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Citations:

Bluebook 21st ed.

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

ALWD 7th ed.

Abdullahi Ahmed An-Na'im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 Mod. L. Rev. 1 (2010).

APA 7th ed.

An-Na'im, A. (2010). *The compatibility dialectic: mediating the legitimate coexistence of islamic law and state law*. *Modern Law Review* , 73(1), 1-29.

Chicago 17th ed.

Abdullahi Ahmed An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law," *Modern Law Review* 73, no. 1 (January 2010): 1-29

McGill Guide 9th ed.

Abdullahi Ahmed An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law" (2010) 73:1 Mod L Rev 1.

AGLC 4th ed.

Abdullahi Ahmed An-Na'im, 'The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law' (2010) 73(1) *Modern Law Review* 1

MLA 9th ed.

An-Na'im, Abdullahi Ahmed. "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law." *Modern Law Review* , vol. 73, no. 1, January 2010, pp. 1-29. HeinOnline.

OSCOLA 4th ed.

Abdullahi Ahmed An-Na'im, 'The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law' (2010) 73 Mod L Rev 1

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THE MODERN LAW REVIEW

Volume 73

January 2010

No 1

The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law

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Islamic Law is not now and cannot be the state law of any state, whether Muslims are the majority or minority of the population. This view does not dispute the religious authority of Islamic Law for Muslims, which exists only outside the framework of the state. Still, some principles of Islamic Law should be relevant to the public discourse, provided the argument is made in terms of what the author calls 'civic reason' and not simply by assertions of religious conviction. While the two are different types of normative systems, each based on its own sources of authority and legitimacy, there are possibilities of compatibility and mutual influence between Islamic Law and state law as complementary normative systems, without requiring either to conform to the nature and role of the other. This lecture examines the requirements, scope and dynamics of this dialectic relationship, whether Muslims are majority or minority.

INTRODUCTION

I am grateful for the high academic honor of presenting the 2009 Chorley Lecture at the London School of Economics, but I must acknowledge from the outset that the issues raised by the relationship of Islamic Law and state law are far from purely theoretical or academic for me. As a Muslim human rights advocate from Sudan, I am discussing these issues in light of Sudan's tragic experience, beginning in 1983, with calls to enforce Islamic Law (*Sharia*) as the state law of the country.¹ Now living with my family in the United States, I am also engaged with the aspirations of 'Muslims of the West' to reconcile their Islamic identity with citizenship of their countries, and the concerns of their wider societies in the United Kingdom and elsewhere. My approach is both personally religious and publicly committed to rendering scholarship in the service of social change. Though I reference the secular state and law in the course of my argument, it is not to

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1 I use the term 'Islamic Law' here for its familiarity to audiences using the English language, though it is not an accurate translation of the term '*Sharīa*' as the religious normative system of Islam.

advance Secularism as a life philosophy, which I personally reject, and do not intend to discuss here. My purpose is to develop a coherent and persuasive model for mediating the relationship of Islamic Law and state law, so that I can be a Muslim freely and by conviction, while fully respecting the human rights of all other human beings, without any other distinction or qualification than being human.

I should also note that my personal engagement with the subject of this lecture is not based on an assumption that the state anywhere is neutral or benign, or that state law is always just and legitimate. The state is a political institution, and state law is often used by the ruling elite and privileged classes and groups to advance and protect their interests. These realities of the universal human condition must always be understood and taken seriously in our pursuit of individual freedom and social justice. To achieve and sustain these objectives, it is imperative to exercise constant vigilance and engage in political struggle for the transparency and accountability of all official institutions and actors. I believe my proposed approach to the relationship of Islamic Law and state law is premised on a clear appreciation of the need for such vigilance and struggle in the cause of individual freedom and social justice. I will not elaborate further on this because it is not the subject of this lecture, but only wish to register my position in this regard.

The subject of this lecture, with due regard for these realities, is the relationship of Islamic Law to state law precisely because this issue is integral to contemporary global struggles for individual freedom and social justice. Muslims constitute the predominant majority in at least forty countries and significant minorities in many others across all regions of the world; the public role of Islamic Law is a global issue. The subject is also important from a comparative perspective for other religious systems and cultural traditions, regarding the meaning and implications of legal pluralism and related issues. With this framing of the subject in mind, let me summarise my main argument and explain my approach.

First, my general argument is that the nature of Islamic Law as a religious normative system, on the one hand, and of the state and state law as secular political institutions, on the other, require clear differentiation between the two in theory and separation in practice. However, the methodological and normative similarities between Islamic Law and state law, and the fact that they both seek to regulate human behavior, raise possibilities of dynamic interaction and cross-fertilisation between the two. For instance, interaction through 'civic reason,' as I will discuss further below, can legitimise state law among religious believers, and change how Muslims perceive and practice the social aspects of Islamic Law within the framework of the constitutional and human rights obligations of the state.

The premise of this argument is that Islamic Law *is not now and cannot be* the state law of any state, whether Muslims are the majority or minority of the population. Islamic Law cannot be enforced as state law and remain Islamic Law in the sense that Muslims believe it to be religiously binding. Since the enforcement of Islamic Law through state institutions negates its religious nature, the outcome will always be secular, not religious. In other words, all state law is secular, regardless of claims of an 'Islamic state' that enforces Islamic Law in countries like Iran and Saudi Arabia.² As

2 For a more detailed defence of this proposition, see A. A. An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, Mass: Harvard UP, 2008) 30–36.

I see it, the choice for Muslims regarding legal adjudication and enforcement of rights and obligations is between good or bad secular law, not between Islamic Law or secular law; between a good or bad secular state, not between an Islamic or a secular state.

This view does not dispute the *religious* authority of Islamic Law, which exists only outside the framework of the state. As a Muslim, I believe Islamic Law is always relevant and binding on Muslims, but only as each Muslim believes it to be and not as declared and coercively enforced by the state. For any act to be religiously valid, the individual believer must comply voluntarily, with the necessary pious intent (*niya*), and without violating the rights of others. This focus on the individual believer is integral to Islam.³ Still, principles of Islamic Law should be relevant to the public discourse, provided the argument is made in terms of what I call 'civic reason' and not simply by assertions of what one believes to be the will of God. By civic reason I mean that the rationale and purpose of public policy or legislation is based on the sort of reasoning that the generality of citizens can accept or reject, which cannot happen when such matters are demanded as categorical religious mandate. The process of civic reason also requires conformity with constitutional and human rights standards in the adoption and implementation of public policy and legislation. All citizens must be able to make their own legislative proposal or object to what others are proposing through public and fully inclusive public debate, without having to challenge each others' religious convictions. Moreover, by its nature and rationale, civic reason is not limited to Islamic Law principles and can apply to other religious normative systems. Civic reason and reasoning, not personal beliefs and motivation, are necessary whether Muslims or members of any other religion or tradition, constitute the majority or the minority of the population of the state.⁴

Secondly, my approach, which seeks to mediate what I call 'the dialectic of compatibility and incompatibility', suggests that these two types of relationships can exist between Islamic Law and state law when the two systems apply to the same human subjects within the same space and time. On the one hand, as already indicated, the premise of my affirmation of the incompatibility of the two systems is that Islamic Law and state law are *different types of normative systems*, each based on its own sources of authority and legitimacy. This does not mean that state law is superior or more effective in regulating human behavior than Islamic Law (or any other non-state system). On the other hand, I propose, the possibilities of compatibility can draw on the similarities in methodology and normative content of these two systems. Moreover, Islamic Law normally requires and sanctions obedience to state law in the interest of public peace and justice, and state law may in turn incorporate some principles of Islamic Law through civic reason and subject to constitutional safeguards. Possibilities of compatibility are also supported by

3 The fundamental principle of individual personal responsibility that can never be abdicated or delegated is one of the recurring themes of the Quran (eg 6:164; 17:15; 35:18; 39:7; 52:21; 74:38). On individuality as the core value of Islam, see M. M. Taha, *The Second Message of Islam* (Syracuse, NY: Syracuse UP, 1987) 62–77.

4 See An-Na'im, n 2 above, 92–101 for a discussion of civic reason and distinguishing it from the notion of 'public reason' as proposed by John Rawls.

the fact that Islamic Law and state law are complementary normative systems, rather than by requiring either to conform to the nature and role of the other.

The proposed mediation of this dialectic is premised on a distinction (not dichotomy) between Islamic Law and state law to avoid confusing the function, operation, and nature of outcomes when the two systems co-exist in the same space and apply to the same human subjects. If state law enforces a principle of Islamic Law, the outcome is a matter of state law and not Islamic Law; it does not have the religious significance of compliance with a religious obligation. Conversely, compliance with Islamic Law cannot be legal justification for violating state law. For Islamic Law and state law to be complementary, instead of being in mutually destructive conflict, each system must operate on its own terms and within its field of competence and authority.

