Navigating Diffuse Jurisdictions: An Intra-State Perspective

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Abstract – All too often the boundaries between State and non-State legal systems are ill-defined. This chapter explores this phenomenon from an intra-State perspective. It focuses on the relationship between State and religious or customary law and the point at which these forms of non-State law are transformed into State law. Drawing on the prescriptive, adjudicative and enforcement functions that are integral to the operation of State legal systems, it argues that the classification of religious or customary laws as State law depends on the extent to which these laws are engaged by the discharge of one or more of these functions. What emerges from this highly desegregated and context dependent approach is that there can be functional, personal, and geographical dimensions to the classification of law, that the classification may not be a singular or static one and that the boundaries between State and non-State law can be diffuse and susceptible to shifting over time. As this chapter demonstrates, the question of classification is not a narrow technical one as it can have important implications for international as well as national law. The question of classification acquires some significance, for instance, in delineating issues of State responsibility where legal pluralism exists and the nature and extent of a State's exercise of jurisdiction is far from certain.

Keywords: legal pluralism, classification of law, State law, non-State law, exercise of jurisdiction

I. Introduction

The idea of a single legal system operating to the exclusion of all others within a State's territory no longer holds good, if it ever did. In its place, one often finds a multiplicity of normative legal systems operating in parallel to, if not in competition with, the State legal system. This de jure or de facto coexistence of different normative legal systems within the same geographical and temporal space generates legal pluralism which is a feature of most, if not all, jurisdictions today.[1] It is a phenomenon that shows little sign of abating given the rising tide of claims for some form of State recognition of religious or customary laws. Legal pluralism can pose difficulties, however. The boundaries between the different legal systems are often ill-defined. This can create uncertainty about the jurisdiction of the respective systems, the status of norms from one system that are given effect in another and how these norms should be interpreted and applied given their concurrent existence within more than one legal system. The lack of clarity also has important practical implications. For example, determining the boundaries between State and non-State law can have

[1] See also in a similar vein, W. Twinning, Normative and Legal Pluralism: A Global Perspective', *Duke J. Comp. & Int'l. L.* 20 (2009-10) pp. 473, 505; B.Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney L. Re*v. 30 (2008) pp. 375-76.

ramifications in international human rights law for the precise nature of a State's obligations, the full import of certain reservations to human rights treaties,[2] State responsibility and the level of protection afforded to the rights of individuals within a State. Specifically, to say that religious or customary law can be classified as State law is to make the State 'directly' responsible for any human rights harm caused by that law.[3] This means that the State will have violated the obligation 'to respect' human rights rather than failing to discharge the more indeterminate positive obligation 'to protect' rights against interference by non-State entities such as religious communities.[4] Related to this, the level of harm experienced by the individual may be compounded by the fact that it is not being imposed by a religious or indigenous community but by the State itself which can impede, if not preclude, access to the State justice system for protection. It follows that the boundaries between State and non-State law is not a narrow technical issue but one of significant import for a range of issues of international as well as national significance.

Just as the definition of non-State actors generated considerable debate in the much-needed search for clarity,[5] the definition of non-State law and specifically the boundaries between State and non-State law also calls for clarity but has received much less attention, notwithstanding that both concepts can have significant implications for the international legal system. Against this backdrop, this chapter analyses the relationship between State and religious or customary law and the point at which these particular forms of non-State law[6] are transformed into State law. The point at which transformation takes place can help map the boundaries between State and non-State law. It can also bring greater clarity to issues that are often misunderstood or misrepresented in public discourse. The status of religious law in the United Kingdom (UK) is a case in point.[7] When our courts enforce decisions of religious courts under the Arbitration Act 1996[8] does this mean that the religious laws

[2] See text accompanying n. 70.
[3] See e.g. *Appleby v United Kingdom* (2003) 37 EHRR 38, para. 41.
[4] Ibid., para. 40. As the Court observed, in 'determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual … The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.'
[5] See e.g. A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, OUP, 2006); P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford, OUP, 2005).
[6] Other forms of non-State law include the laws established by financial, professional or sporting bodies.
[7] A notable example is the media coverage of the Archbishop of Canterbury's 2008 lecture on 'Civil and Religious Law in England:' see R. Griffith-Jones, 'The "unavoidable" adoption of shari'a law – the generation of a media storm', in *Islam and English law: Rights, Responsibilities and the Place of Shari'a,* edited by R. Griffith-Jones (Cambridge: CUP, 2013), pp. 9, 12-14.
[8] S.1. Sharia courts are classified as arbitration courts for arbitral matters (these exclude family law matters).

on which these decisions are based are transposed into State law[9] or is it simply a question of our courts upholding contractual rights or our freedom to resort to alternative dispute mechanisms? Further, by determining what exactly is being enforced by the State legal system, one can also make explicit the values being endorsed by it and the set of policy considerations in play. This is integral to any assessment of whether this exercise of jurisdiction by the State is sufficiently aligned with its international obligations especially under international human rights law.

Given that legal pluralism is predicated on the existence of more than one legal system, this chapter begins by exploring the question whether religious or customary norms can be classified as 'law.' Section II undertakes a brief review of some of the relevant literature in the area ranging from John Austin and Hans Kelsen to Brian Tamanaha and Paul Schiff Bermann. It concludes that one can classify some religious and customary norms as legal norms thereby admitting the possibility of some form of intra-State legal pluralism. The chapter then focuses on the boundaries between the different legal systems and how to delineate them. It does so primarily from the perspective of State law although this State-centred approach has no wider significance than being a helpful analytical tool to delineate the boundaries between different legal systems. The chapter maps out the dominant approaches to the question of what constitutes 'State' law in the literature, highlighting the tendency to focus on the issue of coercion or whether the law emanates from the 'State' (Section III). It argues that neither approach is sufficiently calibrated to guarantee a satisfactory assessment of how a particular law should be classified. For this reason, this chapter proposes an original approach to the question of classification. Drawing on the functions that are integral to the operation of State legal systems, it develops a continuum of such functions. Depending on the extent to which religious or customary law is engaged by the discharge of one or more of these functions, it argues that it is possible to determine whether the law can be classified as State law while performing the function(s) and for so long as it continues to do so. Such an approach admits the possibility of the concurrent classification of laws as State and non-State law which also has significant implications for the interpretation and application of such laws. In effect, this approach both broadens and deepens the scope of the enquiry and facilitates a more calibrated approach to the question of classification while making explicit the consequences that can attach to this classification under international law.

[9] See e.g. I. Edge, 'Islamic Finance, alternative dispute resolution and family law: developments towards legal pluralism?' in Griffith-Jones, *Islam and English Law*, p. 119.

II. Is it Law?

When discussing religious and customary norms, the first question that arises is whether it is correct to classify them as legal norms or whether they should be classified as a set of beliefs, values or traditions. If it is the latter, then at most they would be a source of inspiration for the development of the law but not an independent body of law in and of itself. As a set of beliefs, values or traditions they would be just one among many potential sources of inspiration for the development of a State's legal system. The decisive point, however, is that there would be only one body of law, namely State law. The formation, interpretation and application of the law would remain within the control of one entity, the State. Any discussion of the potential implications of a State permitting the coexistence of different and potentially conflicting legal systems within its territory or of formally integrating all or part of these legal systems within the official legal system would, in theory, be rendered redundant.

