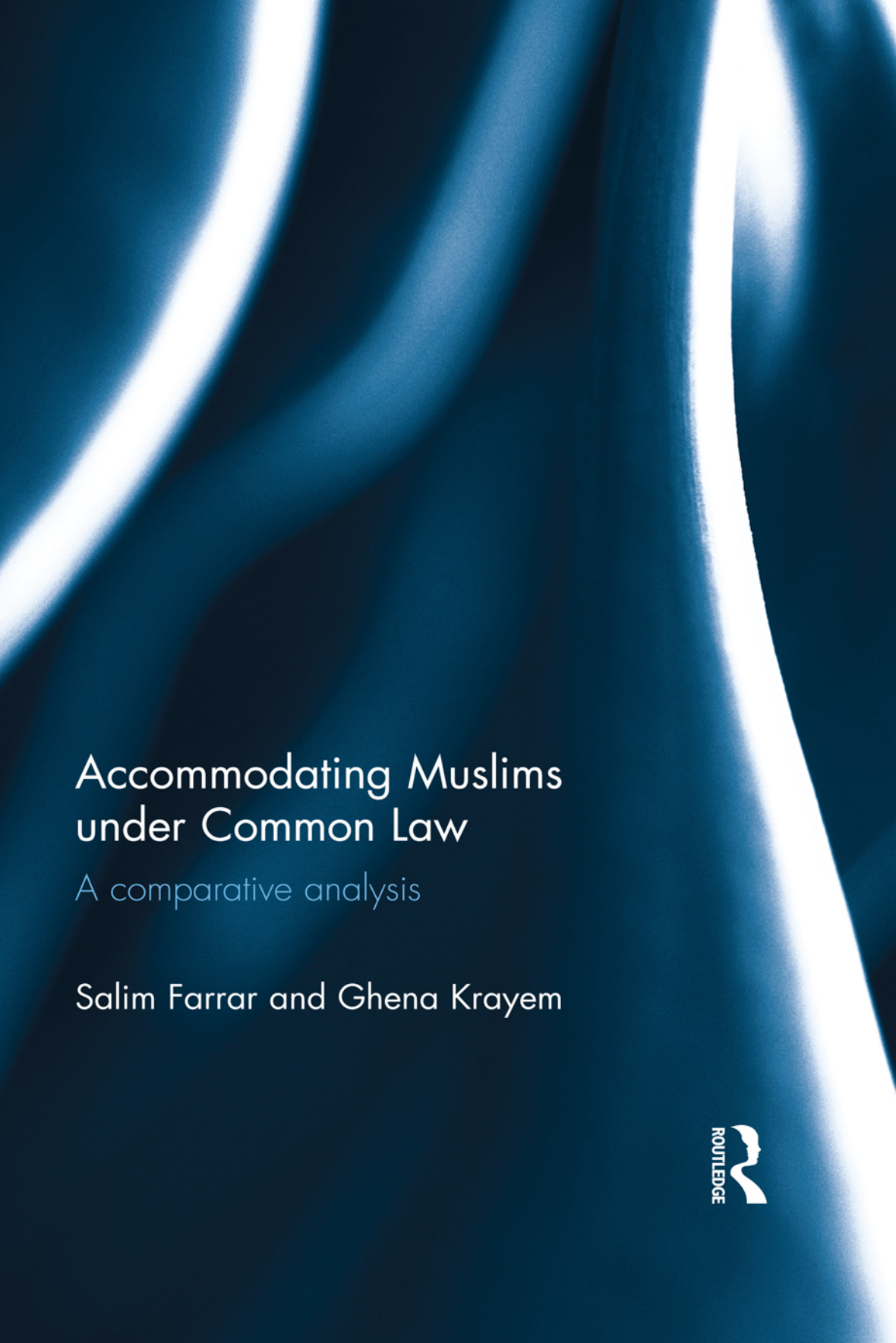
Accommodating Muslims
under Common Law
A comparative analysis
Salim Farrar and Ghena Krayem
ROUTLEDGE

Accommodating Muslims under Common Law

The book explores the relationship between Muslims, the Common Law and Sharīʿah in the West post-9/11. The book looks at the accommodation of Sharīʿah Law within Western Common Law legal traditions and the role of the judiciary, in particular, in drawing boundaries for secular democratic states with Muslim populations who want resolutions to conflicts that also comply with the dictates of their faith.

Salim Farrar and Ghena Krayem consider the question of recognition of Sharīʿah by looking at how the flexibilities that exist in both the Common Law and Sharīʿah provide unexplored avenues for navigation and accommodation. The issue is explored in a comparative context across several jurisdictions and case law is examined in the contexts of family law, business and crime from selected jurisdictions with significant Muslim minority populations including: Australia, Canada, England and Wales, and the United States. The book examines how Muslims and the broader community have framed their claims for recognition against a backdrop of terrorism fears, and how Common Law judiciaries have responded within their constitutional and statutory confines and also within the contemporary contexts of demands for equality, neutrality and universal human rights. Acknowledging the inherent pragmatism, flexibility and values of the Common Law, the authors argue that the controversial issue of accommodation of Sharīʿah is not necessarily one that requires the establishment of a separate and parallel legal system.

