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## Religious Norms and Family Law: Is It Legal or Normative Pluralism?

Abdullahi Ahmed An-Na'im  
*Emory University School of Law*

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# RELIGIOUS NORMS AND FAMILY LAW: IS IT LEGAL OR NORMATIVE PLURALISM?

*Abdullahi Ahmed An-Na'im\**

## INTRODUCTION

The core question for this Symposium issue of the *Emory International Law Review* is how to mediate the tension between democratic demands for the application of religious norms<sup>1</sup> and human rights concerns, especially regarding the rights of women and children. Such demands tend to be more intensely asserted in family matters, perhaps because of the intimacy of family relations and the central role of the family as a marker of identity and agent of children's socialization. Tensions among the competing bases of public policy and legislation tend to come in sharper focus in pluralistic societies because of the multiplicity of exclusive claims of religious truth and visions of the public good.<sup>2</sup> While using the topic of Sharia in Nigeria as a primary case study, this Symposium also includes discussions of broader theoretical and globally comparative perspectives on the mediation of competing normative claims.

The mediation of such controversies and tensions will continue to be the primary function of politics in every society, where disputes are routinely mediated through compromise and accommodation. That politics of mediation includes the possibility of coercive adjudication before state courts when voluntary compliance fails to work. Indeed, the peace, stability, and well-being of every society depend on its ability to mediate and adjudicate such disputes in a peaceful and orderly manner. The more the proponents of each side in a dispute perceive their position as open to negotiation and compromise, the better the prospects for political stability and social justice. This is unlikely to be the case, however, where people believe their positions to be immutable because they are ordained or mandated by God or, in the case of a customary

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\* Charles Howard Candler Professor of Law and Director of the Center for International and Comparative Law, Emory University School of Law.

<sup>1</sup> Reference to religious norms throughout this Essay can include "customary" or "cultural" norms as appropriate. For native or traditional religions, it is difficult to distinguish between what is religious and what is customary or cultural. On the complexity of classification and overlap of religious and customary laws, see Abdulmumini A. Oba, *Religious and Customary Laws in Nigeria*, *infra* this issue, at nn.20–36.

<sup>2</sup> For a clear elaboration on this tension with special reference to the United States and Canada, see Ann Laquer Estin, *Family Law, Pluralism, and Human Rights*, *infra* this issue.

norm, because they are part of the irreducible core of their culture. Moreover, such factors as perceptions, resentment, economic and political competition, and ethnic tensions can all contribute to non-negotiable confrontation over the zero-sum game of power politics and communal pride.<sup>3</sup>

As this Essay argues, however, there are two complementary ways of defusing such unproductive and often destructive deadlock over family law matters. One possibility is to re-examine the normative assumptions of a community of believers, to see whether God did indeed ordain or mandate the particular view one is asserting. The second possibility is to seek to settle such disagreement through community-based mediation, rather than coercive enforcement of one view or another by the state, because believers are unlikely to unanimously agree on one view or another and none of them would accept being coerced into submitting to a view he or she does not accept. In other words, we should avoid coercive state adjudication of family disputes precisely because we believe them to be governed by divinely ordained norms.

Most essays in this Symposium examine various aspects of the relationship between religious and customary norms and state family law on the assumption that the state can enforce religious or customary norms. The premise of this introductory Essay is that it is not possible to have a *religiously valid* (or customary) outcome from any coercive adjudication by the courts of the state. In other words, whatever the state and its courts and other institutions do is inherently secular, and cannot be religious. If that is the case, then believers who are keen to live by their religious norms should *avoid* state enforcement, rather than seek it. To make this argument, Part I of this Essay outlines the premise and core idea of an approach to the mediation of such competing demands. Part II attempts to frame the issues in terms of normative, not legal, pluralism and explain why that characterization could be helpful for mediation of disputes. This proposal is further elaborated in relation to Sharia and family law in view of this Symposium's particular focus. I reflect at various points in the analysis on a sampling of themes and issues discussed in some of the essays in this Symposium to illustrate how this approach might work.

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<sup>3</sup> See, e.g., Eyene Okpanachi, *Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi States*, *infra* this issue; M. Christian Green, *Religion, Family Law, and Recognition of Identity in Nigeria*, *infra* this issue.

## I. AN APPROACH TO MEDIATION

The enforcement of religious norms by state courts and other officials is in fact the “kiss of death” for the integrity and survival of religious normative systems. From the perspective of the religious normative system itself, state judges and other officials lack the religious authority and technical competence to interpret and apply religious norms.<sup>4</sup> State enforcement of religious norms will distort the meaning, abuse the methodology, weaken the moral authority of these norms, and ultimately starve them to death by cutting them off from their religious foundations and sources of communal development. In the case of Sharia, colonial and postcolonial state enforcement of family law froze those norms in the arbitrary formulation adopted by state judges and legislators, thereby denying those norms the possibility of evolving and adapting as part of a total integrated religious and social system.<sup>5</sup> It is only to be expected, therefore, that traditional Sharia family law norms enacted into family law statutes have become an isolated island in a sea of social and economic change.<sup>6</sup> The alternative approach this Essay supports, as will be explained later, is to limit the jurisdiction of state courts to the application of state law, and leave the practice of Sharia norms, including the mediation of disputes, to believers in their families and communities.

My argument is to keep religious norms as such out of the state, and to further keep the state out of religious discourse in principle, with due regard to the practical complexities and contingencies of this relationship in specific contexts, as can be seen in various essays in this Symposium. For example, although it may seem that this Essay is over-simplifying the complexity of the relationship of what Pascale Fournier calls “law in books” and “law in action,”<sup>7</sup> its point is quite different. In part, Fournier examines the paradoxical outcomes of the application of the law of the parties’ nationality by European civil law systems in France and Germany, in contrast to the application of the

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<sup>4</sup> Certain Islamic scholars and jurists known as mujtahids are the only people who can perform legal reasoning of Sharia law. See, e.g., RAFFIA ARSHAD, *ISLAMIC FAMILY LAW* 20 (2010).

<sup>5</sup> In colonial times, Islamic scholars issued legal opinions for governors and state judges to provide private legal consultation on Sharia law in Islamic communities. By the mid-Ottoman period, Sharia became institutionalized and incorporated in European codes. “As openly secular state courts applying those colonial codes began to take over civil and criminal matters, the domain of Shari’a was progressively limited to the family law field.” *ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK* 4–9 (Abdullahi Ahmed An-Na’im ed., 2002).

<sup>6</sup> *Id.* at 9.

