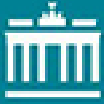

Berliner Wissenschafts-Verlag

Islam, Sharia and Democratic Transformation in the Arab World

Author(s): Abdullahi Ahmed An-Nacim

Source: *Die Friedens-Warte*, 2012, Vol. 87, No. 1, Aufstand und Revolution im Arabischen Raum — Friedenswissenschaftliche Perspektiven (2012), pp. 27-41

Published by: Berliner Wissenschafts-Verlag

Stable URL: https://www.jstor.org/stable/23773953

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

Berliner Wissenschafts-Verlag is collaborating with JSTOR to digitize, preserve and extend access to *Die Friedens-Warte*

JSTOR

This content downloaded from 35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

Islam, Sharia and Democratic Transformation in the Arab World

Abdullahi Ahmed An-Naᶜim,
Emory University School of Law

Rebellions may mature into revolutions over time, in the lives of communities on the ground where native actors have been inspired to action by indigenous concerns. In the context of the modern state, sustainable and legitimate constitutions emerge from "national settlements" reached among native political forces and succeed to the extent they can mediate between domestic conflicts and tensions in political and social relations without attempting to impose preconceived rigid so-called "solutions." By constitution I mean constitutive norms of a political community, whether written or not, which may not have developed yet into a comprehensive normative system. For our purposes here in particular, to the extent that religion is integral to such conflicts, it must also be included in the process of constitutional mediation. This process of conflict mediation according to national settlements is organic to the history and context of each society and must take its own course. There are no short-cuts and no guarantees against setbacks and regression. In each rebellion/revolution, the people themselves must struggle to develop national settlements and pursue constitutional mediations.

External actors can support liberation struggles, but should not attempt to displace or impose on the independent agency of native actors. It is also important to emphasize the need for a patient, long-term view of the transformative processes we seek to achieve through rebellions/revolutions because the outcomes of such processes are contested and contingent, tentative and open to regression. As can be seen in the history of major transformative developments, like the American and French Revolutions, we could only evaluate their outcomes in retrospect. Yet we need try to understand the interaction of actors and factors in current situations like those unfolding across the Arab world in order to decide, depending on who we are and where are located, what to do and how to do it.

Finally on the scope and title, by "democratic transformation" I mean profound and sustainable structural democratization of political, social and economic relations, beyond the necessary but insufficient processes of democratic representation and governance. More specifically, I am concerned with the protection of human rights as both the end and means of democratic trans-

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

formation, though it will not be possible to discuss here many factors that are relevant to these processes. From this perspective, I see the significance of the 2011 rebellions across the Arab world as not only in the prospects for sustainable political, economic, and social transformations, but also in the possibility of transcending the post-colonial predicament of intellectual and political dependency.

There are many aspects to these processes anywhere in the world, but I am particularly concerned here with the role of Islam in the democratic transformation of the Arab world. As I have argued elsewhere[1] the role of Islam in such situations is contingent on various factors, including the human agency of believers and their moral choices, rather than being a conclusive pre-determined outcome, mandated by theological or historical imperatives. I mention the term Sharia in addition to Islam in the title of this article to emphasize that there is more to Islam than Sharia. According to Gordon Newby,

> The term [Sharia] refers to God's law in its divine and revealed sense. This is related to FIQH, which is the human process of understanding and implementing the law. Commentators have argued that the aggregate of all sources by which we know God's law is but a small part of *shari^cah,* which, like God, is unknowable and must be accepted. When the word is used as synonymous with fiqh, it refers to the entirety of Sharia, often in its actual, historical, and potential sense. Following the original meaning of the Arabic word, it is said to be the source from which all properly Islamic behavior derives[2].

Since the essence of the Quran, the divine source of Sharia, is with God beyond human comprehension[3], whatever human beings can understand of the Quran is fiqh (literally understanding). However, I use the term Sharia because it is commonly used in current Islamic discourse, and when writing in English I prefer Sharia over "Islamic law" to avoid confusing religious norms with positive state law. Moreover, I see the combination of infinite spiritual depth of Islam beyond Sharia with the diversity and evolving nature of Sharia as human interpretation and practice of divine guidance as indicating the possibility of Islamic principles influencing the development of national policies and legislation, without violating the principles of constitutional democratic governance or violating human rights norms. The question as I see is about the parameters of the legitimate and realistic prospects of this possibility in relation to what I call Islamist politics.

