

Following is my chapter on “Natural Law, Shari’a, and Democracy,” in Rex Ahdar and Nicholas Aroney, *Shari’a in the West* (Oxford, England: Oxford University Press, 2010).

The publisher writes, “In February 2008, the Archbishop of Canterbury, Dr. Rowan Williams, delivered a public lecture in which he stated that it "seem[ed] unavoidable" that certain aspects of Islamic law (Shari'a) would be recognized and incorporated into British law. The comments provoked outrage from sections of the public who viewed any recognition of Shari'a law in Britain with alarm. In July 2008 Lord Phillips, Lord Chief Justice of England and Wales, weighed into the fray. He praised the Archbishop's speech and gave qualified support for Shari'a principles to govern certain family and civil disputes. Responding to the polarized debate that followed these lectures, this is a collection of short essays written by distinguished and prominent scholars addressing the question of the accommodation of Shari'a within the legal systems of the liberal-democratic West.” The other contributors include Tariq Modood, John Milbank, Jean-François Gaudreault-Desbiens, Michael Nazir-Ali, James W Skillen, Jeremy Waldron, Ayelet Shachar, Jean-François Gaudreault-Desbiens, Sophie van Bijsterveld, Abdullah Saeed, Ann Black, Erich Kolig, and John Witte, Jr., as well Dr. Williams and Lord Phillips.

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Natural Law, Democracy, and Shari'a

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Should the West Accommodate to Islam?

The suggestion that Western liberal democracies accommodate¹ Islamic religious courts and Shari'a religious law might be taken in various ways. First, it might be taken as purely prudential in motive. People of different religions are just too different, the proposer might say, to live amicably under the same laws and courts. If Muslims were granted a degree of juridical autonomy, then we would all get along better. The arrangement would be much like federalism, but along religious rather than geographical lines.

This argument is surprisingly weak. Conceivably there are circumstances in which juridical autonomy for religious minorities would be the last, best hope for those who seek peace, but these circumstances would have to be desperate indeed. The contrast between Shari'a and English law is much greater than between, say, the laws of Virginia and Delaware, and they lie not only in detail but in basic philosophy. It is hard to see why separation into distinct jurisdictions would not undermine the sense of common cause among the citizens, making amicable relations among them more difficult rather than less. Besides, if Muslims were granted juridical autonomy with their own Shari'a courts, whose interpretation of Shari'a would these courts follow? Wouldn't it be necessary to establish separate jurisdictions for Sunnis and Shi'ites—at least for each of the one main Shi'a and four main Sunni schools of jurisprudence? The population would be broken into not two parts but six. But why stop there? If separate jurisdictions were established for the several varieties of Muslims, it would be difficult to explain why they should not also be established for, say, the several varieties of Jews—or is it only that their youth are not so angry? What about Christians? Notwithstanding a few decrepit 'establishments' like the Church of England, it has been a long time since anyone considered the Western democracies Christian—not to mention the fact that if the legal status of an organization such as the Church of England has any effect at all, it makes the situation of local Christians who do not belong to it more awkward,

¹ For discussion of the meaning of 'accommodation', see the Appendix to this chapter.

not less. How many Christian jurisdictions would we need? There is only one Catholic Church, but there are nine Orthodox patriarchates and tens of thousands of Protestant denominations. No doubt the prospect of juridical autonomy would make schism more attractive than ever.

And what about other religions? Would Theosophy count? Would Baha'i? While we are at it, what do we *mean* by religions? To be entitled to courts of their own, would believers have to believe specifically in God? If the argument for autonomy is prudential, that would be strange. Perhaps, as the US Supreme Court suggested in 1965, the juridical meaning of religion should be any 'sincere and meaningful' belief that 'occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God' of groups that do believe in God.² Curiouser and curiouser! But then is Marxism a religion? How about utilitarianism? Perhaps the New Age sects? An especially thorny question is whether a separate jurisdiction is needed for Secular Humanists. The first *Humanist Manifesto*, in 1933, declared their creed religious; the second, in 1973, was silent on the subject; and the third, in 2000, not only denied that the creed is religious, but was indignant with anyone who said that it is. Does this show that Secular Humanism has 'evolved', or has there been a schism between New Secular Humanists and Old Regulars? Should an autonomous jurisdiction be set up just for the Olds? But then the News might be restive. Should the News be allowed courts too? Or is this unnecessary because they already get their way with the law?

Nor is the analogy between religious and geographical 'federalism' very close. How would the polity determine who belonged to each religious jurisdiction? Would juridical identity be determined by birth, ethnicity, profession of faith, simple declaration, or something else? Suppose juridical identity were immutable; what then would become of the liberty to change religions? Suppose it were *not* immutable; how then could individuals be prevented from 'gaming' the system? For example, could a man evade the bigamy laws of the majority jurisdiction by transferring to the Muslim jurisdiction, then, later, dissolve his second, third, and fourth marriages by transferring back to the majority jurisdiction? Of course legislators could set up barriers against change of jurisdiction—for example, one could forbid conversion, or allow people to convert, but require them to live according to the laws of the *former* religion in which they say they no longer believe. Needless to say, however, such solutions would merely produce new problems of their own. And if the system could be 'gamed', then wouldn't *de jure* recognition of different legal norms for different religious jurisdictions be *de facto* equivalent to the adoption of a single legal norm for the whole nation? It would seem that the answer is 'yes'; not only in marriage law but in every branch of law the more permissive of the various available standards would inevitably 'win'. (This also shows why jurisdictional

² *United States v Seeger*, 380 US 163, 165–166, 85 S Ct 850 (1965). The question in *Seeger* was the meaning of legal exemption from military conscription on grounds of a conscientiously held 'belief in a relation to a Supreme Being'.

autonomy for religious groups is not an authentic application of subsidiarity.³) If the marriage law of the majority jurisdiction were monogamous but the marriage law of the minority jurisdiction were polygamous, then the de facto norm for the whole country would be polygamy. If the marriage law of the minority jurisdiction were polygamous but the marriage law of the majority jurisdiction became 'polyamorous', God forbid, then the de facto norm for the whole country would be polyamory.

The prudential argument also assumes that the new constitutional arrangement is stable. This in turn supposes that religious minorities want nothing more than to be left alone, so that, once granted juridical autonomy, they will be content. Doubtless some religious minorities want nothing more than to be left alone, but would this not depend on the actual teachings of their religions? One observer writes that although Shari'a allows truces between Muslims and non-Muslims, such interruptions in *jihād* are but a means to an end; the fundamental teaching is 'a canonically obligatory perpetual state of war until the whole world is either converted or subjugated'.⁴ If this interpretation is correct—I will return to the question later—then Muslims might accept juridical autonomy as a new stage of the truce between themselves and the non-Muslim majority. On the other hand, they might view it as the beginning of the end of the truce; that is, establishment of Shari'a in a single jurisdiction might present itself as the first step toward its imposition on everyone. In fact, the practical difficulties to which I alluded in the previous paragraph would almost compel such a step, because a legal system that can be 'gamed' is not a legal system at all.

Considering the weakness of the prudential argument, the suggestion that the Western liberal democracies accommodate Shari'a probably owes most of the attention it has received to considerations of morality, not prudence. For the typical 'hairy lefty',⁵ it simply seems *wrong* not to grant juridical autonomy to Muslims. The implicit touchstone of justice seems to be something like equal treatment of all religions. Because they are not able to live under their own laws and courts, they are not treated equally.

But in the absolute sense intended, equal treatment is logically impossible. In the first place, not all religions believe in equal treatment. Shari'a, in fact, is quite explicit that different religions should *not* be treated equally. Paradoxically,

³ Subsidiarity is the principle that 'it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them'. In particular, the state should confine itself to those functions that smaller associations, such as families, neighborhoods, and religious communities, simply cannot accomplish on their own: Pius XI, *Quadragesimo Anno* (Encyclical letter, 1931) [79]–[80]. This principle does not mean that each form of association is entitled to its own law; what it means is that the law should respect the moral work of each form of association. The overarching framework is the natural law.

⁴ B Lewis, *The Multiple Identities of the Middle East* (New York: Schocken Books, 1998) 122.

⁵ I allude to a self-deprecating quip by the Archbishop of Canterbury, who includes himself in that tribe. My aim, however, is to characterize the intellectual tendency of 'hairy lefties' in general.

then, insistence on equal treatment of all religions looks like just another kind of religious imperialism, privileging those religions which do believe in equal treatment over those which do not. In the second place, even if we restrict attention to religions that do believe in equal treatment, the fact remains that every view of equality is *some* view of equality. Consider, for example, equality of religious liberty. To one group, this may mean that no one may change his religion; to another, that anyone may change his religion, but no one may proselytize; to still another, that anyone may change his religion, and anyone may proselytize. Each of these three conceptions applies a uniform standard to everyone, but in each case the uniform standard is different. Clearly, to implement one view of equality rather than another is not to treat different views of equality equally, so in yet another way, different religions would fare differently. There is no such thing as being 'equal in every way'; to implement equality in one sense one must bring about inequality in another.

