# 10 The Postcolonial Fallacy of 'Islamic' Family Law

**Abdullahi Ahmed An-Na'im**

## I Introduction

All Muslims today live with a set of norms and institutions which is commonly called family/personal law, but since it is enacted and enforced by the state, this field of state law does not qualify as being 'Islamic' by any clear and verifiable criteria of what it means to be Islamic. This set of norms and institutions are simply secular state law, and not immutable divinely ordained sharia. They are enacted and enforced through the political authority of the state, and are subject to amendment and changed in the same way; which is fundamentally different from how sharia norms and institutions are established and complied with by believers in their communities. Stealing is both a sin and a crime, but it is not a sin because it is a crime and it is not a crime because it is a sin. Confusing the two will have drastic consequences for both the religion of a people and the legal system of their state.

The problem with this process as it applies to the field of family law throughout the Muslim world is calling its outcome 'Islamic' family or personal status law (*al-Ahwal ash-Shakhsiya* in Arabic),[1] because it is the same as any other state legislation in the rest of the legal system. By using reference to sharia as a legitimising framework, Muslim reformists are defeating their presumed purpose of facilitating social and legal reform in their societies. This critique applies whether Muslims are a so-called majority or minority, living in self-proclaimed 'Islamic states' like Iran and Saudi Arabia, or in constitutionally identified secular states like Senegal and India. Reference to the postcolonial in this chapter title indicates the sources of tension and paradox in this subject, namely colonial formations

[1] J. J. Nasir, *The Islamic Law of Personal Status* (3rd edn, Dordrecht: Kluwer Law International, 2002) 34–43.

of the nation state and specialisation of so-called Islamic family law. The notion of 'Islamic family law' (hereafter IFL) is a colonial fabrication that falsely invoked the religious authority of Islam in this field while at the same time displacing the historical practice of sharia in Islamic societies by European codes and institutions.[2]

It is true that some principles of sharia, as mediated through local customary practices, have traditionally governed family relations among other fields of human concerns, but those principles were integral to a comprehensive religious normative system that was constantly adapting to changing social and economic conditions.[3] By initiating a discrete field of so-called 'Islamic family law', while displacing sharia in every other aspect of the legal systems of colonised Muslims, European colonial administrations created an isolated island of archaic family law norms and institutions in a sea of dynamic social and economic change.[4] My purpose in exposing this fallacy is to contribute to opening up the field of family law among Islamic communities to genuine enlightened reform, away from the intimidation and confusion of religious discourse.

Contrary to common current perceptions, family law regimes among Muslims around the world today are in fact the secular law of the state, and not immutable norms of sharia. Muslims in their communities may practise what they believe to be binding sharia, but they do so as a matter of religious compliance with a communal *normative system* among believers, beyond any possibility of adjudication or enforcement by state courts or administrations. In contrast, modern postcolonial nation states seek to enforce their own regulation of social relations of marriage, divorce, custody of children and inheritance. This is necessary for all states to do fairly and without any discrimination on such grounds of race, sex and religion, as mandated by their human rights obligations. Although state legislation and regulation should reflect the religious/cultural values and practices of the communities they govern,

[2] N. J. Coulson, *A History of Islamic Law* (University of Edinburgh Press, 1964) 149–62; N. Anderson, *Law Reform in the Muslim World* (University of London, Athlone Press, 1976) 1–2, 33; H. Liebesny, *The Law of the Near and Middle East* (State University of New York Press, 1975) 56.

[3] W. B. Hallaq, 'Can the shari'ah be restored?', in Y. Haddad and B. Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: Altamira Press, 2004) 21–53.

[4] See generally, A. A. An-Na'im, ed., *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

that must be with due regard to constitutional and human rights requirements of equality and non-discrimination. I have extensively discussed tensions regarding constitutional and human rights issues elsewhere.[5] The problem with claiming that state family law has the quality of being 'sharia' is to insulate that field from critical reflection and development. In that way, the most vital source of justice and human dignity in our most intimate social relationships is isolated as an island of stagnation and regressive values in a sea of social and economic change.

Sharia norms defy codification or legislative enactment because that would change the religious nature of the norm and deny Muslims the inherent religious freedom of choice among different interpretations of the Quran and Sunna (reports of the exemplar of the Prophet) established by traditional Sunni or Shi'a schools of jurisprudence. Since Muslims are religiously accountable for compliance with sharia, they must have the freedom and responsibility to decide which interpretation of the sources and methodologies of sharia they accept. In contrast, arbitrary and harsh outcomes are bound to follow when the rich diversity of views among Muslim scholars is reduced to the extreme selectivity of the language of codification of the positive law of the modern state. The claim of ruling elites of monarchies or republics alike to exclusively specify which sharia norms shall be applied by state authorities to the entire Muslim population of their countries violates freedom of religion for Muslims and inhibits possibilities of positive social change in their communities.

Another objection to claims of IFL is that the high degree of selectivity by which modern family law statutes have been drafted and enacted by human political authorities, without due regard to the authoritative methodology of established schools of jurisprudence, which are supposed to legitimise such legislation. The mechanisms of the enactment of state law are problematic from a sharia perspective because religious validity can neither be determined by a despotic ruler with his few advisers nor through majority rule in parliamentary politics. Theoretical improvement in the status and rights of Muslim women through political legislative process, for example, is unlikely to be realised in practice because it is promised by

[5] See, for example, my book *Muslims and Global Justice* (University of Pennsylvania Press, 2011), chs. 2–4 and 6.

the state by reinforcing the authority of conservative religious scholars over family law among Muslims.[6]

Sharia has been the product of community-based practice of intergenerational consensus around historically established founding scholars and their traditional schools of jurisprudence. Norms and principles became part of sharia for believers over time because generations of Muslim communities accepted them, and not because a religious or civil authority enacted them. The same community-consensus process applied to change and adaptations of local interpretations of sharia over the century, but the flexibility and dynamism of that tradition is now lost to rigid and arbitrary legislation based on political expediency of ruling elites and their partners. More broadly, 'state judges and other officials lack the religious authority and technical competence to interpret and apply religious norms. State enforcement of religious norms will distort the meaning, abuse the methodology and weaken the moral authority of these norms, and ultimately starve them to death by cutting them off from their religious foundations and sources of communal development.'[7]

Assuming my argument is plausible, it may seem problematic for Muslims to 'suspend' the practice of sharia norms and institutions of family life. This concern is more apparent than real for several reasons.

