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# GROUP RIGHTS AND LEGAL PLURALISM

*Natan Lerner*\*

## INTRODUCTION

This Essay deals with a controversial issue in the area of group relations in democratic states, namely the place of group rights in democratic societies and the role of legal pluralism theories. Group rights are presently recognized as entitled to, if not a treatment equal to that of individual rights, at least the recognition of some form of legitimacy that justifies respect, consideration, and protection. Underlying such legitimacy is a view that looks to ensuring harmony between, and constructive coexistence of, the different components of democratic societies. This was not always the case with classic international law, which was not interested in the status and rights of groups, whatever their nature. The new approach tended to favor minorities that were more or less distinct from the majority of the respective populations, namely ethnic, religious, cultural, or linguistic groups. Recently, some of those groups are advancing a position quite different from the one that prevailed in earlier international law, which ignored groups. Beyond the goal of receiving recognition of their rights as a group, now more or less achieved, some groups strive to have part of their value systems incorporated into the general, binding legal systems of the state or to upgrade their traditional adjudication systems to the category of law. While it is clear that, in the sphere of criminal law, liberal democracies reject such aspirations, the situation is more fluid concerning family law, and it is regarding this discipline that the controversy requires attention.

This is particularly the case with religious groups because the press has generally looked to religious groups when it deals with the trend of groups asserting their rights.<sup>1</sup> The claim that, given certain conditions, particular religious traditions should be incorporated into general state legislation and applied to individuals adhering to such traditions, is now being seriously discussed. It has already engendered vigorous opposition not only in secularist

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\* Professor of Law, Interdisciplinary Center Herzliya. Many thanks to my research associate, Stav Cohen, for her most valuable help in the preparation of this Essay.

<sup>1</sup> See, e.g., *Sense About Sharia*, *ECONOMIST*, Oct. 16, 2010, at 16–18; *Whose Law Counts Most?*, *ECONOMIST*, Oct. 16, 2010, at 71–72.

quarters, but also among scholars advocating some accommodation between the secular state and religious groups. Needless to say, the claim is that these religious norms should be applied to only persons sharing the same tradition.

The interaction between minority groups and the state has developed several models based on different historical contexts. In some states, diverse religious communities enjoy wide legal and judicial autonomy, inherited from situations that evolved under the Ottoman Empire or Western colonialism. In addition, in recent decades, traditional forms of law and behavior of indigenous populations are finding their way into international instruments, although in a limited form and not readily accepted by all states. All this has supported the argument that legal pluralism—as described in Part III—should be adopted by plural societies. Prakash Shah, in a book dealing primarily with Great Britain,<sup>2</sup> summarizes the current aspirations of legal pluralism, arguing that “the main challenge must therefore be ceasing to assume that all are equal and acknowledging that *all are different*, that all conceive of law in different ways, and therefore demand different things and situation specific solutions.”<sup>3</sup>

## I. THE EVOLUTION OF GROUP RIGHTS

A short historical overview of religious rights is provided to aid in understanding modern group rights in relation to legal pluralism theories. A few treaties, starting with the Treaty of Westphalia of 1648, which granted religious rights to the Protestants in Germany, intended to protect members of dissenting religions.<sup>4</sup> The Treaty of Oliva (1660) contained provisions in favor of Roman Catholics in Livonia, ceded by Poland to Sweden; the Treaty of Ryswick (1697) protected Catholics in territories ceded by France to Holland; and the Treaty of Paris (1763), between France, Spain, and Great Britain, granted rights to Roman Catholics in the Canadian territories taken from

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<sup>2</sup> PRAKASH SHAH, *LEGAL PLURALISM IN CONFLICT: COPING WITH CULTURAL DIVERSITY IN LAW* (2005). On Great Britain and its Muslim minority, see also Javaid Rehman, *Religion, Minority Rights and Muslims of the United Kingdom*, in *RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES* 521 (Javaid Rehman & Susan C. Breau eds., 2007). The author does not advocate legal pluralism but rather an intensified struggle for nondiscrimination.

<sup>3</sup> SHAH, *supra* note 2, at 173. There is an enormous collection of literature on legal pluralism. See, for example, WILLIAM KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* (2007), and former works of the same author. See also Ann Griffiths, *Legal Pluralism*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY* 289 (Reza Banakar & Max Travers eds., 2002); 9 *THEORETICAL INQUIRIES L.* (2008) (containing several articles on the subject).

<sup>4</sup> NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 7 (2d ed. 2003) [hereinafter LERNER 2003].

France.<sup>5</sup> Later, the Congress of Vienna (1815), the Treaty of Berlin (1878), and the Constantinople Convention (1881) protected Christian religious minorities.<sup>6</sup> A loose system of humanitarian diplomatic intervention of major powers in favor of persecuted minorities also developed, producing measures that acknowledged and protected the rights of groups. In the twentieth century, in the interwar period, several treaties and unilateral declarations created the “minorities system” under the aegis of the League of Nations, an interesting but unsuccessful experiment that collapsed for political reasons during World War II and was considered undesirable by the international community after the defeat of Nazi Germany and its allies.<sup>7</sup> The system ensured the enjoyment of rights by specific minorities and its failure was the result of the conditions prevailing in Europe on the eve of the 1939 war.<sup>8</sup>

When the United Nations (“UN”) was established in 1945 in San Francisco, the majority of the founding members was not inclined to recognize the rights of groups. Their approach was that human rights, as proclaimed in the 1948 Universal Declaration,<sup>9</sup> and the application of the rule of nondiscrimination were enough to prevent crimes such as the Jewish Holocaust—the most brutal assault upon a group, community, or minority in modern times—or subsequent instances of genocide, a notion legally defined only after the war. While the UN Charter forbids discrimination<sup>10</sup>—and race and religion are clearly the main causes of discrimination and group persecution—the United Nations was not ready, in its early years, to consider group rights. An exception was the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which, by its own terms, is an instrument aimed at protecting the existence—the fundamental human right—of ethnic, religious, or linguistic groups.<sup>11</sup>

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<sup>5</sup> *Id.*

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

<sup>7</sup> *See, e.g.*, League of Nations Covenant art. 22.

<sup>8</sup> *See* LERNER 2003, *supra* note 4, at 7–14 (chronicling religious rights embodied in these treaties). On group rights, see generally GROUP RIGHTS (Peter Jones ed., 2009); GROUP RIGHTS (Judith Baker ed., 1994).