1 Cp. An-Na^cim (2006).

2 Newby (2002), p. 193-94.

3 Cp. Quran 43: verses 3 and 4.

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

By "Islamist politics" I am referring to political actors, whether organized as political parties or not, who are pursuing an agenda that they believe is mandated or required by their understanding and practice of Islam in general or Sharia in particular. Although local actors have the primary role in every transformative process, external actors, especially Western powers and civil society organizations, have contributed to unfolding events and seek to influence the local and regional outcomes of the Arab 2011 rebellions. Western powers and civil society organizations are very keen on averting the risk of "Islamists" coming to power in Egypt and other countries in the region, even at the cost of openly supporting oppressive regimes.

As a Sudanese who has closely followed and suffered from the systematic destruction of my home country as result of the ideological confusion and devious agenda of Islamist political forces, I have no illusions about the tragic costs of their rise to power. However, it is precisely because I understand the seriousness of this danger that I believe it must be confronted and defeated through the democratic process, rather than by suppression and exclusion of Islamists from the normal politics of the country. At the same time, unqualified commitment to constitutional democratic governance is the pre-requisite condition for political participation by any citizen or group of citizens. Islamists should be able to participate in the politics of their own country, like all other citizens, while being held accountable for upholding the constitutional democratic system and the protection of equal human rights for all. Islamists should not be permitted to advocate discrimination against women and non-Muslims and violate fundamental freedoms of belief and speech simply because such policies are unconstitutional.

This outcome is unavoidable if one is calling for the enforcement of traditional interpretations of Sharia by the state[4]. Discrimination against women and non-Muslims are so structural to the methodology and general principles of that normative system that they cannot be avoided without repudiating the integrity of the system itself. Yet, this would be totally inconsistent with the alleged religious justification of the policy. That is, one cannot claim to be implementing the will of God, while being selective about which principles to apply or withhold without justification for such selectively from a Sharia point of view. Moreover, when Sharia principles are enacted as state law, they become the secular political will of the state, and not the religious law of Islam. Such contradictions, however, can be avoided by acknowledging the inherently secular nature of the state and its legislation[5]. Once that proposition is accepted, as

[4] Cp. Taha (1987); An-Naᶜim (1990).

[5] Cp. An-Naᶜim (2008).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

I will show in the next section, it would be possible for political parties to call for policy and legislative proposition that are informed by Islamic ethical and jurisprudential principles without being implicated in violations of the constitution and legal system of the state.

As a matter of current political practice, there are no significant demands for the enforcement of Sharia by the state in more than thirty out of forty Muslim-majority countries. From Senegal and the Gambia in West Africa and from Indonesia and Malaysia in Southeast Asia to the Central Asian Republics, the state and its legal system are secular. However, to the extent they exist, such demands are most strongly voiced in the Arab world. Moreover, Sharia is assumed to be the family law in almost all Muslim-majority states, which is also a major source of violation of the human rights of women[6]. To confront the serious negative constitutional, political and social costs of rising demands for the enforcement of Sharia in the Arab world, and to begin rolling back those negative consequences in the family law field as well, as I will argue in the last section of this chapter, it is necessary to understanding the nature and popular appeal of these claims.

Whatever their particular organizational form may be, any Islamist group is simply another political force, and never a religious mandate. Their political appeal lies in their ability to present themselves as the "true voice" of their communities, the "authentic" expression of their people's right to self-determination, and the only effective alternative to corrupt and oppressive regimes. These groups are also able to draw on romantic and simplistic representations of Islamic history as a panacea to the social, political and economic problems of present Muslim-majority states. When they operate under oppressive conditions, Islamists can continue to speak in emotional, vague terms about their status as the "obvious and natural" alternative to oppressive regimes, without having to explain their political platform and action plan. Conversely, the most effective way of dealing with the risk of their coming to power in the Arab world is to allow them to operate legally and openly, in free and fair competition with all other political forces in the country.

