

# Civil And Religious Law In England<sup>1</sup> A Religious Perspective

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## Abstract

The main aim of this paper is to examine the kind of space that can be allowed alongside the secular law of Britain for the legal provisions of faith groups in the country, particularly of the Muslims. The issues that arise around what level of public or legal recognition might be allowed to the legal provisions of a religious group are not particular to Islam. The paper looks at some misconceptions about the nature and claims of the *sharia*. It argues that neither membership of the *umma* nor fidelity to the *sharia* precludes Muslims from having multiple identities that would involve their social relations with the non-Muslims. It goes on to examine three major objections raised whenever there is a robust appeal to the rightness of law of the land protecting individuals on the grounds of their religious identity and securing their freedom to fulfil religious duties. As an alternative to secular legal monopoly the paper argues for supplementary jurisdiction and interactive pluralism. Where it is possible to recognize religious conviction and discipline without interfering with, or blocking access to, the liberties guaranteed by wider society, due consideration should be given to doing just that. In conclusion, the author points out what needs to be done if we are to see intelligent thinking on the relations between Islam and British law.

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<sup>1</sup> This paper is based on the text of the foundation lecture which the author in his capacity as the Archbishop of Canterbury delivered at the Royal Courts of Justice, London on 7 February, 2008

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### **Introduction**

The title of the series of lectures held as part of the 2008 Temple Festival,<sup>3</sup> “Islam in English Law,” signals the existence of what is very widely felt to be a growing challenge in our society – that is, the presence of communities which, while no less ‘law-abiding’ than the rest of the population, relate to something other than the British legal system alone. But, as I hope to suggest, the issues that arise around what level of public or legal recognition, if any, might be allowed to the legal provisions of a religious group, are not peculiar to Islam: we might recall that, while the law of the Church of England is the law of the land, its daily operation is in the hands of authorities to whom considerable independence is granted. And beyond the specific issues that arise in relation to the practicalities of recognition or delegation, there are large questions in the background about what we understand by and expect from the law, questions that are more sharply focused than ever in a largely secular social environment. I shall therefore be concentrating on certain issues around Islamic law to begin with, in order to open up some of these wider matters.

### **Muslim and Western Perceptions of the *Sharia*: The Emerging Issues**

Among the manifold anxieties that haunt the discussion of the place of Muslims in British society, one of the strongest, reinforced from time to time by the sensational reporting of opinion polls, is that Muslim communities in this country seek the freedom to live under *sharia* law. And what most people think they know of *sharia* is that it is repressive towards women and wedded to archaic and brutal physical punishments; just a few days ago, it was reported that a ‘forced marriage’ involving a young woman with learning difficulties had been

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<sup>3</sup> The lecture series *Islam in English Law*, organized by the Temple Church and the Centre for Islamic and Middle Eastern Law, School of Oriental and African Studies, London was part of the 2008 Temple Festival to mark the 400<sup>th</sup> anniversary of King James I granting the Inns freehold of their land. Dr Williams delivered the first lecture.

'sanctioned under *sharia* law' – the kind of story that, in its assumption that we all 'really' know what is involved in the practice of *sharia*, powerfully reinforces the image of – at best – a pre-modern system in which human rights have no role. The problem is freely admitted by Muslim scholars. 'In the West', writes Tariq Ramadan in his groundbreaking *Western Muslims and the Future of Islam*, 'the idea of *Sharia* calls up all the darkest images of Islam...It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word.'<sup>4</sup>

Even when some of the more dramatic fears are set aside, there remains a great deal of uncertainty about what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes. As such, this is not only an issue about Islam but about other faith groups, including Orthodox Judaism; and indeed it spills over into some of the questions which have surfaced sharply in the last twelve months about the right of religious believers in general to opt out of certain legal provisions – as in the problems around Roman Catholic adoption agencies which emerged in relation to the Sexual Orientation Regulations last spring.

This paper will not attempt a detailed discussion of the nature of *sharia*, which would be far beyond my competence; my aim is only, as I have said, to tease out some of the broader issues around the rights of religious groups within a secular state, with a few thought about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom. But it is important to begin by dispelling one or two myths about *sharia*; so far from being a monolithic system of detailed enactments, *sharia* designates primarily – to quote Ramadan again – 'the expression of the universal principles of Islam [and] the framework and the thinking that makes for their actualization in human history.'<sup>5</sup> *Universal* principles: as any Muslim commentator will insist,

<sup>4</sup> Ramadan, Tariq. 2004. *Western Muslims and the Future of Islam*. London: Oxford University Press, p. 31.