Thirdly, though I focus on current notions of the state and state law as globally applicable ideas that have spread far beyond their European origins, I emphasise the distinct historical and contextual workings of these institutions throughout the world. European-derived conceptions of the state and state law are those under which all human societies live today. This does not mean that these ideas are working well everywhere, or that they must apply in the same way in every setting. It is not possible to evaluate or discuss here the distinctive ways in which these institutions work and evolve in various settings, but the need for such analysis is fully acknowledged.

Fourthly, I should emphasise that my argument and analysis are intended to apply whether Muslims constitute the predominant majority or a small minority of a state's population. Recalling the above-noted distinction between religious law and state law, I argue that Islamic Law cannot be enacted into state law and remain 'religious' as such – regardless of the religious affiliation of the population – but it can influence the development and interpretation of state law and contribute to its legitimacy among Muslims. The massive codification projects of the Egyptian jurist Abdul Razeg Al-Sanhouri (1895–1971) for several Arab countries illustrate the potential possibilities of such a synthesis of traditional Islamic Law jurisprudence and modern state law, whereby Islamic Law principles are 'incorporated' into modern legal codes as secular state law, rather than Islamic Law as such.⁵

For the proposed mediation to work through the legitimate synthesis of Islamic Law and state law, proponents of Islamic Law must abandon claims that Islamic Law principles can or should be enacted into state law as a matter of religious obligation. Instead, they should advance Islamic Law as a jurisprudential tradition and cultivate their own ability to persuade other citizens of the utility and expediency of enacting specific principles of Islamic Law as secular state law. The basic point, however, is that proponents of the enactment of an Islamic Law principle should seek to persuade other citizens by giving reasons that all can debate freely, rather than asserting their own religious conviction or cultural affiliation as categorical justification.

Fifthly, to emphasise the point, this broader jurisprudential dimension does not imply that Islamic Law as such can be compatible with state law in the sense that

⁵ See generally, eg, G. Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Leiden: Brill, 2007).

the two systems can co-exist as competing legal systems of any country. In view of the centralised, bureaucratic, and coercive nature of the modern 'territorial' state, as explained below, the secular legislative organs of the state must have exclusive monopoly on enacting state law, and secular judicial (and, as appropriate, administrative) organs must also have exclusive authority to interpret and apply that law. At the same time, principles of Islamic Law can be compatible with state law in substantive terms through the jurisprudential dimension. The existence of strong similarities between Islamic Law principles of, for instance, contracts and property and corresponding principles in many modern legal systems should facilitate the incorporation of those principles into state law through civic reason.⁶

To conclude this introduction, since the argument I am making about the relationship of Islamic Law and state law is premised on the nature of Islamic Law and the nature of the state and state law, I will begin by briefly clarifying the nature and development of Islamic Law. Next, I will outline the nature of the modern state and state law in global perspectives. In light of this overview of the two sides of the dialectic relationship, I will focus in the final section on the possibilities and prospects of compatibility and incompatibility of Islamic Law and state law. I will illustrate this discussion with reference to current debates in Muslim majority and minority situations, and I will call for taking Islamic Law seriously by including it in comparative legal education as a forward-looking jurisprudential tradition, not merely as the subject of historical curiosity.

THE NATURE AND DEVELOPMENT OF ISLAMIC LAW

The underlying question for this lecture is how can Muslims live in accordance with their religious beliefs without violating the rights of others to live in accordance with their religious or other beliefs? In particular, must Muslims have Islamic Law enforced as state law in order to honor a religious obligation, or is that obligation inapplicable to state enforcement, indeed counterproductive for the religious nature of Islamic Law, as I argue? To answer these questions I must explore the development of Islamic Law and its relation to a Muslim's personal religious obligations.

Islam is the monotheistic religion that the Prophet Muhammad propagated between 610 and 632 CE, when he delivered the Quran and explained its meaning and application through what came to be known as Sunna of the Prophet. The Quran and Sunna are where Muslims look for *guidance* in developing their social and political relations, legal and ethical norms; but *these sources are not legal codes as such*. In this foundational sense, Islam is about realising the liberating power of a living and proactive confession of faith in an infinitely singular, omnipotent, and omnipresent God. This is the sense of Islam that Muslims experience in everyday life, wherever and whenever they may live, and from which they seek spiritual and moral guidance.

⁶ See, W. B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge UP, 2009) 239–245 (on contracts), and 296–306 (on property).

The systematic development of Islamic Law began during the eighth and ninth centuries CE (second and third centuries of Islam). This period saw the emergence of the major schools of Islamic jurisprudence (*madhahib*),⁷ the gathering and verification of what came to be accepted as authoritative records of Sunna (the second and more detailed source of Islamic Law after the Quran),⁸ and the development of a juridical methodology (*usul al-fiqh*) to regulate the derivation of principles and rules of Islamic Law from the Quran and Sunna. The Islamic juridical science of *usul al-fiqh*, said to have been perfected for Sunni Muslims by al-Shafi'i (died 820), is concerned with the sources of Islamic law, their order of priority, and the methods by which legal rules may be deduced from the source materials.⁹ The various schools of Islamic jurisprudence were founded during that same general timeframe and continued to develop and spread, influenced by many political, social, and demographic factors. These factors sometimes resulted in the spread of schools from one region to another, the extinction of some schools or their confinement to certain areas, as is the case with Shia schools at present.

The principle of consensus (*ijma*) acted as a unifying force during the ninth century, drawing the methodologies and substantive content of Sunni schools together by drastically diminishing the role of creative juridical thinking (*ijtihad*) from the tenth century on. Some scholars argue that creative juridical thinking continued to varying degrees,¹⁰ but there is no doubt that there has not been any change in the basic *structure and methodology* of Islamic Law for a thousand years. Whatever degree of reform and practical adaptation was achieved over time in different parts of the Muslim world happened within the framework of the methodology and parameters of *usul al-fiqh* as established by the tenth century. While that historical rigidity may have played a stabilising role in times of great political turmoil and external invasion, there is nothing to prevent the revival and active exercise of creative juridical thinking in the modern era. In fact, many Muslim scholars and community leaders have called for this for a couple of centuries now, though few have actually attempted to do so in order to develop coherent methodologies of reform, or produce concrete reform proposals. While critically important, this aspect of the issues is not the subject of this lecture.¹¹

7 The main schools of Islamic jurisprudence followed throughout the Muslim world today are attributed to Ja'far al-Sadiq (died 765); Abu Hanifa (died 767); Malik (died 795); al-Shafi'i (died 820); and Ibn Hanbal (died 855).

8 The most authoritative compilations of Sunna for Sunni Muslims are attributed to Bukhari (died 870); Muslim (died 875); Ibn Majah (died 886); Abu Dawud (died 888); al-Tirmidhi (died 892); and al-Nasa'i (915). For the Shia, the most authoritative compilations also emerged during that general timeframe, namely, those attributed to al-Kulayni (died 941); Ibn Babawayh (died 991); and Abu Ja'far al-Tusi (died 1067).

9 M. H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Text Society, 2003) 1. *Fiqh* means understanding, of Sharia in this context, and *usul* means roots, sources or organising principles. *Usul al-Fiqh* therefore refers to the rules of construction, hierarchy, cross-reference and internal organisation of the sources of Islamic Law. See, for example, Hallaq, n 6 above at 72–124

10 W. B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 *Int J Middle East Stud* 3–41.

11 For my views on Islamic reform see, generally, Taha, n 3 above; also A. A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse UP, 1990).

The essentially religious nature of Islamic Law and its focus on regulating the relationship between God and human believers means that believers can neither abdicate nor delegate their religious responsibility. No human institution can be religious in this sense of regulating the relationship between God and believer, even when it claims to enforce principles of Islamic Law. The state and all its institutions are by definition secular and not religious, regardless of claims to the contrary. If this is true, as I argue, how does one explain the apparent rise in demands for the enforcement of Islamic Law as state law, and how should one respond to such demands?

In my view, the rising demands for enforcement of Islamic Law as state law are a misguided bid for post-colonial self-determination. As the first generation of post-colonial political leaders of Muslim majority countries, from the FNL (National Liberation Front) in Algeria, Jamal Abd al-Nasir in Egypt, the Shah of Iran, to Zulfiqar Ali Bhutto in Pakistan, failed to deliver on the economic and political promise of independence, people started to look for alternatives. By the mid-twentieth century, Islam seemed to represent an appealing and available ideology for the range of issues facing Muslim majority countries. As clearly demonstrated by a series of failed attempts at state enforcement of Islamic Law across the Muslim World the so-called 'Islamic solution' is also failing to deliver on that promise. To draw the right lesson from the failed attempts, it is necessary to understand why they are *a failure of the concept of an Islamic state itself*, and not simply the failure of some 'experiments' that can be corrected in other attempts. I will now try to clarify this point in terms of the nature of Islamic Law, and its relationship to state law.

