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Introduction

Stephen Hockman

The Temple Church in London was built by the Knights Templar during the Crusades, a time of bitter division between Christian and Muslim cultures. Such a gulf may appear to be deepening again in our own time. It was therefore highly appropriate that the Church should have been the venue for a series of discussions on Islam and English law, set up to articulate, understand and, if possible, to begin to bridge, at one crucial point, the apparent chasm between the two cultures. Most of the chapters in this volume have their origin in those discussions; they have been transformed since by the authors themselves – to all of whom we have good reason to be grateful for the care and passion with which they have written. The book, although naturally focused on the UK, is offered as part of an ongoing conversation on topics of international concern; our contributors work in Canada, France, South Africa, the UK and USA.

The twentieth-century resurgence of Islam in some parts of the world is graphically described by Ali Allawi as follows:

> Islam burst out of its confinement as an elemental, even inchoate force, flying in every direction and trying to seek its balance . . . Islam's reappearance as a guiding principle in state and society obliged Muslims to confront a whole multitude of fundamental issues, which were covered up when the reins of power were in the hands of others.[1]

At the same time, these fundamental issues have had to be confronted in other societies, particularly in Western Europe, which have a growing Muslim population. Britain now has more than two million people of Muslim origin. A society which had become predominantly secular, in which, in the words of the Indian writer Milinda Banerjee, modernity itself had become a religion, has had to face the need to accommodate those

[1] A A Allawi, *The Crisis of Islamic Civilisation* (New Haven, 2009), p 83.

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whose religious adherence today is as proud and profound as at any time in history.[2]

English law, renowned for its flexibility and adaptability, has already evolved in response to these developments. The initial lecture by Rowan Williams, then Archbishop of Canterbury, and the subsequent discussions, consider in detail, and sometimes with personal intensity, the implications of these developments, and whether further adjustments to our law, and indeed to moral and social practices, ought to be considered. The discussions reach no firm conclusions; that was not their purpose. But few of those who were able to attend and participate will have disputed the pressing need for such debate and analysis to continue.

The Archbishop delivered his lecture to an invited audience of nearly a thousand people in the Great Hall of the Royal Courts of Justice, London, in February 2008. Robin Griffith-Jones charts, in Chapter 1, the political and religious context of the time and the memorable furore that the lecture stirred in the popular press. The Archbishop, quite wrongly believed to have recommended the introduction of oppressive legal practices to the UK, was (in cruelly personal attacks) condemned for a culpable naivety. Over the months and years that have followed, however – and remote from the bubbling cauldron of public opinion – his lecture has come to be recognised as a foundational statement of the concerns and questions confronting political, social and religious thinkers of all casts. Rowan Williams set an agenda which, as this book bears witness, continues to inform discussions in many parts of the world.

The discussions in the Temple Church itself were largely conducted by and for academic and practising lawyers. The tone of this volume's chapters is, in the way of lawyers, practical. The authors have ever in mind conventions and laws and their application. The authors ask: What is to be *done*? In listening to their answers, we are hearing a conversation, with a welcome variety of viewpoints, proposals and styles of argument.

The European Convention on Human Rights is incorporated into English law. In 2001 the European Court of Human Rights famously held, in relation to the Convention, that:

> 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

[2] M Banerjee, 'Eternity and the Abyss', review of G Beckerlegge (ed), *Colonialism, Modernity, and Religious Identities: religious reform movements in South Asia* (New Delhi, 2008), *The Sunday Statesman* (India), 12 April 2009, p 16.

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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.[3]

This was a dramatic claim, heavy with implications. Nicolas Bratza, the UK's judge in the Court at the time, sets the scene for its exploration. Dominic McGoldrick and Mashood Baderin then offer (strikingly divergent) responses to the Court's claim. Christopher McCrudden looks forward: he points out how little attention has so far been given, in discussion of human rights, to the potentially central category of human dignity.

The most impassioned debate and the deepest misunderstandings have been stirred, since the Archbishop's lecture, in relation to family law and the fuller accommodation there of Islamic law. Elizabeth Butler-Sloss and Mark Hill sketch the present rules governing the settlement of family disputes. Ian Edge engages in detail with arbitration law on the one hand and on the other with the quite different world – so often and so seriously confused with arbitration law – of marriage and divorce law. Prakash Shah asks whether the English courts and their procedures are still (unwittingly) prejudiced against Islam and Muslims. Shaheen Sardar Ali writes a movingly personal account of the questions confronting Muslims in a Muslim-minority culture.

It is too easy to confine our gaze to the UK. Marion Boyd tells and reflects on the dramatic story of Ontario's struggle over Islamic law, a story in which she herself – the author of the seminal 'Boyd Report' – played a leading role. Griffith-Jones then returns, to look back on the years since the Archbishop's lecture and on the quiet, low-key developments that the lecture itself helped to engender in understanding and co-operation between English lawyers and Muslim leaders.

