(2009) 11 Ecc LJ 131–153 © Ecclesiastical Law Society
doi:10.1017/S0956618X09001926

'Transformative Accommodation' and Religious Law

Bernard Jackson
Alliance Professor of Modern Jewish Studies, Centre for Jewish Studies,
University of Manchester

This paper examines the concept of 'transformative accommodation', which the Archbishop of Canterbury invoked in his February 2008 lecture on 'Civil and religious law in England', stressing the need for both the state and religious communities to contemplate internal change. Although he made no substantive proposals on jurisdictional issues, this proved the focus of subsequent public comment. I suggest that jurisdictional issues cannot be avoided, despite the diplomatic interest in doing so, as may be seen from a reading of the January 2008 European Islamic 'Charter of Values'. Missing from the debate thus far is consideration of the (necessarily theological) criteria for accommodation within religious communities. I seek to provide a preliminary discussion of such criteria from the viewpoint of Jewish law. First, an outline of some published research on religious marriage in Judaism and Christianity is provided as a case study. I then sketch the jurisdictional situation in the modern State of Israel, before considering the possibilities for transformative accommodation in English law, in the light of the preceding analysis. A brief conclusion indicates some questions that the analysis might pose for Christianity.[1]

THE ARCHBISHOP OF CANTERBURY'S LECTURE

In February 2008, the Archbishop of Canterbury delivered a lecture at the Royal Courts of Justice entitled 'Civil and religious law in England: a religious perspective'.[2] It was a sophisticated, academically well-documented study, which analysed some problems of multiculturalism in terms of political and legal philosophy. It made no proposals, and insofar as it discussed the possibility of greater accommodation with sharia law, it stressed the criteria for and limitations to be imposed on any such approach. As Dr Williams put it:

> This lecture 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,

1 A version of this paper (with the exception of the case study on religious marriage) was first presented at a conference in memory of Francesco Castro on 'Identità religiosa e integrazione dei Musulmani in Italia e in Europa', at the Centro Interdisciplinare di Studi sul Mondo Islamico 'Francesco Castro', Università degli Studi di Roma Tor Vergata, on 22 May 2008.

2 The text of the Archbishop's lecture, together with a transcript of the question and answer session that followed it, was reproduced in this *Journal*: see R Williams, 'Civil and religious law in England: a religious perspective', (2008) 10 Ecc LJ 262–282. For the text as originally made available on the Archbishop's website, see <http://www.archbishopofcanterbury.org/1575>, accessed 25 March 2009.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

> to tease out some of the broader issues around the rights of religious groups within a secular state, with a few thoughts about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom.[3]

Much media attention was directed at the Archbishop's alleged argument in favour of the 'unavoidability' of the application of sharia law.[4] Dr Williams does indeed speak about the problem of jurisdiction, but in the lecture did not endorse any idea of 'parallel' jurisdictions; rather, he proposed that we consider the possibility of (what his web site later termed) 'overlapping' jurisdictions.[5] In fact, the expression he used most frequently in the lecture was 'supplementary' jurisdictions. The Archbishop, however, is a jurist neither by training nor theological leaning: he gave no specific indication of what (if anything) he had in mind as to the working relationship between these jurisdictions. Most likely, he simply wanted to open up the question. He did, however, introduce into his discussion a highly interesting and potentially fruitful model for the possible relationship between secular law and the sharia. Citing a book by an Israeli scholar teaching in Canada,[6] he observed:

> 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 that 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'. This might include aspects of marital law, the regulation of financial transactions and authorised structures of

3 Ibid, pp 263–264.
4 A claim really constructed by the BBC's interviewer: see <http://www.archbishopofcanterbury.org/1573>, accessed 28 January 2009.
5 See <http://www.archbishopofcanterbury.org/1581>, accessed 28 January 2009.
6 Ayelet Shachar, *Multicultural Jurisdictions: cultural differences and women's rights* (Cambridge, 2001). See also her 'Religion, state, and the problem of gender: re-imagining citizenship and governance in diverse societies', (2005) 50 *McGill Law Journal* 49–88, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921290>, accessed 28 January 2009.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

> 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 such as Islamic minority communities in certain contexts. In such schemes, both jurisdictional stakeholders may need to examine the way that 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 changed by their encounter over time, and we avoid the sterility of mutually exclusive monopolies.[7]

In short, 'transformative accommodation' implies a willingness on both sides to contemplate internal change (resulting in part from mutual influence) in competing for the loyalty of subjects who are simultaneously members of both civic and religious communities.

TRANSFORMATIVE ACCOMMODATION AND THE ISLAMIC CHARTER

In January 2008, a 'Charter of Values', prepared by the Federation of Islamic Organisations in Europe, was signed by some 400 Muslim groups in Brussels, and was hailed by the Vice-President of the European Parliament as pledging Muslims to play a full role as citizens in upholding justice, equal rights and respect for difference. It is not difficult to view the Charter in the light of the concept of transformative accommodation. Indeed, the parallel with the Archbishop's lecture extends to the fact that the Charter, while stressing what is common between Western and Muslim values, also appears to avoid the concrete issues of jurisdiction. Or, at least, it appears to avoid them at the explicit level. Nevertheless, a close reading suggests that these issues necessarily arise, and may indeed be contemplated 'between the lines'.[8] Thus, the rationale for the charter includes 'The Muslim presence in Europe requires a framework of citizenship based on justice, equality of rights, with respect for difference, and the recognition of Muslims as a religious community.'

7 Williams, 'Civil and religious law in England', pp 273–274; the quotation is from Shachar, *Multicultural Jurisdictions*, p 122.

8 The comments that follow are based exclusively on the English version, available at <http://www.islamonline.net/English/EuropeanMuslims/PoliticsCitizenship/2006/09/01a.shtml#1>, accessed 28 January 2009. I am not in a position to judge whether the same connotations may be read into the original Arabic (or parallel translations).

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

Historically, however, the term 'religious community' has jurisdictional connotations, for it was just such (recognised) religious communities that were given jurisdiction in matters of personal status under the 'millet system' of the Ottoman Empire, and it is perfectly understandable that Muslims should seek the same privileges – as religious minorities in the West – as the Ottomans granted to non-Muslim religious communities. Three paragraphs of the Charter itself may be read against this background. According to section 1, paragraph 12, 'In view of the virtues of consultation (Shura) and with consideration to the developments in the political, legislative and constitutional realms, Islam affirms the principles of democracy based on pluralism, freedom to choose political authority and peaceful alternation of power.' Are not judicial institutions 'political'? Similarly, section 2, 'On citizenship', paragraph 2 provides:

> Muslims of Europe adhere to the principle of secularism based on the neutrality of the state regarding religious affairs. This means just dealings with all religions and allows those who hold religious values to express their beliefs and practise the rites of their religion either as individuals or groups in both general and specific matters, as is specified in European and international human rights charters and treaties. On this basis, it remains the right of Muslims, as religious communities, to establish mosques, religious, educational and welfare institutions, to practise their religion in day-to-day affairs in virture of diet, clothing and other needs.

There is an appeal here to group as well as individual rights, specifically the rights of religious communities to practise their religion. That would surely include many matters of personal status. Further, section 2, 'On citizenship', paragraph 4 reads:

> Muslims are urged to positively integrate with their respective societies, on the basis of a harmonious balance between preservation of Muslim identity and the duties of citizenship. Any form of integration that fails to recognise the right of Muslims to preserve their Islamic personality and the right to perform their religious obligations does not serve the interests of Muslims nor the European societies to which they belong.

How can the 'the right of Muslims to preserve their Islamic personality' not entail some form of jurisdiction over matters of personal status?

