British Islam and English Law

*British Islam and English Law* presents a novel argument about the nature and place of groups in society. The encounter with Islam has led English law to tread a line between two theoretical models, liberal individualism and multiculturalism, competing for dominance over the law of organised religion. This philosophical rivalry has generated a set of seemingly intractable conflicts between individual and community, religion and state, nation and culture. This book resurrects the long-buried theory of classical pluralism to address and resolve these tensions. Applying this to five understudied institutions that give structure and form to British Islam – banks, charities, schools, elections, clans – it outlines and justifies reforms that would optimise the relationship between law and religion. Unflinching and unorthodox, this book places law and theory in context, employs innovative methods such as nudge theory and applied history, and provides detailed answers to hard questions about British Islam.

**Patrick S. Nash** is a research fellow at the Woolf Institute and a postdoctoral research associate at St Edmund’s College, Cambridge. He taught jurisprudence, public law, criminal law, tort law and family law at the Universities of Bristol and Newcastle before moving to Cambridge. He was called to the Bar of England and Wales in 2019 (Lincoln’s Inn).
The Law in Context Series

Series editors
Professor Kenneth Armstrong
University of Cambridge
Professor Maksymilian Del Mar
Queen Mary, University of London
Professor Sally Sheldon
University of Kent

Editorial advisory board
Professor Bronwen Morgan
University of New South Wales
Emeritus Professor William Twining
University College London

Since 1970, the Law in Context series has been at the forefront of a movement to broaden the study of law. The series is a vehicle for the publication of innovative monographs and texts that treat law and legal phenomena critically in their cultural, social, political, technological, environmental and economic contexts. A contextual approach involves treating legal subjects broadly, using materials from other humanities and social sciences, and from any other discipline that helps to explain the operation in practice of the particular legal field or legal phenomena under investigation. It is intended that this orientation is at once more stimulating and more revealing than the bare exposition of legal rules. The series includes original research monographs, coursebooks and textbooks that foreground contextual approaches and methods. The series includes and welcomes books on the study of law in all its contexts, including domestic legal systems, European and international law, transnational and global legal processes, and comparative law.

Books in the Series
Acosta: The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law
Ali: Modern Challenges to Islamic Law
Alyagon Darr: Plausible Crime Stories: The Legal History of Sexual Offences in Mandate Palestine
Anderson, Schum & Twining: Analysis of Evidence, 2nd Edition
Ashworth: Sentencing and Criminal Justice, 6th Edition
Barton & Douglas: Law and Parenthood
Baxi, McCrudden & Paliwala: Law’s Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining
Bell: French Legal Cultures
Jackson & Summers: The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions
Kostakopoulou: The Future Governance of Citizenship
Kreiczer-Levy: Destabilized Property: Property Law in the Sharing Economy
Kubal: Immigration and Refugee Law in Russia: Socio-Legal Perspectives
Lewis: Choice and the Legal Order: Rising above Politics
Likosky: Law, Infrastructure and Human Rights
Likosky: Transnational Legal Processes: Globalisation and Power Disparities
Lixinski: Legalized Identities
Loughman: Self, Others and the State: Relations of Criminal Responsibility
McGlynn: Families and the European Union: Law, Politics and Pluralism
Mertens: A Philosophical Introduction to Human Rights
Moffat: Trusts Law: Text and Materials
Monti: EC Competition Law
Morgan: Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law
Morgan & Yeung: An Introduction to Law and Regulation: Text and Materials
Nicola & Davies: EU Law Stories: Contextual and Critical Histories of European Jurisprudence
Norrie: Crime, Reason and History: A Critical Introduction to Criminal Law, 3rd Edition
O’Dair: Legal Ethics: Text and Materials
Oliver: Common Values and the Public–Private Divide
Oliver & Drewry: The Law and Parliament
Palmer & Roberts: Dispute Processes: ADR and the Primary Forms of Decision-Making, 1st Edition
Palmer & Roberts: Dispute Processes: ADR and the Primary Forms of Decision-Making, 3rd Edition
Picciotto: International Business Taxation
Probert: The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600–2010
Radi: Rules and Practices of International Investment Law and Arbitration
Reed: Internet Law: Text and Materials
Richardson: Law, Process and Custody
Rowbottom: Democracy Distorted: Wealth, Influence and Democratic Politics
Sauter: Public Services in EU Law
Scott & Black: Cranston’s Consumers and the Law
Seneviratne: Ombudsmen: Public Services and Administrative Justice
Seppänen: Ideological Conflict and the Rule of Law in Contemporary China: Useful Paradoxes
Siems: Comparative Law, 2nd Edition
Stapleton: Product Liability
Stewart: Gender, Law and Justice in a Global Market
Tamanaha: Law as a Means to an End: Threat to the Rule of Law
Tuori: Properties of Law
Turpin & Tomkins: British Government and the Constitution: Text and Materials, 7th Edition
Twining: General Jurisprudence: Understanding Law from a Global Perspective
Twining: Globalisation and Legal Theory
Twining: Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na’im, Yash Ghai and Upendra Baxi
Twining: Jurist in Context: A Memoir
Twining: Karl Llewellyn and the Realist Movement, 2nd Edition
Twining: Rethinking Evidence: Exploratory Essays, 2nd Edition
Twining & Miers: How to Do Things with Rules, 5th Edition
Wan: Film and Constitutional Controversy
Ward: A Critical Introduction to European Law, 3rd Edition
Ward: Law, Text, Terror
Ward: Shakespeare and Legal Imagination
Zander: Cases and Materials on the English Legal System, 10th Edition

