Legal Categorizations and Religion

On Politics of Modernity, Practices, Faith, and Power

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Introduction

Western constitutionalism and modern liberalism have constructed and promoted the problematic hegemonic myth of separation of religion from state and politics in democracies (Carter, 1995). Yet, a careful and critical analysis of modern politics, law, and society, which deconstructs formal legal categorizations would point to the irreducible significant role of religion in modern states, laws, and legal ideologies. As this article expounds, whilst institutional and cultural variances between and among political regimes and religions exist, religion in the midst of neo-liberal transnational and international expansion ('globalization') is prominent as a sociopolitical and legal force. Religion is conspicuous in various states and societies despite of-- even in reaction to and as part of-- the ethos and practices of secular rationality and teleological modernity in the outset of the third millenium.

Some studies in law and society have conceived religion in constitutional terms of freedom of religion, state neutrality concerning religious institutions and faith, and freedom from religion (Friedman, 1990). Other studies in law and society have looked at religion as a substantive component in tribal cultures that reflect pre-modern

systems of law (Currie, 1968; Pospisil, 1973). Such an inclination to identify religion and religious law with pre-modern social phenomena, sometimes even with savage appearances, has characterized significant bulk of law and society research until the beginning of the 1980s. Later, with the emergence of more sensitivity to the interplay between religious law and nationality, more emphasis was rendered to the analysis of the versatility of religious law, the plurality of religions, and their possible adaptations to and reconciliation with modernity (Rosen 1980; Messick 1988). Thus, these studies have pointed to the flexibility of Islamic law (*Shari'e*) and its pragmatic features despite its theological narratives.

Max Weber's sociological skepticism concerning modernity, and his respect for religions as marginalized phenomena in the midst of regulated modern capitalism, has not attracted the scholarly attention it deserves among law and society students of religion. Max Weber was fascinated by religions all over the globe and he had considered religions, and religious laws as the basis for understanding evolvement of capitalist and non-capitalistic settings (Weber, 1964; Trubek, 1986). Almost for thirty years after Weber's death in 1920, his studies of Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, and Taoism (Weber 1951, 1952, 1956, 1960) had remained unmatched and infrequently touched by law and society scholars. Only with the influence of anthropological studies of law and society, mainly by Adamson Hoebel and his students, the law and society movement has enriched our knowledge with insights into case studies of religions and religious laws (Hoebel, 1954; Pospisil, 1973). Whilst religious law was comprehended outside the realm of state's legal ideology, its conjunction with and struggles against other legal traditions was largely neglected.

Legal pluralism that has been unfolded since the end of the 1980s has called for the need to comprehend various legal traditions and practices in their interactive relations through unveiling state law and legal ideology. It has underscored special attentiveness to cultural disharmonies in law as empowering sources of a pluralistic, possibly ordered, social justice (Merry, 1988; Sarat and Berkowitz, 1994; Twining, 1986, 2000; Santos, 1995). Within that tradition of legal pluralism I am writing this essay, submitting a critical communitarian approach, which has rather been marginal in studies of legal pluralism heretofore. I invite to look at multiplicity of religious communal practices, even fundamentalist, as reconcilable with democratic order (Sarat and Berkowitz 1994). This study conceives religion as a set of epistemological guidance to view the world and as a system of cultural communal practices, driven by beliefs in transcendental sacred forces. Religion constitutes and reflects meanings of existence in every domain of human life in modernity. Such a set of values, norms, and practices cannot be comprehended and judged based on criteria of 'rational' and 'irrational'.

The perspective that this article invites to share is different from the liberal explication of religion as a category of faith that is constitutionally separated from the state. Furthermore, it is different from viewing religion as purely primordial and even tribal. I share the criticism of Talal Asad (Asad 1993) concerning Geertz's project (Geertz 1973) that conceptualizes religion mainly as a distinct symbolic entity. As this article submits, religion and law are inseparable and interchangeable within power and in conflict with power in various, sometimes contradictory sociopolitical interactive spaces.

Accordingly, understanding religion becomes a challenge to students of law, society, and politics in multicultural settings. Whilst fantasies of neo-liberalism imagining a global Western-led society become more ostensible, in the outset of the 21st century, religions in diversity of localities do matter in most countries around the world as part of daily practices and state's practices. A neo-liberal concept of teleological modernity presumes the cultural supremacy of rational secular legality, and it excludes the constructive significance of religions to plurality in democracies. Paradoxically, that concept has been strengthened in the American-led West after the September 11, 2001 terrorist attacks on the TWC. Yet, contrary to secular expectations surveys from the 1990s display high figures of religious practices in contemporary Western and central European democracies. *Inter alia*, 88% in Ireland, 74% in Britain, 69% in North Ireland, 51% in Italy, 43% in Switzerland, 41% in Portugal, 39% in Spain, 34% in Hungary, 34% in Germany (west), 20% in Germany (East), 17% in France, have attended Church at least monthly (Bruce, 1999).