Much has been written about the concept of law.[10] For present purposes, it is not necessary to undertake a systematic review of this literature or to engage in an in-depth analysis of the concept. It is sufficient to map out the key features of those theories that have salience in the present context. These include theories that explicitly recognize religious and customary norms as 'law,' ranging from the nineteenth century 'Command Theory' of John Austin[11] to the 'non-essentialist' theories of law in the literature on legal pluralism.[12] At the other end of the spectrum, they also include Hans Kelsen's Pure Theory of Law which, as a monist and State-centred theory of law, excludes the very possibility of classifying non-State norms as law. [13] Kelsen's theory is significant nevertheless as it encapsulates certain commonly held assumptions about when non-State norms are transposed into State law. As such, his theory is relevant not only to the present discussion but also the discussion that takes place in sections III and IV concerning the relationship between State and non-State law.

[10] For a brief overview of the philosophical, anthropological and theoretical debates about what is law, see e.g. W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: CUP, 2009) especially chapters 3-4; R. Michaels, 'What is Non-State Law? A Primer', in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism,* edited by M.A. Helfand (New York: CUP, 2015) pp. 41, 49-53; J. Griffiths, 'What is Legal Pluralism?', *J. Legal Pluralism & Unofficial L.* 24 (1986) p. 1; Tamanaha, 'Understanding Legal Pluralism', pp. 391-396; F. von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?', *J. of Legal Pluralism* (2002) p. 37; S. Roberts, 'After Government? On Representing Law without the State', *MLR* 68 (2005) p. 1.

[11] *The Province of Jurisprudence Determined* (Cambridge: Weidenfeld and Nicholson, 3rd impr., 1968).

[12] See e.g. P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: CUP, 2012) p. 56; Tamanaha, 'Understanding Legal Pluralism', p. 396.

[13] H. Kelsen, *General Theory of Law and State* (Clark, New Jersey: A. Wedberg tr, Russell & Russell, 1961).

It is useful to begin with John Austin as his theory explicitly addresses the question of whether religious and customary law is law. For Austin, religious laws[14] are 'law properly so called' inasmuch as they are commands emanating from a '*certain* source' which occupies a position of superiority vis-a-vis those to whom the commands are addressed and the commands are backed up with the threat of sanction suffered either 'here or hereafter.[15]' The position in relation to customary law is more complex. Where customary laws arise from the consent of the governed they are regarded as positive morality rather than law.[16] However, some customary laws[17] are regarded as 'law properly so called' when they constitute '*commands* (… being established by *determinate* individuals or bodies) … are armed with sanctions, and impose duties.[18]' In this context, the sanctions are styled moral sanctions in contrast to the political sanctions associated with the third category of law, positive law.[19] The latter corresponds to what would generally be regarded as State law since it is defined as a command by a sovereign[20] to members of an independent political society[21] wherein that sovereign is supreme.[22] While Austin's theory has been heavily criticised, it is of interest in the present context because it proposes a concept of law that is capable of including religious law and some customary laws.[23] In doing so, it does not collapse the distinction between law and other normative orders nor does it define law by reference to the State. In this respect, Austin avoids some of the difficulties associated with later attempts to develop a stand-alone theory of law that is sufficiently broad to encompass State and non-State law while addressing the problem of the 'definitional stop' in the sense of differentiating legal norms from other social norms.[24]

Austin's theory is also of interest in suggesting ways to differentiate State and non-State law. One is the religious, political or moral nature of the sanctions they impose. The second is the way the law is

[14] Referred to as 'Divine laws' or the 'laws of God' in Austin's theory: *The Province of Jurisprudence Determined,* pp. 33-58.
[15] *The Province of Jurisprudence Determined,* pp. 134 (emphasis in original), 34.
[16] *The Province of Jurisprudence Determined*, p. 32.
[17] Austin refers to them as 'positive moral rules' but the definition of these rules is capable of encompassing indigenous or other forms of customary law discussed in the present chapter: *The Province of Jurisprudence Determined*, pp. 134-35.
[18] *The Province of Jurisprudence Determined*, p.135 (emphasis in original). Austin subsequently notes that while this law is 'law properly so called', it 'is not positive law but a rule of positive morality': p. 139.
[19] *The Province of Jurisprudence Determined* p. 157.
[20] A sovereign is defined as a '*determinate* human superior, *not* in a habit of obedience to a like superior' who receives '*habitual* obedience from the *bulk* of a given society': *The Province of Jurisprudence Determined*, p.194 (emphasis in original).
[21] An independent political society is defined as a 'political society consisting of a sovereign and subjects, as opposed to a political society which is … merely a limb or member of another political society': *The Province of Jurisprudence Determined*, p.195.
[22] *The Province of Jurisprudence Determined,* p. 9.
[23] For an overview of the principal criticisms, see H.L.A. Hart, 'Introduction' to *The Province of Jurisprudence Determined,* pp. xi-xv; Kelsen, *General Theory of Law and State,* pp. 31-32.
[24] See e.g. Twining, *General Jurisprudence*, pp. 369-71; Tamanaha, 'Understanding Legal Pluralism', pp. 392-94.

created. While religious law is created by a divine entity, customary and positive law flow from human sources. The latter, in turn, can be distinguished by the fact that positive law is created by sovereigns as 'political superiors' while customary 'law' may be created by sovereigns albeit not as political superiors.[25] Where law is created by the exercise of authority granted by the sovereign, it is deemed to be positive law.[26] On this view, where the sovereign grants authority to religious or ethnic communities to regulate their personal status matters, the resulting regulation would, in effect, constitute positive or State law by virtue of this grant of authority.

Austin also recognized that provisions of religious, customary and positive law sometimes 'coincide' in the sense of containing similar norms.[27] However, he was highly critical of those who would classify positive law as customary or religious law whenever it is inspired by the latter. For him, this would 'confound positive law with law whereon it is fashioned, or with law whereunto it conforms'[28] and 'forget that the copy is the creature of the sovereign, and impute it to the author of the model.[29]' As such, he would reject the suggestion found in some of the academic literature today that there can be a 'blending' of different legal orders leading to the creation of a 'hybrid' order.[30] In this sense, Austin's theory envisages distinct, almost hermetically sealed legal orders and, by implication, admits the possibility of the concurrent classification of norms as both State and non-State law.