<sup>9</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

<sup>10</sup> U.N. Charter art. 1, para. 3.

<sup>11</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A (Dec. 9, 1948) [hereinafter Convention on Genocide], available at <http://www.hrweb.org/legal/genocide.html>. Much literature exists discussing genocide and the convention. *See, e.g.*, ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION (2d ed. 2011); NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION (1949); WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2009).

The 1966 Covenants followed the line of the UN Charter and downplayed the group dimension. Article 27 of the International Covenant on Civil and Political Rights (“ICCPR”) is considered a timid and reluctant recognition of rights emanating from the existence of collective entities.<sup>12</sup> However, by the early sixties, the United Nations had already started a process that took notice of the proliferation of attacks against racial and religious communities. This process resulted in the adoption in 1965 of the Convention on the Elimination of All Forms of Racial Discrimination,<sup>13</sup> and in 1981, after many political difficulties, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>14</sup> These instruments evidence the start of a new trend that considers the weight of group rights and needs. The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities<sup>15</sup> somewhat ameliorated the criticism of the approach taken in Article 27 of the ICCPR by urging states to promote group identity.<sup>16</sup> The International Labor Organization Convention No. 169 on Indigenous Populations<sup>17</sup> and the UN Declaration on the Rights of Indigenous People (“2007 Declaration”)<sup>18</sup> will be discussed further below.<sup>19</sup>

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<sup>12</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. On the discussion of the reach of Article 27, see LERNER, *supra* note 4, at 14–15.

<sup>13</sup> Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Convention on Racial Discrimination]; see also NATAN LERNER, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (2d ed. 1980) (providing commentary on the convention).

<sup>14</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., 73d plen. mtg., Supp. No. 151, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) [hereinafter 1981 Declaration]; see also NATAN LERNER, *RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION* (2006) [hereinafter LERNER 2006] (commenting on the twenty-fifth anniversary of the declaration).

<sup>15</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc. A/RES/47/135/Annex (Dec. 18, 1992) [hereinafter 1992 Declaration].

<sup>16</sup> Although acknowledging that the 1981 Declaration might mean “little change in reality,” scholar Christian Joppke finds “more multicultural diction” in the declaration. Christian Joppke, *Minority Rights for Immigrants? Multiculturalism Versus Antidiscrimination*, 43 *ISR. L. REV.* 49, 51 (2010). Joppke claims that multiculturalism is in retreat, while antidiscrimination is going from strength to strength, but his focus is on minority rights for immigrants, the nucleus of which are alien rights. *Id.* at 61. He does not refer to religious and religious related rights. *Id.*

<sup>17</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter 1989 Convention].

<sup>18</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 3, 2007) [hereinafter Declaration on the Rights of Indigenous Peoples].

<sup>19</sup> See *infra* Part IV.

Against this background, it is necessary to establish which groups are likely to play a role in a society where legal pluralism is being advocated.

## II. THE RELEVANT GROUPS

Not every conglomerate, reunion, or association of persons, even if it is permanent and responds to an evident public interest, constitutes a group in the sense relevant to this Essay. The pertinent groups are also called communities<sup>20</sup> or minorities,<sup>21</sup> sometimes peoples, and are essentially different from associations or organizations created by the free will of their members to achieve some aim or defend some interests. There are essentially three relevant groups, communities, or minorities: ethnic, religious, and linguistic or cultural.<sup>22</sup> All these groups are spontaneous, as differentiated from voluntary; relatively permanent, in the sense that it is very difficult and in some cases impossible to opt out of them; and their members usually identify with the whole and share a feeling of belonging, of solidarity.<sup>23</sup> All of them have essentially a double aspiration: perfect equality with all other persons and the preservation of their distinct characteristics.<sup>24</sup> This Essay will deal mainly with one of these three groups in connection with the issue of legal pluralism—religious groups or communities.

These three groups have rights, a fact which is today more or less acknowledged by international and state law. The catalog of those rights differs from group to group, but, as generally listed in several modern international instruments and summarized in *Group Rights and Discrimination in International Law*,<sup>25</sup> such rights include:

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<sup>20</sup> U.N. Secretary-General, *Definition and Classification of Minorities*, ¶ 4, U.N. Doc. E/CN.4/Sub.2/85 (Dec. 27, 1949) (defining communities as “groups based upon unifying and spontaneous (as opposed to artificial or planned) factors essentially beyond the control of the members of the group”).

<sup>21</sup> There are numerous definitions of the term “minority.” Francesco Capotorti, Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations to prepare a study on the subject, suggests an authoritative definition. He describes a minority as “a group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” The groups relevant to this Essay are precisely those having the indicated characteristics. F. Capotorti, *Minorities*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 385, 390 (1985).

<sup>22</sup> See *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 1 (Apr. 6), available at [http://www.worldcourts.com/pcij/eng/decisions/1935.04.06\\_albania.htm](http://www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania.htm).

<sup>23</sup> See *id.* at 23.

<sup>24</sup> See *id.*

<sup>25</sup> LERNER 2003, *supra* note 4.

- (a) The right to *existence* of the group as such, depending on the right to life of its individual members and protected by the 1948 Convention Against Genocide;<sup>26</sup>
- (b) The right to *nondiscrimination*. UN covenants and instruments on racial and religious discrimination and intolerance, as well as the International Labor Organization (“ILO”) and UN Educational, Scientific and Cultural Organization (“UNESCO”) antidiscrimination treaties, protect this right. The right to nondiscrimination, grounded in the principle of equality, is, like the right to existence, a basic human right granted to every individual person. Its violation, however, is also a denial of the rights of the group to which the individual belongs;
- (c) The right to *identity*, namely the right of the group to preserve and develop its different group characteristics, in addition to its right to equality in the enjoyment of all general liberties;
- (d) The right to *special measures* needed for the preservation of its identity and to ensure its equality within society. International law proclaims this right, provided it is necessary and temporary, until equality is achieved. Article 2 of the Convention Against Racial Discrimination determines the reach and limitations of this right, which is frequently described as affirmative action;<sup>27</sup>
- (e) The right to regulate *membership* in the group. This may in some cases clash with the rights of the individual, including the right to opt out of or return to the group. The state or the international community may in some cases be called to decide complicated issues of group membership;<sup>28</sup>
- (f) The right to establish and manage *institutions*, with due regard to the public law of the country;
- (g) The rights to *communicate*, *federate*, and *cooperate* with similar groups within the country or abroad. This right is of special importance for religious groups;
- (h) In some legal systems, the right to *representation* in various governmental branches. Legal instruments on indigenous populations and minorities refer to such rights;

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<sup>26</sup> Convention on Genocide, *supra* note 11.