So our consideration of the Archbishop's own themes comes to an end. But there are other concerns, widespread in the UK and the USA, which it would be evasive to ignore. Two are prominent: non-Muslims can be angered – not least, because they can be frightened – by the sometimes violent reaction of Muslims against others' use of free speech to speak ill of Muslims, the Prophet or Islam; and more generally, non-Muslims can be angered by the violence espoused by extreme and political Islamists. To address the first of these topics, we brought together Tariq Modood and Albie Sachs for an evening's discussion; their conversation about the character and limits of civility was itself a model of civility. We hope that the

[3] Majority Judgment, *Refah Partisi (Welfare Party) and Others v Turkey* (No 1) (2002) 35 EHRR 3, para 72.

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more formal version of their conversation that we publish here still exudes something of their generosity and willingness to learn from each other.

As to the second topic, namely the violence espoused by extremists, this requires discussion of the concept of *jihad*. Khaled Abou El Fadl starts his chapter with a proposition which will be striking to many readers: 'to engage in *jihad* means to strive or exert oneself in a struggle to achieve a morally laudable or just aim'. But by what means is such an aim to be achieved? To illumine *jihad* and some *jihadi*s' war for an Islamic state, we have a total of three chapters from three leading Muslim scholars who, working in the West, are well placed to interpret the history and character – and, as these scholars point out, the abandonment – of Islamic principles in violent extremism.

The book began with the Archbishop's reflections on law and religion together. It ends with a reunion of these two themes: David Ford, Regius Professor of Divinity at Cambridge, and Nicholas Phillips, until recently President of the UK's Supreme Court, look backwards in gratitude to Dr Williams' prophetic lecture and forwards to the work that he foresaw and that is yet to be done. In December 2012, nearly five years after Dr Williams delivered his lecture, he retired from being Archbishop. We have prepared this book for publication early in 2013, a good moment at which both to acknowledge our debt to Dr Williams and to sketch out some possible routes towards that more just and cohesive society to whose creation Dr Williams devoted so much of his primacy.[4]

We owe as well a great debt of gratitude to Robin Griffith-Jones: his vision and energy engendered the public discussions in the Temple Church and have now brought this book into being. Every page that follows is informed by his editorial care, many by his own research; and his eye has throughout been on the book's part in the long-term socio-legal project launched with the Archbishop's lecture. That lecture and the following public discussions have themselves prompted an ongoing debate far more gracious and fruitful than the newspapers in February 2008 would have led anyone to credit. Now we hope that the present volume will lead to further conversations and perhaps even to consideration of practical changes,

[4] The law, in an area of acute concern, can evolve rapidly. As we conclude this book in autumn 2012, judgment is pending on four cases discussed in it which have been brought before the European Court of Human Rights: *Ladele and McFarlane v United Kingdom* (App nos 51671/10, 36516/10) and *Eweida and Chaplin v United Kingdom* (App nos 48420/10, 59842/10). The Arbitration and Mediation Services (Equality) Bill [HL], also discussed in the following chapters, had its second reading in the House of Lords, 19 October 2012 (Hansard HL, vol 739, cols 1682–1716; <http://www.theyworkforyou.com/lords/?id=2012-10-19a.1682.4>).

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however modest, in law and social practice which would further the development of harmonious relations between Islam and English law. Many may think that this would not only be beneficial from the point of view of social harmony and self-confidence within the United Kingdom, but that it could show a possible path to greater reconciliation in those troubled areas of the world in which the resurgence of Islam, and the reactions to it by others, are a source of so much current anxiety.

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PART I

The Archbishop of Canterbury and shari'a *law*

It might be possible to think in terms of what [the legal theorist Ayelet Shachar] calls 'transformative accommodation': a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters, so that 'power-holders are forced to compete for the loyalty of their shared constituents.' . . . It is uncomfortably true that this introduces into our thinking about law what some would see as a 'market' element, a competition for loyalty as Shachar admits. But if what we want socially is a pattern of relations in which a plurality of diverse and overlapping affiliations work for a common good, and in which groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty, it seems unavoidable.

– From the Archbishop of Canterbury's Lecture, 'Civil and religious law in England', in the Royal Courts of Justice, 7 February 2008.

Question to the Archbishop: Must we accommodate Islam or not, as Christians?

Archbishop: Must we accommodate Islam or not as Christians? Must I love my Muslim neighbour? Yes, without qualification or hesitation. Must I pretend to my Muslim neighbour that I do not believe my own faith? No, without hesitation or qualification. Must I as a citizen in a plural society work for ways of living constructively, rather than tensely or suspiciously with my Muslim neighbour? Yes, without qualification or hesitation.

