

THE ACCOMMODATION OF THE SHARI'A WITHIN WESTERN LEGAL SYSTEMS

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I. INTRODUCTION

Most Western countries today are grappling with the question whether Islamic law, the Shari'a, should somehow be recognized and incorporated into their domestic legal systems. The issue is highly complex and controversial, for it involves not only questions of law and politics, but also of religion, culture and history. Hardly a week goes by without a controversy erupting over some aspect of Muslim ritual, symbolism, belief or practice, whether it be the ban on the public wearing of the *burqa* and *niqab* in France, allegedly offensive comments toward a Muslim woman by a guest-house proprietor in the United Kingdom, the establishment of a mosque and community centre near the site of the World Trade Centre in New York, a Muslim cleric in Melbourne who reportedly instructed his male married followers to hit and force sex on their disobedient wives, the consumption of *halal* meat in New Zealand prisons, or the murder of Westerners in Afghanistan following the burning of a Qur'an in Florida by an American pastor, Terry Jones.¹

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1. See e.g., Peter Allen, *Burka: French Police Cautious Over Enforcing Ban Over Fears of Extremist Violence*, DAILY TELEGRAPH, April 11, 2011; John Bingham, *Christian Couple Face Losing Hotel After Criminal Charges for Offending Muslim Woman*, DAILY TELEGRAPH, September 20, 2009 and Nick Britten, *Hoteliers Cleared of Abusing Muslim Guest*, DAILY TELEGRAPH, December 9, 2009; Editorial, *The Constitution and the Mosque*, N. Y. TIMES, August 16, 2010; Javier Hernandez, *Guiliani Says Mosque Near Ground Zero is Offensive*, N. Y. TIMES, August 19, 2010; *It's OK to hit your wife, says Melbourne Islamic cleric Samir Abu Hamza*, THE AUSTRALIAN, January 22, 2009; *Only halal-certified meat served to prisoners*, OTAGO DAILY TIMES, October 9, 2009; Phillip Sherwell, *UN attacks: How burning the Koran led to murder in Afghanistan*, DAILY TELEGRAPH, April 2, 2011.

When the Anglican Archbishop of Canterbury, Dr. Rowan Williams, called for the accommodation of Shari'a within British law,² his comments triggered a furore.³ Some described his views as "idiotic," "deranged," "cowardly" and "treasonous."⁴ More thoughtful commentators suggested that the Archbishop's lecture was naïve and represented a serious lapse of judgment.⁵ Prominent Islamic scholar, Tariq Ramadan, expressed concern that the comments would fuel a climate of fear and suspicion.⁶ The Archbishop's predecessor, Lord Carey, considered that Dr. Williams had "overstated the case," stating that the "acceptance of some Muslim laws within British law would be disastrous for the nation."⁷ The Roman Catholic Archbishop of Westminster, Cardinal Murphy-O'Connor, expressed similar views.⁸ Prime Minister Gordon Brown, while personally supporting the Archbishop, insisted on the principle that there must be only one common law for all in the UK.⁹ Even the Queen reportedly expressed grave concern about the impact of the lecture on the Archbishop's standing in the community.¹⁰ In an address delivered soon after the lecture, Dr. Williams acknowledged that his approach had been "clumsy" and that his words may have lacked clarity, but he also expressed con-

2. Rowan Williams, *Civil and Religious Law in England: a Religious Perspective*, Foundation Lecture, Royal Courts of Justice, February 7, 2008, reproduced in SHARI'A IN THE WEST, Appendix I (Rex Ahdar & Nicholas Aroney, eds., 2010).

3. *Sharia in Britain: the Reaction*, THE TIMES, February 9, 2008.

4. Brian Cathcart, *Omigod! They'll Come and Chop our Heads Off!*, NEW STATESMAN, February 14, 2008.

5. Nick Johnson, *A Threat to Cohesion*, THE GUARDIAN, February 9, 2008; Editorial, *A defender of the faith needs better judgment*, THE GUARDIAN, February 10, 2008; Ruth Gledhill, *The Intellectual Arrogance that Pervades the Heart of Lambeth Palace Wisdom*, THE TIMES, February 11, 2008.

6. Ruth Gledhill, *Advisers Surprised by Sheer Fury of Attacks on Dr. Rowan Williams*, THE TIMES, February 11, 2008.

7. Lord Carey, *Are We Promoting Harmony or Muslim Ghettos?*, THE TELEGRAPH, February 9, 2008; Jonathan Wynne-Jones, *Sharia Law May Result in 'Legal Apartheid'*, DAILY TELEGRAPH, February 10, 2008; Riazat Butt, *Gordon Brown backs Archbishop in Sharia law row*, THE GUARDIAN, February 11, 2008.

8. *People here 'Must Obey the Laws of the Land'*, THE TELEGRAPH, February 9, 2008.

9. *Id.*

10. David Brown and Ruth Gledhill, *Archbishop Faces Fresh Pressure Over Queen's 'Worry' at Sharia Speech*, THE TIMES, February 13, 2008.

cern that the media had not always represented his views accurately to the public.¹¹

A similar controversy erupted in the Canadian province of Ontario in 2003 when an Islamic organization declared its intention to establish a faith-based arbitration tribunal that would apply religious norms to resolve family and business disputes according to Shari'a principles.¹² There was an immediate and forceful response from several groups that were led by a women's activist who had emigrated from Iran.¹³ Soon thereafter, the Ontario government commissioned former Attorney-General Marion Boyd to conduct an inquiry into the question whether faith-based adjudication should continue to be allowed under the provincial Arbitration Act of 1991. Numerous submissions by various interest groups argued that Islamic arbitration posed a serious threat to the equality rights of women, children, and other vulnerable groups. Nonetheless, Boyd recommended that religious arbitration should be allowed to continue subject to institutionalized oversight and an education program intended to ensure that equality rights were safeguarded.¹⁴ However, the women's groups and other opposition groups stepped up their protests, and the Premier eventually responded by banning faith-based arbitration under the Arbitration Act altogether.¹⁵

The question of accommodating Shari'a in the West generates deep-seated disagreement because it exposes underlying questions, not only about the nature of Islamic law, but also about the nature of the West and its fundamental values. The "West" is itself a complex idea with a very long history, referable initially to the Roman Empire and its division in the fourth century into the Latin-speaking West (centred on Rome) and the predominantly Greek-speaking East (centred on Constantinople), a separation reinforced by the division of the Christian Church into Roman Catholic and Eastern Orthodox communions in the eleventh cen-

11. Rjazat Butt, *Archbishop Defends Sharia Law Remarks but Admits his Words may have Lacked Clarity*, THE GUARDIAN, February 12, 2008.

12. Judy Van Rhijn, *First Steps Taken for Islamic Arbitration Board*, LAW TIMES, November 24, 2003.

13. Lynda Hurst, *Ontario Shariah Tribunals Assailed*, THE TORONTO STAR, May 22, 2004.

14. MARION BOYD, *DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION* (2004).

15. Harvey Simmons, *One Law for All Ontarians*, THE TORONTO STAR, September 14, 2010.

tury. Our idea of the West today owes a great deal not only to its roots in Greek philosophy, Roman law and Christian theology but also to later movements, notably the fourteenth century Renaissance, the sixteenth century Reformation, and the eighteenth century Enlightenment, as well as the European colonization of much of Africa, Asia, America and Oceania. The wider geo-political and cultural idea of the West—an idea that encompasses not only the countries of Europe, but also those of North America and Australasia—is a consequence of these distinct sources and influences.

