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PUBLIC CEREMONY AND PRIVATE BELIEF: THE ROLE OF RELIGION IN THE SCOTS LAW OF MARRIAGE

Historically, religion has played an important role in the legal regulation of marriage in Scotland, with canon law prior to 1560 governing the personal aspects of marriage: formation of marriage, capacity to marry and issues relating to nullity. Following the Reformation in 1560, the control of the Roman Catholic church over marriage was abolished to be replaced in 1563 by the Commissary Court which took over responsibility for all actions arising from marriage. Throughout this period the rules and principles of the canon law continued to be applied “except in so far as altered by statute or inconsistent with the reformed religion”¹ and, therefore, although the Church no longer had direct control over family law, its influence to some extent continued. The 20th Century, a period of substantial statutory reform, brought more radical reforms of Scots family law with marriage becoming increasingly secularised² and nowhere is this more evident than in the Marriage (Scotland) Act of 1939 which introduced civil marriage as an alternative form of regular marriage. Since 1940, Scots law has permitted the constitution of regular marriage by either civil or religious ceremony, with the system being further modernised by the Marriage (Scotland) Act 1977.³ Not only have the legal ties between religion and marriage been loosened, but also religious influence on the traditional roles of husband and wife has decreased in the face of developing economic equality between men and women and growing social acceptance of unmarried cohabitation and children born out of wedlock. In recent years and, in keeping with the general decline in church attendance and formal religious affiliation in Scottish society, it might have been expected that there would have been further steady decline in the influence of religion in legal marriage. Although as a general trend the connections between the secular and the religious have weakened, analysis of some recent developments highlights their ongoing and at times uneasy relationship within the legal context of marriage.⁴

Religious Ceremony

While religious doctrine has played a key role in shaping the institution of marriage and the traditional roles of husband and wife, religion has also influenced the wedding ceremony. In recent decades there has been a significant decline in church attendance but the church has continued to play an important role in marriage to the extent that religious buildings have provided the backdrop for many wedding ceremonies. In an

¹ Clive, *The Law of Husband and Wife* (4th ed) (W.Green, 1997) paras 01.001 – 01.014.

² The control of religion over marriage can be seen to decline in measures such as: the Marriage (Scotland) Act 1834 which recognised the growth of religious bodies other than the established church by permitting religious celebrants from churches other than the Church of Scotland; Marriage Notice (Scotland) Act 1878 which provided a system of giving notice of marriage to a registrar as an alternative to the proclamation of banns; Marriage (Scotland) Act 1977 which abolished the requirement of the proclamation of banns as a legal preliminary to marriage. For an overview of these developments see Clive, *supra*, paras 01.012 – 01.014; R.K.Marshall, *Virgins and Viragos: A History of Women in Scotland from 1080 – 1980* (Collins, 1983) 272 – 273; 294 – 295.

³ Which gave effect to many of the proposals set out in the *Report of the Kilbrandon Committee on the Marriage Law of Scotland* (1969) Cmnd 4011.

⁴ See also K.McK Norrie, “Quiet Revolutions” 2006 JLSS 20.

age where the wedding business has appeared to dominate to a greater extent than concerns about the legal nature of marriage or worries about religious hypocrisy, the choice of religious marriage has remained relatively popular as for many it has offered access to impressive architectural settings to fit with the occasion of the wedding ceremony. For some, the choice may have been dictated more by concerns of appearance than of religious conviction.⁵ Even against an overall decline in religious marriage, the most recent Annual Review from the General Register Office for Scotland reported that a “small increase in religious marriages observed during the period 1997 – 2002 was largely associated with the increase of ‘tourism’ marriages”.⁶ The Marriage (Scotland) Act 1977, in its original form, imposed no limitations on the setting for a religious wedding and access to a religious wedding depended on the willingness of an approved celebrant to officiate at the ceremony. With the growing popularity of wedding ceremonies in unusual locations, the importance of religious marriage continued since such weddings could only take the form of religious weddings. Civil weddings were much more restricted in that the legislation required them to take place in the registry office.⁷ This distinction has in recent years seen significant change with evidence of a consequent reduction in the number of religious weddings.⁸ As a result of the Marriage (Scotland) Act 2002, section 18 of the 1977 Act was amended to allow civil marriages to be solemnised either in the registration office or in an approved place and a growing number of such places are now approved by local authorities. Statistics available since the introduction of the 2002 legislation indicate a steady and significant increase in the use of this new facility with 7055 civil marriages being conducted in approved places in 2005.⁹ The attractiveness of a religious setting has perhaps kept the number of religious weddings rather higher than might have been expected in relation to declining religious affiliation, but this pattern looks to have changed as a result of the increased flexibility and choice which has been introduced into civil marriage.¹⁰