I am therefore strongly urging that all political forces in the Arab region (or elsewhere in the Muslim world) should engage Islamists in open contestation like any other political force in the country. It is true that there is always the risk that some political force may use the democratic process to gain power and then change the rules of the game. As experience has shown, however, that risk has materialized with fascist and Marxist in Europe in the first half of the twentieth century, as well as Arab nationalists in Egypt, Iraq and Syria

[6] Cp. An-Na^c^im (2002b).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

in the second half of the century. The legitimate and viable response to such risks from Islamists in the Arab world, as it has been with other political forces everywhere, is constant vigilance and accountability, rather than by denying citizens their constitutional rights to political participation before they commit any violation of the democratic process. As citizens of these Arab countries, Islamists are entitled to the same rights and are subject to the same obligations as their compatriots. They should neither be deprived of their human rights simply because some of us fear that they may someday overthrow the democratic order, nor should they be allowed to undermine the constitutional and democratic nature of the state. To contribute to such political contestation, I will now outline some arguments about the nature of Sharia and how it relates to the modern legal systems of Muslim-majority countries.

Sharia and the State in the Post-colonial Context

What came to be known among Muslims as Sharia was the product of a very slow, gradual and spontaneous process of interpretation of the Quran, and collection, verification, and interpretation of Sunna (traditions of the Prophet) from the seventh to the ninth centuries[7]. That process took place among scholars who developed their own methodology (*usul al-fiqh*) for the classification of sources, derivation of specific rules from general principles and so forth. It is beyond any dispute that the framework and main principles of Sharia were developed as an ideal normative system by scholars who were clearly independent of the state and its institutions[8]. It is also clear that the principle of consensus (*ijma*) acted as a unifying force in the development of Sharia during the ninth century, thereby drastically diminishing the role of creative juridical thinking (*ijtihad*) from the tenth century on. While some creative juridical thinking must have continued in response to changing circumstances of local communities, there was little change in the basic *structure and methodology* of Sharia for a thousand years. Moreover, recent calls for fresh juridical thinking still do not seek to change the basic principles of the methodology and parameters of *usul al-fiqh* as established by the tenth century[9].

The term Sharia is often used as if it were synonymous with Islam itself, to signify the totality of Muslim obligations in the private, personal religious sense, and in relation to social, political, and legal norms and institutions. This could be misleading in implying an immutable and final code. It may be helpful

7 Cp. Coulson (1964); Schacht (1964).

8 Cp. Kamali (2008).

9 Cp. An-Naᶜim (1990).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

to distinguish between the *concept* of Sharia, as the infinite path or approach to God, from any particular interpretation of the *content* of Sharia, which comes through a specific human methodology of the interpretation of the Quran and Sunna in a particular *context* of time and place. While the concept of Sharia may be closer to its divine origin for believers, the human interpretation of its content in the concrete context of each community of believers is clearly secular – in the sense of worldly – process and outcome. Moreover, Sharia in any meaning is only the door or path into being Muslim and does not exhaust the possibilities of experiencing Islam.

In other words, striving to know and observe Sharia has always been the product of the human agency of believers because it is a system of meaning that is constructed out of human experience and reflection. "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"[10]. The historical understanding and practice of Sharia has been a process that evolved over time into a more systematic development according to one established methodology or another, both of which are bound to be the product of human experience and judgment, and not divine as such. As consensus on the methodology and content of the concept of Sharia evolved over time, it became more difficult to change those human interpretations of the normative system of Islam among believers. It is also clear, however, that the state had no role whatsoever in the interpretation of Sharia or determination of which normative principles apply to the determination of a case[11].

Another question to consider is the impact of the drastic transformation of the state into "nation states" with their European-inspired legal systems on the role of Sharia in the modern context. As a deeply contextual process, this transition worked very differently for various regions. In the Ottoman Empire of Eastern Europe, the Middle East and North Africa, the transformation was an internal process driven by the desire of Ottoman elites to incorporate European models of state administration and legal systems. In the Indian subcontinent, however, the transformation was achieved under direct British colonial rule. Another dimension of the transition relates to developments since independence, with the challenges of political stability, economic development and cycles of authoritarian and democratic regimes.

---

[10] Cp. Weiss (1998), p. 116; emphasis in original.

[11] Cp. Vikor (2005), p. 174–180.

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

The most significant transformation of Islamic societies for our purposes here relates to the nature of the state itself in its local and global context. The establishment of European model nation-states for all Islamic societies, as part of a global system based on the same model, has radically transformed political, economic and social relations throughout the region. By retaining this specific form of political and social organization after independence from colonial rule, Islamic societies have freely chosen to be bound by a minimum set of national and international obligations of membership in a world community of nation-states. This includes certain human rights norms under customary international law, like the prohibition of torture, as well as under treaties. While there are clear differences in the level of their social development and political stability, all Islamic societies today live under national constitutional regimes (even where there is no written constitution) and legal systems that require respect for certain minimum rights of equality and non-discrimination for all their citizens. Even where national constitutions and legal systems fail to acknowledge and effectively provide for these obligations, a minimum degree of practical compliance is ensured by the political, economic, security, legal and other unavoidable realities of international relations[12]. Being founded on and openly acknowledging these obligations, Muslim-majority states are legally bound by and politically accountable for these commitments.