Moreover, a certain general view of the attainment of the truth about God and his moral requirements is usually presupposed even by 'hairy lefty' ideologies that do propose treating all religions equally. This general view is more or less agnostic; it supposes that different religions should be treated differently because they are equally in the dark about religious truth. Concerning just how dark the darkness is, different species of agnostics disagree: rigorists consider it as black as pitch, moderates hold that it is more like the thicker sort of soup. Agnostics of the former type view religious truth as utterly resistant to rational inquiry. By contrast, those of the latter type view it only as relatively resistant to it; while conceding that people may reasonably disagree about many things, they view religious truth as somehow *more* open to reasonable disagreement than the many other things about which Western liberal democracies make decisions. Presumably these other things include such easy and uncontroversial questions as how to achieve peace among nations, how to regulate their economies, and how to induce their agnostic citizens to start having children again.

The crux of the matter is that no matter which variety of agnosticism we consider, it is not theologically neutral. In fact, agnosticism closely resembles the religious view called fideism, for both fideists and agnostics agree that faith and reason are strangers to each other. The difference is that fideists view themselves as siding with faith, agnostics, usually, with reason. What makes the resemblance so important is that not all religions are fideistic—a point that often comes as a surprise to 'hairy lefties', if it is not lost on them altogether. Catholic Christianity, for example, is *not* fideistic. To be sure, it holds that certain revealed truths, such as the Trinity and the Incarnation, exceed the capacity of the human mind to have known without special assistance. Even so, in Christianity God is understood as the *Logos*, or Divine Mind, whose wisdom is reflected in the created order. This fact makes that order accessible to the finite intellect of human beings, who are made in His image. Consequently, Christianity views faith and reason not as strangers, but as complementary to each other—in the striking image of John Paul II, as the two wings of

a bird, both of them are needed for flight.⁶ Since not all religions are fideistic, the 'hairy lefty' is placed in the absurd position of defending his policy of treating all religions equally on grounds that fideistic religions are *right* about rational inquiry, and that non-fideistic religions are *wrong*. To say it yet again: to base public policy on such considerations is plainly not to treat all religions equally.

An even deeper problem is that if the agnostic says that religious truth is especially resistant to rational inquiry, he contradicts himself, for to know God's rational unknowability would be to know something about Him. Indeed, it would be to know a great deal about Him. First, one would have to know that even if He exists, He is infinitely remote, because otherwise one could not be so sure that knowledge about Him were rationally inaccessible. Secondly, one would have to know that even if He exists, He is unconcerned with human beings, because otherwise one would expect Him to have provided the means for humans to know Him. Finally, one would have to know that this hypothetical being is completely unlike the Biblical portrayal of Him, because in that portrayal He does care about us and has already provided such means—not only through revelation, but even, in part, through the order of Creation. So, in the end, the so-called agnostic must claim to know quite a number of things about God just to prop up his claim to not knowing. The problem is that, on his assumptions, he cannot rationally justify any of these things.

But what if the agnostics were right? What if religious truth really were specially resistant to rational inquiry; what then? Even then it would not follow, as the 'hairy lefty' thinks, that different religions should be treated equally. The consistent agnostic would have to be agnostic on this question too; he would have to concede that there is simply no rational way to decide how different religions should be treated. There might be non-rational ways, such as waiting for a bolt of illumination; one could try that. Of course the method would also require a jolt of subjective confidence that the bolt of illumination had come from on high, rather than, for example, from an electrical disturbance in the amygdala of the brain. Alternatively, one might say, 'Since I have not yet been granted a bolt of non-rational illumination, I will proceed on the basis of the things I know by purely rational means, such as the fact that I want to get along'. But that too would be irrational. After all, some religions hold that there are more important things than getting along. Others hold that reason is a 'whore', not to be trusted.⁷ The agnostic is proceeding as though he knew that such claims were false, but on his premises,

⁶ 'Faith and reason are like two wings on which the human spirit rises to the contemplation of truth; and God has placed in the human heart a desire to know the truth—in a word, to know himself—so that, by knowing and loving God, men and women may also come to the fullness of truth about themselves': John Paul II, *Fides et Ratio* (Encyclical letter, 1998) preface, citing Exodus 33:18, Psalm 27:8-9 and 63:2-3, John 14:8, and 1 John 3:2.

⁷ 'As a young man must resist lust and an old man avarice, so reason is *by nature* a harmful whore. But she shall not harm me, if only I resist her. Ah, but she is so comely and glittering': M Luther, 'Last Sermon in Wittenberg' in J B Doberstein and H T Lehmann (eds), *Luther's Works* (Philadelphia: Muhlenberg Press, 1959) Vol 51, 371, 376 (emphasis added).

he has no rational grounds for such a strong conclusion. He accepts it, if he will pardon the expression, on faith—which he rejects.

Should Islam Accommodate to the West?

The contrasting suggestion is usually taken to be that Islam should accommodate itself to Western liberal democracy. But there are two different ways of taking this suggestion. According to one way, Islam must be talked into betraying itself. Though the idea is rarely expressed openly, to anyone who can read between the lines of contemporary discussions it all but shouts its presence. Shortly I will propose a different way of taking the suggestion, but first let us consider what opponents would view as the betrayal program. At least as I read between the lines, betrayalists share the following suppositions.

First, they suppose that liberal democracy is good. What this usually means for them is that it is good *as it is*—good in its present, morally relativistic form. I do not suggest that the citizens of the Western liberal democracies are all relativists, but even where they are not, their rulers tend to be.⁸ Of course there is a paradox in viewing relativism about values as valuable. One may seek to escape the paradox by saying that one's preference for relativistic social arrangements reflects not a judgment about objective value, but merely a personal choice. However, such a move only pushes the paradox one step back. Rather than supposing that nothing is objectively good, it takes the act of choosing as objectively good. Choices, for so long as they last, are justified just by being choices.

Secondly, betrayalists suppose that revealed religion is bad. The usual view is that claims of access to divine revelation are dangerous to religious liberty and antithetical to government by the people. This simply ignores the testimony of history, which shows that throughout Western tradition the dominant arguments for religious liberty and for something like what we call liberal democracy were not only religious in nature but closely entwined with divine revelation. As St Hilary of Poitiers writes, God does not desire unwilling worship or forced repentance; Isidore of Pelusium agrees, adding that salvation is won not by force but by gentle persuasion.⁹ According to St Thomas Aquinas, scripture and reason agree that the best form of government is 'partly kingdom, since there is one at the head of all; partly aristocracy, in so far as a number of persons are set in authority; partly democracy, ie, government by the people, in so far as the rulers can be

⁸ As sociologist of religion Peter C Berger is said to have remarked of my own country, if India is the most religious country and Sweden the least, then America is a nation of Indians ruled by Swedes. Attribution by Richard John Neuhaus, 'The Public Square' (June/July 2002) 124 *First Things: A Monthly Journal of Religion and Public Life* 75, 90.

⁹ Hilary of Poitiers, *To Constantius*; Isidore of Pelusium, *Epistles*, 2.129. For more extensive quotations and discussion, see J Budziszewski, *The Line Through the Heart: Natural Law as Fact, Theory, and Sign of Contradiction* (Wilmington: ISI Books, 2009) Ch 10.

chosen from the people, and the people have the right to choose their rulers'.¹⁰ Unfortunately, betrayalists associate liberal democracy and religious liberty so closely with their relativism that the non-relativist origins of these ideals become invisible to them.

Thirdly, betrayalists suppose that since religious believers are unlikely to abandon their religions, what liberal democracy requires is a way to tame revelation, to make it into a wax nose, something that can be refashioned into whatever shape is desired. If Christianity appears friendly to liberal democracy today, they think, it is only because in Christianity the waxen metamorphosis has finally been accomplished; what remains is for Islam to follow suit. A case could certainly be made for this view. Consider for example Exodus 19:12–13, which reads in part, 'whoever touches the mountain [of God] shall be put to death; no hand shall touch him, but he shall be stoned or shot; whether beast or man, he shall not live'. Gregory Nazianzen, one of the Fathers of the Church, takes 'touching the mountain' to include all expressions of contempt for revealed truth whatsoever. His commentary on the passage breathes fire: to anyone who would 'tear sound doctrine to pieces by his misrepresentations', he issues the warning, 'let him stand yet afar off and withdraw from the Mount, or he shall be stoned and crushed, and shall perish miserably in his wickedness'. Yet by stoning, Gregory does not mean literal stoning, for he immediately explains that 'to those who are like wild beasts', the meaning of 'stones' is simply 'true and sound discourses'.¹¹ 'There', says the betrayalist, 'you see? Through sufficiently creative exegesis, Christianity can push revelation into any shape it pleases'.

