Verschraegen's aim, mentioned in the preface, to make a sharp presentation of just the essentials of the subject, nothing more and nothing less (pp. III-IV).

By covering a wide range of PIL subject-matters, addressing both traditional and modern problems (e.g., international company law, competition law, IP and cultural property, as well as the whole spectrum of problems encountered in modern international family law), Verschraegen makes a significant contribution to the study and practice of private international law in Austria. Readers elsewhere, such as this reviewer, will profit from the Austrian view of the sea of private international law. Not only will they become familiar with the rules and methodology of another important European legal system, with a long-standing tradition of scholarship and learning of this subject. They will also acquire additional insights into the private international law of their own country.

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**Jane Mair and Esin Örücü [eds.], *The Place of Religion in Family Law: A Comparative Search*, Intersentia, 2011, xvi+286 pp., €76, ISBN 978-1-78068-015-6.**

## A. Introduction

Religion has long held a special association with family law, historically shaping the institutions that this area of law seeks to protect. However, in this age of state secularism, traditional religious influence within European jurisdictions is becoming increasingly marginalized. Despite this, at the same time, growing multiculturalism has fuelled calls for greater accommodation of religious practices within the law. This stance was famously exemplified by the Archbishop of Canterbury, Rowan Williams, who expressed his support for giving British Muslims the choice to have certain matters, for example marital disputes, dealt with by sharia courts.[1]

The above view exemplifies one of a number of issues involved in accommodating religion in family law today. In March 2010, a workshop was held in Glasgow involving scholars from various jurisdictions who resolved to produce an overview of this relationship. The result, *The Place of Religion in Family Law: A Comparative Search*, aims to examine such matters by reference to a range of contributions, each presenting the interaction of religion and family law from a distinct perspective.

This review will begin by briefly providing an overview of the book's structure, followed by a discussion of its content through the perspectives of a number

1 The Archbishop of Canterbury, The Rt Rev Dr Rowan Williams, *Civil and Religious Law in England: a Religious Perspective*: text of the Foundation Lecture at the Royal Courts of Justice delivered on 7 February 2008. The full text is available at: <www.archbishopofcanterbury.org/1575>.

of selected themes. In this way, although examination will not be comprehensive, it aims to provide a broad appraisal of the manner in which the volume addresses a number of key tensions involved in the relationship between family law and religion.

## B. Structure

The volume's contributions are arranged in four sections, which serve to broadly delineate their various themes.

The first section, *Accommodating a Place for Religion?*, presents two contrasting accounts (Werner Menski, *Islamic law in British courts: do we not know or do we not want to know?*; Elizabeth B. Crawford and Janeen M.Carruthers, *The place of religion in family law: the international private law imperative*), which detail possible solutions to the conflicts arising from the tension between the United Kingdom's secular legal system and its society's growing multiculturalism. Whilst Menski advocates a pluralistic approach in dealing with legal issues arising from cross-cultural conflict in family law, Crawford and Carruthers present private international law as a forum in which a limited number of the divergences can be resolved.

The following section, *Denying a Place for Religion?*, sets out a number of contributions which exemplify the interaction of family law and religion within the secular environment (Maarit Jänterä-Jareborg, *The legal scope of religious identity in family matters – the paradoxes of the Swedish perspective*; Esin Örücü, *How far can religion be accommodated in the laic family law of Turkey?*; Masha Antokolskaia, *Family law and religion: the Russian perspective, past and present*). The authors outline the coexistence of and, to varying extents, the conflict between, family law and religion in jurisdictions where a strict separation in stipulated.

By way of contrast, the third section, *Supporting a Place for Religion?*, turns to address various aspects relating to the accommodation of religion by family law (Maebh Harding, *Religion and family law in Ireland: from a Catholic protection of marriage to a 'Catholic' approach to nullity*; Ruth Farrugia, *The influence of the Roman Catholic Church in the Maltese family law and policy*; Matthijs de Blois, *Jewish family law and secular legal orders: the example of Get refusal*; Frankie McCarthy, *Prayers and the playground: religion and education in the United Kingdom and beyond*). Using both country- and issue-specific contributions, this section takes a multi-faceted approach to illustrating the extent to which religion is accommodated by the law and the courts.

