Pepperdine Law Review

Volume 39
Issue 5 *Symposium: The Competing Claims of Law and Religion*

Article 10

1-15-2013

Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective

Abdullahi A. An-Na'im

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Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective

Abdullahi A. An-Naᶜim*

I. INTRODUCTION

Whatever view any of us has about the relationship between law and religion is founded on a certain conception of law in relation to a specific understanding of a particular religion.[1] Whether we accept the possibility of mutual influence, or influence by either normative system on the other, would be premised on our particular expectation of what that influence might be. In other words, our view of this relationship is always based on our knowledge and experience of our own legal and religious normative systems, and not on an abstract conception of law or of religion. This will be the case whether we are supportive or critical of those normative systems. Moreover, some of us may claim or assume that our views of the

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* Charles Howard Chandler Professor of Law, Emory University School of Law; Ph.D. in Law, University of Edinburgh, Scotland, 1976; Diploma. in Criminology, University of Cambridge, England, 1973; LL.B., University of Cambridge, England, 1973; LL.B., University of Khartoum, Sudan, 1970. This Article is a part of Pepperdine University School of Law's February 2012 conference entitled, *The Competing Claims of Law and Religion: Who Should Influence Whom?* Substantial portions of this Article are derived from my earlier works, as noted in each Part.

1. For a similar discussion, see Abdullahi A. An-Naᶜim, *Islam, State and Politics: Separate but Interactive*, (Jan. 29, 2011), http://www.brookings.edu/~/media/Files/events/2007/0217islamic%20world/2007islamforum_an%20naim.pdf [hereinafter An-Naᶜim, *Islam, State and Politics*] (a substantially revised version of Abdullahi A. An-Naᶜim, Shariᶜa *and Positive Legislation: Is an Islamic State Possible or Viable?*, *in* 5 Y.B.. ISLAMIC & MIDDLE E. L. 29 (Eugene Cotran & Chibli Mallat eds., 2000) [hereinafter An-Naᶜim, Shariᶜa *and Positive Legislation*]).

relationship between law and religion are supported by what we think we know about other legal and religious normative systems.

There is no possibility for human comprehension, reflection, and communication about the relationship of law and religion that is not premised on some specific view of law and of religion. However critical we are of law, and whatever belief we hold about religion, that can only be of those institutions as we know and experience them. In other words, it is never about law and religion in the abstract, but always about a specific view of particular legal and religious traditions, as viewed through the inherently limited experience of human beings. Since this cannot be exhaustive or conclusive of all religious and legal traditions, we should accept the possibility of alternative views of the relationship between law and religion in different contexts.

In this light, I propose to argue for the following propositions about the relationship between law and religion. First, we should all be open to re-considering our view of this relationship for different conceptions of law and experiences of religion. Second, we should accept the *possibility* of dynamic change and transformation of any legal system or religious tradition.[2] As clearly indicated by the historical evolution of legal systems and religious traditions, these institutions are always changing, though not always in predictable or predetermined ways. Although one cannot predict or preempt how these institutions will evolve, I am unable to see how one can rationally assert that this or that is the way this legal system or that religion are to be for eternity. Third, and most importantly, locating the human agency of citizens and believers at the core of both law and religion, respectively, indicates possibilities of mutual influence to the ends of upholding individual freedom and social justice for all. When people are free to make and change the law as they wish and practice the religion they choose as they understand it, they are more likely to seek and progressively realize a humane view of law and an enlightened view of religion.

There is of course nothing inevitable about these outcomes, but the question for me is a matter of moral choice and of political action by citizens and believers as human subjects. This Article's task is to explore and clarify what this approach means for law and religion from an Islamic perspective in the historical and present context of Islamic societies. The premise of my argument in this Article is that every law enforcement system should be founded on compliance by the general population as the norm, in order to be able to deal with violations as exceptional. Otherwise, the system will not have the necessary political support, and human and material resources to cope with massive and persistent violations of its norms. The challenge for

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2. *See id.* at 6.

every legal system is to draw on ethical as well as pragmatic or utilitarian bases of large scale and consistent compliance without surrendering its own autonomy and political accountability to the totality of the population. There are many possible sources of support for compliance among the population at large, but religion is certainly one of the strongest historical, as well as contemporary, bases of the motivation for believers to comply with legal norms.

The reality of mutual influence of law and religion is due to the normative overlap between these two normative systems, in that they both seek to regulate human behavior through similar ethical sanctions. For instance, to steal is both a crime and a sin at the same time, but it is not a crime because it is a sin, and it is not a sin because it is a crime. Although they apply to the same human conduct, these are two separate characterizations, based on different rationales and leading to different outcomes. The fact that legal and religious norms may relate to the same human conduct creates the false impression that they are competing, but the different sources, nature, and consequences of the underlying authority of these two domains indicate the opposite. Despite apparent perceptions of competing claims, we should see the complementarity and interdependence of law and religion in that the law needs religious sanction to legitimize the coercive authority of the law, while religion needs the coercive authority of the law to protect peace, social justice, and cohesion among all citizens equally, believers and non-believers alike.

For this view of mutual influence of law and religion to be persuasive for non-believers, complementarity and interdependence can mean neither the permanent exclusion of religious norms from the possibility of legal enforcement nor their legal enforcement simply because they are religious norms. There is a realm of legitimate interaction between legal and religious norms, for instance, when a religious norm indicates social disapproval among believers, thereby raising the demand or expectation for civil authorities to punish the conduct. This is part of the broader interaction of ethnical and cultural norms, social practices, and legal sanction among most human societies. The problem emerges when religious disapproval is the sole basis of legal sanction, like when a sin is automatically deemed to be a crime, without requiring additional reasons to justify the need for legal punishment. Although the distinction between a crime and a sin may vary from one society to another, and for the same society over time, the need for this distinction is clear for all societies. For instance, to lie is a sin, but additional harm or injury must be shown to follow before a lie should be punished as a crime. This Article will explore a theory of law and Islam for

clarifying the *criteria and process* through which a sin may become a crime, without claiming to specify or determine how that should be done in all Islamic societies.

