

In Rex Ahdar and Nicholas Aroney, eds., *Sharia in the West?* (Oxford University Press, 2011)

**Afterword:
The Future of Muslim Family Law in Western Democracies**

John Witte, Jr.

A. Introduction

Anglican Archbishop Rowan Williams set off an international firestorm on February 7, 2008 by suggesting that some accommodation of Muslim family law was “unavoidable” in England. His suggestion, though tentative and qualified, prompted more than 250 articles in the world press within a month, the vast majority denouncing it. England, his critics charged, will be beset by “licensed polygamy,” “barbaric procedures,” and “brutal violence” against women encased in suffocating burkas. Muslim citizens of a Western democracy will be subject to “legally ghettoized” Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan, and other former English colonies that have sought to balance Muslim Shari’a with the common law, other critics added. The horrific excesses and chronic human rights violations of their religious courts — even ordering the faithful to stone innocent rape victims for dishonoring their families — prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won’t stay closed for long, however. The Archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Shari’a by English courts. He was, instead, raising a whole series of hard but “unavoidable” questions about marital, cultural, and religious identity and practice in Western democratic societies committed to human rights for all. What forms of marriage should citizens be able to choose, and what forums of religious marriage law should state governments be required to respect? How should Muslims and other religious minorities with distinctive family norms and cultural practices be accommodated in a society dedicated to religious liberty and self-determination, and to religious equality and non-discrimination? Are legal pluralism and even “personal federalism” necessary to protect Muslims and other religious believers who are conscientiously opposed to the liberal values that inform modern state laws on sex, marriage, and family? Is every constitutional accommodation of Muslim family law and Shari’a courts not a dangerous step on the slippery slope toward empowering a faith, some of whose leaders subvert the very democratic and human rights values that now offer them protection? These and other hard questions are becoming “unavoidable” for many modern Western democracies with growing and diverse Muslim communities, each making new and ever louder demands. If current growth rates

of Muslim communities in the West continue, a generation from now the Danish cartoon “crisis” is going to seem like child’s play.

The chapters in this volume -- centered on Australia, Canada, England, and the United States -- have unpacked these questions with particular candor, acuity, and awareness of the high stakes involved. Some authors deftly employ the sharp new tools of multiculturalism and post-modern liberal theory to carve out legal and cultural space for semi-autonomous Muslim minority communities in the West – something of a reverse millet system. Others provide enlightening descriptions of the depth and diversity of Muslim laws and cultures, raising caveats about which of these sundry Muslim laws should govern these diaspora communities. Others offer trenchant analysis of the serious constitutional and cultural implications of accommodating faith-based family laws like Shari’a, warning of the real dangers of maintaining dual religious and political sovereigns to govern domestic life.

We learn from these chapters that these four democratic nations, despite their common law heritage and common commitment to human rights, have taken quite different approaches. England, with the largest groups of Muslim minorities, has been the most accommodating of Muslim schools, charities, banks, and arbitration tribunals that govern the family, financial, and other private issues of their voluntary faithful. In particular, English courts have regularly upheld the arbitration awards of Muslim tribunals in marriage and family disputes, so long as all parties consent to participate and so long as all arbitration takes place without physical coercion or threat. The same deference is accorded to the marital arbitrations of Jewish, Christian, Hindu, and other peaceable religious authorities. Canada, though the most constitutionally liberal of these four nations, debated seriously the development of Shari’a marital tribunals in Ontario, but ultimately rejected religious arbitration in favor of a single provincial marriage law for its citizens. Canadian Muslims, however, enjoy ample religious freedom to engage in their own worship, education, banking, and religious rituals and apparel. Australia, with smaller and more scattered Muslim minorities, grants Muslims general religious freedom. But it is only beginning to grapple with how to accommodate Muslim demands for state enforcement of Muslim marriage contracts and state deference to Muslim religious arbitration of family law and other disputes. The United States, though with sizeable and diverse Muslim populations, has become the least accommodating of its Muslims citizens. Like Muslims in France, Turkey, and elsewhere, American Muslim litigants have not fared well of late when they have challenged state denials of charters or exemptions for their schools, charities, or mosques. Nor have they often succeeded in challenging prohibitions to wear traditional religious apparel while teaching in public schools, testifying in state courts, or serving in public places. American states have also not readily accommodated Muslim family law, let alone Shari’a courts. Most American state courts have only sporadically upheld private Muslim marriage contracts. They have often sided with non-Muslim spouses in divorce and child custody cases involving mixed marriages. They