Conflicts between liberalism and non-liberal (non-ruling) religious communities are common among many democracies. Since liberalism pretends to privatize religion, locating faith and religious practices in the individual sphere, and due to its fundamentalist claim for non-religious virtues, it threatens to infringe upon rights of non-ruling collectivities that aim to preserve and maintain non-hegemonic religious cultures. These minority's religious cultures are perceived in modern liberal legality as confrontational to majoritarian cultures. Such a conflict between self-asserted liberal state law and non-ruling religious collectivities is articulated through cultural legal conflicts in, i*nter alia*, England, France, Germany, India, Israel, Netherlands,

Turkey, and the USA. The conflicts are palpable even in states where a formal liberal separation between state and religion exists, like in France, Germany, and the USA. Whether the state should institutionally and financially assist non- ruling religious communities is under public and legal contentions in these political regimes; the dominant constitutional stand of state courts is against such facilitation due to the principle of freedom of religion. Subsequently, an advantage is practically granted to the hegemonic religions and churches in these regimes.

Conflicts between liberalism and non- ruling (non-liberal) religious communities exhibit the inability of Kantian categorizations to generate universal discourse of human rights that also addresses local predicaments of non-ruling communities. Writings in law and society scholarship, which point to the virtues of secularization, do not expound the needs of those local communities and evade the dilemma how to address them in an inclusive democratic setting (Starr, 1989).

This article examines the knowledge in law and society scholarship and deconstructs the interactions between law and religion through and within a de centered law and society prism (Garth and Sterling 1998). Following problematizations of the liberal dichotomy between state and religion, this article criticizes the epistemological, logical, and theoretical deficiencies of liberalism that prevent it from addressing properly the significant role of religion in democratic politics. Liberalism has failed in comprehending the complex practices in which religion is part of state power foci and a component in modern legality. It has privatized religion as a matter of individual right and hence it has not offered constitutional and political avenues of including non-liberal religious minorities in contemporary multicultural societies. I

critically explicate the escape of liberalism from the challenges of religion and law in a democratic context.

Then, this article deals with and advocates the critical communitarian argument for inclusion of religious communities in democracies through evolvement of collective rights for protecting and empowering religious minorities that challenge hegemonic concepts of modernity, rationality, and secularism. I propose to view multiculturalism not as a liberal project, rather as an empowering political framework for cultivation of cultural and institutional tolerance towards religious minorities, including fundamentalist minorities, and non-liberal communities. In the context of multiculturalism, law should perceive liberalism with all its virtues and importance to democracy, as a relative tradition by itself, not as an absolute ordering criterion for legality. This article offers to inject such cultural relativism in our future studies of religion and law. Deconstruction and reconstruction of law and religion through exploring their genealogical categorizations in society and politics may inspire reforms in contemporary political regimes and make them inclusive entities that constitutionally include, protect, and empower diversity of religious non-ruling communities.

Genealogical Inquiry of Religious Categories in Law and Legal Categories in Religion

Through a genealogical analysis of religion and law I explore below the interplay between law in religion, religion in law, and modern politics of law and religion. Natural religious law, namely- a law driven from a faith in God or in divine forces, has used religion to construct given, sanctified, unchangeable, and universal legal

categorizations as normative guidelines of a just behavior. Such a natural religious law is the absolute criterion for obedience and disobedience to human law, according to the principle of *lex iniusta non est lex* ('an unjust law is not law') (Bix, 1996).

That basic category of law as hermeneutics and practices derived from the will of God and its prophets has been a major characterization in the writings of Saint Augustine, Thomas Aquinas, Abu Alhasan Ali Eben Muchamad Almaourdi, Mimonides, and other theological thinkers in different religions. Accordingly, morality and legality are based on religion as a set of divine and transcendent ordering criteria. Law in that context is a universal, and not a contingent, category in religion that should generate obedience. Law is intended to formulate the space for human choices and for judicial discretion within the scope of a sacred normative order. Natural law has often been a source of dissent to state law in modern times, and a source of empowerment to democracy and multiculturalism. Natural religious law, however, in distinction from natural law in general, was persisted primarily until the 14th century A.D. From then on, natural law has remained a powerful concept, but it has experienced a process of secularization that was spurred by the gradual rise of post-medieval science and rationalization of law as part of it.

The Copernican revolution and the Kantian philosophy have constructed religious morality as a product of human consciousness. Whatever legal categories we construct, they are a matter of our own morality, and a generation of our own consciousness. Objectified categories exist, but as part of our own will and desire that we are framing and implementing as autonomous human beings. Religion is based on morality, and human law creates God; law might even be perceived as God. Hence,

religion becomes a category in law. Kant himself knew and used biblical law, but in the more general framework of his own humanistic conceptions of universal laws as consciousness driven objectified categories (Fletcher, 1996, p. 519).

The gradual secularization of law has centered it and constructed it as omnipotent. As evident from writings of Hugo Grotius in the 16-17th centuries, post-Kantian philosophers of the 18th centuries onwards, and English positivists (Horwitz, 1996), a concept of divine sovereignty was replaced by a concept of a secular one. The latter was imagined as the aggregation of individual wills and originated in contractual relations. Whilst religious institutions could have been separated from the state, religious identities have remained part of state law and its legal ideology. Hence, any project of deconstruction of modern law should be a project of deconstructing the imagined separation between religion and state law. I share the anthropological concept of Talal Asad (Asad, 1993) in his historical exploration of Islam and Christianity. Asad argues that religion is not a separated category, but a constitutive set of practices that can not be understood unless within the broader notions of power, structures, agents, and historical circumstances.