The possibility of religious or customary norms being classified as law and operating in parallel to State law is precluded by Kelsen's Pure Theory of Law. For Kelsen, law is always positive law and its positivity lies in the fact that it is created by human beings.[31] Religious norms being created by a divine entity cannot, on this view, constitute law. Aside from this, the nature of the sanctions associated with religious and customary norms preclude their classification as law. According to Kelsen, what distinguishes law from other social orders is that it purports to regulate human behaviour by coercion[32] which is provided for by this order and socially organised.[33] This can be contrasted with a religious order where the sanction is of a transcendent character and not socially

[25] *The Province of Jurisprudence Determined,* pp. 124, 135-39.
[26] *The Province of Jurisprudence Determined* pp. 136-37.
[27] *The Province of Jurisprudence Determined* pp. 159-60.
[28] *The Province of Jurisprudence Determined* p. 164.
[29] *The Province of Jurisprudence Determined* p. 163.
[30] See e.g. A.J. Hoekema, 'European Legal Encounters Between Minority and Majority Culture: Cases of Interlegality', *J. Legal Pluralism & Unofficial L.*51 (2005) pp. 1, 20.
[31] *General Theory of Law and State,* pp. 114, 9.
[32] *General Theory of Law and State*, pp. 123, 18, 19, 20.
[33] A socially organized sanction 'is an act of coercion which an individual determined by the social order directs, in a manner determined by the social order, against the individual responsible for conduct contrary to that order:' *General Theory of Law and State,* p. 20.

organized and a moral order where the response or sanction is neither provided for by this order nor, if provided, socially organised. [34] One finds a similar emphasis on coercion in more recent theories attempting to distinguish between State and non-State 'law'[35] although Kelsen's theory denies the existence of any form of law beyond positive law. For Kelsen, there can only be one positive law for each territory[36] and since the State as a social order is deemed to be identical with the law,[37] this law can only be State law.

Kelsen's theory does admit the possibility of religious and customary norms being transposed into law. It acknowledges that law can be created by means of legal transactions which Kelsen defines as 'an act by which the individuals authorized by the legal order regulate certain relations legally.[38]' In effect, it directs attention to what Kelsen refers to as the dynamic concept of law by virtue of which law is anything created according to the procedure prescribed by the constitution fundamental to this order.[39] When this procedure permits individuals to regulate their relations legally and those individuals chose to do so on the basis of religious and customary norms, the resulting transactions create law.[40] However, one has to probe exactly what it is that becomes part of State law. For example, when individuals agree to regulate their relations on the basis of religious norms by virtue of the UK Arbitration Act 1996, is it their agreement that becomes part of State law or the religious norms on which this agreement is based? It highlights the need for reflection on what it is that is being transposed into State law. If it is the religious norms, then it suggests that by virtue of the Arbitration Act 1996, Sharia law and other forms of religious law are part of State law in the UK.

Kelsen's theory defines law by reference to the State and is a notable example of the type of State-centred legal theory that has 'dominated' legal scholarship. [41] Once one departs from this State-centred approach, defining law becomes more difficult. This is evident from the numerous attempts to do so by philosophers, sociologists and anthropologists of law.[42] All encounter certain problems, notably, that the theory either fails to distinguish between law and other normative systems or uses

[34] *General Theory of Law and State,* p. 20.
[35] See e.g. A.A. An-Na'im, 'Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives', *Drake L. Rev.* 57 (2008-2009) p. 829.
[36] *General Theory of Law and State*, p. 49.
[37] *General Theory of Law and State*, pp. 190, xvi.
[38] *General Theory of Law and State*, p. 137.
[39] *General Theory of Law and State*, pp. 122-23. Kelsen distinguishes between this dynamic concept of law and his own theory of law. While the former defines 'law' in terms of something pertaining to a certain legal order, the latter would not regard every 'law' created by this procedure as a 'legal norm' since this term is deemed to apply only to a norm that purports to regulate human behaviour by providing an act of coercion as sanction: *General Theory of Law and State*, p. 123.
[40] *General Theory of Law and State*, pp. 115-16, 137.
[41] See e.g. M Giudice, 'Global Legal Pluralism: What's Law Got To Do With It? *OJLS* 34 (2014) pp. 589, 592.
[42] See n. 10.

State law as a benchmark for defining law, thereby failing to provide a concept of law independent of the State.[43] These problems are very much in evidence in the literature on legal pluralism[44] prompting some scholars to abandon the concept of law altogether. [45] However, not all have abandoned the search for a workable concept of law that can accommodate both State and non-State law. Brian Tamanaha and Paul Schiff Berman, for example, advocate a non-essentialist position whereby law is 'that which people view as law'[46] although these approaches have been criticised for failing to provide a set of workable criteria for the identification of law and for conflating 'analytic and folk concepts' of law.[47]

The present author, like many international lawyers, adopts a fairly pragmatic approach to the definition of a legal norm. [48] According to this approach, if the principal addressees of a norm, third party decision makers applying that norm and other relevant actors within the system regard it as a 'legal' norm, then the classification of the norm as a legal norm will generally be accepted. Applying this approach to religious and customary norms, it is generally accepted that at least some of these norms are treated as legal norms within the systems that generated them. There is also considerable evidence to show that they are treated as legal norms within other systems. The customary law of indigenous peoples is a case in point.[49] While customary law is clearly regarded as law within indigenous justice systems, it is also regarded as law by the courts, legislatures and governments in numerous States,[50] by several international courts and human rights bodies[51] and by human rights instruments accepted by the majority of the international community.[52] At the very least, it suggests

[43] See e.g. Griffiths, 'What is Legal Pluralism?'; B.Z. Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism', *Journal of Law and Society* 20 (1993) p. 192; von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?.'

[44] For an overview, see further, Tamanaha, 'Understanding Legal Pluralism', pp. 391-96. See also, the discussion in Griffiths, 'What is Legal Pluralism?', pp. 14-38; F. and K. von Benda-Beckmann, 'The Dynamics of Change and Continuity in Plural Legal Orders', *J. Legal Pluralism & Unofficial L.* 53-54 (2006) pp. 1, 12-17; W. Twining, 'Normative and Legal Pluralism: A Global Perspective', Duke J. Comp. & Int.' L 20 (2009-2010) pp. 473, 497-09.

[45] See the discussion e.g. in Michaels, 'What is Non-State Law?', p. 53; Tamanaha, 'Understanding Legal Pluralism', p. 395.

[46] Berman, Global Legal Pluralism, pp. 56-57; Tamanaha, 'Understanding Legal Pluralism', p. 396.

[47] See e.g. the discussion of Tamanaha's concept of law in Twining, *General Jurisprudence,* pp. 370, 97, 101-102, 104.

[48] See e.g. I. Brownlie, 'The Reality and Efficacy of International Law' *BYBIL* 52 (1981) pp. 1-2; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 7th rev. ed., 1997) pp. 6-7.

[49] The sui generis nature of indigenous law should be noted, however. Underpinned by concepts of indigenous sovereignty and self-determination, it is markedly different from religious and other forms of non-State law.

[50] See e.g. Malaysia's National Report submitted to the UN Human Rights Council during the 2nd Cycle of Universal Periodic Review ('UPR'), UN Doc. A/HRC/WG.6/17/MYS/1 (2013) para. 72; Guatemala's Combined 14th and 15th Periodic Reports to the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/GTM/14-15 (2013) paras. 235, 238; Bolivia's Third Periodic Report to the UN Human Rights Committee, UN Doc. CCPR/C/BOL/3 (2011) para. 31.

[51] E.g. *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court of Human Rights (31 August 2001), paras. 138, 151 164.

[52] E.g. the United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) (adopted by 143 votes to 4; 11 abstentions), Arts. 5, 11(2), 27, 34, 40.

that this form of non-State law, in common with some religious forms of non-State law,[53] is *capable* in principle of being classified as law.