<sup>27</sup> Convention on Racial Discrimination, *supra* note 13, art. 2.

<sup>28</sup> See *Lovelace v. Canada*, Comm. No. R. 6/24, U.N. Doc. Supp. No. 40 (A/36/44) at 166 (1981) (discussing membership in an Indian group, which caused Canada to amend its Indian Act), available at <http://www1.umn.edu/humanrts/undocs/session36/6-24.htm>.

- (i) The right to *impose duties* and taxes on members in order to maintain churches, institutions, or schools, according to the nature of the group. In several countries, the group may be entitled to receive a proportional share of public funds;
- (j) Some groups may enjoy a right to *legal personality*, at the national and even international levels;
- (k) Some groups, particularly those characterized as *peoples*, may enjoy the right to *self-determination*, strictly interpreted in accordance with international law and the public law of the country, and related to issues such as *autonomy* and *regionalism*.<sup>29</sup>

Article 6 of the 1981 Declaration proclaims some rights particularly necessary for the life of religious institutions.<sup>30</sup> They include:

- (a) The freedom to worship and related rights;
- (b) The freedom to make, acquire, and use the necessary articles and materials related to the rites of a particular religion;
- (c) The freedom to teach a religion or belief and write and publish relevant materials;
- (d) The right to solicit and receive voluntary financial support;
- (e) The freedom to train and appoint religious leaders and functionaries;
- (f) The right to observe and celebrate holy days and ceremonies in accordance with the precepts of the respective religion.<sup>31</sup>

Special problems exist in connection with the freedom of association and the extent of autonomy to be enjoyed by religious groups.<sup>32</sup>

The preceding list of rights reflects the present stage of development of international law and human rights law concerning group rights. This picture is far away from some of the aspirations referred to at the beginning of these pages. The following Part addresses the trends and arguments used to advocate a more diversified approach on the basis of the views voiced by spokespersons

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<sup>29</sup> See LERNER 2003, *supra* note 4, at 39–41. For rights of religious groups, see 1981 Declaration, *supra* note 14, art. 6; LERNER 2006, *supra* note 14, at 32–33.

<sup>30</sup> 1981 Declaration, *supra* note 14, art. 6.

<sup>31</sup> See *id.*; see also Concluding Document of the Vienna Meeting 1996 of the Representatives of the Participating States of the Conference on Security and Co-operation in Europe, available at [www.osce.org/mc/40881](http://www.osce.org/mc/40881).

<sup>32</sup> See Natan Lerner, *Religion and Freedom of Association*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION (John Witte, Jr. & M. Christian Green eds., 2011).

for legal pluralism, in its different expressions as resulting from the diverse stages of its evolution.

### III. LEGAL PLURALISM

Legal pluralism is a controversial notion that, since the 1970s, has penetrated not only the area of law, but also the fields of sociology, anthropology, and political science. It is presently an intensely disputed issue regarding relations between state and religion. According to scholar Anne Griffiths, the term encompasses “diverse and often contested perspectives on law, ranging from the recognition of differing legal orders within the nation-state, to a more far reaching and open-ended concept of law that does not necessarily depend on state recognition for its validity” and “may come into being wherever two or more legal systems exist in the same social field.”<sup>33</sup> Legal pluralism, as described by the editors of a timely academic publication, disputes “the legal-centralist notion that state law is exclusive; legal pluralists assert and explore the proposition that non-state legal systems exist alongside state law and are not necessarily subordinate to it.”<sup>34</sup> The authors of the preceding description add that research on multiculturalism “challenges the legal-centralist notion of uniform nation-state law by debating the extent to which today’s multicultural states, inhabited by multiple national, religious or ethnic groups, should allow non-state (often illiberal) law to apply to the lives of their citizens.”<sup>35</sup>

Several stages can be seen in the evolution of legal pluralism theories. Some scholars distinguish between an early period, described as a weak, juristic, or classic form of legal pluralism, and a second stage of strong, deep, or new legal pluralism.<sup>36</sup> There seems to be a correlation between this development and that of the theories on multiculturalism.<sup>37</sup> However, they are different phenomena, and it is necessary to acknowledge that difference. Kymlicka, replying at a symposium on his 2007 book to criticism of that book, makes clear the differences.<sup>38</sup>

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<sup>33</sup> Griffiths, *supra* note 3, at 289. The book carries a comprehensive bibliography for “an overview of the field.” *Id.* at 290, n.2.

<sup>34</sup> *Introduction* to 9 THEORETICAL INQUIRIES L. 343, 343 (2008).

<sup>35</sup> *Id.*

<sup>36</sup> See Griffiths, *supra* note 3, at 296.

<sup>37</sup> See generally KYMLICKA, *supra* note 3; Amnon Rubinstein, *The Decline, But Not Demise, of Multiculturalism*, 40 ISR. L. REV. 763, 765–66 (2007).

<sup>38</sup> William Kymlicka, *Reply*, 2 JERUSALEM REV. LEGAL STUD. 91, 95 (2010). Kymlicka claims that in no case has multiculturalism “been interpreted as a license for immigrant groups to maintain illiberal

A number of developments, empirical and theoretical, influenced the evolution of legal pluralism. Globalization, the growing body of law—in a broad sense—produced by interstate organizations, and the contribution of religious movements<sup>39</sup> played a role in the development of legal pluralism theories. The law of indigenous populations incorporated into state law in postcolonialist situations, as well as the preservation of autonomous community status in some countries that inherited the recognized communities system prevailing under Ottoman and colonialist law, are additional examples of the coexistence of a state legal regime with non-state legal regimes applicable to portions of the population, and are summarized later in this Essay.<sup>40</sup> Feminist theories, as well as migrations and the formation of new minorities—in either a strict sense or a flexible approach—also had an impact on the development of legal pluralism. Such impacts were influenced by the social and political conditions prevailing in the various, affected countries yet, in general, were instrumental in the consolidation of legal pluralism theories and practice.