<sup>7</sup> See Pascale Fournier, *Borders and Crossroads: Comparative Perspectives on Minorities and Conflict of Laws*, *infra* this issue.

law of domicile by common law systems in Canada. This sort of nuanced and thoughtful analysis is necessary to expose the inadequacies and contradictions of state practice whether applying the law of nationality or of domicile. In either case, state courts should not claim or pretend to be applying religious norms. All state law, whether of Canada, Iran, Nigeria, Saudi Arabia, or any other state, is simply the product of the political will of that state and never of any religion. I insist on this point to help Muslims and non-Muslims alike to shed any inhibition or prejudice toward the law of any state because of its presumed religious nature. This point is necessary to resist calls for Sharia to be enforced by the state, whether in Nigeria, in Muslim-majority countries, or for Muslim religious minorities anywhere; whatever the state enforces is not Sharia as such. The premise of Yüksel Sezgin's Essay is that "personal status laws, regardless of whether they are based on Muslim, Jewish, or Hindu tradition, are men-made socio-political constructions that have come to invariably discriminate against and deny women equal rights in the familial relations."<sup>8</sup> The relevant question is how to spread and support this realization, among not only "women-led hermeneutic communities" as Sezgin sees happening,<sup>9</sup> but also women believers at large and the wider public opinion to effect sustainable social and legal change.

In terms of the focus of this Symposium, the mediation of competing claims of religious norms and family law noted earlier may be described in two ways. On the one hand, the normal method for settlement of family issues should be through the voluntary application of and compliance with religious norms within the family and community. This can and should happen even in disputes over custody of children and inheritance. State courts should have nothing to do with such family and community-based mediation, including compliance with outcomes. On the other hand, the jurisdiction of state law can extend to whatever family issues are allocated to it through the democratic process. This proposed scheme does not require or presume that any particular family issues (whether marriage, divorce, custody, or property) should always be governed by state law, because that is a matter for the democratic political process. Every society decides which matters to regulate by law and which to leave for private mediation in the family and community. What this scheme requires is that accepted, applicable religious norms should operate within the family and community outside state courts, which should not claim to apply or

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<sup>8</sup> Yüksel Sezgin, *Women's Rights in the Triangle of State, Law, and Religion: A Comparison of Egypt and India*, *infra* this issue.

<sup>9</sup> *See id.*

enforce religious norms. For example, if a norm setting the minimum age of marriage or maintenance for a wife and children is made part of state law through the normal legislative process, then state courts should apply it as state law without invoking the underlying religious norm. The following remarks may offer some guidance as to what is left to family and community mediation and what is allocated to state law and courts.

First, the law and governance of any state should reflect the population's values, priority concerns, and interests through the democratic principle that the will of the majority should prevail; however, these laws should be subject to the constitutional/human rights of the minority. I use this combined term, "constitutional/human rights" to indicate that the practical protection of rights should happen at the constitutional level out of respect for sovereignty, but reference must also be made to international human rights norms as the standard that constitutional rights should aim to achieve. Religious communities have the right to organize and act collectively to contribute to public policy determinations and legislation as best they can. However, it is also integral to the democratic principle that the collective will of the political majority should not have a monopoly or veto power over issues of policy and law, regardless of the constitutional/human rights of other citizens. In my view, the stronger the political majority, the more important it is to subject its political will to the constitutional/human rights of the minority. This is because a predominant majority has a tremendous advantage in getting what it wants through economic, political, cultural, or social means. The minority should therefore be able to rely on the ability of the law to check the multifaceted power of the majority. The basic point is that the more vulnerable and politically or socially marginalized a person or group is, the more that person or group deserves the protection of constitutional/human rights against the "democratic" tyranny of the majority.

Second, not only are the notions of majority and minority fluid, contingent, contested, and relative to power relations, but also the binary majority and minority may be misleading. These notions are ambiguous because we are all part of the majority on some issues, and the minority on other issues. A numerical minority can be a political majority if it has sufficient power and resources to dominate the numerical majority, as was obviously true in cases like Apartheid South Africa or more subtly so in many parts of the world

today.<sup>10</sup> In any case, when elites claim to act on behalf of one majority or another, that is unlikely to be the case for a range of economic and social policy matters necessary for the daily working of a government. Major political parties in stable democratic states are coalitions of people with disparate ideological views and pragmatic interests. It is important to demystify the notion of a stable majority and see the more sustainable reality of multiple fluid and shifting minorities to promote a more inclusive view of political community as constituted by all religious and cultural communities. The more we appreciate such realities, the less likely we are to assume the permanent dominance of our own worldview or lifestyle and the more we accept the need for pluralistic politics and protection of constitutional/human rights. The more we see ourselves as potential victims of violations of our rights, the less likely we are to accept the victimization of others.

The ambiguities and contingencies of the principle of majority rule, subject to rights of minorities, are so foundational that none of us can ever “get his or her own way” in matters of public policy and legislation. That religious or cultural communities may be subjected to law or policies they oppose is not peculiar to them. We all have to live with policies and laws we oppose though some may be installed by governments for which we voted. Citizens of stable democratic states accept being subjected to policies and legislation they oppose in the hope of being able to change them through the same democratic political process made possible by the constitutional/human rights limitations on the prevalent political majority of the day. In other words, the basic moral and political justification of majority rule is the possibility for the political minority of today to become the political majority of tomorrow. The constitutional/human rights of all citizens must be equally and vigorously protected by all of us for it to be a sufficiently plausible possibility for minorities to engage in the legitimate and peaceful political process, instead of resorting to violent rebellion or submitting to dehumanizing apathy and subordination. We all need these rights for ourselves and our communities, including those who seem to be secure in their power and privilege over the rest of the population.

Third, because religious norms should not be enforced by state courts or other institutions, the term *normative* pluralism is more appropriate than legal pluralism. The purpose is to reflect the reality and appreciation of normative

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<sup>10</sup> See generally NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, SEGREGATION, AND APARTHEID 96–104 (2007).

diversity while preserving the integrity and uniformity of state legal systems. Clearly, people everywhere live in their communities according to a variety of religious, cultural, social, professional, and legal normative systems and are socialized from childhood into ways of mediating the competing claims of relevant normative systems. That is, not all normative systems are applicable in every situation of daily life, but applicable norms in the varying systems sometimes come into conflict. For example, one may have a familial or social obligation to assist a relative in need or danger, but doing so in some situations may violate a legal or professional obligation. This can happen when the relative is a fugitive from justice or the requested assistance may mean favoring a relative applicant over other applicants for the same job.