The distinction between religious and civil marriage has been important not only in respect of the location of the wedding but also in terms of the form of the marriage ceremony. A civil marriage is by definition a non-religious marriage, with care being taken to ensure that the civil ceremony remains strictly secular and while District Registrars may encourage couples to personalise their ceremony, it is made clear that

⁵ See eg statistics cited in The Scottish Parliament Information Centre, *The Marriage (Scotland) Bill*, Research Paper 01/21, 17 December 2001 at p9 which report that “31% of all couples contracting a religious marriage would have preferred a civil marriage if a suitable venue had been available”: available at www.scottish.parliament.uk/business/research/pdf_res_papers/rp01-21.pdf.

⁶ General Register Office for Scotland, 2005 Annual Review, Chapter 1 – Demographic Overview available at www.gro-scotland.gov.uk/statistics/publications-and-data/annual-report-publications/rgs-annual-review-2005/chapter-1-demographic-overview-marriages.html.

⁷ Marriage (Scotland) Act 1977, s18(1), subject to a limited exception as set out in s18(3) where either party is unable to attend the registration office.

⁸ There has been a decrease in religious marriages from 18371 in 2002 to 15368 in 2005: 2005 Annual Review, supra at note 2.

⁹ Representing 23% of all marriages and 45% of civil marriages: an increase of 18% on 2004 and of 104% on 2003: 2005 Annual Review, supra at note 2.

¹⁰ The most recent development has been the introduction of the possibility of civil marriage in Scottish waters – up to a 12 mile limit around the Scottish coast – as a result of ss 48 – 50 of the Local Electoral Administration and Registration Services (Scotland) Act 2006.

there must be no religious content.¹¹ In England, where the distinction between secular and religious is based in the Marriage Act 1949 which prohibits the use of any religious service in a civil marriage, the General Register Office consulted in 2005¹² on proposed changes to the civil marriage ceremony. This consultation resulted from the growing desire of couples to include music, poetry or readings within their civil service which had some religious connection and as a result a relaxation of the test for religious content was proposed which permits the inclusion of material which contained “an incidental reference to a god or deity”. Here again, in response to public demand, there is evidence of a blurring of the distinction between the religious and the secular.

Control over religious marriage in Scots law has been exercised primarily through restrictions over who may be recognised as religious celebrants¹³ and until recently, a strict divide was maintained between those who qualify as religious celebrants and those who act as civil registrars. While the authorisation of religious celebrants reflects a diversity of religious beliefs and practices, there have been challenges to the traditional “theist” approach by those who may have a strong belief system but not one which fits within the traditional confines of religion. Social trends identified with New Age lifestyles and a reviving interest in spirituality, combined with developing legislation and jurisprudence concerning equality and human rights in the area of religion and belief, have supported some reconsideration of the strict divide between religious and secular.¹⁴ In Scotland, this led to the Registrar General appointing a number of humanist celebrants in 2005 for the first time and in so doing acknowledging the desire of some couples to have a marriage ceremony which reflects their beliefs albeit not of a ‘religious’ nature. The authorisation of humanist celebrants is an important recognition of the fact that values, other than traditional religious values, may provide an important belief structure for some people and that this should be reflected in the key moments in their lives.

