURTS: DO WE NOT KNOW OR DO WE
NOT WANT TO KNOW?
Werner Menski .............................................................................................. 15
1. Introduction .............................................................................................. 15
2. The core issue: barriers for knowledge .................................................. 19
3. Methodological barriers ........................................................................ 26
4. Three case studies ................................................................................... 29
   4.1. The adoption case of little Anas ......................................................... 30
   4.2. Ahmadi marriages in Pakistan .......................................................... 31
   4.3. Muslim divorce cases from Pakistan and Bangladesh ................. 33
5. Conclusions ............................................................................................... 34

THE PLACE OF RELIGION IN FAMILY LAW: THE INTERNATIONAL
PRIVATE LAW IMPERATIVE
Elizabeth B. Crawford and Janeen M. Carruthers ......................... 37
1. Introduction .............................................................................................. 37
2. Marriage .................................................................................................... 38
   2.1. Polygamy .......................................................................................... 38
   2.2. Legal capacity to marry ................................................................. 42

Intersentia ix
Contents

3. Extra-judicial divorces and annulments ................................. 47
   3.1. Background ............................................................. 47
   3.2. Recognition of overseas divorces and annulments ............... 48
      3.2.1. EU divorce, legal separation or marriage annulment .......... 49
      3.2.2. Non-EU divorce, legal separation or marriage annulment .. 49
   3.3. Transnational divorces ............................................. 52
   3.4. Family Law (Scotland) Act 2006, section 15 ..................... 55
4. Choice of law in nullity .................................................... 56
   4.1. A statutory response ................................................ 61
   4.2. Forced Marriage etc. (Protection and Jurisdiction) (Scotland)
       Act ................................................................. 62
5. Children ........................................................................... 64
6. Conclusion ......................................................................... 68

PART TWO
DENYING A PLACE FOR RELIGION? ........................................ 71

THE LEGAL SCOPE FOR RELIGIOUS IDENTITY IN FAMILY
MATTERS – THE PARADOXES OF THE SWEDISH APPROACH
Maarit Jänterä-Jareborg ......................................................... 73

1. Introduction ....................................................................... 73
   1.1. The myth of Sweden as “the most secular country in the world” .. 73
   1.2. Demarcations ............................................................. 75
2. Religious affinity in Sweden – statistics and explanations ............. 76
   2.1. The dominance of the Church of Sweden .......................... 76
   2.2. “The Swedish paradoxes” ............................................. 77
      2.2.1. High Church membership without active participation ... 77
      2.2.2. The impact of secularisation on society and religion .......... 79
   2.3. The new presence of Islam in Sweden ............................... 80
3. Marriage and religion ............................................................ 82
   3.1. Various stages of development ......................................... 82
   3.2. Marriage conclusion ..................................................... 84
      3.2.1. The 1734 Marriage Code: obligatory religious ceremony ... 84
      3.2.2. A united Nordic approach – freedom of choice between
              ceremonies .......................................................... 85
      3.2.3. The present situation and challenges of multiculture ....... 85
      3.2.4. The tension of same-sex marriages ............................. 88
4. Divorce and religion ............................................................. 90
   4.1. Divorce under the 1734 Marriage Code .............................. 90
   4.2. A united Nordic approach to divorce ............................... 90
   4.3. The present situation .................................................... 92
   4.4. Divorce and multiculture ................................................. 93
5. The “paradoxes” – a summary of the inter-relation between family law and religion in Sweden ........................................ 95

FAMILY LAW AND RELIGION: THE RUSSIAN PERSPECTIVE, PAST AND PRESENT
Masha Antokolskaia ................................................................. 97

1. Introduction ................................................................. 97
2. The period of religious family law ................................. 97
   2.1. Middle Ages: the period of pure religious family law .... 98
   2.2. New times: religious family law with some secular flavour ... 101
      2.2.1. Reforms of Peter the Great ................................. 101
      2.2.2. Russia “misses the train” of Enlightenment ......... 104
3. The period of secular family law in the militant atheistic environment ... 105
   3.1. Radical break with religious law ............................. 105
   3.2. Radical reforms of family law as an example of successful social engineering ............................. 108
   3.3. Evaluation of reforms: “excesses of the revolutionary period” or paving the way to the future? ................. 109
   3.4. Stalin’s counter reform ........................................ 111
   3.5. From Stalin to perestroika ..................................... 112
4. The period of secular family law in a religion-friendly environment ... 113
5. Concluding remarks ...................................................... 115

HOW FAR CAN RELIGION BE ACCOMMODATED IN THE LAIC FAMILY LAW OF TURKEY?
Esin Örücü ................................................................. 117

1. Introductory overview .................................................. 117
2. Turkish laicism and family law ..................................... 122
   2.1. Turkish laicism .................................................. 122
   2.2. Family law ...................................................... 127
      2.2.1. Religious marriages ....................................... 129
      2.2.2. Children .................................................. 135
         2.2.2.1. The problem of legitimacy of children born into religious marriages ....................................... 135
         2.2.2.2. Religious instruction .................................. 138
      2.2.3. Adultery ...................................................... 139
      2.2.4. The position of the wife as an equal spouse .......... 142
         2.2.4.1. The wife-as-guarantor ................................ 142
         2.2.4.2. The woman’s surname ................................ 144
         2.2.4.3. The wife’s right to work .............................. 145
3. Family law in the early years of the Turkish Republic .... 146
## Contents