The mediation of competing claims includes the process by which we all decide what to do when faced with such choices. We may risk legal responsibility by helping a close relative or refuse to help when the risk is too high, or if we deem the person or his actions not worthy of our taking that risk. The main point of recalling such familiar situations is that we are able to negotiate and mediate among competing claims because various normative systems operate differently. Factors taken into account when deciding which normative claim to follow or disregard include the source and hierarchy of the competing norms, the form and severity of the sanction we expect to suffer for favoring one norm over another, and the likelihood of the application of the sanction.<sup>11</sup> For example, a husband may be more deterred from abusing his wife or neglecting his children out of fear of moral sanction within his family and community than by the law of the state which has jurisdiction over him. Relevant to our subject, religious norms may provide more sustainable protection for a wife or children through family or community-based informal sanctions than the formal sanctions of state law and institutions.<sup>12</sup> Perceptions of informal sanctions by religious normative systems can override even penal sanction by the state. Examples include the persistence of harmful practices like female genital cutting or “honor killing,” even when such actions are punishable under the penal law of the country.<sup>13</sup>

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<sup>11</sup> For an example of a religious minority group that uses two normative systems, see William Twining, *Normative and Legal Pluralism*, 20 DUKE J. COMP & INT'L L. 473 (2010).

<sup>12</sup> ARSHAD, *supra* note 4, at 148–51.

<sup>13</sup> Abdullahi Ahmed An-Na'im, *The Role of 'Community Discourse' in Combating 'Crimes of Honour,'* in HONOUR: CRIMES, PARADIGMS, AND VIOLENCE AGAINST WOMEN 64–77 (Lynn Welchman & Sara Hossain eds., 2006).

Fourth, family or community-based religious normative mediation may be more effective and sustainable than state-enforced family law. Whatever redress or reform of the terms and outcomes of such mediation would need to happen at the same family or community-based level, instead of trying to use state law to “correct” what we see as problematic in religious practice. This does not mean that the state and state law have no role to play in redressing such concerns, but that their role is not as simplistically categorical as “enacting a solution.”<sup>14</sup> What the state can do and how it can do it must be carefully considered in each situation, instead of a generalized prescription that may be counterproductive in some cases. For example, what the state can do to redress religious discrimination against women may be indirect and long-term, like investing in education and economic empowerment of women. This strategy may be more effective in achieving sustainable change in women’s lives than telling families or communities what to do, which they can ignore with immunity.<sup>15</sup>

I therefore call for a distinction between state law and religious norms as two different and separate types of systems that should not be confused by calling both of them “law.” Norms regulating family relations can be religious as long as they are not enforced through state law, but once enforced, they become simply state law rules, regardless of their perceived religious sources. Religious norms lose that quality when they are incorporated into state law because they become subject to legal methodologies of establishment and interpretation and lose touch with their religious roots.<sup>16</sup> In other words, the authority to declare, interpret, and apply the norms becomes exclusively vested in state judges and officials. Religious authorities and methodologies, and cultural symbols and discourse, will no longer be considered in the determination and application of legal rules, regardless of their original source. This is not to suggest or imply that state law is superior or more effective than other normative systems. On the contrary, religious norms may often be more effective than state law in shaping the behavior of believers or members of a community. Rather, because the source and authority of state law is different from that of religious normative systems, it is confusing to use the term “law”

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<sup>14</sup> Abdullahi Ahmed An-Na’im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 175–81 (Rebecca J. Cook ed., 1994) [hereinafter *State Responsibility*]; Abdullahi Ahmed An-Nai’im, *Cultural Transformation and Normative Consensus on the Best Interest of the Child*, 8 INT’L J.L. & FAM. 62, 71–76 (1994).

<sup>15</sup> See *State Responsibility*, *supra* note 14, at 181–84.

<sup>16</sup> See Abdulmumini A. Oba, *Religious and Customary Laws in Nigeria*, *infra* this issue.

for both types of normative systems. The use of the term “law” regarding religious norms seems to indicate that they are binding to regulate human behavior and organize social institutions. This sense can be conveyed by the term “normative system,” referring to rules that are binding and authoritative but in *a different manner* from state law, without confusing normative and legal systems.

Finally, in this introduction, there are clear overlaps between state law and other normative systems of any society, but the two types of systems should be distinguished from each other. For example, theft is a sin and a crime. However, it is neither a crime because it is a sin, nor is it a sin because it is a crime. The manner and consequences of an act being identified as a sin are different from the manner and consequences of it being identified as a crime. At the same time, every religious community needs the state to punish theft as a crime to protect the property and personal security of all people, religious or not. The state also benefits from the religious sanction of theft as a sin, which legitimizes the crime and its punishment among believers. Conversely, however, state law may need to intervene to bring community-based practice into conformity with constitutional/human rights standards.<sup>17</sup> For the purposes of such regulation and mediation of competing normative claims, the state may seek to influence social change by facilitating internal cultural transformation, as discussed below. Yet, the state can defeat its own purposes if intervention in internal community relations is seen by local actors as excessive or coercive. The less support that the state provides for intrusive normative change and the more reliant the state is on internal agents of social change, the more effective and sustainable the outcome will be.

To support the proposed approach, this Essay will try to clarify the preference for the term “normative pluralism” over “legal pluralism” and then elaborate on the possibility of mediating the tension between Sharia and state law. This focus on Sharia is due not only to my familiarity and personal concern as a Muslim from Sudan with the relationship between Sharia and state law, but also to the commonly assumed and particularly challenging “legal” dimension of Sharia. The colonial and postcolonial codification of purportedly Sharia norms into state family law in approximately forty Muslim-majority countries in Africa and Asia and some countries with Muslim

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<sup>17</sup> See, e.g., Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 553, 577–85, 598–602 (Jan Michiel Otto ed., 2010).

minorities creates the impression that it is possible and desirable to enact Sharia into state law. This Essay challenges the common perception that this is a valid enactment of Sharia principles.

## II. LEGAL OR NORMATIVE PLURALISM?

This Part is not critical of the term “legal pluralism” because of any opposition to the purpose and rationale of inclusive pluralism and religious/cultural self-determination for all persons and communities or alternative dispute resolution and mediation. On the contrary, I object to the term “legal pluralism” precisely because it is counterproductive to this purpose and rationale. The notion of legal pluralism not only is incoherent for failing to define the law that is supposed to be pluralistic, but also will take us in a futile direction. In contrast, distinguishing between normative and legal pluralism not only yields coherent and clearer terms, but also is more conducive for mediation of the competing claims of fidelity to religious norms and the protection of constitutional/human rights of others, especially women.<sup>18</sup> As noted earlier, religious norms are binding and applicable only if accepted by the parties, while state law is always secular and subject to constitutional safeguards.

