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Seeking an Islamic Reflective Equilibrium: A Response to Abdullahi A. An-Na'im's *Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective*

Mohammad H. Fadel*

- I. INTRODUCTION
- II. REVEALED RELIGION AND POLITICAL LIBERALISM
- III. RELIGION AS A SOURCE FOR JUSTICE IN CONSTITUTIONAL
DEMOCRACY
- IV. TOWARDS A REFLECTIVE EQUILIBRIUM
- V. CONCLUSION

I. INTRODUCTION

Professor An-Na'im's paper illustrates the difficulty of theorizing the relationship of law and religion, particularly from the perspective of a revealed religion that has its own legal system like Islam. When faced with this challenge, the temptation is to adopt a strategy of either exclusion, in favor of the "secular," or assimilation, in favor of the "religious." Notwithstanding his suggestions that Islamic legal values may have some kind of legitimacy in the secular legal system as he conceives it, it appears that Professor An-Na'im has come down fairly strongly on the exclusionary side of this dilemma, both as evidenced in this paper¹ and in his most recent

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1. Abdullahi A. An-Na'im, *Complementary, Not Competing, Claims of Law and Religion: An*

work, *Islam and the Secular State*.²

I, too, agree with him that the relationship of law and revealed religion is difficult, if not impossible, to theorize, and so I do not want to be understood as claiming that I have stumbled across the “answer” that has eluded so many prior generations of scholars—Christian, Jewish and Muslim—who have all wrestled with the problem of revealed religion and political authority. What I wish to accomplish in this response is a much more modest goal, one intended to illustrate the internal points of tension in Professor An-Na‘im’s analysis in the hope that by drawing greater attention to these internal tensions, we might be able to think more productively about the relationship between revealed religion and secular law. In particular, I want to challenge the binary structure by which Professor An-Na‘im thinks about the problem of religion and the law, as though we could neatly divide rules or norms into two hermetically sealed categories of religious on the one hand and secular on the other.³ In challenging this division, I would like to suggest another approach, one that I think is in fact more consistent with Islamic theological, moral, and legal principles, and principles of political liberalism as articulated by John Rawls in his work which bears that name.⁴

II. REVEALED RELIGION AND POLITICAL LIBERALISM

One might ask why the special emphasis on revealed religion in contrast to religion *simpliciter*? The answer is simply that the religions grounding themselves in revelation—Judaism, Christianity and Islam—each provide to its followers a rich set of normative principles and ideals which, in the words of An-Na‘im, will seek to regulate at least some of the very same conduct that politics seeks to regulate.⁵ Moreover, because of the transcendental claims of these religious principles and norms,⁶ they may *potentially* undermine the political norms of any particular regime to the extent that such religious norms both conflict with the norms of a particular regime and are, from the perspective of an adherent of that particular religion, not

Islamic Perspective, 39 PEPP. L. REV. 1231, 1239 (2013) [hereinafter An-Na‘im, *An Islamic Perspective*].

2. ABDULLAHI AHMED AN-NA‘IM, *ISLAM AND THE SECULAR STATE* (2008) [hereinafter AN-NA‘IM, *ISLAM AND THE SECULAR STATE*].

3. An-Na‘im, *An Islamic Perspective*, *supra* note 1, at 1234. See generally AN-NA‘IM, *ISLAM AND THE SECULAR STATE*, *supra* note 2.

4. JOHN RAWLS, *POLITICAL LIBERALISM* (2005).

5. An-Na‘im, *An Islamic Perspective*, *supra* note 1, at 1233.

6. Rawls refers to such doctrines as “comprehensive doctrines of the good,” insofar as they aspire to provide to their adherents a systematic account of the entirety of human life, and thus are an exercise of both theoretical and practical reason. RAWLS, *supra* note 4, at 173–207. One commentator has, using Rawlsian terminology, described Islam as a “comprehensive ethical doctrine *par excellence*.” Andrew F. March, *Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies*, 101 AM. POL. SCI. REV. 235, 236 (2007) (internal quotation marks omitted).

subject to negotiation. Yet the relationship of the norms of a religious doctrine need not undermine a particular regime, for in certain circumstances, religious norms may reinforce political norms. At yet other times, religious and political norms may operate in completely independent and distinct spheres, sharing no objects of mutual concern, as implausible as this might seem.