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Preface

We began the research for this book in 2012 and in the course of that time, so much has happened. Muslim–non-Muslim relations across Europe, Canada, the USA and Australia were already tense because of a ratcheting up of security fears. We did not think the situation could get worse. How wrong we were. The public beheading of Drummer Lee Rigby in London, the bombing of the Boston Marathon, the assault on the Parliament building in Ottawa, the siege on a café in Sydney, the arbitrary murder of an employee of the NSW Police by a radicalised child, the attacks on offices of Charlie Hebdo, the November 2015 bombings and terrorist attacks in Paris and the killings in San Bernardino, California, have all made a tense atmosphere positively toxic.

We have also seen a concerning rise in Islamophobia in all of these countries as Muslims face a relentless call to condemn and apologise for acts they have nothing to do with and in fact contravene their Islamic values and beliefs. This has been made even more difficult by a poisonous public discourse that allows politicians and 'shock-jocks' to suggest that Muslims are not welcome and even should be placed on a database! This is not to mention the unfurling tragedies in the Middle East, the refugee crisis and the collective sense of pain and hurt Muslims feel when they see so many of their brethren slaughtered, in often horrific ways.

It seems as if unless governments, politicians, academics and communities work together to address problems of discrimination and social exclusion as well as radicalisation, we are moving inexorably towards a state of affairs not seen since the likes of World War II. This book represents our small contribution towards that collective effort.

We have lots of people to thank who have helped on us our literary journey. First, we would like to thank our employer, the University of Sydney Law School, which has provided a sanctuary and safe haven, not to mention a collegial atmosphere, for two Muslim academics to reflect, write on and discuss with fellow academics without fear or favour some of the most controversial issues of the day. Second, we would like to thank our colleagues who read through and commented on earlier drafts: Ron McCullum and Mary Crock, Patrick Parkinson, Simon Butt, Mathew Conaglen and Kevin Walton from the Sydney Law School; and Dr Farah Ahmed from Melbourne University's Faculty

of Law. Third, there are our research assistants, Helen McCue, David Drennan, Chris Frommer, Tamana Daqiq and the several interns from the Centre for Asian and Pacific Law without whose hours spent trawling through and identifying relevant case reports and empirical data across four jurisdictions, this work may never have got off the ground.

Last, but certainly not least, we must thank our families for their unstinting support and tolerance of late nights and working weekends. We dedicate this book to them and ultimately thank the One who made this all possible.

حَسْبُنَا اللَّهُ وَنِعْمَ الْوَكِيلُ

Allāh suffices us and is the One upon whom we ultimately depend

Ghena Krayem
Salim Farrar
Sydney Law School, 16 December 2015

Introduction

Law, religion and the challenge of accommodation

> *The law should not make accommodation for injustice, it will be said. Further the very idea that society can be split up into different groups abiding by different legal standards challenges the very unity and cohesion of a country. So the arguments will go, and they can be very persuasive.*
>
> (Roger Trigg, *Equality, Freedom and Religion*, 2012a: 7)

In the literature of Prophetic sayings (*Ḥadīth*), Prophet Muḥammad relates the story of the holy man, Jurayj (Al-Bukhārī, Ḥadīth No. 3436).[1] Jurayj was a pious worshipper of God and a follower of Jesus. He had a simple hermitage built in the mountains and used to go there to retreat, pray and reflect. He was particularly fond of prayer and would dedicate himself day and night in optional prayer and remembrance of his Lord. One day, his mother called for him while he was in prayer, and he said to himself, 'My Lord, my mother, or my prayer?' He continued praying. The following day, his mother came again and requested he come out to see her. He continued praying. She came a third day and for a third time, Jurayj ignored her request and continued praying. Upset and angry, Jurayj's mother supplicated to God, imploring, 'O Allāh, do not let him die until he sees the faces of prostitutes'.

Envious of Jurayj's reputation for piety, some of the local people also then began to plot against him and convinced a beautiful prostitute to try and seduce him. She failed, but subsequently became pregnant with a local herdsman, gave birth to a child and claimed Jurayj was the father. The people who used to visit Jurayj felt angry and betrayed. Without confirming or properly investigating the rumour, they impetuously tore down Jurayj's hermitage, tied him up and brought him to the public square to be punished. Before punishment was administered, Jurayj requested for the child to be brought to him. Jurayj then placed his finger on the infant's stomach and asked him the identity of his father. To the astonishment of those present, the infant mentioned the herdsman. Now aware of their grievous error and unjust actions, the people kissed Jurayj, released him and offered to rebuild his hermitage out of gold. He turned them down, asking that they rebuild it exactly as it was (out of mud).

The parable of Jurayj, though related from events taking place two thousand years ago and a society vastly different from our own, informs some essential

truths which transcend time and place and which send echoes into our troubled present. Other than noting that a mother's prayers are always answered, the story warns of religious excess, of wrong priorities, of misinformation and disinformation – of community intolerance and of rash response. More optimistically, it also tells us not to abandon hope and that justice wins out in the end.