The West's contemporary interest in accommodating peoples of diverse religions and cultures owes a great deal to, and can only be understood in the context of, this mixed inheritance of classical, religious, and secular ideas and practices. The particular problem of "negotiating the future of Shari'a,"¹⁶ as people in the West have tended to conceive it, is one that requires us to consider not only the nature of Shari'a, but also the West's own characteristic ways of conceiving its possible accommodation within Western political institutions and systems of law.

In this article, we explore the issues raised by the question of accommodating Shari'a in the legal systems of the modern West, focusing on what the controversies and disputes tell us about our conceptions of Shari'a, of the West, and of what the accommodation of Shari'a in the West could mean. In Part II, we examine perceptions and representations of Shari'a, especially as it has been portrayed and explained by leading Muslim intellectuals in the West, with Western audiences mainly in mind. In Part III, we delve further into what is meant by the West itself and how contemporary liberal democracies typically approach questions of religious freedom, toleration, and accommodation. Part IV then examines the extent to which the Shari'a might be granted legal recognition in liberal democratic states, shaped, as this question is, by perceptions of the nature of both Islamic law and Western liberalism. We finally draw the discussion to a close by offering some concluding thoughts in Part V.

II. THE SHARI'A

What, then, is "the Shari'a," particularly as the debate in the West has conceived it? For many in the West, Shari'a evokes pre-

16. ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* (2008).

dominantly dark images of floggings, stonings and amputations for crimes, of women peering meekly out of eye-slits in sombre full-length garments, and bearded imams issuing death decrees against blasphemers and apostates. Swiss-born Muslim intellectual, Tariq Ramadan, however, insists that that this is a crude caricature.¹⁷ He argues that there is no single or simple definition of Shari'a and instead draws attention to two very general senses of the term: a primary sense, reflecting the use of the term in the Qur'an,¹⁸ denoting the entire "way of life" to be followed by a conscientious Muslim, and secondly, a specifically juristic sense of the word. This latter sense denotes a body of legal rules and principles extracted from its two fundamental sources, the Qur'an and the Sunna.¹⁹

An important related concept is *fiqh*, which literally means comprehension or understanding but which, in juristic terms, refers to the body of reasoned reflection and opinion of Islamic scholars and jurists—as well as the science or method of deducing such opinions—concerning what they consider the Shari'a to require of Muslims in the particular time and locality in which they find themselves.²⁰ As an evolving jurisprudence, this body of interpretation can be divided into the classical *fiqh*, formulated in the formative era of Islamic history (632-892), and the *fiqh* that has developed subsequently.²¹ In turn, the classical *fiqh* consists of five leading schools of interpretation, the Hanafi, Maliki, Shafi'i and Hanbali schools of Sunni Islam, and the Ja'fari school of Shi'a Islam, along with numerous less institutionalized schools and approaches.²²

17. TARIQ RAMADAN, *ISLAM, THE WEST AND THE CHALLENGES OF MODERNITY* 47 (2001).

18. Qur'an 45:18 ("We have put you on the (true) Path [Shari'a] of religion; so follow that . . .").

19. TARIQ RAMADAN, *RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION* 359-60 (2009). Abdullahi Ahmed An-Na'im similarly says that the term Shari'a in the juristic sense "refers to the religious law of Islam in general, which is derived from human interpretation of the Qur'an and Sunna of the Prophet." See AN-NA'IM, *supra* note 16, at 3.

20. JAMILA HUSSAIN, *ISLAM: ITS LAW AND SOCIETY* 28 (2nd ed. 2004).

21. Liaquat Ali Khan, *Jurodynamics of Islamic Law*, 61 RUTGERS L. REV. 231, 232-233, fn. 4 (2009).

22. ABDULLAH SAEED, *THE QUR'AN: AN INTRODUCTION* (2008). For a more detailed analysis, see WAEL HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW*, ch. 8 (2005). Two other Shi'a schools are the Isma'ilis and Zaydis. See Anver M. Emon, *Conceiving Islamic Law in a Pluralist Society: History, Politics, and Multicultural Jurisprudence*, SINGAPORE J. L. STUD. 331, 336 (2006).

Many contemporary Islamic scholars working in the West have been at pains to distinguish between the Shari'a and *fiqh*. The latter, says Ramadan, "respectable as they are, remain however only human attempts which cannot be convenient for all stages in history."²³ Abdullahi Ahmed An-Na'im similarly observes:

It is clear that there is no uniform and settled understanding of Shari'a among Muslims that can be enforced by the state. This is true even within the same school of Sunni or Shi'a jurisprudence, let alone across different schools and sects. It should be emphasized at this level that since every understanding of Shari'a, even if universal among Muslims, is a human interpretation, none should be enforced as state law in the name of Shari'a or Islam as such. At another level, because Shari'a is always the product of human interpretation of divine sources, any interpretation of it will reflect the human limitations of those who are interpreting it, despite the divinity of the sources they are working with. From this perspective Shari'a will always remain open to reinterpretation and evolution, in response to the constantly changing needs of Islamic societies and communities in different times and places.²⁴

Writers like Ramadan and especially An-Na'im emphasize the variable and contextual nature not only of *fiqh* but also of the Shari'a itself. Indeed, An-Na'im goes so far as to characterize the Shari'a as "a historically-conditioned *human* interpretation of divine sources,"²⁵ and advocates an Islamic "reformation" in which there would be a reconciliation between Shari'a and universal standards of human rights.²⁶ However, other Muslims writing in the West are unconvinced by An-Na'im's arguments. Liaquat Ali Khan, for example, objects that An-Na'im's method involves a theory of deliberate "abrogation" of teachings in the Qur'an and the Sunna deemed to be inconsistent with contemporary human rights expectations. Kahn explicitly rejects An-Na'im's reforming approach essentially on the ground that it "empowers human beings

23. RAMADAN, *supra* note 17, at 48.

24. AN-NA'IM, *supra* note 16, at 282-83.

25. Abdullahi A. An-Na'im, *Islamic Foundations of Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 337, 353 (J. Witte, Jr. & J. van der Vyver eds., 1996) (Italics in original).

26. An-Na'im further claims that certain historical expressions of Shari'a have in particular respects been productive of serious injustice. These alleged injustices are candidly addressed in his earlier book. ABDULLAHI A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990).

to declare that certain portions of the Qur'an are no longer valid."²⁷ Rather, Kahn presents an alternative methodology of "inter-scriptural reconciliation," in which Qur'anic texts are read synthetically, and in which, he argues, a "permanent and incorruptible core" of Shari'a endures, while at the same time "accommodating evolutionary forces" and adapting to unique environments.²⁸ On this view, the *qanan* or positive law of Muslim states, though usually closely wedded to Shari'a, will vary from country to country.²⁹

Yet other Muslims, characterized sometimes as "Islamist" (though not necessarily "militarist"), go even further in endorsing particular historical understandings of Shari'a as divinely authoritative, and are generally unconvinced by the sorts of arguments adduced by Kahn, An-Na'im and Ramadan.³⁰ For example, Ramadan's call in 2005 for a moratorium on the application of traditional *hudud* punishments such as corporal punishment, stoning, and the death penalty—in order, he said, to address the widespread Western perception of Shari'a as a mere "legal code of punishments"—was met by widespread and often bitter criticism on the ground that the punishments are an essential part of the Shari'a that can by no means be abrogated.³¹

Legal controversy is, of course, the bread and butter of jurisprudence within any legal system. Modern Western liberalism seeks to avoid the most intractable of such disputes by excluding fundamental religio-philosophical matters—what John Rawls called "comprehensive doctrines"—from public discourse and political decision-making.³² And on Rawls' definition, Shari'a is a comprehensive doctrine *par excellence*.³³ As An-Na'im puts it:

27. Khan, *supra* note 21, at 252 n.97.

28. *Id.* at 238.

