The Commission on Religion in British Public Life: Submission of Dr Ronan McCrea.

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Summary

My submissions relate to questions 1 and 2 from the Commission's request for submissions, namely the extent to which recent legislative changes are beneficial or the degree to which existing laws need to be modified.

My submissions suggest that the balance currently struck between freedom of conscience and the right to be free of discrimination is satisfactory and cannot be changed without undermining anti-discrimination more broadly.

On the issue of the expansion of the jurisdiction of religious tribunals, I suggest that such expansion should not be encouraged. It is not possible to expand the jurisdiction of religious tribunals in a way that adequately protects the rights of those who may be disadvantaged by having their claims adjudicated upon by such tribunals or the freedom of religion of the faiths in question. In addition, minimising the use of the state legal system by particular communities undermines a key element of shared life in a multi-faith society.

I. Assessment of Recent Legislative Changes and the Need to Modify the Current Law

The major relevant legislative change relevant to the role of religion in public life in recent times has been the extension of anti-discrimination rules to cover discrimination on grounds of sexual orientation. This has created dilemmas for those whose religious beliefs in relation to the immorality of homosexuality or homosexual behaviour mean that they feel they ought to refuse to provide services which they regard as encouraging or facilitating sinful conduct. The British[1] and European[2] courts have been clear that the law as it stands does not require that an exemption be given to religious individuals permitting them to engage in discrimination in order to abide by their beliefs.

1. *The Balance Struck between Freedom of Conscience and Non-Discrimination Has Not Changed*

It is important to note that the balance struck by the law between the need to protect freedom of conscience and belief on the one hand and the need to prevent discrimination on the other, has not changed in recent years. For a number of decades the law has struck the balance so that individuals are free to hold whatever beliefs they like, including discriminatory beliefs, but they are not entitled to refuse service on the basis of those beliefs when they choose to provide services to the general public.

[1] *Bull v Hall* [2013[UKSC 73.

[2] *Eweida and Others v UK* [2013] ECHR 37.

What has changed in recent years, is the inclusion of discrimination on grounds of sexual orientation within this framework. Given the teachings of many religions, this has meant that the limits that have been placed on the freedom of conscience and belief of everyone for some time in relation to matters such as gender and racial discrimination, now apply to individuals holding mainstream religious beliefs on matters of sexual orientation. The space granted by the law to free conscience has not changed.[3]

2. A Religion-Specific Exemption from Anti-Discrimination Law Is Unjustifiable

The idea that the free conscience rights and freedom of expression of religious individuals deserve greater weight than those of non-religious individuals is inconsistent with European Court of Human Rights' repeated declarations that Article 9 'is also a precious asset for atheists, agnostics, sceptics and the unconcerned'[4] and its recognition that it applies equally to non-religious beliefs such as pacifism[5] and veganism.[6] If we are all equal, the freedom of religion and conscience of each of us is due equal respect whether it is religious in nature or not. One can argue that the state should no longer seek to decide whom one can and cannot serve at work, rent a house to, pay less or more money to or that it should decide these issues much less frequently than current legal arrangements permit. But one cannot be true to a commitment to treat everyone with equal concern and respect and at the same time argue that the state should coerce those with particular kinds of beliefs or identities but not those with other kinds of belief. An egalitarian legal order cannot allow an employer whose religious beliefs say that mothers of young children should not work outside the home to refuse a job to a mother but coerce a second employer who holds the same views with the same intensity for non-religious reasons.

II. Appropriate Relationship between Religious Tribunals and the State Legal System

There have been repeated calls for expansion of the jurisdiction of religious tribunals to cover areas previously adjudicated on by the state legal systems in recent times. In 2013 the High Court of England and Wales issued a ruling that expands the scope for religious courts to adjudicate upon family law disputes subject to supervision of the resulting judgment for compliance with British legal norms. In this case (*AI v MT)*[7] Baker J was faced with a contentious divorce case, including issues of child custody, between a wife and husband both of whom were Orthodox Jews and who had requested that their dispute be resolved by the New York Beth Din. Baker J sought information from the Beth Din on their approach to the case, particularly in relation to the question of the importance of the best interests of children. Having received the reply that "In conjunction with Halacha the best interests of the children are the primary consideration in resolving cases like this."[8] Baker J then decided that he "would endorse the parties" proposal to refer their disputes to a process of arbitration before the New York *Beth Din* on the basis that the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude

[3] I have discussed these matters in greater length in 'Religion in the Workplace: *Eweida and Others v United Kingdom' Vol. 77 (2) (2014) Modern Law Review* 277

[4] *Kokkinakis v Greece* (1994) 17 EHRR 397.