have held a firm line against Muslim polygamy, and have granted little deference to arbitration awards or mediation settlements by Muslim marital tribunals or religious officials. But American Muslims have continued to agitate for greater religious freedom, autonomy, and self-determination in marriage and other subjects.

B. The Evolution of the Law of Marriage

It is no surprise that it is the law of marriage and family life that has triggered this new contest between law and religion in Western democracies. For marriage has long been regarded as both a legal and a spiritual institution – subject at once to special state laws of contract and property, and to special religious canons and ceremonies. Marriage has also long been regarded as the most primal institution of Western society and culture. Aristotle and the Roman Stoics called the marital household the “foundation of the republic” and “the private font of public virtue.” The Church Fathers and medieval Catholics called it “the seedbed of the city,” “the force that welds society together.” Early modern Protestants called it a “little church,” a “little state,” a “little seminary,” the first school of love and justice, charity and citizenship. John Locke and the Enlightenment philosophers called marriage “the first society” to be formed as men and women moved from the state of nature to an organized society dedicated to the rule of law and the protection of rights.

Because of its cultural importance, marriage was also one of the first institutions to be reformed during the divisive battles between church and state in the history of the West. In the fourth century, when Constantine and his imperial successors converted the Roman Empire to Christianity, they soon passed comprehensive new marriage and family laws predicated directly on Christian teachings. In the later eleventh and twelfth centuries, when Pope Gregory VII and his successors threw off their civil rulers and established the Catholic Church as an independent legal authority, the church seized jurisdiction over marriage, calling it a sacrament subject to church courts and to the church’s canon laws. In the sixteenth century, when Martin Luther, Henry VIII, and other Protestants called for reforms of church, state, and society, one of their first acts was to reject the Catholic canon law of marriage and the sacramental theology that supported it, and to transfer principal legal control over marriage to the Christian magistrate. In the later eighteenth century, when the French revolutionaries unleashed their fury against traditional institutions, they took early aim at the Catholic Church’s complex marital rules, roles, and rituals, consigning marriage to the rule of secular state authorities. And, in the early twentieth century, when the Bolsheviks completed their revolution in Russia, one of Lenin’s first acts was to abolish the legal institution of marriage, as a bourgeois impediment to the realization of true communism.

Modern Western democracies have not abolished marriage as a legal category, but they have dramatically privatized it and thinned out many of its

traditional elements. Half a century ago, most Western states treated marriage as a public institution in which church, state, and society were all deeply invested. With ample variation across jurisdictions, most Western states still generally defined marriage as a presumptively permanent monogamous union between a fit man and a fit woman with freedom and capacity to marry each other. A typical state law required that engagements be formal and that marriages be contracted with parental consent and witnesses after a suitable waiting period. It required marriage licenses and registration and solemnization before civil and/or religious authorities. It prohibited sex and marriage between couples related by various blood or family ties identified in the Mosaic law. It discouraged, and sometimes prohibited, marriage where one party was impotent or had a contagious disease that precluded procreation or endangered the other spouse. Couples who sought to divorce had to publicize their intentions, to petition a court, to show adequate cause or fault, to make provision for the dependent spouse and children. Criminal laws outlawed fornication, adultery, sodomy, polygamy, contraception, abortion, and other perceived sexual offenses. Tort laws held third parties liable for seduction, enticement, loss of consortium, or alienation of the affections of one's spouse. Churches and other religious communities were given roles to play in the formation, maintenance, and dissolution of marriage, and in the physical, educational, and moral nurture of children.