29. *Id.* at 273-76.

30. See Mohammad Fadel, *Review Essay: Islamic Politics and Secular Politics: Can They Co-Exist?*, 25 J. L. & RELIG. 101, 110-16 (2009).

31. Eric Brown, *After the Ramadan Affair: New Trends in Islamism in the West*, in CURRENT TRENDS IN ISLAMIST IDEOLOGY (H. Fradkin, H. Haqqani & E. Brown eds., 2005).

32. Compare JOHN RAWLS, *POLITICAL LIBERALISM* (1995); Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J. L. & JURIS. 5 (2008).

33. Andrew March, *Islamic Foundations for a Social Contract in non-Muslim Liberal Democracies*, 101 AM. POL. SCI. R. 235, 236 (2007). See also ANDREW MARCH, *ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS* (2009).

“To Muslims, Shari’a is the ‘Whole Duty of Mankind,’ moral and pastoral theology and ethics, high spiritual aspiration, and detailed ritualistic and formal observance; it encompasses all aspects of public and private law, hygiene, and even courtesy and good manners.”³⁴ Ramadan similarly points out that Shari’a “touches all the aspects of existence,” from the intimately personal, spiritual and familial through to the management of interpersonal relations at a communal level.³⁵ Less reformist Islamic scholars might put this point even more forcefully, arguing that a separation of religion and state is entirely contrary to Islamic principles.³⁶ As Joseph Schacht pointed out several decades ago:

Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself . . . [T]he whole life of the Muslims, Arabic literature, and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law; it is impossible to understand Islam without understanding Islamic law.³⁷

Whether the “comprehensive character” of Islamic doctrine implies that there can be no distinction between religious law and secular law, or between the private and the public, remains an open question. But it is on the possibility of such distinctions that the argument over the accommodation of Shari’a in Western democracies may very largely turn.³⁸

III. THE WEST

But what, then, is the West, and what would it mean for Shari’a to be accommodated within the legal systems of the modern West? As suggested earlier, to identify the West is not a mat-

34. AN-NA’IM, *supra* note 26, at 11.

35. RAMADAN, *supra* note 17, at 33-34.

36. Fadel, *supra* note 30, at 115. Fadel observes: “One can imagine . . . a Sunni Islamist follower of Sayyid Qutb or Abu al-A’la al-Mawdudi who rejects the separation of religion and state advocated by Na’im as dismissing the historical practice of pre-modern Muslim polities as mere evidence of a failure resulting from insufficient commitment to Islamic teachings rather than as evidence of an Islamic normative ideal.” *Id.*

37. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1964).

38. *Cf.* Andrew March, *Liberal Citizenship and the Search for an Overlapping Consensus: The Case of Muslim Minorities*, 34 PHIL. & PUB. AFF. 373 (2006) (discussing whether there can be an Islamic conception of citizenship that is compatible with liberal values and institutions of government).

ter of reaching for an atlas.³⁹ There is, admittedly, an incontrovertible geographical dimension to the term and, as an initial approximation, one could posit the West as comprising Western Europe and its colonial offspring in Canada, the United States, Australia and New Zealand. The way one characterizes a thing depends, however, on the nature of the object of the characterization as well as the purpose for which it is being characterized. The question of the accommodation of Shari'a in the West raises questions about the structure and regulation of human societies, not trade patterns or military alliances. In setting out to define the West for the purpose of tracing the origins and development of what he called the "Western legal tradition," the late Harold Berman pointed out that:

What is called 'the West' is a particular historical culture, or civilization The West is a cultural term. It is not, however, simply an idea; it is a community. It implies both a historical structure and a structured history. For many centuries it could be identified very simply as the people of Western Christendom.⁴⁰

The people of Western Christendom adopted and over time transformed Germanic customs, Greek philosophy, Roman law, and Hebrew religion into a unique synthesis.⁴¹ Cardinal George Pell puts it this way:

The West is the product of a dialogue between what [Pierre] Manet calls 'the party of nature'—that is, the classical inheritance of the Greco-Roman world—and the party of grace—by which he means the revelation of the Christian religion. The party of nature emphasizes pride, magnanimity and the cultivation of the virtues that are natural to man. The party of grace emphasizes humility, renunciation, and the cultivation of the soul.⁴²

As Berman pointed out, the original idea of the West lies in the distinction between the Western and Eastern divisions of the Roman Empire and of the Christian church, a division that became

39. HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 2 (1983).

40. *Id.* at 2-3.

41. *Id.* at 3.

42. GEORGE PELL, *GOD AND CAESAR: SELECTED ESSAYS ON RELIGION, POLITICS & SOCIETY* 43 (2007).

especially sharp following the separation of the Roman and Orthodox communions in 1054. This separation coincided with a movement within Western Christianity “to make the Bishop of Rome the sole head of the church, to emancipate the clergy from the control of emperor, kings, and feudal lords and sharply to differentiate the church as a political and legal entity from secular polities.”⁴³ Berman argued that the West has ever since been characterized by a commitment to ongoing reform, expressed in a succession of revolutions that have both reshaped and revitalized its governing institutions. Each such revolution—the Papal Revolution of the eleventh century, the Reformation of the sixteenth century, the American and French Revolutions of the eighteenth century and the Russian revolution of twentieth century—contributed, directly or indirectly, to the Western legal tradition as we know it today. Despite these revolutions, however, Berman thought that the tradition retained certain fundamental characteristics, the principal ones being:

- (1) a relatively sharp distinction between legal institutions and other types of institutions (religious, moral, political);
- (2) a set of legal institutions administered by a special class of legal professionals (lawyers), themselves trained in a body of legal doctrine which had been systematized into a particular legal science or jurisprudence;
- (3) a conception of the law as a body of doctrine that develops and evolves over the course of centuries according to an in-built capacity for organic change shaped both by an inner logic and a felt need to adapt to new circumstances and expectations, and;
- (4) a conception of the law as both “constitutional” and “constitutive” in nature, supreme over the various governing authorities (church, state and civil society), and making the existence of a plurality of coexisting jurisdictions both necessary and possible (initially of an ecclesiastical, royal, feudal, manorial, urban and mercantile kind), which both compete and cooperate with each other within the context of an overarching legal order.⁴⁴

43. BERMAN, *supra* note 39, at 2.

44. *Id.* at 7-10. Shari'a cannot, for this reason, be compared to the canon law of the Roman Catholic and Anglican churches. See L. CARL BROWN, RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS ch. 3 (2000).