Paragraph 7 of the Charter, however, introduces an important distinction:

> Islam calls for equality between man and woman within the framework of mutual respect and views that a balanced life is one in which the

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

> relationship between man and woman is harmonious and complementary. It unequivocally rejects all notions or actions that undermine women or deprive them of their legitimate rights, regardless of some customs and habits of some Muslims.

There is an implicit distinction here between values taken to be central and universal to the Muslim religious tradition and more local 'customs and habits', which are not. The latter, it appears, may be surrendered in the context of the relationship with European citizenship contemplated by the Charter. Might we regard this as an example of 'transformative accommodation'?[9] Indeed, the possibility of a conflict in values is recognised in section 2, 'On citizenship', paragraph 1:

> Muslims of Europe respect the laws of the land and the authorities that uphold them. This should not prevent them from individually or collectively defending their rights and expressing their opinions based on their specific concerns as a religious community or any general matter that concerns them as citizens. Whenever there is a conflict with regard to certain laws and matters that are specific to religion, the relevant authorities should be approached in order to arrive at suitable and viable solutions.

Such an approach is clearly designed to negotiate a 'transformative accommodation' on the part of state law. In any such 'accommodation' between state (any state) and religious (any religious) law, both systems have to decide what is negotiable and what is non-negotiable in their values.

INTERNAL CRITERIA FOR ACCOMMODATION

From this point, I will draw largely on the history of Jewish law for concepts and examples that may further clarify the issues involved.

A famous principle found in the Talmud is *dina demalkhuta dina*: 'the law of the land is (recognised as part of Jewish) law'.[10] The primary context there is taxation, but more broadly it is taken to apply to 'monetary' (*mamona*) as opposed to 'religious' (*issura*, literally 'prohibition') matters. That distinction,

9 Arguably, a further such concession may be found in para 9: 'Islam respects human rights and calls for equality among all human beings; it rejects all forms of racial discrimination and emphasises the importance of liberty. Hence it *condemns compulsion in religion* and allows the individual freedom of conscience. Furthermore, Islam encourages that freedom ought to be exercised in accordance with moral values and respect for law, such that it does not infringe upon the rights of others' (emphasis added).

10 *Nedarim* 28a, *Gittin* 10b, *Baba Kamma* 113a, *Baba Batra* 54b–55a; see the article of Shmuel Shilo in *Encyclopedia Judaica* (Jerusalem, 1973), vol 6, cols 51–55.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

however, is itself far from self-evident. There has been considerable debate, for example, over whether the Jewish law of wills is subject to *dina demalkhuta dina*, the dominant contemporary opinion being that it is not. Conversely, some surprising aspects of marital law have been classified as 'monetary'.[11]

The distinction between *mamona* and *issura* is also relevant to a parallel question within Jewish law: when are Jews allowed, by mutual agreement, to 'opt out' of the law of the Torah? The classical answer is: 'Contracting out of a Law contained in the Torah as to a monetary matter is valid, but as to a non-monetary matter is void'.[12] It should be stressed that such monetary matters from which contractual opt-out is possible are themselves Torah laws, and thus part of the religious law of the community. Nevertheless, it is clear that they have less religious weight than other areas of religious law. Concessions may be made here to either the will of contracting parties or the law of the state within which the community resides.

All religious traditions must ask themselves such questions. The answers may differ quite radically. Even within Christianity, catholic and protestant conceptions of marriage, and the religious weight attached to it (extending beyond issues of divorce), appear to differ. Is a church wedding simply a means of constituting a civil marriage, decorated with a religious ceremony? Or are two quite different relationships created, both a religious marriage and a civil marriage? If so, what is the difference (and relationship) between them? Does it go beyond the rules for divorce? Such questions cannot be answered without reference to the theological bases of marriage in the religious traditions concerned.

A CASE STUDY: THE NATURE OF RELIGIOUS MARRIAGE IN JUDAISM AND CHRISTIANITY

The Hebrew Bible

Elsewhere, I have sought to address such questions for marriage in the history of Judaism and early Christianity.[13] To do so, I have found it useful to distinguish four different aspects of marital law: the permissibility of the sexual relationship; non-sexual aspects of the relationship between husband and wife (what we may term the 'horizontal' relationship); legitimacy and relationships of parents with children (the 'vertical' relationship); divorce.

The law of the Hebrew Bible is far more interested in sex than in marriage – and in prohibited sex at that. While the Church may have appropriated the

11 See below, p 143.
12 *Tosefta Kiddushin* 3:7–8. For its application in marital law, see below, n 44.
13 What follows in this section is a brief summary of issues fully discussed in the publications cited below in notes 13, 14 and 24.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

prohibitions of Leviticus for its Tables of Affinity and Consanguinity, a man could hardly defend having sex with his sister, even his half-sister (Leviticus 18:9), on the grounds that he had not married her. Prohibited sex is described as an 'abomination' (*to'evah*) in Leviticus 18:26 and elsewhere.

Biblical law shows little interest in the number of contemporaneous relationships a man may have, nor in their precise designation: we encounter a spectrum of 'marital' relationships, principal wives, concubines and semi-servile relationships ('handmaid') variously associated with surrogacy, (internal) debt-slavery and (external) capture.[14] Marriage appears still to be a social rather than either a legal or a religious institution.[15] Only gradually do notions of sacralisation appear. In the eighth century BC, Hosea depicts the relationship between God and Israel in terms of a marriage where the wife has been unfaithful. However, although God's relationship with Israel is here re-established through a *berit* ('covenant': Hosea 2:18), human marriage is not yet itself conceived in terms of a *berit*, and certainly not one with sacral connotations. The marriage metaphor for God's relationship to Israel is also found in Ezekiel 16:8,[16] but it is only in Malachi (2:14), in the fifth century, that the marriage itself is described as a covenant, to which God is a witness.

As for the 'horizontal' relationship, there is only one indication in the laws of the Hebrew Bible, and that is a special case: the purchaser of a Hebrew slave woman (*amah*) sold by her father to pay off his debts must, if he does not treat her as a (principal?) wife, still provide food, clothing and (perhaps) marital rights.[17] A more revealing light on the 'horizontal' relationship is cast by the narrative of the relationship between Abram (later Abraham), Sarai (later Sarah) and Hagar, the Egyptian 'handmaid' given to Abram by his wife Sarai as a surrogate, when Sarai appeared to be barren. When Hagar becomes pregnant and Sarai complains to Abram that Hagar, having conceived, no longer respects her, Abram replies, 'Behold, your maid is in your power; do to her as you please' (Genesis 16:5–6). The 'vertical' relationship of mistress and handmaid prevailed over the 'marital' relationship between man and surrogate wife.

14 BS Jackson, 'Gender critical observations on tripartite breeding relationships in the Hebrew Bible', in D Rooke (ed), *A Question of Sex? Gender and difference in the Hebrew Bible and beyond* (Sheffield, 2007), pp 39–52.

15 BS Jackson, 'The "institutions" of marriage and divorce in the Hebrew Bible', in G Brooke and C Nihan (eds), *Studies in Biblical Law and its Reception* (Oxford, 2009), forthcoming.

16 'And when I passed by you, and looked upon you, behold, your time was the time of love; and I spread my skirt over you, and covered your nakedness; yes, I swore to you, and entered into a covenant with you, says the Lord God, and you became mine.'