The Irrelevance and Relevance of Sharia to Human Rights

In light of the preceding thesis and analysis, my view of the relevance of Sharia to the human rights obligations of the state can be summarized as follows:

1. According to current international law, *legal* human rights obligations can only be assumed by the state, but human rights doctrine and practice can draw on a wide variety of strategies and resources beyond the legal obligation of the state.
2. Whatever Muslims understand and accept Sharia to be as the normative system of Islam is irrelevant to the state's obligation to respect and protect human rights norms, even if Muslims constitute the totality of the population. Any principle that is enforced by the state can overlap in normative content with a Sharia principle, but cannot be the Sharia principle as a religious norm when it is state law. The religious quality of a norm is different from its legal quality under state law, even when it relates to the same conduct like theft of other people's property. The religious quality relates to a sin

[12] Cp. Hallaq (2009).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

and the state law quality to a crime. Accordingly, Sharia principles cannot be part of the legal system of the state as Sharia.

3. Muslims' perceptions of Sharia are relevant to the legitimacy and practical efficacy of the protection and implementation of human rights in Islamic societies and communities. Sharia norms may also influence the content of secular state law, as ethical and cultural norms and institutions of the community, through the process of civic reason.
4. The distinction between the lack of legal force and reality of political and cultural influence of Sharia is helpful for two reasons. First, the two types of relationships require different strategies of response by human rights advocates. Second, it is probably easier to contest the meaning and practice of cultural norms than to confront the legal order of the state, especially when it claims the religious sanctity of Sharia.

My general argument here is that the nature of Sharia as a religious normative system in contrast to state law as a secular political institution requires clear differentiation between the two in theory and separation in practice. It is true that the methodological and normative similarities between Sharia 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. For such possibilities to materialize, however, we must first emphasize that Sharia cannot be enforced as state law and remain Sharia in the sense that Muslims believe it to be religiously binding. Since the enforcement of Sharia through state institutions negates its religious nature, the outcome will always be secular, not religious[13]. The state can be good or bad, democratic or despotic, but it is always secular and never religious.

The distinction I am proposing is also premised on the nature of the modern state as a centralized, bureaucratic, coercive political institution, which Islamic societies have inherited from European colonialism and have chosen to keep long after independence. This does not mean that all states are identical or that they are working well everywhere, as each operates within its own historical, political and economic context. The point to emphasize here is that the states of Islamic societies are not peculiarly Islamic or exceptional, as can be seen in the wide variety of states and their development throughout the Muslim world. In fact, the states of Islamic societies have more to do with colonial experiences and current conditions in different parts of the world than with the religious affiliation of their populations. For instance, states with predominantly Muslim populations in West Africa, like Senegal and Mali, have more in common with other states in that region than with the state in Saudi Arabia, Iran or Pakistan.

[13] Cp. An-Na^cim (2008), p. 30–36.

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

In all these states, society may be "Islamic" in its own organic ways, while the state is secular in its own historically contextual ways.

What I am proposing does not dispute the *religious* authority of Sharia in society, but it does emphasize that that type of authority necessarily operates outside the framework of state institutions because they are simply incapable of having or exercising religious authority. Sharia is always relevant and binding on Muslims as they understand and practice it themselves[14], but not as declared and coercively enforced by the state. At the same time, principles of Sharia can be relevant to public discourse, provided the argument is made in terms of civic reason and not simply by assertions of what one believes to be the will of God. By civic reason I mean that the rationale and purpose of public policy or legislation is based on the sort of reasoning that the generality of citizens can accept or reject, without reference to any religious mandate. For example, theft is a sin for Muslims and a crime under the penal code of the states they live in, but it is not a crime because it is a sin. The process of civic reason also requires conformity with constitutional and human rights standards. Civic reason and reasoning, and not personal beliefs or religious obligation, are the necessary basis and framework for the adoption and implementation of public policy and legislation whether Muslims constitute the majority or the minority of the population of the state[15].