If one knew nothing else about patristics but these few lines, Gregory's interpretation might indeed seem to make the Exodus passage into a wax nose. In the overall context of patristic exegesis, however, the appearance of arbitrariness disappears. Whether or not one agrees with them, writers like Gregory were not playing hermeneutical games. What lay behind their non-literal methods was the conviction that the Incarnation of Christ inaugurated a new and final phase of salvation history. The situation of Israel in Old Testament times was temporary and unique: alone among the nations of the earth, it was the nation from whom God would reveal His anointed one. But now the Messiah has come, and the gates of the covenant have been opened to the Gentiles. Torah, then, can no longer apply to the Church in the way that it applied to the Jews. Yet it is unthinkable that it has no meaning for the Church at all, for 'the word of God is living and active',¹² not like a human word, which briefly sounds and then passes into stillness. God, in whose hands all history lies, can surely arrange that His living word communicates a partial truth to Israel in one age, and a fuller truth to the Church

¹⁰ T Aquinas, *Summa Theologica* I-II, Q 105, Art 1.

¹¹ Gregory of Nazianzen, *Second Theological Oration*.

¹² Hebrews 4:12 (Revised Standard Version).

in a later one. The special case has elapsed, but the eternal realities, both spiritual and moral, endure.

Let us admit this much: the wax nose is a pretty good description of the revisionist biblical scholarship favoured by some on the left. There is no tradition behind it, as there was behind Gregory's hermeneutics. It is merely an accommodation to the shibboleths of the day, and it changes as often as they do. But revisionism of this sort is not about reconciling Christians to liberal democracy as such; it is about reconciling them to the present, relativist condition of the liberal democracies. Moreover, as a program for sustaining a flourishing social order, it seems to be a loser. Those liberal democracies which have gone farthest in the relativist direction are busily committing demographic suicide. Apparently it is true that to lose God is to lose man as well.

One could hardly expect sincere Muslims (or for that matter sincere Christians or Jews) to regard rejectionism as a good idea. The project of turning revelation into a wax nose can advance only by craft and disguise on the part of its proponents, and naive credulity on the part of those whom they seek to influence. It is a means by which an irreligious cultural elite pull the strings of a citizenry that, despite everything, retains vestiges of faith.

Should Both Accommodate to Natural Law?

There is yet another way to take the suggestion that Islam undertake an accommodation: let both Islam and the nations of the West accommodate themselves together to classical natural law—the tradition in which liberal democracy had its remote origins and that also has strong historical connections with Christianity, Judaism, and, at least in the Middle Ages, Islam. Insofar as man is a reasoning, truth-seeking creature, insofar as rightly developed reason is characterized not as bare analytical intelligence but as creaturely awareness and respect, natural law offers a common ground among all human beings. To propose such a common ground would be to abandon the shibboleths of all the 'hairy' tribe and take guidance from our shared creaturehood in a shared Creation, the moral order of which is accessible to reason. The appeal of this suggestion for Islam would be the hope it offered, not to betray itself, but to realize more fully its aspiration of submission to the Mind of God. The appeal of it for the West would be the rediscovery of its non-relativist roots, cut off from which, it is dying.

This way of taking the suggestion has a history. Natural law thinkers were no strangers to social pluralism. The 'hairy lefty' assumes that ancient and medieval thinkers were attracted to the idea of natural law because they had not yet conceived the enormous variety of possible conceptions of right and wrong. On the contrary, 'knowledge of the indefinitely large variety of notions of right and wrong is so far from being incompatible with the idea of natural right that it is

the essential condition for the emergence of that idea: realization of the variety of notions of right is *the* incentive for the quest for natural right'.¹³

The classical natural law tradition must be distinguished from the thinned and flattened versions of natural law theory that emerged from the Enlightenment (and are tied up with our problems). According to their proponents, epitomized by Thomas Hobbes, civic order is based on a social covenant or contract in which we abandon the state of nature and reconcile ourselves to law merely as a desperate expedient to escape the greatest evil, death. Classical natural lawyers would reject every element of this view.

In the first place, for the unfortunate expression 'state of nature' to make any sense whatsoever, it would have to refer to the condition in which our natural potentiality can unfold, the condition in which beings of our kind can flourish. As it turns out, the condition in which that can happen is not anarchy but society, wherein we take counsel together about the common good under the rule of law, a law moreover that respects the multitude of forms of association that the various facets of human association require in order to blossom—not only or even mainly the state, but marriages, families, neighborhoods, friendships, and bodies of worship. In the second place, death is not the agreed-upon greatest evil that Hobbes took it to be. It may be that everyone dreads death, but it is also true that almost everyone views some things as worse than death. Aristotle hit the mark when he wrote that although the political community may come into existence for the sake of staying alive, it exists for living well. In the third place, law is not a necessary evil but a requirement for our good. To achieve beauty, the painter must submit to the laws of human perception, the laws of paint and canvass, and the laws of beauty themselves, as they gradually reveal themselves to the mind of man. So it is in every domain of life, including the organization of society. The right kind of discipline is not the enemy of freedom but its condition.

The central claim of the classical tradition can be expressed in just a few sentences. Law may be defined as an ordinance of reason, for the common good, made by legitimate public authority, and promulgated.¹⁴ Nature may be conceived as an ensemble of things with particular natures, and a thing's nature may be thought of as the design imparted to it by the Creator—as a purpose impressed upon it by the divine art, so that it is directed to a determinate end.¹⁵ The claim of the tradition is that in exactly these senses, natural law is both (1) true law, and (2) truly expressive of nature. Consider the natural law forbidding murder. It is not an arbitrary whim, but a rule which the mind can grasp as right. It serves not some special interest, but the universal good. Its author has care of the universe, for He created it. And it is not a secret rule, for He has so arranged His Creation—including the design of the created moral intellect—that every rational being knows about it.

¹³ L. Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953) 10.

¹⁴ *Summa Theologica* I-II, Q 90, Art 4.

¹⁵ T. Aquinas, *Commentary on Aristotle's Physics* Bk 2, Lect 14.

Has Islam Room for Natural Law?

An Islamic thinker who is writing about the natural law would of course draw from different resources than would a thinker from my own tradition. As he contemplated the moral order of Creation, a Christian thinks of scriptural passages like the following:

[F]rom the greatness and beauty of created things comes a corresponding perception of their Creator . . . if [men] had the power to know so much that they could investigate the world, how did they fail to find sooner the Lord of all these things?¹⁶

When Gentiles who have not the law do by nature what the law requires . . . [t]hey show that what the law requires is written on their hearts, while their conscience also bears witness and their conflicting thoughts accuse or perhaps excuse them . . .¹⁷

From his own scriptures, the Muslim finds a parallel for both of these reflections:

We shall show them Our signs in the horizons and in themselves until it is clear to them that it is the truth.¹⁸

A certain difficulty is posed by the question of how these ‘signs’ are to be interpreted. From medieval times to the present, some Muslim thinkers have argued that God acts not only directly, but also through secondary causes, or *ashab*. In other words, He endowed created reality with an intrinsic order of its own, both moral and physical. Natural laws are simply descriptions of this order. The many who are influenced by the medieval theologian Abu al-Hasan al-Ash’ari deny the existence of secondary causes. In their view, God produces each ‘sign’ we witness in the created world by a direct and unmediated exercise of His will. It may seem that the latter view is incompatible with natural law. However, the question is more complex, for order in created reality might arise not from secondary causes, but simply from the fact that the will of God habitually moves in certain regular ways. The question, then, is not whether God acts through secondary causes, but whether, if not, His will is rational and regular. If it is not, then natural law is impossible—but so, it would seem, is Shari’a! To an outsider, then, it seems that any view that would make Shari’a believable would make natural law believable too.

Just as a Christian natural law thinker also tries to be faithful to sacred scripture and apostolic tradition, so of course a Muslim natural law thinker would try to be faithful to the legal prescriptions of the Qur’an and the traditions about the Prophet, called *hadith*. However, Shari’a is not a simple transcription of these sources; it could not be, for the Qur’an and *hadith* do not provide rules for all

¹⁶ Wisdom 13:5, 9 (Revised Standard Version, Catholic Edition).

¹⁷ Romans 2:14-15 (Revised Standard Version).