Earlier legal pluralism has also been understood as the existence of multiple state law systems, thereby restricting the discussion to one about the varieties of state law.<sup>19</sup> A particularly relevant aspect of the field’s development, not possible to discuss at length here, relates to the consequences of colonial transplantation of European legal systems into colonized regions.<sup>20</sup> In recent scholarship, the main objective of legal pluralism is to question the focus on the centralized legal systems of the centralized state and recognize and legitimize

the informal counter-rules of the patchwork of minorities, the quasi-laws of dispersed ethnic, religious, and cultural groups, the disciplinary techniques of “private justice,” the plurality of non-State laws in associations, formal organizations, and informal

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<sup>18</sup> See Twining, *supra* note 11.

<sup>19</sup> See Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 377–90 (2008) (discussing development of the field).

<sup>20</sup> *Id.* at 381–86 (summarizing the history of legal pluralism that resulted from colonization).

networks . . . . Plural, informal, local quasi-laws are seen as the “supplement” of the official, formal centralism of the legal order.<sup>21</sup>

The main contribution of this Essay is to highlight the diversity of multiple, uncoordinated, coexisting, or overlapping bodies of binding norms that may make competing, sometimes conflicting, claims of authority over a given population.<sup>22</sup> This potential conflict can generate uncertainty or risks for individuals and groups in society “who cannot be sure in advance which legal regime will be applied to their situation.”<sup>23</sup> The existence of these competing claims also creates opportunities for individuals and groups to select from coexisting authorities.<sup>24</sup> The main problem is that legal pluralists fail to account for the distinct characteristics of the state as distinguished from other normative systems.<sup>25</sup> Clarifying the distinction, not dichotomy or hierarchy, between state law and other “normative systems” may enhance the underlying purpose and rationale of legal pluralism by avoiding its confusion of different types of regimes.

In other words, a common problem with scholars of legal pluralism is the failure to have a comprehensive definition of what they mean by “law.” Social scientists who argue for the concept of legal pluralism insist that law is found in the ordering of all kinds of social groups and is not limited to official state legal institutions.<sup>26</sup> Yet, legal pluralists are unable to provide some basis from which to determine or delimit what is and what is not law. In treating “legal pluralism as a species of normative pluralism,” Professor William Twining observes that “discussions about legal pluralism are, perhaps inevitably, drawn into long-standing concerns about problems of conceptualizing law.”<sup>27</sup>

Attempts to define law for social scientific purposes include two basic approaches: defining it in terms of the maintenance of normative order within a social group or in terms of the public institutional enforcement of norms.<sup>28</sup> For proponents of the first approach, every social group has “law” because it has normative regulation, regardless of the presence or absence of state legal

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<sup>21</sup> Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1443 (1992).

<sup>22</sup> See Tamanaha, *supra* note 19, at 375.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 390–96.

<sup>26</sup> *See id.* at 391.

<sup>27</sup> See Twining, *supra* note 11, at 473, 476.

<sup>28</sup> See Tamanaha, *supra* note 19, at 391–92.

institutions.<sup>29</sup> The second approach emphasizes the public institutional enforcement of norms as the characteristic feature of “law” even when not explicitly tied to state law.<sup>30</sup> Either approach has its adherents and critics, but there is no widely accepted definition of law among legal pluralists, which undermines the basis of the whole field. The problem is not only that there is a variety of legal pluralisms because they adopt different definitions of law, but also that they are unable to distinguish “law” from other forms of normative order. If we call all forms of ordering that are not state law by the term law, “[w]here do we stop speaking of law and find ourselves simply describing social life?”<sup>31</sup>

After a comprehensive overview of the debate about legal pluralism, Gordon Woodman concludes that “[l]aw covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.”<sup>32</sup> John Griffiths states, “All social control is *more or less* ‘legal.’”<sup>33</sup> Tamanaha views all normative and regulatory orders as types of law instead of as a single type of ordering.<sup>34</sup> He observes that this

raises the suspicion that the recent discovery of ‘legal pluralism’ mainly involves putting a new label on the old idea that society is filled with a multiplicity of normative orders or regulatory orders. Indeed, why should we call this *legal* pluralism rather than, what seems to be more fitting, *normative* pluralism or *regulatory* pluralism?<sup>35</sup>

After reviewing various theories of criteria of what is law, Ralf Michaels concludes that none of them distinguishes between a “binding, authoritative” system from which one cannot withdraw, such as the territorial jurisdiction of the state, as opposed to a religious normative system, which one may choose.<sup>36</sup>

This critique of theories that fail to make this distinction is correct because religious belief and practice must necessarily be a matter of free conviction and

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<sup>29</sup> *Id.* at 391.

<sup>30</sup> *Id.* at 392.

<sup>31</sup> Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 878 (1988).

<sup>32</sup> Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM 21, 45 (1998).

<sup>33</sup> John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 39 (1986).

<sup>34</sup> Brian Z. Tamanaha, *The Folly of the “Social Scientific” Concept of Legal Pluralism*, 20 J.L. & SOC’Y, 192, 211–12 (1993).

<sup>35</sup> Tamanaha, *supra* note 19, at 394.

<sup>36</sup> Ralf Michaels, *The Re-Statement of Non-State Law*, 51 WAYNE L. REV. 1209, 1215–24 (2005) (reviewing various theories).

voluntary action. States like Iran and Saudi Arabia claim to enforce Sharia norms through the coercive power of the state.<sup>37</sup> The first general point to note is that a claim is not necessarily true because it is made by some political elite in one country or another. More importantly, whatever the state enacts and enforces ceases to be religious by the very fact of coercive enforcement by the state. Because religious *belief* logically requires the possibility of *disbelief*, religious conviction and practice must be a matter of choice if it is to be at all. By affirming that “there is no compulsion in religion” (*la ikraha fi al-din*), verse 2:256 of the Quran is not only saying that no person should be compelled to believe, but also asserting that whatever is coerced is not religion at all because of the coercion.<sup>38</sup> It is therefore necessary to distinguish state *law*, which is, by definition, coercively enforced,<sup>39</sup> and religious *norms*, which, by definition, must be voluntarily observed. The normative quality of Sharia principles is derived from a religious frame of reference and authority outside state institutions, while state law is always the secular, political will of the state that operates in state courts and institutions.<sup>40</sup>

It is not possible or necessary in this limited space to attempt a comprehensive discussion of legal pluralism. The main point of this Essay is simply that the purpose and rationale of legal pluralism are better served through the concept and methodology of normative pluralism than through the ambiguous idea of legal pluralism. As noted earlier, a distinction, not dichotomy, between state law and religious normativity is necessary for mediating competing claims of religious and customary norms and state law. Conversely, insisting on an expansive and unrestrained use of the terms “law” and “legal” to include all norms that are religiously or culturally binding will be counterproductive to the purpose of legal pluralism. This does not mean that state law is superior or more effective than other normative systems. Rather, the point is that because the source and authority of state law are different from that of religious normative systems, it is confusing to use the term “law” for both types of normative systems. Accordingly, this Essay uses the term

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<sup>37</sup> ABDULLAHI AHMED AN-NA’IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A* 280 (2008).