First, the argument is against enforcement of sharia by the state, and not personal and communal compliance outside state courts and institutions. In fact, my argument is in favour of voluntary personal and communal compliance with whatever Muslims believe to be sharia.

Second, it is not true that sharia requires enforcement of its norms and institutions by the state, or that it even addresses the state as a political institution. In fact, the Quran and Hadith never describe or prescribe any form or type of state, which is to be expected since those sources of Islam do not address political institutions that are incapable of religious belief and accountability.

Third, Muslims throughout the world are *already* living with non-enforcement of what they accept as clear aspects of sharia that can only be applied by the state, like conducting jihad for the propagation

[6] See, for example, E. Fawzy, 'Law No. 1 of 2000: A new personal status law and limited step on the path to reform', in L. Welchman (ed.), *Women's Rights and Islamic Family Law: Perspectives on Reform* (London: Zed Books, 2004) 58–94.

[7] A. A. An-Na'im, 'Religious norms and family law: Is it legal or normative pluralism?' (2011) 25(2) *Emory International Law Review* 787.

of Islam or the regulations of non-Muslims. Regardless of whether one accepts or rejects such traditional interpretations of sharia today,[8] my point is about the fact that the vast majority of Muslims who still accept these principles to be binding aspects of sharia are living without their enforcement by the state.

As the following review of the main principles of sharia regarding family law will show, it is possible for Muslims to comply with almost all sharia family law principles without enforcement by the state. This review may also help explain the temptation of assuming that the systematic normativity of sharia principles can easily be transformed into state legislation. My argument is that this temptation must be resisted because the religious nature of the authority of sharia principles is drastically different from the authority of state legislation. Recalling the opening statement of this chapter, stealing is a sin and a crime, but it is not a sin because it is a crime and it is not a crime because it is a sin. It is problematic to confuse the religious normativity of family principles and the legal authority of state family law because of the difference in the normative basis and consequences of the two types of characterisations of the issue in question.

## II Traditional Normativity of Sharia and the Family

I am using the term 'normativity of sharia' in this section's heading to avoid the implication that sharia norms as such can be the positive law of the state. Subject to this caveat, I will use the term 'family law' due to its familiarity as the exceptional field for the application of sharia principles in the modern legal systems of some forty Muslim-majority countries,[9] in addition to many Muslim minorities in countries like India and Israel.

Possible reasons for the exception of family law from displacement by colonial European codes include the high level of specific family principles provided for in the Quran and Sunna, and their stronger significance for the moral sensibilities of Muslims in general, especially regarding issues of sexual propriety, legitimacy of children and so forth. Another possible

[8] For a discussion of coherent and systematic reinterpretation of sharia on such issues see my book, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York: Syracuse University Press, 1990).

[9] I prefer the term 'Muslim-majority' to 'Islamic' country or society because the former formulation focuses on the self-identity of people.

reason for the persistence of IFL in modern legal systems may have been that this field was irrelevant to the economic and political interests of colonial administration. That is, colonial administrations may have either not cared which law applied to family issues, or did not wish to arouse political opposition in matters that were marginal to their colonial objectives. Whatever the reasons may have been, family law remained the exceptional aspect of sharia that successfully resisted displacement by European codes during the colonial period and continues to be the primary sharia field for Muslims, whether they are the majority or minority of the population. IFL has become the symbol of Islamic identity for most Muslims, the hard, irreducible core of what it means to be a Muslim today.

To appreciate the underlying tension of the application of IFL within secular legal systems, we need to first understand the main principles of IFL as stated in traditional sharia sources, and how those principles were incorporated into modern state law, mainly through statutes, as illustrated in the next section. Since it is not possible to present a comprehensive review of this vast and complex field of sharia, this review will be limited to the main principles of the Hanafi madhhab (the most globally widespread among the main Sunni schools of Islamic jurisprudence).

The following factors influenced the formation of traditional IFL:

1. Pre-Islamic customary practices with which Islamic norms had to cope from the start in Arabia and as Islam spread across Africa and Asia over several centuries. This factor was particularly influential in shaping foundational assumptions about the nature of the family and gender family relations, duties and obligations of spouses and parent–child relations, and related matters.
2. Cultural and contextual factors continued to influence the development and elaborations of IFL throughout the formative stages of sharia. In particular, IFL was intended to regulate issues of marriage, divorce, etc., as matters of concern for extended families and community, rather than of the individual spouses alone.
3. The religious ethics of sexuality and sexual propriety from a normative Islamic perspective and their implications for paternity and upbringing of children. For the vast majority of Muslims, it is inconceivable to engage in any sexual relationship outside marriage, and being born out of wedlock remains extremely stigmatised today.

4. The contractual paradigm constructed by early Muslim jurists for the formation and termination of marriage, and the tendency to take legal analysis to its logical, legalistic conclusion. Though obviously aware of the human nature of matrimonial relations, Muslim jurists focused on elaborating the legal relationship and its formal implications.
5. While IFL issues are covered in more detail in the Quran and Sunna than other fields, it is misleading to cite specific verses of the Quran or texts of Hadith as the direct source of any principle or rule of IFL because the system evolved through the specific methodology (*usul al-fiqh*) of each of the schools of Islamic jurisprudence. In particular, that methodology regulated in great detail the relationship between Quranic texts of general and specific application, and between those texts and Hadith. It would, therefore, be necessary to account for a wide range of inter-related applicable texts as the 'source' of a principle or rule of IFL, which is not possible to do in the present limited space.

In light of these factors, we now turn to a brief review of a sample of sharia principles regarding family relations.