¹⁸ Fussilat (Qur’an 41) 53, cited in the open letter of Muslim scholars to Pope Benedict XVI (19 October 2006) in response to the papal address at the University of Regensburg, ‘Three Stages in the Program of De-Hellenization’ (12 September 2006).

possible circumstances. Rather, Shari'a is an interpretation and elaboration of these sources, much as *halakbah*, or Jewish law, is an interpretation and elaboration of Torah. In a certain sense, Shari'a requires even greater interpretive exertion, for the Qur'an contains a much smaller proportion of explicitly legal material than Torah, smaller still if one excludes those passages prescribing rules for religious ritual. The Shari'anic project of interpretation required all of the powers of Islamic moral and legal intelligence over a period of centuries.

To be sure, it is hard to see how Shari'a can be reconciled with natural law if it is regarded merely as a code, as something fixed, immutable, and dead. But a natural law-minded Islamic thinker will regard it instead as a living tradition, entering as fully as possible into the spirit of the jurists who developed it. The list of methods used by these jurists, the relations among them, and the terminology by which they are discussed differ among the various schools of Islamic jurisprudence, but in every school, jurists did much more than follow inflexible precedents and crystal-clear instructions in the holy texts. For example:

- (1) They honoured historical consensus, *ijmāc*, although just whose consensus is to be consulted—for example, the consensus of the whole community, of the companions of the Prophet, or of Islamic jurists themselves—is a matter of disagreement among the schools.
- (2) They employed analogical and 'independent' reasoning. Sunni jurisprudence calls analogical reasoning *qiyas*. Shi'a jurisprudence speaks instead of *ijtihād*, which is the exercise of *'aql*, a more general term for the faculty of reason.
- (3) They debated broad principles for adjudicating among conflicting precedents. This method, called *istihsān*, is characteristic of the Hanafi school of Sunni jurisprudence. Its founder, Abu Hanifa, proposed giving preference to precedents that soften or mitigate hardship or harshness. Controversy arises over whether *istihsān* is to be used only when other grounds for preference fail, or may be used more generally.
- (4) They consulted widely held practices or customs of the local society. Such customs, called *urf*, are acknowledged as a basis for legal reasoning in Sunni but not Shi'a jurisprudence. The literal meaning of the term is 'knowledge', suggesting an analogy with a famous argument of Thomas Aquinas, who held that sound custom 'has the force of a law, abolishes law, and is the interpreter of law' because, by making the people's tacit reasoning about what they judge good manifest, it fulfils the criteria of all authentic law—that is, it is an ordinance of reason, directed to the common good, made by public authority, and promulgated (in this case, not by speech, but by repeated acts).¹⁹

¹⁹ *Summa Theologica* I-II, Q 97, Art 3, in the light of Q 90, Art 4.

- (5) Finally, in some cases they tried to derive legal rules from first principles. The most famous proponent of this method was Ibn Rushd, but here the relationship with the natural law tradition is more subtle. To be sure, classical natural law thinkers view all authentic law as ultimately derivable from first principles. On the other hand, it is not ordinarily the case that the jurist or legislator begins with first principles and then reasons forward, like a deviser of geometrical proofs. Rather, it is the case that, in principle, one can always reason *backward* to the first principles in which correct judgments are grounded. The axiomatic-deductive model is more characteristic of the natural law theories of the Enlightenment than of the classical natural law tradition.

To an outsider such as myself, it seems that the spirit of these five practices within Islam would have every right to be called authentically Islamic. In so far as it employs the powers of intellect to investigate the moral order of Creation, it would also be a natural law tradition, and would make possible the authentic dialogue about rule of law that is so difficult to achieve today. It was no accident that the period during which the thinkers of my faith achieved their greatest insights into natural law coincided with the period during which they were intensely and simultaneously engaged with the pagan thought of Aristotle, the Jewish thought of Maimonides, and the Muslim thought of Ibn Rushd, whom they called Averroes.

Yet the proposal that Islam and the nations of the West accommodate themselves jointly to the natural law presents difficulties of its own—even if one can talk them into doing it. I have called natural law a common ground, but in the first place it is a *slippery* common ground, wet with the dews of self-deception, difficult to stand upon steadily. If we concede St Paul's point that a law is written on the heart of man, we must also concede that it is everywhere entangled with the evasions and subterfuges of men. Neither is it a *neutral* common ground, for if it does turn out to be the case that some truths about God and His moral requirements can be known by reason even prior to revelation, then it is unreasonable to reject these truths, and they will shape our views about which claims concerning revelation are plausible. We would not take seriously a claim that God desires, for example, the encouragement of suicide or the murder of schoolchildren, because this would put God at odds with the moral order He Himself had built into Creation. Finally, it may be an *incomplete* common ground. It is one thing to believe that the natural law determines the outlines of a just public order, but it is quite another thing to suppose that it determines all of their features without any help from revelation whatsoever.

The slipperiness, tilt, and incompleteness of the common ground may account for the reluctance of many in the Islamic world to stand on it. I mentioned earlier that Sunni jurisprudence employs analogical reason, *qiyas*, while Shi'a jurisprudence also employs 'independent' reasoning, or *ijtihad*. Most Sunni writers hold that the gates of *ijtihad* 'closed' after the tenth century and that the practice is no

longer to be used—a point which the various schools dispute, and which modernist scholars within Islam deny.²⁰ What does it mean to say that the gates of *ijtihad* are closed? Would this view preclude a restoration of natural law reasoning in Islam, or would it preclude only the irresponsible personal philosophizing that al-Ghazali sought to criticize in his classic work *The Incoherence of the Philosophers*?²¹ What would it mean to reopen the gates of *ijtihad* if reopening were generally accepted?²²

The West has been vexed by its own version of the problem of irresponsible personal philosophizing; in the liberal democracies, it troubles relations between courts and legislatures. Some hold that judges may void legislative acts by direct appeal to natural law, because if they may not, then legislatures will be omnipotent. Others hold that judges may *not* void legislative acts by direct appeal to the natural law, because if they may, then courts will be omnipotent. What both sides overlook is that judges would not be able to avoid considerations of natural law even if they were utterly deferential and had no authority to void written law. The fact is that considerations of natural law arise willy-nilly, even in the mere interpretation of written laws whose validity is wholly conceded.

I owe my favourite illustration of this point to Professor Charles E Rice. The 1932 *Restatement of Contracts* declares in section 90,²³ 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise'. Put more simply, if breaking a promise would cause injustice, then the promise is binding. This formula does not explain what 'injustice' means; it expects readers to know that already. Suppose language like this were contained in written law. In such a case judges would be forced to work out some of the remote implications of the natural law, just to figure out what the written law meant by 'injustice'. One may try to avoid the problem by replacing undefined terms like 'injustice' with other terms, but then these terms will need interpretation, so the banished problem reappears. Logically, this must also be true for Shari'a.

²⁰ See, eg Wael Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) *International Journal of Middle East Studies* 3; and Shaista P Ali-Karamali and Fiona Dunne, 'The Ijtihad Controversy' (1994) 9(3) *Arab Law Quarterly* 238.

²¹ Abu Hamid Muhammad Al-Ghazali, Sabih Ahmad Kamali (trans), *The Incoherence of the Philosophers* (Lahore: Pakistan Philosophical Congress, 1963).

²² For one form that it might take, see the approach of Mahmud Shaltut, whose work *Koran and Fighting I* discuss below.

²³ *Restatement of Contracts* (American Law Institute, 1932), Sec. 90, 'Promise Reasonably Inducing Definite and Substantial Action'.

The Question of Intrinsically Evil Acts

Considering just the slipperiness of the common ground, two areas of discussion with Muslims will prove both difficult and crucial.

The first sensitive point is likely to be whether Islam recognizes that some acts are intrinsically evil, so that they are not only categorically but irrevocably forbidden; to put it another way, whether any moral prohibitions are not only inviolable, but also immutable. Because of Islamic terrorism, the practical interest of this point is whether, if there are such acts, they include the deliberate taking of innocent life, and further, how innocence is defined.

Superficial arguments can be advanced both pro and con. Against the view that Shari'a recognizes intrinsic evil, one might call attention to the Shari'a principle, *al-daruratu tubiyh al-mahzurah*, 'necessity makes the unlawful lawful'. Taken literally, this would mean that no act is categorically prohibited; it would commit Islam to a form of consequentialism according to which, in the final analysis, right and wrong were determined only by results. The ends would justify the means.