What is called the new, “strong” legal pluralism counteracts the idea that all legal ordering is rooted in state law. Its proponents speak about “integral plurality,” “porous legality,” or “legal porosity” and reorienting legal analysis away from the ideology of legal centralism, conducing to “a framework of understanding the dynamics of the imposition of law and of resistance to it.”<sup>41</sup> Legal pluralists refer to a process in which state law coexists with religious law, local normative orders, and customary law.<sup>42</sup>

Christine Parker points out that, historically, customary and religious law existed before the modern nation-state.<sup>43</sup> Such law continues to exist side by side with the law of the state in postcolonial and multicultural societies like India and Israel.<sup>44</sup> In federal states like Australia and Canada, indigenous peoples’ law coexists with state law, and local law may sometimes conflict

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practices . . . . It has always been seen as part and parcel of a larger process of integrating immigrants into a liberal-democratic constitutional order.” *Id.*

<sup>39</sup> See Griffiths, *supra* note 3, at 298.

<sup>40</sup> See *infra* Part IV.

<sup>41</sup> Griffiths, *supra* note 3, at 304. Griffiths quotes from several authors pertaining to the “new, strong, or deep legal pluralism.” *Id.* at 302.

<sup>42</sup> *Id.* at 309. Griffiths argues that this would provide “a more detailed comprehension of the ways in which ethnonationalist movements work, as well as a more comprehensive understanding of the factors underlying religious movements which cut across national boundaries.” *Id.*

<sup>43</sup> Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES IN L. 349, 352 (2008).

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

with national law.<sup>45</sup> Legal pluralism is even more obvious in transnational communities, especially the European Union.<sup>46</sup> Beyond that, Parker argues that contemporary societies utilize a range of other legal “systems, normative orderings and symbolic meaning systems” that could also be described as “law.”<sup>47</sup> Such “law” is generated by bodies such as families, corporations, ethnic and religious groups, friendship groups, and other “semi-autonomous social fields,” and may have more influence on some people than the official law.<sup>48</sup>

The issues discussed in this Essay are the reach and the limits of such an “extended” view of legal pluralism, particularly against the background of attempts to “upgrade” religious laws and make them mandatory under the law of the state, either by incorporating them into the state framework or otherwise attaching to them the authority of the state. Those attempts do not involve the claim that the voluntary use of religious law should be restricted, except when opposed to public order or basic human rights as part of state law. There is also no serious attempt to give legal force to criminal norms of religious communities. The issue is whether what is seen as legitimate, voluntary arbitration can be made mandatory under general law. The real difficulty, addressed in *The Economist* in relation to Islamic law, comes “where it pertains to family matters.”<sup>49</sup> For the purposes of this Essay, legal pluralism dealing with corporate business or other social or economic organizational structures is not relevant; it is the claim to recognize traditional religious or ethno-religious regulations as law, beyond purely voluntary arrangements, that constitutes the main issue of this Essay.

This issue has become highly controversial in some countries and in some cases, as in Canada, it has produced legislative changes.<sup>50</sup> Ayelet Shachar refers to the demands in Canada “to accommodate religious diversity in the public sphere.”<sup>51</sup> She finds a new challenge in the request to “privatize diversity” through alternative dispute resolution processes that permit parties to move their disputes from public courts into the domain of religious or

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

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Sense About Sharia*, *supra* note 1.

<sup>50</sup> See Family Statute Amendment Act, S.O. 2006, c.1 (Can.); Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008).

<sup>51</sup> Shachar, *supra* note 50, at 573.

customary sources of law and authority.<sup>52</sup> Shachar concludes that “a dual-status system with no communication between the two branches” may come into operation, proving that the debate over the role of Sharia tribunals is not over.<sup>53</sup>

John Witte, Jr. and Joel A. Nichols have dealt with the limits and lessons of accommodation between state law and faith-based family laws in the context of the debate launched by Anglican Archbishop Rowan Williams in 2008 on the possibilities of such accommodation between Muslim family law and the legal systems prevailing in Western democracies.<sup>54</sup> Witte and Nichols point out that the issue is not respect for religious freedom and rights, but Muslim demands for state enforcement of Muslim marriage contracts and religious arbitration of family law and other disputes.<sup>55</sup> For obvious historical and social reasons, the debate concerns primarily marriage law with all its complex implications, both in civil and in criminal law.<sup>56</sup> Marriage law in Western societies has undergone far-reaching changes in the direction of privatization,<sup>57</sup> and the present discussion regards the extent to which that process can be taken further. Although the issue affects several communities of faith, the discussion, as we have seen, deals mainly with Muslim communities that have immigrated into the West.<sup>58</sup> There are several reasons that caused Muslim immigrant communities to be at the forefront of this situation, including political reactions in some countries and dramatic events of terrorism involving Muslims that have been generalized to the larger Muslim population.<sup>59</sup>

Witte and Nichols indicate that Muslim communities aspire to put Sharia laws and their voluntary use by Muslims on “firmer constitutional and cultural ground in the West.”<sup>60</sup> In liberal democracies there is considerable opposition to such aspirations.<sup>61</sup> Such opposition is based on the concern that state enforcement would result in cases where religious law may exceed purely

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 607.

<sup>54</sup> John Witte, Jr. & Joel A. Nichols, *Faith-Based Family Laws in Western Democracies?*, 2010 FIDES ET LIBERTAS 122. Professor Witte also discussed this issue at a workshop on Family, State, and Religion at the Interdisciplinary Center Herzliya, Israel, on May 28, 2010.

<sup>55</sup> *Id.* at 123.

<sup>56</sup> *Id.* at 125.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 122–23.

<sup>59</sup> *Id.* at 127.