17 Exodus 21:10, a formulation which found its way into the rabbinic marriage contract (*ketubbah*) and is still included there today. Rabbinic interpretation accepts 'conjugal rights' as the meaning of *onatah*. The original meaning of *onatah* is much discussed, alternative views being 'oils' and 'accommodation'. See further, BS Jackson, *Wisdom-Laws: a study of the Mishpatim of Exodus 21:1–22:16* (Oxford, 2006), p 92.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

There is, however, another 'vertical' relationship that matters to the narrator: the relationship between Abraham and Ishmael, the son Hagar bore to him. Is he a legitimate heir, of both Abraham's property and God's promise to him? Despite the ambiguous nature of the 'horizontal' relationship between his parents, Ishmael is clearly so regarded by Abram (Genesis 21:10–12) until Sarah, after the birth of her own son, Isaac, succeeds in having him expelled and thus disinherited.[18] Similarly, two generations later, the children of Jacob's surrogate wives, Bilhah and Zilpah (themselves also originally handmaids of the principal wives), become the mothers of four of the twelve tribes of Israel. Clearly, these vertical relationships depend purely on patrilineal descent, rather than on the status of the mother's horizontal relationship with the father.[19]

Divorce, too, appears in the Hebrew Bible as a social rather than a legal or religious institution,[20] despite the famous divorce law of Deuteronomy 24:1–4.[21] While this twice mentions a procedure of divorce ('he writes her a bill of divorce and puts it in her hand and sends her out of his house'), together with two possible 'grounds' for divorce ('he has found some indecency in her' or he simply 'dislikes her'), these matters are incidental to the main concern of the law, which is the prohibition of a wife to return to her first husband after an intermediate marriage. The latter is a form of prohibited sex (*to'evah*). Indeed, we hear of the 'bill of divorce' (*sefer keritut*) only twice elsewhere in the Hebrew Bible, on both occasions in prophetic sources.[22] We also encounter elsewhere a procedure of divorce by formal, oral declaration[23] but, interestingly, there is no mention in the narratives of either of these two procedures.

18 Here, too, Abraham is initially resistant, but is told by God to follow Sarah's bidding.

19 See Jackson, 'Gender critical observations', p 47, arguing against the attempt of Westbrook to impose an ancient Near Eastern model here.

20 Like disinheritance, with which it has much in common: see further, Jackson, 'Gender critical observations', p 50, noting the practice of physical expulsion and the common terminology, as shown in the story of Jepththah (Judges 11:1–7). The story of Hagar shows that, in a polygamous society, the two would often go together in practice.

21 'When a man takes a wife and marries her, if then she finds no favour in his eyes because he has found some indecency in her, and he writes her a bill of divorce and puts it in her hand and sends her out of his house, and she departs out of his house, and if she goes and becomes another man's wife, and the latter husband dislikes her and writes her a bill of divorce and puts it in her hand and sends her out of his house, or if the latter husband dies, who took her to be his wife, then her former husband, who sent her away, may not take her again to be his wife, after she has been defiled [*hutama'ah*]; for that is an abomination [*to'evah*] before the LORD, and you shall not bring guilt upon the land which the LORD your God gives you for an inheritance.'

22 Isaiah 50:1, Jeremiah 3.8.

23 Reflected in the *formula contraria* of Hosea 2:2: 'Plead with your mother, plead; for she is not my wife, nor am I her husband; let her therefore put away her harlotry from her sight, and her adulteries from between her breast', where we may take 'for she is not my wife, nor am I her husband' to be an implied threat to utter the formula in the light of the mother's behaviour. That it is a *formula contraria* is best seen from the Elephantine marriage contracts. Brooklyn 7, for example, commences by recounting that the bridegroom came to the house of the brother of the bride and declared: 'I have come to your [hous]e and asked you for your sister the woman Yehoyishma (as she is called) in marriage, and you have given her to me. *She is my wife and I am [her] husband from this day to*

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

If, then, we ask what, within marriage, carries religious weight in the Hebrew Bible, the answer is clear: it is the permissibility or impermissibility of the particular sexual relationship on the one hand, and the legitimacy of descent on the other, as contrasted with both the 'horizontal' relationship between husband and wife and the criteria and procedures for divorce. The marital relationship as a whole is still far from sacral.

Qumran

At Qumran, the emphasis changes and is explicitly tied to a particular theology. In the Damascus Covenant (CD IV:20f), the sect criticises its opponents for fornication (*zenut*) on the grounds that they 'take two wives in their lifetime' (*lakaḥat shtei nashim beḥayeyhem*), whereas the 'principle of creation' (*yesod haberiyah*) is 'male and female he created them', citing Genesis 1:27.[24] The precise scope of the critique is much discussed; I take it to be a demand for sexual exclusivity: a limitation to one sexual relationship in a lifetime, and thus a ban on both polygamy and remarriage after either divorce or widow/widowerhood.[25] What is clear, however, is that this is tied to a creationist theology, which itself is generally understood to reflect an imminent eschatology, when the perfection of the original creation will be restored. In this context, the sect is required to emulate the exclusivity of the relationship of Adam and Eve. Indeed, the War Scroll also prescribes abstinence for males from the age of 25, in order not to be disqualified from serving in the (imminent, eschatological) holy war, since soldiers must go to battle in a state of purity, not having had relations with women the previous night: 'Any man who is not pure with regard to his sexual organs on the day of battle shall not join them in battle, for holy angels are in communion with their hosts'.[26] The issue of more general celibacy at Qumran is debated. One version of the Community Rule (*1QSa* 1:6–11) requires that a man 'shall not approach a woman to have sexual relations with her, unless he has reached his maturity of twenty years'. Thus he must be admitted to the Community as a virgin, 20 being the age

eternity' (emphasis added). Moreover, the same contract indicates that either party may divorce the other by a declaration in the assembly, that of the husband being 'I divorce my wife Yehoyishma; she shall not be a wife to me', that of the wife being 'I divorce you, I will not be wife to you' (Ginsberg's translation).

24 Further proof texts cited in the passage are Genesis 7:9 (entry into the ark 'two by two') and the rule that the prince (*nasi*) 'shall not multiply wives to himself' (Deut. 17:17).

25 On this passage, see further BS Jackson, '"Holier than thou"? Marriage and divorce in the Scrolls, the New Testament and early rabbinic sources', in *Essays on Halakhah in the New Testament* (Leiden, 2008), pp 173–185. A further passage of the Damascus Covenant, found only at Qumran (4Q271.3), states: 'Let no man bring [a woman into the ho]ly [covenant?] who has had sexual experience, (whether) she had such [experience in the home] of her father or as a widow who had intercourse after she was widowed.' On this, see BS Jackson, 'Marriage and divorce: from social institution to halakhic norms', in C Hempel (ed), *The Dead Sea Scrolls: texts and context* (Leiden, 2009), forthcoming.

26 1QM 7:5–6, based on Deuteronomy 23:11–12. See further Jackson, 'Marriage and divorce'.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

when 'he shall pass before the examiners to be selected by ballot, in the midst of his clan, to join the holy congregation'. Taking this together with the rule in the War Scroll, we may discern a measure of 'eschatological pragmatism':[27] some reproduction was countenanced, in case the eschaton proved not quite as imminent as the sect anticipated. This is consistent with the archaeological evidence of a dearth of female skeletons at Qumran, from which Jodi Magness concludes that there was 'only minimal female presence at Qumran and an absence of families with children'.[28] It is hardly surprising, then, that the Qumran documents provide no rules regarding the 'horizontal' and 'vertical' aspects of family relationships.

The New Testament

A comparable pattern of thought and practice is evident in the New Testament. The argumentation in Matthew's version of Jesus' controversy with the Pharisees over divorce (Matthew 19:3–12) is particularly revealing. In response to the Pharisees' challenge: 'Is it lawful to divorce one's wife for any cause?' Jesus replies in terms of the creationist model:

> Have you not read that he who made them from the beginning made them male and female, and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh.'