In particular, I am concerned with the relationship between the positive law of the postcolonial state on the one hand, and Shariᶜa as the normative system of Islam on the other. By the term "law" I mean law that is made and enforced by the state, in contrast to Shariᶜa which is the expression of religious norms as understood and practiced by believers. The premise of my argument is that Shariᶜa, by its nature and purpose, can only be freely observed by believers, and its principles lose their religious authority and value when enforced by the state. It is from this fundamentally religious perspective that the state must not be allowed to claim the authority of Islam, regardless of whether or not such claims are made by ruling elites. As I have previously noted in my other work, on the one hand, the functions of the state, including adjudication among competing claims of religious and secular authorities, are secular functions of a political institution that should not be allowed to claim religious authority. Since whatever standards or mechanisms are imposed by the organs of the state to determine official policy and formal legislation will necessarily be based on the human judgment of those who control those institutions, state policy and legislation should not be misrepresented as "religious." This is what I refer to as the separation of Islam and the state. On the other hand, the religious beliefs of Muslims, whether as officials of the state or private citizens, tend to influence their actions and political behavior. I refer to this reality as the connectedness of Islam and politics.[3]

Part of the difficulty is that the apparently dominant discourse about Islamic societies today assumes a simplistic notion that there is something called an Islamic state that is authorized to "enforce" the totality of Shariᶜa.[4] This view tends to lay the burden of proof on those who oppose the claim of an Islamic state, as if this is the historical theological truth. To the best of my knowledge, it is not only that there has never been agreement among Muslim scholars in the past or opinion leaders at present on what constitutes an "Islamic state," but there is no theoretical possibility of that happening in the future. The Qur'an and Sunna (traditions of the Prophet) never mention the term "state" a single time, let alone offer any guidance on defining it.[5] There is, of course, strong emphasis on justice and good governance, but there is no mention of particular models of how that might be achieved. The Qur'an and Sunna speak to believers as human beings, and never address an

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3. *See* ABDULLAHI AHMED AN-NAᶜIM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARIᶜA 4–6 (2008) [hereinafter AN-NAᶜIM, ISLAM AND THE SECULAR STATE].

4. *See* An-Naᶜim, Shariᶜa *and Positive Legislation*, *supra* note 1, at 1.

5. *See generally* QUR'AN (M.A.S. Abdel Haleem trans., Oxford Univ. Press 2004).

institution.[6] When texts of the Qur'an or Sunna refer to a collective entity, they do so in terms of a community of believers, not a "believing community." Muslims were, of course, ruled by states throughout history, and many rulers of those states sought religious legitimization, but they did not claim to establish "an Islamic state."[7] When we consider the two modern states that claimed this for the first time in Muslim history, namely the Islamic Republic of Iran and the Kingdom of Saudi Arabia, we find that the founding doctrine of each state is deemed to be a heresy by the founding doctrine of the other state. There is simply no way of deciding, from an Islamic point of view, whether either of the two (the Twelever's Shia doctrine of Iran or the Wahabi doctrine of Saudi Arabia) is valid, simply because religious truth cannot be determined by political means or majority vote.

Once we step away from such absolute claims of an Islamic mandate for the enforcement of Shariᶜa by the state, we can find ample opportunities for collaboration between Shariᶜa and state law as complementary, rather than competing normative domains.[8] This can be done through normative pluralism in communities within the framework of uniformity of the legal system of the state[9]. Briefly stated, this means that Muslims may live in accordance with their voluntary compliance with Shariᶜa, but also subject to the safeguards of constitutionalism, human rights and equal citizenship for all as enforced by the state. This is not a matter of preference of state law over religious law, but rather is the consequence of the fact that religious law is no longer religious when coercively enforced by the state. In contrast, Shariᶜa retains its religious quality when observed voluntarily with the intent to comply, but this cannot be imposed on others through the coercive authority of the state. Another element of the proposed approach is the possibility of jurisprudential influence of Shariᶜa on state law, provided that it is adopted through the normal lawmaking process and that it is subject to constitutional safeguards.[10] To introduce that possibility, I will first explain the related concepts of Islam, state and politics, and I will try to clarify the

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6. *See id.* at 42:38 ("[R]espond to their Lord and keep up the prayer; conduct their affairs by mutual consultation; give to others out of what We have provided for them.").

7. *See* An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 7.

8. For a discussion of Shariᶜa, see AN-NAᶜIM, ISLAM AND THE SECULAR STATE, *supra* note 3.

9. For further discussion on normative pluralism, see Abdullahi Ahmed An-Naᶜim, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, 25 EMORY INT'L L. REV. 785, 790–91 (2011) [hereinafter An-Naᶜim, *Religious Norms*].

10. *See id.* at 807.

dynamic relationship between Shariᶜa and state law within the framework of the modern concept of self-determination.

II. ISLAM, STATE, AND POLITICS[11]

The proponents of "an Islamic state" tend to cite the Prophet's state in Medina (622–632 AD) as the historical model of the implementation of Shariᶜa in the life of the community; however, that experience was too exceptional to be relevant as a model for the modern state and the present postcolonial world that is defined by global economic and political interdependence and integration. Even at the extremely limited and exceptional context in which the Muslims of Medina lived, the implementation of Shariᶜa in that instance was not done through practices of state legislation and administration that can be applied today. Aside from the extraordinary fact of the actual existence of the Prophet, who continued to receive and explain revelation throughout that time, and his personal charisma and moral leadership, the Medina state was made of closely-knit tribal communities of highly-motivated new converts living within an extremely limited space. That experience was also based more on the moral authority of social conformity than on the coercive power of the state as experienced in other human societies, and it was a unique phenomenon that ended with the Prophet's death.[12] The historical experience and theological frame of reference we are dealing with in examining the relationship between Islam, state and politics is that of the rest of the history of Islamic societies, and not the exceptional experience of the Prophet in Medina.

While the term "Islamic state" may serve as shorthand for referring to states where Muslims constitute a clear majority of the population, the adjective "Islamic" logically applies to a people, rather than to a state as a political institution. The term "Islamic state" is sometimes used to refer to those countries that have officially proclaimed Islam to be the state religion, or where Shariᶜa is a formal source of legislation. This characterization is misleading because such features do not accurately reflect an identifiable and verifiable "Islamic" quality of the state itself as a political institution. Unless one is willing to accept every claim by a state to be Islamic, the question becomes who has the authority to determine the quality of being Islamic and according to which criteria. In terms of the example given earlier, the religious and political establishment of Saudi Arabia is unlikely to accept the claim of the present government of Iran that it is an "Islamic republic," or even accept the notion of an Islamic republic. From the Iranian

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11. Substantial portions of Part II are revised and unrevised excerpts from An-Naᶜim, *Islam, State and Politics*, *supra* note 1, and AN-NAᶜIM, ISLAM AND THE SECULAR STATE, *supra* note 3.

12. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 10–11.

