New Multicultural Identities in Europe

Toğuşlu, Erkan , Leman, Johan, Sezgin, İsmail Mesut

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Democratic Theory and the Autonomy of Non-Christian Religious Courts in the UK

Ephraim Nimni

This chapter discusses the dilemmas of the relationship between religions of non-Christian minorities and the state in Western liberal democracies. It also explores the potential way out of these dilemmas offered by the limited autonomy granted in the UK to the Jewish orthodox Beth Din and, by implication, the autonomy of Islamic Shariah Courts, as sanctioned in the UK Parliament's (Divorce) Religious Marriages Bill 2002. It is argued here that this legislation has implications that go beyond the specific needs of the Orthodox Jewish community, to constitute an example of an embryonic democratic pluralism that leads to the creation of supplementary jurisdictions for non-Christian minority communities in the UK, and the possible incorporation of both the Jewish Orthodox Beth Din and Islamic Shariah Courts into the English legal system.

Introduction

With the enactment of the Muslim Marriages Bill (South African Department of Justice and Constitutional Development: *2011: Muslim Marriages Bill),* South Africa has taken the lead in the question of the relationship between religions of non-Christian minorities and the state. For a discussion see Amien (2006). This chapter will discuss the dilemmas of the relationship between religions of non-Christian minorities and the state in Western liberal democracies.

Orthodox Jewish and Islamic courts have similar procedures on matters relating to religious marriages and, indeed, many other matters, including

male ritual circumcision and the definition of pork as ritually unclean and forbidden for consumption. A marker of difference between these religions and Christianity is that worshiping images is forbidden in both religions. Kasher and Halal dietary laws have some similarities, the orthodox Jewish Kasher being the more strict. The ritual slaughter of animals permitted for human consumption is very similar in both religions. There are some differences in the consumption of alcohol, which is forbidden for Muslims and not for Jews, and in divorce procedures. There cannot be any doubt that Islam and Orthodox Judaism are the closest Abrahamic religions. It is an undisputed historical fact that both flourished in close contact, a fact that is unbearably obscured by the tragic and most unfortunate circumstances of the Israeli-Palestinian conflict. In light of this, any jurisprudential procedure or recognition of the autonomy of religious courts, however limited, of one of these two religions in Western liberal democracies, in which both are minorities, will necessarily have an impact on the other.

This chapter will also discuss the landmark contribution of Dr Rowan Williams, former Archbishop of Canterbury (Islam in English Law- civil and religious Marriages in England) to the creation of supplementary religious courts in the English Legal System, and thus allowing for the much better incorporation of religious Jews and Muslims into the British state.

Secularism and secular democracies

The concept of Democracy is inherently contested by different and often contradictory approaches and interpretations. These include the multiple, varied meanings that different people attach to the word democracy (O'Donnell 2007:6). There cannot be a single definition of democracy which satisfies all users and practitioners. It will be sufficient to recall that communist states define themselves as "People's Democracies" while western capitalist states usually adopt the name of "Liberal" or "Representative" democracies; the first is incompatible with the second. In distinction from the two above, religious democracy is a form of government where the principles of a particular religion inspire the laws and rules that govern the demos. Religious democracy is one of the many examples of how democracy coexists in different ethnic, cultural and religious contexts. Like their secular liberal counterparts, religious democracies can operate in accordance with accepted principles of popular representation, periodic elections, the accountability of office holders, and the rule of law. There

is no reason to believe that a religious democracy that respects the egalitarian provisions of the democratic principles and rights of its minorities, either secular or religious, is less legitimate than a political system governed by secular liberal principles (Căbulea May 2009:169).