When the Pharisees retort with Deuteronomy 24 ('Why then did Moses command one to give a certificate of divorce, and to put her away?'), Jesus distinguishes between the era of creation (now, by implication, to be recapitulated) and that of Moses: 'For your hardness of heart Moses allowed[29] you to divorce your wives, but from the beginning it was not so. And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery.' Later, the disciples press Jesus on the matter: 'If such is the case of a man with his wife, it is not expedient to marry.' Jesus appears to accept the implication: celibacy is indeed the ideal, but is not realistic for all:

> Not all men can receive this saying, but only those to whom it is given. For there are eunuchs who have been so from birth, and there are eunuchs

27 As argued in Jackson, '"Holier than thou"', pp 173, 177, 179, 181, noting also (p 173) a provision in the Temple Scroll (57:15–19) that bans polygamy for the eschatological leader but permits (perhaps even requires) him to remarry if he is widowed.

28 J Magness, *The Archaeology of Qumran and the Dead Sea Scrolls* (Grand Rapids, MI, 2002), pp 168–185.

29 For Jesus, divorce in cases of *porneia* was permissive, whereas for the Pharisees it was mandatory. This reflects contemporary differences on the duty of a husband whose wife commits adultery. According to rabbinic law, sexual relations with such a wife were forbidden: *Mishnah Sotah* 5:1; see further Jackson, '"Holier than thou"', pp 203, 208–209, and below, n 35.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

> who have been made eunuchs by men, and there are eunuchs who have made themselves eunuchs for the sake of the kingdom of heaven. He who is able to receive this, let him receive it.

If one asks how this fits with the creationist model, the answer would appear to be that it evokes the belief, attested particularly in Gnostic sources[30] and also found in early rabbinics,[31] that the original form of creation (before the separation of Eve from Adam), was in fact androgynous (and thus more closely approached *imitatio dei*[32]).

Jesus' response to the disciples clearly evokes a hierarchical structure: higher standards are expected of the elect. In the Hebrew Bible, a wider range of prohibitions was imposed on priests than laity: though an Israelite might marry a divorcee or widow, a priest might not marry a divorcee (Leviticus 21:7), and a high priest might not marry either a divorcee or a widow (Leviticus 21:13–15). According to Revelation 1:5–6, the Church inherited the promise of Exodus 19:6: 'And you shall be to me a kingdom of priests'. In the pastoral epistles, both bishops (1 Timothy 3:1–2) and elders (Titus 1:6) must be 'the husband of one wife', which must refer to consecutive[33] rather than concurrent relationships, monogamy being presupposed in the New Testament.[34]

Like the Qumran documents, the New Testament has no interest in regulating the 'horizontal' and 'vertical' aspects of family relationships. Considerable attention is paid to problems of divorce, but even here Jesus appears close to the Hebrew Bible: his interest is not in divorce as such, but rather in remarriage after divorce. The latter is a prohibited relationship, which (assuming the invalidity of divorce) amounts to adultery.[35] It is only in Paul that we encounter a rule banning divorce itself: 1 Corinthians 7:10–11.

Rabbinic law

Rabbinic *halakhah* is not characterised by eschatological fever, and Mosaic law remains as its basis. It retains the biblical emphasis upon forbidden relationships. Indeed, the early texts dealing with the relationship of a husband with his own adulterous wife still use the language of *arayot* (forbidden sex) rather

30 See W Meeks, 'The image of the androgyne: some uses of a symbol in earliest Christianity', (1974) 13 *History of Religions* 165–208.

31 *Genesis Rabbah* 8:1: 'R. Yirmiyahu ben El'azar said: At the time when the Holy one Blessed Be He created *adam harishon*, he created him as an *androgunos*, as it is written (*Gen.* 5:2): *zakhar unekevah bara'am*.'

32 Genesis 1:26: 'And God said, Let us make man in our image, after our likeness.'

33 Even for the lay woman, Paul finds it necessary to state that she is free to remarry when widowed: 1 Corinthians 7:39.

34 See further Jackson, '"Holier than thou"', pp 219–221, arguing from the extension of the definition of adultery to include the husband who remarries after an (invalid) divorce (see n 34): such a remarriage, without more, would be merely polygamous, not adulterous.

35 Matthew 19:9; Mark 10:11; Luke 16:18.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

than *gittin* (divorce): we do not read that the husband is 'commanded to divorce' (as with Matthew's Pharisees), but rather that the wife is 'forbidden to her husband'.[36]

Rabbinic marriage law, however, is fully institutionalised: we find entire tractates of the *Mishnah* devoted to betrothal, the marriage contract and divorce. The historical factors that prompted such a development are largely beyond the scope of this paper.[37] As for the rabbinic understanding of the theological basis of marriage law, we have little comparable to the direct biblical invocations of Qumran and the New Testament. Indeed, Neusner has noted the *absence* of reference to creation[38] models,[39] particularly remarkable given the importance he attaches to that model as the theological basis of much of the rest of early rabbinic law.[40] It is difficult to resist the conclusion that this absence itself reflects reaction against the New Testament and Qumran uses of the model. Rather, debate as to the underlying theory of marriage surrounds inferences from concrete rules and from terminology. On the one hand, betrothal is clearly based upon property models (*kinyan*): the woman is 'acquired' by her husband;[41] on the other, the relationship is described as one of consecration (*kiddushin*). Neusner maintains that the governing focus of the *halakhah* is 'the act of sanctification, in the model of an animal for use at the altar, of a woman for the bed of a man'.[42]

In at least two respects, the history of Jewish marital law provides data relevant to the analytical questions prompted by the concept of transformative accommodation. The first relates to the 'horizontal relationships' between

36 See above, n 28. For the Rabbis, adultery also had implications for 'vertical' relationships, since any children born from it were *mamzerim*, whose own marriages were themselves severely restricted.

37 I have argued in '"Holier than thou"' and 'Marriage and divorce' that the formalisation of divorce criteria may reflect a reaction to the Pauline position. However, this hardly accounts for the entire corpus; nor do Roman law texts provide likely models.

38 Or, we may add, to the prophetic marriage metaphor.

39 Jacob Neusner, *The Theology of the Halakhah* (Leiden, 2001), p 87: 'Israel forms the counterpart to Adam and Eve, but only at a few points is the metaphor articulated.'

40 Jacob Neusner, *The Halakhah: an encyclopaedia of the law of Judaism* (Leiden, 2000); idem, *The Theology of the Halakhah*. See also BS Jackson, 'On Neusner's theology of *halakhah*', (2008) 25 *Diné Israel* 257*–292* [English section].

41 The three possible procedures for constituting betrothal – *kesef* (money/property), *shtar* (a deed), *bi'ah* (intercourse) – are clearly an adaptation of the modes of acquisition of slaves and land – *kesef, shtar, ḥazaqah* (an act of possession) – as is clear from the continuation of this same chapter of the Mishnah (*M Qiddushin* 1:2–5).

42 Neusner, *The Theology of the Halakhah Theology*, p 87. More specifically, idem, *The Halakhah*, vol 4, p 298: 'Particular points of comparison emerge in the very language commonly used for both animals for the altar and women for men. That is, a woman is consecrated to a particular man, just as an animal is consecrated to the altar for the expiation of a particular inadvertent sin that has been carried out by a particular person. A sin-offering consecrated for a particular person and a specific action he has inadvertently performed proves null if it is used for another offering than the designated class, another person, or another sin by the same person. A woman consecrated for a particular man is subject to exactly the same considerations of sanctification (mutatis mutandis). In both cases the relationship is one of consecration, meaning, differentiation from all secular purposes and designated for a sacred function or task.'