III. Is it State or Non-State Law?

If religious and customary norms are capable of being regarded as law, the question then arises whether they should be classified as State or non-State law (or both). Two distinct approaches to this question tend to dominate the existing literature. One approach focuses on whether the norms are given effect within the State legal system. If they are, then they are treated as a form of State law. The alternative approach focuses on the character of the body adopting the norms. If it is a 'State' body, then any rules or regulations it formulates are deemed to be 'State' law. Drawing on the work of Abdullahi Ahmed An-Na'im[54] and Brian Tamanaha,[55] this section maps out some core features of each approach with a view to evaluating its usefulness in classifying religious and customary laws.

At a general level, the first approach raises the question whether religious and customary laws are State law whenever they are accorded some effect within a State's legal system or whether there is some 'threshold' to be met. If any effect is sufficient to transpose religious or customary laws into State law, then the enforcement of agreements based on Jewish or Sharia law in the UK might suggest that these religious laws are already part of State law. This merits reflection as it would have implications not only for those directly concerned but also potentially for the State's role as the 'neutral and impartial organiser of the exercise of religions[56]' under international human rights law. Arguably, it is not sufficient to focus simply on the fact that norms are given some effect within a State legal system. It is important to analyse the extent to which they are given effect, the way it occurs and the basis on which effect is given.

A more nuanced version of this approach is evident in the work of Abdullahi Ahmed An-Na'im.[57] It should be noted that his primary objective is not so much to distinguish between State and non-State law as to demonstrate that the notion of an Islamic State enforcing Sharia as 'positive' law is 'conceptually incoherent' and undesirable from a policy perspective.[58] In language reminiscent of

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[53] E.g. the text of the reservations entered by Malaysia and Singapore to the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'). See reservations available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec> accessed 12 March 2018.

[54] 'Religion, the State, and Constitutionalism', *Drake L. Rev.* 57 (2008-2009) p. 829. See also, 'Towards an Islamic society, not an Islamic State' in Griffith-Jones, *Islam and English Law*, p. 238.

[55] *A General Jurisprudence of Law and Society* (Oxford: OUP, 2001).

[56] *Refah Partisi (The Welfare Party) v Turkey No 2* (2003) 37 EHRR 1, para. 128 (decision of the Grand Chamber).

[57] See 'Religion, the State, and Constitutionalism.'

[58] 'Religion, the State, and Constitutionalism', pp. 840-844.

Kelsen, An-Na'im refers to 'positive law' or 'State law' as law enforced by the State.[59] Although the emphasis is on coercion in identifying positive law, An-Na'im does not subscribe to a monist theory of law since he refers to Sharia as religious '*law*.[60]' Hence while coercion is used by Kelsen to identify law, An-Na'im uses it to identify *State* law.

A central theme in An-Na'im's work is that it is conceptually impossible for Sharia to retain its classification as part of a religious normative system once it is enforced by the State as the State 'can only enforce its own political will, not the will of God.[61]' He accepts that religious values can be transposed into law as Muslims can propose legislation based on their religious beliefs using 'civic reason.[62]' Where the proposals are accepted as law, the decisive point is that this law is no longer religious law but State law. While he accepts that values can be overlapping, An-Na'im continually emphasises the need to distinguish the nature of religious authority from the nature of political authority.[63] There are clear policy considerations underpinning this position, notably, the need to retain the neutrality of the State with respect to religious doctrine and to guard against the dangers associated with totalitarian States claiming religious legitimacy especially for those individuals who would seek to resist the governance model adopted by such States.[64]

An-Na'im's approach is useful in suggesting a clear basis for distinguishing between State and non-State law and is one which addresses the wider potential ramifications of classification. At the same time, it is possible to take issue with certain aspects of this approach. The emphasis on enforcement excludes consideration of other aspects of the legal system, such as mechanisms for the recognition and interpretation of norms. By factoring in these additional aspects, it is possible to appreciate more fully the complexity of the issues surrounding the classification of law and its broader implications. For example, a State legislature may pass a law stipulating that personal status matters such as marriage and divorce are regulated by religious authorities whose decisions are enforced by the State.[65] In these circumstances, classifying the law as State law on the basis that it is adopted by the legislature and enforced by means of the coercive authority of the State presents an incomplete and arguably distorted view of this law. It downplays the fact that the principles governing personal

[59] 'Religion, the State, and Constitutionalism', p. 831.
[60] 'Religion, the State, and Constitutionalism', p. 831 (emphasis added).
[61] 'Religion, the State, and Constitutionalism', pp. 840, 847, 850.
[62] 'Religion, the State, and Constitutionalism', pp. 843, 850.
[63] 'Religion, the State, and Constitutionalism', p. 850.
[64] 'Religion, the State, and Constitutionalism', p. 842.
[65] See e.g. Israel's Initial Report submitted to the UN Human Rights Committee, UN Doc. CCPR/C/81/Add.13 (1998) paras. 532, 549-550, 536, 701.

status matters in that State exist simultaneously as religious principles and that their development within the religious normative system effectively dictates what it is that the State is enforcing. A more expansive approach may also address the type of concerns about human rights that underpin An Na'im's approach. Simply asserting that law is State law by virtue of being enforced by the State even though it originates in religious law will not shut down debates about religious legitimacy nor will it ensure the necessary public space for freedom of religious expression. More importantly, an approach that effectively removes religious authorities from any analysis of State law and, by implication, from any part in its reform will undoubtedly hamper efforts to ensure that in practice as well as in theory these laws respect fundamental human rights.[66]

The alternative approach to classification focuses on the status of the body adopting the norms. Brian Tamanaha, for example, regards State law as having a 'unique symbolic and institutional position that derives from the fact that it is *State* law – the State holds a unique … position in the contemporary political order.[67]' For Tamanaha, State law 'is the law identified with the State and its legal officials.[68]' This might suggest a relatively clear-cut approach to distinguishing between State and non-State law. It is problematic nonetheless, not least because it presupposes a clear understanding of what is the 'State.' Experience with the Human Rights Act in the UK has shown how difficult it can be to answer even the basic question of what is a 'State' function or function of a 'public nature.[69]' In the present context, a further layer of complexity is added. Even if one could determine that a body is exercising a State function, the question arises whether the regulations it adopts when performing that function constitute law and specifically State law. To give a concrete example, would all the regulations adopted by a private security firm in the context of operating a privately-run prison be regarded as State law? It is not impossible to devise a framework for dealing with these issues but the difficulty with some of the literature is that there seems to be an assumption that the identity of State law and indeed what constitutes the State are self-evident.