## Sharia Principles of Marriage

The key to marriage and all its consequences under IFL is that *it is a contract.* Early Muslim jurists developed separate doctrinal categories of 'named' contracts (*al-uqud al-musama*), rather than a unified doctrine of contract. The contract of sale was the paradigmatic model, but each type of contract had its own characteristic features. The contract of marriage therefore shared some of the common requirements of a valid contract, in addition to its own characteristic features as a specific type of contract. As Hallaq explains:[10]

> Marriage [*nikah*], then, rests on an indefinite contract that may be written or oral, but in all cases must involve at least two contracting parties, two witnesses, and a guardian. The foundational elements *(arkan)* necessary to affect a valid marriage must involve a language (*sigha)* of offer by one party and acceptance by the other. The guardian represents the woman in concluding the contract, and the witnesses attest to it as a legal fact, but their function is also to advertise that fact in society so

[10] W. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press, 2009) 272–3.

as to preclude any suspicion of *zina*. The witnesses thus fulfill the requirement of social sanction, since it is this sanction that marks the difference between secretive, illicit acts and lawful behavior.

Accordingly, a marriage contract must satisfy the following essential 'pillars' of a valid contract, namely:

1. the *concurrence* of an offer and acceptance;
2. between two legally competent parties who are qualified to be married to each other;
3. exchanged through a clear and categorical formulation (*sigha*) that affirms the mutual consent of the parties; and
4. in the presence of at least two competent witnesses to attest to and publicise the fact that the marriage contract was validly concluded.
5. A marital gift (*mahr*) must be paid by the man to the woman, a sort of 'obligatory gift', but this is a necessary consequence of marriage, and not a requirement of the validity of the marriage contract.

While a marriage contract is traditionally concluded between two agents of the spouses to be, the contract is between the man and the woman who are to become husband and wife. All the principles of all forms and types of contracts apply to every marriage contract: e.g. requirements of legal competence to conclude a contract, the clarity and unequivocal nature of the language or formula, that an offer cannot be withdrawn once accepted, but the consensual nature of the contractual obligation must be ensured, i. e. the parties clearly understood and freely consented to the formation of a contact of marriage in particular.

The requirement of competent and qualified parties (2., above) includes that the man and woman are not already related to each other in any of the ways that preclude the possibility of marriage. These legal bars to marriage can be either permanent or temporary. The reasons for a *permanent* bar to marriage include certain specific blood relations, such as mother/father (including grandparents), aunt/uncle on either side, sister/brother (whether half or full). Being cousins (son or daughter of an aunt or uncle) is not a legal bar to marriage, and tends to be socially and economically desirable in traditional settings. A peculiar aspect of IFL is that all types of blood relations are also attributed to fostering relationship – called 'milk child or sibling', i.e. when a child is breastfed by a woman other than his or her biological mother, that woman becomes the child's mother for all purposes

of prohibition of marriage due to blood relations. That is, the woman's husband becomes the father of the milk-child and her children become the child's milk-brothers and milk-sisters. Consequently, any relationship that bars marriage from blood relations applies equally to relations based on such fostering relations.

There are five grounds of *transient* bar to marriage, i.e. marriage can become permissible once the temporary bar ends. Situations of temporary prohibition include:

1. A man cannot marry a married woman or during her waiting period (*idda*)[11] after divorce or death of her husband, but can marry her once the waiting period ends.
2. A man cannot be married to sisters at the same time, but can marry one after the termination of his marriage to her sister.
3. A man cannot be married to more than four wives, but can marry again when one of those marriages is terminated.

The legal consequences of marriage can be summarised as:

1. The wife is entitled to the dower gift (*mahr*) according to the terms agreed with the husband or decreed by court or arbitration, if necessary. For instance, if no amount was agreed, each school of Islamic jurisprudence has rules for determining the amount and conditions for its payment to the wife. This gift is the exclusive property of the wife personally, and she is not required to spend any of it on maintaining the household.
2. Each spouse is entitled to inherit from the estate of the other upon death, according to the applicable rules of inheritance.
3. The wife is entitled to maintenance (food, shelter, clothing and other material support) by the husband, without spending any of her own property. In exchange, the husband is entitled to obedience by his wife. These mutual obligations are interdependent, so that the husband is not entitled to obedience if he fails to provide appropriate maintenance, and the wife is not entitled to maintenance if she refuses to be obedient to the husband.

[11] *Idda* is the waiting period a wife must observe before she can remarry. *Idda* is normally three months after termination of marriage and four months and ten days after death of husband.

The preceding is a very general overview of Sunni IFL principles, and there are many variations and differences of opinion among schools of Islamic jurisprudence and individual jurists on almost every single principle. Still, the following general comments may be true of Sunni Muslims' view of marriage.

First, the focus of Muslim jurists on the careful 'legal' consequences of mutual contractual rights and obligations of the spouses can be misleading if taken to represent the exclusive nature of the relationship, within their personal and social networks. The vast majority of marriage relationships tend to run their normal course in mutual love and respect, and the usual tensions of matrimonial life are resolved through mediation within the extended family and community. Still, the legalistic aspects of the contractual relationship tend to be more visible and controversial because they are normally contested when a marriage fails or runs into difficulties.

Second, dower (*mahr*, also called *Sadaq*) is a sum of money or other property which becomes payable by the husband to the wife as an effect of marriage, a sort of required gift upon marriage. It is misleading to call it 'bride-price' because it is the exclusive entitlement of the wife herself, and not any other person. The fact that dower is a consequence of marriage, and not a condition of validity of the contract of marriage, does not diminish the wife's entitlement to it. *Mahr* is implied into the contract even if it is not expressly stated. There is unanimous agreement among Muslims scholars that any property can be paid as dower. There is also unanimous agreement that there is no upper limit to a valid dower, but no agreement on the minimal amount of dower. Although the practice of payment of excessive dower can inhibit prospects of marriage by most young men, any restriction on the maximum amount that can be paid is commonly seen as violation of sharia principles.[12]