<sup>38</sup> QURAN 2:256.

<sup>39</sup> It is not that every rule of law must be immediately coercively enforced, because the efficacy of legal systems presupposes a high degree of voluntary compliance for limited enforcement to be possible, when necessary. But this does mean that all legal rules are *ultimately* supported by the threat of coercive enforcement, though that is less likely to happen in successful legal systems.

<sup>40</sup> See AN-NA’IM, *supra* note 37, at 30–36 (arguing that the idea of an Islamic state is inherently unworkable).

“normative system” to indicate rules that are binding and authoritative in a different manner from rules of state law. This Essay will clarify and illustrate the application of this terminology and its rationale to Sharia as the normative system of Islam.

This Essay is not inconsistent with the possibility of collective rights of religious, ethnic, or cultural groups, as discussed by Professor Natan Lerner in this Symposium,<sup>41</sup> as long as the nature and content of those rights, and process of their implementation, are all governed by secular state law of general application. For example, a collective group may hold the right to cultural heritage or sacred sites and organize the exercise of such rights on behalf of the group as a whole. There is also no inconsistency with this proposal if the rights of the group are defined by the group for *voluntary* practice outside state institutions.<sup>42</sup> Difficulties may arise if group rights are determined by the group independently of the state, but are to be enforced by the state as law. Professor Lerner defined the main issue facing the legal pluralism of religious groups as “the claim to recognize traditional religious or ethno-religious regulations as law, beyond purely voluntary arrangements.”<sup>43</sup> He repeatedly stipulates that the claim does not apply to criminal law.<sup>44</sup> In conclusion, he supports religious and cultural autonomy, but does not see it as absolute separation or independence from the general rule of law and endorses voluntary communal arbitration.<sup>45</sup> In the final analysis, he affirms that “[t]he state cannot extend its sponsorship or sanction norms of behavior of particular segments of the population that may not agree with the law of the state and are not the result of the general legislative process.”<sup>46</sup>

While agreeing with Professor Lerner’s line of analysis, this Essay is more radical. It claims that when the state decides which aspect of Sharia norms to enforce, and does so through its official courts, subject to discretion of state judges, then the outcome is not Sharia at all. If that is true, then what is the justification of this accommodation by the state, which can be risky for the rights of women and children, when the outcome does not respond to the religious obligation of groups in question? Moreover, because state judges and

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<sup>41</sup> Natan Lerner, *Group Rights and Legal Pluralism*, *infra* this issue.

<sup>42</sup> See Abdul-Fatah Kola Makinde & Philip Ostein, *The Independent Sharia Panel of Lagos State*, *infra* this issue.

<sup>43</sup> Lerner, *supra* note 41, at 838.

<sup>44</sup> *Id.* at 829.

<sup>45</sup> *Id.* at 851.

<sup>46</sup> *Id.*

officials are neither competent nor authorized by the religious or cultural frame of reference of those norms, the result will be the distortion of the norms and obstruction of their natural evolution.

Finally, there is the question of how to redress human rights violations, like discrimination against women in marital relations or threats to the best interest of a child.<sup>47</sup> Recalling that this proposal does not require a particular allocation of issues to state law or voluntary family and community-based mediation, the risk of a human rights violation can arise from either type of norm. If a human rights violation arises through the application of state law, the state has the immediate obligation and ability to prevent its law or courts from violating a human rights norm.<sup>48</sup> The difficulty is when the violation arises from the actions of non-state actors in the context of, for example, a family or community mediation applying the rule that the father must always have automatic custody of children regardless of a better claim by the mother. According to current international human rights law, the state is not responsible for human rights violations committed by non-state actors, but should exercise “due diligence” in doing what it can to prevent the violation or hold the violator accountable.<sup>49</sup> As often seen in “domestic violence” cases, it is difficult to hold the state accountable for its “due diligence” obligation when the objectionable conduct happens in the privacy of family and community. Still, such risks of human rights violations should be addressed through internal reform and transformation of the understanding and practice of religious norms, instead of through the coercive intrusion by the state or other external actor.<sup>50</sup> There may, of course, be other policy reasons that can be accepted and appreciated by local populations for vesting jurisdiction in state law and courts over family matters. But the need to address human rights concerns with family and community-based mediation is not a sufficient justification for vesting jurisdiction in state law and courts for the following reasons.

As a general comment, there is little consideration for the actual cost-benefit analysis of resorting to state law and courts in such matters. The

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<sup>47</sup> See Convention on the Rights of the Child art. 3, Sept. 2, 1990, 1577 U.N.T.S. 3.

<sup>48</sup> DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 25 (2010) (discussing *jus cogens* norms and the inability of states to violate them through treaties).

<sup>49</sup> Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 BUFF. HUM. RTS. L. REV. 21, 24 (2005).

<sup>50</sup> See generally ABDULLAHI AHMED AN-NA'IM, CULTURAL TRANSFORMATION AND HUMAN RIGHTS (2002) (illustrating the argument through case studies).

tendency in human rights scholarship, as well as among activists, is to assume that a human right offers protection simply because there is a law affirming the right or when a few cases are “won” against perpetrators. There is little consideration of what happens to the women and children who “win” when they return to the privacy of their families and communities. Moreover, in the present African postcolonial context in particular, state courts will do more harm than good to the rights of women and children.<sup>51</sup> Most women and children are unlikely to seek or be able to obtain protection from state courts against their own families and communities, and witnesses are unlikely to cooperate with the prosecution in criminal cases. The exceptional few complainants who resort to state protection will be chastised by their families and communities, and may struggle for survival because they are often dependent on those families and communities. The idea of human rights protection itself will probably be discredited as a neocolonial imposition. The final analysis argues that gradual change in religious norms and social practice that preempts human rights violations is preferable to rhetorical appearance of protection by state courts that is neither accessible to potential victims nor effective and sustainable in the community at large. This position is more consistent with a commitment to the equal human rights of women and children than legal protection that is perceived by the victims to be competing with their fidelity to their families and communities.