<sup>5</sup> Ramadan, Tariq. *Western Muslims and the Future of Islam*, p. 32.

what is in view is the eternal and absolute will of God for the universe and for its human inhabitants in particular; but also something that has to be 'actualized', not a ready-made system. If *shar'* designates the essence of the revealed Law, *sharia* is the *practice* of actualizing and applying it; while certain elements of the *sharia* are specified fairly exactly in the Qur'an and *Sunna* and in the *hadith* recognised as authoritative in this respect, there is no single code that can be identified as 'the' *sharia*.

And when certain states impose what they refer to as *sharia* or when certain Muslim activists demand its recognition alongside secular jurisdictions, they are usually referring not to a universal and fixed code established once for all but to some particular concretisation of it at the hands of a tradition of jurists. In the hands of contemporary legal traditionalists, this means simply that the application of *sharia* must be governed by the judgements of representatives of the classical schools of legal interpretation. But there are a good many voices arguing for an extension of the liberty of *ijtihad* – basically reasoning from first principles rather than simply the collation of traditional judgements.<sup>6</sup>

Thus, in contrast to what is sometimes assumed, we do not *simply* have a standoff between two rival legal systems when we discuss Islamic and British law. On the one hand, *sharia* depends for its legitimacy not on any human decision, not on votes or preferences, but on the conviction that it represents the mind of God; on the other, it is to some extent unfinished business so far as codified and precise provisions are concerned. To recognise *sharia* is to recognise a *method* of jurisprudence governed by revealed texts rather than a single system. In a discussion based on a paper from Mona Siddiqui at a conference last year at Al-Akhawayn University in Morocco, the point was made by one or two Muslim scholars that an excessively

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<sup>6</sup> See for example Gardet, Louis. 1983. 'Un préalable aux questions soulevées par les droits de l'homme: l'actualisation de la Loi religieuse musulmane aujourd'hui.' *Islamochristiana* 9, 1-12; and Saeed, Abdullah. 2007. 'Trends in contemporary Islam: a preliminary attempt at a classification.' *The Muslim World*, 97:3, 395-404, esp. 401-2.

narrow understanding of *sharia* as simply codified rules can have the effect of actually undermining the universal claims of the Qur'an.

But while such universal claims are not open for renegotiation, they also assume the voluntary consent or submission of the believer; the free decision to be and to continue as a member of the *umma* is not, in that sense, intrinsically to do with any demand for Muslim dominance over non-Muslims. Both historically and in the contemporary context, Muslim states have acknowledged that membership of the *umma* is not coterminous with membership in a particular political society: in modern times, the clearest articulation of this was in the foundation of the Pakistani state under Jinnah; but other examples (Morocco, Jordan) could be cited of societies where there is a concept of *citizenship* that is not identical with belonging to the *umma*. Such societies, while not compromising or weakening the possibility of unqualified belief in the authority and universality of *sharia*, or even the privileged status of Islam in a nation, recognise that there can be no guarantee that the state is religiously homogeneous and that the relationships in which the individual stands and which define him or her are not exclusively with other Muslims. There has therefore to be some concept of common good that is not prescribed solely in terms of revealed Law, however provisional or imperfect such a situation is thought to be. And this implies in turn that the Muslim, even in a predominantly Muslim state, has something of a dual identity, as citizen and as believer within the community of the faithful.

It is true that this account would be hotly contested by some committed Islamic primitivists, by followers of Sayyid Qutb and similar polemicists; but it is fair to say that the great body of serious jurists in the Islamic world would recognise this degree of political plurality as consistent with Muslim integrity. In this sense, while (as I have said) we are not talking about two rival systems on the same level, there is some community of understanding between Islamic social thinking and the categories we might turn to in the non-Muslim world for the understanding of law in the most general context. There is a recognition that *our social identities are not constituted by one exclusive set of relations or mode of belonging* – even if one of those sets is regarded as relating to the most fundamental and non-negotiable level of reality, as established by a 'covenant' between the divine and the

human (as in Jewish and Christian thinking; once again, we are not talking about an exclusively Muslim problem).