Today, by contrast, a private contractual view of sex, marriage, and family life has come to dominate the West, with little constructive role left to play for parents or peers, religious or political authorities. Marriage is now generally treated as a private bilateral contract to be formed, maintained, and dissolved as the couple sees fit. Prenuptial, marital, and separation contracts that allow parties to define their own rights and duties within the marital estate and thereafter have gained increasing acceptance. Implied marital contracts are imputed to longstanding lovers in some states, supporting claims for maintenance and support during and after the relationship. Surrogacy contracts are executed for the rental of wombs. Medical contracts are executed for the introduction of embryos or the abortion of fetuses. Requirements of parental consent and witnesses to the formation of all these contracts have all largely disappeared. No-fault divorce statutes have reduced the divorce proceeding to an expensive formality, and largely obliterated the complex procedural and substantive distinctions between annulment and divorce. Payments of alimony and other forms of post-marital support to dependent spouses and children are giving way to lump sum property exchanges providing a clean break for parties to remarry. Court-supervised property settlements between divorcing spouses are giving way to privately negotiated or mediated settlements, confirmed with little scrutiny by courts. The functional distinctions between the rights of the married and the unmarried couple and the straight and the gay partnership have been considerably narrowed by an array of new statutes and constitutional cases. Marriages, civil unions, and domestic partnerships have become veritable legal equivalents in many states. The roles of the church, state, and broader

community in marriage formation, maintenance, and dissolution have been gradually truncated in deference to the constitutional principles of sexual autonomy, laïcité, or church-state separation. Traditional criminal prohibitions against most voluntary sexual conduct and contact, short of obscenity or child abuse, have become dead or discarded letters. Traditional prohibitions against contraception and abortion have been held to violate the constitutional right of privacy. Traditional tort suits for sexual interference with one's spouse have become largely otiose.

These exponential legal changes in the past half century have, in part, been efforts to bring greater equality and equity within marriage and society and to stamp out some of the patriarchy, paternalism, and plain prudishness of the past. These legal changes are also, in part, simple reflections of the exponential changes that have occurred in the culture and condition of Western families -- the stunning advances in reproductive and medical technology, the exposure to vastly different perceptions of sexuality and kinship born of globalization, the explosion of international and domestic norms of human rights, the implosion of the traditional nuclear family born of new economic and professional demands on wives, husbands, and children. But, more fundamentally, these legal changes represent the rise of a new theory of private ordering of the domestic sphere and the growth of a new "democracy of desire." A fantastic range of literature -- jurisprudential, theological, ethical, political, economic, sociological, anthropological, and psychological -- has emerged in the past four decades vigorously describing, defending or decrying these legal changes.

C. Muslim Responses and Arguments for Accommodation

Many Muslims living in the West decry these massive changes to prevailing state laws of sex, marriage, and family -- and they want out. Some Muslims have just gone back to their Muslim-majority homelands shaking their heads in dismay of what Western libertinism has wrought. Others have stayed put and just quietly ignored the state's marriage and family law, using the shelter of constitutional laws of privacy and sexual autonomy to become, in effect, a law unto themselves. Others have developed elaborate premarital contracts that seek to exempt Muslim couples from much of the state law in favor of the internal norms and practices of their religious communities. Still others have led bi-cultural lives, dividing their time between Western homes and Muslim-majority lands that allow them to form Muslim marriages and families, including those that license polygamy, patriarchy, and primogeniture.

