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Cover Page Footnote
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MUSLIMS AND ACCESSIBLE JURISPRUDENCE IN LIBERAL DEMOCRACIES: A RESPONSE TO EDWARD B. FOLEY'S *JURISPRUDENCE AND THEOLOGY*

*Khaled Abou El Fadl**

EDWARD Foley asks whether religion is ever relevant to a lawyer's work. In answering this question, Foley argues that we must consider the extent to which religion is relevant to the law itself. From there, Foley deals with the role of a judge in adjudicating cases and the extent to which, if at all, a judge may cite religious considerations in reaching a decision. Foley asserts that a judge should not rely on theological beliefs in adjudicating cases. Borrowing Rawls' concept of overlapping consensus,[1] however, Foley argues that under certain circumstances a judge may cite an overlapping consensus of different theological beliefs in support of her judgment. A lawyer, likewise, may not invoke religious reasons but, under certain circumstances, can argue the existence of an overlapping consensus to a court.

I agree with Foley's basic argument. A judge should not rely on religious beliefs in adjudicating cases and should not cite religious reasons in justifying her decisions. Furthermore, I agree that a lawyer should base her arguments on an analysis of the law rather than religious considerations.[2] It is important, however, to differentiate between the various players and spokespersons in a legal system and the extent to which each may rely on or cite religious reasons in a legal system. It is necessary to distinguish between the roles played by legislators, executives, judges, and lawyers in a legal system and the extent to which each of these role players may cite or base their decisions on religious justifications.[3]

Generally speaking, however, public officials in a liberal democracy should rely on arguments or reasons that are open or accessible to

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1. *See* John Rawls, Political Liberalism (1993).

2. The question as to whether a judge or lawyer should inject religious beliefs into the legal process is a separate issue from whether religion is relevant to the law itself. In other words, even if judges or lawyers should not rely on religious beliefs in deciding or arguing cases, this is a separate issue from whether theology is relevant to jurisprudence or whether theology and jurisprudence could benefit from each other. On the benefits of a discourse between law and theology, Joseph Vining has written two excellent works: *From Newton's Sleep* (1995), and *The Authoritative and the Authoritarian* (1986).

3. *See* Kent Greenawalt, Private Consciences and Public Reasons 141-64 (1995); *see also* Kent Greenawalt, Religious Convictions and Political Choice (1988) (distinguishing between the amount of self-restraint that a citizen, legislator, executive, or judge should exercise in invoking religious reasons in support of their activities).

most citizens. Religious reasons or justifications are not accessible or open to most citizens and, hence, tend to exclude and discriminate against those who do not share the religious convictions cited. This is so whether the public official is a legislator or executive and especially when the public official is a judge.

The appearance of fairness and impartiality is crucial in adjudicatory situations. A judicial decision citing Judeo-Christian values, for example, or quoting the teachings of Buddha, is not persuasive to a Muslim and, in fact, is inherently alienating to a Muslim.[4] This is especially the case if the decision citing non-Muslim religious sources was decided against the Muslim litigant. If a non-Muslim judge refers to her religious convictions in deciding a case against a Muslim, by definition, the judge has cited reasoning or justification that is not accessible or open to discussion or refutation by the Muslim litigant. If a judge, for instance, cites Christian values in support of a ruling against a Muslim litigant, the Muslim litigant might be placed in the untenable position of having to convince the judge that Muslim values are worthier than the values cited by the judge,[5] an inherently problematic situation. I believe, however, that it is particularly troubling within the context of the Islamic tradition. There is a strong tradition in Islam emphasizing the need to live and organize life pursuant to the Divine Will and Command and according to Islamic values and laws. But Islam also has a strong tradition emphasizing the values of accessibility and reciprocity.

Devout Muslims are ordered to obey God and conduct themselves according to God's commands. The Qur'an[6] states: "And those who do not judge by God's revelations are unjust."[7] Elsewhere, the Qur'an commands Muslims to obey God and the Prophet Muhammad.[8] Muslims are to search for the Divine Will and implement God's laws ("*Shari'a*").[9] At the same time, however, Jews and Christians are

4. *See* Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 Loy. L.A. L. Rev. 1525 (1996) [hereinafter El Fadl, *Muslim Minorities*].