In terms of the Marriage (Scotland) Act 1977 there is a clear legal distinction between civil and religious marriage and in the past this distinction has been reflected both in the setting and form of the different types of ceremony. Until recently, those who wanted a special setting for their wedding, had often to rely on the willingness of religious celebrants to overlook their lack of religious faith but in this respect religious control has been significantly weakened by the availability of civil marriage in approved places. While recent decades have seen a decline in the relevance of traditional religion, there has been renewed interest in spirituality and belief with the result that strict distinctions between religious and secular are not always clear. These social and lifestyle trends can perhaps also be identified in developments within marriage ceremonies and their legal regulation. In terms of the statutory framework,

¹¹ See also the Regulations which govern the approval of places for civil marriage – the Marriage (Approval of Places) (Scotland) Regulations 2002 SSI 2002 No 260, as amended – which specifically provide that a place will not be approved if it is “in religious premises” – reg 7(2)(b).

¹² GRO, *Content of Civil Marriage Ceremonies: A Consultation Document*, June 2005: available at

¹³ Marriage (Scotland) Act 1977, ss8 and 9.

¹⁴ See eg Art 9 of ECHR which protects freedom of ‘religion or belief’ and the Written Submission from the Humanist Society to the Scottish Parliament with proposed amendment of the Marriage (Scotland) Act 1977, available at

www.scottish.parliament.uk/business/committees/justice1/inquiries/familyLaw/63-fb-HumanistSociety.htm.

the formalities of marriage celebration remain divided between civil and religious but recent legal developments make the distinction less sharp.

Civil Consent

As expressed by Clive,

“Outward actings do not make a marriage. Mere consent does not in itself constitute a marriage either. Marriage requires both a mental element (mutual consent to marry) and an outward or factual element (nowadays either a regular marriage ceremony or cohabitation with habit and repute).”¹⁵

In order to assess the validity of the outward ceremony, as we have seen, the Marriage (Scotland) Act 1977 and accompanying Regulations prescribe separate rules and requirements for civil and religious marriage. The respective roles of civil law and religion are arguably less clear when the focus is shifted to analysis of the validity of consent. With regard to the issue of consent, there is no clear distinction between civil and religious marriage and religious faith may become entangled with civil analysis of consent.

A Sham Ceremony

For many reasons, individuals may enter into marriage by means of a ceremony in which they do not fully believe but the clear and simple requirements of the Marriage (Scotland) Act 1977 mean that for most couples there is no need or opportunity for detailed legal scrutiny of hypocrisy. Within the context of sham marriage, however, a number of cases have been considered by the Scottish courts in which a conflict is presented between the outward civil ceremony and the inner religious beliefs of the parties. In all of these cases there is a question as to the validity of the consent which the parties appear to have exchanged as part of the civil ceremony but which is challenged on the basis of their private religious beliefs. The reason for this scrutiny of the apparent gap between their words of consent and their innermost beliefs is in most cases a suspicion that, in going through a ceremony of marriage, they had some unacceptable ulterior motive. The traditional approach in Scots law was as set out in *Orlandi v Castelli*¹⁶, *Mahmud v Mahmud*¹⁷ and *Akram v Akram*¹⁸ and appeared to have the effect that the private religious beliefs of the parties as to the nature of marriage could take precedence over the outward civil form. Each of these cases arose in the context of immigration, where a civil marriage ceremony took place as a formality to enable one of the parties (the defender) to obtain permission to remain in the UK. In each case, the parties had religious beliefs which prevented them from regarding civil marriage as true marriage and following the marriage there was no cohabitation between the couple.

In *Akram v Akram*, the Lord Ordinary accepted, albeit with some reluctance in the circumstances, that:

¹⁵ Clive, *supra*, para.05.025.

¹⁶ 1961 SC 113.

¹⁷ 1977 SLT (Notes) 17.

¹⁸ 1979 SLT (Notes) 87.

“Scots civil law has always applied the consensual principle to the contract of marriage so that, if it be proved that, notwithstanding the trappings of a formal marriage ceremony, the parties thereto did not exchange their consent for the purpose of obtaining married status, the ceremony must be denied the legal effect which it was designed to produce.”¹⁹

In each of these cases, the pursuer was successful in convincing the court that she did not truly consent to be married despite the apparent exchange of consent within the context of the civil marriage ceremony. The evidence in each case as to why the consent was in fact lacking related to the religious beliefs of the parties as to marriage. According to Clive’s analysis of the issue, however, “it is not the case that ... a civil marriage is void merely because the parties to it do not regard it as having any religious significance.”²⁰ The key distinction to be made is “between an intention to assume the legal relationship of husband and wife and an intention not to get married at all.”²¹ He recognised that these distinctions are unlikely to be clear in the minds of the parties concerned: what is it that the parties are doing if they go through a civil ceremony but with no intention to get married at all?