Nationalism, mainly since the 19th century, has utilized religion for its own political purposes. From Hindu India and Muslim Pakistan to Jewish Israel and Catholic Ireland, from Protestant USA to Lutheran Germany, nationalism has used through legality religious categorizations for empowering some collective identities and marginalizing others. Religion- due to its perceived supra natural magic and transcendental myths- has the power to consolidate a communal ethos in ways that significantly affect the communal normative and practical 'order' and its relations

with its surroundings. Since religion as Karl Marx has keenly observed may be an epiphenomenon, it reflects discriminated ethnic identities, social stratification, and subjugation of minorities. As such it is a political mechanism to mobilize people with different sources of interests to what may wrongly be perceived as a common public goal.

Emile Durkheim, one of the most influential sociologists hitherto, argued that modern societies would necessarily experience intensive secularization. Therefore he was concerned with the question what would happen to modern societies without the effects of religion as a crucial republican consolidating force. Durkheim, one of the founding fathers of modern sociology, alongside Karl Marx and Max Weber, had presumed—in a Neo-Kantian way-- that as a primordial social phenomenon religion is expected to be expelled by secularism as a unifying sociopolitical force (Pickering, 1984). Falsifying Durkheim's teleological argument, most probably made under a Kantian influence, religion has become national civil force in many diverse and contingent facets of modernity.

Inter alia, one legalistic strategy of the nation-state was to exclude religion as a recognizable political force. Such legalistic attempts like in modern Turkey, during the 1920s and the 1960s, and in some authoritarian regimes like China after 1949, have often resulted in resistance and aggravation of religious dissent and violence among minorities (Turkey) and in various localities (China). The other strategy has been to constitutionally privatize religion, like in France and the USA since the 18th century, and in Germany after the II World War. Such a legalistic strategy has

resulted in national attempts to ignore the religious collective demands and needs of non-liberal (non-ruling) religious communities.

A third legalistic strategy has formally recognized the communal nature of religion, though has used it for negating other collective identities of the very same non-ruling community. Israeli law has somewhat followed the *Millet* (community) system of the Ottoman Empire. Israeli Arab-Palestinians were recognized in state law as religious minorities (Muslims, Christians, Bedouins, Druze), and then they were denied collective rights as a Palestinian (national) minority. Thus, religion has largely become a means to procure national control and governance.

Following its consolidation in John Stuart Mill's writings in the mid-19th century, liberalism has intruded in national politics and legal ideologies from the 1950s. Its conjunction with the nation-state has generated 'liberal nationalism'. Namely, it has privatized religion of non- ruling communities through "freedom of religion" legalistic clauses, as one can find in two major liberal constitutional projects, the USA Constitution and the European Convention for the Protection of National Minorities (1998). Liberal jurisprudence in the modern nation-state has had the challenge to reconcile between (veiled) state's religious identities, and its egalitarian asserted commitments to freedom of and from religion. Remarkably, this challenge has further been empowered by the spirit of neo-Kantian globalization that since the 1990s has spurred liberalism (and its foes) in various localities.

Liberalism as a theory of justice has responded to that challenge by two arguments: A. Individual rights precede any concrete and distinct definition of the 'common good.' B. The state is neutral and can provide impartial procedural justice (Rawls, 1973,

1993; Barry, 1995). In other words, the religious identities of the state do not exist, and nevertheless can not hamper the preference given to individuals' freedoms over any republican, religious, good. These two fundamental liberal claims are wrong.

Legal pluralists, feminists, critical legalists, and communitarians in law and society scholarship have argued that individual rights are a certain 'good', that should be referred to within a broader context of cultures, conflicts, plurality of orders, possibilities, needs, and constraints (Crenshaw, Gotanda, Peller, Thomas, 1995; Greenberg, Minow, and Roberts, 1998; Kairys, 1990; Sarat and Kearns, 1999; Selznick, 1992). Such a 'good' is crucial to democracy. Notwithstanding, giving absolute and exclusive preference to individual rights, under all possible circumstances, in all imaginary contexts, and invariably, would repress non-liberal cultures, and non- liberal communities in democracies, which have a different, not indispensably contradictory, ontological conception of the 'good' (MacIntyre, 1984, 1988; Sandel, 1982, 1996). To underscore individual rights as the absolute, transcendental ordering criterion, makes any liberal de ontological justice regretfully disengaged from the variety of historicity, circumstances, social beings, structures, and processes in human life.

The liberal discourse does not empower non-ruling and non-liberal communities. Their members- unless stripped off their embedded identities- can not enjoy the liberal discourse, which does not enable non- ruling and non-liberal communities to preserve their own cultures and to fulfil their distinct communal needs. Religious non- liberal and non- ruling communities do not necessarily negate human rights and individual rights (Asad, 1993; Barzilai, 2003; Carter 1995). However, they

contemplate and demand more emphasize in public policy to their own minority's cultures.