Unfortunately nowadays, the idea of religious democracies appears to clash with the early modern doctrine of an egalitarian "secular democracy", the alleged child of the universal values of the Philosophy of the Enlightenment. Following the 1789 Declaration of the Rights of Man and of the Citizen, which advocated government of the people by the people based on the rule of law originating on the values of universal secular reasoning, religion was eliminated from the public sphere (González, Lozano and Pérez 2009:254). This was advocated on two grounds. First, in order to avoid any form of coercion based on religious beliefs on the lives of citizens and, second and perhaps a more important normative justification, in the need to homogenize the population in the foundational need to elevate reason to a privileged position and simultaneously debase 'irrational' religious and other non-rationalist beliefs which were deemed incompatible with secular modern reasoning. From this it appears that Christianity was removed from a privileged position with the advent of a "superior" form of secular reasoning. Many believe it was superseded by the democratic nation-state, with its aspiration to build a distinct national identity. However, this may not be entirely the case. The nation of the state was in turn built upon a common history, language, tradition and culture, and many secularists believe that nationalism and the nation state came to displace religious belief as the foundation for integration into the national polity. However, this may not be quite so. The formal removal of Christianity by the French Revolutionaries, for example, did not preclude its persistent survival as an implicit foundation engrained in the secular dominant nation's tradition and culture. Since Europe has been Christian, even after the state had removed all or most Christian religious residues, it could well be that Christianity has endured by permeating the different European national cultures and traditions (Mancini 2010:499).

Secularism and difference blind equality

Difference-blind equality assumes that as long as no attention is paid to social difference, it will have no effect. In fact, as long as we pay no attention to difference, we will never overcome the inequalities that difference is used

to sustain (Longo 2001:272). An ingredient of the idea of 'difference blind equality' that haunts contemporary liberal democracies could perhaps be found in the French Revolution's secularization of modern thinking. The values that informed the French Revolution were understood to be a form of superior secular rational thinking. This is, in a nutshell, a way of thinking that leads to the acceptance of the validity of propositions that are strongly supported by reasoned evidence and a rejection of propositions that are not (Kelly 2003:612). Religion is here disqualified on the grounds that it is a body of beliefs that cannot be explained by 'reasoned evidence'. Likewise, human nature is understood in universal terms, adhering to the belief that all humans are transcendentally equal. This epistemic assumption prevents the recognition of constitutive cultural or religious differences. This requires a more detailed philosophical exposition and has implications for an older vision of human rights, but these discussions cannot be entertained here. In a succinct manner we have here the genesis of what Taylor calls "difference blind" liberalism. These principles ignore their own temporality, in that they are themselves a reflection of particular cultures and perceive themselves as transcendental and neutral forms of reasoning (Taylor 1994:44). In addition, as Taylor equally reminds us, Liberalism is also a fighting creed (Taylor 1994:62). If this is the case, this particular kind of liberalism has no room for others in its proselytizing mission. This is, according to Taylor, "a particularism masquerading as universal" (Taylor 1994:43). Furthermore, this conveniently forgets that modern secular reasoning also has the propensity to be elevated to the category of dogma, and it is ardently sustained by actors who believe it is true (Gressgård 2012:20). Here too, there is, regrettably, a propensity to confuse liberal democracy with a kind of militant secularism (Macklem 2012:581).

For centuries this type of liberalism was understood as a form of universal progressive thinking. As a result, a constitutional separation between religion and state has been implemented in many secular liberal democracies, confining religion to the private sphere with no role in the daily functioning of citizenship. As this separation is often enshrined in constitutions, secular republics find it difficult to recognize difference in the form of religious laws or jurisprudence. This egalitarian modus operandi, in which sameness and equality are often confused, results in a form of difference-blind liberalism, which provides each individual with a uniform set of rights and duties, regardless of culture, identity or beliefs (Laborde 2005:312). As will be shown in a moment, this modus operandi also affects some types of religious democracies, leading to the conclusion that it is not secularism per se that impedes the acceptance of minority religious jurisdictions,

but a pervasive difference blind liberalism that has also tainted some religious democracies. These "difference blind" modalities of democratic government tend to alienate minorities, because decision making is done within the parameters of a dominant template, in disregard of the interests of an individual or minority group. They also weaken democratic theory because it misses the opportunity to see that some religious political movements and 'Political Islam' are sometimes programmes for religious democracy (Esposito &Voll 2001:198-9).