The particular relationship of the norms of revealed religion to secular law will then ultimately turn on the nature of the regime at issue and the norms of the particular religion. For Rawls, the challenge of political philosophy in the context of a democracy is to provide a constitutional structure which, in broad terms at least, all “reasonable doctrines,” religious or non-religious, can endorse for the “right reasons.”⁷ What this means from Rawls’ perspective is that the adherents of the various reasonable doctrines that will flourish in a democratic regime will be able to endorse the constitution based on reasons that are internal to their own conceptions of the good and not because they are too weak, i.e., they are unable to resist a term which they believe is unjust.⁸ In this conception, religious citizens endorse the system of public law—what An-Na^cim calls the “secular”⁹—because by doing so they are acting in a way that is, in the most optimistic scenario, required by their deepest moral commitments, and in the least optimistic scenario, does not conflict with those commitments.¹⁰

Rawls’ approach to the problem of religion and the law, then, is different from that of An-Na^cim, who follows a strategy of radical incommensurability between the domains of the political and the religious.¹¹ An-Na^cim hopes to preserve the integrity of the political by insulating it from the religious, and although he does not dwell on it extensively, he presumably wishes to preserve religion’s integrity by insulating it from the political.¹² This approach, of course, also has its supporters, and indeed, the separationist paradigm supports at least one reading of the First Amendment.¹³ Despite the venerable roots of this approach to religion and

7. RAWLS, *supra* note 4, at 128.

8. *Id.* at 128–29.

9. AN-NA^cIM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 9.

10. RAWLS, *supra* note 4, at 9–10.

11. AN-NA^cIM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 267–68.

12. *Id.* at 281.

13. See Arlen Specter, *Defending the Wall: Maintaining Church/State Separation in America*, 18 HARV. J.L. & PUB. POL’Y 575, 580 (1995) (arguing that James Madison “[left] little doubt that he viewed the First Amendment as embodying the doctrine of church/state separation”); see also David G. Dalin, *Jewish Critics of Strict Separationism*, in JEWIS AND THE AMERICAN PUBLIC SQUARE: DEBATING RELIGION AND REPUBLIC 291, 291 (Alan Mittleman, Robert Licht & Jonathan D. Sarna eds., 2002) (stating that Jews “have been, for the most part, strict separationists, committed to the

the law, I believe in its heyday, separationism's success was dependent on the contingent facts that the overwhelming majority of U.S. citizens were at least nominally Christian and that the role of the government was extremely limited. Neither one of these facts continues to be true, which in my opinion casts doubt on the continued vitality of the separationist paradigm that An-Na'im espouses and recommends to Muslims.¹⁴

The separationist paradigm as argued by An-Na'im ultimately suggests that religious doctrines and beliefs are irrelevant to law,¹⁵ and to the extent that believers think they are, they are making a category mistake. Until such time as believers understand this, public institutions have to man the walls in defense of public institutions. I would rather argue that the distinguishing feature of revealed religion's relationship to law in a democratic regime is its normative independence from the regime. What this means is that in a democratic regime, revealed religion must be free to articulate doctrine regardless of whether it reinforces, undermines, or does not relate to secular law; public law cannot determine, by fiat, the proper "boundaries" of legitimate religious discourse. At the same time, however, religious doctrine, precisely because it is politically relevant, cannot, because of its claim to religious authority, enjoy immunity from the kind of discussion, debate, and criticism to which any political idea is subject; nor can its activities, simply because they are "religious," be granted immunity from regulation under principles such as the "ministerial exception."¹⁶ Religion should not be limited in its capacity to address issues, but neither should it be privileged with specific immunities from the law that do not apply to non-religious institutions or citizens. What this implies, then, is that in lieu of a separationist paradigm, the law should adopt a paradigm of principled reconciliation in which legal values and religious values are in a state of continual dialogue with the potential that each may inform and shape the other. Only through this process of continual dialogue can there emerge legal principles that all "reasonable doctrines" can accept for the "right reasons."¹⁷

In broad terms, I believe that Professor An-Na'im's conception of "civic reason," i.e., that the reasons for the adoption of particular policies should be

proposition that the First Amendment was intended to erect a high and impregnable—an absolute—wall of separation between church and state").

14. AN-NA'IM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 29.

15. *Id.* at 15.

16. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); see also Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1971 (2001); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 *ME. L. REV.* 23, 53 (2010); Jessica R. Vartanian, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 *U. TOL. L. REV.* 1049, 1050 (2009).

