

Why the Role of Religious Tribunals in the Legal System Should Not Be Expanded

Ronan McCrea*

In recent years influential academic and public figures have argued that a greater role ought to be accorded to religious tribunals or “minority legal orders” by the legal system.¹ These suggestions have been extremely controversial but recently the law in the UK has taken a significant step towards expanding this role. This is seen most clearly in the decision of the High Court of England and Wales in *AI v MT*² where the High Court accorded a major role to a Jewish religious court in divorce proceedings before it. This article suggests that the approach of the Court is to be regretted and that the academic arguments offered in favour of the approach adopted by the judge are unconvincing for four reasons. First, the judicial decision and academic commentary has proceeded on the flawed premise that a failure to allow religious courts to take on jurisdiction over matters of state law forces members of religious communities to choose between their faith and their legal entitlements. Second, the chief safeguard proposed, namely the review of religious decisions by secular courts to review to ensure compliance with fundamental rights, is inadequate. Third, the idea of the state using access to secular legal powers as a means to pressurise religious bodies to change their religious law is unlikely to succeed and involves inappropriate interference with religious freedom. Finally, I want to suggest that arguments in favour of facilitating individuals in reducing their interaction with the state legal system strikes at the heart of meaningful citizenship and are underpinned by a consumerisation of both law and religion that cheapens both citizenship and religious belief and risks undermining the sustainability of multi-ethnic societies.

Background

The role of religion in the legal system of Western democracies has become increasingly controversial in recent times. Ayelet Shachar’s 2001 book *Multicultural Jurisdictions*³ has

* Senior Lecturer, Faculty of Laws University College London, Jean Monnet Fellow, European University Institute, Florence. I would like to thank Professor Maleiha Malik, Dr. Myriam Hunter-Henin and Nicholas Hatzis for their insightful feedback.

¹ For a hugely insightful account of the work of Shachar and others in this area see R. Sandberg, G. Douglas, N. Doe, S. Gillat-Ray and A. Khan “Britain’s Religious Tribunals: ‘Joint Governance’ in Practice” *Oxford Journal of Legal Studies* Vol. 33, No. 2 (2013), pp. 263-91.

² *Ibid.*

³ *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001).

proved particularly influential. Within the British context her ideas received notable support from the former Archbishop of Canterbury Rowan Williams⁴ and Professor Maleiha Malik.⁵ Shachar's work attempts to justify expanding the role of religious groups in the legal system while at the same time being sensitive to the fact that this can risk compromising the rights of some within the minority group (most notably women and sexual minorities). She proposed an approach characterised as "transformative accommodation" under which religious bodies are allowed to take over functions of the state legal system but in a conditional way which encourages them to themselves reduce the discriminatory nature of the norms they apply. She envisages a process underpinned by ideas of competition and market-share under which the self-interest of the religious group in question will seek to attract as many members of the group as possible by developing their norms so as to minimise discrimination against certain kinds of member.⁶

Malik's work builds on these ideas. Like Shachar, she acknowledges that there are certain risks in expanding the role of what she calls "minority legal orders" noting that "in practice it will be difficult for individuals, especially those who lack power to "exit" from their group and that "vulnerable groups" such as women and LGBT individuals face particular dangers of oppressive or discriminatory treatment by religious legal orders. She also acknowledges that, as Ahmed showed, "having a religious option may increase the perceived disloyalty of pursuing the state option"⁷ and that social pressure to use religious courts may be intense.⁸ Nevertheless, Malik argues that recognition of religious tribunals is justified as a model, can be devised that applies only when individuals choose to submit themselves to it and where state courts supervise the eventual judgments "severing" elements of religious rulings that fall foul of fundamental rights norms.

Like Williams, she suggests that this allows individuals "to simultaneously retain their membership of their minority legal order and at the same time enjoy the protection of a liberal legal order and state courts"⁹ and argues that religious courts have the advantage of greater knowledge of the norms of a religious group than state courts. In line with Shachar's marketplace ideas, Malik suggests that empowering religious courts can ensure better

⁴ R. Williams "Civil and Religious Law in England- A Religious Perspective" *Ecclesiastical Law Journal* Vol. 10 (2008) 262.

⁵ M. Malik "Minorities and the Law: Past and Present", *Current Legal Problems* Vol.67 (2014), p. 90.

⁶ A. Shachar *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001) pp. 3, 14, 113 and 117.

⁷ Farrah Ahmed, "Religious Arbitration: A Study of Legal Safeguards" (2011) 77 *Arbitration* 290.