In a more recent consideration of this problem, in *Hakeem v Hussain*²², Lord Clarke attempted to draw a clear line between the legal concept of civil marriage and the personal model of religious marriage. The pursuer, a Muslim woman who had been born in Scotland to parents who had come from Pakistan, sought a declarator of nullity in respect of a pretended marriage with the defender, Khalid Hussain, also a Muslim, who had come to Scotland in 1998 from Pakistan. It was agreed that the parties would go through a civil marriage in June 1998, which would enable the defender to extend his visa but that, in accordance with their Muslim beliefs, they would not live together as husband and wife until after the required religious ceremonies had taken place at a later date. Following the civil ceremony, for a variety of reasons,²³ the planned religious ceremonies did not take place and ultimately, when it became clear that the defender no longer wished to proceed with the religious marriage, the pursuer sought declarator of nullity.²⁴

The central issue in deciding on the validity of the purported marriage was the apparent exchange of consent in the course of the civil ceremony. There was no question of incapacity or of misunderstanding as to the nature of the ceremony, with both pursuer and defender going through the ceremony “of their own volition”²⁵ and fully understanding the legal effect of civil marriage. The evidence disclosed that all parties involved understood the legal significance of a civil marriage ceremony according to Scots law. It was also clear that all shared a religious faith according to which a couple were not truly husband and wife until they had gone through the required religious ceremonies. There was, therefore, a split between what was required to constitute marriage by Scots law and by the Muslim faith. In his decision, Lord Clarke drew a very clear distinction between the civil law and the personal

¹⁹ *Ibid.*

²⁰ Clive, *supra*, para 07.047.

²¹ *Ibid.*

²² 2003 SLT 515.

²³ *Ibid* at 519.

²⁴ For further comment see Mair “A Sham Marriage or a Proper Wedding: *Hakeem v Hussain*?” 2003 7 EdinLR 404.

²⁵ 2003 SLT 515 at 518.

religious beliefs of the parties involved and reached a decision in his capacity “as a judge in a secular court”.²⁶ In so doing he relied on the distinction drawn by Clive²⁷ and he further rejected the misconception that:

“when a man and woman enter a regular marriage but do not, because of their religious beliefs, consider themselves to be married in the eyes of their god, or according to their religion, until they undergo another ceremony of a religious character, the regular marriage is void and has no legal effect.”

Lord Clarke made an important distinction between the legal validity of a civil marriage and the personal significance of religious marriage for the parties involved. In going through a civil marriage, it was the intention of the couple to acquire the status of husband and wife because that was the means by which the defender could overcome the first hurdle in the immigration process. They consented to civil marriage because they wanted to obtain at least some of the civil benefits of being married. Because of their strong religious views, this civil ceremony of marriage had no significance in terms of their personal relationship as husband and wife and, in terms of their religion, they were not married. Clive stated that, “[i]f the parties intended to get married ... then they will be married, even if their marriage was for a limited purpose”²⁸ This would seem to be broadly the approach followed by Lord Clarke in the Outer House in *Hakeem v Hussain* where the couple had exchanged consent in order to enter the legal state of marriage although, at least for the time being, the marriage was for limited purposes and they would not live together or act as husband and wife in the traditionally expected sense. They had chosen to enter into the legal state of marriage for limited purposes but they would not begin to act as husband and wife, according to their religious beliefs, until the later completion of the religious ceremonies. In essence there was a separation between marriage as a civil status and marriage as an intimate personal relationship.