The term Islamic Law is often used as if it were synonymous with Islam itself – as the totality of Muslim obligations in both the private, personal religious sense, and vis-à-vis social, political, and legal norms and institutions. However, it is important to distinguish between the *concept* of Islamic Law, as the totality of the duties of Muslims, and any particular interpretation of the *content* of Islamic Law, which comes through a specific human methodology of interpretation of the Quran and Sunna in a particular *context*. But even as a concept, Islamic Law is only the door and passageway into being Muslim and does not exhaust the possibilities of experiencing Islam. There is more to Islam than Islamic Law, though knowing and complying with the dictates of Islamic Law is the way Muslims realise Islam in their daily lives. However, the point for our purpose here is that since religious compliance is necessarily a personal matter for individual believers, it does not include coercive enforcement of religious principles as state law.

Islamic Law principles are always derived from human interpretation of the Quran and Sunna; they are what human beings can comprehend and seek to obey within their own specific historical context.¹² Striving to know and observe Islamic Law is always the product of the 'human agency' of believers because it is a system of meaning that is constructed out of human experience and reflection that evolves over time into a more systematic development according to *an* established methodology. Note that it is 'an' not 'the' established methodology because

12 Averroes (Ibn Rushd), *The Book of the Decisive Treatise Determining the Connection Between the Law and Wisdom* (Provo, UT: Brigham UP, trans Charles E. Butterworth, 2001) 8–10.

whatever methodology one accepts, it is also the product of human agency, and not divine. Since the application of any methodology of interpretation is necessarily a human process, the content of Islamic Law can change over time, as alternative methodologies come to be accepted and applied by Muslims in their own historical context.

How various interpretations of the Quran and Sunna came to be established as Islamic Law principles indicates dynamic possibilities of establishing alternative interpretations. However, it is difficult to imagine how this can happen today, at least in the short term, because of the spontaneous and slow nature of the process. Because of their religious nature, Islamic Law principles cannot be 'enacted' from the Quran and Sunna at any specific point in time by any human institution or process. There is simply no religiously valid way of institutionalising or accelerating the process of establishing Islamic Law principles, or amending existing ones. Let me briefly explain.

The religious nature of Islamic Law means that there is no person or institution authorised to decide for all believers the Islamic Law rule on any subject; each believer is responsible for his or her own belief in the matter. This has always been the case for Sunni Muslims, who make up about 90 per cent of the total Muslim population of the world today, hence the extreme diversity of opinions among and within the Sunni schools of Islamic jurisprudence. For Shia Muslims,¹³ the Imam may declare or change established principles of Islamic Law. This remains theoretically possible for some small groups among the Shia, like the Ismailis, who have their own living Imam. But this possibility is irrelevant for the vast majority of Muslims, including all other Shias who do not accept that particular Imam. This proposition is therefore true for at least 95 per cent of the Muslims of the world today. The fact that one or two per cent of Shia Muslims, like the Ismailis, have their own authoritative person or institution is rejected by all other Muslims, Sunnis as well as other Shia communities.

If this is the case, how was any principle of Islamic Law established in the first place? That happened through what I call *inter-generational consensus* among the members of each community or group of Muslims who accepted a principle of Islamic Law as binding from a religious point of view. In other words, every principle accepted today as part of Islamic Law among any group of Muslims has achieved that status only because successive generations of Muslims have personally accepted it as valid and binding. It is therefore logically impossible for Muslims to have *a legislative authority that can enact a single principle of Islamic Law*. Even if the total Muslim population of the world were to meet in a single time and place and vote to adopt a principle as part of Islamic Law, it would remain binding neither for those who voted for it, because they are entitled to change their mind, nor for subsequent generations unless they accept it for themselves. Speaking about consensus among scholars who are accepted as authoritative, which is not realistically possible today, Ibn Rushd explained that the conditions for the valid-

13 The label Shia designates various groups of Muslims united by a belief that the leader of the Muslim Community (*Imam*) should be a member of the Prophet's family, usually a descendant of the Prophet's daughter, Fatimah, and her husband Ali.

ity of a claim of consensus are so difficult to establish that the claim cannot be more than suppositional (*zaniyan*), and never a certainty.¹⁴

It is totally unrealistic to expect any group of Muslims to actually agree on a principle of Islamic Law that can be enacted as state law. Even if Muslims constitute the total population of a country, they are unlikely to agree on what to enact as Islamic Law; and it should remain possible for any Muslim to change his or her mind, from a religious point of view, about what has been agreed. This slow and mysterious, contingent and contestable manner of 'Islamic Law formation' is a good safeguard against imposing any view of Islamic Law on any believer without her voluntary acceptance. But, the nature of the process also means that it is difficult to accelerate it or influence its outcome in a particular direction. All one can do is to advocate for a view and wait to see whether consensus has emerged among Muslims in favor of one proposition or another. The issue cannot be resolved through the democratic principle of majority rule, which has no validity in matters of religion, where a single person, a prophet, can be right and the rest of humanity can be wrong.

This reality is liberating, on the one hand, because it means that no human being can legitimately impose a religious position on another. Of course, people can be coerced into apparent conformity, but they can never be compelled to accept any view within their inner moral conscience. On the other hand, the 'Islamic Law formation' process means that one cannot ensure that desirable change happens, at least within a specific period of time. For example, I believe it is necessary and theoretically possible to achieve complete equality for women and non-Muslims, secure freedom of religion, and abolish aggressive jihad from an Islamic Law point of view.¹⁵ Yet, it is difficult to see how and when this theoretical possibility might be confirmed as established Islamic Law among the Muslims of a particular place or of the world at large. At the same time, any Muslim can in fact decide that what I am calling for is the correct view of Islamic Law on the subject. For that to happen, however, Muslims must have the freedom to freely think, study, debate with others, and decide for themselves, in order to act according to their best judgment, without fear of suppression or other retaliation by the state. In other words, the state must remain neutral in all matters of religion for believers to follow their own convictions and accept religious responsibility.

To conclude by summary, Muslims everywhere are bound to observe Islamic Law as a matter of religious obligation, but that can best be fulfilled when the state is *neutral regarding all religions*. What the religious neutrality of the state means for our purpose here is that the state should not claim to enforce Islamic Law as state law. That coercive enforcement is bound to be used to enforce the views of Islamic Law held by those who control the state, thereby obliging individual Muslims to comply with those views, even when they disagree. For example, the Shia Muslims of Saudi Arabia are forced to conform to the Wahabi doctrine of the Saudi monarchy and the Sunnis of Iran are forced to comply with Shia ideology, as interpreted by the Ayatollah Ruhollah Khomeini and his followers. The possibility of incorporating a principle of Islamic Law into state law through civic reason

¹⁴ Ibn Rushd, n 12 above, 10–11.

¹⁵ See Taha, n 3 above, 139–145; An-Na'im, n 11 above, 52–60.

and the democratic process remains, but this is always a matter of secular state law, never the religious law as such of any community of believers.

THE STATE AND LAW IN GLOBAL PERSPECTIVES

As noted earlier, I am focusing on European notions of the state and law since formerly colonised peoples, including all Muslim majority countries, have elected to continue with these models after independence. I also believe that an institution or model should neither be privileged nor discredited simply because of its origins or other associations. The global perspectives approach I am applying should be open to all human experiences, including those of former colonial powers as part of the broader and constantly evolving and interacting human experience. In being pragmatic by working with existing institutions, however, I am also acknowledging the need to take account of the experiences of all societies in the development of concepts of the state, law, and state law, though it is not possible to do that here.

The territorial 'nation' State

The key features of the modern state for our purposes here are that it is a centralised and bureaucratically organised administrative and legal order run by an administrative staff, binding authority over what occurs within its area of jurisdiction, a territorial basis, and a monopoly of the use of force.¹⁶ The modern state is also characterised by the claim of exclusive sovereignty and a much greater capacity to intervene in society at large.¹⁷ This form of state is sometimes called a 'nation' state, but I prefer to focus on territoriality rather than nationhood, as emphasis on a 'nation' often leads to suppression of minorities to affirm national uniformity. Irrespective of so-called national identity, one of the most characteristic features of all modern states is their territorial nature, as emphasised in national constitutions and international law principles.¹⁸ Reasons for this emphasis on territoriality include the need to clearly define the boundaries of exclusive sovereign control over land, resources, and population to the exclusion of other states. For our purposes here, defined territory indicates the ability of the state to impose its will, coercively if necessary, over a particular space and population.¹⁹

Though territoriality can be seen in early state formations throughout the world, the notion of the territorial state found its strongest and clearest expression in Europe, beginning in the late eighteenth century. As the state emerged as a new form of social ordering, state law had to be binding in order to override previous feudal and religious law, and other forms of social ordering. The concept of the state was implemented both with political/legal and geo-physical boundaries, whereby the national legal system emerged as a means of justifying a particular state and explaining how it was to function. That process also emphasised 'the

16 G. Gill, *The Nature and Development of the Modern State* (Basingstoke: Palgrave Macmillan, 2003) 2.

17 *ibid* 12.

