Religious revival

In some states, and for some individuals and communities, religion is and has been a constant and continuous source of guidance, authority and rules but for many, particularly in Europe, modern times have been more commonly associated with secularism. Against a background of presumed secularism, recent years have seen something of a sudden, surprising and largely unanticipated religious revival and, in many countries religious issues are giving rise to social, political and legal concerns. Against a background of presumed secularism, recent years have seen something of a sudden, surprising and largely unanticipated religious revival and, in many countries religious issues are giving rise to social, political and legal concerns.1 Religion appears to have been revived in various ways: the visible presence of minority communities, identified by religion, living within otherwise secular states; the proliferation of faith-based schools; the legal enforcement of individual religious rights; a rise, in certain regions, in individual religious interest, belief and adherence; the growing media presence of religious figures and religious voices and mounting concern over the words and actions associated with extremist or fundamentalist religious belief and identity.

What revival?

To talk of revival, however, assumes an earlier pattern of decline and for every report of religious revival a counter narrative can be found. The focus on secularism, against which religion has re-emerged, has been criticized for reflecting only a narrow, principally European story, while the adoption of a global perspective (see e.g. Casanova 2003: 22) might have produced different patterns. European secularism is explained by the separation of church and state, the emergence of civil legal systems and the tolerance of religious belief but only within the private sphere. Islam, however, is not premised on a comparable distinction between public and private and therefore tracing the movement of religion between these separate spheres and thereby identifying its influence, decline and resurgence is of little relevance. Some countries, particularly former colonies, provide for the application of personal religious or customary laws to operate alongside

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1 For some indication of the level of social concern in Europe, see Grim 2012.
a secular legal system. For them, this unified picture of decline and revival is also inappropriate. North America too, while evidencing a strong religious element in certain areas, is arguably less easily explained within terms of the European secularist state model. Increasingly, even within Europe, overly simplistic presentations and understandings of assumed secularism are subject to critique (see e.g. Davie 2000). Secularism has given way to post-secularism (see e.g. Habermas 2010) and an earlier perception of the demise of religion is questioned as representing instead a change in the nature, understanding and manifestation of religion. Some have sought to suggest a revival in terms of individual religious adherence and practice. Evidence from America, particularly around covenant marriage, is associated to some extent with revival or increased prominence of religious codes. Within Europe, there is talk of greater religiosity in those eastern countries where the ‘collapse of Soviet Communism has brought about sweeping revivals of religion’ (Froese 2001: 261). The evidence is, however, mixed (Pollack 2008: 169) and others would dispute the fact of a religious revival in Europe except as a result of ‘the significant influx of new immigrant religions’ (Casanova 2008: 101). The nature of decline and the level of revival are subject to much individual and local variation (Davie 2013) and their extent is a matter of uncertainty and disagreement.

Whatever the accuracy of specific claims about decline and resurgence, what is beyond doubt is that there has been a revival of religion ‘as a contentious issue’ (Davie 2013). Recent years have brought significant growth in the volume of academic analysis focusing on a wide range of issues related to religion and spread across many disciplines. Regardless of the empirical evidence about the real presence of religion, there is a very definite increase in its presence throughout academic literature, including legal writing, and that in itself is helping to fuel the impression that religion is once more a significant concern.

Religion in family law

As in other branches of law, and whether in real cases and real life, or in academic analysis, religion has become a high-profile factor and a much debated topic in family law. It is visible as a factor in courts, in public debate and in legal reform in a way that has not been paralleled for some time. Conflicts have been seen in individual cases before the courts, concerning secular state education and religious dress and symbols (see e.g. McGoldrick 2011) and recognition of family practices and relationship models. Legal actions involving individual rights to religious freedom and religious expression have become common in many countries. Whether religious issues are in fact being more frequently raised in courts or whether the raised profile of such cases is partly explained by our heightened sensitivity to the topic, it is clear that religion has become a visible issue in family law cases. Religion is featuring, not only as a practical issue to be addressed in the context of individual family law cases, but also as a key concern in political debate, with religious views and religious voices being heard in legal reform processes concerning family matters including same-sex marriage (see e.g. Kettell 2013), assisted reproduction, euthanasia and abortion.