Likewise, states and courts are not impartial since they maintain and generate identities, ideologies, and interests (Benhabib, 1992; Epstein and Knight, 1998; Feeley and Rubin, 1998; Horwitz, 1992; Jacob, Blankenburg, Kritzer, Provine, and Sanders, 1996; Lahav, 1997; McCann, 1994; Migdal, 1988; Rosenberg, 1991; Sarat and Kearns, 1999; Scheingold, 1974; Shamir, 1996). In more practical terms, liberal states have had to face the reality of multicultural societies and religious fundamentalist communities, which do not have a preference of individual rights as the exclusive, universal, and absolute good.

Can individual rights, alone, guarantee the freedoms and needs of non-liberal religious communities in democracies? Generally, the Western-led scholarship has ignored that dilemma. Partly due to the liberal vision as a meta narrative, partly since in the American academic reality of the 20th century religious minorities have not been regarded as a severe problem for human rights' activists and much more attention was devoted to the predicament of Afro-Americans and native Americans. Moreover, with exception of intellectuals as Tallal Asad and Edward Said, Muslims in the USA and West Europe have suffered from intellectual marginalization. The September 11, 2001 terrorist event has made things even worst, and protecting the Muslim minority, let alone empowering its voice, has become even a more criticized concept.

The deficiencies in liberalism may be exemplified by referring to Joseph Raz, one of the most prominent liberal thinkers, who considers multiculturalism as an axiom of

modern democracy. Communities should be respected, Raz contends, as long as they respect the individual freedom of their members. If communities are not liberal, Raz demands the enforcement of individual freedom in these communities (Raz, 1994). Thus, in that theory freedom should be imposed, and all choices are liberal choices. Four erroneous presumptions lead Raz, and liberalism in large, to that oxymoron of imposed freedom.

First, Raz presumes that most communities in democracies are liberal. That error articulates a western epistemological bias. In many countries, however, communities are often not liberal. *Inter alia*, one may mention Brazil, India, Ireland, Israel, Peru, and (even) North America. Second, Raz believes that individual freedom and its absence can be objectively defined. Indeed, if a person wants to leave a community, she/he should be entitled to exit, notably when the community condones violence against her/him. But these instances are rare. Often, members in communities, including in non-liberal communities, do not wish to leave their sources of identity and empowerment (Asad, 1993; Mautner, Sagie, and Shamir, 1998; Renteln and Dundes, 1994; Sheleff, 1996). How do liberals decide in which instances people do or do not have the freedom to chose their lifestyles in a non-liberal setting? In effect, Raz avoids this issue. As I show elsewhere (Barzilai, 2003), non-liberal religious communities do offer spaces of practices and choices to individuals. Individual freedom is a relative term, and it is culturally and contextually contingent on the specific community.

Third, Raz presumes as other neo-Rawlsian scholars, that individual freedom is an absolute value, superior to any other conceptions of 'good' and justice. Let us

suppose that we can arrive at an 'objective' meaning of 'individual freedom'; does this make it an absolute value? Do we know of any organization and political regime that has justified complete individual freedom, under all circumstances, and is it always desirable to maintain 'individual freedom' as an absolute value at the expense of other values like communal faith and caring? If not, why to presume that individual freedom is (always) superior to a communal right to preserve its non-liberal religious collective culture?

This argument leads us to the fourth error in the liberal endeavor. If we perceive a certain antinomy between the value of individual freedom (in its absolute liberal terms) and communal cultural preservation, how can we normatively endorse the liberal argument as appropriate for multiculturalism? To do so, we must presume — like Raz — that liberalism is superior to any other theory of justice. However, if we presume the superiority of the liberal theory of justice, which is one tradition among others, we are enforced to exclude the principle of cultural relativity that is the basis of multiculturalism. Hence, Raz's arguments do not respond to the needs of non-liberal religious communities of protection- let alone empowerment- in multicultural settings.

Historically, liberal legal culture has primarily been individualistic. As "associations," communities do not relish collective rights or systematic collective protection in public policy and law (Lomosky, 1987; Roberts, 1999). Liberals have emphasized the importance of groups to multicultural political articulation and to collective participation in decision making processes. Yet, they have avoided the

logical consequences of this position and have continued to embrace the primacy of individual rights (Dahl, 1971; Kymlicka, 1995; Smith, 1997).

The facets of religion in law and law in religion that were expounded above are not progressively ordered in a linear clear historicity of teleological modernity. Rather, they are complementary in any historical period, despite some very significant distinctions in the intimacies of law, religion, and power in various historical periods, according to the genealogical analysis presented above. A genealogical analysis of law and religion in the midst of a neo-liberal politics of globalization requires us to dwell upon the hermeneutics and practices of non- ruling communities. The article turns, now, to explicate some aspects in a critical communitarian concept of law and religion. Then it explores religion and law in contemporary intersections of globalization and non-ruling communities.