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

husband and wife, and the status of the wife's biblical rights to food, clothing and even (as rabbinically understood) marital rights.[43] Despite the general principle that 'Contracting out of a Law contained in the *Torah* as to a monetary matter is valid, but as to a non-monetary matter is void',[44] early Palestinian traditions held that the parties could opt out of such aspects of marital law by conditions inserted in the marriage contract. Their interpretation of 'monetary', for this purpose, was extraordinarily wide: they held that a betrothal 'on condition that you have no claim against me for food, clothing, *or conjugal rights*' was valid.[45] Moreover, Rabbi Yose in the Palestinian Talmud appears to have classified as 'monetary' a condition granting the wife a unilateral right to divorce.[46] Neither the condition relating to conjugal rights nor that for unilateral divorce has survived in contemporary Jewish law; nevertheless, the fact that such conditions are recorded in the early, classical sources indicates that the scope for 'accommodation' based on voluntary opt-outs may be greater than might have been anticipated.

The second respect relates to polygamy. In eleventh-century Germany, Rabbenu Gershom of Mainz pronounced a ban (*ḥerem*) against those practising polygamy, but this applied only in Ashkenaz and was not accepted by Sephardi Jews. There is an unsurprising correlation here with the Christian/Muslim environments in which Ashkenazi/Sephardi Jews largely lived. Indeed, the late Ze'ev Falk argued that the ban was largely prompted by pressure from Christian morality, and the desire to avoid a '*ḥillul hashem*' (desecration of God's name) by giving the impression that Jewish law endorsed lower standards.[47] If so, we may regard this as an early example of a Jewish 'transformative accommodation'. A similar issue presented itself with the immigration to the modern State of Israel of polygamous Yemeni and Iraqi Jews.[48] Of course,

43 Exodus 21:10; see above, n 16.

44 Noted above, p 136.

45 *Tosefta Kiddushin* 3:8. See further Y Margalit, 'On the dispositive foundations of the obligation of spousal conjugal relations in Jewish law', in J Fleishman, *Jewish Law Association Studies XVIII: the Bar-Ilan Conference volume* (Liverpool, 2008), pp 161–186.

46 *Ketubbot* 5:8 (30b). The clause is recorded incompletely, and there is dispute over its original scope (see further 'Towards a solution to the problem of the *mesorevet get*: preliminary report of the Agunah Research Unit' (Working Papers of the Agunah Research Unit, December 2006), s 2.1, available at <http://www.mucjs.org/PrelimRep.pdf>, accessed 28 January 2009), but such clauses (the precise effect of which is also debated) appear later, in marriage contracts found in the Cairo Geniza: see BS Jackson, 'Some reflections on family law in the Papyri', in H Gamoran, *Jewish Law Association Studies XIV: The Jerusalem 2002 Conference Volume* (Binghamton, NY, 2004), pp 160–162.

47 ZW Falk, *Jewish Matrimonial Law in the Middle Ages* (Oxford, 1966), ch 4; see also BS Jackson, 'How Jewish is Jewish family law?', (2004), 55 *Journal of Jewish Studies* 226–227. For other examples of the use of *ḥillul hashem*, see e.g. *Tosefta Baba Kamma* 10:15, regarding robbing gentiles.

48 Mandatory legislation (Criminal Code Ordinance 1936, s 181), which remained in force in the State of Israel and is now reflected in the *ḥok Ha-Onshin* 1977 ss 176, 178, made bigamy a criminal offence; and in 1950 the Chief Rabbinate of Israel extended Rabbenu Gershom's *Ḥerem* to all Jews. However, Jews who married two wives before migrating to Israel were not required to divorce; indeed, those polygamous marriages remained recognised for various purposes (including inheritance). Mandatory law exempted Muslims from the sanctions for bigamy if their personal law allowed

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

Jewish law never *required* polygamy:[49] the fact that Ashkenazi and Sephardi practice differed[50] might suggest that this was a matter of community custom rather than law, and for this reason too susceptible to 'accommodation'.

JURISDICTION IN THE STATE OF ISRAEL[51]

The modern State of Israel preserves a particularly vivid example of a legal system with multiple state and religious jurisdictions,[52] and provides clear models of the issues that arise in relation to parallel jurisdictions, as well as the ideological issues inherent in accommodation. Thus, the State of Israel has not only rabbinical courts, but also Islamic courts and courts for some Christian communities. They operate in one of three ways, depending upon the nature of the subject matter: jurisdiction is either 'exclusive', 'concurrent', or 'arbitral' (the last, not strictly a form of jurisdiction at all).

'Exclusive' jurisdiction means that the religious courts have a monopoly in the area concerned, there being no parallel state jurisdiction. This applies, as regards the (state) rabbinical courts, only to marriage and divorce; the exclusive jurisdiction of Islamic courts is wider, extending also to aspects of succession. This exclusive jurisdiction has become increasingly controversial, even amongst the various Orthodox communities, and the former Sephardi Chief Rabbi Bakshi-Doron has himself supported the case for the introduction of civil marriage.

'Concurrent' jurisdiction applies in other areas of personal status, notably (for Jews) succession. Here the jurisdiction is genuinely 'parallel', in the sense that the parties have a choice of court, and therefore a choice between the application of *halakhah* and Israeli state law, and this not infrequently results in a 'race for jurisdiction', to get to the desired court first. Despite this, however, secular law exercises a supervisory role in relation to religious law. On the one hand, the decisions of the religious courts may be challenged in the (civil) High Court on grounds of breach of the rules of natural justice (the *bagatz* procedure); on the other, the Women's Equal Rights Law of 1951 applies even in the religious courts (other than in matters of marriage and divorce). This last may be regarded

them more than one wife. See further RH Eisenman, *Islamic Law in Palestine and Israel* (Leiden, 1978), 98–99, 104–105, 183–184.

49 Except, arguably, where a Jewish man was childless and his wife did not agree to a divorce after 10 years of marriage.

50 In fact, many Sephardi communities adopted the Ashkenazi position (even though they did not regard themselves as bound by Rabbenu Gershom's ban), by inserting a monogamy clause in the marriage contract (which was never regarded as 'Contracting out of a law contained in the Torah' – see above, p 143) or by taking an oath.

51 An earlier version of this section is available as 'The Archbishop and *shari'a*: a Jewish/Israeli perspective', available from <http://www.mucjs.org>, accessed 28 January 2009.

52 Itself inherited from the 'millet' system of the Ottoman Empire, which is still used in varying degrees in Egypt, Iran, Iraq, Jordan, Lebanon, Morocco and the Palestinian Authority.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

as an example of 'accommodation', but it is not 'transformative'. It does not change the internal rules of Jewish law (according to which daughters do not inherit in the presence of sons), and, indeed, traditional law may still be applied in the religious courts, despite the 1951 Law, if all interested parties are of age and consent thereto.[53]

Beyond this, and particularly in commercial matters, the role of the religious courts is purely 'arbitral', depending on agreement between the parties; only where there is such an arbitration agreement is the verdict enforceable in the civil courts. Paradoxically, a recent Supreme Court decision excluded the *state* rabbinical courts from exercising even this function, though the Knesset is currently considering restoring it.