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2 For discussion of two systems, see Menski 2012: 219–52, 200–18.
3 For a range of discussions on this theme see Berger, Davie and Fokas 2008.
4 For discussion of various meanings of religion and methods of measuring its presence, see Woodhead 2011.
5 A useful database of cases can be found at www.religare-database.eu.
6 For details of an interesting empirical study see Ziebertz and Reindl 2013.
A religious revival in family law

In fact, it might be argued that because of the overlapping personal, emotional and developmental aspects of both individual religion and family life, the revival of religion therein has had particular impact. It is often said of family disputes that by their nature they are ill suited to courtroom settings and judicial resolution. They deal with private and personal matters concerned with emotions and relationships and it is almost inevitable that such disputes will be further exacerbated by the additional presence of strongly held religious beliefs. The theoretical tensions between public and private are well known within analysis of family law and therefore revived debate about liberalism and dichotomous constructs has particular resonance when considered within a family context. The recognition of religion, religious values and motivations poses a threat to the linear path of the modernization of family law. For many, family law has come to be associated with individual choice, private decision making and freedom from socially imposed values and norms. Individual religious expression and evidence of the presence of religion in public debate raises doubts about that progression and at a deeper level exposes some uncertainty as to what family law is all about. The debates, therefore, which are taking place in respect of religion, and its legally appropriate place, are of particular relevance in the context of family law.

Some may wish that religion, as a social presence and as a focus for discussion, had remained in decline; its renewed presence is clearly giving rise, in some countries and before some courts, to very difficult questions but, as it has now re-emerged in practice and debate, what can we learn from it? Within the context of family law it presents an opportunity to review how religion has changed. Contemporary religion in family law is rather different to the familiar religious presence of the past. It is not only religion, however, which is open to scrutiny. The presence of religion and religious views within the sphere of family law is also leading us to question some aspects of family law itself. The concerns, which are highlighted by factual situations involving religion, are in many instances not new – they lie at the root of fundamental questions about family law and the regulation of family life. So, whatever the empirical evidence of contemporary religion and whatever the conclusion about its measurement, its presence is undoubtedly reviving debate and this revival is a two-way process: questions of religion and religious concerns are being reconsidered within the scope of family law and family law itself is being reviewed in the light of religion. What can we learn of religion from its renewed presence within the arena of family law and what can we learn of family law from a religious perspective?

Global and local perspectives

In this process of debate and review, the dangers of drawing macro-level conclusions from micro-level experience are well known but the risks of seeking or claiming universality are also obvious. The relationship between law and religion ‘is never about law and religion in the abstract, but always about a specific view of particular legal and religious traditions, as viewed through the inherently limited experience of human beings’ (An-Na’im 2013: 1232). To attempt to consider family law and religion globally or comprehensively is beyond the scope and competence of this short contribution. What happens within an individual family is personal to that family but something similar is often repeated in slightly different form across many families. The detail may be different but the underlying issues are often the same. In many ways something comparable might be said of religion. For some time, we have been encouraged to think and act globally. Globalization, in terms of geographic mobility and intellectual perspective, is one of the factors behind the current interest in and problematization of religion – not our own familiar local religion but that of others. The perspective from which this contribution is written is European. Some of the examples will be even more local; drawn predominantly from
the sphere of the author’s own experience of family law in Scotland and in England and Wales. But while the facts and solutions are unashamedly local, it is hoped that their problems, methods and outcomes can be considered and applied in other contexts.

Revisiting theory

The revival of religion, and in particular, increased concern surrounding the enforcement of individual religious rights against supposed secular states, has given rise to revisiting of constitutional and political theory. Established assumptions as to the separation of church and state and the secular nature of law have been shaken by religious claims and there has been much analysis and reworking of theory in an attempt to confirm, challenge or redefine the boundaries. This debate has largely been situated within a constitutional context, but it has significant and particular resonance within family law.