– From the Questions and Answers following the Archbishop's Lecture, 'Civil and religious law in England', 7 February 2008.

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CHAPTER 1

The 'unavoidable' adoption of shari'a *law – the generation of a media storm*

Robin Griffith-Jones

Rowan Williams, then Archbishop of Canterbury, gave his lecture on 'Civil and Religious Law in England' on 7 February 2008 in the Great Hall of the Royal Courts of Justice. He had recently given two speeches touching on the themes that he would explore more deeply there: the first at the Building Bridges Seminar in Singapore on 6 December 2007;[1] and the second, 'Religious Hatred and Religious Offence', as the James Callaghan Memorial Lecture in the House of Lords on 29 January 2008 (when the planned abolition of the common law offence of blasphemous libel was the subject of heated debate).[2] 'Civil and Religious Law in England' might then be seen as the completion of a series of three lectures.

In the lecture at the House of Lords the Archbishop had suggested:

> It is commonly said that since a religious believer chooses to adopt a certain set of beliefs, he or she is responsible for the consequences, which may, as every believer well knows, include strong disagreement or even repugnance from others. But this assimilation of belief to a plain matter of conscious individual choice does not square with the way in which many believers understand or experience their commitments. For some – and this is especially true for believers from outside the European or North Atlantic setting – religious belief and practice is a marker of shared identity, accepted not as a matter of individual choice but as a given to which allegiance is due in virtue of the intrinsic claims of the sacred. We may disagree; but I do not think we have the moral right to assume that this perspective can be simply disregarded.
>
> It is one thing to deny a sacred point of reference for one's own moral or social policies; it is another to refuse to entertain – or imagine – what it might be like for someone else to experience the world differently . . . The uncomfortable truth is that a desacralised world is not, as some fondly believe, a world without violence, but a world in which there can be no ultimate agreement about the worth of human or other beings.

[1] Accessible at <http://www.archbishopofcanterbury.org/1329>.
[2] Accessible at <http://www.archbishopofcanterbury.org/1561>. The House of Lords on 5 March 2008 finally voted by 148 to 87 to add to the Criminal Justice and Immigration Bill a clause which abolished the common law crime of blasphemous libel.

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The Archbishop resisted 'a lack of imagination about the experience and self-perception of others, especially those from diverse ethnic and cultural contexts, the arrogant assumption of the absolute "naturalness" of one's own position'. For 'none of this makes for an intelligent public discourse or for anything like actual debate, as opposed to plain assertion'.[3]

The Archbishop was speaking about *all* faith-communities, not just Islam. His concern was with the Churches' members too, and with the role that their outlook, convictions and conscience are allowed to play in our public life. The Archbishop mentioned, in 'Civil and Religious Law', two groups who, in the recent past, had found themselves challenged to comply with legislation that ran counter to their own convictions: the medical professionals who were granted an opt-out from the requirements to undertake abortions;[4] and the Roman Catholic adoption agencies who were not granted any opt-out from working on children's placements with gay couples.[5]

The Archbishop referred back to 'Civil and Religious Law' four days after the lecture, in his Opening Address to the Church of England's General Synod. Speaking of religious believers, he remarked that:

> while there is no dispute about our common allegiance to the law of the land, that law still recognises that religious communities form the consciences of believers and has not pressed for universal compliance with aspects of civil law where conscientious matters are in question. However, there are signs that this cannot be taken for granted as the assumptions of our society become more secular.[6]

Such secular assumptions have become more vividly apparent since the lecture's delivery.[7] The Churches may seem to be fighting a permanent

[3] For a definition of religion with a striking emphasis on the individual and free choice, see Iacobucci J in *Syndicat Northcrest v Amselem* in the Supreme Court of Canada [2004] 2 SCR 551; [2004] SCC 47, para 22: 'In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.'

[4] No person shall be under a duty to 'participate in any treatment' authorised by the Abortion Act 1967 to which they have a conscientious objection; see D McGoldrick, 'The compatibility of an Islamic/*shari'a* law system or *shari'a* rules with the European Convention on Human Rights', infra p 55.

[5] For details (including the progress of the appeal mounted by the Roman Catholic diocese of Leeds for exemption from the regulations), see McGoldrick, 'The compatibility of an Islamic/*shari'a* law system or *shari'a* rules with the European Convention on Human Rights', supra n 4.

[6] Accessible at <www.archbishopofcanterbury.org/1583>.

[7] The Churches secured generous provision under the UK Human Rights Act 1998, s 13(1): 'If a court's determination of any question under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion it must have particular regard to the importance of that right.' The tide, however, is not now running in the Churches' favour. 'For the last 150 years English law has proceeded on the assumption that religion generally is an unqualified human good . . . Standard modern accounts of the relationship between

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