Third, although Sunni jurists are unanimous in rejecting 'temporary marriage' (*muta*), the issue should be noted here because of its controversial nature. To Sunnis (and Ismaili Shia), the Prophet prohibited any explicit or implicit time limit on marriage, but Twelvers Shia accept the validity of temporary marriage because they reject the reports (Hadith) of that prohibition. In Twelvers Shia jurisprudence, the duration of cohabitation in a temporary marriage contract must be fixed (could be a day, a month, a year or number of years), and the dower must be specified. The

[12] Nasir, *Islamic Law of Personal Status*, 83–6.

wife is entitled to full dower if the temporary marriage is consummated and half the dower if the marriage was not consummated, but she is not entitled to maintenance. There are no mutual rights of inheritance between the man and woman, but children conceived during the temporary marriage are legitimate and entitled to inherit from both parents.[13]

## Sharia Principles of Termination of Marriage

The term 'termination of marriage' refers to the variety of ways in which marriage can end, some of which do not fit the modern notion of divorce. As a general rule of the Sunni jurisprudence and subject to many significant disagreements among schools and scholars on various aspects of this process, marriage can be terminated in any of the following main ways:

1. Unilateral repudiation by the husband (*talaq*); or by the wife under delegation by the husband (*talaq al-tafwid*). Once given, the husband cannot revoke such delegation unilaterally, and if exercised by the wife, it results in a final irrevocable termination of the marriage.
2. Mutual agreement on termination of marriage upon payment of compensation by the wife to the husband (*khul*).
3. By judicial decree, which can be based on a wide range of grounds, e.g. annulment (*faskh, tafriq* or *tatliq*) for legal reasons like defects in the contract, lack of social compatibility (*kafaa*) between the spouses, inadequacy of dowry (*mahr*), or legal cause like failure of the husband to provide maintenance, causing harm or incompatibility of the spouses. Recall that there are significant disagreements among schools and scholars on almost all these causes of judicial termination of marriage.

The first form of dissolution of marriage, namely, this structure of repeated repudiations by the husband, may be summarised as follows:

Talaq 1: becomes final only after *idda*, unless unilaterally revoked before then. This is minor finality, which permits the parties to remarry with a new contract;

Talaq 2: same consequences;

[13] *Ibid.*, 59–61.

Talaq 3: same consequences, except that after *idda*, this becomes major finality of termination of marriage, with no possibility of remarriage between the two parties, unless the woman marries another man and that marriage runs its normal course.

The second form of dissolution of marriage noted above is known as *khul* (literally to take off or remove), which is a way for a wife to pay her way out of a marriage she no longer wishes to keep. The compensation the wife pays to the husband in exchange for his consent to terminate the marriage can be the return of her bridal gift (*mahr*), or forfeiting the balance of that gift which was postponed at the time of contracting marriage (*muakhar al-sidaq*). In this way, the bridal gift can either provide the wife with some financial security in the case of divorce or death of the husband or enable her to negotiate ending an unhappy marriage. Hallaq explains the consequences of this form of dissolution of marriage: 'If the husband accepts the offer, he will then repudiate his wife once, considered to be an irrevocable utterance *(bain)*. The finality of the single utterance stems from the fact that payment renders the repudiation contractual, thus making the acceptance of the offer binding upon conclusion of the session – which is not the case in unilateral, non-contractual *talaq*.'[14]

## Child Paternity and Custody

IFL principles of paternity, suckling, moral upbringing and supervision of property affairs of the child can be summarised as follows.

Muslim jurists gave particular care to questions of paternity not only because all legal rights and obligations of the child for the rest of her or his life depends on paternity but also because of the strong social stigma of illegitimacy. Paternity is established through the application of several principles.

First, there is a very strong but rebuttable presumption that a child is the legitimate offspring of the marriage, if the apparent parents were married at the time of conception of the child. Some scholars of sharia sought to maintain the application of this presumption by extending the minimum and maximum possible duration of pregnancy, from six months to up to

[14] Hallaq, *Shari'a*, 284.

four years. This exaggerated view of possible duration of pregnancy was intended to avoid a charge that the mother is guilty of the capital crime of extramarital sexual intercourse (*zina*). If the wife cohabited with her husband at any time during that extended period of possible pregnancy, then the husband's paternity of the child is assumed.

Second, if the presumption of legitimacy is totally untenable in that the spouses could not have had intercourse within the framework of such extended duration of possibility of pregnancy, the father may still claim the child as the offspring of the marriage, provided he does not admit that the child was born of illicit sexual intercourse.

Third, if a child cannot be deemed the offspring of a valid marriage either by date of birth in relation to the consummation of the marriage or by the husband claiming the child to the marriage, then the child is deemed to be illegitimate. In that case, the child belongs to the mother alone.

The modern legal concept of custody does not exist under traditional IFL, and the material and moral care of the child is divided into material care for the child (*hadana*), and moral upbringing and supervision of property/financial affairs (*wilaya*). Material care (*hadana*) from birth up to a specific age is determined by each school (e.g. 7 for boys and 9 for girls, according to some scholars). After the specified age, the material care of the child shifts to the father. However, 'Child custody laws in Saudi Arabia, Iran, Syria, Iraq, Kuwait and Jordon show that no matter which school of *Fiqh* is predominant, no fixed age of custody is uniformly followed in these countries and the majority of the laws and trends of courts show that courts have the power to extend child custody to mothers beyond the age stated in texts, depending upon the circumstances of the case'.[15]

The moral well-being of the child and supervision over his or her property/financial affairs (*wilaya*) always belongs to the father, even while the child is still under the material care (*hadana*) of the mother. The father has the authority to supervise (*wilaya*) the property/financial affairs of the child, but the child has her own legal capacity (*ahliya*) to conclude contracts, own and dispose of property, etc. Such issues of legal personality and capacity are governed by a series of presumptions based on the age of the child when the right or obligation is acquired. For instance, every child has a right to parentage, inheritance or receiving a gift even before she or

[15] A. Rafiq, 'Child custody in classical Islamic law and laws of contemporary Muslim world (an analysis)' (2014) 4(5) *International Journal of Humanities and Social Science* 273.

he is born, e.g. if the father dies before birth and the child is actually born alive. From birth up to a set age, 7 according to some scholars, a child can acquire some rights and obligations, e.g. he owns what he purchases (or is purchased for him by his guardian), and has the obligation to pay restitution for what he destroys. Generally, the child progresses in her or his rights and obligations, but always subject to supervision (*wilaya*) until the age of puberty or majority.