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g.*, John F. Burns, *Prime Minister Criticizes British ‘Multiculturalism’ As Allowing Extremism*, N.Y. TIMES, Feb. 6, 2011, at 6.

voluntary arbitration and reach matters not concerning public order or basic human rights.<sup>62</sup> Witte and Nichols point out that “[r]eligious groups in the West have long enjoyed corporate free exercise rights to legal personality, corporate property, collective worship, organized charity, parochial education, freedom of press,” and many other legitimate rights.<sup>63</sup> They question why Muslim religious groups should not enjoy the right to govern the marital and family lives of their voluntary members when Christians and Orthodox Jews, as well as smaller groups, have developed their own voluntary courts and institutions.<sup>64</sup> Nobody is demanding “exemptions from criminal laws against activities like polygamy, child marriage, female genital mutilation, or corporal discipline of wives.”<sup>65</sup> Western Muslims enjoy general religious freedom, but some Muslims advocate special accommodations that are unacceptable to Western democracies.<sup>66</sup> No democratic state can delegate to a religious group the full legal power to govern the domestic affairs of their faithful in accordance with their own religious laws.<sup>67</sup>

The Muslim claim that Sharia provides a comprehensive law governing sex, marriage, and family life makes accommodation more difficult.<sup>68</sup> A state cannot give up its coercive power in this sphere.<sup>69</sup> Jewish law courts’ easy acceptance of voluntary arbitration is grounded in Jewish disputants’ acceptance of the supremacy of state law.<sup>70</sup> Muslims could obtain a similar result only after a prolonged adjustment to Western life, which would eventually dispel the current suspicions. A similar process took place in the area of education and religion.<sup>71</sup>

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<sup>62</sup> The subject attracted wide public attention while this Essay was being written in relation with British Prime Minister David Cameron’s statement opposing forms of cultural pluralism involving legal autonomy for minorities, in particular Muslim immigrants in Great Britain. *See id.* Political leaders of Germany and France made similar statements. *See Nicolas Sarkozy Declares Multiculturalism Had Failed*, TELEGRAPH (Feb. 11, 2011, 1:32 AM), <http://www.telegraph.co.uk/news/worldnews/europe/france/8317497/Nicolas-Sarkozy-declares-multiculturalism-had-failed.html>; Matthew Weaver, *Angela Merkel: German Multiculturalism Has ‘Utterly Failed,’* GUARDIAN (Oct. 17, 2010, 11:58 AM), <http://www.guardian.co.uk/world/2010/oct/17/angela-merkel-german-multiculturalism-failed>.

<sup>63</sup> Witte & Nichols, *supra* note 54, at 127.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 129.

<sup>66</sup> *Id.* at 129–30.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 130.

<sup>69</sup> *Id.* at 131.

<sup>70</sup> *Id.* at 132–33.

<sup>71</sup> *Id.* at 133–34.

Advocates of legal pluralism perceive a threefold structure of law—“official law,” “unofficial law,” and “legal postulates”—as more or less corresponding to Western conceptions of law—“positive law,” “customary law,” and “natural law.”<sup>72</sup> Official law is made or sanctioned by the state. Unofficial law is, in practice, sanctioned by a general consensus.<sup>73</sup> Legal postulates are systems of values or ideals that are related to the fundamental social structure.<sup>74</sup> Examples of legal postulates include the caste system, lineal descent, clan unity, exogamy, and philosophical and political ideologies.<sup>75</sup> Prakash Shah refers to “diasporic legal cultures” and a “jurisprudence of difference.”<sup>76</sup> He points out that “people are often compelled to act against the (official) law when seeking to conform to their religious beliefs.”<sup>77</sup> He claims that law can be generated by different sources, whether recognized by the state or not.<sup>78</sup> Modern states have tended “to operate on the premise that, particularly in the realm of family law, the customary and religious law of the group concerned prevails, and should generally govern the relations among members of that group”; this is the result of continuing to maintain systems of personal law of Asian and African legal systems.<sup>79</sup> Such an evaluation may be too general.

Historically, there are two areas where the ideas of legal pluralism have flourished. One area in which legal pluralism has been accepted and where its principles have even penetrated international norms is the rights of indigenous populations or peoples. A second area where there is an empirical example of legal pluralism is the situation concerning recognized religious communities. These two examples deserve to be treated separately.

#### IV. INDIGENOUS POPULATIONS

Differences are often implied between the terms “populations” or “peoples” regarding the nature of the rights enjoyed by indigenous groups and their meaning in the definitions of such groups, particularly from an international

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<sup>72</sup> See SHAH, *supra* note 2, at 3.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 7, 13.

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.* at 37.

<sup>79</sup> *Id.* at 90.

law viewpoint.<sup>80</sup> Peoples are entitled to self-determination, as this term is understood presently in international law. It was only after the recognition of group rights in recent instruments, and active lobbying by spokespersons of indigenous groups, that international law abandoned its traditional approach to the problems of such populations and steps were taken, mainly by the ILO and the United Nations, to incorporate the subject in international legislative texts, albeit not to the full satisfaction of the interested groups. In the League of Nations era, under Article 22 of the League of Nations Covenant, such populations were seen as not yet able to stand on their own.<sup>81</sup> Therefore, their well-being was considered a “sacred trust of civilisation” to be achieved by securing, in the words of Article 23 of the Covenant, “just treatment of the native inhabitants of territories under their control.”<sup>82</sup> During this period, agreements concluded with indigenous groups were not reputed treaties according to international law, and the Permanent Court of International Justice denied international legal personality to aboriginal tribes.<sup>83</sup>

In the UN era, Article 1 of the Charter and Articles 1 of both Human Rights Covenants referred to self-determination of “peoples”, but this notion was not elaborated.<sup>84</sup> Third World countries understood the right to self-determination to refer strictly to colonial situations. Early human rights instruments, at the global as well as the regional levels, did not refer to the indigenous issue. The ILO was an exception to this trend, and its legislative work reflects the relevant changes in approach. It was not until 1986 that the United Nations directly addressed the issue.<sup>85</sup> UN Special Rapporteur, Jose R. Martinez Cobo, defined indigenous communities, peoples, and nations as those

having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or part of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to

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<sup>80</sup> LERNER 2003, *supra* note 4, at 111–24; *see also* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

<sup>81</sup> *See* League of Nations Covenant, *supra* note 7, art. 22.

<sup>82</sup> *Id.* art. 22, paras. (1), 23(b).

<sup>83</sup> *Cf.* Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5); Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

<sup>84</sup> *See* ICCPR, *supra* note 12; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>85</sup> Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) (by J.R. Martinez Cobo).

future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their cultural patterns, social institutions and legal systems.<sup>86</sup>

This definition already shows the relevance of legal pluralism to the condition of indigenous groups. As this Essay discusses below, this is also evident in the changes to the ILO conventions and in the United Nations' latest approach to the issue. Kymlicka indicates that the problem facing many indigenous peoples, particularly in Latin America, is that they have no self-governing power to amend their customary law: "They have the right to follow indigenous law, but not to make indigenous law. They have the right to live according to their laws, but not the right to give themselves laws."<sup>87</sup>

The ILO dealt with indigenous rights in two conventions, the 1957 Indigenous and Tribal Populations Convention (No. 107) and the 1989 Convention (No. 169), which is a revision of the former.<sup>88</sup> The changes in the title and text of the 1989 Preamble are indicative of the prevailing spirit.<sup>89</sup> The word "integration" was dismissed from the preamble and reference is made to the need to adopt new international standards "with a view to removing the assimilationist orientation of the earlier standards."<sup>90</sup> The 1989 Convention recognizes the aspirations of the indigenous peoples to exercise control over their own institutions, ways of life, and economic development and to develop their identities, languages, and religions "within the framework of the States in which they live."<sup>91</sup> Their social and cultural identity, their customs and traditions, and their institutions should be respected. Article 8, which caused substantial objections, determines that when applying national legislation to the peoples concerned, due regard shall be had for their customary law, which they will have the right to retain except when it is "incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."<sup>92</sup>

Articles 9 and 10 consider penal matters.<sup>93</sup> These articles indicate that the customs of indigenous peoples in such matters should be taken into

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<sup>86</sup> *Id.* at 4.