The separation of religion from the state

In a stark rejection of the Peace of Augsburg's famous slogan *cuius regio, eius religio* (whose region, his religion) which demanded that the religion of the ruler coincide with the religion of the ruled (Conversi 2007:378), most liberal democrats believe that freedom of worship is secured for all religions by separating religion from the affairs of the state. This key normative assertion is not only held by liberals, but is also often held by religious writers, who argue that the separation of religion and the state contributes to enabling religion to be authentic and honest. The religious argument is that "Faith to be faith, prayer to be prayer, worship to be worship – all require a voluntary response, without the sanction of support of the state and without fear of coercion" (Wood 1991:229). In the United States, there is a deep-seated belief that religious freedom can exist only if there is a separation between church and state. For this reason, the constitutional first amendment prohibits civil courts from resolving religious disputes on the basis of religious doctrine and praxis (Scott 1996:1157).

In France, the concept of laïcité is inextricably linked with the Republican Ideal of *liberté, égalité, fraternité,* and it represents an important element of French Political identity. The term laïcité denotes the non-confessional character of the French state. In a very curious way, the principle of *laïcité* is the precise inverted mirror of *cuius regio, eius religio.* If the latter is the tyranny of one religion, the former is surely the tyranny of secularism. But this is of no importance to France, and was until recently of no importance to successive Kamalist regimes in Turkey. These principles were enshrined in the 1905 loi de Sépara*tion des Eglises et de l'Etat* and in the Fourth Republic's Constitution (Chadwick 1997:47). In the name of freedom of religion, and hiding behind the mantle of a difference-blind liberalism, the secular state relegates religion entirely to the private domain; in other words, firmly outside the jurisdiction of the state. In different shapes and

forms, secular liberal democracies exercise a kind of 'benign neglect' of religious jurisprudence, by negating direct assistance to religious communities unless it is available to all, and even more so in the refusal to recognize the jurisdictional autonomy of religious courts in family law for example, which are central to defining religious membership (Oestreich 1999:120-1).

Coercion: religious or secular?

The French and US models come from different normative directions. The United States gives primacy to religious liberty and the French republican model to equality of citizenship, which is understood to be secular. Yet, even if they come from opposing points of view, in their differing ways they converge in a common understanding of the need to separate religion from the state. While they differ in their approach to religion, these two models converge in what are normatively understood to be the liberal and republican conceptions of secularism (Modood 2009:72).

However, the relationship between freedom of religion and the separation of religion from the state is not as clear-cut as the high priests of secular modernity appear to indicate.

To be sure, liberals and democrats are on firm ground in critiquing the slogan *cuius regio, eius religio*, but remain somewhat inconsistent if they do not criticize *laïcité* with equal force. The full institutionalization of a particular religion in the organs of the state is coercive and oppressive to other religions and to secular citizens, and the exclusion of religion from the public domain is oppressive to religious citizens. Consider, for example, the case of Israel. The imposition of aspects of Jewish orthodox behaviour on the institutions of the state (Kasher rules, no public transport on the Sabbath, a regime of religious marriages only, etc) shows religious coercion in different areas of life. Among the many critics of the Israeli system is Haim H. Cohn, a distinguished judge of the Israeli Supreme Court, who called the religious coercion in Israel on matters of marriages and divorce a "Blot on Israel's Democracy" (cited by Karayanni 2012:325, see also Cohn 1998:110).

All secular liberal democracies include law-abiding religious citizens who conduct their private and public lives according to the canons of their respective religions. These religious citizens, as they experience a separation between religion and state in secular democracies, sometimes feel disadvantaged. In a paradoxical way, they find themselves in a similar situation to that of Israel's secular citizens,