### **Recognizing Religious Identity within a Plural Jurisdiction: The Contending Issues**

The danger arises not only when there is an assumption on the religious side that membership of the community (belonging to the *umma* or the Church or whatever) is the only significant category so that participation in other kinds of socio-political arrangement is a kind of betrayal. It also occurs when secular government assumes a monopoly in terms of defining public and political identity. There is a position – not at all unfamiliar in contemporary discussion – which says that to be a citizen is essentially and simply to be under the rule of the uniform law of a sovereign state, in such a way that any other relations, commitments or protocols of behaviour belong exclusively to the realm of the private and of individual choice. As I have maintained in several other contexts, this is a very unsatisfactory account of political reality in modern societies; but it is also a problematic basis for thinking of the legal category of citizenship and the nature of human interdependence.

Maleiha Malik, following Alasdair MacIntyre, argues in an essay on 'Faith and the State of Jurisprudence' that there is a risk of assuming that 'mainstream' jurisprudence should routinely and unquestioningly bypass the variety of ways in which actions are as a matter of fact understood by agents in the light of the diverse sorts of communal belonging they are involved in.<sup>7</sup> If that is the assumption, 'the appropriate temporal unit for analysis tends to be the basic action. Instead of concentrating on the history of the individual or the origins of the social practice which provides the context within which the act is performed, conduct tends to be studied as an isolated and one-off act.'<sup>8</sup>

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<sup>7</sup> Malik, Maleiha. 2000. 'Faith and the state of jurisprudence.' Peter Oliver, Sionaidh Douglas Scott, and Victor Tadros, (eds.). *Faith in Law: Essays in Legal Theory*. Oxford: Hart Publishing, 129-149.

<sup>8</sup> Malik, Maleiha. 'Faith and the state of jurisprudence.' 139-40.

And another essay in the same collection, Anthony Bradney's 'Faced by Faith'<sup>9</sup> offers some examples of legal rulings which have disregarded the account offered by religious believers of the motives for their own decisions, on the grounds that the court alone is competent to assess the coherence or even sincerity of their claims. And when courts attempt to do this on the grounds of what is 'generally acceptable' behaviour in a society, they are open, Bradney claims<sup>10</sup> to the accusation of undermining the principle of liberal pluralism by denying someone the right to speak in their own voice. The distinguished ecclesiastical lawyer, Chancellor Mark Hill, has also underlined in a number of recent papers the degree of confusion that has bedevilled recent essays in adjudicating disputes with a religious element, stressing the need for better definition of the kind of protection for religious conscience that the law intends.<sup>11</sup>

I have argued recently in a discussion of the moral background to legislation about incitement to religious hatred that any crime involving religious offence has to be thought about in terms of its tendency to create or reinforce a position in which a religious person or group could be gravely disadvantaged in regard to access to speaking in public in their own right: offence needs to be connected to issues of power and status, so that a powerful individual or group making derogatory or defamatory statements about a disadvantaged minority might be thought to be increasing that disadvantage. The point I am making here is similar. If the law of the land takes no account of what might be for certain agents a proper rationale for behaviour – for protest against certain unforeseen professional requirements, for instance, which would compromise religious discipline or belief – it fails in a significant way to *communicate* with someone involved in the legal process (or indeed to receive their communication), and so,

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<sup>9</sup> Bradney, Anthony. 2000. 'Faced by faith.' Peter Oliver, Sionaidh Douglas Scott, and Victor Tadros, (eds.). *Faith in Law: Essays in Legal Theory*. 89-105.

<sup>10</sup> Bradney, Anthony. 'Faced by faith.' 102-3.

<sup>11</sup> See particularly his essay with Russell Sandberg. 2007. 'Is nothing sacred? Clashing symbols in a secular world.' *Public Law* 3, 488-506.

on at least one kind of legal theory (expounded recently, for example, by R.A. Duff), fails in one of its purposes.

The implications are twofold. There is a plain procedural question – and neither Bradney nor Malik goes much beyond this – about how existing courts function and what weight is properly given to the issues we have been discussing. But there is a larger theoretical and practical issue about what it is to live under more than one jurisdiction, which takes us back to the question we began with – the role of *sharia* (or indeed Orthodox Jewish practice) in relation to the routine jurisdiction of the British courts. In general, when there is a robust affirmation that the law of the land should protect individuals on the grounds of their corporate religious identity and secure their freedom to fulfil religious duties, a number of queries are regularly raised. I want to look at three such difficulties briefly. They relate both to the question of whether there should be a higher level of attention to religious identity and communal rights in the practice of the law, and to the larger issue I mentioned of something like a delegation of certain legal functions to the religious courts of a community; and this latter question, it should be remembered, is relevant not only to Islamic law but also to areas of Orthodox Jewish practice.