17. RAWLS, *supra* note 4, at 128.

“open and accessible to all citizens,”¹⁸ approaches the Rawlsian ideal of public lawmaking, but the problem in An-Na^cim’s analysis is that it ignores civil culture, the pluralism inherent in it, and the relationship of that civil pluralistic culture to lawmaking.¹⁹ An-Na^cim’s dilemma stems from his fear that adherents of revealed religion may, at times, pursue politics while pursuing goals that have been determined by their religious reason, not their civic reason.²⁰ If this occurs, then religion will *capture* the state and use what should be a neutral institution to further its own, sectarian, rather than, civic ends.²¹ An-Na^cim, however, so sharply tilts the scales in favor of public institutions that he ignores the inverse problem: non-religious citizens capturing the state and using it to further their own, sectarian, or even at times anti-religious, ends.²² While Rawls recognizes the possibility that all comprehensive doctrines—religious and non-religious—have the potential to use their power in a manner inconsistent with the principles of justice, something Rawls calls “the fact of oppression,”²³ An-Na^cim seems to worry only about religious takeovers of the state, but not, for example, a takeover of the state by comprehensive liberals.²⁴

Despite An-Na^cim’s apparent indifference to this threat, examples of it abound and not only in non-democratic regimes and quasi-democratic regimes. While we in North America like to think ourselves superior to the French on these matters, even the United States and Canada are not immune from politicians and even from the government itself, attempting to articulate either an anodyne theological narrative whose main purpose is to immunize the government from criticism or a theology designed to further its current policies. One need look only to the firestorm surrounding the Reverend Jeremiah Wright in the 2008 presidential campaign as evidence of the fierce political pressure brought to bear against American clergy, particularly on the left, who articulate politically subversive religious messages.²⁵ The American government (as well as other Western

18. AN-NA^cIM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 7.

19. RAWLS, *supra* note 4, at 9–10.

20. AN-NA^cIM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 8 (“Civic reason and reasoning, and not personal beliefs and motivations, are necessary . . .”).

21. *Id.* at 92.

22. *Id.* at 8 (“I argue for keeping the influence of the state from corrupting the genuine and independent piety of persons in their communities.”).

23. RAWLS, *supra* note 4, at 37.

24. AN-NA^cIM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 28–29, 281, 292–93.

25. See *Jeremiah Wright*, PBS.ORG (Apr. 25, 2008), <http://www.pbs.org/moyers/journal/04252008/profile.html>. In the month following the release of Reverend Jeremiah Wright’s controversial statements, more than 3000 news stories covered the story. *Id.*

governments), moreover, since 9/11, has been actively involved in intra-Muslim theological disputes in an attempt to promote a “moderate” Islam whose chief virtue would appear to be acquiescence to *Pax Americana*.²⁶ And in Canada, too, in the context of the Shari‘a Arbitration Controversy of 2005 and the recent ban on niqabs in naturalization ceremonies, the government has acted to reduce the rights of Muslims under the peculiar justification of preserving their equality rights.²⁷

It is somewhat perplexing, then, that despite Professor An-Na‘im’s recognition of the possibility for a kind of productive relationship between religion and secular institutions, he comes categorically down on the side of state institutions, saying, for example, that “compliance with Sharia [or presumably religious law more generally] cannot be legal justification for violating state law.”²⁸ He arrives at this position because his resolution of the tension between religion and secular institutions involves conceiving them as “*different types of normative systems*, each based on its own sources of authority and legitimacy.”²⁹ In this configuration, any similarity between law and religion is misleading: thus, while theft is a crime and a sin, the fact that it is a sin is irrelevant to its status as a crime. Because not all sins are crimes, An-Na‘im argues, it must follow that the legal norms that generate crimes are distinctive from the religious norms that classify the same acts as sins.³⁰ But is it the case that the fact that there is no identity between sin and crime sufficient to demonstrate that these are completely different normative orders? One could test this hypothesis from the vantage point of a religion that espouses a principle like the following: all acts of injustice are sins. In

26. See, e.g., CHERYL BARNARD, CIVIL DEMOCRATIC ISLAM: PARTNERS, RESOURCES AND STRATEGIES (Rand Corporation ed. 2003). For criticisms of this approach from the perspective of a social scientist, see Sherifa Zuhur, *Precision in the Global War on Terror: Inciting Muslims Through the War of Ideas*, STRATEGIC STUDIES INST. (Apr. 2008), <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=843> (arguing that American strategic messages that there is a “war within Islam” that are aimed at promoting reform within the Muslim faith—specifically minimizing extremist aspects and promoting ideological moderates—risk alienating Muslims and discouraging them from supporting United States efforts). For a criticism of this approach from a constitutional perspective, see Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125 (2012).