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point of view, the Saudi monarchy is, by definition, un-Islamic and cannot possibly be legitimized by its purported commitment to the enforcement of Shari^{c}a.[13]

The main points I wish to make regarding the relationship among Islam, state, and politics for present Islamic societies can be summarized as follows. First, Islam and the state must be institutionally separate in order to safeguard the possibility of being Muslim out of personal conviction rather than conformity to the coercive will of the state. The enforcement of Shari^{c}a through the coercive power or authority of the state is neither desirable nor possible in the modern context of a territorial nation-state.[14] For instance, the Shari^{c}a system of *dhimmihood*, can be neither applied today to classify the population on the basis of religion, nor legitimately avoided because of its drastic and detailed legal consequences in every aspect of daily life.[15] The alternative view of the separation of Islam and the state would simply avoid the religious mandate claim, without excluding Islamic discourse from the public domain of policy and legislation, as I will briefly explain later. I am calling for separation of Islam and the state, while maintaining the connectedness of Islam and politics, by distinguishing the state from politics by defining the state as the institutional continuity of sovereignty and politics as the government of the day. The distinction, not dichotomy, is between the institutions of the state, like the Department of State, Justice Department, on the one hand, and Secretary of State, and Attorney General as members of the government of the day, on the other hand. Succeeding governments with differing political mandates use the same institutions of the state to discharge their respective mandates without violating the autonomy and integrity of the institutions of the state, thereby enabling the next government to use the same departments to discharge its political mandate.

The state is a complex web of organs, institutions, and processes that are supposed to implement the policies that are adopted through the political process of each society. It signifies the continuity of institutions like the judiciary and administrative agencies, as distinguished from the government

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13. *Id*. at 17.
14. *Id*. at 1.
15. Abdullahi Ahmed An-Na^{c}im, *Beyond Dhimmihood: Citizenship and Human Rights*, *in* 6 THE NEW CAMBRIDGE HISTORY OF ISLAM: MUSLIMS AND MODERNITY, CULTURE AND SOCIETY SINCE 1800, at 314 (Robert W. Hefner ed., 2010).

or regime of the day, which is the product of current politics.[16] The state should therefore be the more settled and deliberately operational side of self-governance, while politics is the dynamic process of making choices among competing policy options. To fulfill that and other functions, the state must have what is known as a monopoly on the legitimate use of force, which is the ability to impose its will on the population at large. This coercive power of the state, which is now more extensive and effective than ever before in human history, will be counterproductive when exercised in an arbitrary manner or for corrupt or illegitimate ends. That is why it is critically important to keep the state as neutral as humanly possible, which requires constant vigilance by the generality of citizens, acting through a wide variety of political, legal, and other strategies and mechanisms.[17]

The distinction between the state and politics assumes constant interaction among the organs and institutions of the state on the one hand, and organized political and social actors, and their competing visions of the public good on the other. This distinction is also premised on an acute awareness of the risks of abuse or corruption that necessarily come with the coercive powers of the state. The state should not be a complete reflection of daily politics because it must be able to mediate and adjudicate among the competing visions and policy proposals, which require it to remain relatively independent from different political forces in society. But complete independence is not possible because of the political nature of the state, which cannot be totally autonomous from those political actors who control it. This reality makes it necessary to strive for a degree of separation of the state from politics, so that those excluded by the political processes of the day can still resort to state organs and institutions for protection against the excesses and abuses of power by state officials.[18]

This necessary balancing of competing claims and tense relationships can be mediated through principles and mechanisms of constitutionalism, rule of law, and the protection of the equal human rights of all citizens. But these principles and institutions cannot succeed without the active and determined participation of at least significant majority of citizens, which is unlikely if people believe them to be inconsistent with those religious beliefs

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16. GRAEME GILL, THE NATURE AND DEVELOPMENT OF THE MODERN STATE 2–3 (2003); GIANFRANCO POGGI, THE STATE: ITS NATURE, DEVELOPMENT AND PROSPECTS 19–33 (Stanford Univ. Press 1990).

17. GILL, *supra* note 16, at 17–20; *see also* An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 2–3.

18. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 2; *see also* Lloyd Hitoshi Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 539–40 (2008) ("[For example], [t]he benefits [of interest groups] include supplying valuable information and advice for government actions and thus increasing the transparency of government, and creating a mechanism through which citizens can both participate in politics generally and influence specific government actions, all of which supports our representative form of government.").

and cultural norms that influence their political behavior. For example, the principles of popular sovereignty and democratic governance presuppose that citizens are sufficiently motivated and determined to participate in all aspects of self-governance, including participation in organized political action to hold their government accountable and responsive to their wishes. This motivation and determination is partly influenced by the religious beliefs and cultural conditioning of citizens. In other words, it is necessary for believers to find some religious justification of constitutionalism and human rights as the necessary framework for regulating the public role of religion.[19]

As I see it, the challenge facing Islamic societies today is how to separate Islam and the state despite the connectedness of Islam and politics. My objective is to affirm and support the institutional separation of Islam and the state as necessary for Shariᶜa to have its proper positive and enlightening role in the lives of Muslims and Islamic societies. This view can also be called "the religious neutrality of the state," whereby state institutions neither favor nor disfavor any religious doctrine or principle. Such neutrality is necessary for ensuring and protecting the freedom of individuals in their communities to adopt, object to or modify any view of religious doctrine or principles. I am therefore emphasizing the separation of Islam and the state in order to realize the purpose of Shariᶜa, rather than to negate its central role in the lives of Muslims.[20]

The context of the constant negotiation of the relationships among Islam, state, and politics in present Islamic societies is shaped by profound transformations in the political, social, and economic structures and institutions under which all Muslims live in community with other believers and nonbelievers today. This context is also shaped by the internal political and social conditions of each society, including the internalization of externally inspired changes, whereby Islamic societies have continued to follow Western forms of state formation, education, social organization, and economic, legal, and administrative arrangements even after achieving political independence. All present Islamic societies not only live within territorial states that are significantly integrated into global systems of economic, political, and security interdependence and cross-cultural influence, but have voluntarily continued to participate in these processes long after they have achieved political independence from European

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19. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 2–3.
20. *Id*. at 3.

colonialism. These realities require the corresponding safeguards of constitutionalism and human rights protection.

Contrary to the claims of its proponents, a so-called Islamic state to enforce Shariᶜa as positive legislation undermines the possibility of an Islamic way of life, not its realization, because it will have to be based on a particular view of Islam that is not accepted by some Muslims who are subject to the jurisdiction of the state. In other words, the repudiation of the dangerous illusion of an Islamic state to coercively enforce Shariᶜa principles is necessary for the practical ability of Muslims and other citizens to live in accordance with their religious and other beliefs. Ironically, the notion of an Islamic state that is asserted in the name of self-determination is a postcolonial idea that is premised on a European model of the state and a totalitarian view of law and public policy as instruments of social engineering by ruling elites. Although the states that have historically ruled over Muslims did seek political legitimacy in a variety of ways, including through religion, they did not claim to be Islamic states.