All of these informal methods of cultural and legal coexistence, however, can only be temporary expedients. Not only do some of these arrangements put in jeopardy many of the state's rights and privileges for spouses and children that depend on a validly contracted marriage. But these creaky accommodations and concessions that now exist in various Western lands can easily fall apart. Eventually a Muslim citizen will appeal to the state for relief from a marriage

contract, religious family practice, or worship community that he or she cannot abide but cannot escape. Eventually an imam or (shadow) Shari'a court will overstep by using force or issuing a fatwa that draws the ire of the media and the scrutiny of state courts. Eventually, an aggressive state case worker or prosecutor will move upon a Muslim household, bringing charges of coerced or polygamous marriage. Eventually, a Muslim school or charity will find itself in court faced with a suit for gender discrimination or with child abuse owing to its practice of corporal punishment and single-sex education. Eventually, another major media event like that surrounding the Ontario Shari'a court of 2005 or the stray Rowan Williams comment of 2008 will bring a bright spotlight back on Western Muslim communities. And, once such a major case or controversy breaks and the international media gets involved, many of these informal and temporary arrangements might well unravel – particularly given the cultural backlash against Muslims prompted by 9/11, 7/7, and now Fort Hood, or by the bloody wars against Islamicist extremists in Iraq, Afghanistan, and beyond.

It is precisely this vulnerability that advocates of faith-based family law and Shari'a courts want to avert. They want to put Shari'a, and its voluntary use by Muslim faithful, on firmer constitutional and cultural ground in the West. Rather than denouncing Western liberalism, however -- and the sexual, moral, and marital lassitude it has occasioned --- sophisticated advocates now press their case for Shari'a in and on the very terms of Western constitutionalism and political liberalism.

Part of the case for Shari'a is an argument for religious freedom. Both Western constitutional laws and international human rights norms give robust protection to the religious freedom of individuals and groups. Why should peaceable Muslim citizens not be given freedom to opt out of state laws on sex, marriage and family that run afoul of their core claims of conscience and central commandments of their faith? Why should they not have the freedom to choose to exercise their domestic lives in accordance with the norms of their own voluntary religious communities? Why doesn't freedom of religion provide a sincere Muslim with protection against a unilateral divorce action or a child custody order by a state court that directly contradicts the rules of Shari'a? Why doesn't freedom of religious exercise empower a pious Muslim man to take four wives into his loving permanent care in imitation of the Prophet, particularly when his secular counterpart can consort and cavort freely with four women at once and then walk out scot free? And, in turn, why shouldn't Muslim religious authorities enjoy the autonomy and freedom to apply their own internal laws and procedures for guiding and governing the private domestic lives of their voluntary faithful? Religious groups in the West have long enjoyed the corporate free exercise rights to legal personality, corporate property, collective worship, organized charity, parochial education, freedom of press, and more. Why can't Muslim religious groups also get the right to govern the marriage and family lives of their voluntary members -- particularly when such domestic activities have such profound religious and moral dimensions for Islamic life and identity.

Part of the case for Shari'a is an argument for religious equality and non-discrimination. After all, many Western Christians do have religious tribunals to govern their internal affairs, including some of the family matters of their faithful, and state courts will respect their judgments even if their cases are appealed to Rome or Canterbury, Moscow or Constantinople. No one is talking of abolishing these church courts, or trimming their power, even after recent discoveries of grave financial abuses and cover-ups of clerical sexual abuse of children in some churches. No one seems to think these Christian tribunals are illegitimate when some of them discriminate against women in decisions about ordination and church leadership. Similarly, Jews are given wide authority to operate their own Jewish law courts to arbitrate marital, financial, and other disputes among the Orthodox Jewish faithful. Indeed, in New York State by statute, and in several European nations by custom, courts will not issue a civil divorce to a Jewish couple unless and until the beth din issues a religious divorce, even though Jewish law systematically discriminates against the wife's right to divorce. And again, Amish, Mennonites, Hutterites, and other ascetic religious minorities have been exempted from compliance with general laws concerning education, child labor, workplace and employment relations and more, and have had their laws of excommunication and banishment upheld by the courts. If Christians can have their canon laws and consistory courts, if Jews can have their Halacha and beth din, and if even indigenous peoples can have their ancestral laws and tribal rulers, why can't Muslims be treated equally in their use of Shari'a and Islamic courts?