Religious dedication, in particular dedication to Islām, is problematic in contemporary times in the secular West. If we believe public opinion polls, the majority of these societies are becoming less religious and not more; so it must appear 'odd' that ethnic minorities, especially Muslim groups, are more religious and adhering more to their faith than before. The fact that some groups who claim to follow the same faith then kill and maim innocent people on their streets in the name of religion makes it yet more perplexing. Donald Trump's plans to prohibit Muslim immigration into the USA, 'Anti-Sharīʿah' bills in state legislatures, anti-Muslim marches and voluminous popular newspaper columns on how incompatible Muslims are to a 'Western' way of life, make almost any attempt to address social exclusion and discrimination against Muslims, or religion generally, as practically fanciful.

Even fanciful projects, however, must be attempted sometimes because of what is at stake.

We hope that our book will form part of the discussion on deciding appropriate responses to the complex questions these issues raise. Importantly, we hope that it will take discussions down the path of cooperative, socially inclusive and integrative models of Muslim–non-Muslim relations, rather than the confrontational and poisonous 'clash of civilizations' (Huntington 1996) thesis which has been heard continuously ringing in the ears of legislators and policy makers in the West since the events of 9/11.

There are a number of authors who have made important theoretical and policy contributions on Muslims in the West post-9/11. There is also comparative sociological work that is revealing important and useful insights.[2] We also note a number of important works in particular subject discipline areas, especially in Islamic Family Law (Macfarlane 2012; Bowen 2010), and in particular jurisdictions (Griffith-Jones 2013). As one might expect, there is also a burgeoning literature on radicalisation, terrorism and Muslim engagement in the criminal justice system; as there is on Muslims in business and finance. So far as we can see, however, there are no works as yet which have attempted to draw all of these different strands of the debate and subject areas together and across jurisdictions. Also our work incorporates a discussion and analysis of the law itself, of case law, and how judges have purported to deal with religious questions in a secular context. This issue is important, not just because it demonstrates the capacity, or otherwise, of Common Law Courts to resolve issues where problems of litigants are rooted in understandings of Sharīʿah. It is also important for symbolic reasons, as it sends out a message to Muslims – perhaps those with more 'separatist' inclinations (see Chapter 2) – that there is no need for a system of parallel Sharīʿah courts (if they ever claimed as such; see Chapter 2).

Also, unlike the majority of these works, we also approach these legal, political, philosophical, moral and social issues from a stance of 'critical subjectivity' and experiential knowing (Heron and Reason 1997). As academic lawyers, as practising Muslims, as migrants and locals, of different genders, ethnicities and nationalities, we live and participate within multiple communities – often simultaneously. We understand intuitively the pain, exclusion and significance of racist, sexist and Islamophobic comments and behaviours – as we do the fear, confusion and uncertainties when questions of Islām and Sharīʿah are raised. We also have our preferred responses to these issues that originate in our subjective circumstances and particular interpretations of Islām. As Sunnis, and traditionalists, our 'take' on Islām may not be shared by other Muslims, particularly those from more 'liberal' or conversely 'separatist' perspectives (see further Chapter 2). Nevertheless, we would argue that our views are sufficiently 'mainstream' for policy makers to take notice and which they can ill afford to ignore.

Not only is our understanding of Islām important, but so also is our interpretation of 'law'. For many, religious law, such as 'Sharīʿah', is not 'law' so-called, but religion and applies only in the moral sphere, if at all. Discussion of the accommodation of Muslims or of Sharīʿah, then, is not a legal question but a political one, worked out by communities and their representatives in elected parliamentary or council chambers.

We view 'law' to mean a 'norm' and, like critical legal scholars, an 'expression of power'. But rather than see law necessarily as an instrument of oppression – though in many cases it may be – fundamentally, we view 'law' as 'emancipatory' – it *empowers* and protects human beings, it does not just control or seek to guide them. Law can be also both secular (with a small 's') *and* religious. The latter seeks to guide and lift an innate human instinct to aspire to that which is greater than itself and to release the human soul from its shackles of temporality. The former provides the space in which that human soul manifests its desire for release, without necessarily preferring one religion or interpretation of religion over another. Not all, of course, would share such a religious construction or approve the interrelationship between religious and secular law. We would argue, however, that this conception of law is consistent with a liberal understanding of the function of law as the mechanism to protect and promote moral and personal autonomy (Raz 1988). The point of law in a liberal democracy is to protect individual freedom and to *enable* the human being to make choices, including *religious* choices, in their conception of the 'good life'. 'Religious' law, so long as its application does not deprive others of their choices, can therefore coexist with 'secular' law and need not be in conflict; one can help serve the other.