However, it is far from clear whether Shari'a requires the principle to be taken literally. An analogous maxim can be found in classical natural law tradition, *necessitas legem non habet*, 'necessity knows no law'. Like the corresponding principle of Shari'a it is dangerously worded, and it has been subjected to endless abuse by Western consequentialists—for example to rationalize the atomic bombing of Hiroshima and Nagasaki, which was a clear violation of the 'discrimination' principle of the just war doctrine because it involved the deliberate targeting of non-combatants. But *necessitas legem non habet* was never intended literally in classical natural law, nor could it have been, because the same tradition also insisted that 'Evil must not be done that good may come'.²⁴ The original intention of the Western maxim about necessity seems to have been to dispense individuals from subordinate regulations in cases where these work at cross-purposes with the greater rules that they are ordained to serve. Thus, in cases of great necessity a sacred ritual may be held in an unconsecrated space, and a penitent at the point of death may seek absolution from a priest other than his own.

Thomas Aquinas sheds light on the underlying reasoning in his discussion of another example: why a person in extreme need may take the property of another. Property ownership is not absolute; it is a form of stewardship of goods that are ultimately intended for the succour of man's needs. Thus, 'whatever certain people have in superabundance is due, by natural law, to the purpose of succouring the poor'.²⁵ In this context the principle 'necessity knows no law' functions not

²⁴ Citing Romans 3:8, Thomas Aquinas takes the principle for granted. Eg *Summa Theologica* pt, I-II, Q 79, Art 4, ad 4; II-II, Q 64, Art 5, ad 3; and III, Q 68, Art 11, ad 3; compare Supp, Q 4, Art 1, ad 4.

²⁵ *Ibid* II-II, Q 66, Art 7. For another example, see Supp, Q 8, Art 6.

to authorize theft, but to clarify what is meant by theft; one steals not simply by taking the property of another, but taking it against his rational will. Much the same reasoning appears in Shari'a. For example, 'the jurists validate demolition of an intervening house to prevent the spread of fire to adjacent buildings, just as they validate dumping of the cargo of an overloaded ship to prevent the danger (or *darar*) to the life of its passengers'.²⁶

An equally indecisive argument can be offered in favour of the opposite view, that Shari'a does recognize intrinsic evil. When Pope Benedict XVI suggested at the University of Regensburg that Islam authorizes holy war, a group of Muslim scholars protested by calling attention to 'traditional and authoritative Islamic rules of war'. These rules, they wrote, include prohibition of attacks on non-combatants, prohibition of attacks on grounds of the victims' religious belief, and the obligation to live at peace except for legitimate self-defence and maintenance of sovereignty.²⁷ But this argument is beside the point. The question is not whether Shari'a includes such rules; it is whether they are (1) inviolable, and (2) immutable.

Shari'a certainly classifies some acts as *haram*, categorically forbidden. On the other hand, M H Kamali holds that what is viewed as *haram* can change: 'The Qur'an thus leaves open the possibility, although not without reservations, of enacting into *haram* what may have been classified by the *fuqahā* [jurists] of one age as merely reprehensible, or *makruh*. Similarly, the recommendable, or *mandub*, may be elevated into a *wajib* [obligation] if this is deemed to be in the interest of the community in a different stage of its experience and development'.²⁸

One may sharpen the question, then, as follows: is it conceivable in Muslim thought that the traditional and authoritative Islamic rules of war could change, so that even if it is now *haram* to deliberately take innocent life, it may not be *haram* in the future? To sharpen the question even further, would it be possible to argue (as some voices on al-Jazeera did argue after 9/11) that the destruction of the World Trade Centre was not a taking of innocent life, because, since Americans vote for their rulers, they all share the guilt of their government's sins? In the end, may evil be done that good may come?

The Question of Religious Compulsion

The second sticky point for discussion concerns religious compulsion. According to the classical natural law tradition, man is ordained for truth and endowed by his Creator with an inbuilt longing to attain it—not just practical truth, such as where his next meal is coming from, but the truth about the meaning of his life,

²⁶ M H Kamali, 'Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law', sec 7 (Association of Muslim Lawyers, UK, no date), available at <http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf>.

²⁷ Open letter of Muslim scholars to Pope Benedict XVI (n 18 above).

²⁸ M H Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003) 40.

the truth about reality as a whole, and especially the truth about God.²⁹ To attain such truth, however, he must have liberty to seek it. Nor are there any shortcuts, because it pertains to the very essence of religion that it be freely chosen. '[N]o one is detained by us against his will', says Lactantius, 'for he is unserviceable to God who is destitute of faith and devotedness.' A little later he explains, 'For nothing is so much a matter of free-will as religion, in which, if the mind of the worshipper is disinclined to it, religion is at once taken away, and ceases to exist'.³⁰

The group of Islamic scholars who responded to Benedict XVI agreed, quoting the Qur'anic passage, 'There is no compulsion in religion'.³¹ Although the Pope had quoted the same verse, he had written that 'It is one of the suras of the early period, when Mohammed was still powerless and under [threat]'. The Pope might have added that in some interpretations of Shari'a, this fact would imply that it does not provide the final word about Islamic duty, but merely expresses a norm for that time. The Islamic scholars replied:

In fact this verse is acknowledged to belong to the period of Qur'anic revelation corresponding to the political and military ascendance of the young Muslim community. *There is no compulsion in religion* was not a command to Muslims to remain steadfast in the face of the desire of their oppressors to force them to renounce their faith, but was a reminder to Muslims themselves, once they had attained power, that they could not force another's heart to believe. There is no compulsion in religion addresses those in a position of strength, not weakness.

These statements are most surprising. In his classic commentary to al-Misri's classic work of *Shāfi'ī* jurisprudence, *Reliance of the Traveller*,³² 'Umar Barakat writes that '*Jihād* means to war against non-Muslims, and is etymologically derived from the word *mujahada*, signifying warfare to establish the religion'. To be sure, he adds, 'As for the greater *jihād*, it is spiritual warfare against the lower self (*nafs*), which is why the Prophet (Allah bless him and give him peace) said as he was returning from *jihād*, "We have returned from the lesser *jihād* to the greater *jihād*". On the other hand, according to 'Umar Barakat, the scriptural basis for *jihād* lies in verses like 'Fighting is prescribed for you' and 'Slay them wherever you find them',³³ as well as *haditha*³⁴ like the following: 'I have been commanded to fight people until they testify that there is no god but Allah and that Muhammad is the Messenger

²⁹ *Summa Theologica* I-II, Q 94, Art 2.

³⁰ Lactantius, *Divine Institutes* Bk 5, Ch 20.

³¹ Al-Baqarah (Qur'an 2) 256.

³² Ahmad ibn Naqib al-Misri, *Reliance of the Traveller* (revised edn, Beltsville, Maryland: Amana Publications, 1994). This is a collaborative work; only a small part comes from the original manual by Ahmad ibn Naqib al-Misri. The quotation from 'Umar Barakat is found in sec 09.0, p 599. The translator, Nuh Ha Mim Keller, omits some sections of this massive work, such as the section on slavery, which I am not using. Arabic and English text are presented in parallel columns. A disadvantage for readers who do not speak Arabic is that certain bracketed sections of the Arabic text are omitted from the English text, without marks of elision in the English text to show where the bracketed sections belong.

³³ Al-Baqarah (Qur'an 2) 216, and An-Nisa' (Qur'an 4) 89. Here and throughout my discussion of *The Reliance of the Traveller*, I am using the translations of Qur'an and *hadith* provided in the English version of the work itself.

³⁴ The Arabic plural is actually *ahadith*, but it is often rendered as *haditha* or *hadiths* in English.

of Allah, and perform the prayer, and pay zakat. If they say it, they have saved their blood and possessions from me, except for the rights of Islam over them. And their final reckoning is with Allah'.³⁵

Plainly, scriptures like the latter refer not to war against the lower self but to war to compel religious belief. If they supply the *basis* for *jihād*, as 'Umar Barakat asserts, then it would appear that the 'lesser' *jihād* is the *central* meaning of *jihād* even if it is the lesser one. Perhaps the *Shāfi'ī* school is eccentric, but if so then it behoves the 38 scholars to explain what school of jurisprudence they are following. To say that Shari'a *should* be interpreted as prohibiting religious compulsion is laudable; to say that normally it is so interpreted is implausible.

Even if the view of the 38 scholars were conceded, it would not settle the question. The sticky point is not just whether Shari'a prohibits compulsion in religion. Nor is it only whether such prohibitions are categorical and immutable (the question we asked about the killing of innocents). After all, a prohibition might be both permanent and exceptionless, yet narrow. The further question, then, is how broadly religious compulsion is to be understood.