**International Journal of Law in Context: A Global Forum for Interdisciplinary Legal Studies**

The *International Journal of Law in Context* is the companion journal to the Law in Context book series and provides a forum for interdisciplinary legal studies, which offers intellectual space for groundbreaking critical research. It publishes contextual work about law and its relationship with other disciplines including, but not limited to, science, literature, humanities, philosophy, sociology, psychology, ethics, history and geography. More information about the journal and how to submit an article can be found at http://journals.cambridge.org/ijc
British Islam and English Law

A Classical Pluralist Perspective

PATRICK S. NASH

University of Cambridge
L’espérance réalisée
– from the seal of Admiral George Brydges Rodney (1718–92)
## Contents

Acknowledgements .......................... page xv

**General Introduction** .................. 1

0.1 Political Religion ...................... 2
0.2 Sociological Religion ................. 4
0.3 Legal Religion .......................... 5

**Part I Theory** ............................. 15

Introduction to Part I ..................... 15

1 **Liberal Individualism** ................. 17

1.1 An Introduction to Ronald Dworkin  
  1.1.1 Integrity and Interpretation .... 17
  1.1.2 Responsibility and Good Living .. 22
  1.1.3 Equality and Self ............... 24
  1.1.4 Community and Obligation ...... 27
  1.1.5 Religion and Neutrality ...... 29
1.2 Liberal Individualism in the English Law of Religion 31
1.3 Counter-Trends and Declining Influence 36
1.4 Conclusion ............................. 44