And part of the case for Shari'a is an argument from political liberalism. One of the most basic teachings of classic liberalism is that marriage is a pre-political and pre-legal institution. It comes before the state and its positive laws, both in historical development and in ontological priority. As John Locke put it famously in *Two Treatises on Government* (1689), the marital contract was "the first contract" and "the first society" to be formed as men and women came forth from the state of nature. The broader social contract came later, presupposing stable marital contracts. And contracts to form state governments, churches, and other voluntary associations within this broader society came later still. Why, on this simple contractarian logic, should the state get exclusive jurisdiction over marriage? After all, it was sixteenth-century Protestants, not eighteenth-century Enlightenment philosophers who first vested the state with marital jurisdiction. But why is state jurisdiction over marriage mandatory, or even necessary? Before the sixteenth-century Protestant Reformation -- and in many Catholic lands well after the Reformation, too -- the Catholic canon law and Catholic church courts governed marriage. Moreover, even in Protestant England until the nineteenth century, the state delegated to ecclesiastical courts the power to treat many marriage and family questions. There is evidently nothing inherent in the structure of Western marriage and family law that requires that it be administered by the state. And there is nothing ineluctable in liberalism's contractarian logic that requires marital couples to choose the state rather than their own families or their own religious communities to govern their domestic

lives -- particularly when the state's liberal rules diverge so widely from their own beliefs and practices. On this latter argument, conservative Muslims sometimes join hands with selected conservative Christians and critical liberals who call for exemption from, or the abolition of, state marriage law – conservative Christians because the state has betrayed traditional Christian teachings on marriage, critical liberals because the state is encroaching on individual privacy and sexual autonomy.

D. The Limits and Lessons of Accommodation

The problem with the pro-Shari'a argument from religious freedom is that it falsely assumes that claims of conscience and freedom of religious exercise must always trump. But this is hardly the case in modern democracies, even though religious freedom is cherished. Even the most sincere and zealous conscientious objectors must pay their taxes, register their properties, answer their subpoenas, obey their court orders, swear their oaths (or otherwise prove their veracity), answer their military conscriptions (even if by non-combat duty), and abide by many other general laws for the common good that they may not in good conscience wish to abide. Their eventual choice if they persist in their claims of conscience is to leave the country or go to prison for contempt. Even the most devout religious believer has no claim to exemptions from criminal laws against activities like polygamy, child marriage, female genital mutilation, or corporal discipline of wives, even if their particular brand of Shari'a commends it or if their particular religious community commands it. The guarantee of religious freedom is not a license to engage in crime. Muslims who are conscientiously opposed to liberal Western laws of sex, marriage, and family are certainly free to ignore them. They can live chaste private lives in accordance with Shari'a and not register their religious marriages with the state. That choice will be protected by the constitutional rights of privacy and sexual autonomy so long as their conduct is truly consensual. But that choice also leaves their family entirely without the protections, rights, and privileges available through the state's complex laws and regulations of marriage and family, marital property and inheritance, social welfare and more. And if minor children are involved, the state will intervene to ensure their protection, support, and education, and will hear nothing of free exercise objections from their parents or community leaders. Western Muslims enjoy the same religious freedom as everyone else, but some of the special accommodations pressed by some Muslim advocates today in the name of religious freedom are simply beyond the pale for most Western democracies.

Even further beyond the pale is the notion of granting a religious group sovereignty over the sex, marriage, and family lives of their voluntary faithful. Allowing religious officials to officiate at weddings, testify in divorce cases, assist in the adoption of a child, facilitate the rescue of a distressed family member, and the like are one thing. Most Western democracies readily grant Muslims and other peaceable religious communities those accommodations. Some