4. Family law in the later years of the Turkish Republic. 148
5. Concluding remarks. 152

**PART THREE**

**SUPPORTING A PLACE FOR RELIGION?** 159

**RELIGION AND FAMILY LAW IN IRELAND: FROM A CATHOLIC PROTECTION OF MARRIAGE TO A “CATHOLIC” APPROACH TO NULLITY**

Maebh Harding 161

1. Introduction 161
2. Pre 1937: two separate functioning systems 162
3. The Irish constitutional protection of marriage: a protection of Catholic values? 164
4. Judicial deference to Catholic values in the immediate aftermath of the 1937 Constitution 169
6. An explosion of nullity grounds: the high tide mark of canon law 173
7. A new secular age of divorce 177
8. The end of subjective nullity 181
9. Conclusions 183

**THE INFLUENCE OF THE ROMAN CATHOLIC CHURCH IN MALTESE FAMILY LAW AND POLICY**

Ruth Farrugia 187

1. Introduction 187
2. Background 188
   2.1. Religion in Malta 188
   2.2. Church–State relationship 189
   2.3. Sources of Maltese family law 190
3. Definition of family 191
4. Intimate relationships 195
   4.1. Marriage 195
   4.2. Annulment 197
   4.3. Divorce 201
   4.4. Cohabitation 203
5. The influence of the Catholic Church in Malta today 204
Contents

5.2. Restrictions on religious dress: the UK perspective 256
6. Conflict of rights: parents versus children 260
7. Conclusion 262

PART FOUR
REFLECTING A PLACE FOR RELIGION? 265

RELIGION IN THE HISTORY OF FAMILY LAW IN SCOTLAND
John Finlay 267
1. Introduction 267
2. Family law 270
3. The household 273
4. The influence of canon law 276
5. The significance of the reformation 277
6. The significance of Roman law 283
7. The language of the law 288
8. Post 1800 293
9. Conclusion 299

ACCOMMODATING RELIGION TO THE GAY EQUALITY
IMPERATIVE IN FAMILY LAW
Kenneth McK. Norrie 303
1. Introduction 303
2. Christian approaches to gay and lesbian equality 308
3. The changing law relating to gay and lesbian people 311
4. Accommodating religious concerns 313
5. Accommodation as defeat 315
6. The principles underpinning accommodation 318
7. The coming of marriage 327
8. Conclusion 330

RELIGION, FAMILY VALUES AND FAMILY LAW
Michael Rosie and Fran Wasoff 333
1. Introduction 333
2. Religion and the trend towards secularisation 334
3. The politics of family law reform and the voice of faith groups 336
4. The family module of the Scottish Social Attitudes Survey 2004 337
5. Operationalising “religion” - affiliation and (claimed) practice 338
6. Religious adherence and family values 341
6.1. Marriage and cohabitation 341
## Contents

6.2. Age effects .................................................. 342  
6.3. The traditional marriage scale .............................. 343  
7. Religious adherence and sexual moralities ................... 347  
7.1. Gay and lesbian adoption ................................ 350  
8. Familial obligations ........................................... 351  
9. Discussion and conclusion .................................... 353  

**ASSESSMENT** ......................................................... 357  

---

**THE PLACE OF RELIGION IN FAMILY LAW: A COMPARATIVE SEARCH**  
Jane Mair .............................................................. 359  

1. Why search for religion in family law? ........................ 359  
2. Religion and family law: views from the past ................. 361  
   2.1. Church and State .......................................... 361  
   2.2. Scripture as law ........................................... 363  
   2.3. The Church in the community ............................ 364  
3. Religion and family law: current dilemmas .................... 365  
   3.1. Accommodating a place for religion .................... 366  
   3.2. Denying a place for religion ............................ 368  
   3.3. Supporting a place for religion ........................ 370  
   3.4. Reflecting a place for religion ........................ 372  
4. Should there be a place for religion in family law: continuing debates? . 374  
   4.1. Religion and family law: a public/private dichotomy? .. 375  
      4.1.1. Public space for religion ............................ 375  
      4.1.2. The private nature of belief ......................... 376  
      4.1.3. Personal meaning of public relationships .......... 377  
   4.2. Religion and family law: form or function? ............ 378  
      4.2.1. Form of family relationships ....................... 378  
      4.2.2. Function of family relationships ................... 379  
      4.2.3. Form of religion ..................................... 380  
      4.2.4. Functions of religion ............................... 381  
   4.3. Religion and family law: certainty or chaos? ........... 382  
      4.3.1. Clear laws but chaotic meaning ..................... 382  
      4.3.2. Clear belief but chaotic laws ....................... 383  
5. The results of our search .................................... 384