The ideological battle in Israel has not concerned the rights of religious *minorities* to apply their own law in matters of personal status, but rather an internal battle within the *majority* (Jewish) religious community as to whether the *halakhah* should be adopted (subject to the rights of religious minorities) as the law of the state. This has long been the aspiration of the *mishpat ivri* movement,[54] a leading exponent of which, Chief Rabbi Herzog, advanced an argument that may be regarded as a genuine example of transformative accommodation. In 1949, he prepared a manuscript entitled 'A proposal for *takkanot* in matters of inheritance', seeking to equalise the rights of daughters with those of sons in the law of inheritance, through enacting that a standard clause to that effect be inserted in the marriage contract.[55] His motivation is described thus by a recent commentator:

> Rabbi Herzog's aspirations to achieve the adoption of Jewish law as the law of the State were nevertheless tempered by the sober realization that many aspects of Jewish law were simply unacceptable to the vast majority of

53 Women's Equal Rights Law, 1951, s 1: 'A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceeding, against women as women, shall be of no effect'; s 7: 'All courts shall act in accordance with this Law; a tribunal competent to deal with matters of personal status shall likewise act in accordance therewith, unless all the parties are eighteen years of age or over and have consented before the tribunal, of their own free will, to have their case tried according to the laws of their community.'

54 On its methodological approach, see BS Jackson, '*Mishpat ivri, halakhah* and legal philosophy: *agunah* and the theory of "legal sources"', (2002) 1 *Jewish Studies, an Internet Journal* 69–107, available at <http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf>, accessed 28 January 2009. A number of useful articles on its early proponents have been written (mainly in Hebrew) by Amichai Radziner, including '"A scholar who was not properly eulogized": J.S. Zuri and his Jewish law studies on the background of Jewish law research history', (2005) 23 *Shenaton Ha-Mishpat Ha-Ivri* 259–349; '*Mishpat ivri* is not halakhah (but is nonetheless of value)', (2005) 16 *Akdamot* 81–109; 'From dogmatist to historian: Asher Gulak and research on Jewish law in the Hebrew University, 1925–1940', (2005–2006) 43 *Jewish Studies* 169–200.

55 I Herzog, 'A constitution for Israel according to the *Torah*', ed I Warhaftig, published posthumously in his *Collected Works* (Jerusalem, 1989), vol 2; extracts translated in B. Greenberger, 'Rabbi Herzog's proposals for *takkanot* in matters of inheritance', in BS Jackson (ed), *The Halakhic Thought of R. Isaac Herzog* (Atlanta, 1991), pp 49–112.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

> Israelis. Up until the creation of the State, the image of Jewish law, as perceived by most Jews in the country, was one of fossilized antiquity, of a system that could not presume to cope with the complexities of a modern state or to adapt itself to the fundamental liberalism of a modern democratic society. A cardinal case in point is that of Jewish inheritance law, which denies any right of inheritance to women, whether as wives or daughters, in all cases where the decedent leaves male heirs, and which grants the first-born son a double share vis-a-vis the other heirs. These are entirely inconsistent with modern notions of equality, and were frequently cited as examples par excellence of the kind of rules that made Jewish law inappropriate for the modern State of Israel. . . . Rabbi Herzog was convinced that the machinery in fact exists within Jewish law to introduce changes that would go a long way toward answering the arguments of its critics. . . . Rabbi Herzog believed adoption to be critical to the future survival and development of Jewish law, he believed that a sufficient justification therefore existed for enacting *takkanot* that would explicitly and directly equalize the inheritances of all heirs.[56]

Rabbi Herzog failed, however, to persuade his rabbinical colleagues to adopt the reform. Moreover, it is clear that his underlying theological approach, which claimed that the foundation of the State of Israel represented the 'beginning of redemption',[57] and thus justified a greater measure of *halakhic* innovation to meet the needs of the hour, was also rejected. The rabbinic leadership in Israel has since Herzog's day moved from a 'Religious Zionist' to an Ultra-Orthodox (*Haredi*) orientation, for whom, in effect, the secular government is no different from the Diaspora governments under which the *halakhah* developed through the two millennia of exile.[58] Any 'transformative accommodation' that has occurred has been accommodation of the secular law to religious demands, as in the Law of Return (Amendment No 2), 1970, which rejected the 'secular' definition of a Jew[59] (as self-definition) in favour of a quasi-*halakhic* definition.[60]

56 Greenberger, 'Rabbi Herzog's proposals', p 50.

57 He refers to 'the light of Israel that, with the help of its Redeemer, has now begun to shine again': see ibid, p 50.

58 This is well discussed by Yaacov Bazak, 'The halachic status of the Israeli court system', in *Crossroads: halacha and the modern world*, vol 2 (Jerusalem, 1987), also available at <http://www.jlaw.com/Articles/israelcourt.html>, accessed 28 January 2009, who notes a significant *haredi* mistranslation of a vital text of Maimonides on recourse to gentile courts. The text, *Hilkhot Sanhedrin* 26:7, was quoted as: 'Anyone who litigates with non-Jewish laws [*dinim*] or in their courts . . . is an evildoer and is considered as though he has blasphemed and raised his hand against the Torah.' In fact, it reads: 'Anyone who litigates with non-Jewish judges [*dayanim*] or in their courts . . .'.

59 *Shalit v Minister of the Interior*, HC 58/68, *PD* 23(2) 477.

60 'Jew' means 'anyone who was born to a Jewish mother or who has been converted, and who is not a member of another religion'.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

Israeli history indicates very clearly not only that 'transformative accommodation' may go in either direction but also that the accommodation that secular law makes is not limited to granting some form of jurisdictional pluralism but is also found in the substantive modification of secular law to meet the demands of religious minorities, albeit through the operation of the democratic process. We have not yet seen examples of this in England, and this does not appear to be what the Archbishop has in mind. But we do encounter examples in the United States, in the areas of abortion and same-sex unions.[61]

'TRANSFORMATIVE ACCOMMODATION' IN ENGLISH LAW?

We may now return to English law, and the possibilities for 'transformative accommodation', in the light of the analysis and examples sketched above. It is clear that both state law and religious systems have to ask what their respective ideologies regard as non-negotiable, and what may be subject to 'accommodation'.[62] We may again take marital law as our principal example.[63]

No one that I know of, least of all Dr Williams, advocates the introduction of any form of exclusive religious jurisdiction in England, such that Jews could only get married and divorced in a rabbinical court, Muslims in a sharia court. This would violate the general principle on which the Archbishop rightly insists, namely that any accommodation with religious law should not deprive citizens of rights that they have under state law. The fact that Jews marry in a synagogue (whether Orthodox or Progressive) and do not have to go to a registry office for a civil ceremony (as Muslims do) is no exception to this principle. There is legislation authorising the appointment of Jewish officials as civil registrars, so that the civil marriage is traditionally performed in synagogue (immediately after the

61 Dr Williams recognises this kind of danger, but equates it with what we may term secular fundamentalism: '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 sociopolitical arrangement is a kind of betrayal. It also occurs when secular government assumes a monopoly in terms of defining public and political identity' (Williams, 'Civil and religious law in England', p 265).

62 Dayan Berger, as reported in *The Jewish Telegraph*, 14 February 2008, specifically rejected any reversion to the 'millet' system.

63 The limitations here do not apply to commercial law, where it is normal practice for a *bet din* to require both parties to sign a compulsory arbitration agreement before they will hear the case. In this respect, religious institutions have no particular privilege: any secular body may be chosen by the parties to exercise a similar role. There is no reason why Muslim courts may not operate under the same arbitration provisions. However, it is important to distinguish the different legal regimes applicable in different legal contexts. The *Sunday Times* of 14 September 2008 is thus misleading when it reports: 'Muslim tribunal courts started passing sharia judgments in August 2007. They have dealt with more than 100 cases that range from Muslim divorce and inheritance to nuisance neighbours. . . . Jewish Beth Din courts operate under the same provision in the Arbitration Act and resolve civil cases, ranging from divorce to business disputes. They have existed in Britain for more than 100 years, and previously operated under a precursor to the act' (available at <http://www.timesonline.co.uk/tol/comment/faith/article4749183.ece>, accessed 28 January 2009).