Liberalism as Tradition, Communitarianism as Critic

As Robert Cover (Minow, Ryan, Sarat, 1993) and Stephen Carter (1999) have expounded, state law has been violent towards non- ruling religious hermeneutics. It has eliminated these hermeneutics as viable sources of law making and policy making. The jurispathic essentialism of modern state law-i.e., its paternalism, deference to violence of state's officials, and coercion- is embedded in its intervention in the life of non- liberal (non-ruling) communities. Cover has highlighted the collision between *nomos* [i.e., basic world view and normative aspirations] of non-ruling religious communities that have challenged the state, and the interest of the state to subdue those *nomos* since non-ruling communities could have endangered dominant narratives and state hegemony. The conflict between state legal ideology

and the non- ruling religious communities reflects the proclivity of the state to veil its own religious partiality and to extinguish any alternative modes of faith and religious practices.

Cover has perceptively comprehended the prescriptive effects of religion on statehood and political power. Religion has accordingly been perceived as a constitutive force of normative order and civil obedience, but also as a source of oppression. Accordingly, Cover has invited the pluralistic interplay of all religious ontological conceptions of the 'good' as part of law making and legal interpretations, whilst being aware of the inability of the state to suggest an impartial justice. Cover points to the fact that in a ruling like *Wisconsin v. Yoder* in 1972[1] state law has acknowledged its limits of power in recognizing the *Amish* community's legal authority to remove its children members from attending public schools after the eighth grade (Minow, Ryan, Sarat. 1993, p. 165). Yet, as Sarat and Berkowitz have shown (1994), in *Yoder*, state law was not conceived as being under threat, and hence multiplicity of religious practices was considered as reconcilable with order. *Yoder* has articulated the liberal concept that state law is the superior regulating order, while communal practices can be considered as legally valid only when they do not endanger state's order.

Carter has primarily underscored the collision between liberal constitutionalism of separation of state from religion, and non-ruling religious communities. Religion is perceived as a political redemptive force that renders criticism and dissent to state law and its ideology. Like Cover, Carter distrusts state law, but unlike Cover he is not only a legal pluralist. Carter is also a communitarian who puts much more trust than Cover in the internal normative order of non- liberal religious communities, while

Cover admits cases in which state intervention is required for redemptive purposes as prevention of racial discrimination. Both of them, Cover and Carter have seen state judges as the focus of the liberal erroneous project of constitutionalism. Cover as a legal pluralist has primarily underscored the exclusiveness of the liberal constitutional language, which through adjudication 'kills' alternative hermeneutics, while Carter as a communitarian has emphasized the blindness of liberalism to the virtues of non-ruling religious communities. Both, Carter and Cover, have partly neglected to explicate the political power of liberalism as an anti communitarian force, which is generated through state law and its ideology.

Liberalism, as Marxists have keenly noted, has been a political force of particularization that has advanced individualistic legalities concerning collectivities. The individualistic legalities- as reflected in Marx's criticism of contract law and property law- have deconstructed collective consciousness. While Marx has referred to the deprived social class, I underscore the communal aspect, since religion has been an important force in consolidating communal normative orders of non- ruling communities that may resist state law and its ideology.

The attempts of states to subdue religious non- ruling communities have had several facets. First, religious practices have been interpreted as irrational acts, especially under the effects of individual liberalism and later under the influence of rational choice conceptions. For example, adherents of rational choice theory condemn a usage of religious symbols during elections as irrational acts that affect voters' discretion (Barzilai, 2000; Bruce, 1999). It has followed a wrong concept of modernity, as if religion is an irrational setting that contradicts modern rational law

(French, 2001; Likhovski, 1999). There are two types of accustomed mistakes concerning religion and rationality. It is a fault to profess that religions are irrational. It is based on the evidently erroneous presumption that believing in anything is good, but believing in God/Goddess is evil. It is also erroneous to avow that liberalism offers a free choice between religions. In every political regime there is hegemonic religion, therefore people who have been born into religious minorities are often discriminated due to their faith and practices.

Second, in countries where formal separation of religion from state exists, funds to education in religious communities have been conceived as encouragement for segregation (Carter, 1998). Furthermore, religious acts of non-ruling communities which have been part of cultural preservation have often been conceived as coercive and jeopardizing the 'rule of law' (Roberts, 1999). Third, religion of majoritarian groups and dominant groups has been conceived as part of nationality, whilst religion of minorities has been considered as part of primordial culture, which may endanger individuals and the modern state. Since a Western modernity has a narrative of secular progression, any religious resistance to it may be perceived as fundamentalism, even extremism, and may be criminalized in state law.

As Max Weber has suggested in his writings- published after his death as *The Sociology of Religion* (1922/1964)- any categorization of religion should be problematized. Furthermore, in *Hegelian* terms, secularism may be a religious faith if it renders the sense of "absolute being." Thus, Judaism, Christianity, Buddhism, and Islam are religions, but also scientology, psychotherapy, and nationalism itself may be considered as religions. Due to the empowerment of nationalism in modernity, states

have categorized what is 'religion' for political purposes of constitutionally recognizing communities and controlling them, or denying communities and marginalizing them. Consequently, religion has become a source of dissent if and to the extent that it has been marginalized and discriminated. In countries that have aimed to suppress religion, like in Poland and Lithuania in Europe, and Turkey in Asia, religion has incited some collective resistance to the state.