27. See, e.g., *Ontario Premier Rejects Use of Sharia Law*, CBC NEWS (Sept. 11, 2005, 5:19 PM), <http://www.cbc.ca/news/canada/story/2005/09/09/sharia-protests-20050909.html>; Althia Raj, *New Canada Niqab Rules Ban Muslim Face Coverings During Citizenship Ceremonies*, HUFFINGTONPOST (Dec. 13, 2011, 2:03 PM), http://www.huffingtonpost.ca/2011/12/12/new-niqab-rules-ban-citizenship-ceremonies_n_1143101.html; James Sturcke, *Sharia Law in Canada, Almost*, THE GUARDIAN NEWS BLOG (Feb. 8, 2008, 8:11 AM), <http://www.guardian.co.uk/news/blog/2008/feb/08/sharialawincanadaalmost>.

28. An-Na‘im, *An Islamic Perspective*, *supra* note 1, at 1250.

29. Abdullahi Ahmed An-Na‘im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1, 3 (2010) [hereinafter An-Na‘im, *The Compatibility Dialectic*].

30. An-Na‘im, *An Islamic Perspective*, *supra* note 1, at 1233; see also Abdullahi Ahmed An-Na‘im, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, 25 EMORY INT’L L. REV. 785, 793 (2011).

this case, we are no longer dealing with “different types of normative systems,” but rather different and potentially competing conceptions of a normative conception of *justice*.³¹ An-Na‘im’s attempt to resolve tensions between the demands of justice and the demands of religion simply amounts, at the end of the day, therefore, to a demand that religion abandon any claims of justice it may traditionally have held, and limit itself *exclusively* to the proper relationship of an individual to God.

III. RELIGION AS A SOURCE FOR JUSTICE IN CONSTITUTIONAL DEMOCRACY

An-Na‘im’s approach, I believe, would make some sense if secular political institutions could guarantee just outcomes, but given that they cannot, why would it be sensible for religions having their own powerful resources for promoting justice to surrender the terrain of justice to institutions that themselves are prone to perversion and exploitation for immoral ends? Justice Robert Jackson’s famous quote, speaking of the Supreme Court’s unreviewable power to interpret the Constitution, that “[w]e are not final because we are infallible, but we are infallible only because we are final,”³² illustrates dramatically the dilemma that Professor An-Na‘im’s position creates for any citizen, and not just religious citizens, who holds strong moral convictions: our secular political institutions, no matter how well-designed, cannot *always* be relied upon to produce moral outcomes, and in some cases, they may actually produce immoral outcomes. Indeed, An-Na‘im himself tacitly concedes the all-too-imperfect nature of secular decision-making when he writes that “[i]t is unrealistic and unwise to expect people to fully comply with the requirements of civic reason.”³³ If it is unrealistic to assume that actual citizens will be motivated by civic reason, then we have no reason to believe that the deliberative results of such a citizenry will produce results that are always worthy of respect morally. One might take the view, in the defense of the categorical exclusion of religious reasons from public life, that while the sources of political motivation that tempt citizens to stray from the ideal of civic reason are diverse and many, none is as widespread or as dangerous as religiously-motivated defections from civic reason, but An-Na‘im does not attempt to explain why *religiously* motivated defections from the norm of civic reason must be treated categorically, while, for example, the crass pursuit of narrow partisan interest need not.

31. An-Na‘im, *The Compatibility Dialectic*, *supra* note 29, at 3 (italics omitted).

32. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

33. An-Na‘im, *An Islamic Perspective*, *supra* note 1, at 1241.

One of the most important tasks of revealed religion in a democratic regime, then, is to provide an independent voice of moral conscience, even in cases where the law has been, in Justice Jackson's sense, "infallibly" established. And at times, this moral conscience may require a stance of civil disobedience if the injustice of the law so requires. Prominent examples from nineteenth century American history would include refusal to comply with laws such as the Fugitive Slave Act,³⁴ as well as laws enforcing Jim Crow regulations in the American South.³⁵ But unjust laws are not mere relics of a distant past. Contemporary examples of morally dubious legislation abound, including: recently passed state laws criminalizing acts such as knowingly transporting an alien whose presence in the United States is unlawful;³⁶ a penal system so punitive that U.S. incarceration rates exceed those of other developed countries by several orders of magnitude;³⁷ recently enacted legislation authorizing indefinite detentions of persons without trial at the discretion of the executive;³⁸ and systematic application of judicially-created doctrines such as the "state secrets privilege"³⁹ and qualified immunity⁴⁰ to thwart any attempt to hold government actors responsible for illegal conduct such as torture, or even private actors who aided and abetted

34. See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864). The Fugitive Slave Act was part of the Compromise of 1850 between Southern slave-holders and Northern delegates. Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 845 (2011). Forming the earliest system of national law enforcement, the law charged the federal government and all citizens with catching and returning runaway slaves, establishing county federal commissioners appointed for that very cause. *Id.* at 879. "The Fugitive Slave Act of 1850 outraged the North because it was so antithetical to American values of justice, fairness, and due process." *Id.* at 855.