To sum up, there are difficulties with relying *exclusively* on either approach in determining whether a law should be classified as State or non-State law. Aside from this, the tendency to focus on the

[66] See e.g. the numerous recommendations of UN Human Rights Treaty Monitoring Bodies calling on States to involve religious leaders in the process of law reform especially rendering religious laws compatible with human rights norms, discussed in H. Quane, 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?', *OJLS* 33 (2013) pp. 675, 699-700.
[67] 'Understanding Legal Pluralism', p. 411 (emphasis in original).
[68] *A General Jurisprudence of Law and Society*, p. 225.
[69] See e.g. Joint Committee on Human Rights, Seventh Report, *The Meaning of Public Authority under the Human Rights Act* (2003-04 HL 39; 2003-04 HC 382); D. Oliver, 'Functions of a Public Nature under the Human Rights Act', *Public Law* [2004] p. 329.

classification of law either as State or non-State law tends to side-line the possibility that law can be classified concurrently as State and non-State law. This is unfortunate given the potential implications of this dual classification for the interpretation and application of the law. For example, in some jurisdictions State law reproduces norms found in religious law. This raises the question which body, State or religious, can provide a definitive interpretation of the norm? A simple answer would be to let each body decide within the remit of its own jurisdiction but this risks the bifurcation of the law. This can cause uncertainty not only within the State's jurisdiction but further afield. For instance, when a State enters a reservation to a human rights treaty to the effect that it will comply with the treaty so far as its provisions are compatible with the beliefs and principles of Islam, how can one determine whether it is complying with its obligations if there is uncertainty as to how these beliefs and principles are interpreted within the State? The broad-brush drafting of the reservation combined with the divergent interpretations of these 'beliefs and principles' can generate considerable uncertainty at the international level and undermine the extent to which the State can be rendered accountable for complying with its treaty obligations.[70] Recognizing the potential dual classification of the law helps to make explicit the need for the State to address these interpretive issues with a view to ensuring the effective discharge of its international obligations.

IV. Mapping the Boundaries between State and Non-State Law: A More Calibrated Approach?

This section proposes a different approach to the classification of legal norms. It identifies a range of factors that can help determine whether religious and customary laws can be regarded as 'State' law. The analysis is undertaken explicitly from the perspective of the State legal system. This does not imply the monopoly of the State in law creation nor does it make the recognition of non-State law as 'law' dependent on recognition by the State or call into question the autonomy of non-State law. This approach represents a purely analytical tool for delineating the diffuse boundaries that often exist between State and non-State law. Further, this analysis eschews an exclusively binary classification of laws either as State or non-State law, preferring instead to highlight the permeable

[70] See e.g. Brunei's reservation to CEDAW based on its 'Constitution … and …the beliefs and principles of Islam.' As is evident from the response of other States to this reservation, the precise status of these beliefs and principles within Brunei's legal system and, consequently, the treaty commitments undertaken by Brunei are unclear. See, reservation available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec accessed 2 March 2018.

nature of the boundaries between these two types of law, the possible concurrent classification of laws and the potential implications that can flow from this.

The starting point for the present approach is the acknowledgement of the wide range of functions that are integral to the operation of any State legal system. While this approach has a functional dimension, it should not be mistaken for a functional theory of law.[71] While the latter focuses on the broad societal functions that are believed to be *performed by* a legal system, the present approach focuses on the functions integral to the *operation of* a legal system and specifically a State legal system. These functions range from the formation and recognition of norms, to the interpretation of norms through to their enforcement. It is useful to position these functions at different points along a continuum. In this way, it becomes possible to unpack in more detail the range of questions that need to be addressed to determine the correct classification of religious and customary norms in any given context. The use of a continuum also demonstrates how few, if any, of these functions exist in isolation from one another. This is helpful as the extent to which specific norms are engaged by one or more of these functions can reinforce or lessen the impression that these norms may or may not be classified as State law. This should facilitate a broadening and deepening of the enquiry into how religious and customary norms should be classified and the development of a more calibrated approach to classification.

(1) The formation of norms

At one end of the continuum, there is the formation of norms. Norms can be generated by a variety of actors including religious authorities, indigenous peoples or State entities. Of course, any reference to 'State' entities raises the preliminary question of how to define the State. As this is an integral feature of each point on the continuum, it is useful to explain how this question is addressed in this chapter. While a considerable body of literature exists on this question, the chapter adopts a pragmatic and somewhat circumscribed approach. It draws on the law of State responsibility and specifically those international legal principles governing the attribution of conduct to the State. Drawing on these principles, when norms are formed by a *de jure* or *de facto* organ of the State or by an entity exercising elements of governmental authority,[72] they will be deemed to be State norms. As

[71] On functionalist theories, see Twining, *General Jurisprudence,* pp. 109-116; B.Z. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism', *Journal of Law and Society* 27 (2000) pp. 296, 300-302.

[72] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts, 2001' (UN 2001) Arts. 4, 5; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Judgment of 26 February 2007 (International Court of Justice) paras. 392-93.

experience with the Human Rights Act in the UK has shown, it can be difficult in practice to determine what constitutes 'governmental authority' or, to use the language of the Act, 'functions of a public nature.[73]' Notwithstanding these difficulties, the law on State responsibility provides some guiding principles. While it does not define the State as such, it does provide guidance on when conduct can be attributed to the State such that the conduct can be regarded as 'State' conduct. For present purposes, that is sufficient.

When one or other of these three entities formulate norms, it follows that these norms can be regarded as State norms. Where non-State entities formulate the norms then the norms can be regarded as non-State norms. At this point, the position is straightforward. Matters become more complicated when the laws adopted by the State are influenced by non-State norms contained in religious or customary law. Where the influence is of a rather indeterminate character, the customary or religious law may be classified as a source of inspiration for the development of State law but it would be too tenuous to classify it as State law as such. Beyond this, it is necessary to enquire further into the nature and extent of this influence. At this point, the formation of norms tends to merge into the second point on the continuum, namely, the recognition of norms as State law.

(2) The recognition of norms

The recognition of norms as State law may seem to be a relatively straightforward process. Intuitively, one looks to the law created by the legislature to determine what can be regarded as State law. If religious and customary laws are recognised by the legislature, this may be sufficient to classify them as State law. On closer examination, this approach may be overly narrow and overly broad. It may be overly narrow to the extent that it suggests that the legislature has a monopoly of law making powers. Admittedly, this can be mitigated by recognising that the legislature can create law directly or indirectly; the latter occurring when it confers certain powers on other entities which subsequently adopt rules, principles or norms in the exercise of such powers. Nevertheless, it still does not capture the reality of the law-making process in many jurisdictions today, not least the role of the judiciary in this process. For this reason, it may be preferable to draw on Kelsen's dynamic concept of State law, that is, anything created by the procedure prescribed by a State's constitution. At the same time, this emphasis on the *process* by which law purportedly comes into being may be too broad.

[73] Human Rights Act 1998, S. 6(3)(b). See e.g. *YL v Birmingham City Council* [2008] 1 AC 95.

Revisiting the example of the privately-run prison may help to illustrate the point. When operating the prison, the private security firm can be deemed to be exercising elements of governmental authority. While this is sufficient to ensure that in doing so its conduct can be regarded as State 'conduct,' the question arises whether all the regulations it adopts while operating the prison may be regarded as State 'law.' Compare regulations governing prison discipline with those governing the opening hours of the prison canteen. While it may be possible to regard the former as State law, it is questionable whether it is possible to do the same in respect of the latter. It highlights the need to look beyond the powers granted, directly or indirectly, by the legislator. In this regard, it brings to mind Austin's theory of law by virtue of which not every Act of Parliament would necessarily be regarded as 'law'[74] and reserving the designation 'law' for those Acts of Parliament which oblige a person or persons 'generally … to a *course* of conduct.[75]' This suggests that to qualify as 'law' the regulation should have a normative character and apply generally rather than '*specifically* or *individually.*[76]' While this might be unduly limiting and at odds with the non-essentialist concept of law previously endorsed, it may be useful to retain some normative element given that the present discussion relates specifically to 'State' law and a normative component invariably is a feature of this type of law.[77] To this, one could add an additional element, drawn from the earlier discussion of what constitutes law, namely, that the regulation should be capable of being perceived as 'law' by those to whom it is addressed and other participants within the State legal system.[78]

It follows that there are various steps in the process of determining whether religious or customary law is recognised as State law. The first is to determine whether it is recognised by an entity whose conduct can be attributed to the State such that recognition would constitute 'State' recognition. The second is to determine whether such recognition translates into recognition as State 'law.' This requires a consideration of various factors, notably, the procedure for granting this recognition, the normative character of the religious or customary laws in question and the extent to which these religious or customary laws are regarded as 'State law' by participants within the State legal system. Having established in general terms the various factors that can help determine whether non-State law is recognized as State law, it is useful to turn now to some practical examples and the implications that can flow from the various forms of recognition granted to religious and customary law by the State.