The proponents of a so-called Islamic state in the modern context seek to use the powers and institutions of the state, as constituted by European colonialism and continued after independence, to coercively regulate individual behavior and social relations in the specific ways selected by ruling elites. It is particularly dangerous to attempt to implement such totalitarian models in the name of Islam because that would make it far more difficult to resist than when that is done by a secular state that does not claim religious legitimacy. At the same time, the separation of religion and the state is not easy because the state will necessarily have to regulate the role of religion in order to maintain its own religious neutrality, which is necessary for the role of the state as mediator and adjudicator among competing social and political forces, as mentioned above.[21]

In making my argument from an Islamic point of view, I remain convinced that succeeding generations of Muslims have always sought to discover what God had decreed or willed for them to do or be (*hukm Allah*), as they believe that to be the divine guidance for all aspects of their daily life. But I also see that "Islamic jurisprudence is a speculative essay to comprehend the precise terms of Allah's law."[22] It is reasonable to assume that generations of Muslims through the ages generally earnestly strove to live up to the ideals set by the Prophet and early generations of Muslims as a matter of personal conviction. I am not concerned here with an assessment or evaluation of whether, and to what extent, any generation or group of Muslims have failed or succeeded in either discovering God's decree or will

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21. *Id*. at 3–4.
22. NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 41 (1969).

regarding any matter, or whether and how they have managed to live up to that ideal from a sociological or anthropological point of view. The question I am addressing here is whether it is possible for any state, however constituted and rationalized, to enforce Shariᶜa through positive legislation.[23]

Affirming the religious neutrality of the state does not mean that Islamic principles are irrelevant to law and public policy. Indeed, Muslims can and should propose policy or legislation out of their religious or other beliefs, as all citizens have the right to do so, but must support such proposals in terms of "civic reason," instead of simply asserting them as required by Shariᶜa. By civic reason I mean the need for reasons of policy and legislation to be publicly declared, as well as that the process of reasoning on the matter should be open and accessible to all citizens. In other words, the rationale and purpose of public policy or legislation must be based on the sort of reasoning that the generality of citizens can accept or reject, as well as make counterproposals to through public debate and without reference to religious belief or doctrine. Civic reason and reasoning, and not personal beliefs and motivation, are necessary whether Muslims constitute the majority or minority of the population of the state, because even if Muslims are the predominant majority, they would not agree on what policy and legislation necessarily follow from their Islamic beliefs.[24]

It is unrealistic and unwise to expect people to fully comply with the requirements of civic reason because such choices are made within the realm of inner motivation and intentions. It is difficult to tell why people vote in a particular way or how they justify their political agenda to themselves or to their close associates. But the objective should be to promote and encourage civic reasons and reasoning while diminishing the exclusive influence of personal religious beliefs over time. The requirement of civic reasons and reasoning processes does not assume that people who control the state can be neutral. On the contrary, this requirement must be the basis of the operation of the state precisely because people are likely to continue to act on personal beliefs or justifications. The requirement to publicly and openly present justifications that are based on reasons that the general population can freely accept or reject will, over time, encourage and develop a broader consensus among the population at large, beyond the narrow religious or other beliefs of various individuals and groups. Since the ability to present civic reasons and debate them publicly is already present in most societies, what I am calling for is the deliberate and incremental enhancement and

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23. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 7–8.
24. *Id*. at 8–9.

development of these processes and their underlying culture over time, rather than suggesting that this concept is completely absent now, or that it is expected to be fully realized immediately.[25]

In conclusion of this section, what is at issue is whether Shariᶜa can in fact be enforced as such by the state, as distinguished from voluntary compliance with its dictates by Muslims out of personal religious conviction or choice. The significance of this distinction can be seen in the difference between the formal legal prohibition of paying or taking interest for loans as a matter of economic and social policy, as opposed to refraining from engaging in such practices because they constitute usury (*riba*), which is prohibited for Muslims under Shariᶜa.[26] Another example is the difference between outlawing insurance contracts as too speculative or contingent, in contrast to personal abstention from engaging in these practices because they are not allowed to Muslims as speculative contracts with inherently uncertain outcomes (*qharar*). The point here is to emphasize the difference between enforcing legal principles and rules in accordance with the constitutional standards and legislative process of the country, regardless of their original source, as distinguished from enforcing them because that is required by Shariᶜa as the will of God. In my view, past or current claims or demands to enforce Shariᶜa through legislation by the state are based on a historical fallacy, as that is inconsistent with the nature of Shariᶜa itself and impossible for the state, as constituted today, in any country in the world.[27] In other words, it is neither possible to conceive of this possibility in theoretical terms, nor is it true that such a model existed in the past so that it can be reenacted today. The question then becomes what should the role of Shariᶜa be in a modern-state society in its present global context?[28]

III. SHARIA AND STATE LAW[29]

What came to be known among Muslims as Shariᶜa was in fact the product of a very slow, gradual and spontaneous process of interpretation of the Qur'an, and a collection, verification, and interpretation of Sunna during

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25. *Id.* at 9–10.

26. *See* QUR'AN, *supra* note 5, at 3:130.

27. ABDULLAHI AHMED AN-NAᶜIM, AFRICAN CONSTITUTIONALISM AND THE ROLE OF ISLAM 105 (2006) ("A state that seeks to enforce some general principles of Shariᶜa regarding public affairs and governance would find it extremely difficult to fulfill its essential domestic and international functions in the present increasingly global context.").

28. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 10.

29. Substantial portions of Part III are revised and unrevised excerpts from An-Naᶜim, *Islam, State and Politics*, *supra* note 1, and An-Naᶜim, Shariᶜa *and Positive Legislation*, *supra* note 1.

the first three centuries of Islam (the seventh to the ninth centuries AD).[30] This process took place among scholars and jurists who developed their own methodology for the classification of sources, derivation of specific rules from general principles, and so forth. That technical aspect of their work came to be known as the "science of the foundations" or the "principles of human understanding of divine sources" (*usul al-fiqh*).