As such, the “separation of church and state” has long been fundamental to the constitutional structure of the West.⁴⁵ Jesus Christ taught his disciples to render unto Caesar the things which are Caesar’s and unto God the things that are God’s.⁴⁶ Augustine drew his famous distinction between the heavenly and earthly cities.⁴⁷ Pope Gelasius I distinguished between priestly authority and the royal power.⁴⁸ Martin Luther wrote of two kingdoms, temporal and spiritual.⁴⁹ Roger Williams referred to a “hedge or wall of Separation between the Garden of the Church and the Wilderness of the world,”⁵⁰ and Thomas Jefferson wrote similarly of a “wall of separation between church and state,”⁵¹ a formula later taken up by the United States Supreme Court.⁵² While each of these authors, separated by time and context, meant something specifically different, the idea of two distinct powers or spheres remained fundamental and has continued to shape Western conceptions of the relationship between church and state.⁵³ What has changed, rather, is the prevailing relationship between *religion* and the state.

As Brian Tierney has explained, most pre-Christian societies drew no sharp distinction between religious authority and the governing powers.⁵⁴ Sacrificing to the genius of the Roman Emperor was enforced as a civic duty, and the early Christians were persecuted due to their refusal to participate in the imperial cult.⁵⁵ In this context, numerous appeals for religious toleration were made

45. On this dualism of authority, see REX AHDAR AND IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 13-15, 34-36 (2005).

46. *Matthew* 22:21 (King James Version); *Mark* 12:17 (KJV); *John* 18:36 (KJV) (“My kingdom is not of this world.”).

47. AUGUSTINE, *THE CITY OF GOD* (413-426).

48. GELASIIUS I, *LETTER TO EMPEROR ANASTASIUS* (494).

49. MARTIN LUTHER, *TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED* (1523).

50. ROGER WILLIAMS, *MR. COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSWERED* (1644).

51. THOMAS JEFFERSON, *LETTER TO THE DANBURY BAPTIST ASSOCIATION* (1802).

52. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

53. See Brian Tierney, *Religious Rights: An Historical Perspective*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES*, *supra* note 25, at 17-45.

54. *Id.* at 22.

55. G.E.M. de Ste. Croix, *Why were the Early Christians Persecuted?*, 26 *PAST & PRESENT* 6, 10 (1963).

by both biblical⁵⁶ and early patristic⁵⁷ writers. However, following the adoption of Christianity as the official religion of the Empire under Theodosius in 380 A.D., attempts were made to use Christianity as an instrument of imperial statecraft,⁵⁸ and the Church came to approve the use of secular power to exterminate heresy.⁵⁹ Persecution and suppression of religious dissent were thereafter frequently justified as necessary to preserve the integrity of medieval Christendom.⁶⁰ However, such voices were not the only ones to be heard. In particular, philosophical nominalists, such as William of Ockham and Jean Gerson, developed theories of natural rights and religious freedom founded on the idea of “evangelical liberty,”⁶¹ and the Reformation idea of the “priesthood of all believers” led to a moderate and incomplete form of religious toleration in some Protestant lands.⁶² These ideas, in turn, laid the foundation for a wider reaching principle of tolerance, in which “freedom of conscience” was the fundamental value.⁶³ Indeed, it was largely those who descended from, or were sympathetic to, the radical wing of the Reformation who first pursued and implemented policies of disestablishment and toleration.⁶⁴ Toleration was also later urged by important figures of the Enlightenment, such as Voltaire and Lessing,⁶⁵ and under that influence, the disestablishment of religion and an increasing secularization has become a feature of most contemporary Western states.

As Charles Taylor has recently put it, one account of this secularization consists in the notion that:

56. *E.g.*, I. Timothy 2:2.

57. *E.g.*, TERTULLIAN, APOLOGY AND AD SCAPULAM 2.2 (c. 212).

58. CHARLES N. COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE ch. 9 (1940).

59. *See, e.g.*, Fourth Lateran Council (1215), Canon 3. *See also* AHDAR & LEIGH, *supra* note 45, at 15-22.

60. *E.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA, II:II, Q.10, art. 8.

61. Tierney, *supra* note 53, at 28-29.

62. JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN THE CALVINIST TRADITION ch. 1 (2005).

63. Steven Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 Harv. L. Rev. 1869, 1876-79 (2008-9).

64. *E.g.*, ROGER WILLIAMS, THE BLOODY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE (1644); JOHN MILTON, OF TRUE RELIGION (1672). *See* AHDAR & LEIGH, *supra* note 45, at 23-25; Tierney, *supra* note 53, at 34-43.

65. FRANCOIS.-MARIE. AROUET [VOLTAIRE], A TREATISE ON TOLERATION (1763); GTHOLD E. LESSING, THE EDUCATION OF HUMANKIND (1780).

whereas the political organization of all pre-modern societies was in some way connected to . . . some faith in, or adherence to God, or some notion of ultimate reality, . . . the modern Western state is free from this connection. Churches are now separate from political structures . . . Religion or its absence is largely a private matter. The political society is seen as that of believers (of all stripes) and non-believers alike.⁶⁶

On this view, the public spaces of the West are now empty of religion: “the norms and principles we follow, the deliberations we engage in, generally don’t refer us to God or to any religious beliefs; the considerations we act on are internal to the ‘rationality’ of each sphere.”⁶⁷ Secularization in this general sense is compatible, as Taylor points out, with large numbers of people in a society continuing to hold religious beliefs, and indeed practicing their religion vigorously—albeit in private. Institutional and structural secularization is different, however, from a second, private or individual manifestation of secularization, in which the vast preponderance of the country’s citizens are no longer *personally* religious. Thus, as many have observed,⁶⁸ the United States is a country where religion is constitutionally disestablished, yet religious belief and practice appears to be thriving; whereas in the countries of Western Europe, many of which retain established churches or provide direct state funding for the incumbent traditional religious bodies, religious practice has declined to near terminal levels—except of course in the case of migrant groups and especially among the Islamic communities of Europe.

Pace the received wisdom on secularization that dominates in the West, however, Talal Asad cautions that:

“the secular” should not be thought of as the space in which real human life gradually emancipates itself from the controlling power of “religion” and thus achieves the latter’s relocation. It is this assumption that allows us to think of religion as “infecting” the secular domain or as replicating within it the structure of theological concepts. . . . Secularism doesn’t simply insist that religious practice and belief be confined to a space where they cannot threaten political stability or the liberties of “free-thinking”

66. CHARLES TAYLOR, *A SECULAR AGE* 1 (2007).

67. *Id.* at 2.