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[74] *The Province of Jurisprudence Determined*, p. 20.
[75] *The Province of Jurisprudence Determined*, p. 24 (emphasis in original).
[76] *The Province of Jurisprudence Determined*, p. 19 (emphasis in original).
[77] On the utility of including a normative component, see Twining, *General Jurisprudence,* p. 100.
[78] While this may appear to introduce uncertainty into the law, the courts are used to dealing with imprecision, notably, in determining how an issue would be perceived by the 'reasonable man.'

One form of recognition is the complete co-optation of non-State law, or part of this law, into State law. An example would be an Act of Parliament that reproduces provisions of religious or customary law governing the contraction of a valid marriage. In this instance, it may be possible to regard the relevant provisions of religious or customary law as State law because they have been adopted by the legislature, are normative in character and are capable of being perceived as State law by participants in the State legal system. This is probably the most clear-cut case of non-State law being recognized as State law. At the same time, it is important to acknowledge that these provisions continue to exist within the non-State legal system. This, combined with the symmetry in the content of the provisions, suggests that the norms in question have a dual or concurrent classification. They exist both as State and non-State law. This concurrent classification may be only temporary in nature. As non-State law is often described as 'living' law, it can continue to evolve and in ways that diverge from the provisions that exist within the State legal system.[79] If the non-State law evolves in ways that diverge from the legislative provisions, it is no longer accurate to refer to the concurrent classification of the provision. There is State law and non-State law although both have a common origin.

This explicit acknowledgement that the classification of religious and customary law may not be a singular or static one is important. Focussing only on its status as a form of State law to the exclusion of its concurrent status as religious or customary law divorces it from the wider context (both State and non-State) including the range of factors that can determine how it is interpreted and applied. As such, it risks creating a distorted and incomplete account of this law as well as a disjuncture between law on the ground and law on the books. Crucially, it risks undermining the effectiveness of any strategies for reforming the law where, for example, the law is deemed to be incompatible with international human rights standards and insufficient efforts are made to involve the relevant religious or indigenous community in the reform process.[80]

Another form of recognition occurs where the State formally grants autonomy to a community over certain issues either on a territorial or a functional basis. In respect of the former, devolved, federal or autonomous institutions may be established within the constitutional structure of the State. Where

[79] J. Bond, 'Pluralism in Ghana: The Perils and Promise of Parallel Law', *Or. Rev. Int'l L.* 10 (2008) pp. 391, 402; R. Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Using Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty', *Harvard HRJ* 24 (2011) pp. 71, 108.

[80] The need to engage these non-entities in law reform processes is evident, e.g., in the recommendations of the Committee on the Elimination of Discrimination Against Women to Mauritius: UN Doc. CEDAW/C/MAR/CO/5 (2006); the recommendation of the Special Rapporteur on Violence Against Women to Ghana: UN Doc. A/HRC/7/6/Add.3 (2008).

such institutions, acting within the remit of their powers, adopt legislation based on religious or customary laws, then prima facie these laws can be regarded as State laws.[81] Such laws can exist simultaneously as State and non-State law. The position is more complex when the State grants autonomy to a community on a functional basis.[82] For example, the grant of autonomy could relate to a religious community being able to determine the conditions under which members of that community can contract a valid marriage.[83] Equally, the grant of autonomy could relate to internal community governance issues. For instance, the community may have the autonomy to regulate the manner of appointment of its religious leaders whose functions include officiating at marriages which are then recognised as valid marriages by the State. In these circumstances, the question arises whether all the laws adopted by the religious community constitute State law due to the grant of autonomy by the State. While it could be argued that the laws regulating the contraction of a valid marriage could be regarded as State law, can the same be said for the laws regulating the appointment of the religious community's leaders? Indeed, to classify the latter as State law would suggest that the State is involved in the appointment of religious leaders, a situation that would raise issues under international human rights law in terms of respecting religious freedom.[84] At the very least, it sounds a note of caution about adopting Kelsen's approach to 'legal transactions' or Austin's concept of an 'indirect command' from the sovereign as it invariably means that every form of regulation adopted due to the grant of autonomy by the State is treated as State law.

It is submitted that while the grant of autonomy is one factor to be considered in determining the classification of laws, it should not be the only one. It is helpful to consider two additional factors. One relates to the nature of the regulation in question. Does it relate to a matter traditionally regulated by the State? In the example given, the regulation of how a valid marriage is contracted is one that is normally undertaken by the State. In contrast, regulating the appointment of religious leaders is not normally undertaken by the State. Admittedly, the distinction may not be clear-cut in all instances and there can be variations depending on the history and traditions of the State as well

[81] See International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (UN 2001), pp. 40-42.
[82] See e.g. the position in Ghana, discussed in Bond, 'Pluralism in Ghana.'
[83] See e.g. the situation in Jordan and Israel outlined respectively in UNHRC, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt: Addendum: Mission to Jordan' (2014) UN Doc. A/HRC/25/58/Add.2, para. 28; UNHRC, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: Addendum: Mission to Israel' (2009) UN Doc. A/HRC/10/8/Add.2, para. 44 ('Jahangir Report').
[84] See e.g. UNHRC, 'Report of the Independent Expert on Minority Issues, Gay McDougall: Addendum: Mission to Greece' (2009) UN Doc. A/HRC/10/11/Add.3, para. 95.

as their evolution over time.[85] As a general principle, however, it can be helpful in considering whether a law should be classified as State law.

A second factor relates to coercion. Although coercion is often associated with enforcement, it is useful to acknowledge its relevance to other points on the continuum. In the present context, it relates to the availability of choice or what are often termed 'exit routes' for members of the community in question.[86] For example, an individual may be able to contract a valid marriage only by complying with the religious laws of her community[87] or she may have the additional option of contracting a valid marriage by complying with the laws applicable to everyone within the State.[88] If the latter applies, one can argue that there is an exit route available and a choice whether or not to submit to regulation by the religious community of which she is a member. If the former applies, one can argue that she has no option but to comply with religious law if she wants to marry. In these circumstances, the absence of choice and its implications for the individual in question could be viewed as a form of coercion. In effect, the individual is being forced to submit to regulation by the religious community. This element of coercion, which is effectively brought about by the conduct of the State, should be an additional factor to be considered when determining whether the law should be classified as State law. Ultimately, all three factors (the grant of autonomy, the nature of regulation, and the issue of coercion) should be considered in determining whether religious or customary law is recognised as State law. In the example given, classifying the law as State law has practical implications as it would mean that the State itself is responsible for restricting the right to marry rather than for any failure on its part to discharge the more indeterminate positive obligation 'to protect' the right to marry against interferences by third parties such as religious bodies.