18 G. Patrick, 'The Nationalist Heritage' in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge UP, 2003) 79.

19 *ibid* 80–81.

exclusivity of state sources of law, so they are all instrumentally directed toward the process of creating *binding* law, which can be uniformly enforced within the defined territory of the state.²⁰

As Europe divided into territorially-defined states, European international law developed out of the need for governing relations between states, to legitimate the territorial sphere of each state by formalising its boundaries.²¹ As Europe exported the state through colonialism and imperialism, international law necessarily followed.²² In fact, European international law justified and legitimised colonialism and imperialism by applying the European criteria of sovereign statehood to other regions of the world. Military conquest and occupation of territories and populations in Africa, Asia, and Latin America were justified by deeming their pre-existing polities and political formations as lacking sovereignty by European standards. In that way, European models of the state and conceptions of international law became dominant norms by the first half of the twentieth century, and were continued by colonised peoples after gaining independence. Whatever changes people may want to make in these systems now have to be made through the established institutions and processes of the present state system, rather than trying to bypass them.

In general, this now universalised territorial state tends to be a bureaucratic organisation that is centralised, hierarchical, and differentiated into separate institutions and organs with their own specialised functions. The institutions of the state are supposed to operate according to formal rules and a clearly defined hierarchical structure of accountability to central authorities. The hierarchical yet interconnected state institutions are distinguished from other kinds of social organisations, like political parties, civil society organisations, and business associations. The scope and functions of the state require its institutions to be distinct from non-state organisations because state officials and organs regulate non-state entities and at times have to adjudicate differences among them. This complex relationship of theoretical distinctiveness and practical interconnectedness between state and non-state institutions or organisations is one aspect of the distinction between *state* and *politics*. As I have explained elsewhere, this distinction is useful for mediating the paradox of separation of religion and the state and the realities of connectedness of religion and politics.²³

The expansive and far-reaching domain of the modern state – extending now to every aspect of social, economic, and political life, including the provision of educational, health, and other services – is far more extensive than any other kind of organisation. This comprehensive and far-reaching range of functions also emphasises the uniqueness, autonomy, and independence of the state from all other kinds of organisations. To fulfill its multiple functions and roles, the state must have sovereignty, both internal and external. It must be the highest authority within its territorial borders. The state must also be the authoritative representative of its citizens and entities within its territory to all entities and actors outside

20 *ibid* 83.

21 *ibid* 85.

22 *ibid* 86.

23 An-Na'im, n 2 above, 88–92.

that territorial domain. For the same reasons, the state must also have a monopoly over the *legitimate* use of force and coercion. This capability is essential for the state to be able to enforce its authority in order to protect its sovereignty, maintain law and order, regulate economic activities, and adjudicate disputes. Conversely, the state is territorially defined and limited because it normally possesses no authority beyond its borders. Other kinds of organisations, like religious groups or Sufi orders, can operate across political boundaries of states because they are defined by functional scope rather than their geographical reach.²⁴

It is also useful to note here that, as the ultimate source of power and authority over a territory, with the necessary monopoly over the legitimate use of force, the state is the final institutional actor. This power and authority derive from a combination of sovereignty and territorial integrity which are vested in the state, and therefore, can be undermined by the loss or diminishing of either quality. Territorial sovereignty means that the exclusive control of the state over its population and territory cannot be legitimately shared with any other entity, except with the consent and cooperation of the state itself. The central authority of the state means that it is autonomous, which includes holding the sole original authority to make rules governing its operations, as well as its role as the original source of all political authority, even when such functions are delegated to other organisations or entities. This centrality of the state also requires that it coordinate the functions and activities of all of its organs and institutions, which emphasises and entrenches the power of the state as a whole.²⁵

Although democratic governance as such is not required for qualifying as a state in domestic and international law and relations, the people of the country are generally assumed to be the ultimate source of power and authority of the state, which exists to serve its people. This assumption seems to be true even of authoritarian dictatorships or monarchies that tend to justify their authority in terms of the collective will and the best interest of their populations. Citizenship flows from this underlying basis of legitimacy of the state to ensure that all of the inhabitants of the territory have general and equal obligations and entitlements in their relation to the state. This combination of democratic legitimacy and citizenship should also be embodied in the nature and function of law in relation to the state. Whatever view Muslims had of the law, its sources and norms in the past, the state has increasingly taken over the function of *making* law and not just enforcing it. Historically, the autonomy of the law may have been grounded in religion, tradition, or the culture of the community. Now, however, law is widely regarded as both the product and instrument of the policy of the state.²⁶

Law and state law in interactive perspectives

My limited objective here is to clarify the notions of law and state law for the purposes of our subject, rather than attempt to be definitive or exhaustive on these

24 Gill, n 16 above, 3–7.

25 G. Poggi, *The State: Its Nature, Development and Prospects* (Stanford: Stanford UP, 1990) 22.

26 *ibid* 29.

conceptions or related institutions. In particular, I hope to show that the relationship between Islamic Law and state is one of two complementary normative systems, without implying any ranking or priority between them. Distinguishing these two systems is necessary for both systems to work properly, each in terms of its own nature and framework, and confusing the two systems is detrimental to both of them.

There seems to be some reciprocity between the territorial state and state law, whereby the state gives its law binding force, which enables the state to enforce its will on the territory and population.²⁷ It is certainly true that state law aspires to be binding on its subjects, and this may generally be true, but this claim neither explains how state law becomes binding, nor necessarily distinguishes state law from other types of normative systems. A rule may be asserted as binding by the relevant normative system, and be perceived as such by the subjects of that system, without any reference to the state. It may also be appropriate or necessary to conceive of law in broader or other perspectives for different purposes. According to William Twining, for instance, 'From a *global perspective* it is illuminating to conceive of law as a species of *institutionalised social practice* that is *oriented to ordering relations* between *subjects* at one or more *levels* of relations and of ordering.'²⁸ In his view, a social practice is law when it is oriented to ordering relations, that is, when the point of it is to fulfill a particular ordering function such as dispute prevention, allocation of power, etc.²⁹ Boaventura de Sousa Santos argues that a proper definition of law needs to be 'broad and flexible enough to capture the sociological dynamics' within the three frameworks of time and space: nation-state, local, and global. Santos conceives of law as

a body of regularised procedures and normative standards that is considered justiciable – i.e., susceptible of being enforced by a judicial authority – in a given group and contributes to the creation and prevention of disputes, as well as to their settlement through an argumentative discourse coupled with the threat of force.³⁰

It may also be helpful to recall here the dynamic interaction of law and other normative systems. As H. L. A. Hart explains, moral and legal rules are similar in that they both are binding on individuals regardless of their consent, are supported by social pressure to conform, and are necessary to the viability of any society. These similarities mean that many moral and legal rules can serve the same function. There are also important differences between moral and legal rules. First, moral rules are often viewed as having a higher importance than legal rules. Secondly, legal rules can be changed by deliberate action (eg enacting legislation), whereas morality and tradition cannot be changed by a simple deliberate act (although law may have the effect over time of changing tradition/morality). Third, while moral offenses are by their nature committed voluntarily, some legal offenses can be

27 See eg P. Glenn, 'A Transnational Concept of Law' in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (New York: Oxford UP, 2003) 840.

28 W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge UP, 2009) 117 (emphasis in original).

29 *ibid* 110–111.