for they are disadvantaged by their religiosity in similar ways to those in which secular Israelis are disadvantaged by their secularity. A common example is marriage and divorce. Israel's secular citizens are disadvantaged because their state does not have recognized procedures for secular marriage and divorce. As will be explained in a moment, non-Christian religious citizens in secular liberal democracies are also disadvantaged in matters relating to marriage and divorce because the separation of religion and state impedes the recognition of religious rulings in such matters. Here, and in a perplexing and paradoxical way, it appears that the liberal democratic quest for a blind equality between citizens in secular procedures is the inverted mirror image of Israel's theocratic quest for the blind equality of its Jewish citizens in accordance with the cannons of the Jewish religion. The central problem lies in the liberal democratic assumption that liberal equality requires that all citizens be treated as homogenous and homologous individuals. The liberal principle of equal respect requires the secular state to treat citizens in a difference-blind fashion, devoid of any kind of religious connotation. The Israeli state treats its Jewish citizens, religious or secular, in accordance with the religious canon in a difference-blind fashion, not considering whether they are secular or religious. Charles Taylor goes as far as to argue that this liberalism that is blind to difference is in an insidious and subtle way homogenizing and discriminatory (1994:43). Whether religious or secular, difference-blind equality defaults in the dominant practice and excludes and alienates minorities. The three Abrahamic religions develop explanations of human rights that are generally grounded in religious texts, and, furthermore, they often appeal to historical praxis to establish their normative justifications (Afsaruddin 2008:57). For that reason, the exclusion of religious justifications of human rights undermines the acceptance of those rights by faith communities.

The veil of ignorance

As argued before, the neutrality of the state is more apparent than real. Its sovereign, the demos, is always concretely inserted in time and space in an insulated localized history, ethnos and religious tradition. But in spite of this, in the famous phrase coined by John Rawls (1999:108), a liberal state is required normatively to hold a "veil of ignorance rule" (a "veil rule"). This is a rule that suppresses the knowledge of decision makers of the religious adherence of its citizens in the name of neutrality and anonymity. The justification for this is

that if rulers and ruled do not know the allegiance of the elected ruler, they will choose fairly because otherwise they might inadvertently choose someone who is detrimental to their interests (Moghaddam 2012:318). The individuals in Rawls' model are behind a veil of ignorance about their own culture or religion; the underlying assumption is that principles of justice developed here are for a homogeneous society. There is no recognition of the fact that humans differ in religion, speech, and culture, forming kin groups with distinctive characteristics that they cherish and want to preserve (Van Dyke 2004:727). Following this point, a Feminist critique of the "veil of ignorance" doctrine persuasively argues that this theory fails because on its choice of an abstraction of a "human being" in the exemplary image of a "normal" male member of the dominant group. This abstraction invokes the characteristics of a male and a member of the dominant majority. The consensus it creates is thus achieved by fiat (Matsuda: 1986:613-14). This criticism particularly applies to the discussion of the values of non-Christian minorities in secular democracies. The abstractions of the "veil of ignorance" subsume non-Christian communities into what they are not.

While the United States and France and most (but not all) Western democracies have unambiguous constitutional provisions that separate religion from state, the United Kingdom has no separation between Church and State. The state supports one particular religious faith, The Church of England, and The Head of State, the Queen, is the Supreme Governor of the Church of England. In the European Union, only the UK, Denmark and Greece are religious democracies, although of very different kinds. Religious democracies support a particular religion, and to some extent (it varies from case to case); religious values influence the political configuration of that state. There are some intermediate, ambiguous categories, for example, the Republic of Ireland's constitution declares that the state may not endorse any particular religion and guarantees freedom of religion, but the values of the Catholic Church influence important Irish laws (Cosgrove et alii 2011:1).

Religious autonomy and transformative accommodation

In part because of its multinational and religious pluralism, the UK does not hold a Rawlsian "veil of ignorance", and it is argued here that because of this, paradoxically, a section of its actually veiled citizens, orthodox Jewish and to some extent Islamic women, are granted a higher degree of autonomy and personal freedom than "veiled" liberal secularist democracies are able to afford.