democracies also will uphold the religious arbitration awards and mediation settlements over discrete domestic issues. But that is a long way from asking the state to delegate to a religious group the full legal power to govern the domestic affairs of their voluntary faithful in accordance with their own religious laws. No democratic state can readily accommodate a competing sovereign to govern such a vital area of life for its citizens – especially since family law is so interwoven with other state public, private, procedural, and penal laws, and especially since so many other rights and duties of citizens turn on a person’s marital and familial status. Putting aside the formidable constitutional obstacles to such a delegation of core state power to a private religious body, surely a democratic citizen’s status, entitlements, and rights cannot turn on the judgments of a religious authority that has none of the due process and other procedural constraints of a state tribunal. Moreover, the proud claim of Muslim advocates that Shari’a provides a time-tested and comprehensive law governing all aspects of sex, marriage, and family life for the Muslim faithful is, for some, an even stronger strike against its accommodation. Once a state takes the first step down that slippery slope, skeptics argue, there will eventually be little to stop the gradual accretion of a rival religious law over sex, marriage, and family life, particularly as Muslim communities grow larger and more politically powerful. Some Western states thus resist even religious arbitration and mediation of marital disputes by Muslim tribunals.

The pro-Shari’a argument from liberal contractarian logic – since marital contracts are pre-political, coming before the contracts that form the society, the state, or religious associations, marital parties should be free to choose whose laws govern them -- is clever but incomplete. It ignores another elementary teaching of classical liberalism, namely, that only the state and no other social or private unit can hold the coercive power of the sword. The government contract does grant this coercive power over individuals but only in exchange for strict guarantees of due process of law, equal protection under the law, and respect for fundamental rights. A comprehensive system of marriage and family law – let alone the many correlative legal systems of inheritance, trusts, family property, children’s rights, education, social welfare, and more -- cannot long operate without coercive power. It needs police, prosecutors, and prisons, subpoenas, fines, and contempt orders, material, physical, and corporal sanctions. Moral suasion and example, communal approbation and censure can certainly do part of the work. But a properly functioning marriage and family law system requires resort to all these coercive instruments of government. And only the state, not a religious body, can properly use these instruments in a modern democracy.

The pro-Shari’a argument from religious equality and non-discrimination takes more effort to parry. A useful starting point is the quip of United States Supreme Justice Oliver Wendell Holmes, Jr.: “The life of the law has not been logic but experience.”¹ This adage has bearing on this issue. The current accommodations made to the religious legal systems of Christians, Jews, First

¹ *The Common Law* (1881), 1-2.

Peoples, and others in the West were not born overnight. They came only after decades, even centuries of sometimes hard and cruel experience, with gradual adjustments and accommodations on both sides.

The accommodation of and by Jewish law to Western secular law is particularly instructive.² It is discomfiting but essential to remember that Jews were the perennial pariahs of the West for nearly two millennia, consigned at best to second class status, and periodically subject to waves of brutality – whether imposed by Germanic purges, medieval pogroms, early modern massacres, or the twentieth-century Holocaust. Jews have been in perennial diaspora after the destruction of Jerusalem in 70 c.e., living in a wide variety of legal cultures in the West and well beyond. One important legal technique of survival they developed after the third century c.e. was the concept of *dina d'malkhuta dina* (“the law of the community is the law”). This meant that Jews accepted the law of the legitimate and peaceful secular ruler who hosted them as the law of their own Jewish community, to the extent that it did not conflict with core Jewish laws. This technique allowed Jewish communities to sort out which of their own religious laws were indispensable, which more discretionary; which secular laws and practices could be accommodated, which had to be resisted even at the risk of life and limb. This technique not only led to ample innovation and diversity of Jewish law over time and across cultures. It also gave the Jews the ability to survive and grow legally even in the face of ample persecution.

Western democracies, in turn -- particularly in the aftermath of the Holocaust and in partial recompense for the horrors it visited on the Jews – have gradually come to accommodate core Jewish laws and practices. But it is only in the past two generations, and only after endless litigation and lobbying in state courts and legislatures, that Western Jews have finally gained legal ground to stand on, and even that ground is still thin and crumbles at the edges at times. Today, Western Jews generally have freedom to receive Sabbath day accommodations, to gain access to kosher food, to don yarmulkes, distinctive grooming, and other forms of religious dress in most public places, to gain zoning, land use, and building charters for their synagogues, charities, and Torah schools, to offer single-sex and bilingual education, and more. And Jewish law courts have gained the right to decide some of the domestic and financial affairs of their faithful who voluntarily elect to arbitrate their disputes before them rather than suing in secular courts. These Jewish law courts are attractive to Jewish disputants, because they are staffed by highly trained jurists, conversant with both Jewish and secular law, and sensitive to the bicultural issues that are being negotiated. Unlike their medieval and early modern predecessors, these modern