The last section, *Reflecting a Place for Religion?*, discusses the relationship between religion and family law with reference to societal development (John Finlay, *Religion in the history of family law in Scotland*; Kenneth McK. Norrie, *Accommodating religion to the gay equality imperative in family law*; Michael Rosie and Fran Wasoff, *Religion, family values and family law*). Presenting this line of analysis from both historical and contemporary perspectives, the contributions attempt to explain the trend towards secularization in Europe with analogy to

decreasing religious adherence within society and the resulting shift in public opinion with regard to a number of key issues addressed by family law.

A final contribution (Jane Mair, *The place of religion in family law*) attempts to draw together the findings and observations of the previous essays. In doing so, it presents a concise account of the book's content, analyzed from both general and thematic perspectives.

## C. Commentary

### *I. State Secularism vs. Legal Pluralism – A Complex and Multifaceted Debate*

Linking the book's numerous contributions, the apparent tension between secularism and pluralism is greatly drawn upon in this volume. However, the definitional uncertainty surrounding these terms makes it difficult to come to a concrete assessment concerning their interaction. These two principles, although not directly opposing, could be seen as having difficulty in co-existing. It could be purported that state secularism, by its very nature, precludes the recognition of alternative legal systems based on religion. However, envisaged from another perspective, a certain degree of secularism could be seen as a necessary pre-requisite to embracing a pluralistic legal system; after all, the former principle is also associated with an embracing of tolerance.[2] Ambiguity aside, the tenuous relationship between state secularism and legal pluralism features considerably in the book's contributions and is examined from a variety of perspectives.

Although pluralism in the field of family law existed in Europe in centuries past,[3] it is no longer favoured today. However, with the growing multi-culturalism found in many European countries, this status quo is being increasingly called into question.

Against the backdrop of the interaction between sharia law and the British courts, *Menski* eloquently advocates a pluralistic approach in dealing with the issues emanating from the tension between the two entities. Utilizing a critical stance, the author illustrates the conflict through exemplification of selected cases concerning Islamic adoption, marriage and divorce practices. As a result of the confusion and lack of knowledge regarding sharia law within the British legal system, a great deal of legal insecurity is generated for those to whom it applies. *Menski* argues strongly in favour of increased expertise and plurality consciousness amongst legal practitioners and judges in order to tackle the problems highlighted in his contribution.

In contrast to the aforementioned view, *Crawford* and *Carruthers* propose the utilization of private international law as a means of resolving certain family law issues arising as a result of cross-cultural diversity. This usage can be exemplified in a number of areas of potential conflict, such as polygamy, legal capacity to

2 K. Meerschaut & S. Gutwirth, 'Legal pluralism and Islam in the scales of the European Court of Human Rights : the limits of categorical balancing', *in* E. Brems (Ed.), *Conflicts between Fundamental Rights*, Intersentia, Oxford, 2008, pp. 431-465.

3 *E.g.* 1937 Irish Constitution, Article 2(5): constitutionally protected prohibition of marriage dissolution between 'baptised' persons; *see* p. 165.

marry and extra-judicial divorces. The authors are critical of attempts by the British judiciary to interpret the law in light of religious nuances,[4] warning that 'to substitute religious views for secular outcomes ... would be to undermine the universal application of private law'.[5] The traditional legal approach adopted by the authors, although well-reasoned, does not offer a comprehensive answer to the concerns voiced by *Menski*. Although private international law may indeed provide a solution to conflicts which involve a cross-border element, the proposition fails to acknowledge that many of those involved in such disputes have no transnational linkage on which they can rely. This, in itself, arguably equates to a two-tier system and places the latter group in a considerably disadvantaged position.

It is interesting to also consider the attitude of the European Court of Human Rights (ECtHR) towards secularism and pluralism. As highlighted in Örücü's contribution, the Strasbourg court has been explicit in its support of Turkish laicism (secularism) over pluralism.[6] It has stated that to allow plurality of legal systems (in this case, to embrace sharia law) would infringe the principle of non-discrimination between individuals and that, in line with the Laic approach, religion was 'primarily a matter of religious conscience'.[7] Along this line of reasoning, legal pluralism appears to be placed in direct opposition to secularism. The clarity of this statement can be contrasted with the decidedly more complex attitude of Strasbourg towards plurality of religious beliefs in education. The legislation and case law concerning the complicated relationship between religion and education is extensively discussed in McCarthy's contribution. On the one hand, Article 2 of the First Protocol (P1-2)[8] could be perceived as supporting pluralism through stipulating respect of the parents' right to ensure education in conformity with their own religious and philosophical convictions. However, on the other hand, the interpretation of this provision by the ECtHR could be seen as indicating an emphasis on state neutrality.[9] The author raises the open question of whether this requirement can be viewed as synonymous with secularism. Outside matters of curriculum, Strasbourg's preference for secularism is somewhat clearer: for instance, several judgments concerning the wearing of headscarves in educational settings demonstrate a willingness to accept a justification of Article 9 infringement on the grounds of public order.[10] Although this contribution does not (or,