Public and private

Liberalism confronted the problems of infinite diversity in religious belief, recognized the impossibility of accommodating such diversity within the public sphere and concluded, therefore, that the proper place for religion was in the private sphere. As expressed by Rawls, the challenge posed was how to achieve ‘a stable and just society of free and equal citizens profoundly divided by the reasonable religious, philosophical and moral doctrines’ (Rawls 1993: xxv). The answer was to restrict such doctrines to the private sphere, leaving the public to be regulated on the basis of shared ‘public reason’. In the current revival of interest in religion, classical liberalism as presented by its various proponents, has been revisited, restated, subjected to criticism and reconstructed in an attempt to resist, accommodate or make sense of the presence of religion and religious individuals (see e.g. McIlroy 2013). The traditional liberal approach might say: ‘[b]e a citizen in public, a Jew (or a Catholic or a Muslim) . . . in private’ (Shachar 2010) but how should one ‘be’ in the family which occupies a somewhat uneasy space between public and private? When contemporary debates about liberalism, secularism and religion are transposed to the micro-society that is the family, shared concerns and dilemmas emerge concerning their respective positions and their treatment by law and state. Current debates about challenging or reinforcing the private nature of religion, redrawing the boundaries between public and private or transcending them in recognition of their interconnectedness, echo strongly feminist legal perspectives on families and family law (see e.g. O’Donovan 1985; Olsen 1983).

Margaret Davies has commented that ‘[i]n contemporary Western nations, religion is often regarded by law as a matter of private freedom, as though it occupies a space which is other to law, the state and our public sphere’ (Davies 2011: 72) and this is a view which strongly resonates with perceptions of the family. Family form in modern terms is encapsulated in the model of the domesticated, nuclear family based on affective relationships. Family life is lived out within the private home and the personal domain of the family is the space, above all others, where one can be oneself. The ideology of this private model of family is of course contentious and it has been subject to extensive critique. In her exploration of public and private in the context of family regulation, O’Donovan, for example, describes the family, and in particular the married couple, as ‘a black box, into which the law does not purport to peer’ (O’Donovan 1985: 12). More

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7 As exemplified by cases and national bans concerning the presence of religious symbols and dress within public places; discussed in McGoldrick 2011.
detailed scrutiny reveals that contrary to this image, law does indeed regulate marriage and the family, but ‘the ideology of privacy and non-intervention’ (O’Donovan 1985: 12) nonetheless defines our expectations, constrains law’s relationship with familial matters and masks complex patterns of regulation. If the family is where we are governed by our own personal beliefs and desires and religion too is placed within that private space, it should come as no surprise to us that those with religious beliefs and obligations will expect to be able to order their family life according to them. Recent experience suggests that many legal systems and societies are not entirely comfortable with the realization that private families are in some cases regulated according to private religious norms, particularly where those norms emanate from what might be termed a minority religion.

One feature of constructing the family as a predominantly private space is the willingness of many legal systems to permit and even encourage private ordering within family relationships. Private negotiation and settlement, in the form of pre-nuptial contracts and separation agreements, are common in many jurisdictions and regarded, often in positive terms, as part of a move towards the contractualization, or consensualization, of family law (see e.g. Scherpe 2012). Attitudes towards the enforceability of private settlements may be seen to shift, however, when those settlements have been concluded within the context of religious tribunals and arbitration or are intended to import religious obligations. Concerns raised about inequality of bargaining power and unfair treatment of women within the context of faith-based arbitration and private agreements may, in some cases at least, be well placed but the debate should surely consider more broadly the use of contractual settlements within a family setting. Concern for the fairness of all privately negotiated settlements within families is more compelling than simply a narrow focus on those which are structured and directed by religion.

‘Out of a desire for a neutral and shared public reason, the Rawlsian answer has so curtailed the capacity of religious convictions to speak that those who hold them may not find a reasonable place in public political debate’ (Jamal 2013: 9). This criticism of liberal public reason echoes the experience of recent social and political debate surrounding family law reform. The expression of religious convictions in public debate about family law has been seen particularly in the recent reform processes of many countries concerning the introduction of same-sex marriage. In Scotland, for example, where public consultation is a central part of legislative reform, there was opposition from a clear and significant majority of respondents to the proposed introduction of same-sex marriage. In responding to the consultation process, and deciding nonetheless to proceed with the introduction of same-sex marriage), the Scottish government tried to rationalize and avoid much of the opposition, on the basis of its religious inspiration and its presentation as part of an organized religious campaign. Instead they sought to emphasize consensus, wherever possible, even though it related only to matters ancillary to the central question. While that approach might be justified on the basis that the responses were not representative of the population as a whole and more generally on the argument that it permitted an important policy achievement, it is arguable that the determination to contain the impact of