² The accommodation of the First Peoples of Canada, Australia, or the United States are simply not precedents for any others besides First Peoples. These arrangements are products of ancient treaties worked out, in no small part, as compensation for massive atrocities and dislocation of native or aboriginal peoples committed during earlier colonial days. The courts of all three lands have stated clearly that these accommodations and benefits are *sui generis*, not to be imitated by and for others.

Jewish law courts claim no authority over all of Jewish sex, marriage, and family life, leaving many such issues to the state. These Jewish law courts have also abandoned their traditional authority to impose physical coercion or sanctions on the disputants; in particular, they claim no authority beyond persuasion to stop a disputant from simply walking out of court and out of the Jewish community altogether.

The modern lessons in this story for Shari'a advocates are four. First, it takes time and patience for a secular legal system to adjust to the realities and needs of new religious groups and to make the necessary legal accommodations. The hard-won accommodations that modern Jewish law and culture now enjoy are not fungible commodities that Muslims or any others can claim with a simple argument from equality. They are individualized, equitable adjustments to general laws that each community needs to earn for itself based on its own needs and experiences. Muslims simply do not have the same history of persecution that the Jews have faced in the West, and simply do not yet have a long enough track record of litigation and lobbying. Concessions and accommodations will come, but only with time, persistence, and patience.

Second, it takes flexibility and innovation on the part of the religious community to win accommodations from secular laws and cultures. Not every religious belief can be claimed as central; not every religious practice can be worth dying for. Over time, and of necessity, diaspora Jewish communities learned to distinguish between what was core and what more penumbral, what was essential and what more discretionary to Jewish legal and cultural identity. Over time, and only grudgingly, Western democracies learned to accommodate the core religious beliefs and practices of Jewish communities. Diaspora Muslim communities in the West need to do the same. As several chapters in this volume have made clear, Islamic laws and cultures have changed dramatically over time and across cultures, and modern day Islam now features immense variety in its legal, religious, and cultural practices. That diversity provides ample opportunity and incentive for Muslim diaspora communities to make the necessary adjustments to Western life, and to sort out what is core and what is more discretionary in their religious lives. Cultural adaptation, though not assimilation, is what is needed to win the accommodations of the state.

Third, religious communities, in turn, have to accommodate, or at least tolerate, the core values of their secular host nations if they expect to win concessions for their religious courts and other religious practices. No Western nation will long accommodate, perhaps not even tolerate, a religious community that cannot accept its core values of liberty, equality, and fraternity, or of human rights, democracy, and rule of law. Those who wish to enjoy the freedom and benefits of Western society have to accept its core constitutional and cultural values as well. So far, only a small and brave band of mostly Western-trained Muslim intellectuals and jurists have called for the full embrace of democracy and human rights in and on Muslim terms. These are highly promising arguments.

But so far these arguments can hardly be heard amidst all the loud denunciations of them from sundry traditional Muslims in and beyond the West. Moreover, even liberal Muslims are hard pressed to point to modern examples of a Shari'a-based legal system that maintains core democratic and human rights values. Until that case can be reliably made out, deep suspicion will remain the norm. Western-based Muslims have an ideal opportunity to show that Shari'a and democracy can co-exist and complement each other.

Finally, Muslim tribunals must become more legally sophisticated and procedurally equitable to be both attractive to voluntary Muslim disputants and acceptable to secular state courts. Like the Jewish beth din that sits in New York or London, the Muslim law court needs to be staffed by jurists who are well trained both in religious law and in secular law, and who maintain basic standards of due process and representation akin to those in secular courts or arbitration tribunals. A single imam pronouncing legal judgments in an informal proceeding at the local mosque will get no more deference from a state court than a single priest or rabbi making legal pronouncements in a church or synagogue. And, Western state courts will have little patience with claims that this lack of deference violates the religious liberty of the mosque or its imam and members. The court's suspicions will be the opposite: that the disputing parties who appeared before the imam either did not understand the full legal options available to them at state law, or were coerced to participate in the internal religious procedures. It's much harder for a court to have such suspicions when educated Muslim parties, eyes wide open, choose a legally sophisticated Muslim arbitration tribunal over a secular court that does not share their core values but still offers them a serious jurisprudential option to state marriage law.