[5] *Arrowsmith v UK* (1978) 19 DR 5.

[6] *H. v UK* (1993) 16 EHRR DR 44.

[7] *AI v MT [2013] EWHC 100 (Fam).*

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

either party from pursuing applications to this court in respect of any of the matters in issue."[9] The judge also noted that while there is a long history of mediation in family law, when he made this order (February 2010), there was no precedent for arbitration in family law proceedings. However he found it significant that, during the course of the case before him, the Family Procedure Rules 2010 came into force which included an obligation to encourage Alternative Dispute Resolution as part of a broader duty to actively manage and expedite cases.[10]

The High Court was subsequently involved in issuing various orders in relation to child custody and related matters while the arbitration was ongoing. In the end, it ratified the decision of the Beth Din on the grounds that it was consistent with the best interests of the children and was satisfactory from a financial point of view.[11] The judge made some broader comments about the significance of the case and the reasons for his approach stating:

"[…] at a time when there is much comment about the antagonism between the religious and secular elements of society, it was notable that the court was able not only to accommodate the parties' wish to resolve their dispute by reference to their religious authorities, but also buttress that process at crucial stages […] In this respect, this case illustrates the principle propounded by Archbishop Rowan Williams in his 2008 [...] that "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".[12]

It is my submission that the approach of the High Court in this case and broader calls, by figures such as Lord Williams, for an expansion in the role of religious tribunals in adjudicating on matters of state law should not be followed for the following reasons.

1. Using State Courts Does Not Require a Choice between Faith Identity and One's Rights

Many of the arguments put forward for the broadening the jurisdiction of religious courts have relied on the idea[13] that to refuse to allow individuals to choose to have their family law disputes adjudicated upon by religious courts in some way forces people to choose between membership of their religious community or religious legal order and their citizenship. This is untrue. The existence of religious tribunals empowered to decide on religious matters is not in dispute. Indeed, a secular state should regard itself as incompetent to rule on religious matters and should therefore not interfere with the right of religious bodies to decide religious matters according to their own norms.

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[9] *AI v MT [2013] EWHC 100 (Fam) at [15]*.
[10] *AI v MT [2013] EWHC 100 (Fam) at. [20].*
[11] *AI v MT [2013] EWHC 100 (Fam) at. [37]*.
[12] *AI v MT [2013] EWHC 100 (Fam) at [35].*
[13] See, M. Malik "Minorities and the Law: Past and Present", Current Legal Problems Vol.67 (2014), R. Williams "Civil and Religious Law in England: a Religious Perspective", Lecture by the Archbishop of Canterbury, the Temple Festival Lecture Series, 7 February 2008, available at: http://people.bu.edu/joeld/sharia.pdf (last visited 7 November 2014) and the judgment of Baker J in *AI v MT [2013] EWHC 100 (Fam).*

It is true that individuals must make use of a religious tribunal if they are to obtain sanction to remarry within their faith[14] but the fact that individuals wish to obtain religious permission to remarry does not mean that bodies granting such religious permission necessarily need to be empowered to rule on matters of state law and civil marriage. Leaving religious courts free to rule on religious matters and leaving state courts to rule on matters of civil law merely involves the recognition that in a multi-faith society one's membership of a religious community is not all encompassing, does not extinguish one's rights and duties as a citizen and does not mean that one must restrict one's use of communal institutions to a minimum. Such recognition is an unavoidable necessity of a meaningful shared life in a multi-faith society whether or not it is more challenging for those whose beliefs reflect religious traditions that have sometimes struggled with the concept of a secular legal and political order.[15]

The true issue in *AI v MT* was not a request to use religious courts (which remain available for religious purposes) but to use (subject to state supervision) such courts for the purposes of state law in addition to religious matters and therefore to restrict one's interaction with the civil courts to a minimum. The idea behind this claim is that interaction with shared state institutions is in some way inconsistent with holding religious faith and must be minimised. This is a troubling position. Life in a multi-faith liberal democracy involves significant scope for living a religious life in common with others and making use of voluntary religious institutions but it also involves a recognition that there is life, and shared institutions, beyond one's own religious group that are valuable and should be engaged with. One must ask oneself what exactly is the problem that expanding the authority of religious courts to cover matters of state law is intended to solve. As religious tribunals remain available for religious purposes, the aim is not to allow use of religious tribunals but to restrict use of state courts to a minimal supervisory role. The idea that using the state courts for state purposes while using religious courts for religious purposes involves sacrificing religious identity strikes at the maintenance of multi-faith societies in which a person's vibrant faith identity lives alongside meaningful ideas of citizenship and commitment to engagement with communal institutions.