IFL is particularly concerned that every person has a clearly defined legal personality from viable pregnancy to death, with carefully specified relationships determining the person's rights and obligations for the full duration of her life. The same concern with precise legal determination of rights and obligations is also reflected in sharia principles of property and contacts. In addition to the obligations of the husband/father for the maintenance of his wife and children, sharia also set a maintenance obligation among members of the wider family and other relatives. This obligation depended on such factors as the degree of relationship and material status of relatives, whereby the obligation is most strongly owed to parents and destitute relatives and weakest for distant relatives or those who have no need for assistance. Whether the state provides legal remedies for failure to provide extended family support, the obligation under sharia remains binding.

Sharia family law principles are usually enacted by statute in the context of modern state legal systems in most Muslim-majority countries today.[16] This is not problematic per se because every society is entitled to decide on its own laws as a matter of self-determination. What is profoundly problematic, I argue, is the fact that such state legislation tends to be called 'sharia family law', instead of simply ordinary legislation.[17] This is misleading because in such enactment, the language of the statute is the law, and it is the law by virtue of the political authority of the state, and not by virtue of the sharia principle as such. In fact, the extreme diversity of interpretations of sharia by various schools of Islamic jurisprudence means that it is the state as a political institution that decides which views are to be enacted into law and which views are to be excluded. Moreover, the legislative organs of the state have the sole authority to amend, add or remove

[16] See generally, A. A. An-Na'im (ed.), *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002).

[17] See generally Nasir, *Islamic Law of Personal Status*.

provisions from these statutes. It is therefore clear that the so-called IFL is nothing more than secular state legislation presented as sharia to promote its legitimacy among Muslims and insulate it against criticism.

## III From Traditional Practice to Postcolonial Transformation

The primary question for this chapter is the relationship of traditional IFL principles to modern legal systems of the postcolonial nation state. This question emerged out of the rise of so-called territorial nation states during European colonial rule over most Muslim communities in Africa and Asia, including the transformation of the legal system and public administration of the emerging states. The magnitude and consequences of those changes can be appreciated in light of the following brief review of the processes of administration of justice in traditional Islamic societies.

### Traditional Practice of Sharia

Whatever court system or manner of resolution of disputes in the precolonial era no longer exists or has been subjected to fundamental change in our time.[18] We should understand the premodern practice of sharia in terms of the political and social context when Muslim societies did not operate on the bureaucratic organisation of modern political regimes. In premodern states, the caliphs and sultans had absolute military and political power and authority that was based on 'personal loyalty rather than obedience to abstract, impersonal regulations'.[19] At the same time, caliphs and sultans needed the legitimising authority of scholars and religious leaders of the communities because legitimacy was seen as 'the preserve of religion, erudition, ascetic piety, moral rectitude, and, in short, in the *persons* of those men who had profound knowledge of, and fashioned their lives, after, the example of the Prophet and the exemplary forefathers'.[20]

The political and legal history of Muslim societies can therefore be seen as a constant interaction and negotiation between the rulers and the

[18] K. S. Vikor, *Between God and the Sultan: A History of Islamic Law* (Oxford University Press, 2005) 140.

[19] Hallaq, *Shari'a*, 147. [20] *Ibid.*, 131.

scholars/jurists. The rulers needed the legitimacy of the knowledge and interpretation of sharia by the Muslim scholars/jurists, who in turn needed the political authority of the rulers to implement sharia. That mutual dependency required both sides to observe a traditional form of what could be called 'checks and balances'. Rulers had to curtail their impulse to seek to co-opt or influence the scholars, and scholars had to resist co-optation or influence to maintain the 'dance of power and knowledge'. Rulers needed to respect the integrity and autonomy of scholars to preserve their legitimising competence, and the scholars needed to protect their integrity and autonomy to maintain their moral standing among their communities. As a result, the worst charge for scholars in Islamic societies up to the present time is to be called *ulama' al-Sultan* (scholars of the state).

The structural safeguard of the integrity and autonomy of the founding Muslim scholars of sharia was first ensured by the independence of the informal educational system of 'circles of learning' (*halaqas*) that usually convened in mosques where Muslims came to pray five times a day. Throughout Muslim history, these informal circles of learning remained the established forum of legal education and retained their autonomy by not receiving endowments from the ruling elites.[21] In addition, however, more institutionalised colleges (*madrasas*) emerged at the end of the eighth century when endowments and salaries began to be paid to professors.

It was through the funding of these institutions that the ruling elites gradually co-opted scholars/jurists and influenced the legal profession. Madrasas did not substitute halaqas; they 'rather bestowed on the *halaqa* an external legal framework that allowed pedagogical activity to be conducted under the auspices of endowments'.[22] By the seventeenth century, unfortunately, most jurists were employed by the state, and those who insisted on maintaining their autonomy 'had to function within a diminishing "moral community" created by the financial and material dependence of their less independent peers on the ruling powers'.[23] The decline in the autonomous role of sharia and its scholars started before the rise of European colonialism in Africa and Asia.

The central role in the daily practice of sharia was that of the jurist/scholar (mufti) whose task was to consult a whole host of sharia sources, according to his training and affiliation with one of the schools of Islamic jurisprudence (madhhab) to produce a legal opinion (fatwa), which

[21] *Ibid.*, 140. [22] *Ibid.* [23] *Ibid.*, 151.

becomes the basis of rulings by judges (qadis) in specific cases. The authority of the mufti was based on his reputation as a learned and pious scholar, while the authority of judges was drawn either from official appointment or voluntary submission by individual litigants. The fatwa established the connection between relevant principles of sharia and the particular case, and was in theory valid only for the case for which it was formulated. Judges were not obliged to seek a fatwa for every case they had to decide, and could seek it only when unsure of the legal basis for determining the case or if he felt the need for stronger authority for his ruling due to the nature of the case or public attention it attracted.