In contrast to a doctrinaire secularist understanding of the rule of law, which demands full compliance with the established secular legal procedure, or non-recognition and alienation by the legal system, Ayelet Shachar (2001) advances a case in favour of "joint governance" and "transformative accommodation" of minority non-Christian religious communities. Unlike the sovereign state, transformative accommodation does not grant jurisdiction in "an all or nothing" fashion (Shachar 2001:126). Shachar advances instead the idea of a limited form of autonomy for religious courts, which provides a way for politically accommodating the claims of religious groups without endorsing any ruling or potential ruling that may contravene internationally accepted principles of human rights. Religious courts are understood as a public space offering a dialogical compromise of religious jurisprudence with the laws of the land and HR norms. The transformative character of the accommodation lies in the mutual adjustment between non-Christian minority religious courts and established principles of human rights. In this way, non- Christian minority religious courts realize that in order to remain relevant they must transform those practices that violate established norms of human rights. In other words, partnership and participation in the state system are possible only through mutual compromise between the state and the religious courts (Shachar 2001:125).

'Transformative accommodation' implies a willingness on all sides to contemplate internal change to accommodate subjects who are simultaneously members of both civic and religious communities (Jackson 2009:133).

Here the example is of Jewish Orthodox Religious courts, and the ongoing development of an Islamic Fiqh (Jurisprudence that deals with the observance of rituals, morals and social legislation in Islam), attuned to the needs of Islamic minority communities in Western societies (Fiqh *al-Aqalliyyat,* the fiqh, or jurisprudence, of Muslim minorities). The argument is based on the premise that all individuals utilizsing these jurisprudential services voluntarily agree to them and subject themselves to their jurisdiction without coercion. As there are differences between a Muslim majority and Muslim minority context, European Muslims are likely to develop different social and religious norms to regulate their lives. (Malik 2009:3) The "jurisprudence of Muslim minorities" *(Fiqh al-Aqalliyat)* attempts to present a strong Islamic foundation for a set of relationships of moral obligation and solidarity with non-Muslims (March 2009:34-35). This is a powerful integrative tool, one that fills an important gap in the consolidation of plural societies. *Fiqh al-Aqalliyyat* (the fiqh, or jurisprudence,

of Muslim minorities) is a legal doctrine introduced by Shaykh Dr. Taha Jabir al-Alwani, and Shaykh Dr. Yusuf al-Qara-Dawi of Qatar. This fiqh maintains that Muslim minorities, especially those residing in the West, need a special type of Jurisprudence to take care of their religious needs, which differ from those of other faiths, and from those of Muslims residing in Islamic countries. It tries to resolve differences with the culture and values of the host societies from within the framework of Islamic jurisprudence. Its goal is to reinterpret some Islamic concepts, while at the same time not being a religious reform movement that breaches orthodoxy (Fishman 2006).

Veit Bader raises the question of the accommodation of non-Christian minorities in his model of associative democracy, which in many ways converges with the model of *supplementary jurisdictions* raised by Shachar The central idea of *associative democracy* is to encourage minority group representation that is compatible with the norms of democratic governance. Associative democracy, according to Bader, provides good institutional and policy opportunities to combine the protection of basic needs and rights of all and the protection of minimal liberal-democratic standards, as well as for accommodating divergent religious practices. Much like Shachar's model, it encourages minorities to reinterpret their best interests to facilitate their representation and accommodation (Bader 2007:177).

The non-availability of these courts of religious law, attuned to the needs of non-Christian minorities residing in liberal democratic societies, constitutes a harmful stumbling block in the process of integration of these religious minorities, by increasing their segregation and alienation.

Rowan Williams' model of transformative accommodation

Rowan Williams, the former Archbishop of Canterbury, relies on the conceptual argument of Shachar (a Feminist Jewish secular academic) in his plea for the incorporation of certain aspects of Shariah Law into English law. In an important homily he gave in 2008, he was subjected to the abuse and scorn of the rather limited tabloid press that plagues the UK, which completely misunderstood his argument. Fortunately, his argument was later published in a scholarly journal (Williams 2008). In his thought-provoking article, Williams attempts to advance Shachar's overlapping jurisdictions to the arena of the recognition of religious law in a pluralist democratic state.