<sup>87</sup> KYMLICKA, *supra* note 3, at 153.

<sup>88</sup> 1989 Convention, *supra* note 17; Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 2, 1957, 328 U.N.T.S. 247.

<sup>89</sup> *See* 1989 Convention, *supra* note 17.

<sup>90</sup> *Id.* pmb1.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* art. 8(2).

<sup>93</sup> *Id.* arts. 9, 10.

consideration.<sup>94</sup> Furthermore, Article 17, which provoked many controversies, provides that the rights of ownership and possession over the lands that the peoples concerned “traditionally occupy” shall be recognized and contains protective measures for the transfer of lands, the capacity to alienate them, and other related matters.<sup>95</sup>

The 1989 Convention means that some rules concerning legal pluralism have been modestly accepted by positive international law. The United Nations followed a similar orientation in the 2007 Declaration on the Rights of Indigenous Peoples.<sup>96</sup> The declaration recognizes in the preamble the need to respect and promote the “inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.”<sup>97</sup> The preamble also refers to the rights affirmed in treaties between states and indigenous peoples and to their collective rights; the right to autonomy or self-government in matters related to their internal and local affairs and the right to maintain and strengthen their distinct political, *legal*, economic, social, and cultural institutions; the elimination of forced assimilation and destruction of indigenous culture; the right to choose their representatives and participate in decision-making on matters that would affect their rights; and respect for their customs, traditions, and land tenure systems.<sup>98</sup>

Article 27 of the 2007 Declaration can be seen as reflecting legal pluralist theories.<sup>99</sup> States should give “due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems . . . pertaining to their lands, territories and resources,” establishing and implementing, to that effect, “a fair, independent, impartial, open and transparent process,” in which indigenous peoples shall have the right to participate.<sup>100</sup> They have the right—proclaims Article 33—“to determine their own identity or membership in accordance with their customs and traditions.”<sup>101</sup> They have the right—states Article 34—“to promote, develop and maintain their . . . procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* art. 17.

<sup>96</sup> Declaration on the Rights of Indigenous Peoples, *supra* note 18.

<sup>97</sup> *Id.* pmb1.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* art. 27.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* art. 33.

international human rights standards.”<sup>102</sup> Furthermore, Article 40 calls for “due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned.”<sup>103</sup>

It is needless to stress that the 2007 Declaration is not a mandatory treaty.<sup>104</sup> Still, several countries voted against it or abstained, and concerns were voiced with respect to its wording.<sup>105</sup> One significant example is the statement of Canada’s representative to the United Nations, Ambassador John McNee, during the General Assembly session that adopted the declaration. McNee denied the legal effect of the declaration, affirming that “its provisions do not represent customary international law.”<sup>106</sup> This lack of agreement indicates the restricted approach of international law with regard to the demands of legal pluralists.

Forms of legal pluralism have been incorporated in some national legal systems rather than at the international level. Examples of such incorporation are laws that recognize religious communities as entitled to a large degree of legal autonomy, particularly with regard to family law, education, and linguistic rights.

A special case is that of the Bedouin, a traditionally nomadic Muslim population that developed a system of law “that emerged in the deserts of the Middle East to provide protection to individuals and nomadic society alike,” in the absence of any other authority in the desert.<sup>107</sup> Such authority exists presently, but the Bedouin still turn to their own laws, which sometimes clash with state law.<sup>108</sup> Taking issue with the claim that Bedouin law is, in fact, lawless, Clinton Bailey argues “that Bedouin in modern times still resort, with trust and hope for justice, to the legal system that their earliest ancestors bequeathed them speaks volumes for the soundness of its ways.”<sup>109</sup>

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<sup>102</sup> *Id.* art. 34.

<sup>103</sup> *Id.* art. 40.

<sup>104</sup> *See Canada Votes ‘No’ As UN Native Rights Declaration Passes*, CBC NEWS (Sept. 12, 2007, 4:07 PM), <http://www.cbc.ca/news/canada/story/2007/09/13/canada-indigenous.html>.

<sup>105</sup> *Id.*

<sup>106</sup> John McNee, Ambassador, Permanent Representative of Can. to the United Nations, Statement to the 61st Session of the General Assembly on the Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), <http://www.ainc-inac.gc.ca/ap/ia/stmt/2007/undir-eng.asp>.

<sup>107</sup> *See CLINTON BAILEY, BEDOUIN LAW FROM SINAI AND THE NEGEV: JUSTICE WITHOUT GOVERNMENT 1* (2009).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 301.

## V. RECOGNIZED COMMUNITIES WITH SEPARATE LEGAL SYSTEMS

States that were established as a consequence of the disruption of the Ottoman Empire or the end of colonial regimes have maintained the legal rights enjoyed formerly by minority religious communities, particularly with regard to family law. Such are the cases of Israel, India, and South Africa,<sup>110</sup> among others. The Ottoman rulers permitted non-Muslim religious communities to enjoy autonomy in legal matters, which were applied by their own courts.<sup>111</sup> The system was called *Millet*.<sup>112</sup> The *Mejelle*, the Islamic civil law, governed the same issues for Muslims.<sup>113</sup> In the case of Israel, the British Mandate over Palestine, established under the League of Nations, maintained the *Millet* system by incorporating it into Article 83 of the Palestine Order in Council of 1922.<sup>114</sup> After the creation of the State of Israel in 1948, no changes were introduced in this respect, and the new state recognized additional communities.<sup>115</sup> There are today thirteen recognized communities in Israel, several of which have their own courts for issues of personal status.<sup>116</sup> This does not mean that persons belonging to non-recognized communities do not enjoy religious freedom; it means that some recognized religious communities enjoy the additional privilege of having their own tribunals and applying, with certain limitations, their own law, whether written or customary.<sup>117</sup>

The Jewish community in Israel is ruled by state law, but family matters are reserved to rabbinical tribunals that have jurisdiction over all Jews and apply to them the *Halakha*, Jewish religious law.<sup>118</sup> A similar jurisdiction is granted to other recognized communities over their adherents. Still, the actions of all state institutions in the religious sphere are subject to review by the High Court of Justice, including matters pertaining to the application of religious law.<sup>119</sup> Religious courts exceed their jurisdiction if they issue judgments contrary to

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<sup>110</sup> See T W Bennett, *Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform*, *infra* this issue, for a discussion of family law in South Africa.