We also see 'law' as an act of symbolism – a reflection of the norms, or values of a particular society. Our contemporary societies are heterogeneous, comprised of communities from a variety of ethnic, cultural, linguistic and religious backgrounds; and, given the flows of migrants and global refugee crisis, are likely to become even more so. If law is symbolic of our collective values, then it should reflect that heterogeneity rather than wallow in a fossilised

imagination of a society's 'glorious past'. That means adapting to the values of newcomers, and recognising the values of suppressed peoples, especially minorities, past and present. This does not mean *deference to*, but rather respect and recognition of difference so that we *all* weave our threads into the fabric of law. Law must be socially inclusive and seen to be so, lest it becomes illegitimate in the eyes of those whom it seeks to govern.

'Law', then, in this conception, is necessarily pluralist. Our conception of law acknowledges the multiplicity of norms in our lives that jostle for priority and some of which will not be found in a posited 'State' Law. Indeed, we may regard such non-posited norms as more important and it would be curious if we did not call that 'law'. We may call these a 'higher law', 'natural law', 'cultural law' or 'religious law' – but those norms are still *law* because of the guiding force they play in our lives (Hooker 1975; Chiba 1989; Davies 2005; Tamanaha 2000). The issue, of course, is what happens when norms collide and how contemporary governments and courts in our liberal democratic and secular contexts should respond. And that is the topic of our book as it relates specifically to Muslims.

The methodology of our study is both comparative and contextual. As we have just sketched out, we believe the problem of 'acceptable' religious expression and how it relates to Muslims is a global issue, and not just a local one. Jurisdictions, therefore, can learn from each other, analyse the particular issues occurring in one jurisdiction and compare in the other. In so doing, we can build up, inductively, a more accurate multifaceted picture of the both the problem we confront as well as the lessons to be drawn. We can also begin the process of formulating more workable policies that address the real problem rather than the ones people commonly, and often wrongly, perceive as the problem.

While much has been written of the pitfalls of comparative analysis and the dangers of promoting legal reforms simply on the basis of successful outcomes elsewhere – the so-called legal 'transplant' (Legrand 1997; Watson 1974), this is less of a problem in our study. We are not comparing 'oranges' with 'lemons'. Epistemic problems are more likely when one compares one legal tradition with a different legal tradition, such as between the Common Law legal system and the Civil Law legal system. We cannot be sure that we are comparing like with like (though there are various techniques to try and make sure that you do). The danger is less, however, where comparisons are between jurisdictions that belong to the same so-called 'legal family' and here the family of 'Common Law' (Glenn 2010; David and Brierley 1978).

These jurisdictions share, to varying degrees, a legal tradition founded on English law: its historical concepts and orientating values; the use of juries and the separation between the tribunal of fact and of law; special procedural devices, such as writs and pleading; a special role for professional lawyers and advocates and, of course, a special place for the trial itself. There is not a single philosophy of the Common Law, other than each case is decided on its facts, and interpreted within the narrow confines of a principle elucidated from a trail of previous cases decided within a particular court hierarchy; and that where there are no clear answers, courts may also look to matters of public policy (Shepherd

2009). In their determination of 'hard cases' (Dworkin 1988), certain concepts frequently emerge, such as 'reasonableness', 'certainty' and 'fairness', but they are not necessarily peculiar to the notion of 'Common Law', but an important feature of Common Law decision-making which we elaborate upon further in our conclusion.

That is not to say that the dangers of false comparisons are not still present, especially when one considers the diversity of the Common Law legal family. It is for this reason we have not included within our comparative analysis the 'Asian' Common Law jurisdictions, such as India, Pakistan, Malaysia and Singapore, even though they have considerable Muslim populations and engage frequently with Sharīʿah matters. In one sense, they are a particular study in their own right because of their common colonial histories, struggles for development and Muslim majorities or considerable Muslim minorities.

Instead, our focus is the major 'Western' Common Law jurisdictions: Australia, Canada, the UK and the USA. Their traditions are closer, being economically and politically developed, generally English-speaking, and without the same flavour of recent anti-colonial struggle. Muslims are also, relatively speaking, a small minority in these countries, particularly in the USA (see further, Chapter 1), and are especially vulnerable to 'tyranny of the majority'. Muslims rely more on the courts than representatives in legislative assemblies in these countries to protect and defend their rights. This makes decisions of the courts, for current purposes, a very important area of study.

But 'Western' Common Law jurisdictions have important differences too. Australia, Canada and the United States have federal legal structures which distinguish between federal law and state law. The UK, on the other hand, while it has a unitary legal structure, is not *unified* as Scotland, England and Wales, and Northern Ireland have their own separate jurisdictions (and systems, in the case of Scotland). Australia, Canada and the USA all have written constitutions which all empower the judiciary to subject the legislatures to its particular terms. The UK, however, is without a written constitution and Parliament remains sovereign, meaning that the courts cannot override Parliament's legislative will. Canada and the United States have their own domestic Bills of Rights, with their particular histories, emphases and doctrines of interpretation. The UK is a party to the European Convention on Human Rights and, since the Human Rights Act of 1998, has incorporated the Convention rights into domestic law and applies the jurisprudence of the European Court of Human Rights. Australia does not even have a Bill of Rights, though it has a few limited rights in its written constitution, and two of its state legislatures, Victoria and the ACT, have drafted their own Bills of Rights that apply to their particular jurisdictions. Canada, Australia and the UK (obviously) are also part of the Commonwealth and, in addition to being constitutional monarchies, frequently refer to judicial precedents from each other's jurisdictions. The United States, on the other hand, is a republic and refers to decisions from the Commonwealth in only very rare cases.