On appeal,²⁹ the Inner House firmly rejected the possibility of such a separation and reinforced the fundamental essence of the marriage relationship, at the same time rekindling the potential conflict between civil rules and religious beliefs. Is marriage in Scots law, purely a civil legal status or does it require a particular form of personal relationship? Can the rights, obligations and benefits of marriage be accessed by simple compliance with the legal rules governing the constitution of marriage or must the relationship of the spouses also conform to an accepted model of marriage. If it is the latter, then the law says little about the form of this relationship and it may be that we need to turn again to religion to find some substance for the relationship of husband and wife. In considering the reclaiming motion, Lord Penrose grappled with the issue of the substance of marriage. He recognised that the principal legislation, the Marriage (Scotland) Act 1977, does not define marriage but instead concentrates on setting out clear procedures for its constitution. He summarised the authorities to the effect, however, that “formal compliance with the procedural requirements of regular marriage is not conclusive of the contraction of a valid marriage”.³⁰ It was not enough that the parties participated in an appropriate ceremony of marriage and that in the course of this ceremony they spoke the words of consent if in fact they did not

²⁶ *Ibid* at 525.

²⁷ Clive, *supra*, para 07.047.

²⁸ Clive, *supra*, para 07.047.

²⁹ *SH v KH* 2006 SC129; for further analysis see Mair “Marriage: Legal Status or Personal Relationship?” 2007 11 EdinLR 117.

³⁰ *Ibid* at para 33.

exchange “matrimonial consent”.³¹ As a matter of public policy, he argued that there should be some legal control over access to the admittedly limited “privileges” and “benefits” of modern marriage. Those that remain should be reserved only for those couples who had “exchanged true matrimonial consent.”³² He firmly rejected the notion that couples can pick or choose which aspects of marriage they wish to accept and he rejected the suggestion that “there were two institutions: civil marriage and religious marriage. There was only one marriage.”, the essence of which was “consent to live together, to offer mutual support, in most cases to share exclusive sexual relations, and generally to be husband and wife (Stair, *Institutions*, Liv.1 on ‘conjugal obligations’).”³³ In rejecting the possibility that marriage could be formed simply by the exchange of formal consent,³⁴ Lord Penrose considered the concept of marriage itself and in so doing, relied on the statements of Fraser³⁵ to the effect that “[m]arriage is a contract, in so far as it requires the consent of two persons, but it is very much more than this. It is an institution or status.”³⁶ In reinforcing the requirement that the couple should comply with at least some of the expected behaviour of spouses, Lord Penrose signalled approval of Fraser’s concept of marriage, recognising albeit that it was “based on a Christocentric analysis”.³⁷ In the circumstances of this case, what it meant to be married was informed not just by the requirements of civil law but also, and more significantly, by the religious background and beliefs of the parties.³⁸

There are sharp distinctions between the approach adopted by the Lord Ordinary in the Outer House and that expressed by Lord Penrose on appeal. In the Outer House it was enough that the couple had apparently exchanged consent within the context of a civil marriage. In the Inner House, their consent was found wanting by analysis based on their particular religious beliefs. There was a split between outward compliance with the form of the ceremony and scrutiny of the substance of the ensuing relationship. There was a split between marriage as a legal status and marriage as a personal relationship. And there was a return to the intermingling of issues of legal and religious compliance within the analysis of the validity of a purported marriage.

A Mixed Marriage

In some marriages, the faith of the parties may be shared but in others their cultures and religions differ. Such “mixed marriages” can give rise to issues and conflicts which require to be worked out both in choosing how to marry and within the context of the personal relationship. It is well accepted in Scots law that marriage requires both mutual consent and an outward ceremony or other factual sign.³⁹ Within the context of irregular marriage by cohabitation, evidence is needed of the relevant

³¹ *Ibid* at para 39.

³² *Ibid* at para 39.

³³ *Ibid* at para 41.

³⁴ *Ibid* at para 42.

³⁵ Fraser Husband and Wife (2nd ed) 1876, Vol 1 at p156.

³⁶ *SH v KH, supra*, at para 45.

³⁷ *Ibid* at para 47, quoting Fraser at p162: “I conceive that marriage ... may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”

³⁸ *Ibid* at para 53.