2 **Multiculturalism** ..................... 45

2.1 An Introduction to Bhikhu Parekh and Tariq Modood 45
2.2 Abstract Multiculturalism ............. 49
2.3 Applied Multiculturalism .............. 55
  2.3.1 The Right of Groups to Integrity 55
  2.3.2 The Right of Groups to Representation 59
2.4 Multicultural Law and Policy in Britain 62
<table>
<thead>
<tr>
<th></th>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4.1</td>
<td>Emergence</td>
</tr>
<tr>
<td>2.4.2</td>
<td>Zenith</td>
</tr>
<tr>
<td>2.4.3</td>
<td>Decline</td>
</tr>
<tr>
<td>2.5</td>
<td>Conclusion</td>
</tr>
<tr>
<td><strong>3</strong></td>
<td><strong>Classical Pluralism</strong></td>
</tr>
<tr>
<td>3.1</td>
<td>An Introduction to Otto von Gierke</td>
</tr>
<tr>
<td>3.1.1</td>
<td>History and Interpretation</td>
</tr>
<tr>
<td>3.1.2</td>
<td>Philosophical Tenets</td>
</tr>
<tr>
<td>3.1.3</td>
<td>Group Units</td>
</tr>
<tr>
<td>3.1.4</td>
<td>Law and Authority</td>
</tr>
<tr>
<td>3.1.5</td>
<td>Summing Up</td>
</tr>
<tr>
<td>3.2</td>
<td>The Golden Age of Pluralism</td>
</tr>
<tr>
<td>3.3</td>
<td>Eclipse</td>
</tr>
<tr>
<td>3.4</td>
<td>A Silver Age</td>
</tr>
<tr>
<td>3.4.1</td>
<td>Echoes and Fragments</td>
</tr>
<tr>
<td>3.4.2</td>
<td>False Dawns</td>
</tr>
<tr>
<td>3.5</td>
<td>Conclusion</td>
</tr>
<tr>
<td><strong>4</strong></td>
<td><strong>Part II Practice</strong></td>
</tr>
<tr>
<td><strong>Introduction to Part II</strong></td>
<td></td>
</tr>
<tr>
<td><strong>5</strong></td>
<td><strong>Banks</strong></td>
</tr>
<tr>
<td>4.1</td>
<td>Introduction</td>
</tr>
<tr>
<td>4.2</td>
<td>A Brief History of Islamic Banking in the UK</td>
</tr>
<tr>
<td>4.3</td>
<td>Distinguishing Features of Islamic Finance</td>
</tr>
<tr>
<td>4.4</td>
<td>The Regulation of Islamic Finance in the UK</td>
</tr>
<tr>
<td>4.5</td>
<td>English Case Law on Islamic Finance</td>
</tr>
<tr>
<td>4.6</td>
<td>Interpreting Islamic Banks and Finance</td>
</tr>
<tr>
<td>4.6.1</td>
<td>Via Liberal Individualism</td>
</tr>
<tr>
<td>4.6.2</td>
<td>Via Multiculturalism</td>
</tr>
<tr>
<td>4.7</td>
<td>A Pluralist Response to Islamic Banks and Finance</td>
</tr>
<tr>
<td><strong>5</strong></td>
<td><strong>Charities</strong></td>
</tr>
<tr>
<td>5.1</td>
<td>Introduction</td>
</tr>
<tr>
<td>5.2</td>
<td>A Brief History of the Abuse and Regulation of Religious Charities</td>
</tr>
</tbody>
</table>
xiii Contents

5.3 Contemporary Challenges 159
  5.3.1 Charity Commission Capability 159
    5.3.1.1 Criticisms and Improvements 159
    5.3.1.2 Budget and Record Keeping 161
  5.3.2 Administrative Abuse 162
    5.3.2.1 Unregulated Domestic Fundraising 162
    5.3.2.2 Terrorist Financing 165
  5.3.3 Purposive Questions 167
    5.3.3.1 Foreign State Funding 167
    5.3.3.2 Defining Extremism 169
5.4 Interpreting the Abuse of Charitable Religion 171
  5.4.1 Via Liberal Individualism 171
  5.4.2 Via Multiculturalism 173
5.5 A Pluralist Response to the Abuse of Charitable Religion 177