Other examples in which oppressed and marginalized religions were a source of dissent are telling, as well. The Catholic Church in Communist regimes, e.g., used its power to unreservedly oppose the regimes and to significantly intervene in their internal affairs, as was the case with the Catholic Church in East Germany. So are Islamic movements in India, Indonesia, and Israel. In Israel, nationalistic Jewish fundamentalists inclined to severely criticize the state, which they had conceived as too secular and therefore too much pro-Palestinian, especially after the conclusion of the Oslo Accord (1993-1999). Eventually it led to the assassination of PM Yitzhak Rabin on November 4th, 1995. The same phenomenon of religious dissent to state law has repeated itself in Egypt and Jordan, and in the West Bank and the Gaza Strip, where Muslim groups and factions have become major localities of dissent and violence against the political regimes and their ruling elite. Invariably, in democratic and non- democratic regimes, in secular and non-secular constitutional settings, religions do not only construct identities, and incite action in law, but they also constitute practices outside it, and towards it.

Correspondingly, the challenge is to understand what is happening beyond the veil of formal constitutional formulations of religion and state. Scholars of law and society have indeed looked at alternative legal texts to that of state law (Ewick and Silbey,

1998; Sarat and Kearns, 1996). Religions have rather been unique in a sense that their law has not only been unwritten, *non-scripta*, rather they have offered, to their believers, a structured and sacred text that has embedded detailed normative guidelines of alternative order in all spheres of life. That normative order, based on a faith in a superior divine force, has frequently challenged the state. Furthermore, religions have offered absolute irreducible criteria for 'good' and 'evil'. The more a religious community is fundamentalist, the more it may challenge the state through its legal religious texts. Efforts of states to quell religions have often resulted in religious resistance and violence.

How can we reconcile between the totality of the domination of the state and the absolute desire of non-ruling communities for their own religious communal hermeneutics and practices? Let us look at two possible categorizations. First, individual autonomy and identity, and second, dissent vs. jurispathic law.

I borrow the logic of the first from Joseph Raz, the liberal intellectual, and the second from Robert Cover the legal pluralist, and Alasdair MacIntyre and Stephen Carter the communitarians. Personal autonomy and personal identity justify the legal protection of individual affiliations with religious communities. This is a concept emphasized by national liberals as Joseph Raz, and analyzed by prominent liberal historians as Rogers Smith (Smith, 1997). Yet, the problem is that non-ruling religious communities are not protected as collectivities in a liberal context.

In the case of *Board of Education of Kiryas Joel V. Grumet*[2], e.g., the US Federal Supreme Court has refused to justify a federal support for a religious community of ultra-Orthodox Jews. Similarly, e.g., in the case of *Sharei Tzedeck*, the European

Court of Human Rights has not granted recognition of non-ruling religious communities as such (in France), veiling under the argument of the need to respect national sovereignty even within the EU. That is the dilemma mainly recognized by Cover and Carter, and illuminated in philosophy by MacIntyre. State law- and liberal modern law promoted through the state- is jurispathic and therefore inclines to eliminate alternative types of hermeneutics and practices. Hence, this article suggests to seriously considering collective rights of religious non- ruling communities. It means autonomy in most spheres of life, like education, property, jurisdiction, and worship.

Possible conflicts between human rights and religious normative orders in non-ruling communities may exist. The predicament of women has been prominent in that context. Muslim women, e.g., have suffered from killing for the family honor (*Katal al-Sharaf*). Amnesty International reports in 2001 about 5,000 such killings around the globe. The phenomenon of 'honor' murders is particularly prominent in countries with large Muslim populations as Nigeria, Sudan, Turkey, Egypt, the Gaza Strip and the West Bank, and also exists among Muslim communities in West Europe. Should the communitarian stand justify such killings or any other violence in communities, as part of an argument for maintaining communal non-liberal cultures of minorities? Obviously, it should not.

Two principles may be sources of solutions in cases of these conflicts. First, the right of exit; second, the redemptive principle suggested by Robert Cover (Minow, Ryan, Sarat, 1993). The first principle claims that a potential victim deserves to leave her community, and that she deserves a state's protection against violence. The second

principle is that if state's interference in a specific sphere of communal life is necessary to abolish discrimination, the interest in social redemption should overcome the principle of communal singularity and autonomy. According to both principles, however, the internal normative order of the non-ruling community should not be dissolved.

It is utterly doubtful whether religious communities are more violent than any other organization and collectivity that has some control over means of ruling. The danger in secular fundamentalism is that due to lack of cultural relativism, religion would be characterized as equivalent to violence, and religious fundamentalism would be regarded as extremism and terrorism. Various studies elucidate that even fundamentalist religious interpretations of law might turn to be constructive hermeneutics. They have enriched plurality in societies, and sometimes have led to reforms in state law in ways that have improved human rights (Barzilai, 2003; Likhovski ,1999; Theriault, 2000). In religions one can often find strong traditions that call for reforms, within the religious community. Religions, even these that are characterized as fundamentalist, do have trends that call for constant reforms as part of law making and law application within the community (Asad, 1993; French 1998, 2001).