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8 As was evident in the widespread and hostile response to the suggestion of the then Archbishop of Canterbury, Dr Rowan Williams, that there might be some accommodation within English law of Muslim family law. For discussion of a specific example of faith-based resolution see Sandberg et al. 2013.


religious views hindered more open and meaningful debate about marriage and its place within the range of regulated adult family relationships and sometimes resulted in the absence of legal principle or sense. Much needed discussion, for example, as to why the same-sex relationship of civil partnership\textsuperscript{12} – which in legal terms is almost exactly identical to marriage – should be retained when same-sex marriage becomes possible, was sidetracked, perhaps due to reluctance to enter more deeply into consideration of the civil meaning of marriage.

\textbf{Monist or pluralist}

Alongside academic debate about liberalism, there has also been renewed discussion around the possibility of legal pluralism. Western modern, secular states are associated with monist frameworks where regulation emanates from one single, universal legal source and ‘if you take the position that law is singular (legal monism) and is derived from a secular state, then it follows that any beliefs held by religions are in some sense other or external to that system of law’ (Davies 2011: 75). Secular legal systems have long acknowledged the existence, and sometimes recognized the jurisdiction, of countries which operate pluralist frameworks and where individuals may choose to have aspects of their lives regulated according to their own system of personal, religious law. Domestic rules of international private law come into play, for example, in the context of claims for recognition of family relationships established according to the rules of a foreign jurisdiction which applies personal law. This could be perceived as a relatively unthreatening form of pluralism, where recognition is strictly controlled by the choice of law rules of the country where the legal action is being heard and the applicability of personal law is restricted by the requirement of extra-territoriality (Crawford and Carruthers 2011). A much more radical form of legal pluralism can be seen in the work of, for example, Werner Menski, who has argued in favour of individuals being able to bring their personal law with them when they travel to other countries and settle there (Menski 2011). For many this approach is to be resisted on several grounds, including concerns about the messy nature of the intersecting and overlapping frameworks of regulation.\textsuperscript{13} It is, however, an issue increasingly highlighted in European family law in countries which are experiencing unprecedented patterns of migration and are now being faced with the presence of significant religious-based communities within an otherwise secular legal state.

‘Most commonly legal pluralism is seen in empirical terms: it describes the presence of several legal systems co-existing in one space’ (Maclean and Eekelaar 2013: 89). The concept of legal pluralism is, however, open to a range of interpretations and, as Davies identifies, a second form ‘displaces state law as the prime mover of social organization, and looks as well at the variety of cultural, religious, regulatory, semi-autonomous spheres which exist in any society’ (Maclean and Eekelaar 2013: 89). In other words, individuals are regulated by and owe obedience to rules that emanate from a variety of sources. This is a view that resonates clearly with families, where the scope, nature and relevance of law as a source of regulation is to some extent contested. O’Donovan, in her discussion of ‘divisions and dichotomies’ commented with regard to women, home and family that, ‘[t]he private, regarded in legal ideology as unsuitable for legal regulation, is ordered according to an ideology of love’ (O’Donovan 1985: 12). Against this attitudinal background towards families, it should not be surprising that some individuals may expect their familial relations to be ordered according to their religious beliefs and frameworks.

\textsuperscript{12} Civil Partnership Act 2004.
\textsuperscript{13} For some further perspectives see Maclean and Eekelaar 2013.
Current concerns, as to the proper place of religion and its suitability or otherwise for legal regulation and public presence, echo similar concerns about the family and family law. They are neither clearly public nor private and attempts at reform variously seek to expose the absence of clear divisions, to redraw the boundaries or to challenge the very use of a dichotomous perspective. The complexities inherent in family analysis are only increased when religion meets family life and family law. Family lawyers should at least be open and receptive to multiple obligations and identities of those religious individuals who wish to exist across boundaries between public and private and conform with plural obligations. Feminist family law has long exhorted us to reject the false limits of a public/private dualism and to transcend the constraints that it imposes on our options for regulation and reform. Similar arguments are now being made in respect of approaches to religion with calls to ‘recognize the limits of our existing legal vocabulary: [which] relies upon, and replicates, a polarized, oppositional dichotomy’ (Shachar 2010: 409–10).