6 Schools 185
  6.1 Introduction 185
  6.2 A Brief History of Law, Religion and English Schools 185
  6.3 The Trojan Horse Affair 192
    6.3.1 Education Funding Agency (EFA) Reports 194
    6.3.2 Wilshaw Report 196
    6.3.3 Kershaw Report 196
    6.3.4 Trojan Horse Review Group Report 197
    6.3.5 Clarke Report 198
    6.3.6 Wormald Review 200
    6.3.7 House of Commons Education Committee (HCEC) Reports 200
    6.3.8 Aftermath 201
    6.3.9 Illegal Schools 205
    6.3.10 Unregulated Madrassas 206
  6.4 Interpreting the Trojan Horse Affair 207
    6.4.1 Via Liberal Individualism 207
    6.4.2 Via Multiculturalism 209
  6.5 A Pluralist Response to the Trojan Horse Affair 213

7 Elections 219
  7.1 Introduction 219
  7.2 A Brief History of Corruption 219
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.3 Understanding Modern Electoral Fraud</td>
<td>225</td>
</tr>
<tr>
<td>7.3.1 Vulnerabilities</td>
<td>226</td>
</tr>
<tr>
<td>7.3.2 Opportunities</td>
<td>227</td>
</tr>
<tr>
<td>7.3.2.1 Postal Voting</td>
<td>227</td>
</tr>
<tr>
<td>7.3.2.2 Personation</td>
<td>229</td>
</tr>
<tr>
<td>7.3.2.3 Intimidation</td>
<td>230</td>
</tr>
<tr>
<td>7.3.2.4 Typology of Problems with the Electoral System</td>
<td>232</td>
</tr>
<tr>
<td>7.3.2.4.1 Regulatory Problems</td>
<td>232</td>
</tr>
<tr>
<td>7.3.2.4.2 Bureaucratic Problems</td>
<td>234</td>
</tr>
<tr>
<td>7.3.2.4.3 Structural Problems</td>
<td>234</td>
</tr>
<tr>
<td>7.3.2.5 Statistical Difficulties</td>
<td>235</td>
</tr>
<tr>
<td>7.3.3 Mechanisms</td>
<td>238</td>
</tr>
<tr>
<td>7.3.4 Summing Up</td>
<td>241</td>
</tr>
<tr>
<td>7.4 Interpreting Modern Electoral Fraud</td>
<td>242</td>
</tr>
<tr>
<td>7.4.1 Via Liberal Individualism</td>
<td>242</td>
</tr>
<tr>
<td>7.4.2 Via Multiculturalism</td>
<td>244</td>
</tr>
<tr>
<td>7.5 A Pluralist Response to Modern Election Fraud</td>
<td>248</td>
</tr>
<tr>
<td>8 Clans</td>
<td>257</td>
</tr>
<tr>
<td>8.1 Introduction</td>
<td>257</td>
</tr>
<tr>
<td>8.2 A Brief History of Endogamy and English Law</td>
<td>257</td>
</tr>
<tr>
<td>8.3 Clans, Public Health, Clannism and Geopolitics</td>
<td>263</td>
</tr>
<tr>
<td>8.3.1 The Clan as a Group Unit</td>
<td>263</td>
</tr>
<tr>
<td>8.3.2 Clans and Public Health</td>
<td>266</td>
</tr>
<tr>
<td>8.3.3 Manifestations of Clannism</td>
<td>268</td>
</tr>
<tr>
<td>8.3.3.1 Harms to Members</td>
<td>268</td>
</tr>
<tr>
<td>8.3.3.2 Harms to Non-members</td>
<td>269</td>
</tr>
<tr>
<td>8.3.3.3 Harms to British Democracy</td>
<td>275</td>
</tr>
<tr>
<td>8.3.4 Geopolitical Significance of Clans</td>
<td>279</td>
</tr>
<tr>
<td>8.4 Interpreting Clans</td>
<td>281</td>
</tr>
<tr>
<td>8.4.1 Via Liberal Individualism</td>
<td>281</td>
</tr>
<tr>
<td>8.4.2 Via Multiculturalism</td>
<td>284</td>
</tr>
<tr>
<td>8.5 A Pluralist Response to Clans</td>
<td>288</td>
</tr>
<tr>
<td>Conclusion</td>
<td>298</td>
</tr>
<tr>
<td>Index</td>
<td>305</td>
</tr>
</tbody>
</table>
Acknowledgements

Academia is a catty, desperate, miserly, paranoid, odious world at the best of times, and these times are not the best. Still, working on this book has been great fun. Those who made it so are acknowledged here in vague thematic order.