Given these differences, any general conclusions we draw need to take into account local nuances, especially the emphases placed on the 'establishment of

religion' (USA), multiculturalism (Canada) and, in the UK, the impact of European jurisprudence.

As we have mentioned, our comparative analysis is contextual and not reliant on case analysis alone. This is for a number of reasons, but primarily because judicial decisions do not operate in a vacuum; they are the product of a particular political, cultural and social environment. Also it is down to epistemic reasons, as in some subject areas there may be only one or two cases in each jurisdiction or no cases at all. We would gain little illumination discussing just one case. It should be remembered that we are also discussing the situations in jurisdictions as a whole and not simply the role of the courts, though given the relative inability of Muslims to influence legislative majorities, that role is a very important one.

Our book is called '*Accommodating* Muslims under Common Law' which clearly implies that the concept of 'accommodation' is fundamental to our thesis. Our use of this terminology, however, is not necessarily for normative purposes. Rather, it is a term that we read – and we ourselves have used (Farrar 2011; Krayem 2014) – in academic and political discussions, over the extent to which the state has and should recognise different aspects of Muslim identity and the Muslim's legal code, the Sharīʿah. Unfortunately, the connotations and implications of this term have often been left unscrutinised and deemed unproblematic.

The New Shorter Oxford English Dictionary (1993) offers the following definitions of 'accommodation': 'something which supplies a want or ministers to one's comfort'; 'room and provision for the reception of people'; 'an arrangement of a dispute; a settlement; a compromise'; 'adaptation, adjustment'; 'self-adaptation; obligingness; a favour'. We would argue that these boil down to three basic meanings: 'compromise', 'adaptation' or 'favour', which present three alternative approaches as to the role of law in the regulation of Muslims' identity and their place within the broader society. We would also argue that all three of these approaches have been applied by courts and legislatures across our jurisdictions and subject matters.

The term 'compromise' implies that there is a two-way communication process in which 'Muslims' – a complex label as we discuss in Chapters 1 and 2 – and the 'State' agree on the acceptable boundaries of religious expression, as it applies to Muslims. In that agreement, each 'side' foregoes aspects of its self-identity and expression. In the words of the former Archbishop of Canterbury, Rowan Williams, this is a *transformational* process in which

> we are prepared to think about the basic ground rules that might organise the relationship between jurisdictions, making sure that we do not collude with unexamined systems that have oppressive effect or allow shared public liberties to be decisively taken away.
>
> (Williams 2008a)

For Muslims, perhaps, this might mean sacrificing the practice of some elements *optional* to their religious worship as opposed to those that are *obligatory* (see

further, Chapter 2). For the State, it means it sacrifices its neutrality, and provides the means for those obligations to be performed and removes obstacles that affect their performance, by providing exemptions or opt-outs, for example.[3] From an Islamic perspective, the problem, as we discuss in Chapter 2, apart from very clear matters mentioned explicitly in the Qur'ān and the Prophetic Sunnah and where Islām's top scholars have managed to agree, there exist competing interpretations, including whether a matter is optional or obligatory. The problem is that it then offers to a court, for instance, a choice as to competing interpretations and who is the Common Law Court, a secular construct, to prefer one interpretation over another? Moreover, if it does prefer one interpretation, is it not *colonising* the 'other', denying the Muslim the opportunity to self-identify? This is a reoccurring theme that emerges in particular from our discussion of family and business law in Chapters 3 and 5.

The second term 'adaptation', simply means 'change' but contrary to the first meaning, that change is unilateral on behalf of the state. It does not require anything of the Muslim community. Yet, it remains transformational of the state as it incorporates those aspects of Islām and Sharīʿah it deems compatible. The problem here, as with the first, is that the state offers a preferred view of Islām but it says nothing about the criteria through which this is done.

The third term 'favour' implies that it is the state which is doing all the adapting and is not obliged to recognise religion or a religious community, such as Muslims. Rather, it offers its patronage and, in *quasi*-regal terms, dispenses privileges rather than rights. This then no longer becomes part of a discourse of equality – or even of citizenship – with the position of religion, and of Muslims, subject to the whims and caprice of government. On the one hand, this has some advantages for Muslims as they can remain as they are without needing to adapt to the society around them. On the other hand, their status is rendered fragile and subject to the political mood. In symbolic terms, this concept is also negative for it reinforces a sense of 'otherness' rather than a sense of belonging.