68. *Id.* at 57; RODNEY STARK & ROGER FINKE, *ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF RELIGION* (2000); Rex Ahdar, *The Idea of ‘Religious Markets,’* 2 INT’L J. L. IN CONTEXT 49 (2006).

citizens. Secularism builds on a particular conception of the world.⁶⁹

The prevailing secularization discourse in the West, thus, makes the issue of the accommodation of Shari'a in Western democracies especially controversial and problematic, and not only from an Islamic point of view. As Berman contended, the progressive secularization of the West has precipitated a far-reaching sense of crisis—encompassing its legal institutions, procedures, values, concepts, rules and ways of legal thought—in which the idea of the Western legal tradition, and the very structure of Western legality, is itself under challenge. In part, this is due to forces within the West itself—its ascendant political motifs of secularism, liberalism and individualism—but it is also in part a consequence of the West's confrontation with non-Western civilizations, theologies and philosophies.⁷⁰ For Berman, virtually all of the key characteristics of the Western legal tradition are being challenged in our time, including the belief that the law transcends politics and the hope that the law retains a genuine capacity for reform. Western law—by which he meant the law of the democratic nation-states of the modern West—is thus routinely criticized from various quarters as being fragmentary, irredeemably ideological and stratified, an instrument of raw power and inherently monopolistic.⁷¹

When considered in this context, the controversy over Archbishop Rowan William's proposal that Shari'a be accommodated in Britain was due not only to disparate views about the nature and attractiveness of Shari'a, but also exposed simmering subterranean unease about the identity of the West itself, especially given its mixed inheritance of humanistic, religious, and post-modern elements.⁷² This crisis of identity takes different

69. TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 191 (2003). See also, JOHN MILBANK, THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON 9 (1990) ("Once there was no 'secular.' And the secular was not latent, waiting to fill more space with the steam of the 'purely human,' when the pressure of the sacred was relaxed The secular as a domain had to be instituted or *imagined*, both in theory and in practice. This institution is not correctly grasped in merely negative terms as desacralization.").

70. As Asad has observed: "[t]he discourse of European identity is a symptom of anxieties about non-Europeans." *Id.* at 161.

71. HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 33-34 (1983).

72. Williams, *supra* note 2, Appendix I.

forms within each Western nation. In France, for example, it manifests itself in the strictly secularist doctrine of *laïcité*,⁷³ whereas in Canada, on one account at least, the debate over Shari'a pivots on the Canadian polity's commitment to the principles of non-discrimination and gender equality.⁷⁴ But in both countries, as in other Western democracies, there is a felt tension, not clearly resolved, between various "secular" principles (non-establishment of religion, government neutrality, equality standards, and human rights) and the problem of accommodating the diverse religious beliefs and practices of the resident population, both established and newly-arrived. Further, the accommodation exercise is rendered even more fraught when those who seek to be acknowledged are immigrants of a different race from the domestic citizenry, for then policy-makers have to contend with certain persistent xenophobic voices that seize their opportunity to be heard.

Western liberalism is supposed to offer a way in which peoples of different religious commitments and worldviews are able to live together, at least through some pragmatic *modus vivendi*—if not, as Rawls hoped for, on the basis of some more principled and enduring "overlapping consensus."⁷⁵ But, as the mixed and ambiguous responses to Shari'a that have emerged suggest, there is reason to ponder whether Western secularist statecraft has the resources to accommodate Islam without assimilating it into irreducibly Western and derivatively Christian thought-forms,⁷⁶ just as there is reason to wonder whether Muslims can find within their religious tradition the resources to accommodate themselves to Western traditions and forms of life without continuing to interpret the West in a confined binary fashion, as ultimately either the *dar ul-harb* (the house of war), or the *dar ul-Islam* (the house of Islam).⁷⁷ The questions of Shari'a in the West would seem to be a

73. See OLIVER ROY, *SECULARISM CONFRONTS ISLAM* ch. 1 (George Holoch trans., 2007).

74. Jean-Francois Gaudreault-DesBiens, *Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society* 19 NAT'L J. CONST. L. 155 (2005-2006); Anna Korteweg, *The Sharia Debate in Ontario: Gender, Agency, and Representations of Muslim Women's Agency*, 22(2) GENDER & SOC'Y 434 (2008); Ayelet Shachar, *Entangled: State, Religion, and the Family*, in SHARI'A IN THE WEST, *supra* note 2, ch. 8.

75. JOHN RAWLS, *POLITICAL LIBERALISM* ch. 4 (1995).

76. Cf. TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 191 (2003).

77. See Mohammad Fadel, *Review Essay: Islamic Politics and Secular Politics: Can They Co-Exist?*, 25 J. L. & RELIG. 101, 115-16 (2009); John Milbank,

litmus test—possibly *the* litmus test—of whether anything more than a *modus vivendi* between these two forms of life is going to be possible.

IV. SHARI'A IN THE WEST

The Muslim call for the accommodation of Shari'a within the legal systems of the West raises questions about both Islam and the West. As such, it is important for liberal secularists in the West to appreciate the “indelible connection that Muslims feel with their God,” a tie that, Wael Hallaq argues, “the Christian West for the most part severed long ago.”⁷⁸ Hallaq continues:

The idea of giving to Caesar what is Caesar's and to God what is God's does not wash in the Muslim world-view, for Caesar is only a man, and men, being equal, cannot command obedience to each other. Obedience therefore must be to a supreme entity, one that is eternal, omnipotent, and omniscient.⁷⁹

Whether these statements accurately represent Christian understandings of Christ's teaching may be seriously doubted.⁸⁰ But they do serve to underscore the fact that committed Muslims, like committed Christians, think in theological terms, and that their respective beliefs about the nature and character of God and His revealed instructions for humankind fundamentally shape their attitudes to all issues of life, including those of law and politics.

In this connection, as Hallaq has pointed out, mainstream Sunni jurisprudence, influenced by the theology of Abu al-Hasan al-Ash'ari (d 324 AH / 936 AD) and working from the premise that the nature of God is radically inscrutable, has traditionally considered the rationale behind God's revealed laws to be beyond human comprehension. Accordingly, the rationales for the rules in the revealed texts could be discovered only to the extent that God chose

Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism, in SHARI'A IN THE WEST, *supra* note 2, ch. 9.

78. Wael Hallaq, “Muslim Rage” and *Islamic Law*, 54 HASTINGS L. J. 1705, 1716 (2003).

79. *Id.* at 1706.

80. For the relevant texts, see the collection and commentary in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 100-1625 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999) 74 (Ambrose of Milan), 117 (Augustine of Hippo), 468 (William of Ockham), 592, 598 (Martin Luther), 700 (John Ponet).

explicitly to declare the *ratio legis* of each case. Without divine revelation, the human mind is utterly incompetent to judge whether an act is good or bad. As a consequence, Hallaq argues, traditional Islamic jurisprudence has tended to be literalistic in its interpretation of the Qur'an and Sunna.⁸¹

A second important characteristic of Islamic and, especially, Sunni jurisprudence is that it has historically been administered by a body of jurists that is generally independent of state regulation.⁸² There is no jurisdictional hierarchy within Islam, unlike the canon law systems of the Roman Catholic *curia* and other Christian churches.⁸³ In contrast to Roman and European civil law, which is primarily legislative in character, and unlike Anglo-American common law, which is essentially judicial in origin, Shari'a is a law of jurists and legal scholars.⁸⁴ Hallaq argues that the characteristic response of Sunni jurisprudence to the problem of regulating the potentially divergent opinions issued by Islamic jurists was to fix upon certain canonical works, with each school favoring its particular authoritative authors, a development which has also contributed to the highly conservative character of traditional Islamic jurisprudence.⁸⁵

Thirdly, Islamic jurisprudence offers a comprehensive framework for the whole of life: as noted earlier, no area of human endeavor is untouched by the Shari'a.⁸⁶ As Hallaq observes:

[Islamic] law defined not only the Muslim way of life, but also the entire culture and psyche of Muslims throughout fourteen centuries. Islamic law governed the Muslim's way of life in literally every detail, from political government to the sale of real property, from hunting to the etiquette of dining, from sexual relations to worship and prayer. It determined how Muslims conducted themselves in society and in their families; how they de-

81. WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 135-36, 207 (1997).

82. *Id.* at 208.