4 *SH v. KH* 2006 SC129: on appeal, Lord Penrose granted annulment for a marriage between two Muslims which had only be officiated in a civil ceremony on the grounds that the parties had agreed not to consider themselves man and wife until a religious marriage had been undertaken. This reservation was seen as sufficient in order to undermine consent.

5 E. Crawford and J. Carruthers, 'The place of religion in family law: the international private law imperative', *in* J. Mair and E. Örücü (Eds.), The Place of Religion in Family Law: A Comparative Search, at p.69 (pp. 37-69).

6 *Refah Partisi (Welfare Party)and others v. Turkey*, ECHR (2003), No. 41340/98, 41342/98, 41343/98, 41344/98.

7 Para. 93.

8 European Convention on Human Rights.

9 *Folgero and Others v. Norway*, ECHR (2007) No. 15472/02; *Zengin v. Turkey*, ECHR (2007), No. 1448/04.

10 *Leyla Şahin v. Turkey*, ECHR (2004) No. 44774/98; *Dahlab v. Switzerland*, ECHR (2001), No. 42393/98.

more likely, cannot) provide comprehensive explanation for the inconsistent human rights approach towards education, it effectively outlines the paradoxes that exist within this sensitive area of law.

*II. Does the Law Reflect Reality?*

The extent to which a country's legal system caters towards the characteristics of its population is another defining theme in this book. Whilst in some instances the law appears to reflect a country's religion and traditions, in others, the situation is converse, with the law seemingly designed to shape the society to which it applies.

The comprehensive account of Turkish laicism provided by Örücü is a notable example of a jurisdiction in which the legal system is considerably removed from the society it seeks to regulate. In a country where around 98% of the population follows Islam, there is virtually no interaction between law and religion. Primarily imported from the West (most notably, Switzerland), this legal system could be seen as an attempt to transform the country's societal, political and religious norms. The problems which accompany this policy are particularly well illustrated by the state's non-recognition of religious marriage. The formalities attached to civil marriage mean that some couples, especially those from rural villages, may opt for religious marriage alone. This creates problems not only with regard to the legitimacy of children and the succession of spouses, but also with regard to where a divorce is sought. Although some judicial and legislative allowances have been made for the consequences of religious marriage (*e.g.* Amnesty Acts to correct the legitimacy of children not born to a secular marriage and the use of the law of civil liability to grant surviving partners compensation for lack of support following their spouse's death), the courts cannot give legal effect to the marriage itself. Whilst the laicism may sit comfortably with the views of the Turkish urban elite, it appears markedly less suited to the way of life of the country's rural population.

This formal separation between religion and state is not ascribed to in Malta, where Roman Catholicism is constitutionally recognized as the country's religion. Although the devoutness of the island's small population may have decreased somewhat in recent years, it is still estimated that 98% of the population are Catholic. The Church continues to play a pivotal role in the country's welfare, providing assistance and shelter for the most vulnerable in society. As discussed by *Farrugia*, Maltese family law has been strongly influenced by Canon law. The impact of this is most clearly seen in the legislative and judicial treatment of marriage and marital breakdown. A marriage between a man and a woman remains the only legally recognized partnership, and divorce was, until very recently, a legal impossibility. However, social attitudes are slowly changing and, with this, so is the law. A referendum held in May 2011 returned a *yes* vote (52.68%) in favour of introducing divorce, and legislation giving effect to this came into force in October 2011. The outcome of the referendum demonstrates a clear divergence in opinion on this major legal issue between the majority of the Maltese population and the Catholic Church. It indicates that the views of society and the Church can no longer be taken to be synonymous. This may spell political and leg-

islative turmoil for the government in the years ahead; traditionally heavily influenced by the Church, it may find its loyalties becoming decidedly divided.