Reassessing religion

There is extensive research and commentary, particularly within the disciplines of sociology and anthropology, into the meaning, nature and extent of religion and religious behaviour, highlighting a range of interpretations and diversity of understanding (see e.g. Woodhead 2011). Law, by contrast, has generally been reluctant to become involved in defining or determining what is meant by religion. While there is extensive protection of religious rights in international and domestic legislation, the underlying concept of religion tends to be left undefined.14

Religious difference

For western European states, until recently, references to religion in family law have most often been found in an historical context. Throughout Europe, religion played a central role in the regulation of family law in terms of canon law; the law of the Roman Catholic Church and, in the past, religion was of interest to family lawyers as a source of rules. In contemporary debate, religion is once again being encountered as a source of regulation and obligation but this time it is to a large extent present as ‘a rival normative system’ (Shachar 2010: 405). The new presence of religion is characterized by diversity and the most prominent religion is often that of minorities. The current problem of religion is less that of religion itself and more one of accommodation of difference. The framework of international human rights, together with domestic legal guarantees of equality, is increasingly faced with the challenge of how to protect individual freedom while maintaining space for diversity.

The challenges which currently face courts and legislatures throughout Europe include how to accommodate secular principles in education with religious values of individual children and families; differences of opinion between state and religious community models of marriage and conflicting concepts of child welfare. The framing of the conflicts tends to push the parties into opposing corners and to harden differences. Closer assessment often discloses that within these opposing, apparently homogenous, groups, there is in fact considerable individual difference and scope for internal diversity. In several European countries, very clear views as to what is and is not acceptable in marriage are emerging and in particular there are objections to forced

14 For discussion of the absence of definition in international law, see Gunn 2003 and, within a European context, see Carrera and Parkin 2010: 3.
marriage and child marriage. While a significant element of these objections is understandable in terms of a desire to protect vulnerable parties, particularly young women and children, there is growing concern that the objections are at least partly motivated by other concerns: uncontrolled immigration and a reluctance to recognize diverse family models. A certain bias and lack of consistency may emerge when these reactions to difference are viewed within the broader context of increasing social and legal recognition or at least tolerance in many countries of a diverse range of relationship types. While accommodation of diversity is a key objective in many family law systems, acceptance and tolerance of difference is less clearly accepted when linked to religion.

**Religion and belief**

In many domestic legal systems, previous recognition or protection of one established or dominant religion is likely to have given way to more equal treatment of a range of religions. An additional shift can be identified from the label of ‘religion’ to the broader or combined term of ‘religion and belief’. In the European conventions, charters and directives, there is protection for equality in terms of religion and belief and that is being reflected in the individual domestic law of many countries. What is meant by belief, however, and what its relationship is with religion, is largely undefined. To be protected, must the particular belief in some way mirror religion? Belief is perhaps perceived as going beyond religion but, as understanding of religion changes, the extent to which the two are distinct is also unclear. Two recent examples from family law within the UK help to highlight some of the trends and uncertainties.

In England, a recent decision of the Supreme Court provided an opportunity to consider if the definition of religion, or more precisely of a ‘place of meeting for religious worship’, has changed. In England, couples may choose to marry in religious or civil ceremonies. Whereas in Scotland, legal control of religious marriage focuses on authorization of the celebrant, in England the place in which the wedding is to be held must be approved as a ‘place of meeting for religious worship’. This particular case concerned a couple who wished to marry in the London church which they regularly attended. The minister of the church was happy to conduct the ceremony but the problem was that the church was part of the Church of Scientology and in an earlier decision of the Court of Appeal, R v Registrar General, ex parte Segerdal, necessary recognition had been refused to a different church within the Church of Scientology. The key question was whether or not the building concerned was a place at which people engaged in ‘worship’. In Segerdal, Lord Denning had said of the creed of the Church of Scientology that it seemed to him ‘to be more a philosophy of the existence of man or of life, rather than a religion. Religious worship means reverence or veneration of God or of a Supreme Being.’ In this recent appeal, to the Supreme Court, the central question was whether the decision in the earlier case of Segerdal should be upheld. In Lord Toulson’s opinion, the question of what is a religion must be ‘interpreted in accordance with contemporary understanding’ and, having considered a range of authorities, he concluded that Scientology should be recognized as a religion and the physical