(3) The interpretation of norms

The third point on the continuum relates to the interpretation of norms. State courts may be called upon to interpret norms that originate in religious or customary laws. This will often be the case where the provisions of religious or customary law are reproduced in an Act of Parliament. In these

[85] In this regard, it echoes the approach to determining what constitutes 'elements of governmental authority' under State responsibility law and the possibility of variable responses depending on the context in which the question arises.
[86] See e.g. A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: CUP, 2001).
[87] In Israel e.g. there is no prospect of a civil marriage. According to one estimate, this means that more than 250,000 Israeli citizens and residents are barred from marrying in Israel including those who have no officially recognized religion, who are 'unmarriageable according to Jewish law' or 'immigrants who are not recognized by the Orthodox Rabbinate as certain to be Jewish:' Jahangir Report, para. 45.
[88] See e.g. the Marriage Act 1961 and the Recognition of Customary Marriages Act 1998 in South Africa.

circumstances, the interpretation of these norms by State courts reinforces the perception already arrived at in relation to the recognition of these norms by the State, namely, that these norms are part of State law. Even where religious or customary laws have not been reproduced in Acts of Parliament, State courts may be called upon to interpret them. One example is where a State has a 'Sharia Guarantee Clause' by virtue of which laws adopted in accordance with constitutional provisions may be declared void if they are inconsistent with Sharia law and where the task of enforcing the clause is vested in judicial rather than political institutions.[89] In these circumstances, the fact that State courts are called upon to interpret the actual provisions of Sharia law in the discharge of their official functions lends weight to the view that these provisions can be regarded as State law.

The involvement of State courts in the interpretation of religious and customary law is clearly important in terms of the classification of the law. It also has broader significance for the potential bifurcation of the law. This is because State courts will draw on interpretive techniques and doctrines that may be alien to the bodies entrusted with interpreting these laws within the religious and indigenous communities in which the laws originate.[90] For example, while customary law on the ground may be 'dynamic and constantly evolving,[91]' State courts may be unable to adopt an interpretation which reflects this reality due to the doctrine of binding precedent. Over time, these differences in interpretive techniques can produce substantive differences in the law itself.[92] Where this occurs, it is no longer possible to refer to the concurrent classification of these laws as State and non-State law. Instead, two distinct bodies of law come into existence, State law and non-State law, which despite their common origins and apparent similarity are different. Failure to recognize this bifurcation of law can have important implications. At a practical level, it can create uncertainty among those to whom the (State and non-State) law is addressed about the exact nature and scope of their rights and obligations. This, in turn, can undermine the efficacy of State law and even thwart the original intentions of the State legislator. This will often be the case where State recognition of religious or customary laws was intended to protect and promote the identity of distinct religious or

[89] See C.B. Lombardi, 'Designing Islamic constitutions: Past trends and options for a democratic future', *International Journal of Constitutional Law* 11 (2013) p. 615.
[90] See e.g. W. Kamau, 'Law, pluralism and the family in Kenya: beyond bifurcation of formal law and custom', *International Journal of Law, Policy and the Family* (2009), pp. 133, 138.
[91] Kamau, 'Law, pluralism and the family in Kenya', p. 138. See also Perry, 'Balancing Rights or Building Rights?', pp. 78-79. It should also be acknowledged that the interpretation of non-State law can vary even within the community: see e.g. M.A. Baderin, 'An analysis of the relationship between shari'a and secular democracy and the compatibility of Islamic law with the European Convention on Human Rights' in Griffith-Jones, *Islam and English Law*, pp. 72, 74-76.
[92] See e.g. B. Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology', *Conn. L. Rev.* 38 (2005-2006) pp. 239, 285-86.

ethnic communities within the State or ensure the more effective enjoyment of their human rights.[93] At a more general level, this bifurcation can undermine the perceived legitimacy of State law within the religious or ethnic communities in question and affect their level of engagement with it. It is hardly surprising then that various techniques of a formal or informal nature are deployed in different jurisdictions to ensure some consistency in State and non-State interpretations of the law.[94] It follows that when States decide to recognize religious or customary law as State law, they need to realise that this is just one step in the process. Careful consideration needs to be given to questions of interpretation given the wider implications to which they can give rise. Specifically, consideration needs to be given to the nature and level of engagement between State and non-State bodies in interpreting the law, which body will be accorded primacy in discharging the interpretive function and what techniques or strategies should be deployed in discharging that function.

(4) Enforcement of norms

The final point on the continuum relates to the enforcement of laws. This point has several strands. One is where the State's executive or judicial organs enforce decisions of religious or customary courts. The question here is whether, on its own, this is sufficient to transform religious or customary law into State law. Recall the position in the UK where decisions of religious courts may be treated as a form of alternative dispute resolution (ADR) and enforced by State courts. Focussing exclusively on the enforcement of the decision by the State court, however, can result in a distorted classification of the religious law on which the decision is based.[95] In this example, it is possible to argue that the State court is enforcing the *agreement* between the parties to resolve their dispute by means of ADR, subject always to the caveat that this does not violate fundamental principles of public policy. In view of this, it is questionable whether the religious or customary laws on which the original decision is based can be classified unequivocally as State law. It is necessary to look beyond the fact of enforcement and take account of all the surrounding circumstances before reaching a conclusion. If non-State law is recognised by the State and/or interpreted by State courts, then this*, in combination with* enforcement by the State, would suggest that it is State law. It is only

[93] See e.g. the discussion in UNHRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples.'

[94] On the range of formal and informal techniques employed, see Lombardi, 'Designing Islamic constitutions', pp. 627-35.

[95] See also, R. Michaels, 'The Re-*State*-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', *Wayne Law Review* 51 (2005) pp. 1209, 1229-1231. Referring to arbitral awards based on the application of lex mercatoria, he argues that an 'arbitral award is enforced regardless of what law was applied. This is the opposite of an explicit endorsement of the applied normative order as "law"': p. 1229.

by interrogating what is being enforced in these circumstances that one can avoid falling into error when classifying religious or customary law.

Enforcement may also be undertaken by religious or customary courts with or without the consent of the State. Where it is undertaken without the consent of the State, it is too tenuous to treat the de facto enforcement of religious or customary law on a State's territory as being sufficient to classify this law as State law.[96] In contrast, where enforcement is undertaken with the consent of the State, it may be possible to classify the religious or customary law enforced by the non-State entity as State law.[97] There can be several reasons for this. One is that the entity may be regarded as exercising elements of governmental authority. If this is the position, then enforcement may be attributed to the State and it is possible to treat the law as though it is being enforced by the State itself. Here there is no ambiguity as to what exactly is being enforced. It is the religious or customary law of the community concerned. Hence, due to the enforcement of these laws by the non-State entity with the consent of the State it is possible to classify them as State law.