30 B. de Sousa Santos, *Towards a New Legal Common Sense* (London: Reed Elsevier, 3rd ed, 2002) 86.

'strict liability'. Finally, moral pressure to conform to a moral rule is based on the idea that the rule is intrinsically valuable whereas compliance with a legal rule is typically coerced through threats of physical punishment or other unpleasant consequences.³¹

There is also strong co-relation between law and morality, as law typically follows morals. Voluntary participation by at least some members of a society is a prerequisite for the functioning of law. For legal rules to be enforced when necessary, their violation must be the exception rather than the common practice, because enforcement systems cannot cope with massive and constant violation. As Hart rightly observed,

[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process . . . the further ways in which law mirrors morality are myriad, and still insufficiently studied . . .³²

Moral principles are important to the legitimation of laws. A system of laws that is in accord with moral principles is more likely to hold the respect of its subjects and therefore remain stable, whereas a system disconnected with the morals of the society is likely to be more unstable and subject to upheaval.³³ Moreover, judges often interpret laws with the assumption that they were made in accordance with or in furtherance of accepted morals.³⁴

State law is the law that the state creates and enforces, indeed this defines the state itself as a system by which duties and obligations are created, recognised, and enforced. Since the state is preoccupied with the legal relationship, it does not recognise or enforce every duty and obligation between persons, only those that arise from state law. All state law, regardless of its normative foundations, is created by the state through its legislative, executive, or judicial functions. It is important to note here that this relationship between the state and its law emerged through a complex and protracted process, with contingent and ambivalent outcomes at different times. 'The mid-to-late medieval period was characterised by a remarkable jumble of different sorts of law and institutions, occupying the same space, sometimes conflicting, sometimes complementary, and typically lacking any overarching hierarchy or organisation.'³⁵ There was frequent conflict over jurisdiction between the various forms of law and the courts applying them, whereby many legal issues could be tried in either a church or a secular court.³⁶

Gradually, other forms of law were absorbed or eliminated as state apparatuses were established to oversee tax collection, law enforcement and adjudication. During the seventeenth and eighteenth centuries, state law became the pre-emi-

31 H. L. A. Hart, *The Concept of Law* (Oxford: Oxford UP, 2nd ed, 1994) 172–179.

32 *ibid* 203–204.

33 *ibid* 201–202.

34 *ibid* 204–205.

35 B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney L Rev* 375, 377.

36 *ibid* 377.

ment form of law and the basis for legal recognition of any other norms. Customary norms and religious law were deemed to belong to the private realm. Although some rules of non-state law continued to be sanctioned by the state and others were still enforced in religious or social contexts, they lost their *legal* status and applied only as religious, moral, or customary *norms*.³⁷ In the colonies, European powers also attempted to expand the reach of state law by incorporating customary or religious law through codification and the creation or recognition of informal or 'customary' courts run by local leaders. As a result, a dual legal system emerged, with state courts dealing with economic activities and government affairs and with customary or religious institutions enforcing local norms.³⁸ Generally speaking, that duality continues in most former colonies, but state law may have less power in the social life of communities due to concerns about its relevance to local conditions or weakness of the state judiciary and legal profession.³⁹ As to assertions of the supremacy of Islamic Law over state law, as was claimed in the early 1990s in Sudan or 2000 in some states in Northern Nigeria, that was really about secular state law, and not Islamic Law as such, as I explained earlier.

It should also be noted here that the earlier 'nationalisation of law' now seems to be diminishing, primarily due to intensifying globalisation, and demands of minorities and populations invoking non-state law to uphold their identity. States are now less able to control their own economies due to their connectedness to the global economy and its fluctuations.⁴⁰ Citizens are increasingly viewing their identity in transnational or cosmopolitan terms rather than seeing themselves exclusively as citizens of a particular state.⁴¹ Examples of the weakening of the traditional legal functions of states include the increased use of private security forces, penitentiaries that are privately owned and operated, private institutions that have their own rules, and the use of arbitration or private courts to bypass state courts.⁴²

It can be argued that since the state is sanctioning these growing fields, they all fall within the conceptual category of state law, but that view can also be criticised for being too formalistic or superficial. After all, what is the rationale of the state and state law in the first place, what does sovereignty mean, and how can the state remain accountable to its constitutional obligations, when it is ceding so much of its power and authority? Should one still speak of the state when it is an empty shell, or should we find new ways of understanding and regulating what is really happening? These are obviously legitimate questions, which should be discussed in relation to notions of legal pluralism, legal theory, and sociology of law. For instance, there is no doubt that many community affiliations, including ethnic groups, religious institutions, and trade organisations, exert tremendous power over human behavior even though they are not part of an 'official' state-based

³⁷ *ibid* 381.

³⁸ *ibid* 384.

³⁹ *ibid* 384–385.

⁴⁰ *ibid* 386.

⁴¹ S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton UP, 2006) 1; Glenn, n 27 above, 843.

⁴² Tamanaha, n 35 above, 387.

system. In fact, the interactions between normative systems often do not take place in an official hierarchical fashion based on coercion, but rather have a 'dialectical quality'.⁴³ Still, I believe that such factors do not negate the importance of the notion of state law for the purposes of my subject in this lecture for two reasons.

First, it is necessary to establish a clear understanding of state law before we can appreciate the ways it is being transformed or contested. For instance, when hegemonic communities establish their own community law as the law of the state, those outside the hegemonic power structure often invoke an 'alternate legality' to reduce the exclusion they experience even though the alternative identity they invoke may be one of being an outsider.⁴⁴ Yet, to understand and address what is happening, we need to take the notion of state law seriously because it has strategic value due to its pervasiveness and power. As Santos put it, state law is backed by vast and organised power 'with potentially infinite mobility and infinite potential for diffusion in the most diverse social fields'.⁴⁵ This vast power firmly establishes state law as the principal around which all other legal systems organise, and in relation to which they seek to maximise their power.

The second more important reason for keeping the notion of state law for our purposes here is that it relates to a *different* type of normative system than Islamic Law. From this perspective, all the forces and factors that are diminishing the traditional European notions of sovereignty and state monopoly are all acknowledged to be *secular*, and can be contested as such. In contrast, assertions that Islamic Law can be enforced as state law and remain Islamic in a religious sense, which is the main proposition I am challenging here, is about claims of *divinity*, which are not possible to contest from a secular human point of view. This is why it is particularly dangerous to concede such claims. Another reason, important for me personally as a Muslim, is that claims of enforcing Islamic Law itself as state law is corrupting of Islamic Law. In other words, I am as concerned about protecting the integrity of Islamic Law as I am about preserving the legitimate and necessary domain of state law.

FAILURE TO TAKE ISLAMIC LAW SERIOUSLY

By calling for 'taking Islamic Law seriously' I am calling for allowing it to be a legitimate influence on the legal system through its role in public policy debates, legal education, and scholarship through civic reason as defined earlier. For instance, one aspect of taking Islamic Law seriously that scholars and legal practitioners can engage in immediately is the inclusion of this field in comparative legal studies. Comparative study and cross-fertilisation is often inhibited by perceptions of otherness. Certain ideas and doctrines are identified with one's self and associated with familiarity; while 'other' ideas or doctrines are taken to be so alien or different that it is impossible to comprehend and compare them to those of one's self. To overcome this tendency, it would be helpful to demystify Islamic

43 P. Berman, 'Global Legal Pluralism' (2007) 80 S Cal L Rev 1155, 1197.

44 Santos, n 30 above, 391

45 *ibid* 392.

Law and show how it is fundamentally similar to other jurisprudential traditions that are the basis of modern legal systems. As Lawrence Rosen observed

we may perhaps see that both of these systems (Islamic Law and Common Law) share a certain family resemblance; they both belong to the same taxonomic category. Both emphasise process over form, both utilise moving socio-cultural categories, both limit the power of judges by degrees of uncertainty about the range and force of their rulings for future cases.⁴⁶

By showing that the Islamic Law tradition is not so alien or different that it defies comparative reflection with modern legal traditions, legal scholars can facilitate more practical interaction between Islamic law and state law in a variety of fields and contexts.

Muslims can also facilitate this process in a variety of ways. For instance, although the meaning and significance of Islamic Law in the private and social life of Muslims is not part of my subject here, the public and private dimensions are obviously interactive. The way Islamic Law is understood and practiced by Muslims influences its role in the public domain, and vice versa. *This is not about the enforcement of Islamic Law as state law because that is simply impossible.* Those Muslims who suffer under the illusion or pretence of enforcing Islamic Law itself as state law are not only undermining the integrity and religious sanctity of this normative system, but they are also obstructing its legitimate and appropriate role in public life. My call to take Islamic Law seriously is therefore addressed to Muslims as well as non-Muslims. I ask both groups to appreciate the incompatibility of Islamic Law and state law in order to engage the possibilities of compatibility. This is what I call the dialectic of compatibility and incompatibility.

In light of the preceding understandings of Islamic Law, the state, and state law, I will now focus on the variety of relationships between Islamic Law and state law, in terms of the dialectic of compatibility and incompatibility. As noted at the beginning, my theory of the relationship of Islamic Law and state law is based on the nature of each system. I also said from the outset that the theory I am presenting is intended to apply regardless of whether Muslims are the majority or minority of the population. By those remarks, I mean to emphasise that the main parameters of this relationship should be settled. This does not mean that the actual process and its outcomes are totally predictable or will be identical everywhere. Other factors can also influence the process and outcome of the relationship, including the impact of differentials in power relations and resources among normative systems.