The first objection to a higher level of public legal regard being paid to communal identity is that it leaves legal process (including ordinary disciplinary process within organisations) at the mercy of what might be called vexatious appeals to religious scruple. A recent example might be the reported refusal of a Muslim woman employed by Marks and Spencer to handle a book of Bible stories. Or we might think of the rather more serious cluster of questions around forced marriages, where again it is crucial to distinguish between cultural and strictly religious dimensions. While Bradney rightly cautions against the simple dismissal of alleged scruple by judicial authorities who have made no attempt to understand its workings in the construction of people's social identities, it should be clear also that any recognition of the need for such sensitivity must also have a recognised means of deciding the relative seriousness of conscience-related claims, a way of distinguishing purely cultural habits from seriously-rooted matters



of faith and discipline, and distinguishing uninformed prejudice from religious prescription.

There needs to be access to recognised authority acting for a religious group: there is already, of course, an Islamic Shari'a Council, much in demand for rulings on marital questions in the UK; and if we were to see more latitude given in law to rights and scruples rooted in religious identity, we should need a much enhanced and quite sophisticated version of such a body, with increased resource and a high degree of community recognition, so that 'vexatious' claims could be summarily dealt with. The secular lawyer needs to know where the potential conflict is real, legally and religiously serious, and where it is grounded in either nuisance or ignorance. There can be no blank cheques given to unexamined scruples.

The second issue, a very serious one, is that recognition of 'supplementary jurisdiction' in some areas, especially family law, could have the effect of reinforcing in minority communities some of the most repressive or retrograde elements in them, with particularly serious consequences for the role and liberties of women. The 'forced marriage' question is the one most often referred to here, and it is at the moment undoubtedly a very serious and scandalous one; but precisely because it has to do with custom and culture rather than directly binding enactments by religious authority, I shall refer to another issue. It is argued that the provision for the inheritance of widows under a strict application of *sharia* has the effect of disadvantaging them in what the majority community might regard as unacceptable ways. A legal (in fact Qur'anic) provision which in its time served very clearly to secure a widow's position at a time when this was practically unknown in the culture becomes, if taken absolutely literally, a generator of relative *insecurity* in a new context.<sup>12</sup>

The problem here is that recognising the authority of a communal religious court to decide finally and authoritatively about such a question would in effect not merely allow an additional layer of legal routes for

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<sup>12</sup> See, for example, Mayer, Ann Elizabeth. 1999. *Islam and Human Rights: Tradition and Politics*. Boulder: Westview Press and London: Printer. 111.

resolving conflicts and ordering behaviour but would actually *deprive* members of the minority community of rights and liberties that they were entitled to enjoy as citizens; and while a legal system might properly admit structures or protocols that embody the diversity of moral reasoning in a plural society by allowing scope for a minority group to administer its affairs according to its own convictions, it can hardly admit or 'license' protocols that effectively take away the rights it acknowledges as generally valid.

To put the question like that is already to see where an answer might lie, though it is not an answer that will remove the possibility of some conflict. If any kind of plural jurisdiction is recognised, it would presumably have to be under the rubric that no 'supplementary' jurisdiction could have the power to deny access to the rights granted to other citizens or to punish its members for claiming those rights. This is in effect to mirror what a minority might themselves be requesting – that the situation should not arise where membership of one group restricted the freedom to live also as a member of an overlapping group, that (in this case) citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship – or, better, to recognise that citizenship itself is a complex phenomenon not bound up with any one level of communal belonging but involving them all.

But this does not guarantee an absence of conflict. In the particular case we have mentioned, the inheritance rights of widows, it is already true that some Islamic societies have themselves proved flexible (Malaysia is a case in point). But let us take a more neuralgic matter still: what about the historic Islamic prohibition against apostasy, and the draconian penalties entailed? In a society where freedom of religion is secured by law, it is obviously impossible for any group to claim that conversion to another faith is simply disallowed or to claim the right to inflict punishment on a convert. We touch here on one of the most sensitive areas not only in thinking about legal practice but also in interfaith relations. A significant number of contemporary Islamic jurists and scholars would say that the Qur'anic pronouncements on apostasy which have been regarded as the ground for extreme penalties reflect

a situation in which abandoning Islam was equivalent to adopting an active stance of violent hostility to the community, so that extreme penalties could be compared to provisions in other jurisdictions for punishing spies or traitors in wartime; but that this cannot be regarded as bearing on the conditions now existing in the world. Of course such a reading is wholly unacceptable to 'primitivists' in Islam, for whom this would be an example of a rationalising strategy, a style of interpretation (*ijtihad*) uncontrolled by proper traditional norms.