The implications of accommodation as 'favour' are evident across our chapters, but particularly in the 'Sharīʿah debates' in Chapter 2 and the discussion of Muslims in crime in Chapter 4. In Chapter 2, the legal recognition of Muslims and of Sharīʿah is presented as asking for *special treatment*, although like Jurayj, what they actually want is the freedom to do what is legally available for them (and all other citizens) to do – no more, no less. In Chapter 4, accommodation as 'favour' manifests in two respects. First, in the securitisation of Muslims, the freedoms of Muslims are deemed to be only a privilege, rather than a right, so they can be restricted or taken away completely. Second, in the application of the Criminal Law, reference to Muslim identity and Sharīʿah is constructed as an 'excuse' which, in an increasingly uncompromising environment, governments, legislatures, judges and juries are less willing to afford them. The Criminal Law protects the public square and lays down foundational values. As such, people asking for 'excuses' on the grounds of who they are, is deemed divisive, a threat to the unitary state and too fundamental a challenge to what is 'common' in the law.

The challenge of 'accommodation', for the state, in all three senses of this word, is that it jeopardises the secularity and neutrality of the liberal state. By acknowledging Islām, and particularly preferred interpretations of it, the state is no longer the impartial provider and governor. In the spirit of that liberal tradition, therefore, we might expect the Common Law Courts across all of our jurisdictions to maintain a strict detachment from religion and religious interpretation. They will not accommodate Sharīʿah because the law is the 'law' and it is up to Muslims to ensure they come within it. There is no negotiation or agreement, but it does not mean the law is thereby *imposed* on Muslims. Rather, they *navigate* their way around legal obstacles and reinterpret or plough more deeply into their tradition, where appropriate, to ensure that it 'fits' with the current legal and constitutional framework.

Again, we see evidence of this process in our discussion of family and business law in Chapters 3 and 5. The problem with this approach, however, is that it assumes the state is neutral and secular. But as Roger Trigg informs: 'Secularism is never neutral, but always takes a view about the proper place of religion' (Trigg 2012a: 5). Moreover, the state does not operate in an historical vacuum as it has already provided religious exemptions and opt-outs for historically assimilated religious groups. A 'neutral' approach also assumes Muslims will have the financial and intellectual capital to be able and afford the lawyers to craft their own 'carve outs' and navigate the system. As our discussion in Chapter 1 will show, however, Muslims, generally speaking, are amongst the most marginalised and impoverished communities and, therefore, are at a great disadvantage in comparison with others. A neutral approach is more likely to reinforce the unequal status quo.

If we revisit our conception and function of law, as well as our immediate objects, it becomes readily apparent that the concept of 'accommodation', because of its contextual and varied connotations, is possibly not up to the task. If we want to address religious excess and extremism, it is unlikely to succeed unless Muslims are motivated to believe that they are an integral part of the society they live in. Our working concept needs to promote their personal and moral autonomy – their freedom – whereas accommodation has a predilection to dictate, neglect or control. We suggest 'recognition', the active *incorporation of norms* (Woodman 2001: 2), is more appropriate as it reflects and respects human dignity, which is said to underpin the Universal Declaration on Human Rights, as it is based on a mutual 'knowing'. As Muslims, it also happens to reflect a Qur'ānic mandate: ' "O" people! You have been created as male and female, and made into nations and tribes that you may *know* each other.' (Qur'ān, 49:13)

The overall argument we advance in this book has both descriptive and normative aspects. First, we argue that Sharīʿah and Common Law are *not* inherently incompatible with each other. They are both 'law' in the sense they represent and communicate a set of 'norms' that operate at both an individual and a community level. Both are 'open-textured' and subject to interpretation which enables boundaries or ground rules to be worked out to the mutual satisfaction relevant communities. We address this argument in our foundational Chapters – 1 and 2.

Second, when we move to actual recognition in the courts, we will argue that there is much evidence of compatibility. The pattern, however, is inconsistent reflecting the complexity and varied connotations of 'accommodation'. In part, this reflects also the nature of the subject matter and the contexts in which the cases arise, as it does the individualistic nature of Common Law decision-making. It further reflects the values of the time in a context of securitisation. This argument is traced through our substantive chapters on family (Chapter 3), crime (Chapter 4) and business (Chapter 5).

In the conclusion, we address normative considerations and questions of policy. We will suggest that 'accommodation' is not enough and that, as liberal democratic societies, we should move towards a notion of 'recognition'. Not all forms of religious or Islamist identity, of course, should be recognised. But like many other behaviours with which the Common Law deals, we argue that it should be filtered by judge or jury through determinations of 'reasonableness'.

Notes

1 There are different narrations of this *Ḥadīth*. See Al-Bukhārī, *Al-Ṣaḥīḥ*, Ḥadīth No. 3436, Kitāb Aḥādīth Al-Anbiyā', in Ibn Ḥajr Al-'Asqalānī (1986), *Fatḥ Al-Bārī*, Vol. 6, Dār al-Diyān Lil-Turāth, Cairo, at 549; Al-Bayhaqi, *Kitāb Al-Adab*, Vol. 1, at 309.