As one would expect, there was much disagreement and disputation among those early scholars about the meaning and significance of different aspects of the sources with which they were working. Moreover, although those founding scholars are generally accepted to have been acting independently from the political authorities of the time, their work could not have been in isolation from the prevailing conditions of their communities, in local as well as broader regional contexts. Those factors must have also contributed to disagreements among the jurists and sometimes to differences in the views expressed by the same jurist from one time to another, as is reported of the changes in the view of Imam al-Shaf'i when he moved from Iraq to Egypt. Even after those disagreements eventually evolved into separate schools of thought (*madhahib*), differences of opinion persisted among scholars of the same schools, as well as between different schools.[31]

The significant question to ask here is, how can Shariᶜa principles be divinely predetermined if they can only be discovered through human understanding of the Qur'an and Sunna? "How is it possible for the jurist (*faqih*) to conclude at the end of a very empirical evaluation and research of facts and texts, that his conclusions constitute a transcendental and divine authority?"[32] The obvious answer is that whatever ruling a jurist reaches remains a matter of human judgment and cannot constitute transcendental or divine authority. Jurists or scholars, however highly respected they may be, and even if their views came to be universally accepted by Muslims everywhere (which of course has never happened for any of them), can only present their own views of what God has decreed on any matter.

A distinction is commonly drawn in Islamic discourse between Shariᶜa and fiqh. "Shariᶜa law is the product of legislation (*Shariᶜ*), of which God is the ultimate subject (*shāriᶜ*). Fiqh law consists of legal understanding, of

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30. *See generally* ABDULLAHI AHMED AN-NAᶜIM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 11–33 (1990) [hereinafter AN-NAᶜIM, ISLAMIC REFORMATION]; NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (1964).

31. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 11–12; *see also* AN-NAᶜIM, ISLAMIC REFORMATION, *supra* note 30, at 17–18.

32. Ebrahim Moosa, *Allegory of the Rule (Ḥukm): Law as Simulacrum in Islam?*, 38 HIST. RELIGIONS 1, 21 (1998).

which the human jurist is the subject (*faqīh*)."[33] This distinction can be useful in a technical sense because it indicates that some principles or rules, as compared to others, are more based on speculative thinking than textual support from the Qur'an and Sunna. But this does not mean that those principles that are taken to be Shariᶜa, rather than fiqh, are the direct product of revelation because the Qur'an and Sunna cannot be understood or have any influence on human behavior except through the effort of fallible human beings.[34]

> Although the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God *as humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law—the human fiqh—that must be normative for society.[35]

The founding jurists and scholars of Shariᶜa exercised profound acceptance of diversity of opinion because they were highly aware of and sensitive to the risks of human error. At the same time, they promoted consensus among themselves and their communities in the interest of normative stability by holding that whatever was accepted as valid by consensus (*ijma*) among all jurists (or the wider Muslim community according to some jurists) to be permanently binding on subsequent generations of Muslims.[36] Since the idea of a believer's consent to the ruling is the basis of its binding authority, it is problematic to hold subsequent generations bound by the views of earlier Muslims. Whether the consensus is supposed to be of a group of scholars or of the community at large, why should the view of one generation bind subsequent generations? Whatever solutions one may find for such conceptual and practical difficulties, that answer will itself always be the product of human judgment. In other words, Shariᶜa norms cannot possibly be drawn from the Qur'an and Sunna except through human understanding, which necessarily means both the inevitability of differences of opinion and the possibility of error, whether the matter is decided among scholars or the community in general.[37] It is remarkable that the founding scholars of Islamic jurisprudence would have no difficulty with this idea of the unattainability of certainty because they

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33. BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 120 (1998).
34. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 12–13.
35. WEISS, *supra* note 33, at 116.
36. *Id.* at 120–22.
37. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 13–14.

believed that any human knowledge of Shariᶜa is inherently and permanently suppositional *(zani)*, never certain.[38]

This religious and historical view raises a major objection for the enforcement of Shariᶜa as the law of the state. The basic dilemma here can be explained as follows. On the one hand, there is the paramount importance of a minimum degree of certainty in the determination and enforcement of positive law for any society. The nature and role of positive law in the modern state also requires the interaction of a multitude of actors and complex factors that cannot possibly be contained by an Islamic religious rationale. This is true of Islamic societies today more than ever before because of their growing interdependence with non-Muslim societies throughout the world. On the other hand, a religious rationale is key for the binding force of Shariᶜa norms for Muslims. Precisely because Shariᶜa is supposed to be binding on Muslims out of religious conviction, a believer cannot be religiously bound except by what that believer personally accepts as a valid interpretation of relevant texts of the Qur'an and Sunna. Yet, given the diversity of opinions among Muslim jurists, whatever officials of the state elect to enforce as positive law is bound to be deemed an invalid interpretation of Islamic sources by some of the Muslim citizens of that state.[39]

This dilemma has traditionally been mediated by holding that "each individual Muslim was absolutely free to follow the school [of jurisprudence] of his choice and that any Muslim tribunal was bound to apply the law of the school to which the individual litigant belonged."[40] Accordingly, an individual also had the right to change his or her school of law on a particular issue, and litigants selected and submitted to the jurisdiction of the judge who would adjudicate their disputes.[41] This situation continued until the introduction of Al-Majallah by the Ottoman Empire in the second half of the nineteenth century and more widely through the enactment of family law codes since the 1920s.[42]

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38. AVERROËS, THE DECISIVE TREATISE DETERMINING THE CONNECTION BETWEEN THE LAW AND WISDOM 8–10 (Charles E. Butterworth trans., Brigham Univ. Press 2001).

39. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 13–14;. An-Naᶜim, Shariᶜa *and Positive Legislation*, *supra* note 1, at 34–35.

40. COULSON, *supra* note 22, at 34.

41. KNUT S. VIKØR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 174–80 (2005).

42. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 14.

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The principle underlying the codes [of Islamic family law] is that the political authority has the power, in the interests of uniformity, to choose one rule from among equally authoritative variants and to order the courts of his jurisdiction to apply that rule to the exclusion of all others; and the choice of this rule or that has been made simply on grounds of social desirability, the codes embodying those variants which were deemed most suited to the present standards and circumstances of the community.[43]

The imperatives of certainty and uniformity in national legislation are now stronger than ever before; this is due not only to the growing complexity of the role of the state at the domestic or national level, but also to the global interdependence of all peoples and their states. Despite the many problems of the present national and international systems, the realities of national and global political, economic, security and other relations remain firmly embedded in the existence of sovereign states that have exclusive jurisdiction over their citizens and territories. For Islamic societies, this point has recently been painfully and traumatically emphasized by the eight years of the Iran-Iraq war of the 1980s, the composition of the international alliance of Muslim and non-Muslim countries which forced Iraq out of Kuwait in 1991, as well as by the invasion and occupation of Iraq in 2003. The governments of Muslim-majority countries on both sides of these violent conflicts acted (and continue to act) as independent states rather than as part of a uniform or united global Islamic community or on behalf of the totality of Muslims at large.