³⁹ See Clive, *supra* at note 15.

period of cohabitation together with substantial repute as husband and wife. This, which is the outward element of marriage, will give rise to a presumption of a tacit exchange of consent. The presumption may, however, be rebutted and it has previously been established that rebuttal can result from evidence of a future intention to marry or a specific refusal of an offer of marriage. It is difficult to establish that a couple have lived together as husband and wife where there is evidence to the effect that “they had rejected the institution of marriage”.⁴⁰ Actions for declarator arising from cohabitation are by their nature cases where the circumstances of the case and the credibility of the witnesses are of considerable influence and certainly no clear principle can be discerned.⁴¹ There is, however, some evidence of judicial willingness to show understanding of the influence of religious beliefs on the behaviour of the parties. In *Nicol v Bell*⁴², the pursuer had moved into the house of the defender around the time of his divorce from his first wife. In considering whether or not they had cohabited as husband and wife, one of the issues related to the defender’s refusal to go through a ceremony of marriage. As Roman Catholics, they could not go through a religious ceremony as “in the eyes of their church he was still a married person”⁴³ and the defender refused to marry in a civil ceremony as “he was unwilling to court ecclesiastical disapproval”⁴⁴. Both in the Outer House and on appeal, these religious objections to a marriage ceremony were not regarded as sufficient to rebut the presumption that tacit matrimonial consent had been exchanged at some point in the course of their cohabitation.

Nicol v Bell, with its references to concubinage, ration books and social acceptability might be disregarded as belonging to another age but in a much more recent decision of the Outer House,⁴⁵ religion as an obstacle to regular marriage was again a significant factor in the decision to recognise irregular marriage. In this case, there was evidence from several sources to the effect that the pursuer had refused the defender’s offers of marriage and that the reason for this was the different religions of the couple and their respective families. In the case of *Sheikh v Sheikh*,⁴⁶ again the court was presented with a conflict between outward conformity with the model of marriage and inward religious reservations but here the religious beliefs were not shared by the parties. In an action for declarator of marriage on the basis of cohabitation with habit and repute, Karen Wetherhill or Sheikh sought declarator to the effect that she had been married to Zahid Hussain Sheikh as a result of cohabitation between November 1985 and November 1998. The couple met and had a relationship in the late 1970s which came to an end in 1978 when the defender, a Muslim, went through an arranged marriage with a Muslim woman. Some months after this wedding, however, the relationship with Karen Wetherhill began again and

⁴⁰ Sutherland, *Child and Family Law* (T & T Clark, 1999) para 10.79.

⁴¹ In *Mackenzie v Scott* 1980 SLT (Notes) 9, the pursuer’s evidence to the effect that they had on several occasions discussed marriage appeared to be fatal to her argument that they were married by cohabitation with habit and repute whereas in *Shaw v Henderson* 1982 SLT 211, where the defender had died, declarator was granted despite evidence to the effect that a regular wedding ceremony had been planned for later in the year. Here a distinction was drawn between “the marriage state” and “a marriage ceremony”: at 214.

⁴² 1954 SLT 314.

⁴³ *Ibid.*

⁴⁴ *Ibid* at 321.

⁴⁵ Karen Elizabeth Wetherhill or Sheikh v Zahid Hussain Sheikh (OH), 10 February 2005, unreported: available at www.scotcourts.gov.uk/opinions/CSOH25.html.

⁴⁶ *Ibid.*

by 1980 or early 1981 the couple were living together in rented accommodation in Edinburgh while the defender's wife continued to live with his family. In 1982, the defender's wife left Edinburgh and returned to England; at which time the pursuer was introduced to the defender's family who "accepted her as his wife and treated her as such."⁴⁷ Subsequently the defender obtained a divorce from his wife and, in the following years, the couple cohabited, jointly purchased property, started up and pursued several small businesses together and had two sons. They continued to live and work together until 1998. Following their separation, the pursuer sought and obtained a declarator of marriage.