Lest the foregoing seems like an unduly patronizing argument for religious minorities to "wait-and-see" or "change-and-hope-for-the-best," it's worth remembering that majority Christians, too, went through much of the same exercise in the area of religion and education. The American story offers a good illustration of how this developed, and how common educational standards were eventually raised and maintained. In the later nineteenth century, a number of American states wanted a monopoly on education in public (that is, state run) schools. Some of this agitation was driven by anti-Catholicism, some by anti-religious animus altogether. For half a century, churches, schools, and religious parents struggled earnestly to protect their rights to educate their children in their own private religious schools. In the landmark case of *Pierce v. Society of Sisters* (1925),³ the United Supreme Court finally held for the churches and ordered American states to maintain parallel public and private education options for their citizens. But in a long series of cases thereafter, courts also made clear that states could set basic educational requirements for all schools – mandatory courses, texts and tests, minimal standards for teachers, students and facilities, common requirements for laboratories, libraries, gymnasias and the like. Religious schools could add to the state's minimum requirements, but they could

³ 268 US 510 (1925).

not subtract from them. Religious schools that sought exemptions from these requirements found little sympathy from the courts, which instructed the schools either to meet the standards or lose their accreditation and licenses to teach.

This compromise on religion and education, forged painfully over more than half a century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly, even if marriage law must be a state prerogative. Religious parties in the West have long had the right to marry in a religious sanctuary, following their religious community's preferred wedding liturgy. Religious officials have long had the right to participate in the weddings, annulments, divorces, and custody battles of their voluntary members. But the state has also long set the threshold requirements of what marriage is and who may participate. Religious officials may add to these threshold state law requirements on marriage but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state could throw him in jail. A rabbi may encourage a bickering couple to repent and reconcile, but he cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals do eventually get more involved in marriage and family law, states might well build on these precedents and set threshold requirements in the form of a license – formulating these license rules through a democratic process in which all parties of every faith and non-faith participate. Among the most important license rules to consider: No child or polygamous marriages or other forms of marital union not recognized by the state.⁴ No compelled marriages or coerced conversions before weddings that violate elementary freedoms of contract and conscience. No threats or violations of life and limb, or provocations of the same. No blatant discrimination against women or children. No violation of basic rules of procedural fairness, and more. Religious tribunals may add to these requirements but not subtract from them. Those who fail to conform will lose their licenses and will find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools slowly to transform themselves from sectarian isolationists into cultural leaders. Muslims in the West have already begun some of this exercise, too, in the development of grade and high schools, which are now sometimes attractive to non-Muslims because of their discipline and high academic standards. This should continue, and eventually give rise to major colleges and universities on the order of Notre Dame, Brigham Young, Wheaton, or Pepperdine.

⁴ I put the case against religiously-based polygamy briefly in "The Legal Challenges of Polygamy in the USA," *Ecclesiastical Law Journal* 11 (2009): 72 and at greater length in *Why Two in One Flesh: The Western Case for Monogamy over Polygamy* (forthcoming).

Such an arrangement holds comparable promise for questions of religion and marriage in Muslims diaspora communities. It not only prevents the descent to 'licensed polygamy,' 'barbaric procedures' and 'brutal violence' that the Archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer. Even hardened and prejudiced local communities in democratic lands eventually will find room for new Muslim minorities who are skilled at "cultural navigation" and who are both consistent and persistent in pressing their main case for accommodation. And, in the process of adjusting to the legal and cultural realities of their new homes, Muslim religious minorities may eventually become legal and cultural leaders in succeeding generations of the West.