5. Even if the judge refers to his or her religious beliefs in dictum not directly relevant to the adjudication of a case, this is still problematic. If the cited dictum invokes terminology or symbolism inconsistent with the Muslim litigant's religious beliefs, this has an alienating effect on the Muslim litigant. Furthermore, there is the appearance of impropriety and suspicion of possible bias. The losing Muslim litigant may, understandably, suspect that she lost the case for reasons unrelated to the legal merits of the litigation.

6. The holy book of Islam. Muslims believe God revealed the Qur'an to the Prophet Muhammad through the Angel Gabriel.

7. Qur'an 5:45. All translations of the Qur'an in this Essay are to A. Yusef Ali, The Holy Qur'an: Translation and Commentary (1977). In some passages I have altered the translation to reflect my understanding of the original.

8. *Qur'an* 3:132. Muslims believe that the Prophet Muhammad is the last prophet in a long line of prophets that include Ibrahim, Moses, Jesus, and others.

9. *Shari'a* literally means "the way." Islamic law is often somewhat inaccurately called *Shari'a*. *See* Joseph Schacht, An Introduction to Islamic Law 1 n.1 (1964) (defining *Shari'a* as "the sacred law"); El Fadl, *Muslim Minorities*, *supra* note 4, at 1525-

commanded to govern themselves by their respective revelations as well.[10] The Qur'an states: "To each of you We have given a law and a way and a pattern of life. If God had pleased, God could have made you one people (professing one faith)."[11] At least in theory, Islamic theology accepted differences in religious convictions and beliefs as natural and acceptable. Even more, it was accepted that certain religious minorities in an Islamic state would be able to retain their courts and laws.[12] Although historical practice was not always at par with theory, the fact remains that the idea that people should be bound by their own religious laws was affirmed in principle. While Muslims should govern themselves by the laws revealed to them, non-Muslims should implement their own laws.

The basic principle affirmed here is one of reciprocity and accessibility. If Muslims are to live by their own religious laws, so must non-Muslims be allowed the same privilege. This is why, for example, a number of Muslim jurists demanded that Muslims be able to retain their own laws in non-Muslim lands. These jurists expected a degree of reciprocity—because non-Muslims were permitted to retain their own laws in Muslim lands, the reciprocal relationship would be expected in non-Muslim lands.[13] Other Muslim jurists argued that the public laws of *Shari'a* have no application in non-Muslim lands. Muslims living in non-Muslim territory are bound by the public laws of the territory in which they reside. As long as these Muslims are allowed to practice their religion privately and are not forced to obey the religious laws of the host state, these Muslims may continue to reside in the non-Muslim territory even if the public laws of *Shari'a* are suspended.[14]

Beyond the dynamics between Muslims and non-Muslims, the internal dynamics of Islamic law affirm the principle of accessibility. There is no formal church in Islam. Furthermore, no single institution can

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26. *Shari'a* is an all encompassing term that means the way of Islam. The positive laws of Islam are called *fiqh*.

10. Qur'an 5:43, 5:47.

11. *Id.* 5:48.

12. *See* Choucri Cardahi, *Conflict of Law*, *in* Law in the Middle East 335-37 (Majid Khadduri & Herbert J. Liebesny eds., 1955); N.J. Coulson, A History of Islamic Law 27 (1964); Rodolphe J.A. De Seife, The Shar'ia: An Introduction to the Law of Islam 70-71 (1993). Criminal and commercial laws were often considered public laws applicable to Muslims and non-Muslims alike. Christians and Jews retained their own personal laws.

13. *See* Bernard Lewis, *Legal and Historical Reflections on the Position of Muslim Populations Under Non-Muslim Rule*, *in* Islam and the West 43, 53-55 (1993); El Fadl, *Muslim Minorities*, *supra* note 4, at 1533.