⁸ M. Malik "Minorities and the Law: Past and Present", *Current Legal Problems* Vol.67 (2014), p.83.

⁹ M. Malik "Minorities and the Law: Past and Present", *Current Legal Problems* Vol.67 (2014), p.97.

provision of “services” such as religious divorce that many women in minority communities desire.¹⁰ Her conclusion is that the best approach is a conditional empowerment of religious courts to exercise authority over matters of secular law subject to supervision by state courts for compliance with fundamental rights and equality norms. This, Malik feels, will lead to benefits to individuals as well as allowing the state to incentivise religious courts to develop religious norms in the direction of tolerance and equality.¹¹

***AI v MT* and Its Defenders**

The influence of the points made by figures such as Shachar, Malik and Williams can be seen in the case of *AI v MT* in the English High Court where Baker J was faced with a contentious divorce case, including issues of child custody, between an Orthodox Jewish couple who requested that their dispute be resolved by the New York Beth Din. Baker J sought information from the Beth Din on their approach to the case, particularly in relation to the question of the importance of the best interests of children. Having received the reply that “In conjunction with Halacha the best interests of the children are the primary consideration in resolving cases like this.” Baker J referred their disputes to a process of arbitration before the New York *Beth Din* on the basis that the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude either party from pursuing applications to this court in respect of any of the matters in issue.”¹² There was, at the time, (February 2010), no precedent for arbitration in family law proceedings.¹³ The High Court subsequently ratified the decision of the Beth Din on the grounds that it was consistent with the best interests of the children and was satisfactory from a financial point of view.¹⁴

An Obligation to Choose between Religious Identity and State Courts?

Williams, Baker J and Malik have all suggested that to refuse to allow individuals to choose to have their family law disputes adjudicated upon by religious courts in some way forces people to choose between membership of their religious community and their citizenship. A refusal to broaden the jurisdiction of religious courts to cover jurisdiction over secular matters, does not require anyone to leave their faith or prevent them from using a religious tribunal to obtain a religious divorce or religious annulment. The existence of religious

¹⁰ M. Malik “Minorities and the Law: Past and Present”, *Current Legal Problems* Vol.67 (2014), p.83.

¹¹ M. Malik “Minorities and the Law: Past and Present”, *Current Legal Problems* Vol.67 (2014), p.90.

¹² *AI v MT* [2013] EWHC 100 (Fam) at [14]-[15].

¹³ *AI v MT* [2013] EWHC 100 (Fam) at. [20].

¹⁴ *AI v MT* [2013] EWHC 100 (Fam) at. [37].

tribunals empowered to decide on religious matters is not in dispute. Indeed, a secular state should regard itself as incompetent to rule on religious matters and should therefore not interfere with the right of religious bodies to decide religious matters according to their own norms. As Baker J noted, in *AI v MT*, arbitration in family law cases has been unknown until recently in the UK yet this has not prevented Catholic religious tribunals ruling on issues such as annulment (for religious purposes) of a marriage or Sharia tribunals ruling on religious divorce for British Muslims.¹⁵ Indeed, the 2013 debate on the legalisation of same-sex marriage and the protections given to religious bodies in the relevant legislation, underlined the key importance for religious freedom and equal rights of the distinct nature of religious marriage and civil marriage.

The fact that individuals need to obtain religious permission to remarry within their faith does not mean that bodies granting such religious permission necessarily need to be empowered to rule on matters of state law and civil marriage. Leaving religious courts free to rule on religious matters and leaving state courts to rule on matters of civil law, merely involves the recognition that in a multi-faith society one's membership of a religious community is not all encompassing, does not extinguish one's rights and duties as a citizen and does not mean that one must restrict one's use of communal institutions to a minimum. Such recognition is an unavoidable necessity of a meaningful shared life in a multi-faith society whether or not it is more challenging for those whose beliefs reflect religious traditions that have sometimes struggled with the concept of a secular legal and political order.¹⁶

The true issue in *AI v MT* was not a request to use religious courts (which remain available for religious purposes) but to use (subject to state supervision) such courts for all purposes and therefore to restrict one's interaction with the civil courts to a minimum. The idea behind this claim is that interaction with shared state institutions is in some way inconsistent with holding religious faith and must be minimised is troubling. Life in a multi-faith liberal democracy involves significant scope for living a religious life in common with others and making use of voluntary religious institutions but it also involves a recognition that there are

¹⁵ For an account of how religious tribunals in the UK separate religious matters from those dealt with by secular courts see R. Sandberg, G. Douglas, N. Doe, S. Gillat-Ray and A. Khan "Britain's Religious Tribunals: 'Joint Governance' in Practice" *Oxford Journal of Legal Studies* Vol. 33, No. 2 (2013) pp. 280-81 and 284.