The point here is not that the nature of the state is identical for all societies, because the processes of state formation and consolidation vary from one country to another. Rather, my point is that there are certain common characteristics that all states need to have in order to be part of the present international system because membership is conditional upon recognition by other members. For the states ruling over Islamic societies to be and remain accepted as members of the international community, they must comply with a recognizable set of minimum features of statehood in the present sense of the term. In particular, the ability to determine and enforce the law in everyday life is central to the existence of any state, regardless of its philosophical or ideological orientation. Moreover, as explained in the next section, the nature of the state and its present global context preclude the possibility of the application of Shariᶜa as historically

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43. COULSON, *supra* note 22, at 35–36; An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 15.

understood by its founding jurists and still commonly accepted among Muslims.[44]

All the above objections to the enforcement of Shariᶜa through positive law and the notion of an Islamic state do not, of course, preclude Muslims from personally conforming by every aspect of Shariᶜa. The fact that usury and speculative contracts (*riba* and *gharar*) are not illegal in a given country does not mean that Muslims have to engage in these practices. Any person can simply abstain from any form of commercial transaction or personal behavior in accordance with his or her own religious or moral convictions. The arguments I am making here are against enforcement by the state, not to suppress private conformity with the dictates of one's beliefs. Indeed, people may seek to reinforce the religious or moral values through the activities of non-governmental organizations and other agencies of civil society. It is true that legal prohibition will reinforce the authority of religious norms, but the question is how to ensure the freedom for personal religious conformity without violating the rights of others. Human judgment about law and public policy will necessarily have to be made in terms of a cost-benefit balance of legal enforcement of any norm, in contrast to other ways of promoting the social good. In the present limited space, I will focus on the general framework within which any Islamic text, including the Qur'an and Sunna, can influence public policy.[45]

The underlying assumption of claims to enforce Shariᶜa through positive legislation is that Islamic societies and communities have the right and responsibility to organize their public and private lives in accordance with the dictates of Islam. In modern terms, one can say that this is a matter of political and cultural self-determination. But self-determination is not an absolute right because the manner in which one group or entity exercises the right will have consequences or implications for the rights of others. In particular, all the states of Islamic societies are bound by customary international law and humanitarian law, like any other state in the world. They are also bound by all the international treaties they have ratified, such as the Charter of the United Nations, which is binding on all of them as members of that organization. All of these sources set clear and categorical limits on what the states of Islamic societies may or may not do, both within their own borders as well as in their dealings with other states and their citizens. As a practical matter, other states do act on these principles in their

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44. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 15–16; An-Naᶜim, Shariᶜa *and Positive Legislation*, *supra* note 1, at 35–36.
45. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 19.

economic, political, security, and other dealings with the states of Islamic societies. Whether it is the organization and operation of the state in general, the treatment of vulnerable persons and groups who are their own citizens, or the treatment of citizens of other countries, the states of Islamic societies are not free to behave as they please.[46]

In conclusion of this section, I wish to emphasize that whether in its traditional formulation, as known to Muslims today, or through some new or modernist elaboration and articulation, Shariᶜa will always remain a historically conditioned human understanding of the Qur'an and Sunna of the Prophet. While sharing the belief of Muslims that these sources are divine, it is clear to me that their interpretation and expression as Shariᶜa norms will always remain a human endeavor, open to challenge and reformulation through alternative human efforts. In other words, the divine sources of Shariᶜa cannot influence human life and experience except through human agency in the understanding and implementation of those sources in the specific historical context of Islamic societies. As indicated earlier, this does not mean that Islamic societies are not entitled to realize their right to self-determination in terms of an Islamic identity, or that they are incapable of achieving that objective. On the contrary, I believe that they do indeed have that right, and can realize it in practice. For that to happen, however, I am suggesting that Islamic societies must categorically renounce any commitment to a romantic ideal of an Islamic state that never was, and expressly abandon expectations of the enforcement of Shariᶜa as such by the state.[47]

IV. PROMOTING COMPLEMENTARITY THROUGH NORMATIVE PLURALISM AND LEGAL UNIFORMITY[48]

In light of the preceding discussion, I would argue that the nature of Shariᶜa as a religious normative system, on the one hand, and of the state and state law as secular political institutions, on the other, require clear differentiation between the two in theory and separation in practice. However, the methodological and normative similarities between Shariᶜa and state law, and the fact that they both seek to regulate human behavior, raise possibilities of dynamic interaction and cross-fertilization between the two.[49] For instance, interaction through civic reason, as I will discuss further

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46. *Id.* at 19–20; An-Naᶜim, Shariᶜa *and Positive Legislation*, *supra* note 1, at 38–39.

47. An-Naᶜim, *Islam, State and Politics*, *supra* note 1, at 16; An-Naᶜim, Shariᶜa *and Positive Legislation*, *supra* note 1, at 36.

48. Substantial portions of Part IV are revised and unrevised excerpts from Abdullahi Ahmed An-Naᶜim, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 MOD. L. REV. 1 (2010) [hereinafter An-Naiᶜim, *The Compatibility Dialectic*].

49. An-Naᶜim, *Religious Norms*, *supra* note 9, at 800.

below, can legitimize state law among religious believers, and change how Muslims perceive and practice the social aspects of Shariᶜa within the framework of the constitutional and human rights obligations of the state. Since the enforcement of Shariᶜa through state institutions negates its religious nature, the outcome will always be secular, not religious. As I see it, the choice for Muslims regarding legal adjudication and enforcement of rights and obligations is between good or bad secular law—by a good or bad secular state. The choice is never between Shariᶜa and secular law because Shariᶜa as such cannot be enforced as state law. The choice cannot be between an Islamic and a secular state because it is not possible for the state to be "Islamic."[50]

This view does not dispute the *religious* authority of Shariᶜa, which exists only outside the framework of the state. Shariᶜa is always relevant and binding on Muslims, but only as each Muslim believes it to be and not as declared and coercively enforced by the state. For any act to be religiously valid, the individual believer must comply voluntarily with the necessary pious intent (*nya*), and without violating the rights of others. This focus on the individual believer is integral to Islam.[51] Still, principles of Shariᶜa should be relevant to the public discourse, provided the argument is made in terms of what I call "civic reason" and not simply by assertions of what one believes to be the will of God. The process of civic reason also requires conformity with constitutional and human rights standards in the adoption and implementation of public policy and legislation. All citizens must be able to make their own legislative proposal or object to what others are proposing through public and fully inclusive public debate, without having to challenge each other's religious convictions. Moreover, by its nature and rationale, civic reason is not limited to Shariᶜa principles; it can apply to other religious normative systems as well. Civic reason and reasoning, not personal beliefs and motivation, are necessary whether Muslims or members of any other religion or tradition constitute the majority or the minority of the population of the state.[52]

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50. An-Naiᶜim, *The Compatibility Dialectic*, *supra* note 48, at 2.