35. For a discussion on the role of civil disobedience in a democratic society, see Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1942 (2005) ("[T]he liberal opposition to Jim Crow was justified by the same egalitarian sensibility that also motivated the protesters to seek racial equality, and this sensibility was correctly understood to be authoritative regardless of political fashion:").

36. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, ALA. CODE § 31-13-13(c) (2011).

37. See David C. Fathi, *Prison Nation*, HUMAN RIGHTS WATCH (Apr. 9, 2009), <http://www.hrw.org/news/2009/04/09/prison-nation> ("This gives the United States an incarceration rate of 762 per 100,000 residents—the highest rate in the world, dwarfing those of other democracies like Great Britain (152 per 100,000), Canada (116), and Japan (63).").

38. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298.

39. See *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) ("The state secrets privilege is a common law evidentiary privilege that permits the government to bar the disclosure of information if 'there is a reasonable danger' that disclosure will 'expose military matters which, in the interest of national security, should not be divulged.'" (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953))); Michael C. Dorf, *The U.S. Court of Appeals for the Ninth Circuit Dismisses a Challenge to Warrantless Wiretapping But Leaves Plaintiffs With a Sliver of Hope*, FINDLAW (Nov. 19, 2007), <http://writ.news.findlaw.com/dorf/20071119.html>.

40. *Arar v. Ashcroft*, 585 F.3d 559, 597 (2d Cir. 2009) (en banc); *In re: Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 109 (D.D.C. 2007) (granting qualified immunity to defendants where there was no "clearly established" constitutional violation).

these violations of law.⁴¹ If religion, however, is in fact as Professor An-Na^cim would describe it a “different type[] of normative system[],”⁴² it could not function as a meaningful source of dissent or resistance to injustice for it would have nothing meaningful to say in the face of such acts.

If one is sympathetic to the claim that it is appropriate in a democracy for religion to provide resources to oppose injustice, one might legitimately ask what leads Professor An-Na^cim to adopt a view of religion that would appear to preclude it from playing such a role? I think the answer lies in Professor An-Na^cim’s conceptions of law, on the one hand, and religion, on the other. Law, in An-Na^cim’s conception, exists in the realm of coercion and necessity, while religion exists in the realm of freedom and subjectivity.⁴³ “Enforcement” of a religious norm coercively, therefore, is an oxymoron because the logic of coercion intrudes upon what should be a domain of freedom; the very act of enforcement, therefore, transforms a religious norm into a non-religious norm, thus destroying it of any religious significance.⁴⁴ Religion’s subjectivity, in An-Na^cim’s conception, effectively means that it cannot provide any meaningful insights into the constituent elements of justice.

This bifurcation between law as the realm of coercion and necessity and religion as the realm of freedom raises difficult problems, including, whether it is possible to reconcile freedom with any kind of coercive legal system. But if we assume that some kinds of legal systems are consistent with our freedom, then we need to ask why a religiously-inspired rule cannot be enforced consistently with our freedom. Take, for example, Professor An-Na^cim’s insistence that while Muslims are perfectly free to adhere to certain principles of Islamic commercial law voluntarily, they cannot enlist the power of the state to enforce their agreement to abide by a “religious” norm, even in circumstances when it appears that such an agreement should otherwise be enforceable on purely contractual grounds.⁴⁵

Suppose that A and B enter into a contract, which provides, among other things, that both parties agree to waive their right to seek statutory interest from the date that any judgment is entered against either party for breach or to seek punitive damages against the other, with the contract stating explicitly that the reason for this rule is the parties’ mutual belief that such

41. See *Mohamed et al. v Jeppesen Dataplan, Inc.*, ACLU (Nov. 15, 2011), <http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc>.

42. An-Na^cim, *An Islamic Perspective*, *supra* note 1, at 1250 (italics omitted).

43. AN-NA^cIM, ISLAM AND THE SECULAR STATE, *supra* note 2, at 4, 7, 78.

44. *Id.* at 4, 122.