I am therefore arguing for two types of relationships between Sharia and state law when the two systems apply to the same human subjects within the same space and time. On the one hand, Sharia and state law are *different types of normative systems*, each based on its own sources of authority and legitimacy. This differentiation does not imply that either system is superior or more effective in regulating human behavior than the other. On the other hand, the possibilities of compatibility can draw on the similarities in methodology and normative content of these two systems. Sharia 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 Sharia through civic reason subject to constitutional safeguards against discrimination on grounds of sex or religion.

In this way, I see Sharia and state law as complementary normative systems, without requiring either to conform to the nature and role of the other. The mediation of the relationship of the two systems is premised on a distinction (not dichotomy) between Sharia and state law to avoid confusing the function, operation and nature of outcomes when the two systems co-exist in the same

[14] Cp. The Quran 6:164; 17:15; 35:18; 39:7; 52:21; and 74:38.

[15] Cp. An-Naᶜim (2008), p. 92–101.

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

space and apply to the same human subjects. If state law enforces a principle of Sharia, the outcome is a matter of state law and not Sharia; it does not have the religious significance of compliance with a religious obligation. Conversely, compliance with Sharia cannot be legal justification for violating state law. For Sharia 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. The proposed mediation can work through the legitimate synthesis of Sharia and state law, whereby Sharia is seen as a jurisprudential tradition that Muslims can draw upon in formulating policy proposals, without asserting their religious conviction or cultural affiliation as the justification of those proposals.

This broader jurisprudential dimension does not imply that Sharia and state law can operate together as competing legal systems of any state. In view of the centralized, bureaucratic and coercive nature of the modern 'territorial' state, the secular legislative organs of the state must have 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, principles of Sharia can be compatible with state law in substantive terms through the jurisprudential dimension[16]. The existence of strong similarities between Sharia principles of, for instance, contracts and property and corresponding principles in many modern legal systems should facilitate the incorporation of those principles into state law through what I call civic reason. For instance, the massive codification projects of Al-Sanhouri, the Egyptian jurist, for several Arab states in the mid-twentieth century (1940s–1960s), illustrate the possibilities of such a synthesis of traditional Sharia jurisprudence and modern state law, whereby Sharia principles are 'incorporated' into modern legal codes as secular state law, rather than Sharia as such[17].

Multiple Strategies for Protection of Human Rights

In the preceding section, I have emphasized that Sharia principles as such cannot be state law, although they may influence the content of secular state law through civic reason in the democratic process and may be subject to constitutional safeguards. The reason I am emphasizing this point is that it is particularly difficult for human rights advocates to resist the combined power of the coercive force of state law and religious authority of Sharia. When the state is neutral regarding religious doctrine and its legal consequences, the issue

[16] Cp. Hallaq (2009), p. 296–306.

[17] Cp. Bechor (2007).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

becomes a matter of public debate in civil society rather than defying the law of God and the state. It is extremely difficult to resist religious and social pressure in the community when calling for reform of some problematic aspects of historical interpretations of Sharia, but that is a different type of struggle than confronting the coercive authority of the state. The protection and promotion of human rights requires effective strategies for both types of struggle, but I believe it is helpful to distinguish the two in order to develop and deploy the appropriate strategy for each type.

I will now try to illustrate how this multiple strategies approach might work in the promotion and protection of the human rights of women in Muslim-majority states, especially those expecting good prospects of democratic transformation, like Tunisia. Although I have argued elsewhere that family law in Muslim-majority countries is not Islamic as it is commonly described because Sharia cannot be the law of the state[18], I will take some of its principles to illustrate my argument. The reason for this focus is that this aspect of state law is a major source of violation of the human rights of women, even in states which do not attempt to enforce Sharia in any other field. Yet, so-called Islamic family law (*Shariᶜat al-ahwal al-shakhsiyah*) is hardly ever resisted in its basic principles that are clearly discriminatory against women, like the exclusive right of the husband to unilaterally repudiate his wife (*talaq*). Whatever "reform" is achieved, it tends to focus on some procedural formalities, like registration with a state court or official, but never by challenging the principle itself[19].