2. It is Difficult to Ensure that Use of Religious Tribunals Is Genuinely Voluntary

The recognition of a religious alternative makes it difficult for individuals who may not want to use religious courts to avoid doing so as they can be labelled as traitors to their faith or group by choosing the state courts. Ahmed notes "having a religious option may increase the perceived disloyalty of pursuing the state option"[16] and even those in favour of the recognition of such tribunals acknowledge that social pressure to use religious courts may be intense.[17] Therefore, even under a "voluntary" model where both parties must opt to use religious court it is likely that vulnerable people such as women or LGBT individuals whose interests are unlikely to be favourably treated by religious courts, will be pressurised into using religious tribunals when they would prefer not to. Even if they resist such pressure and

[14] *G. Douglas in N. Doe, G. Douglas, S. Gillat-Ray, R. Sandberg and A. Khan, Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts (Report of Cardiff University, 2011), p. 44.*

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

[16] Farrah Ahmed, "Religious Arbitration: A Study of Legal Safeguards" (2011) 77 Arbitration 290.

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

take their claim to state courts they will have to endure emotional and social costs which are not imposed on their fellow citizens who are not from minority groups when they exercise their fundamental right to use the state justice system.

3. Supervision by State Courts Cannot Provide Adequate Safeguards

It is far from certain that supervision by secular courts, as occurred in *AI v MT*, will be adequate to prevent unfavourable treatment of vulnerable individuals such as women and LGBT individuals. There are many ways in which a minority or religious court can adopt a problematic approach or treat an individual before it in a less favourable way that are unlikely to show up as verifiable breaches of fundamental rights before a state court exercising a supervisory function.

Vulnerable individuals may be particularly disadvantaged in this regard. Consider a lesbian mother seeking a divorce from her husband and custody of their children before an orthodox Beth Din, Sharia court or some form of Pentecostal Christian religious tribunal. Such decisions involve assessment of a range of imprecise and unquantifiable factors. It is certainly possible that the courts' overall view of that woman's suitability as a parent or her deservingness of financial support, would be unaffected by the strongly negative religious teachings of Orthodox Judaism, mainstream Islam and Pentecostal Christianity on homosexuality. This disapproval could manifest itself in many ways short of the kind of "smoking gun" discriminatory statement in the judgment necessary to alert the supervising state court to violation of fundamental rights or equal treatments. Fundamental rights are, as their name suggests, fundamental. They represent a minimal standard that should not be violated, not a desirable standard. Judges have great discretion in disposing of cases and clients can obtain disappointing or unusually negative results from a court without their fundamental rights being violated or the decision being readily appealable. Having subcontracted its duty to hear witnesses, assess credibility and take evidence to another tribunal, a state court exercising a supervisory jurisdiction will have to defer to a degree to the original decision maker. Indeed, in *AI v MT*, Baker J made it clear that he would "attach weight to the Beth Din's decision"[18] meaning that a party disfavoured by that decision, even if he or she faced down social pressure to accept it and challenged it in state court, would face additional obstacles in asserting his or her rights before the civil courts.