Shachar's *Multicultural Jurisdictions* envisages 'joint governance' as a dialogical mode of politics whereby some authority in personal matters can be shared collectively by different non-Christian religious groups. She aims to transcend the dilemmas posed by secularism and the cruel binary understanding of secularist law encapsulated in the term "*either-your-culture-or-your rights*" (Shachar 2001:113). She offers instead a model of joint governance for institutional arrangements that seek simultaneously to prevent intra-group and extra-group cultural domination.

Rowan Williams argues that with the imposition of secularism, a failure of secular legal systems is to remove from consideration religious motivations and practices of groups in plural societies. He further argues that the defence of secular legal monopoly in terms of the universal doctrine of human right misunderstands the circumstances in which this doctrine emerged (Williams 2008:273).

In this he agrees that by ignoring minorities there is in Rawls' principle of the 'veil of ignorance' a biased abstraction harmful to the integration of minority communities. If the law of the land, Williams argues, fails to take religious motivation as a serious constituting element of the individuals concerned, then it fails to engage and integrate an important segment of society (Williams 2008:262), and creates not only a sense of alienation among the minority community, but also real issues of power and imposition. The impact of all this is crucially to undermine the overall cohesion of the body of citizens. Following Charles Taylor (2004), Williams argues that to be part as a meaningful participant, you need to be recognized as what you are. He then rhetorically asks whether a monopolistic approach to a legal system is a satisfactory basis for a modern pluralistic and democratic state. Might there be room, he asks, for 'overlapping jurisdictions', in which individuals can choose in certain limited areas whether to seek justice under one system or another? (Williams 2008:262).

Here the limited autonomy granted to the Orthodox Jewish courts becomes exemplary, and he invites the British state to act in accordance with this precedent, in relation to a religious community that exhibits many similarities with Orthodox Jews. To recognize Shariah, the former Archbishop argues, is to recognize a method of jurisprudence based on revealed texts, the interpretation of which varies with time, rather than to recognize a single system of jurisprudence (Williams 2008:264). He further argues that in the relations between Islam and English law, it is necessary to deconstruct crude binary oppositions and mythologies, and these refer the ignorance of the role and purpose of Shariah law or the domineering crude Manichean interpretation of the philosophy of the

Enlightenment (Williams 2008:262). He proposes as a criterion for recognizing religious communities whether a communal jurisdiction interferes with liberties granted to the wider society (Williams 2008:273). Williams concludes by saying that to think intelligently about Islam and English law a fair amount of deconstruction of crude opposition and mythologies is necessary, whether about the nature of Shariah or the nature of the Philosophy of the Enlightenment (Williams 2008:274-5).

Following this logic, it is reasonable to conclude that the UK Parliament's legislation to create supplementary jurisdictions for non-Christian minorities is an important example of this.

The specific case discussed below is related to UK legislation that partially empowers religious tribunals of a non-Christian minority to pass specific rulings for their congregations. These rulings have in some limited form the status of the law of the land. It is argued here that the lack of the militant secularism and one-sided understanding of the Philosophy of the Enlightenment that characterizes republican models (France for example), which constitutionally inhibit the granting of any minimal autonomy to religious courts, facilitates the acceptance of this limited autonomy on matters of religious importance to minority communities. This kind of religious legal pluralism encourages the integration and loyalty of minority religious communities, as their members find in state mechanisms the recognition of their identity and way of life. In contrast, egalitarian secularist republics cannot employ such mechanisms and, contrary to their stated egalitarian aim, they increase the sense of alienation of religious minority communities.

Divorce (Religious Marriages) Act 2002

In order to understand the Divorce (Religious Marriages) Act 2002, it is necessary first to discuss the case of refusal of an orthodox Jewish divorce, the harm this creates for Jewish orthodox women refused divorce by recalcitrant husbands, and the remedial action taken in conjunction with the cannons of Jewish Halachaic law through the legislation enacted by the UK Parliament. This legislation was lobbied for by the Jewish community and enacted by Parliament in 2002. This legislation aims to resolve a human rights failure in Orthodox Jewish Law relating to discrimination against women in cases of religious divorce. What follows is a summary of the case and argument submitted to justify the passing of the Bill.