The above contributions can be contrasted with the quantitative approach adopted by Rosie and Wasoff in attempting to explain the opinions of the Scottish public regarding the major issues of family law. Their contribution serves to compliment the largely descriptive tone of previous chapters. The results of the survey which the authors seek to analyse demonstrate what one would probably expect: there is a sliding scale of acceptance of non-traditional family types (*e.g.* cohabitation and same-sex partnerships), with the greatest degree of support found with those of no religion, and the least with those who are actively religious. This chapter conveniently follows Norrie's contribution concerning the gay equality imperative in family law. The statistics from the survey show general support for the conception of familiar obligations as conceived in the Civil Partnership Act 2004 and the Family Law (Scotland) Act 2006. With regard to succession, for example, it would appear that both religious and non-religious groups agree with the inheritance of property by the surviving partner, regardless of the couple's marital status or sexual orientation.

Despite its usefulness, Rosie and Wasoff's contribution could, however, have benefited from greater consideration of the decreasing levels of religiousness amongst the population. While statistics concerning the decreasing religious affiliation and observance over the past two decades are set out early in the chapter, it is perhaps unfortunate that these are not utilized to give a more speculative aspect to the discussion later on. Contemplation of the future direction of both public opinion and the law would probably have provided an insightful close to the contribution.

*III. Secular Remedies to Religious Matters*

The somewhat paradoxical issue of the use of civil remedies in dealing with religious doctrine is insightfully analyzed by De Bois in his contribution concerning the matter of *get* refusal in Jewish family law. This issue results from the unique nature of divorce in Jewish law: the granting of divorce by the rabbinical court is dependent on the will of both parties. The husband has to deliver the *get*, and the wife has to accept it. Although the rabbinical court may apply pressure on the parties to cooperate in the process, consent must be given voluntarily. At times, this gives rise to a situation in which refusal (particularly from the husband) creates a stalemate in the divorce process. The consequences are especially serious for the wife, who is unable to remarry without risking social stigma for herself and any future children (the same does not apply to the husband).

The example of the *get* provides an informative illustration of the interaction between civil and religious law from a perspective of which the reader may not be familiar. Contrasting the treatment of the *get* refusal in Israel and in a number of secular Western jurisdictions, De Bois skillfully utilizes case law in framing the dilemmas involved in attempting to deal with this issue. The Israeli legal system, although largely secular, recognizes legal pluralism in the field of family law. In the realm of marriage, the couple's religious affiliation dictates the law which is applicable. Thus, if the husband and wife are Jewish, the rabbinical courts will

preside over their divorce. This creates problems for the issue of *get* refusal, as the rabbinical court cannot apply sanctions to the extent that the will of a party is overcome. However, the civil courts have been known to intervene in such circumstances, awarding damages in line with tort liability in light of a husband's negligence in not complying with a rabbinical decree. Such action has been met with dismay by the rabbinical courts, which regard the use of tort as precluding the effective execution of the *get*.

The complexity surrounding the treatment of this issue is not limited to Israel; many secular jurisdictions in the West (*e.g.* UK, Canada, France and the Netherlands) have also attempted to tackle *get* refusal through civil means. According to the author, such measures have varied in perceived success, with some judgments appearing to lack the requisite knowledge of religious sensitivities (*e.g.* appearing to coerce a husband into delivering a *get* under threat of judicially imposed sanctions[11]). The author also takes time to consider the positive and negative human rights implications in recognizing religious law. Discussing the issue from this perspective allows for a more critical analysis of the viability of dealing with the Jewish *get* in secular legal systems and, more generally, the possibility of embracing a greater level of pluralism within Western legal traditions.

## D. Concluding Remarks

This review aims both to discuss a number of themes highlighted in this volume and to provide critique regarding its treatment of such issues. However, like the book itself, it does not seek to comprehensively address the relationship between religion and family or to provide definitive conclusions as to the quality of the authors' contributions. With the issues dealt with in the book often intertwined, and the terminology hard to define, concrete conclusions would be unhelpful in the absence of further research. The open-ended nature of the volume is therefore fortunate, as it will hopefully function as a catalyst for further examination of the intricacies of the interaction. Amongst the many questions which remain unanswered, one thing is certain though: unless Western jurisdictions seriously consider the ways in which religion might better be integrated into family law, they run the risk of increasing disenfranchisement amongst the growing minorities in their societies.

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11 *E.g.* Dutch Supreme Court judgment: HR 22 January 1982, *NJ*, 1982, p. 489.