Traditional interpretation of Sharia enforced as current state family law, usually by statutory legislation, is premised on the notion of male guardianship over women *(qawama)* and is consequently characterized by many features of inequality between men and women in marriage, divorce and related matters. For example, as a general rule, a man may take up to four wives and divorce any of them at will without having to show cause or account to any judicial or other authority for his decision. In contrast, a woman can only be married to one man at a time and is not entitled to obtain a divorce except through a judicial ruling on a few specific grounds. Although there are some differences between and within the major schools of Islamic jurisprudence, as applied by the judicial systems of various states, the above-mentioned premise and characterization is true of where Sharia family law is enforced today.

The notion of male guardianship has serious implications for the marriage relationship as a whole and for the economic and social rights of married women. According to most scholars, a husband is entitled to the obedience of his wife

[18] Cp. An-Naᶜim (2002b).

[19] Cp. An-Naᶜim (2002a).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

and can prevent her from taking employment outside the home if he wishes. A wife who is disobedient to her husband is not entitled to maintenance. In some jurisdictions, a wife who leaves the matrimonial home can be physically forced to return through the execution of a judicial obedience decree. Moreover, these and other features of traditional Sharia have serious political and social consequences for women by limiting or inhibiting their freedom to engage in activities outside the home. These aspects of Sharia also reinforce and sanction the socialization of women from early childhood into submission and dependency on their fathers, brothers, husbands, and sometimes even their sons.

Most Muslim-majority states are parties to international treaties which provide for a wide range of human rights that are violated by Sharia family law applied by the official courts of the same states. It is therefore clear that these states are bound to change such aspects of their law in accordance with their obligations under international human rights law[20]. The question is how to achieve and sustain such change in practice. Here are three necessary strategies I propose:

First, as already emphasized, is to separate the legal authority of the state from the religious authority of Sharia. This would enable Muslim human rights advocates to seek *legal* reform without having to confront Sharia as such.

Second, to effectively pursue legal reform, these advocates should engage in various strategies of political mobilization needed for any legal reform, as well as specific strategies for the educational and economic empowerment of women to enable them to claim and exercise their own human rights in general.

Third, and most importantly for the subject of this article, is the development and propagation of what I call an Islamic hermeneutics for human rights[21]. The question here is what to do about the non-legal power of the religious belief that seems to support discrimination against women in the family law field. In other words, how can the state be expected to have the political will to challenge the religious beliefs of its citizens in upholding equality for women in family law matters?

To my knowledge, the best methodology for addressing this particularly important and relevant strategy for the protection of the human rights of women in the family law field is that of the Sudanese Muslim reformer, *Ustadh* Mahmoud Mohamed Taha[22]. The theoretical framework within which this approach can best be understood, in my view, can be summarized as follows: Whether through the selection and interpretation of the relevant texts of the Quran and

[20] Cp. An-Na^c^im (1994).

[21] Cp. An-Na^c^im (1995).

[22] Cp. Taha (1987).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

Sunna, or through the application of other methodological techniques of Islamic jurisprudence (*usul al-fiqh*), the founding scholars of Sharia constructed what they believed to be an appropriate normative system for their communities in very local terms. However, those scholars were clearly and explicitly aware that they were not constructing "divine and eternal" Sharia, as many Muslims seem to believe today. In fact, the most authoritative scholars expressed their views as individual views and strongly opposed attempts by state officials to codify or enforce those views as the only valid version of Sharia. It is therefore possible and appropriate by both the doctrine and ethos of early Muslim scholars for modern Muslim scholars to construct an Islamic normative system that is appropriate for the present context of Islamic societies.

Against this theoretical backdrop, the proposed approach argues that in constructing traditional interpretations of Sharia, the early Muslim scholars emphasized certain texts of the Quran and Sunna as relevant and applicable to the issue at hand and de-emphasized or excluded others. This process was taken by the majority of succeeding generations of scholars to mean that the de-emphasized texts were repealed or abrogated for normative purposes, though they remain part of the tradition in other respects. The methodology (*usul al-fiqh*) employed by the early scholars in constructing their visions of Sharia were entrenched by subsequent generations of Muslims as the only valid way of deriving principles and rules of Sharia. Given the fact that both aspects of this process were the work of the early Muslim scholars in the first place, modern Muslims can reconsider and reformulate the whole process and thereby develop an alternative interpretation of Sharia.