2 See Jocelyn Cesari, *Why the West Fears Islam: An Exploration of Muslims in Liberal Democracies* (New York: Palgrave Macmillan, 2013); Dagistanli, S., Possamai, A., Turner, B.S. and Voyce, M., *Sharia in Australia and US*. ARC Discovery Project 2013–2016.

3 This would be similar to the tests that have been applied to 'manifestation of religion' under Article 9(1) of the European Convention of Human Rights. Here, the European Court has drawn a distinction between acts of worship or devotion that are 'aspects' of a particular religion or belief, from those which are merely 'motivated by it'. See further, *X* v. *United Kingdom* [1984] 6 EHHR 558; *Arrowsmith* v. *UK* [1978] 3 EHHR 218; and *Williamson and Others* v. *The Secretary of State for Education and Employment* [2002] EWCA Civ 1926. See also, the discussion by Robin Griffith-Jones, in *Islam and English Law* (2013), pp. 9–19.

1 Muslim communities in a multicultural context

> There is a growing understanding that the incorporation of Muslims has become the most important challenge of egalitarian multiculturalism.
>
> Tariq Modood (2009: 166)

Introduction

Muslim communities have been at the forefront of recent debates about multiculturalism, so much so that it may be argued that the future success of multiculturalism will depend upon how it deals with the 'Muslim' issue. This refers to the presence of Muslim communities in secular Western liberal democracies, such as those considered in this book: the USA, UK, Canada and Australia. More particularly, it refers to their 'accommodation' and the understanding of accommodation that Muslims deserve 'favour' or 'special treatment'. For some, Islām is inherently incompatible with the West and any accommodation that attempts to afford special treatment to Muslims will necessarily be socially divisive. However, it is the argument of this book that research indicates the exact opposite. Muslim communities are seeking out ways to integrate more with mainstream society, including with the legal system.

We will begin the chapter by exploring the issue of multicultural accommodation and the challenges faced by states who attempt to respond to the needs of its diverse cultural and religious groups. We will question the assumption often made about the neutrality of a secular state and consider the different types of approaches to secularism that a state can adopt. We argue that contrary to the often-held view that multicultural policies divide and destabilise society, these policies can lead in fact to greater social cohesion and transform both the mainstream and the minority communities.

We often speak about Muslim communities as if they are an homogenous group or one community, identical in nature and speaking with one voice. So when one person or group acts or speaks, to say that Sharīʿah, for example, should be recognised officially, then it is assumed that this is what the entire community desires. Whilst it may be tempting to talk about 'the' or 'a' Muslim community, to assert a singular and cohesive Muslim 'community' would be not only a distortion but also inaccurate. This is especially true of Muslims in the

minority context because of a multiplicity of Muslim ethnicities arising from their patterns of immigration. This chapter, therefore, will attempt to provide insights on the various Muslim communities in the UK, USA, Canada and Australia in terms of their size, ethnic and cultural make-up, immigration patterns, age, location, education and workforce participation. Although there are similarities, each jurisdiction has its own particular ethnic make-up and social environment that might impact on the role Sharīʿah plays. This is critical because in order to explore more deeply the potential role of Sharīʿah and the need for governments to consider how or whether they should recognise certain of its aspects, we need to understand more about the Muslim communities themselves in each of our particular jurisdictions.

Finally, the chapter considers the broader context of these communities, looking at the impact of the 'War on Terror' and the subsequent rise in *Islamophobia*. In all four countries, Muslims have reported negative sentiments and attacks against them simply because of their faith. This is not just in the form of random attacks on Muslims but also in the tenor of the general public discourse with politicians and the media contributing to a poisonous environment leaving Muslim communities feeling they are under siege. These sentiments also affect any discussion about the 'accommodation' of Muslims and pose one of the great challenges for the future of multiculturalism.

Muslim communities in a multicultural context

Each of the four countries discussed in this book can be described as a multicultural state because of the great diversity of their populations. Canada prides itself as the first country to adopt multiculturalism as official policy. It is home to people from over 200 different ethnic origins and speaking more than 200 different languages (Government of Canada 2015). Australia also has a population that comes from 200 different birthplaces and speaks over 200 different languages, making it one of the most culturally and linguistically diverse places in the world (Racismnoway n.d.). There is no doubt that both the USA and the UK are similarly multicultural in terms of their demographic make-up.

However, there are many challenges that come with being part of a multicultural state, not least of which is the challenge faced by the state when dealing with calls for accommodation or recognition of the diverse practices of the various groups that come within it. As we will discuss in Chapter 2, the recognition of Sharīʿah has been one such challenge. However, the presence of these Muslim communities raises more issues than simply accommodating Sharīʿah. It also relates to their status as a minority group within a multicultural state, as we shall now explore in more detail.

Multicultural citizenship

Accommodating the practices, laws and principles of minority groups is a challenge for any state. Historically, the response of states to such a task was to place

the obligation on minority groups to assimilate into the majority culture and society. This meant abandoning any different practices they may have had. However, as demonstrated in this book, this has not in fact occurred. Rather, states have had to deal with the demands made by minority groups for recognition and accommodation of their cultural and religious identity (Baumeister 2003: 396).