But first it is important to understand that this Act has implications only for a small minority of Jews, those who adhere to orthodox Jewish practice and live their lives in strict adherence to the principles of the Halacha, the Talmudic literature that deals with the interpretation of the laws of the Hebrew Scriptures. This is the collective body of religious laws for Jews, including Biblical law, and Talmudic and Rabbinic law, as well as customs and traditions. Like Islam, Judaism draws no distinction in its laws between religious and ostensibly non-religious life; it does not distinguish clearly between religious and civil law. In the Islamic faith, there is a similar codification in the form of Shariah Law (the interpretation of the moral code and religious law of Islam). However, the majority of Jews do not adhere strictly to Halacha principles or they interpret them differently. Consequently, for this majority of Jews, the Act discussed below is irrelevant.

It has been also argued by Judge David Pearl that this Act deals exclusively with Orthodox Jewish Religious law. The object of the Act is to enable an English Court to order that a civil divorce be not finalized until both parties have taken such steps as are required to dissolve the marriage in accordance with Jewish Orthodox Law. However, there is a provision that this procedure can be extended to other religions. Judge Pearl argues that the position of Muslim women is different from that of orthodox Jewish women. A Muslim woman denied divorce from her husband can obtain a *faskh* from the Shariah council (Pearl: 2003:14). Indeed, upon application by a Muslim wife, a Shariah Court can grant a decree of divorce, in the form of a *faskh*, on any ground which it recognizes as valid, and this is indeed different from the Jewish Orthodox case. However, the important point of this Act and its relevance to the Islamic Community in the UK is that it establishes the precedent of the recognition of a religious tribunal (The Beth Din), and that this precedent can successfully be invoked for the recognition of an Islamic Religious Tribunal (Shariah court).

The mechanism of a Jewish Orthodox divorce

For a divorce to be effective in the Orthodox Jewish community (one that adheres literally to Halacha principles), a "get" must be obtained. A get is a consensual divorce in which mutual co-operation between the parties is required. The husband has to go before the *Beth Din* (Religious tribunal, akin to the Shariah Council in Islam) for a get and deliver it to his wife, and she is required to accept it. If he does not do so, the wife cannot remarry in Jewish law, although the

husband may be able to do so (monogamy is not consensual in Judaism; some Jewish traditions accept polygamy on similar terms to those of Islam).

Sometimes a man will completely refuse to grant a divorce. This leaves his wife with no possibility of remarriage within Orthodox Judaism. Such a woman is called a *mesorevet get* (literally "refused a divorce"). A get refusal has very serious implications for a woman and it is tantamount to a serious violation of human rights. In Biblical times a woman who had sexual intercourse with a man other that her lawful husband or a man who could otherwise be her husband was deemed to be an adulteress (*Noefet*). The Biblical punishment for this was stoning to death at the place of public execution (Deut. xxii. 24). Fortunately The Talmudic Sages have softened this penalty, and contemporary Orthodox Judaism does not follow this procedure. Nevertheless, without a get, a woman who has a child by her subsequent partner is defined as a *Noefet* (adulteress under Jewish law), while the command in Deut. xxii 24 is not acted upon; her child becomes an illegitimate outcast (*mamzer*), which is a very serious stigma. S/he is not permitted to become a member of the Jewish body politic (Deut. xxiii. 3 [A. V. 2]), and cannot intermarry with a Jew or Jewess (Jewish Encyclopaedia: Entry on Adultery); her child becomes an illegitimate outcast (*mamzer*), which is a stigma that carries on into future generations.

A woman who is trapped in a marriage that she seeks to end is called in Hebrew an "*agunah*" (a "chained" one), meaning one who is chained to a spouse against her will. If a wife refuses to accept her husband's get, he is known as an "agun". However, he does not suffer from the same disadvantages. A man who is refused a get by his wife has the option to seek an *Hetermeahrabbanim* (Hebrew: "permission by one hundred rabbis") This is a term in Jewish law which means that one hundred Rabbis agree with a Rabbinical court that a particular situation warrants an exemption to permit a man to remarry even though his wife refuses to accept a get. As a result, a husband can effectively hold his wife to ransom, and can demand money, property or other rights concerning custody or child maintenance in return for a get.