83. *Cf.* JAMES A. BRUNDAGE, MEDIEVAL CANON LAW (1995).

84. M. Cherif Bassiouni and Gamal M. Badr, *The Shari'a: Sources, Interpretation, and Rule-Making* 1 U.C.L.A. J. ISLAMIC & NEAR EAST. L. 135, 136-37 (2002).

85. HALLAQ, *supra* note 22, at 208.

86. It needs to be noted that there are numerous Christian studies that draw attention to the same basic insight—that all of life in all its dimensions is lived by faith and invested with religious significance—against the secularizing tendencies to compartmentalize life into neat boxes marked “the sacred” and “the secular/profane.” See, e.g., ALBERT WOLTERS, CREATION REGAINED: BIBLICAL BASICS FOR A REFORMATIONAL WORLDVIEW ch. 1 (2nd ed., 2005).

signed and ordered their cities and towns; and, in short, how they viewed themselves and the world around them.⁸⁷

As in the medieval and modern West, there is, fourthly, a strong insistence within traditional Islam on the rule of law. According to classical and medieval Islamic thought, all political authorities are bound by the law and responsible to administer it. Thus, although many Muslim jurists were customarily appointed to administrative and judicial positions, the body of law that they studied and expounded operated very largely outside of state influence and provided a kind of counter-balance to it.⁸⁸ Yet, there was not the same separation of life into different spheres governed by distinct jurisdictions that emerged in medieval Christendom;⁸⁹ the pluralism in the Islamic tradition lay in the variety of schools of interpretation and the multiplicity of states in which Shari'a was applied.

As Hallaq also points out, however, Western colonization of the Islamic world during the nineteenth and early twentieth centuries led to the creation of "sovereign" nation-states and the enactment of "positive" legal codes embodying "secular" legal values. These codes, on the model of nineteenth century legal positivism, displaced the Islamic jurists and their Shari'a. Hallaq argues that this does much to explain, not just the resurgence of fundamentalism with its emphasis on the reinstatement of Islamic law, but also why so many contemporary Islamic states are oppressive regimes: the institutional and social roots of the old Shari'a-based rule of law have been severed and not yet restored.⁹⁰

In this context, as noted, reformist scholars within the Islamic tradition have in the last century or so sought through various techniques of Qur'anic interpretation and jurisprudential logic to carve out a middle way between Islamist literalism and secularist modernism. Without attempting to pronounce upon the cogency of these techniques or to predict how successful they are likely to be in the long term, it is of real significance that these projects are not simply juristic or philosophical, but are fundamentally theological in character. Reformists characteristically seek to identify the "spirit," as distinct from the "letter," of the law, thus avoiding

87. Hallaq, *supra* note 78, at 1707.

88. *Id.* at 1708-10. See, further, HALLAQ, *supra* note 22, at ch. 8.

89. See Milbank, *supra* note 77, ch. 9.

90. Hallaq, *supra* note 78, at 1711-15. See also Emon, *supra* note 22, at 339-49.

the literalism of the traditional schools. But such reformism, as Hallaq points out, is premised upon a rejection of the fundamental principle of Ash'arite theology, in which it is asserted that human reason is independently incapable of distinguishing between right and wrong and of discerning the *ratio legis* of the Shari'a. On the contrary, the reformists tend to follow the lead of path-breakers such as Muhammad 'Abduh (d 1905), who maintained that there is an inherent harmony between the deliverances of sound reason and the dictates of divine revelation: if there appears to be a contradiction it is because one or the other has been misunderstood.⁹¹ It is notable that this move is remarkably reminiscent of the synthesis of reason and revelation inaugurated in profoundly influential terms by St. Thomas Aquinas in thirteenth century Europe.⁹²

Just as it is necessary for us to understand the theological motives of committed Muslims, it is important to understand the intellectual resources with which Western political thought approaches the question of religious accommodation. Here, as Larry Alexander has put it, Western liberalism confronts its "foreign policy problem;" by this he means its need to address the various comprehensive philosophies and ideologies of its citizens and residents, including those which are antagonistic to its most basic tenets.⁹³ Like medieval Christianity or traditional Islam, contemporary Western democracies will defend themselves when their fundamental premises or major institutions are directly challenged.⁹⁴ As William Galston, observes: "A liberal democracy must have the capacity to articulate and defend its core principles, with coercive force if needed."⁹⁵ Liberalism has, necessarily, an in-built antipathy to religions that oppose its teachings about truth, goodness, and meaning.⁹⁶

91. HALLAQ, *supra* note 81, at 212.

92. Thomas Aquinas, *SUMMA CONTRA GENTILES* (1259–1265), Bk. I chs. 3, 7–8. See also Nicholas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 26 *LAW & PHIL.* 161, 168–9 (2007), and J. Budziszewski, *Natural Law, Democracy and Shari'a*, in *SHARI'A IN THE WEST*, *supra* note 2, ch. 11.

93. Larry Alexander, *Liberalism, Religion and the Unity of Epistemology*, 30 *SAN DIEGO L. REV.* 763, 763–764 (1993).

94. Vicente Medina, *Militant Intolerant People: A Challenge to John Rawls' Political Liberalism*, 58 *POL. STUD.* 556 (2010).

95. William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 *WM. & MARY L. REV.* 869, 904 (1999).

96. "A liberal society must be intolerant and nonneutral towards the forms of life that are inconsistent with or threatening to its liberal values of human soci-

A landmark case of direct relevance to this point is the unanimous decision of seventeen judges of the European Court of Human Rights in *Refah Partisi (No 2) v Turkey*.⁹⁷ Refah Partisi (the Welfare Party) was the largest political party in Turkey's Parliament, and in a coalition Government, when in January 1998 it was dissolved and its assets confiscated. The Constitutional Court of Turkey at first instance justified this action on the ground that the Party was a "centre of activities contrary to the principle of secularism." This decision was in turn upheld by four votes to three in the Third Section of the Chamber of the European Court of Human Rights at Strasbourg on July 31, 2001, and reaffirmed unanimously by the Grand Chamber of that Court on February 13, 2003. The Strasbourg Courts' grounds for upholding such drastic action were that the Refah Party had been shown to advocate and intend the introduction of Shari'a, either for everyone or as part of a plural system of laws for citizens of different faiths. Moreover, its leaders' statements about *jihad* did not clearly rule out resort to force to achieve its aims. Significantly, the Court observed that even in the absence of threats of force, both Shari'a and plural religiously-based legal systems were *in themselves* inherently incompatible with the European Convention on Human Rights and the conceptions of democracy and the rule of law that it enshrines. The following key passage of the lower court was adopted by the Grand Chamber:

[T]he Court considers that Shari'a, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Shari'a, *which clearly diverges from Convention values*, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts In the Court's view, a political party whose actions seem to be aimed at introducing Shari'a in a State . . . *can hardly*

ety and the values necessary for its preservation." Polycarp Ikuenobe, *Diverse Religious Practices and the Limits of Liberal Tolerance*, in *DEMOCRACY AND RELIGION: FREE EXERCISE AND DIVERSE VISIONS* 309, 316 (David Odell-Scott ed., 2004) (original italics omitted).