The basic idea in the methodology proposed by *Ustadh* Mahmoud Mohamed Taha is the reversal of the abrogation process by shifting from texts early scholars deemed applicable to other texts they deemed to be abrogated. It should be noted here that the existence of the two types of texts is commonly accepted by all Muslims. What is new in Taha's thinking is the possibility of reversal of the human strategy of abrogation, which most Muslims scholars take to be categorical and permanent. This methodological innovation makes it possible to abolish from an Islamic point of view the principle of male guardianship over females which is the primary rationale of every feature of inequality of women or discrimination against them. In addition to this foundational paradigm shift, Taha presents specific arguments on particular issues, like relying on the Quranic requirement of binding arbitration (*tahkim*) to overcome a husband's claim of an exclusive right of unilateral repudiation (*talaq*) of his wife[23].

[23] Cp. Taha (1987).

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

I must also recall here that, however theoretically coherent and persuasive Taha's may be, he was executed in Khartoum in January 1985, his books were banned and his movement was suppressed. Although the charges for which he was condemned to death were political, the religious charge of apostasy was added by a special court after the trial and was re-affirmed by President Numeiri in confirming the death penalty[24]. Nevertheless, the prevailing political and social environment throughout the Arab world and much of the Muslim world apparently endorsed the charge of apostasy and other repressive measure against Taha's movement. The question now is whether the current drive for democratization will finally enable these ideas and other similar ideas to be discussed and accepted or rejected by Muslims. This is not to say that Taha's approach must be accepted as the only Islamic hermeneutics for human rights. What I am calling for is opening up these issues for public debate and contestation, whether through this or any other approach. Such public discourse can also yield other methodologies of Islamic reform to supplement or replace Taha's approach.

In the final analysis, the so-called Arab spring will not mean much for Arab women, and human rights in general, unless it leads to genuine and sustainable democratic transformation. In my view, the process of participation in public discourse about Sharia and its implications for human rights is in itself empowering and transformative, even if positive outcomes cannot be realistically expected in the short term. As long as the state does not use its coercive power to restrict human rights, there is always the chance that people might be persuaded and decide to act in support of those rights. For that possibility to materialize, however, Muslims must insist on exercising their right to freely think, study, and debate with others and decide for themselves, even under the most oppressive conditions. The exercise of human rights is both the end and means of democratic transformation.

References

An-Na^cim, Abdullahi Ahmed (1986), The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan. *Religion, vol. 16, 197–223.*

An-Na^cim, Abdullahi Ahmed (1990): Toward an Islamic Reformation. Syracuse University Press.

An-Na^cim, Abdullahi Ahmed (1994): State Responsibility under International Human Rights Law to Change Religious and Customary Law. In Rebecca J. Cook (ed.) *Human Rights of Women: National and International Perspectives.* University of Pennsylvania Press.

[24] Cp. An-Na'im (1986).

This content downloaded from 35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms

An-Naᶜim, Abdullahi Ahmed (1995), Toward an Islamic Hermeneutics for Human Rights. In Abdullahi A. An-Na'im et al., (eds.) *Human Rights and Religious Values*. William B. Eerdmans Publishing Company.

An-Naᶜim, Abdullahi Ahmed (ed.) (2002a): Islamic Family Law in a Changing World: A Global Resource Book. Zed Books.

_______ (2002b), Sharia and Islamic Family Law: Transition and Transformation. In: Abdullahi Ahmed An-Naᶜim (ed.): Islamic Family Law in a Changing World: A Global Resource Book.

An-Naᶜim, Abdullahi Ahmed (2006): African Constitutionalism and the Role of Islam. University of Pennsylvania Press.

An-Naᶜim, Abdullahi Ahmed (2010): Islam and the Secular State. Harvard University Press.

Bechor, Guy (2007): The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949) (Leiden, Brill).

Coulson, Noel (1964): A History of Islamic Law. Edinburgh University Press.

Joseph Schacht, Joseph (1964): An Introduction to Islamic Law. Clarendon Press.

Hallaq, Wael (2009): Sharica: Theory, Practice, Transformations. Cambridge University Press.

Kamali, Mohammad Hashim (2008): Sharicah law: an Introduction, Oneworld Publications.

Newby, Gordon D. 2002, A Concise Encyclopedia of Islam. One World Publications.

Taha, Mahmoud Mohamed (1987): The Second Message of Islam. Syracuse University Press.

Vikor, Knut (2005): Between God and Sultan: A History of Sharia. Oxford University Press.

Weiss, Bernard (1998), The Spirit of Islamic Law. University of Georgia Press.

This content downloaded from
35.129.134.34 on Thu, 07 Jul 2022 08:10:38 UTC
All use subject to https://about.jstor.org/terms