Thanks to Policy Exchange and the Woolf Institute for making this happen in good time, and for leaving me to get on with it.

Thanks to Miriam Wagner and Ed Kessler for being such understanding bosses and for allowing me to commandeer the Weston Room.

Thanks to Lord and Lady Woolf for their generosity and warm encouragement.

Thanks to everyone in or around the Woolf Institute including Chris, Rodrigo, Simon, Efe, Sebastian, Sam, Kitty, Emma, Tara, Dunya, Alissa, Mohammed, Helen, John, Amy, Claire, Tina and David for all sorts.

Thanks a million to Jessica Tearney-Pearce for everything and for saving me from my own disastrous attempts at indexing. Thanks to Lori Heaford and Clare Ranson for copy-editing.

Thanks to Finola O’Sullivan, Marianne Nield, Tom Randall and Gemma Smith at Cambridge University Press for their patience and good-humoured support.

Thanks to Russell Sandberg, Pat Capps, William Twining, Richard Mullender, Philip Wood, Guglielmo Verdirame QC, Richard Mawrey QC, Peter Edge, Kenneth Dibble, Pauline Ridge, Mary Synge, Caroline Morris, Neville Harris, Martyn Frampton, Richard Ekins and Jack Cottrell for reading drafts and saving me from many mistakes. Thanks also to Deniz Guzel for informing me about lawfare. Any remaining errors are mine alone.

Thanks to Eirik Bjorge, Basil Salman, Jonathan Burnside, Julia Mizen, David and Eleanor Harte, Ann Sinclair, Thom Brooks, Mary Anne Case, Lindsey Bell, Steven Greer, Gwen Seabourne, Dave Cowan, Bronwen Morgan, Lois Bibbings, Gemma Short, Chris Wilmore, Antonia Layard, Michael Naughton, Kathryn Hollingsworth, Rebecca Probert, Rajnaara Akhtar, Vishal Vora, Julian Hargreaves, Katharine Charsley, Alison Young, David Feldman QC and the Mallinckrodtis for their advice and kindness.
Thanks to Tom Holland, Adrian Goldsworthy and Robert Tombs for indulging my historical dilettantism.

Thanks to Catherine Arnold, Philip McCosker and Alban McCoy for the late-night revels at St Edmund’s. May they never end.

Thanks to James, Helen, Godfrey and Honor for being such great hosts and friends.

The Bristol years would have been beige without Andy, Jonno, Jo, Mat, Perran, Rachel, Seb, Steve, Tom, Ellen, Adam, Nick, Rich, Barnes, Tom, Michael, Pablo, Maria, Ben, David, Ravan, Jonathan, my former law students and the Cat and Wheel. Thank you all. Semper Bristoliensis.

Thanks for all sorts to Tom, Tom, Alex, Robbie, Kyle, Stu, James, Gray, Seb, Elliot, Rupert, Hannah, Melissa, Plamena, Wiktoria, Jeff, Rex, Oscar, Amy, Josh, Marco, Matt, Matt, Sakshi, Lois, Adam, Yaz, Patrick, Rhys, Ed, Nathan, Vincent, Rob, Steve, Noah, Alexa, Pyth and the York boys Joel, Jack, James and Conor.

Special thanks to Sir Larry Siedentop for the conversation, guidance and friendship.

Above all, however, I owe my biggest debt of gratitude to Julian Rivers. Anyone who counts him as a mentor, colleague and friend is privileged indeed. Once again and one last time, thank you.

For better or worse, this is probably the first law book to have come out of Consett. Let it not be the last.