97. Refah Partisi (No 2) v. Turkey, 37 Eur. Hum. Rts. Rep. 1. (2003).

*be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.*⁹⁸

The Court here invoked what has been described as the principle of “militant democracy.”⁹⁹ This was explained in the Court’s summary of the Turkish Government’s case against Refah Partisi:

The Government asserted that, when confronted with the risk which political Islam represented for a democratic regime based on human rights, that regime was entitled to take measures to protect itself from the danger. “Militant democracy,” in other words *a democratic system which defended itself against all political movements which sought to destroy it*, had been born as a result of the experience of Germany and Italy between the wars with fascism and national-socialism, two movements which had come to power after more or less free elections. In the Government’s submission, militant democracy required political parties, its indispensable protagonists, to show loyalty to democratic principles, and accordingly to the principle of secularism.¹⁰⁰

A more forceful response by the European Court of Human Rights to the advocacy of Shari’a by a European political party can be hardly imagined. The Court’s response is comparable to those who are skeptical, if not openly antagonistic, to the recognition of Shari’a in any form. For them, state acknowledgment and adoption of Shari’a is a dangerous folly, even if allowed only in limited form and even if democratically adopted. Over time, they contend, the familiar slippery slope will operate: the ambit of Shari’a law will incrementally expand as the inexorable outworking of its comprehensive scope and the theonomic logic on which it is based. The altered demographics, and consequently greater political clout of the swelling Muslim communities of Europe, convince these commentators that this is one slippery slope that will actually materialise.¹⁰¹

There are others, however, working also within the framework of liberal democratic politics, who support the recognition of

98. *Id.* at 123 (emphasis added).

99. For an illuminating critique of the concept, see Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT’L J. CONST. L. 488 (2006).

100. Refah Partisi (No 1) v Turkey (2002), 35 Eur. Hum. Rts. Rep. 3 at 62 (part 3) (emphasis added).

101. *E.g.*, MOORTHY MUTHUSWAMY, *DEFEATING POLITICAL ISLAM: THE NEW COLD WAR* (2009).

Shari'a, at least to some extent. In its strongest variant, this accommodation takes the form of a fully-fledged parallel system of justice operating alongside existing state law, to which Muslims and persons born into Muslim families would automatically be subject. More qualified accommodations (such as that advocated by Archbishop Rowan Williams) involve certain "safeguards" to the enforcement of Shari'a, including restrictions on its jurisdiction, maintenance of its entirely voluntary nature, and subordination of religious rules and judgments to human rights norms. Thus, for example, some in the West suggest that Shari'a should govern certain areas of law only—most commonly only civil law and family matters—and not criminal law.¹⁰² In addition, some insist that Shari'a must not be imposed upon persons, especially upon the vulnerable or oppressed: hence the rights of Islamic women to opt out of Islamic adjudication and appeal to the secular courts must be maintained. Relatedly, there are those who argue that the operation of Shari'a must be subject to antidiscrimination principles. On this view, historically hard-won protections of women's rights—to equal treatment, for instance—cannot be jettisoned simply because we want to accord religious law limited autonomy.¹⁰³

Lying behind these specific policy responses to Shari'a are different attitudes to the state's treatment of minorities and their religious and cultural needs. Within the framework of Western liberal-democratic political thought, the various views can be spread along a continuum.¹⁰⁴

At one end is assimilation. In its pure form, assimilation allows no exceptions at all for minorities. The law is the law and, as the saying goes, "when in Rome, one must do as the Romans do." On this view, migrants and their offspring, as well as indigenous peoples, are to blend into the dominant culture. When believers of a particular religion find themselves in conflict with the general law, then it is *them*, and not the state, which must yield. And if they will not do so, believers will have to face the consequences—fines, arrest, imprisonment, de-registration, and so on. Assimilation in

102. Compare John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, in SHARI'A IN THE WEST, *supra* note 2, ch. 16.

103. See, e.g., Shachar, *supra* note 74, ch. 8.

104. See REX AHDAR AND IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE ch. 3 (2005); see also W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES (John Witte, Jr. & Johan van der Vyver, eds., 1996).

its strict and undiluted form has probably never been practiced, and its influence certainly waned over the second half of the twentieth century. Even under official assimilationist policies, states have usually been prepared to grant at least the occasional ad hoc exception where these sorts of concessions do not cost the state too much—in terms of both loss of face and derogation from significant societal objects that would otherwise be met by the law.

This leads us to the accommodation model. In the West, the longstanding policy of assimilation has been replaced by multiculturalism as the preferred governmental stance toward minorities and migrants. Self-consciously multicultural societies seek to make *due* allowance for difference. A liberal and tolerant state on this view recognizes religious pluralism and the genuine call of conscience by making *reasonable* accommodation of cultural and religious minorities, *within* the framework of a comprehensive system of law. But note the italicized words. It is not accommodation at all costs, but only an allowance that is “due” and “reasonable.” And in the modern West, what is reasonable is for the powers-that-be to determine—given all the usual exigencies and countervailing concerns such as public health, safety, order and the rights of others. Further, accommodation is on this view located firmly “within” the existing legal framework of constitutional norms. Accommodation is seen as a gracious *concession* conferred by the framers of the single overarching law for all citizens and decidedly not the acknowledgment of a rival legal order to which some citizens, by virtue of their faith, can avail themselves.

Nevertheless, accommodation is “an elastic term.” As Jeremy Waldron has clarified,¹⁰⁵ it may take two broad forms: (a) exemptions from the general law and (b) enforcement of transactions governed by religious norms. Exemptions from the law of the land are familiar and usually uncontroversial—Sikh motorcycle riders are permitted not to wear crash helmets and devout doctors may be excused from having to perform abortions.¹⁰⁶ Sometimes the exemptions are more contentious, however—one thinks here of the sacramental use of narcotics such as marijuana for Rastafarians or peyote for native American Indians tribes.¹⁰⁷

105. Jeremy Waldron, *Questions about the Reasonable Accommodation of Minorities*, in SHARI'A IN THE WEST, *supra* note 2, ch. 7.