51. The fundamental principle of individual personal responsibility that can never be abdicated or delegated is one of the recurring themes of the Qur'an. *See* QUR'AN, *supra* note 5, at 6:164, 17:15, 35:18, 39:7, 52:21, 74:38. On individuality as the core value of Islam, see MAHMOUD MOHAMED TAHA, THE SECOND MESSAGE OF ISLAM 62–77 (Abdullahi Ahmed An-Naᶜim trans., 1987).

52. An-Naᶜim, *The Compatibility Dialectic*, *supra* note 48, at 3; *see also* AN-NAᶜIM, ISLAM AND THE SECULAR STATE, *supra* note 3, at 92–101.

The mediation of the dialectic of compatibility and incompatibility suggests that these two types of relationships can exist between Shariᶜa and state law when the two systems apply to the same human subjects, within the same space and time. On the one hand, the premise of my affirmation of the incompatibility of the two systems is that Shariᶜa and state law are *different types of normative systems*, each based on its own sources of authority and legitimacy. This does not mean that state law is superior or more effective in regulating human behavior than Shariᶜa (or any other nonstate system). On the other hand, the possibilities of compatibility can draw on the similarities in methodology and normative content of these two systems. Moreover, Shariᶜa normally requires and sanctions obedience to state law in the interest of public peace and justice, and state law may in turn incorporate some principles of Shariᶜa through civic reason and subject to constitutional safeguards.

Possibilities of compatibility are also supported by the fact that Shariᶜa and state law are complementary normative systems, rather than by requiring either to conform to the nature and role of the other. The proposed mediation of this dialectic is premised on a distinction (not dichotomy) between Shariᶜa and state law to avoid confusing the function, operation, and nature of outcomes when the two systems coexist in the same space and apply to the same human subjects. If state law enforces a principle of Shariᶜa, the outcome is a matter of state law and not Shariᶜa because it does not have the religious significance of compliance with a religious obligation. Conversely, compliance with Shariᶜa cannot be a legal justification for violating state law. For Shariᶜa and state law to be complementary, instead of being in mutually destructive conflict, each system must operate on its own terms and within its field of competence and authority.[53]

I should emphasize that my argument and analysis are intended to apply whether Muslims constitute the predominant majority or a small minority of a state's population. Recalling the above-noted distinction between religious law and state law, I argue that Shariᶜa cannot be enacted into state law and remain religious as such—regardless of the religious affiliation of the population—but it can influence the development and interpretation of state law and contribute to its legitimacy among Muslims. Egyptian jurist Abdul Razeg Al-Sanhouri's massive codification projects for several Arab countries illustrate the potential possibilities of such a synthesis of traditional Shariᶜa jurisprudence and modern state law, whereby Shariᶜa principles are incorporated into modern legal codes as secular state law, rather than Shariᶜa as such.[54]

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53. An-Naᶜim, *The Compatibility Dialectic*, *supra* note 48, at 3–4.

54. *Id.* at 4. *See generally* GUY BECHOR, THE SANHURI CODE, AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932 TO 1949) (2007).

For the proposed mediation to work through the legitimate synthesis of Shariᶜa and state law, proponents of Shariᶜa must abandon claims that Shariᶜa principles can or should be enacted into state law as a matter of religious obligation. Instead, they should advance Shariᶜa as a jurisprudential tradition and cultivate their own ability to persuade other citizens of the utility and expediency of enacting specific principles of Shariᶜa as secular state law. The basic point, however, is that proponents of the enactment of a Shariᶜa norm (like prohibiting charging interest on loans, and not in its religious quality as *riba*) should seek to persuade other citizens by giving reasons that all can debate freely, rather than asserting their own religious conviction or cultural affiliation as categorical justification. This broader jurisprudential dimension does not imply that Shariᶜa as such can be compatible with state law in the sense that the two systems can coexist as competing legal systems of any country. In view of the centralized, bureaucratic, and coercive nature of the modern "territorial" state, the secular legislative organs of the state must have an exclusive monopoly on enacting state law, and secular judicial (and, as appropriate, administrative) organs must also have exclusive authority to interpret and apply that law. At the same time, some Shariᶜa norms can be compatible with state law in substantive terms through the jurisprudential dimension. The existence of strong similarities between Shariᶜa principles of, for instance, contracts, property, and corresponding principles in many modern legal systems should facilitate the incorporation of those principles into state law through civic reason.[55]

To be clear on this point, if individual persons seek religious or any other manner of private mediation of their disputes, there is no legitimate way for the state to prevent it if the parties comply voluntarily with the outcome. By the same token, however, none of the parties of such mediation can resort to state courts for coercive enforcement, as failure to voluntarily comply transforms the nature of the process from voluntary private mediation to coercively enforced law of the state.[56]

The main objective of legal pluralism as an approach is to question the focus of legal systems on the law of the centralized state and to recognize and legitimatize

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55. An-Naᶜim, *The Compatibility Dialectic*, *supra* note 48, at 4–5; *see also* WAEL B. HALLAQ, SHARĪᶜA: THEORY, PRACTICE, TRANSFORMATIONS 239–45, 296–306 (respectively discussing contracts and property) (2009).

56. An-Naᶜim, *Religious Norms*, *supra* note 9, at 794–95.

> [T]he informal counter-rules of the patchwork of minorities, the quasi-laws of dispersed ethnic, religious, and cultural groups, the disciplinary techniques of 'private justice,' the plurality of non-State laws in associations, formal organizations, and informal networks . . . . Plural, informal, local quasi-laws are seen as the "supplement" of the official, formal centralism of the legal order.[57]

The main problem is that legal pluralists fail to account for the distinct characteristics of the state, as distinguished from other normative systems.[58] Clarifying the distinction, not dichotomy or hierarchy, between state law and other "normative systems" may in fact enhance the underlying purpose and rationale of legal pluralism by avoiding its confusion of different types of regimes. In other words, a common problem with scholars of legal pluralism is the failure to have a comprehensive definition of what they mean by "law." Social scientists who argue for the concept of legal pluralism insist that law is found in the ordering of all kinds of social groups and is not limited to official state legal institutions. Yet, legal pluralists are unable to provide a basis by which to determine or delimit what is and what is not law. The problem is not just that there is a variety of legal pluralisms because they adopt different definitions of law, but also that they are unable to distinguish "law" from other forms of normative order. If we call all forms of ordering that are not state law by the term law, "[w]here do we stop speaking of law and find ourselves simply describing social life?"[59]

I agree with this critique of theories that fail to make this distinction, because we need to distinguish between compliance with coercive state law and behavior out of religious belief and practice which must necessarily be a matter of free conviction and voluntary action. It is true that states like Iran and Saudi Arabia claim to enforce Shari°a norms through the coercive power of the state; but, a claim is not necessarily true because it is made by some political elite in one country or another. More importantly, whatever the state enacts and enforces ceases to be religious by the very fact that the state coercively enforces it. Since religious *belief* logically requires the possibility of *disbelief*, religious conviction and practice must be a matter of choice. By affirming that "there is no compulsion in religion" (*la ikraha fi al-din*), verse 2:256 of the Qur'an is not only saying that no person should be compelled to believe, but is in fact asserting that whatever is coerced is not religion at all because of the coercion. It is therefore necessary to

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57. Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1443 (1992).