¹⁶ For a discussion of the need for believers in missionary religions to engage in a degree of cognitive dissonance to function in liberal society see J. Habermas "Intolerance and Discrimination" (2003) 1(1) *International Journal of Constitutional Law* 2.

shared institutions and a broader life, beyond one's own religious group that are valuable and should be engaged with. As religious tribunals remain available for religious purposes, the aim of expanding the authority of religious courts to cover matters of state law is not to allow use of religious tribunals but to restrict use of state courts to a minimal supervisory role. The idea that using the state courts for state purposes while using religious courts for religious purposes involves sacrificing religious identity strikes at the maintenance of multi-faith societies with meaningful ideas of citizenship and commitment to engagement with communal institutions (see below).

Inadequate Safeguards

"Voluntary" Use of Religious Courts

Neither Shachar nor Malik offer any real solution to the fact that the recognition of a religious alternative makes it difficult for individuals who may not want to use religious courts to avoid doing so as they can be labelled as traitors to their faith or group by choosing the state courts. In fact, having acknowledged this pressure as a problem, Malik is silent about what could be done to address it. It is simply inevitable that, even under a "voluntary" model, it is likely that some women or LGBT individuals (whose interests are unlikely to be favourably treated by religious courts), will be pressurised into using religious tribunals when they would prefer not to. This is not to deny that such individuals have agency in these matters but simply to note that if they resist such pressure and take their claim to state courts they will have to endure emotional and social costs which are not imposed on their fellow citizens who are not from minority groups when they exercise their fundamental right to use the state justice system.

The Inadequacy of Supervision by State Courts

Malik endorses the ruling in *AI v MT* is on the basis that individuals using religious courts will "enjoy the full protection of a liberal legal order and state courts" by virtue of the retention of a supervisory role over the secular decisions of religious courts by the state legal system."¹⁷ It is far from certain that supervision by secular courts will be adequate to this task. There are many ways in which a minority or religious court can adopt a problematic approach or treat an individual before it in a less favourable way that are unlikely to show up as verifiable breaches of fundamental rights before a state court exercising a supervisory function.

¹⁷ M. Malik "Minorities and the Law: Past and Present", *Current Legal Problems* Vol.67 (2014), p. 97.

For example, it is far from clear that a religious court will have a conception of the best interests of the child that coheres sufficiently with those of a liberal and egalitarian society (and particularly the child's interest in his or her ability to make independent decisions in future in relation to their religious, social, sexual or other identity). Indeed, despite being otherwise relatively supportive of the ruling in *AI v MT*, Judge Nasreen Pearce expresses surprise that Baker J agreed to religious arbitration given the complications in relation to the paramountcy of the best interests of the child that arise in religious tribunals.¹⁸

Baker J declared himself satisfied in relation to the approach of the Beth Din of New York to the paramount nature of the best interests of the child on the basis of statement by a Rabbi attached to it who stated "At our *Beth Din* the rabbis follow Halacha in connection with resolving child custody disputes [...]. In conjunction with Halacha the best interests of the children are the primary consideration in resolving cases like this".¹⁹ It is unclear from this statement to degree to which the duty to adhere to Halacha may qualify the best interests of the child. To say that one accepts a particular principle is paramount "in conjunction with" compliance with religious law may mean very little if "in conjunction with" is seen as meaning "subject to". Saudi Arabia, for example has ratified the UN Convention on the Elimination of Discrimination against Women subject to compliance with norms of Islamic law, something that has not resulted in adequate protection of the equal rights of Saudi women.²⁰ A Jehovah's Witness religious authority could also claim to be taking the best interests of the child into account "in conjunction with" their religious teachings in recommending that a child not be given a life-saving blood transfusion.

Particular kinds of people may be particularly disadvantaged in this regard. Consider a lesbian mother seeking a divorce from her husband and custody of their children before an orthodox Beth Din, Sharia court or some form of Pentecostal Christian religious tribunal. Such decisions involve assessment of a range of imprecise and unquantifiable factors. It is unlikely that the courts' overall view of that woman's suitability as a parent (or even her deservingness of financial support) would be unaffected by the strongly negative religious teachings of Orthodox Judaism, mainstream Islam and Pentecostal Christianity on

¹⁸ HH Judge N. Pearce *Journal of Social Welfare and Family Law* (2013) Vol. 35 No.2 259-268 at 266.