Under a narrow interpretation, the only thing counted as compulsion would be forcing people to convert against their will. However, if we take seriously the considerations that ground religious liberty—the nature of man as a truth-seeker and the nature of religion as freely chosen—then this would seem to be far from sufficient. Properly understood, liberty would not only require the prohibition of forcing others to become Muslims, but protect Muslims who converted to other religions. It would include freedom to seek and to disseminate information about other religions. It would forbid hindering the rites of worship of other religions, or the construction and consecration of sacred spaces where such worship may take place. Needless to say, such freedoms are far from prevalent in Islamic states that claim to follow Shari'a, and in the light of the Qur'anic principle 'there is no compulsion in religion', it is worth asking Islamic jurists why not.

Not all 'other religions' are equivalent, either according to Shari'a or according to natural law. It would be no injury to liberty, properly understood, to hinder proselytizing for, say, a religion of kidnappers, a pederastic sect, or a cult of assassins. Such religions have existed in the past, and exist today. But in Islamic countries, even monotheistic religions that adhere to the Decalogue, such as Judaism and Christianity, suffer hindrance and persecution. Although a minority of jurists dissent, in most schools of Islamic jurisprudence the penalty for Muslims who convert to other religions remains death.

Properly understood liberty would also prohibit the imposition upon non-Muslims of civil disabilities such as a higher rate of taxation, or applying to them a different standard of justice. The customary justification for treating tolerated non-Muslims as second-class citizens, or *dhimmis*, is the verse 'Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden

³⁵ The speaker is Muhammad. 'Umar Barakat remarks that this *hadith* is recorded by Sahih al-Bukhari and Muslim ibn al-Hajjaj.

by Allah and His Messenger, nor acknowledge the religion of Truth, [even if they are] of the People of the Book, until they pay the *jizya* with willing submission, and feel themselves subdued'.³⁶ Although *dhimmi*s are not forced to convert to Islam, an injunction to 'fight' them until they 'feel themselves subdued' would seem difficult to reconcile with the doctrine 'there is no compulsion in religion'.

In saying that citizens of different religions should be granted the protection of the same standards of justice, I am not suggesting that the natural law prohibits confessional states. Probably it does not, although prudence should also be consulted. Consider the case of the United States. Its founding document, the Declaration of Independence, not only confesses a belief in natural law, but identifies its source, avowing that the laws of Nature are the laws of Nature's God. Although it does not go so far as to identify the Creator with the God of a particular historical religion, its view of created reality is monotheistic, moral, and providential. This profession is declaratory, not coercive; nothing in it compels belief, and nothing in it requires second-class citizenship for those who do not believe. If such a profession is compatible with liberty rightly understood, then it is not obvious why the foundational documents of another nation may not go a little further and profess Catholicism, Protestantism, Judaism, or Islam—provided that one's status as a citizen were not made conditional on one's status as a believer.

Historically, the need for the latter distinction has been a hard lesson to learn, and not only in Islam. At certain notorious points in their history, Christians have also blurred faith with citizenship, confusing the body politic with the Body of Christ. What made it possible for Christians to escape this error—and it is an error—was the persistent New Testament teaching that the two bodies are *not* the same. The most emphatic statement of this theme comes at the end of a long tribute to the 'men of old who received divine approval':

These all died in faith, not having received what was promised, but having seen it and greeted it from afar, and having acknowledged that they were strangers and exiles on the earth. For people who speak thus make it clear that they are seeking a homeland. If they had been thinking of that land from which they had gone out, they would have had opportunity to return. But as it is, they desire a better country, that is, a heavenly one. Therefore God is not ashamed to be called their God, for he has prepared for them a city.³⁷

Whether Islam contains resources for escaping the same error remains to be seen.

³⁶ At-Taubah (Qur'an 9) 29–30. I am using the translation of Abdullah Yusuf 'Ali from Online Quran Project, available at <<http://al-quran.info>>. Compare the wording of the verse incorporated into Rudolph Peters' translation of a treatise of Averroes, discussed later.

³⁷ Hebrews 11:2, 13–16 (RSV). Compare Philippians 3:20 (RSV), 'But our commonwealth is in heaven, and from it we await a Savior, the Lord Jesus Christ', and Ephesians 2:19 (RSV), 'So then you are no longer strangers and sojourners, but you are fellow citizens with the saints and members of the household of God'.

The Question of Holy War

To further investigate the portents for relations between Shari'a and Western liberal democracy, let us consider the question of outright war. Earlier I mentioned the view of Bernard Lewis that although Shari'a allows tactical truces between Muslims and non-Muslims, the basic teaching is 'a canonically obligatory perpetual state of war until the whole world is either converted or subjugated'. Such views are widely challenged. Rudolph Peters, for example, suggests that early Islamic treatises 'were not overly explicit' about the conditions that justify warfare against unbelievers who have not submitted to Islamic rule. 'In order to counter the rather distorted view of the jihād that is commonly held in the West', he says, modernist Islamic scholars 'profess that the jihād is essentially defensive warfare, striving to protect the Islam and the Moslems and to guarantee the propagation of the Islamic mission'.³⁸

At stake here is how to construe the Qur'anic and *hadithic* passages like Al-Anfal (Qur'an 8), 39: 'Fight them until there is no more fitna and the deen is Allah's alone. If they stop, Allah sees'. I do not wish to be tedious, but translations of the Qur'an render the first part of the verse in strikingly different ways.³⁹ The reason for this variety is that the words *deen*⁴⁰ and *fitna* are broad in meaning and have no exact equivalents in English. *Deen*, usually translated as 'religion', refers to much more than a set of beliefs; it signifies a comprehensive system of life, law, morals, manners, belief, ruling authority, and subordinating power, along with the obedience, submission, and discipline resulting therefrom. *Fitna* has an even greater range. According to the authoritative lexicon of E W Lane,⁴¹ its meanings include burning with fire; melting ore in order to separate good from bad; trial or probation; distress or affliction; chastisement or punishment; war, civil war, or slaughter; faction, sedition, or discord; madness or diabolical possession; sin, crime, or disobedience; shame, disgrace, or ignominy; error or deviation from the right way; infidelity or unbelief; difference of opinion; or anything whatsoever that tempts, misleads, or seduces.

You see where this is going. Fighting 'until there is no more *fitna* and the *deen* is Allah's alone' would appear to mean making war until nothing more remains that could give rise to distress, temptation, disagreement, or trial of faith for Muslims,

³⁸ Rudolph Peters (trans), *Jihād in Mediaeval and Modern Islam: The Chapter on Jihād from Averroes' Legal Handbook, 'Bidayat Al-Mudjtahid', and the Treatise, 'Koran and Fighting', by the late Haykh Al-Azhar, Mahmud Shaltut* (Leiden: E.J. Brill, 1977) 5.

³⁹ I have used the translation of Abdalhaqq and Aisha Bewley; contrast the translations of Abdullah Yusuf 'Ali, Ahmed 'Ali, Ali Quli Qara'i, Mohammed Marmaduke Pickthall, and Syed Vickar Ahamed 'Ali. These and others may be found at the Online Quran Project, available at <<http://al-quran.info>>.

⁴⁰ Often transliterated *din*.

⁴¹ Edward William Lane, *Arabic-English Lexicon* (Cambridge: Cambridge University Press, 1974, reprint of 1877 ed.) Bk 1, Pt 6, 2335–2336.

and a comprehensive way of life has been fully established by force. Just how Muslims should approach non-believers in the context of such war is laid out in an authoritative *hadith* found in one of the four main collections of *haditha*, *Sahih Islam*.⁴² I quoted a small portion of it earlier, but it needs to be read in its entirety. The focus in this passage is on polytheists:

[W]hen the Messenger of Allah (may peace be upon him) appointed anyone as leader of an army or detachment . . . [h]e would say: Fight in the name of Allah and in the way of Allah. Fight against those who disbelieve in Allah. . . . When you meet your enemies who are polytheists, invite them to three courses of action. . . . Invite them to (accept) Islam; if they respond to you, accept it from them and desist from fighting against them. Then invite them to migrate from their lands to the land of *Muhajirs* and inform them that, if they do so, they shall have all the privileges and obligations of the *Muhajirs*. If they refuse to migrate, tell them that they will have the status of *Bedouin Muilims* and will be subjected to the Commands of Allah like other Muslims, but they will not get any share from the spoils of war or *Fai'* except when they actually fight with the Muslims (against the disbelievers). If they refuse to accept Islam, demand from them the *Jizya*. If they agree to pay, accept it from them and hold off your hands. If they refuse to pay the tax, seek Allah's help and fight them.