<sup>111</sup> Daphna Hacker, *Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts* (Tel Aviv Univ., Working Paper No. 123, 2011), available at <http://law.bepress.com/taulwps/tp/art123/>.

<sup>112</sup> *Id.* at 5.

<sup>113</sup> See AMIRA EL-AZHARY SONBOL, *WOMEN OF JORDAN: ISLAM, LABOR AND THE LAW* 20 (2003).

<sup>114</sup> Hacker, *supra* note 111, at 5.

<sup>115</sup> *Id.*; see LERNER 2006, *supra* note 14, at 201–11; Hacker, *supra* note 111, at 5.

<sup>116</sup> Hacker, *supra* note 111, at 6.

<sup>117</sup> *Id.*

<sup>118</sup> See Chief Rabbinate of Israel Law, 5740-1980, 34 LSI 97 (1980).

<sup>119</sup> See Initial Report of States Parties Due in 1993, Human Rights Committees, Apr. 9, 1998, U.N. Doc. CCPR/C/81/Add.13 at 171 (June 2, 1998) [hereinafter Initial Report].

provisions of secular laws regarding equal rights for women, adoption, and spousal economic relations.<sup>120</sup>

The system has been criticized for several reasons. Some criticize the fact that persons considered Jews for the purpose of the Population Register are automatically under the jurisdiction of the rabbinical courts regardless of the individual's will or self-definition. Other criticisms include the strict application of *Halakhic* norms to individuals who consider themselves secular persons and do not wish to undergo religious ceremonies for the purpose of marriage or divorce.<sup>121</sup> The system of recognized religious communities also has implications for taxation and financial support because only recognized communities enjoy some benefits.<sup>122</sup>

In India, the British colonial authorities introduced a general territorial law, but applied, in issues related to family law in the regular courts, the Quranic law to the Muslims and the *Shastra* law to the Hindus.<sup>123</sup> In time, distinctive bodies of Anglo-Hindu and Anglo-Muslim case law evolved, and the courts of British India and later the state courts of independent India applied these bodies of personal law.<sup>124</sup> Though the 1950 Constitution “appears to envision the dissolution of the personal law system in favor of a Uniform Civil Code,”<sup>125</sup> the personal law system has been preserved, and certain family law issues are still governed by separate Hindu, Muslim, Parsee, and Christian religious laws.<sup>126</sup> There has been, however, an evolution toward permitting the application of personal law on a voluntary basis.<sup>127</sup>

## VI. LEGAL PLURALISM AND IMMIGRANT COMMUNITIES

An intense controversy is now taking place with regard to the application of the principles of legal pluralism to groups of new immigrants and their descendants, also described as “new minorities.” Resistance to considering groups of immigrants as new minorities was first expressed when the ICCPR

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<sup>120</sup> See Chief Rabbinate Law of Israel, 34 LSI 97; Initial Report, *supra* note 119, at 171.

<sup>121</sup> Marc Galanter & Jayanth Kriushnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 122–23 (2000).

<sup>122</sup> See Initial Report, *supra* note 119 (providing an authoritative description of the Israeli system).

<sup>123</sup> See Marc Galanter, *The Displacement of Traditional Law in Modern India*, 24 J. SOC. ISSUES, Oct. 1968, at 65.

<sup>124</sup> Galanter & Kriushnan, *supra* note 121, at 106–07.

<sup>125</sup> *Id.* at 107.

<sup>126</sup> *Id.* at 109.

<sup>127</sup> *Id.* at 130–31.

was drafted. Spokespersons of immigrant-receiving countries claimed “that persons of similar background who entered their territories voluntarily, through a gradual process of immigration, could not be regarded as minorities, as this would endanger the national integrity of the receiving States.”<sup>128</sup> Although the newcomers would enjoy individual rights, including linguistic and religious rights, “they were expected to become part of the national fabric.”<sup>129</sup> In response, it was pointed out that dispersed religions may not receive the protection of Article 27 of the ICCPR and that “the bias against the creation of new minorities, encapsulated by the requirement of pre-existence, indicates that recently formed religions could be treated differently than traditional ones under the provision.”<sup>130</sup> Article 27 engendered many discussions as to its reach.<sup>131</sup> The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was written in a mildly more group-oriented language, but did not change the approach of the international community to the place and rights of minorities in democratic countries.<sup>132</sup>

The issue today is not related to recently formed religious groups. Mostly, the controversy refers to Muslim communities, particularly in Europe, and focuses on the resort to Sharia norms instead of, or in addition to, general family law, on a mandatory basis. At the beginning of this Essay, reference was made to the impact of this discussion on general organs of the world press.<sup>133</sup> The discussion also involves politicians and legal commentators and has become a major issue in international life.<sup>134</sup> The issue is not so much legal pluralism as the present state and future of multiculturalism. The controversy reached a peak with a statement made in February 2011 by British Prime Minister David Cameron proclaiming the failure of multiculturalism in Great Britain, following similar pronouncements by German Chancellor Angela Merkel and French President Nicolas Sarkozy.<sup>135</sup> Such statements, seen against the background of dramatic international developments in parts of the Muslim world, led qualified observers to point out a higher level of Islamic extremism

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<sup>128</sup> See MARC BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 496 (1987).

<sup>129</sup> *Id.*

<sup>130</sup> See Bernardette Meyler, *The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law*, 22 ST. JOHN'S J. LEGAL COMMENT. 535, 548–49 (2007).

<sup>131</sup> See LERNER 2003, *supra* note 4, at 14–15. Beyond that debate, Article 27 is the most important positive mandatory provision concerning minorities in international law. See ICCPR, *supra* note 12, art. 27.