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

religious ceremony, conducted 'according to the usages of the Jews') by signing the civil register (Marriage Act 1949).[64] There is no reason why this should not be extended to Muslims, although the very fact that the privilege extends to both Orthodox and Progressive marriages illustrates the fact that the state is here defining membership of religious groups.[65]

Civil and religious marriage are thus separate, despite the procedural short-cut. It is open to a Jew to opt to have only one and not the other, though in practice there is little reason to opt for a religious marriage only. As regards divorce, the same situation obtains, though without the short-cut: a religious divorce does not terminate the civil marriage, any more than a civil divorce terminates the religious marriage.[66] Until recently, Jewish courts (*batei din*) in England required parties to have obtained a civil divorce before they presented themselves for a religious divorce. A recent legislative change, however, has prompted a reversal of the traditional sequence. In response to the problem of the *agunah*,[67] the Divorce (Religious Marriages) Act 2002 grants a discretion to the civil judge in such cases to delay the decree absolute of divorce until satisfied that the barrier has been removed. This certainly represents a 'transformative accommodation' of state to religious law. It is designed to provide a partial remedy to what is widely regarded as an abuse of Jewish law,[68] where the husband uses withholding of the *get* (the Jewish bill of divorce, whose writing and delivery to the wife is a private act, rather than an act of the court) as a means of pressure over ancillary matters, or even as a straightforward form of extortion. However, there are situations where the problem is one of genuine religious differences. Suppose the wife has fallen in love (but not had relations) with another man (perhaps a gentile), and her husband refuses her a *get*, on the

64 Thus, it is the state that defines the procedures for a civil marriage; it does not simply recognise a religious marriage. The religious ceremony itself is not sufficient if the parties do not comply with the other provisions of the Act, regarding registration and certification.

65 According to the Marriage Act 1949, s 26(1)(d), the procedure applies to 'a marriage between two persons professing the Jewish religion according to the usages of the Jews'. Section 53(c) provides that such marriages shall be registered 'by the secretary of the synagogue of which the husband is a member'. Such a secretary is, however, to be certified by specified Jewish authorities (s 67): in effect, the Board of Deputies for Orthodox Jews, the West London synagogue for Reform Jews and the Liberal Jewish Synagogue, St John's Wood for Liberal Jews. In such matters, the Board of Deputies would act on the advice of the (Orthodox) Chief Rabbi's office. The range of authorities now recognised in this context relieves the Orthodox authorities of the earlier embarrassment of certifying Reform and Liberal marriages as satisfying the requirements of s 26(1)(d), but the legislation has apparently not yet caught up with the establishment of Masorti synagogues, for whom, it seems, the President of the Board of Deputies (s 67(a)) must certify the name of 'the secretary of a synagogue in England of persons professing the Jewish religion'.

66 In fact, there is a partial parallel to this even in the State of Israel, where the divorce of Jews is recognised for civil purposes not on the basis of the *get* delivered by the husband but rather on the basis of a 'certificate of divorce' (*te'udat gerushin*) issued by the *bet din*.

67 The 'chained wife', whose husband (who may already have obtained a civil divorce) refuses to grant his wife a religious divorce, thus preventing her from entering into a new religious marriage.

68 On the problem, and attempts to resolve it internally, see <http://www.mucjs.org/agunahunit.htm>, accessed 28 January 2009, and the papers available from its 'Publications' page.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

grounds that he is not obliged to do so by Jewish law; here the Act does not apply, since it is not the party seeking the civil divorce who is blocking the religious divorce. The wife may obtain her civil divorce (and remarry civilly). In Jewish law, however, she is still married to the first husband; her second civil marriage is adulterous, and any children born of it will be *mamzerim*. There is clearly no transformative accommodation here, on either side. The grounds for divorce are incompatible and non-negotiable. If the woman is Orthodox, she has to make her choice. Frequently, she will remain an *agunah*.

It is in some of the matters ancillary to marriage and divorce (which fall within the 'horizontal' and 'vertical' spheres of marriage law, distinguished above) that issues of supplementary jurisdiction may arise. We have seen that there are Jewish sources that allow contractual opt-outs on financial matters; this can apply both during marriage and in relation to divorce. Such contractual provisions (if not the application of *dina demalkhuta dina*) would justify recourse to civil courts in such matters (despite the traditional Jewish discouragement of recourse to gentile courts). Indeed, the London Bet Din will not entertain such cases,[69] as violating the principle that the jurisdiction of the family law courts is not to be ousted.[70] (Similarly, it was in this legal context that the Canadian province of Ontario legislated in 2006 against the use of arbitration by religious courts in matters of family law,[71] following a politicisation of the issue not

69 Dayan Lichtenstein, of the *bet din* of the Federation of Synagogues, commenting in *The Jewish Chronicle* of 14 February 2008 on the Archbishop's argument, observed: 'Although commercial disputes, when the parties have signed a deed of submission to arbitration by the beth din, are enforced by the English courts, marital issues are not. The beth din's authority to deal with assets in divorce proceedings is doubtful and it has no say over custody of children – although a rabbi who lives in the Orthodox Jewish world is better placed to understand its nuances and to rule on details of access and contact than an English family court judge.' Dayan Lichtenstein saw the Archbishop's lecture as inviting an extension of religious jurisdiction into such matters and (unlike Dayan Berger, writing in the same issue) welcomed it.

70 The same principle was affirmed by the Minister of Justice, Jack Straw, in Parliament on 24 November 2008, in relation to Muslim arbitration in such matters: 'Arbitration is not a system of dispute resolution that may be used in family cases. Therefore no draft consent orders embodying the terms of an agreement reached by the use of a Sharia council have been enforced within the meaning of the Arbitration Act 1996 in matrimonial proceedings.' The full text is available at <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081124/text/81124w0012.htm>, accessed 28 January 2009.

71 Family Statute Law Amendment Act 2006. The background is described thus by CL Eisgruber and M Zeisberg, 'Religious freedom in Canada and the United States', (2006), 4 I-CON 265–266: 'Just before this article went to press, groups in Canada and around the world took to the streets to protest a proposal that would have allowed Islamic couples to obtain legally binding decisions from private tribunals applying Shari'a law. The proposal involved an application of Ontario's Arbitration Act, a very general statute that enables consenting parties to submit disputes to private arbitrators. Ontario's Muslims contended that they should be able to invoke the act for family law disputes, something that Orthodox Jews and Catholics had already done. Critics responded that Shari'a was unacceptably discriminatory, and that Muslim women would be coerced to participate in private tribunals and surrender rights they had under Canadian family law. In mid-September 2005, Ontario's premier, Dalton McGuinty, surprised both sides in the controversy by moving to ban all religious arbitrations, including Jewish and Catholic ones as well as the controversial Shari'a tribunals. Disputes about the authority of arbitrators to apply religion-based family law have arisen

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

dissimilar to that which followed the Archbishop's speech in February 2008.) The position in England is thus quite different to that of the concurrent jurisdiction found in Israel, where the winner of the race for jurisdiction is able to impose the chosen forum (and law) on the slower party.

Of course, consent to religious arbitration (and thus sometimes to the application of discriminatory religious rules) may be culturally conditioned or pressured: a religious woman may have to choose between family and community loyalty and her own personal interest. State law in such circumstances has to decide to what extent it will compromise its individualistic principles. We have seen the way in which this is done in Israel, in respect of the Women's Equal Rights Law of 1951. Not everyone, however, is satisfied with the formality of an initial, written consent. Ayelet Shachar proposes that, despite the concept of binding arbitration, a woman should have the right to withdraw from the proceedings of a religious arbitration *at any stage*, if she fears discrimination.[72]

However, all this may be a red herring in terms of the Archbishop's real agenda. From a Christian point of view, he is not interested in jurisdictional issues. The role of consistory courts applying the ecclesiastical law of the Church of England is not mentioned. There is no argument that these courts (which concern themselves only with internal church matters) should acquire jurisdiction (whether exclusive or concurrent) over marriage and divorce of Christians. The situation of catholicism is, of course, different, but the Archbishop does not address questions of its domestic application.