45. An-Na^cim, *An Islamic Perspective*, *supra* note 1, at 1251.

remedies are inconsistent with their religious beliefs as Muslims. There can be little doubt that such a limitation on the parties' contractual remedies would be deemed a perfectly valid contractual provision from the perspective of contract law; however, An-Na'im's theory of religion and religious freedom suggests that a court could or should refuse to enforce this agreement against A if he subsequently changed his religious views and no longer finds his right to claim statutory interest or punitive damages contrary to his religious beliefs.⁴⁶ If we agree, however, that a valid contractual term is enforceable regardless of the subjective motivations of the parties to the agreement and regardless of whether those motivations persist throughout the life of the contract, up to and including the date of the judge's decision, it is not at all clear why we should be concerned about whether the proper characterization of a contractual term is religious or non-religious, especially when the consequences of characterizing a particular term as "religious" is that it becomes unenforceable. Rather than focusing on the origins of a rule in religious or non-religious motivations to adjudicate its legitimacy, we would simply be better off focusing on what are the circumstances in which coercive enforcement of a rule is consistent with the demands of justice.

IV. TOWARDS A REFLECTIVE EQUILIBRIUM

As a general rule, I agree with Professor An-Na'im that a law cannot gain its legitimacy solely because it is claimed to represent religious truth.⁴⁷ I also agree with him that for laws to be legitimate, meaning, that they can be coercively enforced consistently with the demands of justice, they must be the product of, among other things, deliberative procedures that rely on premises that are reasonably accessible to all citizens and methods of reasoning which are generally held in common, a process he calls "civic reason."⁴⁸ This principle of legitimacy is implicit in the ideal of equal citizenship within a political society that guarantees to each member both equal liberties and the effective means of actualizing those liberties.⁴⁹ But while An-Na'im suggests that the practice of civic reason will eventually displace religious discourse, at least on matters related to politics, broadly understood—"the objective should be to promote and encourage civic reasons and reasoning while diminishing the exclusive influence of personal religious beliefs over time"⁵⁰—my view is closer to that expressed by John Rawls in *Political Liberalism*, where the desideratum of political philosophy is the articulation of principles of justice that adherents of reasonable

46. *Id.* at 1251–53.

47. *Id.* at 1234.

48. *Id.* at 1241.

49. *Id.* at 1254–55.

50. *Id.* at 1241.

comprehensive doctrines, whether religious or non-religious, can endorse for morally compelling reasons internal to their own conceptions of the good.⁵¹

Rawls argues that public reason—the requirement that citizens address one another using political argument rather than controversial metaphysical claims—is not so much an extraneous censor on political motivations, but rather is the product of the recognition by individual citizens of the equal moral worth of their fellow citizens.⁵² From this perspective, coercive enforcement of a religious norm will almost always be unjust, not because it is subversive of true religion or because it lacks a conception of justice, but because it relies on controversial metaphysical premises, and thus is inconsistent with the norms of public reason and the standards of legitimacy that it underwrites.⁵³ A reasonable religious citizen will therefore not propose the use of coercive power to enforce religious norms that cannot be justified within the limitations of public reason because he or she knows that to do so would violate the rights of her fellow citizens who are not to be subject to coercion, except pursuant to laws that are based on justifications that reasonable citizens could reasonably be expected to find acceptable.⁵⁴ More importantly, the reasonable religious citizen respects the limits of public reason not out of a sense of compulsion, but because the citizen's own deepest moral commitments cause him or her to respect the political rights of other citizens, chief among these being their right to be free of coercion on grounds that do not fall within the structure of public reason.⁵⁵

But, and here is the principal difference with An-Na^cim—public reason is not the source of citizens' morality; Rawls assumes that citizens will have other sources of morality, including, but not limited to, revealed religions.⁵⁶ The triumph of public reason on Rawls' account, therefore, is not coincident with the disappearance of religion, but rather with the strengthening, over time, of religious interpretations that are consistent with, rather than opposed to, the principles of justice.⁵⁷ This means it is a mistake to believe that emptying revealed religion of its public relevance is the key to democratic stability; rather, what is crucial is to develop internal accounts of revealed religion that are broadly consonant with norms of democratic legitimacy.⁵⁸

51. RAWLS, *supra* note 4, at 9–10.

52. *Id.* at 10–11, 14.

53. *Id.* at 10, 221–22.

54. *Id.* at 217, 224–25.

55. *Id.* at 225–26.