<sup>132</sup> 1992 Declaration, *supra* note 15.

<sup>133</sup> See *supra* note 1 and accompanying text.

<sup>134</sup> See *supra* note 62 and accompanying text.

<sup>135</sup> See *id.*

and that the “advocacy of Muslim exceptionalism (such as the use of Shariah)” was becoming “more mainstream” among Muslims.<sup>136</sup>

As indicated, the problem is mainly European. In this respect, Kymlicka stresses the importance of size and proportion of the immigrant groups.<sup>137</sup> This explains the differences between North America and Europe. In the United States or Canada, no one equates the category of “immigrant” with the category of “Muslim.”<sup>138</sup> When “bad” immigrants are seen as the prime beneficiaries of multiculturalism—and the same would certainly apply to legal pluralism—public support for multiculturalism can “dramatically diminish, leading to high-profile cases of retreat.”<sup>139</sup> There has, however, been strong resistance in North America to attempts at establishing legal pluralism for Muslim groups, as shown by the cases in Ontario and Oklahoma. In Ontario, Canada, the acceptance of private arbitration for family disputes on the basis of Sharia was dropped, and in Oklahoma, United States, a “Save Our State Amendment,” preemptively banning Sharia law, was passed late in 2010, although later blocked.<sup>140</sup>

## CONCLUSION

In any case, it is with regard to immigrant groups, of a religious or an ethnic-religious nature, and specifically Muslims, that the main discussion on the applicability of legal pluralism is presently taking place. There are no objections to the use of Muslim religious law concerning family rights and duties on a purely voluntary basis, anywhere in the world, in a similar way to what is currently happening with the voluntary application of religious norms in

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<sup>136</sup> John Vinocur, Commentary, *British Shift on Muslims Is Ominous*, INT’L HERALD TRIB., Mar. 1, 2011, <http://www.nytimes.com/2011/03/01/world/europe/01iht-politicus01.html>. John Vinocur (Politicus) criticizes Cameron’s failure in making proposals to “deal with the scale of the problem of Muslim immigration.” *Id.* The same day, in the same newspaper, Judy Dempsey wrote about the reaction to a speech made by Turkish Prime Minister Recep Tayyip Erdogan during a visit to Dusseldorf calling upon “our children,” namely the children of Turkish immigrants, to learn Turkish prior to German. Judy Dempsey, *German Politicians Assail Turkish Leader over Cultural Remarks*, INT’L HERALD TRIB., Mar. 1, 2011, <http://www.nytimes.com/2011/03/01/world/europe/01iht-germany01.html>. He declared, “[n]o one should be able to rip us away from our culture and civilization.” *Id.* According to Dempsey, Erdogan’s remarks “touched a raw nerve in Berlin.” *Id.*

<sup>137</sup> KYMLICKA, *supra* note 3, at 125–26.

<sup>138</sup> *See id.*

<sup>139</sup> *Id.* at 125–26, n.41.

<sup>140</sup> *See McGuinty Rules out Use of Sharia Law in Ontario*, CTV News (Sept. 12, 2005, 11:31 PM), [http://www.ctv.ca/CTVNews/TopStories/20050912/mcguinty\\_shariah\\_050911/](http://www.ctv.ca/CTVNews/TopStories/20050912/mcguinty_shariah_050911/) (discussing Sharia in Ontario); Roger Cohen, Commentary, *Shariah at the Kumbak Café*, INT’L HERALD TRIB., Dec. 7, 2010, <http://www.nytimes.com/2010/12/07/opinion/07iht-edcohen.html> (discussing Sharia in Oklahoma).

some Catholic and Jewish communities. The difficulty is with voices arguing in favor of some sort of state-sanctioned application of such norms. It is the advocacy of replacing voluntarism with mandatory, state-sponsored Muslim religious law that raises opposition.

Manifestations of legal pluralism are present with regard to indigenous populations or peoples in some countries. State successors of former empires or colonial states have in some cases preserved forms of legal pluralism on the basis of communities recognized by the state as entitled to separate juridical structures, including bodies of legal norms and autonomous judicial systems. Such systems usually overlap with educational autonomy and frequently with linguistic separation. This often occurs with relatively new states that were part of the Ottoman Empire or the British Commonwealth. The degree to which former structures have been preserved varies from country to country. While this system has the advantage of providing a considerable amount of respect for the historic identity of the favored communities, it may imply, especially in the case of communities based on religion, coercion on the conscience of individuals reluctant or opposed to being defined as belonging to such communities in disregard of their philosophical or religious convictions. This Essay has provided, as examples, the cases of India, Israel, and South Africa as reflecting such situations, despite their differences.

The issue of legal pluralism is related to the risk of a clash between too much religious autonomy—as legitimate as the claim that such autonomy is a right of religious communities may be—and the autonomy or the rights of the individual. A democratic state should not sponsor or support policies that abolish or excessively restrict the individual's right to be left alone in the sphere of fundamental convictions. While religious groups are more affected than other groups, the issue is also of interest to ethnic and linguistic minorities. A very liberal approach to group rights should not imply the abolition of the right of the nation, the entire nation, to preserve its historical identity, beyond the point that became legitimate in liberal democracies. At the other end, belonging to a minority group should not prevent an individual from opting out of the group, when possible, or from preferring the application of the general civil law of the state rather than the particular, and often religious, law of the group to his or her case. It would be necessary to correct the coercive character of the particular group system and to provide individuals with an option to preserve that right. Where historical reasons support the maintenance of traditional systems of law without forcing the individual to

submit to norms that are not those of the general population of the state, democracy and human rights might be served.

Such an option exists for members of indigenous minorities. It should also exist for members of recognized communities with a separate legal system. As to immigrants, they are certainly entitled to enjoy general group rights in accordance with international and constitutional law. But the demand to be subject to the legal system of their original countries or systems of law as a mandatory, state-sponsored, or imposed set of norms in some areas of life, as proponents of ambitious models of legal pluralism suggest, would probably lead to restrictions in immigration law, in addition to enormous legal difficulties. It would also increase the tension, which already exists, between the secular, liberal state and the autonomy of religious communities, churches, or associations. The secular state should not be hermetic. There should be wide room for religious and cultural autonomy, but autonomy is not absolute separation or independence from the general rule of law. Voluntary communal arbitration can be a valuable instrument to foster social peace and harmony. The 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.