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15 With specific focus on America, see McClain 2006–2007.
16 R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages [2013] UKSC 77.
17 Places of Worship Registration Act 1855, s.2.
19 Ibid. at 707.
20 [2013] UKSC 77 at para. 34.
A religious revival in family law

premises where the services took place should be regarded as a ‘place of worship’. He described ‘religion in summary as a spiritual or non-belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite’. 21 He also found in favour of a broad notion of worship which includes not only ‘reverence and adoration of a deity’ but also ‘religious rites and ceremonies’. 22 He noted in particular, that to refuse approval to this building as a ‘place of worship’ would prevent Scientologists from being married in a form which used their own marriage service and would lead to a result which was ‘illogical, discriminatory and unjust’. 23

In this decision, recognition is given to the importance of ritual in family law and, in this context, even in countries where membership of religious organizations is falling and formal attendance at weekly religious services is in decline, there is continuing evidence of attachment to religious ceremony (see e.g. Jantera-Jareborg 2011). The desire for personalized rites of marriage to suit a wide range of preferences is also reflected in recent reform in Scots family law. Since 2006, humanist celebrants have been authorized by the Registrar General as temporary celebrants according to the Marriage (Scotland) Act 1977. As such, together with civil registrars and a wide range of religious celebrants, they are able to formalize valid marriages. To date, however, they have been technically classified as religious celebrants because of the Act’s limited framework. This has now been addressed by the Marriage and Civil Partnership (Scotland) Act 2014 which will replace references in the Marriage legislation to ‘religious body’ with ‘religious or belief body’. The legislation will define a religious or belief body in the following terms: an organized group of people which meets regularly (a) for religious worship or (b) which has as its principal object to uphold or promote philosophical beliefs and which meets regularly for that purpose. 24

In both of these developments, the personal significance of religious and other public rites of commitment, within the context of family law and family life, is reinforced but, in the move towards promotion of equality and reflection of private preference, the boundaries behind religion and belief remain unclear.

Reviving debates

The power of contemporary interest in religion has revived debates about the nature of religion and its proper place and these are debates that are of interest and relevance to our understanding of family law. The presence of religion has also had a reviving effect on debates internal to family law itself. While the detail of recent cases in many jurisdictions might be described as novel in that they involve consideration of religion in the context of what were previously assumed to be secular family law provisions and secular family life, there is something much more familiar about the underlying questions that are raised: questions which have long been at the heart of families and their regulation. To what extent are families a public or a private concern? What is the function of family law: the facilitation and accommodation of individual preference or the promotion of socially valued models? These debates are central to many of the religious questions that are currently being addressed. It might be argued that they are not new; a religious perspective has simply served to refresh them.

21 Ibid. at para. 57.
22 Ibid. at para. 62.
23 Ibid. at para. 64.
24 Marriage and Civil Partnership (Scotland) Act 2014, s. 10.
The value of marriage

Family law, particularly as it regulates adult family relationships, has come to be characterized in many jurisdictions as value free or at least it no longer seeks to enforce shared social values on individuals but rather to allow individuals to develop and pursue their own values within the context of legally acknowledged relationships. This is particularly evident in the changing regulation of marriage and the changing position of marriage within a hierarchy of relationship models. What is the purpose of marriage and why is it legally regulated? Is it a flexible and largely empty legal status, which can be adapted and applied to a variety of individual relationship preferences, or is it a normative institution, demanding compliance with established rules? As expressed by Maggie Gallagher, ‘[t]here are two broad views of marriage currently competing in the public square’ (Gallagher 2001): the relationship view which conceives of marriage as ‘an essentially private, intimate, emotional relationship created by two people for their own personal well-being’ (Gallagher 2001: 3) or the view of marriage as ‘a normative social institution’ which ‘consists, by definition, of isolating and preferring certain types of unions over others’ (Gallagher 2001: 9). Recently, debates surrounding the introduction of same-sex marriage in many countries have also highlighted the nature and meaning of marriage. One particular issue that has emerged is the extent to which modern legal marriage continues to be underpinned by religious – Judeo-Christian – theology or has it been fully replaced by a civil model.\(^\text{25}\) In this context, it could be argued that, ‘marriage has not fully emerged as a secular legal status’.\(^\text{26}\)