At the cultural level, religious texts and hermeneutics may contribute to the normative order through infusion of values, norms, and methodology of interpreting legal texts. At the institutional level, religions have sometimes democratized public life either through consolidating state power or through withdrawing from it. A good example of democratic consolidation is the action taken by the Catholic Church in East

Germany, which had incited unification with West Germany in order to hold more public strongholds under the German Basic Law of 1949 (Theriault, 2000). In other instances, like in Nigeria, religion would impel women to withdraw to communal life since state law does not protect them (Ifeka, 2000). Palestinian Muslim women in Israel have applied for state's protection against their husbands and spouses in cases of expected violence due to *Katal al-Sharaf*. They have done so, despite their Palestinian national and Muslim religious consciousness, which challenges the Jewish state. Yet, the state, despite its liberal egalitarian assertions, has not inclined to intervene in communal life. Consequently, the Palestinian feminists are in a struggle against an unexpected coalition of Muslim male elite and state law of the Jewish state that has experienced since the beginning of the 1990s liberal legislation for protection and advancement of women. Hence, more efforts by Palestinian feminist organizations in Israel are focused on helping women to help themselves within their own community through creating feminist communal consciousness. In these instances, exemplified in Nigeria and Israel, withdrawal through religion is aimed to practically form and enlarge a civic space within the community.

The contradictions between religious communities and modern state law may be imaginary, especially in non-western political regimes. In practice, the relations between the sacred texts and the secular texts may be somewhat complementary. John Bowen, for example, exhibits how religious courts in Indonesia have interpreted religious and secular laws in complementary ways. That mode of interaction is explained, again, through power, since the state has increased its influence over the religious courts in different regions of the country (Bowen, 2000). In African countries- especially in Chad, Djibouti, Egypt, and Guinea- there is criminal

legislation that prohibits the often-utilized genital cutting among women. Boyle and Preves demonstrate that due to transnational effects, African countries have followed the West in formally prohibiting genital cutting that prevails in Muslim countries (Boyle and Preves, 2000). However, that impressive legislation does not intrude in the religious communities but rather aims to change one value within a more comprehensive and diverse communal religious culture.

Liberalism and Religious Communities- The Challenge of Glocalization

Exploration of religion and law should be a focus of interest for students of law and society under conditions of *glocalization (*namely-*glo*balization in various *local*ities). Globalization in its neo-liberal sense may not supersede local religious practices. Studies point to the fact that religion in various non-ruling communities is as vivid as ever (Barzilai, 2003; Merry, 2001). Furthermore, the fear of and the uncertainty concerning the meaning of globalization may further incite religious beliefs and religious practices as significant sources of identities. Religious communities are important sources of constituting, articulating, and generating identities because the uncertainty facing the meaning of linear time and neo-liberal progression generates religion as a source of circular time that empowers collective and individual identities through traditions and divine texts. Thus, religious fundamentalist movements in Christianity, Islam, and Judaism have been generated as a resistance to modernity and to its exclusive secular conception of historicity and legality.

The collisions between globalization and religious fundamentalism may result in violence as was horribly proven in the September 11, 2001, *Al-Quada* attack on the WTC and the Pentagon. It has followed a series of serious terrorist attacks against US and other Western targets all over the world. Religious terrorism has a lengthy experience. Religions may include sub-cultures of violence against 'external enemies', such as state law and state legal institutions that symbolize secular depravity. Sub-cultures of violence have emerged in various religions, as Buddhism, Christianity, Islam, and Judaism (Juergensmeyer, 2000). Religious terrorism has been manifested in Western and non-Western political regimes *inter alia*- Algeria, Egypt, England, France, India, Indonesia, Israel, Japan, North Ireland, Lebanon, Philippines Turkey, and the USA.

Indeed, not all terror incidents and terror organizations are religious. In fact, most terror incidents and terror organizations in Europe, heretofore, have been secular- ETA in Spain, Bader Mainhoff in Germany, and The Red Brigades in Italy, to name a few examples. In the context of this article, however, I would like to shortly sort out why religions may spur terrorism as a possible hermeneutics against state law and its ideology, in the midst of neo-liberal globalization? It is an especially intriguing dilemma since religious fundamentalism is not necessarily violent.

Religious texts often ingrain a binary theological distinction between eternal redemptive good and irreducible evil. The cosmic and canonized struggle, including a violent clash, between good and evil is a-historical and should end in apocalyptic warfare (Juergensmeyer, 2000). Believers symbolize the good, while the heretics and the seculars, the 'others', represent the evil in that cosmic struggle. Notwithstanding,

most religions condemn warfare in general (Weber, 1922/1964). Religious texts include legalistic categorization that enables to determine whether a war is just or unjust. Hence, religious texts as other legal texts are subjected to variety of hermeneutics that constitute their practical application and re-constitution. When believers are swayed that they are under attacks of secularism, the probability to use a religious text, as a manifesto of warfare against the perceived aggressor, is significantly higher due to the binary distinction between good and evil.