But, to use again the terminology suggested a moment ago, as soon as it is granted that – even in a dominantly Islamic society – citizens have more than one set of defining relationships under the law of the state, it becomes hard to justify enactments that take it for granted that the only mode of contact between these sets of relationships is open enmity; in which case, the appropriateness of extreme penalties for conversion is not obvious even within a fairly strict Muslim frame of reference. Conversely, where the dominant legal culture is non-Islamic, but there is a level of serious recognition of the corporate reality and rights of the *umma*, there can be no assumption that outside the *umma* the goal of any other jurisdiction is its destruction. Once again, there has to be recognition that difference of conviction is not automatically a lethal threat.

As I have said, this is a delicate and complex matter involving what is mostly a fairly muted but nonetheless real debate among Muslim scholars in various contexts. I mention it partly because of its gravity as an issue in interfaith relations and in discussions of human rights and the treatment of minorities, partly to illustrate how the recognition of what I have been calling membership in different but overlapping sets of social relationship (what others have called 'multiple affiliations') can provide a framework for thinking about these neuralgic questions of the status of women and converts. Recognising a supplementary jurisdiction cannot mean recognising a liberty to exert a sort of local monopoly in some areas.

The Jewish legal theorist Ayelet Shachar, in a highly original and significant monograph,<sup>13</sup> explores the risks of any model that ends up

<sup>13</sup> See Shachar, Ayelet. 2001. *Multicultural Jurisdictions: Cultural Differences and Women's Rights*.

'franchising' a non-state jurisdiction so as to reinforce its most problematic features and further disadvantage its weakest members: 'we must be alert', she writes, 'to the potentially injurious effects of well-meaning external protections upon different categories of group members here – effects which may unwittingly exacerbate pre-existing internal power hierarchies.'<sup>14</sup> She argues that if we are serious in trying to move away from a model that treats one jurisdiction as having a monopoly of socially defining roles and relations, we do not solve any problems by a purely uncritical endorsement of a communal legal structure which can only be avoided by deciding to leave the community altogether. We need, according to Shachar, to 'work to overcome the ultimatum of "either your culture or your rights."' <sup>15</sup>

So the second objection to an increased legal recognition of communal religious identities can be met if we are prepared to think about the basic ground rules that might organise the relationship between jurisdictions, making sure that we do not collude with unexamined systems that have oppressive effect or allow shared public liberties to be decisively taken away by a supplementary jurisdiction. Once again, there are no blank cheques. I shall return to some of the details of Shachar's positive proposal; but I want to move on to the third objection, which grows precisely out of the complexities of clarifying the relations between jurisdictions. Is it not both theoretically and practically mistaken to qualify our commitment to legal monopoly? So much of our thinking in the modern world, dominated by European assumptions about universal rights, rests, surely, on the basis that the law is the law; that everyone stands before the public tribunal on exactly equal terms, so that recognition of corporate identities or, more seriously, of supplementary jurisdictions is simply incoherent if we want to preserve the great political and social advances of Western legality.

There is a bit of a risk here in the way we sometimes talk about the universal vision of post-Enlightenment politics. The great protest of the Enlightenment was against authority that appealed only to tradition and refused to justify itself by other criteria – by open reasoned

<sup>14</sup> Shachar, Ayelet, *Multicultural Jurisdictions*, 113.

<sup>15</sup> Shachar, Ayelet, *Multicultural Jurisdictions*, 114.

argument or by standards of successful provision of goods and liberties for the greatest number. Its claim to override traditional forms of governance and custom by looking towards a universal tribunal was entirely intelligible against the background of despotism and uncritical inherited privilege which prevailed in so much of early modern Europe. The most positive aspect of this moment in our cultural history was its focus on equal levels of accountability for all and equal levels of access for all, to legal process. In this respect, it was in fact largely the foregrounding and confirming of what was already encoded in longstanding legal tradition, Roman and mediaeval, which had consistently affirmed the universality and primacy of law (even over the person of the monarch).