¹⁹ *AI v MT* [2013] EWHC 100 (Fam) at [14].

²⁰ See *Ratification reservations of the Kingdom of Saudi Arabia to the Convention on the Elimination of Discrimination against Women, United Nations, CEDAW/SP/2006/2*.

homosexuality. This disapproval could manifest itself in many ways short of the kind of “smoking gun” discriminatory statement in the judgment necessary to alert the supervising state court to violation of fundamental rights or equal treatment. Fundamental rights represent a minimal standard that should not be violated, not a desirable standard. As practising lawyers know, judges have great discretion in disposing of cases and clients can obtain unusually negative results from a court without their fundamental rights being violated or the decision being readily appealable. Having subcontracted its duty to hear witnesses, assess credibility and take evidence to another tribunal, a state court exercising a supervisory jurisdiction will have to defer to a degree to the original decision maker. Indeed, in *AI v MT*, Baker J made it clear that he would “attach weight to the Beth Din’s decision”²¹ meaning that a party disfavoured by that decision, even if he or she faced down social pressure to accept it and challenged it in state court, would face additional obstacles in asserting his or her rights before the civil courts.

Religious Freedom and State Neutrality

Defenders of greater recognition suggest that such recognition can be a “win-win” for liberal values, by guaranteeing the protection of the legal system of the liberal democratic state while also encouraging the liberalisation of religious norms. Just as Shachar envisages beneficial change to religious legal orders coming from a process of “non-exclusive competition for loyalties”²² Malik suggests that the state can “ensure internal change through mutual influence between state and the minority legal order” and can have “a complex system of incentives and penalties to ensure that the minority legal order changes its legal norms rather than lose members.”²³ However, it is unclear why it should be assumed that the more liberal or egalitarian a religious legal order is the more popular it will be amongst believers. Adapting religious norms in a pro-LGBT fashion may well reduce the popularity of a religious tribunal amongst believers. Moreover, many religious bodies value adherence to truth over market-share. It is rather optimistic to imagine that discriminatory beliefs in relation, for example, to gender and sexual orientation in mainstream Christianity, Judaism and Islam which are the outcome of centuries of thought and theological reflection, will be readily changeable in order to enable religious courts to take over the administration of areas of family law.

²¹ *AI v MT* [2013] EWHC 100 (Fam) at [18].

²² A. Shachar *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001) p. 117.

²³ M. Malik “Minorities and the Law: Past and Present”, *Current Legal Problems* Vol.67 (2014) pp. 89-90.

More importantly, there are serious problems in principle with this degree of state interference in religious freedom. It is highly problematic for liberal states to hold out the prospect of access to state power to a religion on condition that that faith change its beliefs to accord with those favoured by the state and to punish “bad” faiths by denying them such power. Shachar and Malik reject the idea that the right to exit a group means that the state should not interfere with what Shachar calls systematic “violations of certain of its member’s citizenship rights”.²⁴ However, if religious tribunals are restricted to religious matters and are not empowered to rule on the secular legal rights of their members, then the violation of *citizenship* rights need not arise.

Shachar argues that a right to exit is not a solution as it places burdens on the individual “while relieving the state of any responsibility for the situation.”²⁵ However, in a non-totalitarian state there must be things for which the state is not responsible. All fundamental rights come with costs. Free speech hurts feelings, and fair trial rights mean some guilty people go free. A pluralist liberal society will not interfere with the formation of peaceful groups with unpopular or unpalatable views. The idea of state intervention to change the beliefs of voluntary groups in order to alleviate the emotional or social costs of leaving for a person who is disfavoured by those beliefs is inconsistent with the most basic level of freedom of association. In addition, Shachar’s approach fails to pay sufficient heed to the fact that, as Ahmed powerfully argues, empowering religious bodies to rule on matters of secular law can *increase* the costs to individuals seeking to exit the religious legal system.²⁶ Indeed, if we are concerned about the emotional or social costs of leaving, a great advantage of not empowering religious courts to rule on matters of secular law is that it allows individuals to remain within religious communities that may discriminate against them without having to sacrifice their legal rights.

Finally, if the state allows religions with objectionable beliefs to act as secular family law courts and uses the supervisory jurisdiction of the state courts to sever objectionable parts of religious judgments, this involves state institutions in directly assessing what religious beliefs are good and bad. It was precisely to avoid the State sitting in judgment on the merits of religious belief that religious matters were first recognised as distinct from matters of

²⁴ A. Shachar *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001) p. 12.