### III. ISLAMIC NORMATIVE SYSTEMS AND STATE LEGAL SYSTEMS

This Part clarifies the relationship between Islamic normative systems (in the plural) and the legal system of the state in relation to the subject of this Symposium as a whole. Given that all social life is regulated by different normative systems, what should be the relationship between Islamic normative systems and state legal systems? The nature of Sharia as a religious normative system on the one hand, and state law as a secular political institution on the other, require clear differentiation between the two in theory and practice. At the same time, the methodological and normative similarities between Sharia and state law, and the fact that they both seek to regulate human behavior in the same social space, indicate possibilities of interaction and cross-fertilization between the two. Methodologically, though Sharia evolved outside of the state institution and among independent Muslim scholars and their

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<sup>51</sup> See generally ABDULLAHI AHMED AN-NA’IM, HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES (2003) (exploring the complex limitations on the ways state courts can protect human rights, especially those of vulnerable groups like women and children).

communities, the methods those scholars used for developing Sharia principles and rules are similar to modern techniques of textual construction, reasoning by analogy, and precedent.<sup>52</sup> Normative similarities between Sharia and state law can be seen in such fields as property, contracts, and civil liability for damage to or misappropriation of property.<sup>53</sup> It is therefore not difficult to envision a dynamic process of mutual interaction between Sharia and state law principles through “civic reason,” as discussed further below.

What is not possible, as briefly discussed above, is for a Sharia norm to be enacted into state law and retain its quality as a Sharia norm. In addition to arguments in support of this proposition given earlier, I would add two more: namely, the inherent fallibility of any human understanding of Sharia and the impossibility of containing Sharia principles into any legislative or juridical language. First, as commonly acknowledged by Muslim scholars through the ages,<sup>54</sup> any human knowledge of Sharia can only be suppositional (*zanni*), a guess, and never certain knowledge. Only God knows Sharia as God decreed it, and each person’s knowledge, even that of the most pious and learned, is that person’s own limited and fallible interpretation and supposition.<sup>55</sup> The religiously valid position is therefore for each Muslim to struggle with her understanding of Sharia and be responsible for it before God, but not before any other human being who must necessarily be in the same position of uncertainty as she is. Because every Muslim is only supposing or guessing how Sharia decides any question, no Muslim has a superior claim to the truth of one view or another, such that that view is binding on all Muslims.

The second Islamic objection to the enforcement of Sharia principles as state law is that whatever the legislative or judicial organ of the state selects for enforcement will be a particular view among many equally legitimate views of Muslims scholars and schools of Islamic jurisprudence. That is, in light of the significant variations in opinion among Muslim scholars and traditional schools of jurisprudence and the lack of a reliable, independent way of upholding one view as more valid, this choice was traditionally left to individual Muslims. For example, Wahabi Sunnis of Saudi Arabia are

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<sup>52</sup> WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* 100–10 (2009).

<sup>53</sup> *Id.* at 239–47, 296–306 (examining Sharia principles of contracts and property).

<sup>54</sup> See Ibn Rushd Averroës, *The Decisive Treatise Determining the Connection Between the Law and Wisdom*, in *THE BOOK OF THE DECISIVE TREATISE DETERMINING THE CONNECTION BETWEEN THE LAW AND WISDOM & EPISTLE DEDICATORY* 1, 8–11 (Charles Butterworth trans., 2001). For a discussion of the scholars who have adopted this view, see CHARLES KURZMAN, *LIBERAL ISLAM: A SOURCE BOOK* 17 (1998).

<sup>55</sup> Averroës, *supra* note 54, at 11.

imposing their views on Shia citizens of the country who believe the Wahabi view to be heretical.<sup>56</sup> The Shia rulers of Iran are imposing their views of Sharia on citizens of Iran who disagree with the official religious ideology of the state.<sup>57</sup>

The state's coercive power authorizes whatever is being enforced through state law and the administration of justice, not the validity of the rule. Because it is impossible to enforce the totality of Sharia, according to all possible interpretations, some aspects would be enforced because the state so decreed, while others will remain unenforced because the state so determined. The legislative authority of the modern state must be very specific about what it chooses to enact as law. Moreover, any view of a Sharia principle that the legislature selects as the law of the state is the actual formulation of the principle or rule in statutory language and not the Sharia principle. This means that state judges will use established techniques of statutory interpretation, rather than refer to the theological methodology of a Sharia principle as it exists independently of state law.

Despite this conceptual impossibility of retaining the religious quality of the norm once enacted into state law, almost all Muslim-majority states claim to apply Sharia family law through state law or judicial practice.<sup>58</sup> To note, many of the traditional interpretations of Sharia that are enacted into state law in this way are profoundly discriminatory against women.<sup>59</sup> For example, a Muslim man can marry up to four wives at the same time (polygyny); can marry a Christian or Jewish woman; and can unilaterally repudiate any or all of his wives without having to give reasons to anyone, including the repudiated wife.<sup>60</sup> In contrast, a Muslim woman can marry only one Muslim man at a time and can only seek judicial termination of the marriage for specific reasons (some Muslim scholars do not accept this possibility). A wife may also ask for termination of a marriage through a financial arrangement with the husband (*Khul*).<sup>61</sup> These principles are usually enacted by statute in most Muslim-majority countries today, but these countries tend to call it Sharia family law (*Shariat al-Ahwal al-Shakhsiya*), rather than simply ordinary legislation.<sup>62</sup> This

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<sup>56</sup> See JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 222–23 (4th ed. 2011).

<sup>57</sup> Israel Elad-Altman, *The Sunni-Shia Conversion Controversy*, in 5 *CURRENT TRENDS IN ISLAMIST IDEOLOGY* 1, 2 (Hillel Fradkin et al. eds., 2007).

<sup>58</sup> See generally Noah Feldman, *Why Shariah?*, N.Y. TIMES MAG., Mar. 16, 2008, at 46.

<sup>59</sup> AN-NA'IM, *supra* note 37, at 109.

<sup>60</sup> ARSHAD, *supra* note 4, at 53, 109–11.

<sup>61</sup> *Id.* at 109.

<sup>62</sup> See, e.g., JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* (2002).

nomenclature is misleading because, in this enactment, the language of the statute is the law by virtue of the political authority of the state, not the Sharia principle. In fact, the extreme diversity of interpretations of Sharia by various schools of Islamic jurisprudence means that the state as a political institution decides which views are to be enacted into law and which views are to be excluded. Moreover, the legislative organ of the state is the sole authority to amend, add, or remove provisions from these statutes. It is therefore clear that the “Islamic” family law is nothing more than secular state legislation presented as Sharia to insulate it against criticism.