How is all of this to be taken? Rudolph Peters, whose comforting interpretation I quoted above, has helpfully presented back-to-back translations of the chapter on fighting from a classical Islamic legal handbook by Averroes, *Bidayat Al-Mudjtahid*, as well as a modernist Islamic treatise, *Koran and Fighting*, by Mahmud Shaltut.⁴³ A cursory glance at the two works of Averroes and Shaltut makes them seem worlds apart. Averroes says that one may war against unbelievers either for conversion, or for payment of the *jizya* or poll tax, the sign of subordination.⁴⁴ He adds that scholars disagree about the *motive* for making war against unbelievers, some saying that it is because they disbelieve, others that, in view of their disbelief, they may fight.⁴⁵

⁴² This particular *hadith* is *Sahih Muslim*, Bk 19, *Hadith* 4294. I am quoting it in the translation of Abdul Hamid Siddiqui (available online at the University of Southern California's Center for Jewish-Muslim Engagement at <<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim>>).

⁴³ Shaltut criticizes the traditional method of Qur'anic interpretation—"explaining the verses and chapters of the Koran, in their traditional order . . . on the basis of certain extra-Koranic assumptions or principles"—an approach which he thinks 'does scant justice to the fact that the Koran is the primary source of Islam', creates an 'intellectual anarchy', and results in an 'aversion' to the Qur'an and its interpreters. Instead he follows the second method—"collecting all the verses concerning a certain topic and analyzing them in their interrelation"—so that 'the purpose of these verses and the rule that can be derived from them, becomes clear': M Shaltut, in Peters (n 38 above) 26–27.

⁴⁴ 'The Moslems are agreed that the aim of warfare against the People of the Book, with the exception of those belonging to the Quraysh-tribe and Arab Christians, is twofold: either conversion to Islam, or payment of poll-tax (*djizyah*). This is based on [*Ar-Taubah* (Qur'an 9), 29], "Fight against those who do not believe in Allah nor in the last Day, and do not make forbidden what Allah and His messenger have made forbidden, and do not practice the religion of truth, of those who have been given the Book, until they pay the *jizya* off-hand, being subdued": Averroes, *Legal Handbook* in Peters (n 38 above) 23–24.

⁴⁵ Concerning a disagreement among scholars as to whether any categories of unbelievers may be exempted from slaughter, Averroes says: 'Basically, however, the source of the controversy is to be

By contrast, Shaltut says that one may war against unbelievers *only* for protection, never for conversion. Summarizing his own conclusion, he remarks: 'How remote all this is from the smell of compulsion! How strong its aversion from the use of force as a means of propagating the Mission. Moreover, the Koran states clearly and distinctly that faith produced by force is without value and that he who yields to force and changes his faith loses his honor'.⁴⁶

On closer examination, the difference between Averroes and Shaltut is small. Against whom is one to fight? Both give the same answer: non-believers. When does one stop fighting? Again, both give the same answer: not until all the non-believers have either accepted the 'offer' of conversion, or else submitted, signifying their submission by payment of the *jizya*. Only regarding the reason for fighting do the two seem to give different answers. Averroes says that the motive is either just that the enemy *are* non-believers, or else that, being non-believers, they may fight. Shaltut says that the motive is solely their danger to Islam. But the verbal difference is misleading, because for Shaltut, the defensive justification is astonishingly broad. At first it seems narrow, for the Qur'anic verse just quoted:

commands the Moslems to fight a certain group which is characterized by 'they do not believe in Allah etc'. Previously they had broken their pledges and hindered and assailed the propagation of the Islamic Mission. These acts constitute for the Moslems reasons for fighting them. Therefore this verse does not say that the quality of being an unbeliever etc. constitutes a sufficient reason for fighting...⁴⁷

So far, so good, but now Shaltut goes on to explain the 'characteristics peculiar to' this group, 'in order to give a factual description and as a further incitement to attack them once their aggression will have materialized'. Notice that the 'incitement' here is the mere characteristics of the group. Although aggression may have taken place, it need not have done so. It is sufficient that unbelievers have a *disposition* to aggress against Islam, that they are the sort of people who do make aggression. What is the evidence of such a disposition? In the case of the polytheists just mentioned, the evidence is just this:

They modified the religion of Allah and took their scholars and monks for Lords apart from Him, while making things allowed and forbidden according to their whims, since they did not accept that only Allah can do so. There was nothing to hold them back from breaking pledges, and violating rights, and they were not inclined to desist from aggression and tyranny.

These are the people which, according to this verse, must be fought continuously until, by being thoroughly subjected, they can do no more harm and will desist from the persecution

found in their divergent views concerning the motive why the enemy may be slain. Those who think that this is because they are unbelieving do not make exceptions for any polytheist. Others, who are of the opinion that this motive consists in their capacity for fighting, in view of the prohibition to slay female unbelievers, do make an exception for those who are unable to fight or who are not as a rule inclined to fight, such as peasants and serfs: *ibid* 17.

⁴⁶ Shaltut, in Peters (n 38 above) 36.

⁴⁷ *Ibid* 47.

they used to practice. The Koran introduced a special token for this submission, viz. the payment of poll-tax (*djizyah*), which means that they actually participate in carrying the burdens of the state and providing the means for the commonweal, both for Moslems and non-Moslems.⁴⁸

‘Modifying’ the religion of Allah apparently means simply believing a religion that is *not* the same as Islam. ‘Taking their scholars and monks for Lords apart from [Allah]’ means simply following religious leaders other than Muslim religious leaders. ‘Making things allowed and forbidden according to their whims’ means simply following laws other than Islamic laws. Such acts are sufficient ‘incitement to attack’ non-believers, just because they signify the disposition of non-believers to misbehave toward Islam: ‘there was nothing to hold them back’. Indeed, Shaltut comes very close to saying that such acts not only show a disposition to aggression, but constitute aggression per se. And why shouldn’t he? Let us recall the broad meaning of *fitna* in the verse examined earlier, ‘Fight them until there is no more *fitna* and the *deen* is Allah’s alone’.

In short, although Islam may technically oppose conversion by the sword, both the traditional authority, Averroes, and the modernist scholar, Shaltut, believe all of the following points:

- (1) That the mere fact that some are not Muslim constitutes danger to Islam.
- (2) That war is a justified response to such danger.
- (3) That such war may continue until non-Muslims are either converted or otherwise subjugated.

Between such a stance and conversion by the sword, there is a hairsplitting formal difference, but the material difference is non-existent. I very much hope that I am wrong, but I fear that I am right.

Is It Possible to Talk?

The preconditions for serious discussion about these topics are even more difficult and sensitive than the topics themselves. Foremost among such preconditions is that the parties are able to trust each other. Can they? I do not presume to say what shape this question takes for faithful Muslims. For non-Muslims, the great problem is what Shari’a says about lying. We have no space here to consider what each of the different *madhhabs* say about the matter; it will be sufficient to illustrate from the Shāfi‘ī school of jurisprudence.

The problem is not that Islam does not condemn lying; it does. According to the Qur’an, ‘Allah guides not the profligate liar’ and ‘May liars perish’.⁴⁹ As we read in

⁴⁸ Ibid 48.

⁴⁹ Ghafir (Qur’an 40) 28 and Adh-Dhariyat (Qur’an 51) 10.

Reliance of the Traveller, 'Primary texts from the Koran and sunna that it is unlawful to lie are both numerous and intersubstantiative, it being among the ugliest sins and most disgusting faults'.⁵⁰ Yet various traditions suggest that it *is* permitted to lie. The occasion of one of the most notorious such traditions, recorded by the renowned collector of *hadiths*, Muhammad ibn Ishaq, was a proposal to kill a certain Jew: 'Muhammad bin Maslamah said, "O apostle of God, we shall have to tell lies." "Say what you like," Muhammad replied. "You are absolved, free to say whatever you must"'.⁵¹ *Reliance of the Traveller* cites a far milder *hadith*: 'I did not hear him [Muhammad] permit untruth in anything people say, except for three things: war, settling disagreements, and a man talking with his wife or she with him'.⁵² But the outcome is blunt: 'This is an explicit statement that lying is sometimes permissible'.

For 'the best analysis', *Reliance of the Traveller* refers the reader to the great al-Ghazali. In the sharpest possible contrast with the classical natural law tradition, which views human speech as a gift of God ordained to truth,⁵³ al-Ghazali flatly declares that 'Speaking is a means to achieve objectives'. 'When it is possible to achieve [a praiseworthy] aim by lying but not by telling the truth', he states, 'it is permissible to lie if attaining the goal is permissible, and obligatory to lie if the goal is obligatory', although 'it is religiously more precautionary in all such cases to employ words that give a misleading impression, meaning to intend by one's words something that is literally true... while the outward purport of the words deceives the hearer.' Although he cautions that 'strictness is to forgo lying in every case where it is not legally obligatory', this statement comes on the heels of his startling remark, 'One should compare the bad consequences entailed by lying to those entailed by telling the truth, and if the consequences of telling the truth are more damaging, one is entitled to lie'.⁵⁴

Westerners should not feel self-righteous. The temptation to the abuse of casuistry has been felt here too. In *The Reliance of the Traveller*, however, it seems more than a temptation. May God grant Islamic jurisprudence the grace to escape from views like al-Ghazali's, for unless it can escape from them, the preconditions for honest discussion are impossible to meet.