While state law systems usually have a power advantage, some non-state actors may still wield significant powers to coerce and induce. Efforts to coercively enforce may not be effective enough, or result in seriously adverse political and

⁴⁶ L. Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (New York: Oxford UP, 2000) 53. George Makdisi suggested that, at its point of origin, English law borrowed from Islamic Law as it developed three formative institutions of the English common law system; the action of debt, the assize of novel disseisin, and trial by jury, institutions that only existed in superiorly developed Islamic law at the time they originated in England. See, J. A. Makdisi, 'The Islamic Origins of the Common Law' (1999) 77 NCL Rev 1635.

social consequences when state law norms are inconsistent with the norms of the community.⁴⁷ In developing countries in particular, official legal systems tend to be weak due to such factors as the recent introduction and poor legitimacy of the territorial state and law; less entrenched legal traditions and institutions; and the lack of training for legal professionals.⁴⁸ Whenever the official legal system is weak, other normative systems tend to become more assertive and influential, drawing on their stronger legitimacy and relevance to the lives of local communities. Generally speaking, official legal institutions rarely, if ever, manage to dictate their terms or categorically prevail when they come into conflict with powerful customary, religious, or functional norms.

When two different co-existing normative systems can neither ignore nor eliminate each other, as can happen with religious law and state law, state law can provide a zone of autonomy for a religious or ethnic group in which they may exercise their personal law. As noted earlier, this approach was often taken in colonised areas 'where western legal systems were layered on top of the personal laws and customs of indigenous communities.'⁴⁹ This colonial practice has not only continued in post-colonial settings, like Egypt and India, but it is also demanded by Muslim minorities in former colonial powers like the United Kingdom and other western countries like Canada. In my view, as I will briefly explain later, such arrangements can be seriously detrimental to the minority communities in whose name these demands are made, in addition to undermining the integrity of the state legal system as a whole. But at this stage of my analysis I am simply noting this factual aspect as it exists today, namely, that coexisting state law and religious/customary normative systems are part of each other's environment and neither can be fully understood or expected to play its role without the other. State law systems should therefore take non-state systems into account, anticipate their underlying needs and tension and respond to them.⁵⁰

To continue now with clarifying and illustrating what I referred to earlier as the dialectic of compatibility and incompatibility of Islamic Law and state law I recall my earlier remarks about the value of comparative legal studies in enhancing familiarity with Islamic Law principles and promoting prospects of incorporation of some principles into state law through the process of civic reason. At the same time, comparative reflection will clarify the different natures of Islamic Law and state law, which is the reason for the incompatibility of these systems, as explained earlier. Once this aspect of incompatibility is appreciated, possibilities of compatibility can be explored in the development and interpretation of state law. To clarify and illustrate both aspects of this dialectic of mediation of compatibility and incompatibility, I will now consider the application of this process in Muslim majority and minority situations. In both situations I will attempt to show how Islamic Law is not taken seriously on its own terms at present, and offer some suggestions for how that might be done.

47 Berman, n 43 above, 1178; Tamanaha, n 35 above, 401.

48 A. A. An-Na'im, 'The Legal Protection of Human Rights in Africa: How to Do More with Less' in A. Sarat and T. R. Kearns (eds), *Human Rights: Concepts, Contexts, Contingencies* (Ann Arbor: University of Michigan Press, 2002) 89–115.

49 Berman, n 43 above, 1205.

50 Tamanaha, n 35 above, 402.

Integrity and legitimacy of law in Muslim-majority situations

The main question in Muslim-majority situations is whether the democratic principle justifies and enables the enactment of Islamic Law principles into state law. My response is that the normative value that is believed to exist in an Islamic Law principle can be enacted into state law provided this is done as a matter of secular state law, through civic reason and subject to constitutional safeguards. The rationale and purpose of state law must be based on the sort of reasoning that the generality of citizens can accept or reject, make counter-proposals to, or subsequently abolish and repeal through free and open public debate, without reference to religious beliefs.⁵¹ This fundamental constitutional principle should not be subject to overrule by Muslim-majority vote in the name of a religious mandate because that is bound to impose the human views of ruling elites, and never the divine command itself.

To explain briefly, since effective governance requires the adoption of specific and precise laws, the legislative organs of the state must select among competing views within the massive and complex corpus of Islamic Law. Whatever selection is made among competing views of Islamic Law cannot be challenged politically when they are presented as mandated by the 'divine will of God.' To avoid this risk, religious rationale itself cannot be sufficient basis for legislation, and that deficiency cannot be remedied by majority vote, even if unanimous. The reason for this ultimate entrenchment of the civic reason process is that majority rule should prevail in a democratic state only when it is subject to the rights of the minority, even of a single person, including the potential of objection in the future. Thus, for example, a Muslim majority, however strong, should never override constitutional objections to any legislation that violates the fundamental requirements of equality and non-discrimination against women or non-Muslim citizens.

Unfortunately, this has not been the way in which Muslim-majorities have dealt with the relationship between Islamic Law and state law in their countries. Ironically, the roots of the distorted ways in which Islamic Law is now enacted as state law can be traced to the policies of European powers in their relations with Muslim-majority colonies in Africa and Asia. Much of the present confusion can be traced to the tendency to arbitrarily mix enforcement of European style statutes and judicial decisions of state law in economic and political aspects of the colonial administration with Islamic Law and customary law in the so-called personal law field for local populations, without regard to the integrity of either type of normative system. For instance, this was initially done in the construction of so-called 'Muslim and Hindu personal law' by the British colonial administration of the Indian subcontinent that continues in post-independence India, Pakistan, and Bangladesh.⁵²

51 For further elaboration I have made in support of this view, see An-Na'im, n 2 above, 7–8, 86–88, 92–97.

52 See V. Narain, *Gender and Community: Muslim Women's Rights in India* (Toronto: University of Toronto Press, 2001) 13–23; Hallaq, n 6 above, 371–383.

The problem can also be traced to the way in which the Ottoman Empire attempted to mimic the legislative style of modern European states without regard to the different nature of Islamic Law. 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 of Islamic jurisprudence, combining European form with Islamic Law content. The *Majallah* also included some provisions drawn from sources other than the Hanafi School, thereby expanding the possibilities of ‘acceptable’ selectivity from within the Islamic tradition. The principle of selectivity (*takhayur*) among equally legitimate doctrines of Islamic Law was already accepted in theory for personal compliance, but it was not done in practice in terms of state legislation of general application. By applying that principle through the institutions of the state, the *Majallah* opened the door for more wide-reaching subsequent reforms, despite its initially limited purpose.

This trend towards increased eclecticism in the selection of sources and the synthesis of Islamic and Western legal concepts and institutions became the dominant norm. As noted earlier, this approach became particularly influential through the work of the Egyptian jurist Abdul Razeq Al-Sanhouri, who applied it in drafting the civil law codes of several Arab countries in the mid-twentieth century. The pragmatic approach of Al-Sanhouri was premised on the view that Islamic Law (*Sharia*) could not be reintroduced in its totality, or applied without strong adaptation to the needs of modern Islamic societies. He used this approach in drafting the Egyptian Civil Code of 1948, the Iraqi Code of 1951, the Libyan Code of 1953, and the Kuwaiti Code and Commercial law of 1960/1. Al-Sanhouri was employed by an undemocratic regime to draft a code that was imposed on the Muslim population of the country without public debate or legislative deliberation. This autocratic ‘top down’ process is neither possible nor desirable in the 21st century.

The Ottoman *Majallah* and Al-Sanhouri’s codifications rendered the entire corpus of Islamic Law principles more available and accessible to judges and policy makers in the process of transforming their nature and role through formal selectivity and adaptation for their incorporation into modern legislation. Islamic Law principles began to be drafted and enacted into statutes that were premised on European legal structures and concepts. This was also done by often mixing some general or partial principles or views from one school of Islamic jurisprudence with those derived from other schools, without due regard to the methodological integrity or conceptual coherence of any of the schools whose authority was invoked. The incoherence and risks of this process can be appreciated by recalling my earlier remarks about the nature of Islamic Law.