Consider, for example issues of the best interests of children as the paramount concern in family law proceedings. It is far from clear that a religious court will have a conception of the good of the child that coheres sufficiently with those of a liberal and egalitarian society (and particularly the child's interest in his or her ability to make independent decisions in future in relation to their religious, social, sexual or other identity). Indeed, despite being otherwise relatively supportive of the ruling in *AI v MT*, Judge Nasreen Pearce expresses surprise that Baker J agreed to religious arbitration given the complications in relation to the paramountcy of the best interests of the child that arise in religious tribunals.[19]

It is notable that in Baker J declared himself satisfied in relation to the approach of the Beth Din of New York to the paramount nature of the best interests of the child on the basis of

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

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

statement by a Rabbi attached to it who stated "At our *Beth Din* the rabbis follow Halacha in connection with resolving child custody disputes such as the one you describe. In conjunction with Halacha the best interests of the children are the primary consideration in resolving cases like this".[20] It is very unclear from this statement to degree to which the duty to adhere to Halacha may qualify the best interests of the child. To say that one accepts a particular principle is paramount "in conjunction with" compliance with religious law may mean very little if "in conjunction with" is seen as meaning "subject to". Saudi Arabia, for example has ratified the UN Convention on the Elimination of Discrimination against Women subject to compliance with norms of Islamic law, something that has not resulted in adequate protection of the equal rights of Saudi women.[21] A Jehovah's Witness religious authority could also claim to be taking the best interests of the child into account "in conjunction with" their religious teachings in recommending that a child not be given a life-saving blood transfusion.

4. Expanding the Jurisdiction of Religious Tribunals Is Dangerous for Religious Freedom

Arguments that the greater liberalism and egalitarianism within religious traditions may be brought about by the state granting power to religious courts but subjecting such a grant of to a condition of compliance with liberal and egalitarian norms, pose problems in terms of religious freedom. It is highly problematic for liberal states to hold out the prospect of access to state power to a religion on condition that that faith change its beliefs to accord with those favoured by the state and to punish "bad" faiths by denying them such power. Even if the state allows religions with objectionable beliefs to act as secular family law courts and uses the supervisory jurisdiction of the state courts to sever objectionable parts of religious judgments, this involves state institutions in directly assessing what religious beliefs are acceptable and unacceptable. It was precisely to avoid the State sitting in judgment on the merits of religious belief that religious matters were first recognised as distinct from matters of state. This approach of indirectly pressuring religious groups to change their beliefs is somewhat in tension with the European Court of Human Rights statements "that in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs."[22] At the very least it undermines the potential for the state to hold the allegiance of a religiously diverse population if its institutions are regularly called upon to assess which religious beliefs it accepts and which beliefs it rejects.

5. Life in a Multi-faith Society Requires a Minimum Level of Engagement with Common Institutions

It is possible that a society characterised by facilitation of the desire of particular groups to avoid engagement with common institutions to the maximum degree possible would remain cohesive and that its members will remain willing to pay taxes to support a welfare state for

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

[21] See *Ratification reservations of the Kingdom of Saudi Arabia to the Convention on the Elimination of Discrimination against Women which states:*

"1. In case of contradiction between any term of the Convention and the norms of islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention." Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec last visited 7 November 2014.

[22] See, amongst others, the judgment in *Metropolitan Church of Bessarabia and Others v Moldova [2010] ECHR 518, at [117].*

citizens with whom they share ever fewer experiences and institutions, but this uncertain to say the least.[23] National identities can and should change and be enriched by new perspectives but sustainable polities also require some commitment to citizenship and a common life together. To regard the law and the legal system, one of the fundamental elements of our equal status as citizens, as merely a service that citizens should use is to strike at the heart of shared citizenship. To encourage citizens to disengage from the state legal system to the maximum degree possible and to use alternatives which provide a tailored service more in tune with the desires of particular "consumers" involves a degradation of the idea of a common citizenship and a withdrawal from a fundamental element of a shared national life. Such minimalisation of the use of common institutions is likely to undermine cohesion and inter-faith understanding in the long run.

I hope the Commission finds these submissions helpful. I remain at your disposal should any clarification be necessary.

Yours faithfully,

Ronan McCrea

[23] Several studies have suggested that increased diversity places strain on support for redistributive policies and the welfare state. For the state to encourage minorities to reduce their interaction with shared institutions seems likely to exacerbate this problem. See for example *A. Alesina and E.L. Glaeser Fighting Poverty in the US and Europe, (Oxford, OUP, 2004), S. Soroka, K. Banting and R. Johnston "Immigration and Redistribution in a Global Era" in P. Bardham, S. Bowles and M. Wallerstein (eds.) Globalization and Egalitarian Redistribution, (Princeton NJ, Princeton University Press, 2006) 261-288* and R. Putnam "E Pluribus Unum, Diversity and Community in the Twenty-First Century" *Scandinavian Political Studies* 30, no. 2 (June 2007): 137-174.