58. Brian Z Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 391–96 (2008).

59. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 878 (1988); *see also* An-Na°im, *Religious Norms*, *supra* note 9, at 795–96.

distinguish state law, which is by definition coercively enforced, and religious norms, which by definition must be voluntarily observed.

It is not that every rule of law must be immediately coercively enforced, but all legal rules are *ultimately* supported by the threat of coercive enforcement, though that is less likely to happen in successful legal systems. In contrast, the normative quality of Shariᶜa principles is derived from a religious frame of reference and authority outside state institutions, while state law is always the secular political will of the state, and operates in state courts and institutions. Taking an expansive and unrestrained view of the terms "law" and "legal" to include norms that are religiously or culturally binding will in fact be counterproductive for the purpose of the legal pluralism. This does not mean that state law is superior or more effective than other normative systems; but, since the source and authority of state law are different from that of religious normative systems, it is confusing to use the term "law" for both types of normative systems.[60]

As I have previously proposed, state law should be the exclusive legal system coercively enforced by the state, while Shariᶜa principles may be observed voluntarily among communities of believers without being enforced by the state. A question that may be raised here is how to regulate the social practice of Shariᶜa in order to protect the fundamental rights of all citizens equally. If a human rights violation arises through the application of state law, the state has the immediate obligation and ability to prevent its officials from violating a human rights norm. The difficulty is when the violation arises from the actions of nonstate actors in the context of, for instance, a family or community mediation applying the rule that the father must always have automatic custody of children regardless of a better claim by the mother. According to current international human rights law, the state is not responsible for human rights violations committed by nonstate actors, but should exercise due diligence in doing what it can to prevent the violation or hold the violator accountable. As often seen in so-called domestic violence cases, it is difficult to hold the state accountable for its due diligence obligation when the objectionable conduct happens in the privacy of family and community. Still, I would argue that such risks of human rights violations should be addressed through internal reform and transformation of the understanding and practice of religious norms, instead of the coercive intrusion by the state or other external actor.[61]

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60. An-Naᶜim, *Religious Norms*, *supra* note 9, at 796–97.

61. *Id.* at 799. For more on this argument and relevant case studies, see CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA (Abdullahi Ahmed An-Naᶜim ed., 2002).

The tendency in human rights scholarship, as well as among activists, is to assume that a human right is protected simply because there is a law affirming the right, or because a few cases have been "won" against perpetrators. In the case of human rights of women, for instance, there is little consideration of what happens to the women and children who "win" when they return to the privacy of their families and communities. Moreover, in the present postcolonial context in particular, state courts will do more harm to the rights of women and children than good.[62] Most women and children are unlikely to seek or be able to obtain protection from state courts against their own families and communities, and witnesses are unlikely to cooperate with the prosecution in criminal cases. The exceptional few complainants who resort to state protection will be chastised by their families and communities, and may struggle for survival because they are often dependent on their families and communities. The idea of human rights protection itself will probably be discredited as a neocolonial imposition. In the final analysis, I would rather see gradual change in religious norms and social practices that preempt human rights violations than a rhetorical appearance of protection by state courts that is neither accessible to potential victims nor effective or sustainable in the community at large. I believe this position to be more consistent with a commitment to equal human rights than with legal protection that is perceived by the victims themselves to be competing with their fidelity to their families and communities.[63]

To summarize, this Article and my previous works cited herein have advocated for Shariᶜa and state law to be complementary normative systems, instead of being in mutually destructive conflict, each system must operate on its own terms and within its field of competency and authority. As I see it, the proposed compatibility dialectic works as follows. First, the constructive and legitimate relationship of Shariᶜa and state law can be promoted by upholding the true nature and purpose of each system. Shariᶜa remains binding on Muslims from a religious point of view, which can only be fulfilled through voluntary personal compliance that is undermined by futile attempts of coercive enforcement as state law. That religious obligation is fully consistent with—and is indeed facilitated by—the religious neutrality of the state and the integrity of its necessarily secular law. The role of state law in facilitating this dialectic relationship is not only to protect freedom of religion and other human rights for all citizens,

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62. *See generally* HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES (Abdullahi Ahmed An-Naᶜim ed., 2003) (discussing the complex limitations on what state courts can do to protect human rights, especially of vulnerable groups like women and children).

63. An-Naᶜim, *Religious Norms*, *supra* note 9, at 799–800.

Muslims and non-Muslims equally and without discrimination, but also to safeguard the integrity and religious neutrality of the state and state law.[64]

Secondly, the role of Shariᶜa in facilitating the dialectic is to support and sustain over time this dual role of state law. For instance, the successful mediation of this dialectic needs to be sustained by and intended to facilitate internal debate and critical reflection within and among Islamic and other religious communities to promote the legitimacy and efficacy of the process of dialectic mediation as a whole. In particular, internal debate and critical reflection should also promote a shared understanding of freedom of religion, that is consistent with the constitutional and human rights obligations of the state, for all citizens, without distinction or discrimination. This internally legitimate understanding of freedom of religion is necessary for Muslims and other believers to combine a genuine feeling of religious compliance with unqualified commitment to abide by state law.[65]

Lastly, it should remain possible for some norms of Shariᶜa to be enacted into state law provided this is done through civic reason within the framework of constitutionalism, human rights and equal citizenship for all, Muslims and non-Muslims, men and women. While this is imperative for the principle of the legality of state law to be enforced by state courts and other official institutions, it should remain possible for citizens to engage in private consensual mediation of their disputes for exclusively voluntary compliance outside state institutions. Still, the state has the obligation to ensure the voluntariness and fairness of such private arrangements as an integral part of its general obligation to keep the peace and protect the human rights of all citizens.[66]

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64.   An-Naiᶜim, *The Compatibility Dialectic*, *supra* note 48, at 28–29.
65.   *Id*.
66.   *Id*. at 29.

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