The Divorce (Religious Marriages) Act 2002 requires the dissolution of a religious marriage before a secular divorce is granted, empowering the Beth Din to grant this divorce, and in this way bringing equality to the situation, for the husband will not be able to remarry in a civil court if he does not grant his wife a get. The husband can also be coerced by the civil tribunal (using alimony, serious punitive costs, financial damages, etc) to grant the religious divorce, something that the Beth Din is unable to do because the Halacha requires that the husband

concedes the Get of his own free will. (Divorce (Religious Marriages) Act 2002) The Act also empowers the Lord Chancellor to extend its provisions to other faiths, particularly in similar cases in the Islamic community. This implies the recognition not only of the Beth Din, but also of the Islamic Shariah Council, which ultimately rules on the dissolution of a religious marriage.

While this is an example of limited autonomy for religious communities, it is nevertheless important, for it deals with issues that are central to the lives of members of these communities. Furthermore, by this kind of recognition of the authority of their religious law, these communities can feel respected in their values and better integrated into the wider society.

Consider the opposing point of view, that of secular advice to a Jewish orthodox woman whose get has been refused. Simply go to a civil court and a judge will grant you the divorce you seek. Yes, sure, but, is it that simple? Is it not the case that such secular advice reveals a gigantic misrecognition, complete disregard and ignorance of the identity and lifestyle of this unfortunate woman? For in this case she will still be married in Jewish law, her orthodox father will throw ashes on his head, recite Kaddish, the Jewish prayer for the dead, tear his shirt, declare his daughter dead and sits Shiva, the Jewish period of mourning. No-one should be required to pay such a high price at the altar of monist and dogmatic Western secularism.

Shariah and the transformation of Islamic Law in the West

Other cases refer to the Islamic jurisprudential transformation of Shariah law through the adaptation of Western Islamic communities to their status as minorities, a central condition for acquiring a form of religious autonomy compatible with the values of human rights and the ethos of Western societies. This is another example of a dialogical mode of politics whereby autonomy can be shared among different religious groups.

The expansion of this idea will allow Shariah Councils to develop jurisprudential roles that will not clash with accepted values of human rights. The argument, however, goes further than the specific case of Islamic minorities in Western liberal democracies. Supporters of *Fiqh al-Aqalliyyat* argue that the developments being articulated in the *Fiqh al Aqalliyyat* are also relevant to the rights of non-Muslims in Islamic states. In understanding that in international law the right to preach Islam peacefully is safeguarded, the spread of norms of

peaceful relations among states, religious freedom, the self-determination of peoples and the prohibition against aggressive war mean that the world has become the equivalent of one territorial jurisdiction, implying that law (at least public law) ought to be universal.

There is however controversy about these principles, not necessarily advocated by conservatives, but by others who see Islam as being sufficiently flexible to adapt to the circumstances of Western democracies without the need for a specific Fiqh (Parray 2012:88-106). In particular, Hellyer and Ramadan remain somewhat skeptical, for they prefer a vision that sees Muslims in Europe, rather than Muslims as a minority in Europe (Hellyer 2009:94-5, Ramadan 2004). Such a debate cannot be entered into here, for it is a discussion that ought to be pursued by the followers of the faith. However, this discussion shows a lively debate taking place between Islamic scholars as to what is the best method of accommodation of Islamic minorities in Western Liberal democracies. This debate replicates similar discussions in Orthodox Judaism and among other minorities in Europe, and it is a sure sign of the willingness to accommodate and peacefully coexist in the West. This willingness gives ample justification to Rowan Williams' request for supplementary jurisdictions for British Muslims, and to his project on integrating Shariah into English law, following the successful experience of the autonomy granted to the Jewish Beth Din. As argued earlier, any jurisprudential procedure or recognition of the autonomy of religious Jewish and Islamic courts in Western liberal democracies will integrate these religious minorities into the legal system; it will necessarily have an impact the other community, will undo alienation and exclusion and will encourage dialogue, compromise, peace and integration.

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