As the founding jurists of Islamic Law were highly aware of the nature of Islamic Law, and sensitive to the risks of imposing what might be an erroneous view, they have always emphasised acceptance of diversity of opinion, while seeking to enhance consensus among themselves and their communities. This was done through the notion that whatever is accepted as valid by consensus (*ijma*) among Muslim jurists (or the wider Muslim community according to some jurists) is deemed to be binding on subsequent generations of Muslims.⁵³ However, the

53 B. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998) 120–122.

many practical difficulties of applying this notion were clear from the beginning. For instance, confining binding consensus to that of a select group of jurists begs the question of how to identify those jurists, and how to verify the scope of their agreement. Expanding the concept to the consensus of the Muslim community at large begs the question of how to determine and verify that this has happened on any matter. Whether the consensus is supposed to be of a group of jurists or of the community at large, why should the view of one generation bind subsequent generations? There is simply no way of avoiding the inherently human nature of the process by which Islamic Law principles can be drawn from the Quran and Sunna, which necessarily means both the inevitability of differences of opinion and the possibility of error, whether among scholars or the community in general. In this light, the question becomes how and by whom can such difference of opinion be properly and legitimately settled in practice in order to determine what is the state law to be enforced in specific cases? To apply the mechanics of majority rule to resolving such difficulties repudiates the religious nature of the outcome – legislation can be drafted and adopted, but it can never be Islamic Law on its own terms.

The basic unavoidable deadlock in any purported attempt to enforce Islamic Law as state law can be explained as follows. The nature and role of state law requires the interaction of a multitude of actors and complex factors, which cannot possibly be contained by an Islamic religious rationale. This is more true today than ever before because of the growing interdependence of Muslim and non-Muslim communities locally and globally. On the other hand, a religious rationale is the key to the binding force of Islamic Law norms for Muslims because a believer cannot be religiously bound except by what he or she personally believes to be a valid interpretation of relevant texts of the Quran and Sunna. As explained by Noel Coulson, because of the religious nature of Islamic Law, the strong traditional view has always been that 'each individual Muslim was absolutely free to follow the school [of jurisprudence] of his choice and that any Muslim tribunal was bound to apply the law of the school to which the individual litigant belonged.'⁵⁴ Accordingly, an individual also had the right to change his or her school of law on a particular issue. This traditional solution is appropriate for individual practice of religion, but cannot apply to state law because the diversity of opinions among Muslim jurists means that whatever the state elects to enforce as state law is bound to be unacceptable as a valid interpretation of Islamic sources by some of the Muslim citizens of that state.

Despite this obvious deadlock, this arbitrary and illegitimate approach was applied to an expanding field of legal issues, perhaps most widely in the massive 'legislative coup' of 1983 by former President Numeiri of Sudan, in which he enacted nine major statutes by presidential decree in the name of making Islamic Law the sole basis of the Sudanese legal system.⁵⁵ As can be seen from the preceding analysis, however, this process can only lead to a secular enactment of the view

54 N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: University of Chicago Press, 1969) 34.

55 See, eg, C. N. Gordon, 'Islamic Legal Revolution: The Case of Sudan' (1985) 19 *International Lawyer* 793.

of Islamic Law of those who control the state, and the outcome cannot be Islamic Law itself. At the same time, unfortunately, it is extremely politically difficult for that outcome to be challenged or changed, again as illustrated by the case of Sudan as well as Pakistan since the enactment of so-called Islamic Law statutes by Zia ul Haq in the mid 1970s. By emphasising that such initiatives cannot produce valid Islamic Law outcomes, I hope to encourage Muslims to take Islamic Law seriously by upholding the integrity of this normative system in personal practice of religion, while engaging possibilities of its comparative and normative influence on state law. This will not be relegating religion to the exclusively private domain, as it will continue to be relevant to public policy and legislation, but simply avoiding the illusion of the enforcement of Islamic Law as such through coercive state law. A similar approach can be applied to the situation of Muslim minorities as follows.

The mirage of Islamic Law for Muslim minorities

Recalling earlier remarks about the dialectic of compatibility and incompatibility, I will now discuss what I call the mirage of Islamic Law in Muslim minority situations, in order to conclude with a plea for taking Islamic Law seriously in terms of citizenship participation instead of reluctant accommodation. As the following review will show, the ways in which Islamic Law is invoked is a mirage because the outcome cannot be Islamic Law itself. In all cases, it is state law that determines the degree and manner of relevance of Islamic Law, and subjects it to whatever rationale and limitations state law decides to apply. The judges and other legal professionals involved in the process neither have the knowledge or training to be competent in Islamic Law, nor hold the religious authority to interpret Islamic Law on its own terms. The outcome can never be legitimate from an Islamic Law perspective, which is the alleged rationale. Instead of continuing to chase this mirage, it is better for Muslim minorities to come to terms with state law and explore ways of influencing it from their religious and cultural perspective through civic reason and engaged citizenship, as explained earlier.

For the purposes of this lecture, I will focus particularly on the situation of Muslims of Western Europe and North America, though my analysis can apply to any other situation where Muslims constitute the minority of the population. The general framework of this overview is that Muslims of Western Europe and North America enjoy the benefits of living in liberal democratic states, with effective protection of their fundamental rights and the ability to organise their religious, social, or cultural activities in ways that are at least officially equal to those of majority communities. There are also some policies that reflect an expansive view of religious freedom and accommodation. For instance, German courts have ruled that Muslim social security funds can be used if necessary to pay for ritual practices, like boy's circumcision and funeral and burial arrangements.⁵⁶ However, while it is reasonable therefore to assume that basic freedoms of religious belief

56 M. Rohe, 'Application of Shari'a Rules in Europe: Scope and Limits' (2004) 44 *Die Welt des Islams* 323, 332–333.

and practice are protected in Western countries, there is always the possibility of serious conflict over some aspect of what that means, for instance, regarding planning permits for building mosques in particular locations.

It is also clear that it is difficult to generalise about how Muslim issues are being negotiated in different settings due to significant differences in the legal and political context of various Western countries. For instance, while France bans female students from wearing an Islamic headscarf in schools,⁵⁷ the United Kingdom permits them to wear the headscarf in schools provided they are otherwise in compliance with the school's uniform requirements and funds independent Islamic schools.⁵⁸ In Germany, there is constitutional protection for public manifestations of religion, and prohibition of discrimination or preference on the basis of religion.⁵⁹ Despite such variations, the general acceptance of principles of freedom of religion and non-discrimination indicates that

the secular legal orders in Europe do not refuse religion and are not at all anti-religious (*lā-dīnī*) as is often wrongly assumed. On the contrary, they [secular legal orders] open a broad space for religious belief and practice. It is only that the state itself has to be neutral and is prevented from interference with religious affairs.⁶⁰

Since it is not possible here to examine the wide range of national policies in detail I will try to present a thematic sampling of the issues within this general framework. To locate this review within the general thesis and analysis of this lecture, I will begin with the relatively simpler freedom of religion and related 'accommodation' matters. These types of issues are easier to deal with because they require the least normative adjustment on the part of the Western states and societies or can be 'managed' by Muslims without the need for such adjustments. In contrast, some family and other concerns raise a more serious challenge to both Muslim minorities and wider Western societies because they either require more serious normative 'concessions' by Western states and societies or are harder for Muslims to manage on their own.

Regarding the first type of issues, I am thinking of a spectrum of issues framed by the application of freedom of religion principles at one end and appeal to reasonable accommodation at the other end, but it is not possible or helpful to see these issues in binary terms. Religious freedom arguments can be raised in calls for accommodation, while general public policy factors are taken into account in applying religious freedom principles, as I will note during the following review. Accordingly, for instance, Western states and societies tend to respect religious demands by Jews and Muslims for special arrangements regarding dietary requirements – *kosher* for Jews and *halal* for Muslims.⁶¹ Yet this apparently straight-

57 J. Cesari, 'Islam, Secularism and Multiculturalism After 9/11: A Transatlantic Comparison' in J. Cesari and S. McLoughlin (eds), *European Muslims and the Secular State* (Aldershot: Ashgate, 2005) 46.

58 J. Fetzer and C. Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge: Cambridge UP, 2005) 4–6.

59 Rohe, n 56 above, 327.

60 *ibid.*, 328.

61 N. Miller, 'English law already makes provision for Sharia councils' *The Lawyer* 18 February 2008.

forward matter of freedom of religion can still be implicated in wider political or institutional issues. For example, the Constitutional Court of Germany ruled in 2002 that freedom of religion included the right of Muslims to slaughter animals in accordance with Islamic principles with a special license under the Animal Protection Act. The reason why the issue had to be ruled on by the Constitutional Court was that some German courts initially refused to grant this right to Muslim applicants for the license because they did not have an organisational structure that is recognised by the state, as is the case for Catholics, Protestants, and Jews. The Constitutional Court overruled those earlier decisions by deeming the organisational structure requirement irrelevant as long as the application is based on religious beliefs.⁶² The point to note for our purposes here is the existence of the requirement of state recognition of religious organisations in Germany and some other European states like Italy and Spain.⁶³ Although found to be irrelevant to this case, and regardless of what one thinks of the appropriateness of this requirement in one setting or another, the existence of this factor itself confirms my earlier remark that such legal determinations are made as a matter of secular law, rather than immediate conformity with religious rationale.