The role of both judge and *mufti* was confined to identifying and interpreting the law for application to specific cases, but never to create the law. The tasks of a judge (qadi) included resolving conflicts (tahkim), adjudicating rights and obligations (qada) and representing the community (hisba). To duly perform his functions, a judge was supposed to investigate not only the facts of the case, but also information about the integrity of the litigating parties and the history of their interactions. He had to take into account social customs and strive to resolve the dispute in ways that preserved social harmony and stability.[24]

## Transition to Nation State Legal Systems

Whatever the nature and manner of the role of sharia in the daily administration of justice in Islamic communities from West Africa to Central and Southeast Asia may have been, that role has been drastically transformed by European colonialism even for parts that were not formally colonised like the Arabian Peninsula and Iran. European colonialism has been spectacularly successful not only in its scale and scope, but more importantly in transforming the political and legal institutions of the colonised societies as well as the global economic and trade system. Those transformations were first prompted by the attempts of the Ottoman Empire to modernise its political and legal institutions during the nineteenth century to meet the challenge of rising European powers. The symbolic significance of the Ottoman concessions to rising European powers culminated in the

[24] For clear explanation of the traditional practice of sharia prior to its displacement by colonial legal systems in the nineteenth and twentieth centuries, see Vikor, *Between God and the Sultan*, chs. 8–9.

abolition of the caliphate (symbol of Islamic unity and sovereignty) by 1924. This event marked the irreversible shift to European models of the state and its legal system that came to prevail throughout Ottoman regions in the Middle East and North Africa. Concurrent processes were taking place in Iran and South Asia, which culminated in similar outcomes.

Thus it was a combination of colonial European challenge and accommodation and adaptation by Islamic societies in the nineteenth and first half of the twentieth centuries that resulted in the establishment of 'nation states' from North and West Africa to South and South East Asia. When Islamic societies of Central Asia were finally released from the grip of Russian/Soviet colonialism by 1991, they also opted for the nation state formation that had become the established global order. The same dynamic process resulted in the total incorporation of all Islamic societies into the global state-centric economic, political and security systems of today. As openly secular state courts applied European statutes during the colonial era and since independence in almost all Islamic societies, the domain of sharia became limited to the family law field. Even in the family law field, the state continued to regulate the role of sharia as part of broader legal and political systems of government and social organisation within the framework of postcolonial European models.

While this process unfolded in different ways among Islamic societies, the experience of the late Ottoman Empire has probably had the most far-reaching consequences. The concessions made by the Ottoman Empire to European powers during the nineteenth century set the model for the adoption of western codes and systems of administration of justice. The Ottoman Majallah was promulgated over a ten-year period (1867–77), to codify the rules of contract and tort according to the Hanafi school, combining European format with sharia content. This major codification of sharia principles simplified a huge part of the relevant principles and made them more easily accessible to litigants and jurists.

The Majallah acquired a position of supreme authority soon after its enactment, partly because it represented the earliest and most politically authoritative example of an official promulgation of large parts of sharia by the authority of a modern state, thereby claiming to transform sharia into positive state law in the modern sense of the term. Moreover, the Majallah was immediately applied in a wide range of Islamic societies throughout the Middle East and North Africa, and continued to apply in some parts into the second half of the twentieth century. The success of the

Majallah was also due to the fact that it included some provisions drawn from sources other than the Hanafi school, thereby expanding possibilities of 'acceptable' selectivity of legislative enactment from within the Islamic tradition. The principle of selectivity (*takhayyur*) among equally legitimate doctrines of sharia was not new within Muslim communities, but it was never before done in statutory enactment for centralised and bureaucratic administration of the justice by the state.[25]

This trend towards increased eclecticism in the selection of sources and the synthesis of Islamic and western legal concepts and institutions was also carried further and became irreversible. The most influential work in this regard is that of the Egyptian jurist Abd al-Razzaq al-Sanhuri (died 1971),[26] who used this approach in the drafting of the Egyptian Civil Code of 1949, the Iraqi Code of 1951, the Libyan Code of 1954 and the Kuwaiti Code and Commercial law of 1960, among others.[27] Those developments made the entire corpus of sharia principles more available and accessible to judges and policymakers in the process of the incorporation of those principles into modern legislation. This was also often done by mixing some general or partial principles or views from one school of sharia (madhhab) with those derived from other schools, without due regard to the methodological basis or conceptual coherence of any of the schools whose authority was being invoked.

The accessibility of sharia principles highlighted the complexity and diversity of the broad Islamic tradition, and highlighted the strong disagreement among and within Sunni and Shia schools. This is particularly significant in view of the fact that Sunni and Shia communities sometimes coexist within the same country, as in Iraq, Lebanon, Saudi Arabia, Syria and Pakistan, with each community following a different school, regardless of the official status of those schools in relation to state law. Judicial practice may not necessarily be consistent with the school followed by the majority of the Muslim population in the country. For example, the courts of Egypt and Sudan followed the official Ottoman preference for the Hanafi

[25] J. L. Esposito, 'Perspectives on Islamic law reform: The case of Pakistan' (1980–1) 13 *New York University Journal of International Law and Policy* 236.

[26] See, generally, G. Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Leiden: Brill, 2007).

[27] N. Saleh, 'Civil codes of Arab countries: The Sanhuri Codes' (1993) 8(2) *Arab Law Quarterly* 161–7.

school, while popular practice continued to observe the Shafi'i and Maliki schools.

The legal and political consequences of these developments were intensified by the significant impact of European colonialism and postcolonial influence in the fields of general education and professional training of state officials, business leaders and other influential social and economic actors. Changes in educational institutions not only dislodged traditional Islamic education but also introduced a range of secular subjects that tend to create a different worldview and expertise among young generations of Muslims. Moreover, the monopoly held by Islamic scholars of intellectual leadership in societies that had very low literacy rates has been drastically eroded by the fast growth of mass literacy and growing higher education in secular sciences and arts. Regarding legal education in particular, the first generations of lawyers and jurists took advanced training in European and North American universities and returned to teach subsequent generations or to hold senior legal and judicial offices.