Many have long articulated a basis for minority rights to be recognised to supplement traditional human rights in liberal societies (Kymlicka 1996: 6). They argue that the state actually privileges the majority and makes decisions that reflect their norms, thereby questioning the assumed neutrality of the state (Kymlicka 1996: 51). The classical nation state, Koenig argues, is 'considerably less secular and certainly less neutral than is often assumed' (Koenig 2005: 232). This is because the practices of the minority are seen as different (Baumeister 2003: 397) and perceived as 'other', (Addis 1991–92: 619), whereas the dominant cultural understanding and experiences tend to universalise themselves as the 'inevitable norm for social life' (Addis 1991–92: 619).

One of the main arguments against adopting multicultural policies in liberal democratic states is that it is inconsistent with liberalism's focus on the individual. Whilst it is true that there is an emphasis on the individual within liberalism, the individual is not valued at the expense of a shared community (Kymlicka 1989: 2). Part and parcel of individualism is the freedom to make choices, and cultural membership allows individuals to make sense of their lives, not only by providing these choices but also by making them meaningful. Kymlicka contends '(c)ultures are valuable, not in and of themselves, but because it is only through having access to a societal culture that people have access to a range of meaningful options' (Kymlicka 1996: 83). However, members of minority cultural communities may face disadvantage with respect to the 'good of cultural membership' because their culture is not recognised or accommodated in the same way as is the majority culture. It is the rectification of such disadvantage that requires and justifies the provision of minority rights, and obligates a state to take into account and accommodate the various cultural communities that reside within it (Kymlicka 1989: 2). This is certainly how many Muslims feel in the countries that we have considered throughout this book and as later chapters will demonstrate.

Therefore historically, migrant groups were expected to assimilate – in the sense that they were to conform to the existing cultural and political norms – it was hoped that over time 'they would be indistinguishable from native-born citizens' in their way of life. If a group was perceived incapable of assimilation, they were excluded from entering the country (Kymlicka 2007b: 71). However, by the 1970s things started to change as countries such as the USA, Canada and Australia adopted more tolerant approaches, acknowledging the differences of the many different groups that had become part of the state. This policy or approach is often referred to as 'multiculturalism' and it encompasses a broad range of policies that aim to provide 'some level of public recognition, support or accommodation to non-dominant ethnocultural groups' (Kymlicka 2007b:

71). To varying degrees, each of the Common Law countries have grappled with the implications of adopting multicultural policies.

Can such policies lead to civil instability?

There is an increasing fear that multiculturalism 'produces separateness and is counterproductive to social cohesion' (Vertovec and Wessendorf 2005: 21). In particular, the criticism is that liberal multiculturalism fragments society, undermines its stability and ultimately erodes our ability to act collectively as citizens (Kymlicka 1998: 15). The argument is that recognition and accommodation of diversity means that cultural groups will remain as separate entities without developing any common bonds between them (Kymlicka 1998: 15). Kymlicka disagrees, arguing that 'there is no inherent trade-off between diversity policies and shared citizenship policies' (Kymlicka 2007a: 39) because the aim should not be to achieve a 'standard homogenizing model of citizenship'.

No doubt, there still are important policies designed to promote overarching national identities and loyalties, such as official languages, core curricula in schools, citizenship requirements and state symbols, just to name a few (Kymlicka 2007b: 83–84). However, we would argue that liberal democracies should adopt multicultural policies to transform and supplement such nation-building policies so that they do not exclude minority groups (Kymlicka 2007b: 83).[1] This is a central argument that will be explored throughout the book, as it is argued that attempts at seeking some form of official recognition or accommodation of Muslims are attempts to try to fit into the mainstream legal structure and framework, rather than an attempt to set up a separate parallel system. This is evident in our later chapters which consider the ways in which Muslims are doing this in the areas of Family Law, Criminal Law and business transactions.

In fact, it is our argument that accommodation promotes integration into the larger society and not self-government by different groups (Kymlicka 1996: 31). In demanding greater recognition or accommodation, these groups aim to modify the institutions and laws of the mainstream society to make them more accommodating of difference (Kymlicka 2007b: 11). By creating a pluralistic public space, civil society is strengthened (Fielding 2008: 31). It allows minority groups to more actively participate in civil society and reciprocate the tolerance shown towards them (Fielding 2008: 50). If minority groups are alienated, then they are more likely to 'withdraw into their ghettoized communities' (Fielding 2008: 45–46). As will be discussed in Chapter 2, this potential alienation can lead to an increase in Muslim groups adopting separatist approaches and not engaging with the broader community.

We agree with Kymlicka that successful accommodation, in the form of recognition and as a process of mutual knowing, is transformative of both the mainstream society and the minority group. It is a two-way process that requires the mainstream society to adapt itself to minority groups, just as those groups must adapt to the mainstream (Kymlicka 1996: 96). In this way, it is accepted that culture is not static but adaptive and that cultural hybridism is the normal