The recent focus on marriage has served to emphasize that, contrary to what might have been predicted on the strength of downward trends in marriage and rising levels of unmarried cohabitation, there is some evidence of continuing belief in the relationship of marriage and in its legal status. Individuals and governments, for a range of reasons, continue to regard marriage as in some way special and worth preserving and yet, from a family law perspective, it can be difficult to define what distinguishes it in substance from other forms of adult relationship, aside from the obvious formality of celebration and registration.

One explanation of the purpose of family law, and the place of marriage within it, focuses on its ‘channelling function’ (Schneider 1992), according to which the legal regulation and prioritization of marriage can be at least partly understood because it is ‘thought to serve desirable ends’ (Schneider 1992: 498). Belief in this channelling function, to some extent helps to explain why states continue to value marriage and to preserve its distinctive and often superior position to other family relationships. This requires something of a balancing act between giving legal recognition to social demand for other types of relationships and family models and preserving sufficient legal core to maintain marriage as a recognizable and effective institution. There are perhaps related concerns in respect of religion, as highlighted in the comment of Habermas in reference to post-secular society and its recognition of ‘religious fellowship in view of the functional contribution they make to the reproduction of motivations and attitudes that are socially desirable’ (Habermas 2006: 46). If marriage is to continue to be legally recognized as a distinct relationship, there needs to be further thought as to its nature and

\(^{25}\) The importance of looking at marriage, and how it has changed, over a long period of time is highlighted by Kindregan Jr 2007–2008.

\(^{26}\) Scott 2007–2008: 538. There is some evidence of this in Scots law where, in the absence of clearly defined obligations of marriage, there has been uncertainty as to the interaction of the civil concept of marriage and a personal faith-based understanding of the relationship: see e.g. \textit{SH v KH} 2006 SC 129 and further discussion in Mair 2007.
A religious revival in family law

meaning. Without clarification of what marriage is, the values it represents and the desirable ends it serves, it becomes almost indistinguishable from other adult domestic relationships. To date, while some may instinctively feel drawn to the apparent benefits of clearer values, there is also perhaps an underlying fear that talk of values is simply a way of reintroducing old-fashioned, conservative family policies.\textsuperscript{27} If marriage is to develop as a relevant model in future family law, it seems essential that more open conversation should begin as to its meaning and value within a broader legal and social context (see e.g. Sörgjerd 2012; Barker 2013; Garrison and Scott 2013).

Knowing what’s best

Within child law, both internationally and in many domestic legal systems, family law states its values clearly in the form of guiding principles. It can be less open, however, about the value judgments that lie behind those outward-facing principles. Underpinning the operation of Western family law in respect of children is the guiding principle that the welfare or best interests of the child should be the paramount consideration. Applied by judges and relied upon as a benchmark by all those who work with and care for children, it has come to be treated as an almost scientific formula. Universal understanding of the welfare of the child is, however, placed under considerable pressure where the religious motivations of the parents come into contact with a secular assessment of what is best.

Conflict is perhaps most ostensible when human rights come face to face with Islamic law. Attitudes to child marriage, adoption and circumcision, for example, are often presented as being contrary to what is best for the child from the perspective of international human rights. Viewed from the high ground of rights’ inspired welfare, the preferences of religious parents can appear clearly unacceptable. Some would argue, however, that these stark presentations of incompatibility fail to consider the ‘inbuilt latitude and flexibility’ in Shari’a (see e.g. Rehman 2011: 154). Conflict between general social values and those of a minority of religious parents can also arise in the context of medical treatment decision-making. The beliefs of Jehovah’s Witness parents, and in particular their opposition to blood transfusions, are often highlighted as being contrary to the welfare of their children\textsuperscript{28} but, difficult as such decisions may be, it is important to remember that the parents are acting not to harm their children but precisely to protect them, according to their own values. ‘There is such a diversity of possible goods in parenting that defining exhaustive understandings of what is good for children is not feasible’ (Shelley 2013) and while it may be that there is or should be a common core, recent concerns about parenting and attitudes towards children across different religious communities suggests that these are issues which have not been fully explored.\textsuperscript{29} It is sometimes too easy to rely on the public reason of the welfare principle without considering the motivating private values and the diversity inherent in assessing what is or is not in the best interests of a child. While this concern is not new (see e.g. Reece 1996; Piper 2000), it is a potential weakness of family law that has once more been highlighted by the presence of religion.