More generally, the establishment of the European model for Muslim-majority countries as part of a global system based on the same model has radically transformed political, economic and social relations throughout the region. By retaining these models at home and participating in them abroad after independence, Islamic societies have become bound by the national and international obligations of membership in a world community of states. All Islamic societies today live under national constitutional regimes 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 expressly acknowledge and effectively provide for these obligations, a minimum degree of practical compliance is ensured by the present realities of international relations. These transformations also affected the situation of Muslim minorities living in other countries, including Western Europe and North America, who continued to assume the Islamic religious and cultural authority of the Middle East and North Africa.

Wael Hallaq examines this process in terms of 'modernizing the law in the age of nation-state', in relation to such modernist projects as nationalism and law reform, except for family law.[28] Whatever may have been the rationale or justification of the exception of IFL from displacement by

[28] Hallaq, *Shari'a*, 445.

European codes, the point for our purposes here is that despite the popular perception that IFL remained 'an authentic and genuine expression of the *fiqhi* [of Islamic jurisprudence] family law, the fact of the matter is that even this sphere of law underwent structural and foundational changes that ultimately resulted in its being severed from both the substance of classical *fiqh* and the methodology by which *fiqh* had operated'.[29] Devices deployed in this process included the principles of necessity (*darura*), the procedural device of administrative discretion (*siyasa shar'iyya*) and eclectic selection and amalgamation (*takhayyur* and *talfiq*) of any views not only from within any school, but also from other schools. 'The product thereof was entirely new, because the opinions now combined had originally belonged to altogether different, perhaps incongruent, premises.'[30] Other devices included new forms of free interpretation (neo-*ijtihad*) and the notion that any law that does not contradict sharia is lawful.[31]

## Postcolonial Legislative Reforms

To conclude this review of traditional community-based practice of sharia and its postcolonial transformation, I emphasise that my purpose is not to offer a general discussion of IFL in Muslim-majority countries. In particular, I am not in the least suggesting or implying a critical evaluation of the reforms that IFL statutes have introduced in the various countries. On the contrary, my objection to the fallacy of calling these statutes 'Islamic' is intended to facilitate and promote future prospects of such reforms away from any inhibition or confusion of pretending to comply with sharia standards. As I have tried to briefly explain at the beginning of this chapter, sharia norms and institutions lose their religious Islamic quality when enacted into and enforced as positive law of the state. Acknowledging this reality, I argue, releases the social and political dynamics of family law reform, and facilitates the contributions of social science scholars, civil society organisations and other concerned actors.

According to unanimous traditional practice of sharia, 'any departure from the legal doctrine (*madhhab*) as stated in these sources renders his

[29] *Ibid.* 446–7. [30] *Ibid.*, 448.

[31] For more elaborate explanation and illustrations of these devices and their outcomes, see Anderson, *Law Reform in the Muslim World*, 42–82.

[jurist/*mufti*] opinion suspicious if not altogether void'.[32] It should also be recalled that traditional practice was the realm of scholars, muftis and judges, and was never codified by any state in thirteen centuries of Islamic history. This methodological inconsistency and the arbitrary outcomes of recent reforms are profoundly problematic for the integrity and cohesion of sharia as a comprehensive religious normative system in two primary ways.

First, state determination and enforcement of supposedly sharia norms undermine the integrity of the whole system. Second, arbitrary selectivity fails to account for the normative and social cohesion of each school in its broader social context. In each school, the rule of inheritance, for instance, operates in the same context as the rules of maintenance during marriage or consequences of termination of marriage. Whether one agrees or disagrees with the principles that were the outcome of traditional methodologies, each set of rules is integral to the normative and sociological system of each school as a whole.

Turning now to a brief review of postcolonial legislative reforms,[33] by being the first codification of sharia principles, the Ottoman Majallah of the 1870s already indicated a major departure from traditional Islamic juridical practice. The Majallah 'was based on principles derived from the Shari'a. Instead, however, of adopting the dominant doctrine in the *Hanafi* school in all particulars, this code comprised a selection of opinions from among those which had found any sort of recognition in that school (although some of them originated, in fact, in one of the other schools).'[34] That compounded deviation from traditional sharia practice was soon followed by more drastic departures by the use of 'an amalgamated selection (*takhayyur*) from several traditional doctrines held by a variety of schools. Even weaker doctrines within an individual school, inadmissible in the traditional system, have been rejuvenated

[32] W. B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, 1997) 209.

[33] Although the Ottoman heartland was not occupied and colonised as such, the Ottoman state was acting in a postcolonial mode already during the second half of the nineteenth century. That functional postcolonial mode operated from mimicking European military and administrative organisation to copying European codes. After all, colonialism is a state of mind of the colonised as well as the coloniser.

[34] J. N. D. Anderson, 'Modern trends in Islam legal reform and modernisation in the Middle East' (1971) 20 *International and Comparative Law Quarterly* 2.

and bestowed by a legitimacy equal to that enjoyed by the "sound" (*sahih*) doctrines.'[35]

As noted earlier, the Ottoman Law of Family Rights (1917) was the first major state legislation that employed such dubiousness in the name of sharia. It was followed first in Egypt,[36] and then in Ottoman provinces of the Middle East and North Africa, as they gradually became independent states. Examples of this include the Jordanian Law of Family Rights in 1951 (replaced by the Jordanian Law of Personal Status in 1976), the Syrian Law of Personal Status in 1953, the Tunisian Law of Personal Status of 1956, the Moroccan Code of Personal Status in 1958 and the Iraqi Code of Personal Status of 1959.[37] Family law codes in Arab countries took the arbitrary reformist methodologies further 'to include Shi'ite doctrines, a step previously unthinkable. Moreover, the reformers resorted to the so-called *talfiq* according to which part of a doctrine of one school is combined with a part from another.'[38] The methodological expedience of selectivity, *takhayyur*, was extended in Egypt 'first, to *any* opinion ... within the orthodox schools, held in the past in some extinct school, or attributed to some early jurist ... to views culled from one of the "heterodox" schools of the *Shi'is* or *Ibadis*; and finally to the combination of part of the opinion of one school or jurist with part of the opinion of another school or jurist'.[39]

Similar reform strategies to arbitrary or inconsistent outcomes were deployed in the Indian subcontinent. For instance, the Indian Dissolution of Muslim Marriages Act of 1939, relied on the Maliki madhhab (school of Islamic jurisprudence which is dominant in North and West Africa) in expanding grounds for termination of marriage beyond the three accepted under the Hanafi madhhab (school of Islamic jurisprudence). While the expanded grounds were supposedly based on the Maliki madhhab, the outcome was different from what that school provided for:

[35] Hallaq, *History of Islamic Legal Theories*, 210.