Choices among competing views have to be made, which is realistically a matter for the ruling elite. When the policy or law is presented as mandated by the “divine will of God,” it is difficult for the general population to oppose or resist it. For example, there is the well-established principle of *Khul*, whereby a wife can pay her husband an agreed amount (or forfeit her financial entitlement) to induce him to accept the termination of their marriage.<sup>63</sup> Yet, this choice was not available in Egypt until the government decided to enact this ancient principle of traditional Sharia into law in 2000.<sup>64</sup> That this principle was part of Sharia did not make it applicable in Egypt until the state decided to enforce it. This legislation certainly gave Egyptian women a way out of a bad marriage, but this was possible only at a significant financial cost to the wife, and could not be contested because the legislation was made in terms of “enacting” Sharia, rather than simply a matter of good social policy. Because the legislation was framed in terms of binding Islamic principles, the possibilities and requirements of the legal termination of marriage remain limited to general principles of Sharia, formulated by Islamic scholars a thousand years ago. Although the timing, terms, and language of the Egyptian legislation were all decided by the political will of the ruling elite, not the normative system of Islam, the legal outcome is difficult to resist, amend, or even debate when presented as the will of God.

Instead of continuing such religiously coercive and intellectually dishonest pretense, this Essay calls for an honest and candid process of secular legislation in all fields including family law, according to the political will of the majority, subject to the constitutional rights of minorities. In this process, Muslims who wish to enact any Sharia principle into state law need to make

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<sup>63</sup> HALLAQ, *supra* note 52, at 283–86.

<sup>64</sup> Essam Fawzy, *Law No. 1 of 2000: A New Personal Status Law and Limited Step on the Path to Reform*, in *WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* 58, 67–68 (Lynn Welchman ed., 2004).

their argument on the basis of civic reason without reference to religious belief. Private consensual practice of Sharia in the family and community is protected by freedom of religion and difficult to prevent in practice when no complaint is made by a potentially aggrieved party. Only through civic reason subject to constitutional safeguard should a Sharia principle be made binding as a matter of state law and subsequently enforced by state courts. Advocates of such legislation are entitled to try to persuade other citizens to enact, for example, the husband's right to unilateral divorce, and to show that this principle is not unconstitutional as discriminatory against women; however, they cannot invoke the religious, binding authority of Sharia as the basis of the law or its constitutionality. If they succeed, that principle becomes state law in the same way any other norm becomes law and is subject to the same constitutional scrutiny, not by virtue of being Sharia.

I should emphasize that my critique of the current system in Muslim-majority countries does not dispute the *religious* authority of Sharia, which must necessarily exist outside the framework of the state. Sharia is always relevant and binding on Muslims, but only as each Muslim believes it to be and not as declared and coercively enforced by the state.<sup>65</sup> For any act to be religiously valid, the individual believer must comply voluntarily, with the necessary pious intent (*nya*), and without violating the rights of others. This focus on the individual believer is integral to Islam.<sup>66</sup> Still, principles of Sharia should be relevant to the public discourse, provided one can make his argument through "civic reason" and not simply by assertions of what one believes to be the will of God. Civic reason refers to the rationale and purpose of public policy or legislation based on the reasoning that citizens can accept or reject, which cannot happen when such matters are demanded as categorical, religious mandates. The process of civic reason also requires conformity with constitutional and human rights standards in the adoption and implementation of public policy and legislation. All citizens must be able to make their own legislative proposals or object to what others propose through public and fully inclusive public debate without having to challenge each others' religious convictions. Moreover civic reason is not limited to Sharia principles and can apply to other religious normative systems. Civic reason and reasoning, not personal beliefs and motivation, are necessary whether Muslims or members of

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<sup>65</sup> AN-NA'IM, *supra* note 37, at 279–80.

<sup>66</sup> The fundamental principle of individual, personal responsibility that can never be abdicated or delegated is one of the recurring themes of the Quran. QURAN 6:164, 17:15, 35:18, 39:7, 52:21, 74:38. On individuality as the core value of Islam, see MAHMOUD MOHAMED TAHA, *THE SECOND MESSAGE OF ISLAM* 62–77 (Abdullahi Ahmed An-Na'im trans., 1987).

any other religion or tradition, constitute the majority or the minority of the population of the state.<sup>67</sup>

These two types of relationships can exist between Sharia and state law when the two systems apply to the same human subjects. It may therefore be helpful to understand Sharia and state law as complementary yet different normative systems, instead of requiring either to conform to the nature and role of the other. In other words, this dialectic relationship is premised on a distinction between Sharia and state law to avoid confusing the function, operation, and nature of outcomes when the two systems coexist in the same space and apply to the same human subjects. If state law incorporates a principle of Sharia for coercive enforcement by state courts and executive powers, the outcome is a matter of state law and not Sharia because it will not have the religious significance of compliance with a religious obligation. Conversely, compliance with Sharia cannot provide legal justification for violating state law. For Sharia and state law to be complementary, instead of being mutually antagonistic, each system must operate on its own terms and within its field of competence and authority.

The distinction between Sharia and state law applies whether Muslims constitute the predominant majority or minority of the population. However, though Sharia cannot be enacted into state law and remain “religious,” it may have greater influence on state law through civic reason in situations where Muslims are the predominant majority of the population and subject to both constitutional safeguards and the democratic political process. The premise here, as noted earlier, is that the law and administration of justice of any state should reflect the ethical values, priorities, and interests of the majority, subject to the constitutional/human rights of the minority, however small, including members of the Muslim majority who disagree with other Muslims. For such possibilities of positive interaction, however, it must be clearly accepted that Sharia cannot be enforced as state law and remain religiously authoritative for Muslims.

#### CONCLUSIONS: SHARIA AND THE PLURALISTIC DEMOCRATIC STATE

Recalling the core issue of how to mediate competing claims, this Essay highlights some specific modalities of mediation available to Muslims in democratic pluralistic states. How can the competing claims of normative

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<sup>67</sup> See AN-NA’IM, *supra* note 37, at 92–101.

systems and the state's legal system be mediated at different levels of social and political life, without undermining the peace and stability of society and the state or violating social justice for all segments of the population? There are three main elements to this framework:

(1) Private social practice of Sharia within the framework of state law and its constitutional safeguards;

(2) Consideration of Sharia as a normative/jurisprudential resource for state law through scholarly and judicial legal analysis or civic reason in the democratic political process, without claiming that Sharia as such can be state law;

(3) Religious discourse and cultural transformation to mediate tensions between historical interpretations of Sharia and modern constitutional and human rights principles.

First, Muslims can behave in conformity with the vast majority of Sharia principles without coming into conflict with state law in a democratic society. For example, Muslims can refrain from taking or charging interest on loans (*riba*), which is prohibited by Sharia, and establish the necessary financial institutions within the framework of existing state law.<sup>68</sup> Muslims can also observe Sharia requirements about marriage and divorce voluntarily without the state imposing rigid standards on all.