²⁵ A. Shachar *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (CUP 2001) p. 41.

²⁶ F. Ahmed “Personal Autonomy and the Option of Religious Law” *International Journal of Law Policy and Family* Vol. 24 (2010) 222.

state. At the very least, it undermines the potential for the state to hold the allegiance of a religiously diverse population if its institutions are regularly called upon to assess which religious beliefs it accepts and which beliefs it rejects.

Citizenship and History

The promotion of role and jurisdiction of religious courts at the expense of the state legal system raises troubling issues for society as a whole. Encouraging members of minority groups to use religious courts to resolve secular matters subject only to supervision of the state legal system promotes a vision of society where individuals are encouraged to remain within particular religious or cultural groups to a maximum degree and where engagement with shared institutions such as the legal and education systems (that are an important basis of a shared experience and shared national identity) is radically reduced.

It is possible that a society characterised by facilitation of the desire of particular groups to avoid engagement with common institutions to the maximum degree possible would remain cohesive and that its members will remain willing to pay taxes to support a welfare state for citizens with whom they share ever fewer experiences and institutions, but this strikes me as unlikely.²⁷ National identities can and should change and be enriched by new perspectives but sustainable polities require some commitment to citizenship and a common life together. To regard the law and the legal system, one of the fundamental elements of our equal status as citizens, as merely a service that citizens should use is to strike at the heart of shared citizenship. To encourage citizens to disengage from the state legal system and to use alternatives which provide a tailored service more in tune with the desires of particular “consumers” involves a degradation of the idea of a common citizenship and a withdrawal from a fundamental element of a shared national life.

Finally, Malik rightly states that there is a long history of parallel legal systems in Europe and that the embrace of the idea of equal citizenship before one law that applies equally to all is relatively recent. That the principle of one law for all and equality before that law were hard and relatively recently won does not mean that it is right to judge them to be, in Malik’s words, an “a-historical myth”.²⁸ Rather, they are precious elements of the egalitarian and

²⁷ See for example A. Alesina and E.L. Glaeser *Fighting Poverty in the US and Europe*, (Oxford, OUP, 2004), R. Putnam “E Pluribus Unum, Diversity and Community in the Twenty-First Century” *Scandinavian Political Studies* 30, no. 2 (June 2007): 137-174.

²⁸ M. Malik “Minorities and the Law: Past and Present”, *Current Legal Problems* Vol.67 (2014) pp. 74-77.

democratic order which has been built up over centuries of conflict. There is a long history of monarchical government, sexism, racism and homophobia in Europe but that does not mean that such principles should be facilitated by the legal system or that the identification of anti-racism, sexual equality and democracy as key principles of the constitutional order should be dismissed as a-historical myths. The legitimacy and worth of fundamental values are not dependent on universal acceptance over the centuries.

Conclusion

Religious bodies should be free to operate according to religious norms and to decide on religious matters such as religious divorce but the trend towards widening the use of religious arbitration in family law should not continue. Civil marriage is a public institution as well as a private matter between parties and the welfare of children of any such marriage provides a further powerful justification for restricting the ability of parents to “privatise” the resolution of their dispute. Religious courts may, as Malik argues, have greater knowledge of the norms and traditional beliefs of religious groups. However, they are often highly unrepresentative in terms of gender and will often have less knowledge of the norms and beliefs of liberal society or worse, highly problematic approaches to the equal status of groups such as women or LGBT individuals. It may not be possible to ensure genuine voluntary engagement with minority legal orders and the exercise of supervisory jurisdiction by state courts is no guarantee that vulnerable categories will not suffer mistreatment.

Finally, encouraging disengagement from a legal system that shares and defines the rights and duties of all members of the community undermines ideas of a meaningful shared citizenship where people of diverse religious and other backgrounds can share common institutions and a life together at the same time as remaining members of vibrant religious groups. Quite apart from the dangers to vulnerable groups such as women and gay individuals inherent in the empowerment of often reactionary religious bodies, to encourage the religious courts to take over large parts of the role of the legal system for their members is to follow a disintegrative ideal where the legal system is a service, individuals are consumers and where if there is not quite “no such thing as society”, then society is an increasingly balkanised affair and with ever shrinking spheres of shared interaction between diverse groups. Whatever moves to bring such a reality about are, they should not be regarded as progressive.