\textsuperscript{27} A concern expressed, for example by Margaret Davies in her reference to recent examples in Australian politics of ‘family-oriented politicians espousing conservative Christian ethics’: Davies 2011: 73.
\textsuperscript{28} See e.g. the English case of \textit{Re N (A Child) (Religion: Jehovah’s Witness)} [2011] EWHC 3737 (Fam).
\textsuperscript{29} As Shelley highlights, when assessing the conduct and values of religious parents ‘there needs to be parity of critique’ (2013: 135).
Resisting religion or joining the debate

Religion in contemporary academic legal treatment is rarely a neutral matter but rather, for many, it is presented as a problem. Religion is a problem for law in a very practical and real way because it is the substance of difficult disputes which come before judges. The claims of religious minorities, living within states which do not share their beliefs and values, and the attempts of religious individuals to enforce legal rights to identity and expression, when presented in the black or white, right or wrong, language of law, certainly emphasize the complex and challenging nature of religion and highlight law’s struggle to deal with it. The practical challenge presented by the day-to-day re-emergence of religion is also a problem for many legal theorists, because its public presence contradicts an expectation that it should be, and indeed had become, private. The revival of religion is a problem too for law’s confidence in its own modernity. To readmit religion to legal discourse is an echo of earlier times associated with the past, revival suggests a trend that is backward looking. Religion and religious belief are associated with more primitive, less rational and less sophisticated ways, at odds with modern, secular and scientific motivations. Ferrari sums up the progression as follows: ‘[t]he magical and irrational law of primitive peoples, founded on oath and ordeal, is replaced first by the partially rational law of the great monotheistic religions . . . and later by the completely rational law of modern society born of the Enlightenment’ (Ferrari 2012: 357). And religion is a problem because it is premised on values: predefined and universal, rather than discovered and personal, and prescriptive, rather than flexible and open.

The problems of religion have been exacerbated because they are unexpected, shocking and new. Religion’s reappearance was unexpected because the assumption was of secularism. Its resurgence was shocking because it was so sudden and apparently extensive and because it was sometimes extreme. And because of a presumed gap between the religious influence of the past and this contemporary redevelopment, the problems it has brought are often thought of as new. On the contrary, what is notable about much of the current writing about religion is the extent to which it is familiar. Theoretical re-workings of old debates are emerging in an attempt to make sense of new religious situations. Instead of being disturbed and deterred by these debates, to some extent we might be reassured by their familiarity. Family law is well placed to contribute because the religion inspired models and perspectives now being discussed resonate with those that have long been applied to family law. Some might prefer to resist, to close down the scope for religious influence and religious presence but in family life it appears there is continuing interest in and demand for it. Given the nature of personal relationships and religion, this is scarcely surprising. Family law aims to reflect the needs and expectations of those who use it and in this respect it seems inappropriate or impossible to ignore religious individuals, families and communities. Elements of contemporary religion are new: its diversity, its forms of expression, its presence not necessarily as authority but as arbiter of disputes or provider of ceremonial rites, but its place within family life remains relatively constant. The temptation to resist the intrusion of religion is perhaps strongest where its presence has the effect of highlighting internal insecurities and uncertainties of modern family law itself. The place in particular of ‘values’ in family law is increasingly under scrutiny although again this is not new. The questions and concerns highlighted in modern family law by contemporary religion have long lurked in academic narratives. Resisting, rather than joining in, tends to hinder effective communication and debate. It may now be time to revive and engage in more open

30 For discussion, see Berman 1974–1975.
A religious revival in family law

conversations about the nature, functions and scope of family law and the influence of religion as one factor within it.

**Bibliography**