Second, any state's law and administration of justice should reflect the ethical values, priorities, and interests of the majority, subject to the constitutional/human rights of the minority, including members of the Muslim majority who disagree with other Muslims. Muslims (and other religious or cultural communities) have the right to organize and act collectively in contributing to the formulation and implementation of public policy and legislation through civic reason and the political process, provided they do not claim to have a monopoly or veto power over such matters, even when acting in the name of the predominant majority of the population. For example, judges and legal scholars can incorporate some of the jurisprudential thinking of early Muslim scholars in the definition of property, principles of contracts, or the finer points of specific types of contracts (*al-'uqud al-musama*). The key point here is that such resources are examined, whether incorporated or not, as *human legal theory and jurisprudence*, not as the binding word of God.

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<sup>68</sup> *Id.* at 93–95.

This qualification is necessary because other citizens may not accept or care for our God or our interpretation of God's word. Even those who accept our beliefs have no way of knowing whether their understanding is valid. These people may later want to change their minds but cannot because they would be violating their prior affirmation. Thus, Sharia jurisprudence can be considered just as one might consider Roman law, English common law, or German legal theory. Approaching Sharia in this way, we will find truly superb legal theory, definitions, distinctions, and varieties of legal wrongs and their remedies,<sup>69</sup> which can be instructive in the interpretation and application of the secular state law without affecting its secular nature. This jurisprudential approach is also recommended by its appeal to the popular consciousness of state law and its legitimacy. After all, Sharia jurisprudence is the source of common understanding and resonance of the same terms and concepts used in modern legislation and judicial practice.

The possibility of considering Sharia jurisprudence through civic reason and democratic process enables Muslims to lobby for legislation consistent with their religious beliefs without asserting those beliefs as the rationale of state law enforcement in a variety of ways. For example, it is possible that Muslims could lobby for a legal ban on charging interest by trying to persuade others of the economic or social benefits of such a ban, reasoning that all citizens can debate freely, rather than asserting their own religious conviction or cultural affiliation as categorical justification. Muslims could also propose legislation based on Sharia principles of child custody, family maintenance, or testate and intestate succession<sup>70</sup> through the same process and subject to constitutional/human rights of all citizens. This possibility does not mean that Sharia can coexist as a parallel legal system competing with state law of any country or that it retains its religious authority when incorporated into state law. In view of the centralized, bureaucratic, and coercive nature of the modern "territorial" state,<sup>71</sup> the secular legislative organs of the state must have exclusive monopoly on enacting state law, and secular judicial and administrative organs must also have exclusive authority to interpret and apply state law.

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<sup>69</sup> See, e.g., HALLAQ, *supra* note 52, at 239–307 (examining Sharia legal actions and remedies in contract, family, inheritance, and property law).

<sup>70</sup> See *id.* at 287–95 (discussing these Sharia law principles).

<sup>71</sup> The use of "territorial" state over "nation" state is preferred because territorial sovereignty and jurisdiction is a more universally accurate feature of all modern states, while the notion of nation is myth or fiction that is often manipulated to exclude or oppress some segments of the population.

The third and critically important approach to religious and cultural self-determination for all Muslims is the interpretation of Sharia through Islamic discourse in the context of the modern world. Because all principles accepted by Muslims as Sharia norms today are the product of human interpretation of the Quran and traditions (*Sunna*) of the Prophet, any of those principles can be modified through reinterpretation of the same sources. If accepted by present-day Muslims as reasonable or valid, the outcome would be as legitimate from an Islamic point of view as any earlier interpretation of the Quran and *Sunna*. Such popular consensus is the only manner in which any principle of Sharia was established in the past remains valid today. There is no possibility of a human institution that can “declare or amend Islamic doctrine” on behalf of the general Muslim population of the world.<sup>72</sup>

It must be emphasized that none of these approaches would permit Muslims to opt out of the application of secular state law, or have Sharia principles enacted as state law except through the regular democratic process and subject to constitutional safeguards. Neither would Muslims be entitled to plead Sharia as justification of violation of state law. Rather, the object is to enable Muslims to exercise their right to religious and cultural self-determination within the framework of state law and its constitutional safeguards, like any other religious or cultural community. The same or equivalent approaches are equally available to other religious or cultural communities to exercise their right to self-determination within the same framework and subject to the same safeguards.

In conclusion, this Essay can be summarized in the following propositions. First, all state law, whether statutory or judicial, must be distinguished from religious normative systems. This is necessary for the coherence and legitimacy of religious norms as well as the integrity and constitutional accountability of the state administration of justice. State law may reflect some of the values and address some of the concerns of the religious norms of the society, as it should in a democratic state. The difference between state law and religious norms is that state law is *made and enforced* by the state, founded on civic reason, and binding on the generality of the population regardless of its conformity or nonconformity with any religious norm. Religious norms are derived by believers from their religion’s sources, are binding only on believers, and tend to lose their religious value when coercively enforced. Binding religious norms are only those which the parties to a dispute accept as

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<sup>72</sup> AN-NA’IM, *supra* note 37, at 12–15.

binding and submit to through family and community-based mediation. Such mediation may be spontaneous and flexible, or organized and structured as an arbitration of a dispute, provided that all the parties voluntarily accept the manner and outcome of the process. If this is not possible in a given case, then the parties should take their dispute to state courts that apply secular state law.

Second, state law is not the only source of binding norms, but it is the only source of norms that are binding and coercively enforced by the authority of the state on population regardless of its beliefs or wishes. State judges are appointed presumably because of their competence in matters of state law and policy and are authorized by the state to adjudicate disputes under state law and according to state policies. Judges are unlikely to know or understand religious norms, nor is it likely that they will appreciate the norms' authoritative methodology. Additionally, state law judges will certainly not be perceived by members of religious communities as having the competence to adjudicate disputes. In other words, authorizing state judges to adjudicate matters governed by religious norms will mean requiring them to do what they are unlikely to do well without legitimate authority as perceived by the parties to the dispute. Moreover, because judicial or official determinations of religious norms will be supported by the coercive power of the state, the internal basis and methodology of religious authority will be undermined and eventually overwhelmed. By necessarily applying judicial or bureaucratic methods to the interpretation and application of religious norms, judges will undermine and confuse the basis of those norms in the practice of their communities.

Third, the risk that the application of religious norms through family or community-based voluntary practice may violate human rights norms should be addressed through internal reform. This reform should emphasize the transformation of understanding religious norms and their practice, not the coercive intrusion by the state, international organs, or nongovernmental organizations. Human rights cannot be protected anywhere without the consent and cooperation of the people whose rights are supposedly being protected. At the same time, however, state law and administration of justice should ensure that the democratic right of the political majority to determine public policy and legislation for the country does not violate the constitutional/human rights of all citizens, whether they belong to the majority or a minority. State intervention to hold perpetrators of human rights violations accountable would be the legitimate use of coercive power, as distinguished from intervention against the wishes of the right-holder herself.