56. *Id.* at 19–20.

57. *Id.* at 9–10, 41.

58. *Id.* at 38.

An-Na'im, at various points in his paper, recognizes implicitly that civic reason cannot successfully operate if it is not tethered to a system of moral values widely shared among a society's citizens, which reinforce its values.⁵⁹ Accordingly, it does not seem possible for "civic reason," as An-Na'im uses that term, to become viable in a particular society *unless* the citizens of that society effectively internalize the norms of justice.⁶⁰ Far from requiring a separation of civic reason from religious reason as An-Na'im's analysis would suggest,⁶¹ it seems more plausible to believe that the proper relationship between the citizens' moral and religious commitments with civic reason can be achieved only when citizens undertake a deep engagement, both with the principles of secular justice and the norms of their own doctrine(s)—a process that Rawls refers to as "reflective equilibrium."⁶² If religion and law are part of distinctly different normative domains, it is difficult to understand how to begin a meaningful dialogue between the two, much less reach a principled equilibrium between the two conceptions.

Professor An-Na'im is certainly right to worry about the deleterious influence religion can have on public law, but just as he distinguishes good secular law and bad secular law (without providing clear criteria for distinguishing between the two),⁶³ he ought to recognize the distinction between good religion and bad religion. Indeed, in a previous phase in his scholarship, this is precisely what he advocated, urging Muslims in particular to adopt the premise of the "golden rule" in order to afford non-Muslims under Islamic law the same rights Muslims enjoy.⁶⁴ Likewise, 'Abd al-Razzāq al-Sanhūrī, in his theoretical work on the modernization of Islamic law, viewed non-Islamic legal systems to be a constituent element of Islamic law so long as the relevant rules, norms or principles found in non-Islamic legal systems were not *repugnant* to Islamic law.⁶⁵ Accordingly, Sanhūrī's vision of a modernized Islamic law was essentially grounded in comparative law, and was a universalistic project in which both Muslims and non-Muslims could participate as part of a humanistic legal project.⁶⁶

59. An-Na'im, *An Islamic Perspective*, *supra* note 1, at 1241.

60. *Id.*

61. *Id.*

62. RAWLS, *supra* note 4, at 8.

63. An-Na'im, *An Islamic Perspective*, *supra* note 1, at 1249.

64. 'Abdallahi Ahmed An-Na'im, *Shari'a and Basic Human Rights Concerns*, in LIBERAL ISLAM: A SOURCEBOOK 222, 225 (Charles Kurzman ed., 1998).

65. 'ABD AL-RAZZAQ AL-SANHURI, AL-SANHURI MIN KHILALI AWRAQIHI AL-SHAKHSIYYA, 151 (Nādiya al-Sanhūrī & Tawfiq al-Shāwī eds., 2005).

66. See generally Enid Hill, *Al-Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971* [Part I], 3 ARAB LAW QUARTERLY 33-64 (1988) (Neth.); Enid Hill, *Al-Sanhūrī and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971* [Part II], 3 ARAB LAW QUARTERLY 182-218

In that spirit, I humbly offer that substantive Islamic law—when read properly after taking into account the differences in social and political contexts in which those rules were originally developed and applied—continues to provide doctrinal resources that are supportive of a more just and humane world. Part of our task as legal scholars—particularly when faced with irrational campaigns against Islamic law—is to educate the public on those legal resources. Here are some examples:

- 1) Accountability of public officials and the government to the law: In Islamic law, immunity covers only actions of public officials undertaken pursuant to a good-faith interpretation of the law and is limited to the personal liability of the public official. Where a public official causes a loss as a result of a good-faith, but mistaken, conception of the law, even though the public official is excused from personal liability, the public treasury must make whole the injured party. No immunity attaches to actions undertaken in bad faith.⁶⁷ Current U.S. law on “qualified immunity” is anything but “qualified,” and in fact subverts the rule of law by exempting public officials from legal standards whenever there is a colorable claim of legal uncertainty.⁶⁸
- 2) Islamic law of war: The Islamic law of war makes a distinction between international war, the law of *jihād*, and the law of civil conflict, which is governed by the law of *baghy*.⁶⁹ The chief distinction between the two is that in the case of the former, the two parties are not bound by a shared normative conception of justice, and accordingly, each party is not acting unjustly by pursuing its own interests through war.⁷⁰ In the latter, by contrast, parties to the conflict are bound by a common legal

(1988) (Neth.); Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC'Y 201–44 (2001).