In considering the case, Lord Philp, the Lord Ordinary, was satisfied that sufficient evidence of cohabitation, together with substantial repute, had been established and the principal issue to be considered was whether the resulting presumption of tacit exchange of matrimonial consent could be rebutted. There was evidence from several sources to the effect that the defender had proposed marriage on more than one occasion but that his proposals had been rejected by the pursuer. Her explanation of her refusals was on the basis that the defender, because of his religious beliefs, wanted to be married by an Islamic ceremony and that she was unwilling to be married in this way. Her concerns were that she would require to "convert to Islam, and among other things, would require to cover her head in public."⁴⁸ She was apparently worried that regular marriage, as proposed by the defender, would involve changes to her life which went beyond the civil requirements of marriage, as understood in Scots law. In order to conform to the religious beliefs of the defender and his family she would also, she argued, be damaging her relations with her own family and, in particular, with her father whom she believed "would disown her".⁴⁹

The fears of the pursuer were accepted by the Lord Ordinary, although it might be argued that a more critical approach could have been adopted to her concerns. There was considerable evidence from members of the defender's family to the effect that they accepted that the couple were married. The defender and his family were presented as adhering strongly to Islamic belief, a significant aspect of which was that a couple must not cohabit without being married, and so it must be assumed that the pursuer was already acting, in their eyes, appropriately. They believed that she and the defender had gone through a ceremony of marriage and they did so without requiring the behaviour which she feared that "certain followers of Islam expect of married women".⁵⁰ It might, therefore, be suggested that the fears which the pursuer presented and which were so readily accepted by the court were little more than stereotypical fears of an unfamiliar religious culture. In accepting the pursuer's explanation of her refusal of marriage, however, the Lord Ordinary drew a distinction between her rejection of a ceremony of marriage and her acceptance of the state of marriage and in so doing he might be argued to have overruled the religious beliefs of the defender in order to allow the pursuer to gain access to the civil benefits of marriage.

⁴⁷ *Ibid* at para 12.

⁴⁸ *Ibid* at para 18.

⁴⁹ *Ibid*.

⁵⁰ *Ibid* at para 43.

Conclusions

In terms of both ceremony and consent the distinction between religious and civil marriage in Scots law is neither consistently nor clearly made. In this, family law may be doing that to which it often aspires: reflecting the needs and expectations of those affected by it. In the Scottish Executive White Paper, which preceded the Marriage (Scotland) Act 2002, it was noted that:

“in recent years the marriage *ceremony* has increasingly come to be seen as a matter whose elements, including venue and circumstances, are properly for choice by the couple, rather than part of a uniform package with elements all decided by some religious or municipal authority.” (section 1.1)

What is less well accepted is the extent to which a similar “pick and mix” approach may be adopted to consent. Can couples choose the extent to which they contract in to marriage or is it an institution with a non-negotiable essence to which full matrimonial consent is required? When a couple exchange consent to be married, what is it that they are doing? Do they agree to be bound simply by the civil legal rules which at any time apply to husbands and wives or do they commit themselves to a relationship with a fundamental essence. In a legal system which does not prescribe rules for married life, where then is this essential model of marriage to be found? Should private religious beliefs exercise any control over access to the legal status of marriage? In *Hakeem v Hussain*⁵¹, a strict separation was drawn between the couple’s religious beliefs as to how they should conduct themselves towards each other and their conformity with the civil rules of marriage which enabled them to gain access to the legal status of marriage. On appeal,⁵² however, the two were regarded as inseparable. In consenting to marriage, the validity of the consent was assessed in light of the religious concept shared by the parties of what it meant to be husband and wife. In *Sheikh*,⁵³ the couple had outwardly conformed to an expected pattern of conjugal behaviour although there was some doubt as to the exchange of matrimonial consent. The religious beliefs, in this case, were not shared and in fact were presented as an obstacle to the exchange of consent within the context of religious marriage. Irregular marriage allowed the pursuer access to the legal benefits of civil marriage where she had been unwilling to contract the religious marriage which had been proposed. In these decisions, as in the developments relating to the dual framework of religious and civil marriage, the divisions between the religious and the secular are not always clear.⁵⁴ While religious faith remains a personal matter, its interaction with the civil concept of marriage highlights continuing uncertainty as to the nature and meaning of marriage as a legal concept.

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⁵¹ *supra* at note 22.

⁵² *supra* at note 29.

⁵³ *supra* at note 45.

⁵⁴ For an interesting historical account of developments throughout Europe of systems adopting either “obligatory civil marriage” or dual systems, see M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective* (2006 Intersentia) at 13.4.2.