106. See AHDAR & LEIGH, *supra* note 104, at ch. 6.

107. See KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOL. 1: FREE EXERCISE AND FAIRNESS ch. 5 (2006).

What the Archbishop of Canterbury meant in his lecture when he referred to “supplementary jurisdictions”¹⁰⁸ was the recognition and enforcement of transactions by religious tribunals according to religious norms, the second form of accommodation identified by Waldron. In simple terms, the Archbishop envisioned tribunals with limited powers being able to resolve certain kinds of disputes according to their own religious law, and the state co-operating by enforcing those judgments. However, the existing UK arbitration law, the Arbitration Act 1996, already embraces religious tribunals within its framework—a context which implies that the Archbishop’s proposal was either positively “otiose”¹⁰⁹ or, as we rather think, directed to something significantly more than merely affirming the rights of individual believers to agree to submit their disputes to the arbitration of religious courts. Indeed, Dr. Williams referred explicitly to “something like a delegation of certain legal functions to the religious courts of a community,”¹¹⁰ suggesting a kind of *permanent* recognition of a *standing system* of religious courts having a form of *presumptive jurisdiction* over all persons identified with that religion. However, the Archbishop at the same time would have this subject to the condition that any religious court process must have built-in safeguards, such as the right of appeal to the regular civil courts, and be subject to continual monitoring by the state in order to ensure that the rights and liberties of vulnerable individuals are protected.¹¹¹ The recently-introduced United Kingdom measure, the Arbitration and Mediation Services (Equality) Bill 2011, represents an attempt to address these kinds of concerns.¹¹² All criminal and family disputes are precluded from the jurisdiction of all arbitration tribunals in England and Wales and the Bill creates an offense (carrying a maximum five-year jail sentence) for anyone falsely claiming or implying that Shari’a courts or councils have jurisdiction over family or criminal matters. Furthermore, any discrimination against women is banned

108. See Williams, *supra* note 2, Appendix I at [10]-[11], [13]-[14], [20].

109. Adam Tucker, *The Archbishop’s unsatisfactory legal pluralism*, PUB. L. 463, 466 (2008).

110. Williams, *supra* note 2, Appendix I at [8].

111. *Id.* at [10]-[11], [14], [16], [19], [29].

112. The Private Member’s Bill was introduced in the House of Lords on 8 June 2011 by Baroness Cox. See Karen McVeigh and Amelia Hill, *Bill limiting sharia law is motivated by ‘concern for Muslim women,’* THE GUARDIAN, June 8, 2011.

and it would be unlawful for a Muslim Arbitration Tribunal to treat a woman's testimony as worth half that of a man's.

Arbitration regimes do not amount to a comprehensive regime of devolution and autonomy, or what the Archbishop referred to (and expressly refused to support) as "parallel" jurisdictions.¹¹³ However, they could, over time, develop into something very close to this. Notably, Dr. Williams understood the recognition of religious tribunals to be properly understood as a matter of "communal rights" and "public" legitimacy, and he rejected the idea that the state be conceived as a "sovereign order," which confers upon other subordinate orders the merely positive right to exist.¹¹⁴ Rather, he suggested that the ultimate ground of such accommodation ought to be a commitment to "human dignity as such"—no matter how any particular community might understand itself and its rights.¹¹⁵

However, as Jean-François Gaudreault-Desbiens has argued, conceiving the question of the accommodation of Shari'a courts in this way runs the serious risk of oversimplification and a failure to grapple with the much stronger claims that may be made by Shari'a courts, involving a kind of autonomous self-government, or what he characterises as a form of "personal federalism."¹¹⁶ Autonomy of this kind is what Professor Budziszewski distinguishes as a third level of accommodation.¹¹⁷ Under this stronger model, religious courts are in no sense subordinate or subject to review by the ordinary civil courts.¹¹⁸ Under such a regime, a wider range of possibilities emerges, which could include the imposition of punishments for violations of distinctly religious norms and rules (fines, corporal punishment, and even capital punishment for blasphemy, apostasy and adultery, or punishments that are even more severe than those issued by the general law as a response to the perpetration of certain crimes—amputation for theft, for instance).

113. Williams, *supra* note 2, at 28.

114. *Id.* at [8], [12], [15].

115. *Id.* at [17].

116. Jean-François Gaudreault-Desbiens, *Religious Courts' Recognition Claims: Two Qualitatively Distinct Narratives and Religious Courts, Personal Federalism, and Legal Transplants*, in SHARI'A IN THE WEST, *supra* note 2, ch. 4 & 10.

117. Budziszewski, *supra* note 92, ch. 11.

118. One version of parallel jurisdictions is the Malaysian model. For trenchant criticism see Joshua Neoh, *Islamic State and the Common Law in Malaysia: A Case Study of Lina Joy*, 8 GLOBAL JURIST (2008).

V. CONCLUSIONS

The possible accommodation of Islamic Shari'a within Western legal systems is a highly complex issue, raising profoundly difficult questions about Shari'a, about the West, and about the many different things that the accommodation of Islamic law could mean. Shari'a is not a monolithic system of law, the content and application of which is generally agreed. Rather, there are several schools of Shari'a, many different cultural and national expressions of Islamic faith and practice, and there is no widely accepted jurisdictional hierarchy of Islamic courts, on either a global, regional or national scale. Accommodating Shari'a in the West would, therefore, require choices to be made among a plurality of legal sources and juristic opinions.

Similarly, the stance of the West is not uniform. Different Western countries have different official stances, and prevailing attitudes to the accommodation of minority beliefs, and practices differ from country to country. Moreover, the Western legal tradition is itself heir to a long succession of philosophical and religious ideas, each of which imply subtly different approaches to matters of religious and cultural diversity. Accordingly, the accommodation of Shari'a within the legal systems of West could entail vastly different things, ranging from a system of parallel courts exercising exclusive civil and criminal jurisdiction over an entire Muslim community to an completely voluntary system of personal arbitration based solely upon the agreement of individual parties to submit their particular disputes to Islamic adjudication on a case-by-case basis.

Calls for the accommodation of Shari'a, thus, present Western policy makers with issues that are not only highly controversial, but also exceedingly complex, for they involve an imposing set of profound and difficult questions simultaneously straddling law, politics, statecraft, history, culture, philosophy and religion. The Western response so far has been to receive significantly large numbers of Muslim migrants from Africa, the Middle East and South Asia, and to accord them a very large measure of freedom to exercise their religious faith and to order their lives according to the values and laws of their religion. This includes a capacity to resolve internal disputes according to each Muslim community's understanding of the Shari'a. In many Western countries, Muslims can even seek to have Shari'a judgments given the force of secular law under civil arbitration statutes of various kinds. However, submission to the judgment of Shari'a tribunals has generally been

understood as a voluntary arrangement, and individual Muslims remain theoretically free to commence legal proceedings before the general courts of the land if they so wish, and the judgments of those courts will be enforced by the state notwithstanding anything that might “privately” have been decided by a Shari’a tribunal.

Whether further and deeper accommodation of Shari’a will develop in the future—perhaps in the form of some kind of standing recognition of Shari’a courts having presumptive jurisdiction over those within the Muslim community as whole—remains, however, a very open question. From a Western point of view, the practice of Shari’a is in part a religious liberty issue and, to that extent, its conscientious practice ought to be a right enjoyed by all committed Muslims, qualified only by strictly justifiable limitations imposed by the general law. However, given the complexities and lurking problems that more far-reaching accommodation could entail, the enforcement of Shari’a by state authority needs to be approached very cautiously, noting the nature of Shari’a as “entire way of life,” its constitutional implications for the basic structures of the state, and the possibility of its use as a tool by extremist elements. Concerns such as these need to be fully aired and the issues closely scrutinized before proceeding beyond “Arbitration Act” style accommodation—and even here, close attention needs to be given to the communal pressures to conform that may arise within particular contexts, undermining the genuinely voluntary nature of any supposed submission to arbitral jurisdiction. But because the accommodation of Shari’a must depend also on Islamic views about what Shari’a is and how it is to be practiced within Western societies, much will ultimately turn on the efforts of Muslim scholars, jurists and religious leaders to articulate approaches to the Shari’a that make its accommodation compatible with Western values.