14. The position that the public law of *Shari'a* is suspended in non-Muslim territory belongs particularly to the Hanafi school of law in Islam. *See* Khaled Abou El Fadl, *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 Islamic L. & Soc'y 141, 172-81 (1994); Khaled Abou El Fadl, *Legal Debates on Muslim Minorities*, 22 J. Religious Ethics 127, 146-51 (1994).

define the correct view in Islamic law. Islamic historical practice has produced several equally orthodox Islamic schools of law. In the contemporary age, many of these schools have become extinct and only a few survived.[15] A Muslim has the right to adopt the school of law that he or she finds most persuasive.[16] Because each of the schools is considered equally orthodox, at times this led to the state setting up several parallel court systems with each court system following a specific school.[17] Litigants could choose the court system that followed a school of law consistent with their own beliefs. Furthermore, in the Islamic tradition there is an established practice in which a jurist suspends her own convictions or jurisprudential school in order to apply a law more accessible to the litigants. This became particularly relevant when the jurist belonged to a minority school or adopted a minority view in the law. In this case, the jurist would rule according to the majority view or pursuant to the position adopted by the school of law followed by the majority of the population.[18]

In short, the idea that the law should be accessible and non-exclusive finds strong support in the Islamic tradition. But in order for the law to be equally accessible either the state must allow each religious group to retain its own laws or it must take a neutral position in relation to all religions. If Muslims are not to attempt to force their own religious views upon others, they are entitled to expect the same from non-Muslims.

In a liberal democracy we must differentiate between political or legal views that are accessible and non-exclusive, and comprehensive views which are non-accessible and exclusive. Religious views, by their very nature, are non-accessible and exclusive. Whatever the merits or demerits of invoking religious arguments in the political process, the judiciary must maintain an absolute appearance of fairness and impartiality. In order to do so the judiciary must be able to explain its decisions in non-exclusive and accessible terms to everyone who comes before it.[19]

This brings me to Foley's argument that in certain circumstances the judiciary may invoke an overlapping consensus of religious views on a certain point. I think this argument is problematic. The concern here is that only the views of the popular or powerful would be integrated in this consensus. For example, the views of the Jewish or Christian traditions might be considered and integrated in this overlapping consensus while the traditions of the unpopular or disempowered may be

15. There are four surviving Sunni schools of law: Hanafi, Hanbali, Shafi'i, and Maliki. There are three surviving Shi'i schools of law: Ja'fari, Zaydi, and Isma'ili.

16. Instructive on this point is Jalal al-Din al-Suyuti, Ikhtilaf al-Madhahib (1983). Note that for the purposes of this Essay, the *Fordham Law Review* is relying upon the author's personal translation of the foregoing work.

17. *See* Sherman Jackson, Islamic Law and the State 52-53 (1996).

18. El Fadl, *Muslim Minorities*, *supra* note 4, at 1539-40.

19. *Id.* at 1540.

misrepresented or excluded. A judge might either assume that the views of the minority religions are consistent with her own or reconstruct the views of such religions to fit within the overlapping consensus. In other words, a judge of Christian background might be convinced that Jewish and Christian views support what she believes to be an overlapping consensus. The judge might know very little about the Islamic tradition. It is quite conceivable that the judge would assume that the Islamic tradition supports the overlapping consensus or might reconstruct or interpret the Islamic tradition so that it would fit within the consensus.

I do believe a judge can and should bring her own sense of decency and conscience to bear upon the cases she adjudicates. A judge should integrate a sense of right and wrong into her work as long as she can explain her decision in accessible and non-exclusive terms. If a judge is deeply religious, it is not realistic nor even advisable to ask that she develop a split personality when she performs her job. But if the judge is unable to translate her sense of right or wrong into accessible and non-exclusive terms then, by definition, her decision is exclusive, discriminatory, and unjust. For a devout Muslim there is no greater injustice than to feel that while the public laws of *Shari'a* are suspended, she must follow the laws of a different religion.