But suppose that Islamic jurisprudence can overcome such views. The final difficulty of discussion—and with this I conclude—concerns how to make its hoped-for achievements effectual. In Catholicism, the achievement of consensus and the consolidation of hard-won insight about disputed points of natural

⁵⁰ *Reliance of the Traveller* (n 32 above) sec r8.1, 744. The quotation is attributed to Abu Zakaria Mohiuddin Yahya Ibn Sharaf al-Nawawi.

⁵¹ Muhammad ibn Ishaq, Alfred Guillaume (trans), *Life of Mohammad: A Translation of Ishaq's Sirat rasul Allah* (Oxford: Clarendon, 1955) *hadith* 551. A version of this *hadith* is also reported by Sahih Bukhari, M. Muhsin Khan (trans), *Hadith of Bukhari* (Charleston: Forgotten Books, 2008) Vol 4, Bk 52, *hadith* 271.

⁵² *Reliance of the Traveller* (n 32 above) sec r8.2, 745.

⁵³ Eg *Summa Theologica* II-II, Q 110, Arts 1–4, on 'the vices opposed to truth, and first of lying'.

⁵⁴ *Reliance of the Traveller* (n 32 above) sec r8.2, 745–746.

and divine law are facilitated by the final authority of the Magisterium. As Paul Marshall has pointed out,⁵⁵ in Sunni Islam the situation is more like that in Protestantism, for:

a similar fragmentation has occurred. Despite the authority of institutions such as Al-Azhar University in Egypt, and despite the high regard given to learning, a teacher or jurist can gain authority if he can draw followers. In practice such leaders can establish their own mosques and *madrassas*, as well as radio and TV shows. Osama bin Laden, it should be remembered, is an engineer, not a jurist, but in practice he can issue *fatwās* that have tremendous influence.

It would be terrible indeed if consensus on Islamic renewal were reached among a few dozen or a few thousand Muslim thinkers, yet remained a dead letter because the rest of the population ignored it.

Let us be honest: the same dread rises when one contemplates the West. After the spectacle of Muslims rioting to protest the Pope's suggestion that Islam is too open to violence, the prospect of a renewal in Islamic thought may seem unbelievable. Yet after the meteoric advance of what the Pope has called the dictatorship of relativism, the prospect of a return of the West to its own ancient springs may seem equally unbelievable.

Aristotle wrote that in order to achieve a more beautiful story, the poet should set aside unbelievable possibilities in favour of believable impossibilities.⁵⁶ But the rule for real life is different than for stories. That Western liberal democracy could establish autonomous jurisdictions for religious minorities without destroying itself is a pleasant story and easy to imagine, but impossible. That Islam might accommodate itself to Western liberal democracy by betraying its faith is equally impossible. These poetic fictions should be set aside.

That Islam and the Western nations might mutually commit themselves to the common ground they share in the order of Creation is almost beyond our power to conceive, but it is possible. There is no hope but in the possible, even when it seems unbelievable; so let us take hold of our hope, and remember that all things are possible for God.

Appendix: The Meaning of Accommodation

To forestall confusion, it may be helpful to explain that 'accommodation' is an elastic term. In various ways, some norms of some religions are already accommodated by civil law. Consider for example the relation between civil marriage and religious marriage in Catholicism, a faith more familiar in the West. Simplifying, we can distinguish at least three levels of civil accommodation.

⁵⁵ P Marshall, 'Islamic Counter-Reformation' (August–September 2004) 145 *First Things: A Monthly Journal of Religion and Public Life* 21, 22.

⁵⁶ Aristotle, *Poetics* Bk 24, 1460a.

Level one. Provided the couple register their union with the state, the vows they take during their religious ceremony are also regarded as satisfying the requirements for civil marriage. In other words, the couple do not have to go before a civil magistrate and take separate vows in a prescribed civil form, as they do, for example, in France. Certainly this reflects a degree of accommodation. However, the two relationships remain independent. The Church concerns itself with the sacramental marriage, the state concerns itself with the civil. If the Church issues a decree of annulment, declaring that a valid sacramental marriage never actually existed, this does not affect the validity of the civil marriage in the eyes of the state. If the state issues a decree of divorce, declaring that the civil marriage has come to an end, this does not affect the validity of the sacramental marriage in the eyes of the Church.

Now let us up the ante. Agreements to submit contractual disagreements to private arbitration are increasingly common in business, and widely accepted by courts. Sometimes, depending on their religious convictions, the parties agree that such arbitration will be conducted by religious bodies. For Orthodox Jews, these will be rabbinical courts. For Muslims, they will be Shari'a courts. Suppose, then, that our Catholic couple treat their marriage in a similar way: they enter a *civil* agreement to conform their *civil* marriage to the religious norms that govern sacramental marriage as interpreted by *religious* courts. For example, they agree that neither will seek a civil divorce unless a marriage tribunal of the Church agrees that the sacramental marriage is invalid. Suppose, further, that their agreement is enforceable in civil courts; we have then reached level two. Such possibilities are not far-fetched even in the United States, where in the New Jersey case *Minkin v Minkin* a civil court ordered a man who had sued for civil divorce to obtain and pay for the costs of a *get*, or Jewish severance decree. The basis for the court's decision was that upon marrying, the man and woman had entered into a *ketuba*, an agreement to conform to Jewish marriage laws, which require the man to give his wife a *get* in the event of divorce. The wife had demanded the *get* because, under Jewish law, she would otherwise be precluded from remarrying. Taking the view that neither the *ketuba* nor the *get* is in itself a religious act, the court ordered the husband to fulfill his contract.⁵⁷

The examples just offered are not precisely parallel; business is not marriage, and Jewish marriage is not Catholic marriage. Finer distinctions would be needed if our main concern lay in level two. But let us raise the ante higher still. At the third level of accommodation, it makes no difference whether or not our Catholic couple have entered a civil contract to abide by Catholic marriage norms. The state simply treats Catholics by different rules. If the Church says that they are sacramentally married, then the state says that they are civilly married; if not, then not. Now suppose that the state applies this approach not only to marriage but to other realms of law, and the decisions of religious authorities are enforced in civil courts. This

⁵⁷ *Minkin v Minkin*, 180 NJ Super 260 (1981).

time the nearest analogy might be the *battei din* of Israel, which have exclusive jurisdiction over a variety of matters including Jewish marriage and divorce, as well as conversion to Judaism, which has civil ramifications because it affects the Law of Return.

Which level of accommodation do the proponents of accommodating Shari'a have in mind? For our example we may take the Anglican Archbishop of Canterbury, Rowan Williams.⁵⁸ Plainly he has more in mind than level one; that is merely the status quo in the United Kingdom, as well as my own country, the United States. Almost certainly, he also means more than level two. One reason for thinking so is that although the state is already trying out experiments in level two accommodation, and has been for some time, much more so in the United Kingdom than in the United States, the Archbishop finds this approach inadequate. He is thinking of level three.

Despite his maddeningly ambiguous language, an even more important reason for thinking that the Archbishop of Canterbury has the third level in mind is that it is hard to take his words in any other way. He persistently criticizes civil law for viewing faith communities through the 'privatizing' lens of individual decisions. Instead, he calls for 'plural jurisdiction', emphasizing the need for civil law to 'recogniz[e] and collaborat[e] with communal religious discipline', to 'delegate' the authority of civil law to 'recognized authority acting for a religious group'. There is nothing like this at level two, where the state is still merely ratifying private decisions which happen to be motivated by communal religious conviction. True, the Archbishop wants to cut some exceptions. Not *everything* would be decided by the communal group. For example, no religious body would be allowed to wreak vengeance on apostates, thank you. Even so, it is the third quantum tier that he occupies.

As I suggest in the body of the chapter, the arrangement might be much like federalism. Each citizen would be automatically subject to the laws of the jurisdiction in which he 'lives', but the jurisdictional lines are religious rather than geographical. If he 'lives' in Islam, the state holds him accountable to Shari'a courts; if in Judaism, to *battei din*; if in Catholicism, to canon law tribunals. For the reasons explained in the opening section, however, this could not work.

⁵⁸ R Williams, 'Civil and Religious Law in England: a Religious Perspective' (see Appendix I).