67. See, e.g., 2 IZZ AL-DIN ABD AL-AZIZ IBN ABD AL-SALAM AL-SULAMI AL-DIMASHQI, *QAWA'ID AL-AHKAM FI MASALIH AL-ANAM* 132–33 (1999) (explaining different liability rules that apply to public officials when (i) a defendant is mistakenly, but in good faith, put to death, in which the public bears the costs, and (ii) a defendant is put to death in intentional violation of the law, in which case the public official is personally liable).

68. See *supra* note 40 and accompanying text.

69. See, e.g., Mohammad Fadel, *International Law, Regional Developments: Islam*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010) ¶ 19 [hereinafter Fadel, *International Law*], available at www.law.utoronto.ca/documents/Fadel/Max_Planck_Final.pdf.

70. Fadel, *International Law*, *supra* note 69, at ¶ 9.

system, and accordingly, their conflict is a result of a breakdown in the common administration of a system of right, the solution to which is a restoration to the rule of law, not the unilateral will of the stronger party.⁷¹ Unlike international conflicts, therefore, the results of civil conflict can never alter the legal entitlements or legal obligations of the parties to the conflict.

The idea of an international community, which several prominent Muslim jurists in the twentieth century endorsed to justify radical departures from the pre-modern doctrine of *jihād*,⁷² implies a shared legal order among all states in the world, and to that extent, means that all states are subject to a common standard of law, and are estopped from claiming for themselves certain exemptions from international law, whether based in an inordinate share of power, or quasi-messianic claims of serving a divine mission.

- 3) Managing religious-secular conflict: Because Islamic law, historically, was simultaneously a religious law and a secular law, it developed its own approach to managing conflicts between claims of religion and claims of state authority.⁷³ Accordingly, it afforded prima facie legitimacy to the rules of the secular order, even in circumstances where religious beliefs offered different solutions to the same problem, and limited the right of non-compliance to situations where compliance would entail sin.⁷⁴ In such circumstances, a believer was entitled (indeed, was obliged) to refuse compliance with a law that would compel him to sin.⁷⁵ On the other hand, Muslim jurists were very careful to distinguish a right, indeed an obligation, of non-compliance with sinful laws, and the right to resist violently unjust laws. In modern terms, then, we can say that Islamic law endorses a relatively *broad* notion of civil

71. *Id.*

72. *Id.* at ¶¶ 46-48.

73. See Mohammad Fadel, *Back to the Future: The Paradoxical Revival of Aspirations for an Islamic State: Review of The Fall and Rise of the Islamic State by Noah Feldman*, 14 REV. CONST. STUD. 105, 108-13 (2009) [hereinafter Fadel, *Back to the Future*] (giving overview of normative principles of medieval Islamic constitutional law); An-Na'im, *An Islamic Perspective*, *supra* note 1, at 7.

74. Mohammad Fadel, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J. L. & JURISPRUDENCE 5, 58 (noting that Muslims are obliged to comply with commands of the state unless doing so would entail disobedience to God); Fadel, *Back to the Future*, *supra* note 73 at 106.

75. Fadel, *Back to the Future*, *supra* note 73 at 106.

disobedience when issues of moral conflict (but not partisan self-interest) genuinely arise, while it imposes very strict limitations on the legality of armed resistance.⁷⁶

In my opinion, the approach of Muslim jurists to this conflict is more consistent with the rule of law as a moral ideal, and helps clarify the rule of law as a moral ideal from what could be a merely positivist conception of rule by law in which the content of law is untethered from any substantive moral conception or limitation.

V. CONCLUSION

The challenge facing scholars of Islamic law, of course, is separating its underlying structural principles from the detailed historical application of those principles, and then articulating those principles in a manner consistent with a universalist and humanist conception of law, in contrast to Islamic law's historical form when it was first and foremost a law for Muslims. Such a project, by its very nature, is a long-term project, but one that must be done if, as Professor An-Na'im believes, we hope for a system of national and international law that can reasonably be internalized by those subject to it. While I therefore agree with much of the substantive goals expressed by Professor An-Na'im in his paper, I believe that it will be impossible to achieve those goals by adopting the separationist paradigm he seems to advocate.

76. Thus, defiance of even a just law could not constitute rebellion unless it involved the use of weapons and force (*mughālabā*). See, e.g., 4 ABŪ BARAKĀT AḤMAD IBN MUḤAMMAD B. AḤMAD AL-DARDĪR, AL-SHARḤ AL-ŞĀGHĪR 427 (Muşţafā Kamāl Waşf ed., 1979).