### **Law in a Plural Society of Overlapping Identities**

But the above set of considerations alone is not adequate to deal with the realities of complex societies: it is not enough to say that citizenship as an abstract form of equal access and equal accountability is either the basis or the entirety of social identity and personal motivation. Where this has been enforced, it has proved a weak vehicle for the life of a society and has often brought violent injustice in its wake (think of the various attempts to reduce citizenship to rational equality in the France of the 1790's or the China of the 1970's). Societies that are in fact ethnically, culturally and religiously diverse are societies in which identity is formed, as we have noted by different modes and contexts of belonging, 'multiple affiliation'. The danger is in acting as if the authority that managed the abstract level of equal citizenship represented a sovereign order which then *allowed* other levels to exist. But if the reality of society is plural – as many political theorists have pointed out – this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalised or privatised to the extent that what is produced is a ghettoised pattern of social life, in which particular sorts of interest and of reasoning are tolerated as private matters but never granted legitimacy in public as part of a continuing debate about shared goods and priorities.

But this means that we have to think a little harder about the role and rule of law in a plural society of overlapping identities. Perhaps it

helps to see the universalist vision of law as guaranteeing equal accountability and access primarily in a negative rather than a positive sense – that is, to see it as a mechanism whereby any human participant in a society is protected against the loss of certain elementary liberties of self-determination and guaranteed the freedom to demand reasons for any actions on the part of others for actions and policies that infringe self-determination. This is a slightly more gentle or tactful way of expressing what some legal theorists will describe as the ‘monopoly of legitimate violence’ by the law of a state, the absolute restriction of powers of forcible restraint to those who administer statutory law. This is not to reduce society itself primarily to an uneasy alliance of self-determining individuals arguing about the degree to which their freedom is limited by one another and needing forcible restraint in a war of all against all – though that is increasingly the model which a narrowly rights-based culture fosters, producing a manically litigious atmosphere and a conviction of the inadequacy of customary ethical restraints and traditions – of what was once called ‘civility’.

The picture will not be unfamiliar, and there is a modern legal culture which loves to have it so. But the point of defining legal universalism as a negative thing is that it allows us to assume, as I think we should, that the important springs of moral vision in a society will be in those areas which a systematic abstract universalism regards as ‘private’ – in religion above all, but also in custom and habit. The role of ‘secular’ law is not the dissolution of these things in the name of universalism but the monitoring of such affiliations to prevent the creation of mutually isolated communities in which human liberties are seen in incompatible ways and individual persons are subjected to restraints or injustices for which there is no public redress.

The rule of law is thus not the enshrining of priority for the universal/abstract dimension of social existence but the establishing of a space accessible to everyone in which it is possible to affirm and defend a commitment to human dignity *as such*, independent of membership in any specific human community or tradition, so that when specific communities or traditions are in danger of claiming finality for their own boundaries of practice and understanding, they are reminded that they have to come to terms with the actuality of human diversity -

and that the only way of doing this is to acknowledge the category of 'human dignity as such' – a non-negotiable assumption that each agent (with his or her historical and social affiliations) could be expected to have a voice in the shaping of some common project for the well-being and order of a human group. It is not to claim that specific community understandings are 'superseded' by this universal principle, rather to claim that they all need to be undergirded by it.

The rule of law is – and this may sound rather counterintuitive – a way of honouring what in the human constitution is not captured by any one form of corporate belonging or any particular history, even though the human constitution never exists without those other determinations. Our need, as Raymond Plant has well expressed it, is for the construction of 'a moral framework which could expand outside the boundaries of particular narratives while, at the same time, respecting the narratives as the cultural contexts in which the language [of common dignity and mutually intelligible commitments to work for certain common moral priorities] is learned and taught.'<sup>16</sup>

I would add in passing that this is arguably a place where more reflection is needed about the theology of law; if my analysis is right, the sort of foundation I have sketched for a universal principle of legal right requires both a certain valuation of the human as such and a conviction that the human subject is always endowed with some degree of freedom over against any and every actual system of human social life; both of these things are historically rooted in Christian theology, even when they have acquired a life of their own in isolation from that theology. It never does any harm to be reminded that without certain themes consistently and strongly emphasised by the 'Abrahamic' faiths, themes to do with the unconditional possibility for every human subject to live in conscious relation with God and in free and constructive collaboration with others, there is no guarantee that a 'universalist' account of human dignity would ever have seemed plausible or even emerged with clarity. Slave societies and assumptions about innate racial superiority are as widespread a feature as any in human history (and they have persistently infected even Abrahamic communities,

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<sup>16</sup> See Plant, Raymond. 2001. *Politics, Theology and History*. 357-8.

which is perhaps why the Enlightenment was a necessary wake-up call to religion...).