Liberal globalization has propelled the expansion of exhibitionist secularism, and has spurred a sense of siege mentality among religious fundamentalist (non-ruling) communities. They have protested against prominent manifestations of liberal secularism as pornography, homosexuality, artificial abortions, free sex, and even personal computers connected to the Internet. Furthermore, perceptions of transcendental cosmic justice have legitimated violence as a means to revolutionize the praxis, and to impose religious law on earth. Instead of religious categorization in law, religious terrorism has aspired to spur law as a categorization in a fundamentalist religion.

The question why a certain religious text would be subjected to hermeneutics of violence is beside this article. In general, the more a non-ruling community perceives itself as discriminated, the more it will be inclined to use religion as a source of violent resistance against hegemonic legal ideology. Invariably, a religious text cannot be isolated from the sociopolitical context that affects the utilization of religion to different public purposes. Islam, for example, may have very moderate hermeneutics towards non- Muslims, or a very violent hermeneutics, depends on the

leadership that makes use of religion to various purposes and contingent on the sociopolitical context that frames the usage of the religious text.

In a context that pays a great deal of attention to non-ruling religious communities, two processes may take place. I follow Santos' terms (Santos, 1995). First process is globalization of local knowledge. Religion may become more transnational and its ability to influence and construct cross-national identities and practices may become broader through means as *Internet* and the international media. Thus, a study among religious Indian and Pakistani communities in the USA explicates how these communities have maintained their fundamentalist beliefs and practices and have contributed to transnational networks between USA, India, and Pakistan (Williams, 1998).

The Internet constructs virtual transnational interactions and in turn non-ruling communities may better mobilize support and better control their members. The technological usage of Internet in religious, even fundamentalist, non-ruling communities has been multiplied as a prevailing phenomenon. Other aspects of transnational liberalism, as the international media, make the dissemination of ideas an easier task for religious communities. Since state's regulation of the virtual space and of the international media may be somewhat fragile, however still meaningful, the ability of religious non-ruling communities to universalize their virtues and practices is growing fast. Transnational liberalism is becoming a major dialectical source of advancing, among other things, religious and even fundamentalist ideas and practices. Contrary to visions of universal self-celebrated secularism, the partial decline of the

state, and its partial but significant sensitivity to virtual spaces may strengthen expansion of religious ideas and practices that challenge liberal secular globalization.

A second process is localization of globalization. Religious communities may adopt practices that are affected by increasing liberal values. Using (secular) technology and more litigation in courts for communal purposes are two examples of attempts to challenge state law, like immigration and education laws, in ways that may deregulate state supervision over religious non-ruling communities. The legal setting in the USA has already been altered in that direction, whilst educational autonomy has increased and been legalized. Globalization in that sense generates more multiplicity of religious practices. A good example is feminism and its conjunction with religion. Thus, feminism has gained in the last decade some empowerment through religion; an observation that demystifies the conventional claim as if religion is an alternative to feminism. Religious women affected by the liberal mood would like to gain more equality in their community without secularizing it. Therefore, they would raise religious arguments for gender equality based on human dignity and preservation of the communal culture, albeit its stigmatization as violent against women in the midst of liberal globalization (Katz and Weissler 1996; Reece 1996).

Hence, I expect, religious categorizations may be more diverse but their importance will remain central in political power and law. Religious categorizations are to remain avenues in the 21st century of construction, generation, marginalization, and elimination of identities that build and challenge power. Religious categorizations will remain a source of coercion and resistance in and towards law. On the one hand, religion will continue to reflect ethnic and other social identities in law. On the other

hand, religion will continue to be a source of looking for reforms in legalities of global-local world.

Conclusion

This article has embarked on deconstructing and conceptualizing the relations between law and religion, through a prism of legal pluralism in which power, state, and non-ruling religious communities were the main focus of exploration. This article has explicated to what degree power, state, and non- ruling communities are crucial for understanding law and religion. Consequently, we may conclude that scholars of law and society should pursue the de-centering critical approach of law and society studies to deconstruct the relations of law in religion and religion in law.

Religion is not autonomous from power, and the attempts to use it for political purposes have been reflected in various types of legalities. Especially after the September 11, 2001, terror events, we should not be misled by liberal expectations of separation of state from religion, nor should we be captives of illusions concerning globalization of secular values and the inevitable cultural war between them and religious fundamentalism.

Communities are crucial to the study of law and religion, since the conflict between non-ruling religious communities and the state is a valuable source of legal practices and hermeneutics. It also points to the deficiencies of contemporary liberalism that is aloof to the predicaments of various religious localities. Accordingly, this article encourages more emphasize in law and society scholarship to the importance of non-

liberal and non- ruling religious communities to evolvement of just and democratic societies.

Can we reconcile between the legal texts of non- liberal religious communities and the aspiration for a universal code of human rights? This is a challenge for law and society scholars that I would like to pursue. Since religions are not autonomous from other cultures and historicity, and they constitute parts of human experiences and practices, abstraction of basic human rights from diversity of religions should and can be a component in the aspiration for a universal minimal legal code. That code should admit cultural relativity. It should acknowledge the importance of political spaces in which various non-ruling communities, non-liberal and religious, can be included as legitimate components in civilizations of legality.

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