[36] B. A. Venkatraman, 'Islamic states and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the shari'a and the Convention compatible?' (1995) 44 *American University Law Review* 1986–7.

[37] For a discussion of these reforms in regional comparative perspectives, see L. Welchman, 'The development of Islamic family law in the legal system of Jordan' (1988) 37 *International and Comparative Law Quarterly* 871–86.

[38] Hallaq, *History of Islamic Legal Theories*, 210

[39] Anderson, 'Modern trends in Islam legal reform', 13.

*Maliki* law utilized judicial repudiation (*talaq*) whereas the Dissolution of Muslim Marriages Act adopted judicial recision [rescinding] (*faskh*). There is a significant and very practical difference between these two forms of divorce. *Talaq* is a revocable repudiation which only becomes final after ninety days, *i.e.*, the end of the '*iddah*, or waiting period. The purpose of this waiting period, provided by the *Qur'an*, is to provide a time for possible reconciliation as well as to establish paternity. *Faskh* bypasses these procedures for it is a decree which becomes final upon its issuance by the court.[40]

Although such reform methodologies are implemented in the name of upholding sharia rule, they are in fact an affront to the very essence of sharia as a normative system because they fail to respect and protect the internal rationality and consistency of the various schools. To the founding scholars and their successors in schools of Islamic jurisprudence, the principles of property, contact, financial capacity and competence, inheritance, marriage and its termination, custody of children, etc., are all designed to serve an integrated holistic social and economic system. Modern reformers may disagree with some aspects of the integrated system supported by early schools, but the opportunistic selectivity of modern reformers to serve their alternative view of the social and economic system of their societies is profoundly offensive to the theological and methodological integrity of the same schools of Islamic jurisprudence modern reformers claim to be supportive of their family law legislation as 'Islamic'. If modern reformers think that the internal consistency and cohesion of the traditional schools are no longer important or relevant, it would then be intellectually dishonest and hypocritical to invoke the names of the same schools to legitimise the reform outcomes, without even acknowledging their disagreement with the founding scholars of those schools.

## IV Concluding Remarks

In conclusion, the religious nature of sharia and secular nature of state law requires differentiation of the two normative systems, while the methodological and normative similarities between sharia and state law indicate possibilities of interaction and cross-fertilisation between

[40] Esposito, 'Perspectives on Islamic Law Reform', 230–1.

the two.[41] Although sharia evolved among independent Muslim scholars and their communities, completely outside state institutions, the methods those scholars used for developing sharia principles and rules are similar to modern techniques of textual construction and reasoning by analogy and precedent.[42] Normative similarities between sharia and state law can be seen in such fields as property, contracts and civil liability for damage or misappropriation of property.[43]

We should also appreciate the difference between the religious and moral nature of marriage and family relations and the legal regulation of such relationships by the state. Human relationships of love and compassion are both the objective and the daily norm, to varying degrees, in the vast majority of family relations. This human norm includes possibilities of negotiations among the spouses and mediation by extended family advisers as well as communal sanction against offending spouses. Still, the enforcement of legal regulation must remain available as a last resort. However, that framework can cope only when severe family discord is the exception, and not the daily norm. This social and legal framework became more complex as modern states assumed more responsibilities through bureaucratic processes.

For instance, a marriage or divorce could be valid from a sharia point of view but most Muslim-majority countries today require it to be officially registered to be recognised by state courts and civic administration. Thus, official registration of marriage or divorce has become a prerequisite condition for obtaining judicial remedy or determination of any dispute regarding issues of marriage, divorce, and maintenance and custody of children. Official registration is also required for recognition of the marriage by administrative agencies of the state for such purposes as pension, social security payments, tax status or other consequences of marriage.

In practice, however, the requirement of registration tends to unfairly penalise vulnerable women who have little opportunity to comply with it in the first place. A Muslim woman who accepts to enter into a polygamous marriage without satisfying the conditions set by the state may believe herself legitimately married under IFL, but her marriage simply 'does not

[41] A. A. An-Na'im, 'The compatibility dialectic: Mediating the legitimate coexistence of Islamic law and state law' (2010) 73 *Modern Law Review* 1–29.

[42] Hallaq, *Shari'a*.

[43] *Ibid.*, 239–45 on sharia principles of contracts, and 296–306 on property.

exist' for state courts and administrative agencies. This will not only deny her any of the entitlements of a wife under state law, but also leave her in an untenable position of neither being married for all official purposes nor unmarried from a religious point of view so that she can marry someone else.

The IFL reforms reviewed above may indeed be appropriate for exploring possibilities of reform in the enactment or interpretation of statutory law of the state. My objection is not only to the pretence that the outcome is valid and legitimate sharia, but also to reinforcing the misconception that family law reform is necessarily confined to the realm of historical Islamic jurisprudence. Stated slightly differently, the issue is not the precise nature and value of the reforms so introduced, but it is the defective methodology that is bound to lead to more complications for the presumably enlightened outcome, for instance, by reinforcing the belief that so-called Islamic institutions, like al-Azhar in Egypt, should hold the exclusive authority to approve or reject future reforms.[44]

[44] Fawzy, 'Law No. 1 of 2000', 58–94.