### **Secular Legal Monopoly vs. Supplementary Jurisdiction and Interactive Pluralism**

But to return to our main theme: I have been arguing that a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, as I mentioned at the beginning of this paper, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to 'activate' this whenever called upon.

Earlier on, I proposed that the criterion for recognising and collaborating with communal religious discipline should be connected with whether a communal jurisdiction actively interfered with liberties guaranteed by the wider society in such a way as definitively to block access to the exercise of those liberties; clearly the refusal of a religious believer to act upon the legal recognition of a right is not, given the plural character of society, a denial to anyone inside or outside the community of access to that right. The point has been granted in respect of medical professionals who may be asked to perform or co-operate in performing abortions – a perfectly reasonable example of the law doing what I earlier defined as its job, securing space for those aspects of human motivation and behaviour that cannot be finally determined by any corporate or social system. It is difficult to see quite why the principle cannot be extended in other areas. But it is undeniable that there is pressure from some quarters to insist that conscientious disagreement should always be overruled by a monopolistic understanding of jurisdiction.



I labour the point because what at first seems to be a somewhat narrow point about how Islamic law and Islamic identity should or might be regarded in our legal system in fact opens up a very wide range of current issues, and requires some general thinking about the character of law. It would be a pity if the immense advances in the recognition of human rights led, because of a misconception about legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties and the law's function was accordingly seen as nothing but the securing of those liberties irrespective of the custom and conscience of those groups which concretely compose a plural modern society.

Certainly, no-one is likely to suppose that a scheme allowing for supplementary jurisdiction will be simple, and the history of experiments in this direction amply illustrates the problems. But if one approaches it along the lines sketched by Shachar in the monograph quoted earlier, it might be possible to think in terms of what she calls 'transformative accommodation': a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that 'power-holders are forced to compete for the loyalty of their shared constituents.'<sup>17</sup> This may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution – the main areas that have been in question where supplementary jurisdictions have been tried, with native American communities in Canada as well as with religious groups like Islamic minority communities in certain contexts. In such schemes, both jurisdictional stakeholders may need to examine the way they operate; a communal/religious *nomos*, to borrow Shachar's vocabulary, has to think through the risks of alienating its people by inflexible or over-restrictive applications of traditional law, and a universalist Enlightenment system has to weigh the possible consequences of ghettoising and effectively disenfranchising a minority, at real cost to overall social cohesion and creativity. Hence 'transformative accommodation': both jurisdictional parties may be

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<sup>17</sup> Shachar, Ayelet. *Multicultural Jurisdictions*, 122.

changed by their encounter over time, and we avoid the sterility of mutually exclusive monopolies.

It is uncomfortably true that this introduces into our thinking about law what some would see as a 'market' element, a competition for loyalty as Shachar admits. But if what we want socially is a pattern of relations in which a plurality of diverse and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable. In other settings, I have spoken about the idea of 'interactive pluralism' as a political desideratum; this seems to be one manifestation of such an ideal, comparable to the arrangements that allow for shared responsibility in education: the best argument for faith schools from the point of view of any aspiration towards social harmony and understanding is that they bring communal loyalties into direct relation with the wider society and inevitably lead to mutual questioning and sometimes mutual influence towards change, without compromising the distinctiveness of the essential elements of those communal loyalties.

#### **Conclusion: Future Relations between Islam and British Law**

In conclusion, it seems that if we are to think intelligently about the relations between Islam and British law, we need a fair amount of 'deconstruction' of crude oppositions and mythologies, whether of the nature of *sharia* or the nature of the Enlightenment. But as I have hinted, I do not believe this can be done without some thinking also about the very nature of law. It is always easy to take refuge in some form of positivism; and what I have called legal universalism, when divorced from a serious theoretical (and, I would argue, religious) underpinning, can turn into a positivism as sterile as any other variety. If the paradoxical idea which I have sketched is true – that universal law and universal right are a way of recognising what is least fathomable and controllable in the human subject – theology still waits for us around the corner of these debates, however hard our culture may try to keep it out. And, as you can imagine, I am not going to complain about that.