A similar conclusion can be arrived at if one focuses on coercion as the defining element of State law. Drawing on Kelsen's theory, the severity or efficacy of the sanction is immaterial to the question of classification.[98] Consequently, it does not matter whether the sanction imposed by the non-State entity entails the loss of liberty, physical punishment or simply a public apology to the community concerned. It is the fact that the sanction can be imposed by these bodies with the consent of the State that determines the classification of the relevant laws. Even though the State is one step removed from the entity imposing the sanction, it is still possible to argue that ultimately the sanction is provided for by the State legal order and is socially organised. Once again, there is no ambiguity about what is being enforced. It is clearly the religious or customary laws of the community concerned and in view of the element of coercion, these laws can be regarded as State law. Arguably, while Kelsen's approach to coercion is useful for the purposes of classification, it is too narrow. This is because coercion is viewed primarily in terms of a socially organised sanction provided for by the State legal order.[99] There is insufficient consideration of coercion that may

[96] However, the State may be responsible for any failure to protect the human rights of an individual against interferences with these rights by the non-State court.
[97] See e.g. the position of the Court of the Navaho Nation in the United States discussed in UNHRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples', p. 19.
[98] *General Theory of Law and State*, pp. 20, 23, 30.
[99] *General Theory of Law and State*, pp. 20-21. There are exceptional circumstances where Kelsen would not equate coercion with sanctions, notably, where coercion is used to prevent harm even though the individual concerned did not commit a delict: p. 279.

dictate the forum in which the law is enforced and, by implication, the range of socially organized sanctions available. For example, in several States today, the only way an individual can obtain a divorce is to institute proceedings before a religious court.[100] The traditional view of coercion focuses on the sanctions that may be imposed during or at the end of the proceedings. However, it is possible to argue that sanctions come into play at an earlier stage, indeed, before the proceedings are even instituted. In the example given, if the individual does not institute divorce proceedings before the religious court, then s/he must remain married with all the attendant implications that this can have for the rights of that individual. It is submitted that the implications for the individual in not accessing the religious court are such that they constitute a form of coercion. In these circumstances, religious law can be classified as State law not only because the State consents to its enforcement by the religious court but also because it coerces the individual to submit to enforcement by that court.

Whether one focuses on the element of coercion or the exercise of governmental authority, the law being enforced by the non-State entity with the consent of the State may be classified as a form of State law. While there can be several reasons for a State to allow non-State entities to exercise some enforcement functions, [101] it is important to recognize the implications of doing so. At the very least, it means that the law being enforced by non-State entities in these circumstances can be regarded as State law. As a form of State law, the State must ensure that it is enforced in a non-discriminatory manner.[102] This requires the State to consider carefully the measures that will be needed to address the variations that will inevitably arise both between and among non-State and State bodies in the enforcement of the law. This will be a significant challenge for States even when one acknowledges that variations are only discriminatory when there is no reasonable and objective justification for the difference in treatment.[103] Nevertheless, classifying the law as State law means that the State must ensure that not only is there reasonable and objective justification for any differences in enforcement but that this justification remains valid over time. It means that the State must remain seized of the

[100] See e.g. the position of Muslims in Zanzibar discussed in M.J. Calaguas and others, 'Legal Pluralism and Women's Right: A Study in Postcolonial Tanzania', *Columb. J. Gender & L.* 16 (2007) pp. 471, 472, 538.
[101] E.g. increasing access to justice in geographically remote and resource constrained areas, respecting the right to self-determination of indigenous peoples, maintaining social harmony in culturally diverse societies.
[102] Virtually all States are bound by at least one international human rights treaty which contains a non-discrimination clause. See e.g. *Report by the UN High Commissioner for Human Rights, Navanethem Pillay, Strengthening the United Nations Human Rights Treaty Body System* (2012), pp. 17-18, available at http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf accessed 15 March 2018.
[103] On the definition of discrimination, see e.g. UN Human Rights Committee, General Comment No. 18 in *Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev. 7 (2004).

situation. Contrary to what can occur at present,[104] the State cannot grant enforcement powers to non-State bodies and then effectively walk away from the enforcement of what is, in fact, *State* law within the communities concerned.

V. Conclusion

Legal pluralism is no longer an historical anachronism found in former colonial countries or confined to theocratic States. It is a feature of most, if not all, State jurisdictions today. Its pervasiveness can be attributed to a range of factors including the rise of identity politics and the accompanying clamour for State recognition of religious and customary law as well as State acquiescence in the regulation of a wide range of activities such as sport, financial transactions and professional standards by non-State actors. Legal pluralism is a phenomenon that is set to become more rather than less pronounced in the coming years. Yet, it is one that has received limited attention from the perspective of international law. While there is widespread recognition of the fact that non-State actors can raise profound issues for the State-centred international legal order,[105] far less attention is paid to the distinct issues raised by regulation by non-State actors. This is particularly so when one considers regulation by religious or traditional communities. The tendency to view religious or customary law as predominantly a matter for municipal legal systems masks the important issues it raises for the international legal system. This chapter explores some of these issues, focussing on religious and customary forms of non-State law and their implications specifically from the perspective of State responsibility and international human rights law. What becomes readily apparent is the need to delineate the boundaries between State and non-State law in order to calibrate and make more explicit these implications. Given the extent to which non-State law can become enmeshed in State legal systems this is a complex task.

Traditionally, the emphasis has been on coercion or the 'State' in determining the classification of law as State law and, by implication, the boundary between State and non-State law. Given such a broad-brush approach to classification, it is hardly surprising that one encounters extensive and often erroneous claims being made about the status of various forms of religious or customary law within State legal systems. To avoid such pitfalls, this chapter proposes an original and more calibrated approach to the question of classification, one that broadens and deepens the scope of the enquiry.

[104] This is evident from the numerous recommendations made by the UN Human Rights Treaty Bodies calling on States to ensure that religious and customary law does not discriminate and is compatible with human rights: see e.g. UN Docs. CRC/C/15/Add.221 (2003); CEDAW/C/VUT/CO/3 (2007); CRC/C/BOL/CO/4 (2009); CEDAW/C/KEN/CO/7 (2011).
[105] See n.5. On the impact of non-State actors on jurisdiction in international law, see A. Mills, 'Rethinking Jurisdiction in International Law', *BYBIL* 84 (2014) pp. 187-239.

Based on the prescriptive, adjudicative and enforcement functions that are integral to the operation of State legal systems, it formulates a highly desegregated and context dependent approach to the classification of laws. By analysing the extent to which religious or customary laws are engaged by the discharge of one or more of these functions, it is possible to assess if these laws should be classified as State law. What emerges from this approach is that laws can have a concurrent classification as State and non-State law and one needs to be alert to this possibility when considering the interpretation, application and possible reform of the law. Further, it demonstrates that there can be functional, personal, temporal and geographical dimensions to the classification of law[106] and that the boundaries between State and non-State law can be diffuse and susceptible to shifting over time. Above all, this chapter makes explicit the need to probe more deeply into the municipal arena to draw out the international law implications where legal pluralism exists and the nature and extent of a State's exercise of jurisdiction is far from certain.

[106] E.g., the State may permit the use of religious law to regulate clearly defined matters, the behaviour of members of a particular community, or in a particular region or for a particular period of time.