If jurisdiction is not in fact the Archbishop's primary interest, what is that interest and where does the question of jurisdiction come into the argument? The answer appears to be that Dr Williams is seeking to build a religious coalition, led by the Church of England (as the 'established' Church), in favour of exemptions from secular law on grounds of religious conscience. But the Church cannot argue for such privileges on a purely Christian basis: 'Christians cannot claim exceptions from a secular unitary system on religious grounds (for instance in situations where Christian doctors might not be compelled to perform abortions), if they are not willing to consider how a unitary system can accommodate other religious consciences'.[73] There is a combination

elsewhere – including in New York, with regard to Orthodox Jewish women seeking gets in divorce cases – but Ontario's battle over Shari'a was especially heated and visible. It involved not only free exercise-type issues (insofar as an Islamic minority sought accommodation for its religiously motivated practices) but also establishment-type issues (insofar as the state was asked to enhance the power of Islamic institutions by allowing them to promulgate legally authoritative rulings).'

72 Shachar, 'Religion, state, and the problem of gender', p 73: 'the tribunal would have to ensure legal representation for both parties, clearly register their consent, and permit the parties to turn to the civil court at any time if they feared that their rights were being violated'. See also pp 61–66 on 'the Canadian debate over the establishment of a private Islamic arbitral tribunal'.

73 From the Archbishop's website, <http://www.archbishopofcanterbury.org/1581>, accessed 28 January 2009, commenting on the controversy.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

of moral equity and political strategy in this argument. But the link with jurisdictional issues is far from necessary.

We may distinguish four areas in which claims for the equal treatment of religions may be made. One is jurisdiction, a second is discrimination law, a third is conscientious objection and a fourth is the protection of the criminal law. This last was an area where, until recently, there was a manifest inequality. The Race Relations Act 1965 criminalised incitement to racial hatred, and though this did not explicitly cover religious hatred, the courts interpreted the definition of racial groups as covering Jews and Sikhs but not Muslims or Christians. In 2006, the Racial and Religious Hatred Act effectively removed this inequality, by creating offences involving 'stirring up hatred against persons on religious grounds'.

Religious discrimination, particularly in employment law and the provision of services, is also outlawed both by UK legislation and by a number of international conventions to which the United Kingdom is a party. In this context, a 2001 Cambridge study commissioned by the Home Office addressed, inter alia, a question clearly of interest to the Archbishop: Who should take the lead in having an overview of and responsibility to monitor developments and propose changes in this area? The Cambridge study does not suggest that this be the head of the established Church, nor even the monarch as 'Defender of Faiths' (as the Prince of Wales would have it). A more obvious option would be to have a Commission for Religious Equality, parallel to the existing Commission for Racial Equality.

However, the Archbishop's interest is clearly wider than the areas covered by discrimination law. Though he speaks in terms of 'justified conscientious objections', he is really advocating conscientious exemptions. The former concept is generally understood as a moral right to break the law (and take the consequences) rather than a legally recognised exemption (a 'liberty of conscientious opting-out') from adhering to a particular law. The Archbishop fears that secular society is in danger of going too far in applying the 'one law' principle (a phrase, incidentally, clearly of biblical origin: for example, Leviticus 24:22).[74] There is, however, the danger that the 'one law' principle may come to be applied in the opposite direction. The difference between an exemption for Christian doctors from being compelled to perform abortions and a general legislative restriction on abortion is a function simply of the respective strengths at particular times of the religious and secular constituencies (and the balance within individuals between religious and civic values).

74 However, members of non-Christian religions are hardly likely to sign up to his agenda in the terms in which it was expressed to the General Synod: 'If we can attempt to speak for the liberties and consciences of others in this country as well as our own, we shall I believe be doing something we as a Church are called to do in Christ's name, witnessing to his Lordship and not compromising it' (see <http://www.archbishopofcanterbury.org/1583>, accessed 28 January 2009).

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

By linking these quite discrete issues in the way that he did, Dr Williams risked provoking a political backlash (which we may compare with that in Ontario) which could undermine some of the positive aspects of the relationship between secular and religious law. Those who advocate civil remedies to problems within religious law have cause to reflect on the stability of such strategies.

CONCLUSIONS AND FURTHER QUESTIONS

The concept of 'transformative accommodation' is a useful one, but it requires careful examination of the ideological foundations and strength of both religious and secular positions. The history of marriage in the Judaeo-Christian tradition well exemplifies this. Difficult questions arise, which require the integration of legal with theological analysis. For example, if the New Testament foundations of Christian positions on divorce presuppose a context of imminent eschatological expectation, what happens when the *eschaton* is deferred by the need to await a second coming, so that the theological context becomes one of 'realised eschatology'?

The fact that, in modern societies, individuals are often simultaneously members of both civic and religious communities is apt to produce conflated religio-civic institutions.[75] This is what appears to have happened in the case of marriage. One possible response is that of complete separation. Thus a Christian think-tank, Ekklesia, has argued that legal marriages should be scrapped and replaced with a range of civil partnerships: there should be a separation of the role of Church and state in weddings. Under its proposals, couples could specify the kind of legal commitment they wanted to make to each other. The current situation, argues Jonathan Bartley (the Director of Ekklesia), is confused by attempts to fuse the Christian and civil concepts of marriage onto a 'one size fits all' arrangement:

> At the moment there is only one form of marriage defined under law, which everyone has to take or leave. It does not reflect Christian ideas of marriage, which are based on a covenant before God, rather than a legal contract and agreement between individuals. And it does not properly acknowledge the reality of the existence of other, secular viewpoints, either. . . . Religious communities are entitled to have their own ideal of marriage which they offer to the wider society. But requiring others to

75 But sometimes this can be a solution rather than a problem. Despite some views that the principle of *dina demalkhuta dina* ('the law of the land is (recognised as part of Jewish) law') applies even in succession, many Orthodox Jews feel bound to write wills under Jewish law. But Jewish lawyers have found ways of adapting the formalities of Jewish wills in such a way that the resulting documentation conforms to both Jewish and English law.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press

> accept this definition by law benefits no one. It is confusing and counter-productive.[76]

But this fails to grapple with the detail of what is entailed in marriage. The logic of Bartley's argument must surely be that a Christian marriage could only be terminated by a church procedure, while the (concurrent) civil partnership could be terminated by a state procedure akin to secular divorce. But what of those religious traditions that also address the 'horizontal' and 'vertical' issues? It is difficult to envisage concurrent regimes applying in these areas; there must be ways of deciding which system shall apply. Either one system imposes its rules on the other, or one opts out by allowing recourse to the other. Indeed, the concept of 'transformative accommodation' might here be applied *between* religious traditions in a multicultural society. Perhaps some Christians would like Church courts to undertake a comparable arbitral function to that exercised by the courts of the Jewish and Muslim communities.

76 As reported at <http://news.bbc.co.uk/1/hi/uk/5089932.stm>, accessed 28 January 2009. For the full Ekklesia paper, see <http://www.ekklesia.co.uk/research/papers/abolishmarriage>, accessed 28 January 2009.

https://doi.org/10.1017/S0956618X09001926 Published online by Cambridge University Press