Moreover, in reaching its decision, the German Constitutional Court pointed to a lack of evidence that *halāl* slaughtering was more painful to animals than the methods generally practiced in Germany. The point to note for our purpose here is that other factors, cruelty to animals in this case, were taken into account in permitting a claim based on Muslims' perceptions of a religious obligation. I take this consideration as an exercise in civic reason, whereby public policy is justified in terms of reasons other citizens can appreciate and debate, instead of being exclusively founded on religious beliefs. Such weighing of religious demands against other factors can also be seen in other religious discrimination cases. The German Federal Constitutional Court has ruled it is a violation of the constitution's protection of religion for an employer to discriminate against a Muslim woman for wearing a headscarf without adequately showing that this style of dress causes a significant burden to the employer.⁶⁴ But a claim for public assistance by a Muslim woman wearing a *niqāb* (total cover of the face and body which leaves only the eyes visible) was rejected by the Administrative Court in Mainz on the ground that this particular kind of clothing would prevent her from finding employment. The Court also noted that the applicant did not produce any explanation for the necessity of wearing this severe style.⁶⁵

An example of what I call accommodation are the so-called 'Sharia-compliant' methods of investment which allow Muslims to invest without violating Islamic prohibitions such as usury and investments in industries that are prohibited. For example, German and Swiss banks offer Sharia-compliant share packages that do not include investments in industries prohibited by Islam such as alcohol, tobacco,

62 Rohe, n 56 above, 328, 330.

63 On Germany see S. V. Monsma and J. C. Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Lanham, MD: Rowman and Littlefield, 2nd ed, 2009) 183. On Italy and Spain see S. Ferrari, 'State and Church in Italy' and I. C. Ibán, 'State and Church in Spain' both in G. Robbers (ed), *State and Church in the European Union* (Baden-Baden: Nomos, 1996) 97, 172.

64 Rohe, n 56 above, 331.

65 *ibid*, 332.

interest-yielding credit, or the sex industry. In the United Kingdom, 'Islamic mortgages' enable Muslims to avoid the prohibition against usury. The UK reformed its tax law in order to allow such Islamic mortgages without forcing Muslims to pay a double duty on the two transactions involved.⁶⁶ The rationale of such arrangements may include an appeal to freedom of religion, in addition to the consistency of such policies with the free market principles and expected economic benefits to Western states and societies.

Reference to Islamic Law may also appear in the application of general principles of state law, like conflict of laws or private international law in appropriate cases or enforcement of arbitration decisions by state courts. A range of cases involving this sort of reference to Islamic Law can be cited from the United States. For example, in *National Group for Communications & Computers Ltd v Lucent Technologies International, Inc*, an arbitration clause in the contract between the parties stipulated that disputes would be adjudicated under Saudi Arabian law. A New Jersey state court evaluated the Sharia-based Saudi law and rendered a judgment accordingly.⁶⁷ In *Mohamad v Mourssi* the state court upheld an arbitration decision by an Islamic mosque, as stipulated by the arbitration agreement between the two business partners.⁶⁸ In *Jabri v Qaddura*, a wife filed for divorce and sought enforcement of an arbitration agreement stating that all claims and disputes would be submitted for arbitration by the Texas Islamic Court. The Texas state court held that the Arbitration Agreement was valid and enforceable.⁶⁹ However, in *Zawahiri v Alwattar* a court in Ohio refused to enforce the dower (*mahr*) provision of an Islamic marriage agreement because the agreement failed to meet the standards required for a prenuptial agreement.⁷⁰

As noted earlier regarding European examples, Islamic Law is being applied in such cases in the United States as a matter of secular state law, subject to state law rationale, and not by virtue of the authority of Islamic Law as such. The state courts are either applying 'foreign law' as the applicable choice of law according to their own domestic law, or enforcing the outcome of arbitration, which could have applied to whatever substantive and procedural rules the parties accepted. In either scenario, Islamic Law provisions are being applied by a competent state court, and subject to whatever safeguards or limitations that state law imposes.

This *secular law* quality is also true of cases involving stronger possibilities of conflict between Islamic Law and state law principles. Although there can be a significant degree of normative compatibility between Islamic Law and state law, as noted earlier, there are also clear points of conflict with European and North American legal norms regarding, for instance, discrimination against women in family law matters like polygamy, unilateral divorce by the husband, custody of children, and rules prohibiting non-Muslims from inheriting from Muslims. These discriminatory aspects of Islamic Law will be rejected by the courts in France, the Netherlands, Germany, and Belgium, even when

66 *ibid*, 338–339.

67 See *Nat'l Group for Commc'ns and Computers LTD v Lucent Tech. Int'l Inc* 331 F.Supp.2d 290, 293–301 (D.N.J. 2004).

68 See *Mohamed v Mourssi* 680 N.W.2d 569, 570–574 (Minn. Ct. App. 2004).

69 See *Jabri v Qaddura* 108 S.W.3d 404, 406–414 (Tex. App. 2003).

70 See *Zawahiri v Alwattar* WL 2698679 1, 1–7 (Ohio App. 10 Dist. 2008).

approached as a matter of foreign law in applying private international law principles of state law.⁷¹

It is reasonable to assume that many matters of serious normative conflict escape the attention of state authorities and public opinion. For instance, though official laws in the United States prohibit and punish polygamy, there seems to be substantial numbers of polygamous families within Muslim communities outside the framework of official law.⁷² When such matters do register in the official or public mind, Western states and societies have responded in different ways. American courts face difficulties in determining if an Islamic marriage is valid when the secular rules of the state are not followed, deciding if a marriage lacking secular and Muslim documentation is a valid putative or common law marriage,⁷³ and sometimes struggle to interpret Muslim marriage contracts.⁷⁴ Courts in the United States have interpreted Islamic marriage agreements in terms of prenuptial agreements, gifts, and contracts.⁷⁵ When interpreted as a prenuptial agreement, and the terms do not comply with state law regarding prenuptial contracts, some courts in the United States have refused to enforce dowry (*mahr*) terms as contrary to public policy because the courts see it as encouraging separation by only providing for settlement in the event of divorce.⁷⁶ In contrast, under English law *mahr* terms are enforced as strictly contractual. In Germany, contractual stipulations regulating the payment of the 'Islamic' *mahr* are accepted and enforced, but discriminatory provisions in a marriage contract are deemed void for violating good morals under Article 138 BGB of the German Civil Code.⁷⁷

It can be argued that none of the preceding ways of reference to Islamic Law are problematic from a state law perspective because they are in accordance with the terms and conditions of the state law in question. These policies may even be promoted by some as legitimate forms of legal pluralism in response to legitimate demands of Muslim citizens and lawful residents. There have also been some popular demands for the implementation of Islamic Law within European legal systems that can be traced to the 1990s, though the evidence is patchy.⁷⁸ Some Muslim groups in England are seeking to establish a separate system of Muslim personal law with a semi-official status to address problems of discrepancy between Islamic and English marriage and divorce law, like the so-called 'limping marriage' where Muslim women are deemed still married under Islamic Law after obtaining a civil divorce. Muslims are also following the Jewish practice of religious arbitration as a form of alternative dispute resolution within the larger fra-

71 M. Foblets, 'Muslim Family Laws before the Courts in Europe: A Conditional Recognition' in B. Maréchal, S. Allievi, F. Dassetto and J. S. Nielsen (eds), *Muslims in the Enlarged Europe: Religion and Society* (Leiden: Brill, 2003) 256, 262, 264.

72 A. L. Estin, 'Unofficial Family Law' (2009) 94 Iowa L Rev 449–475.

73 A. Quaraishi and N. Syeed-Miller, 'No Altars: A Survey of Islamic Family Law in the United States' in L. Welchman (ed), *Women's Rights and Islamic Family Law: Perspectives on Reform* (London: Zed Books, 2004) 199–200.

74 T. Siddiqui, 'Interpretations of Islamic Marriage Contracts by American Courts' (2007) 41 *Family Law Quarterly* 639, 639, 651–654.

75 *ibid*, 646–650.

76 R. Freeland, 'The Islamic Institution of Mahr and American Law' (2000–2001) 4 *Gonzaga Journal of International Law* 2.

77 Rohe, n 56 above, 339.

78 J. S. Nielsen, *Towards a European Islam* (New York: St. Martin's Press, 1999) 81–84.

mework of English law.⁷⁹ This context has been the backdrop for the controversy around the Archbishop of Canterbury, Rowan Williams, who is reported to have 'suggested that some sort of accommodation between Shariah, or Islamic Law, and the law of Britain was not only 'unavoidable' but advisable.'⁸⁰ This controversy continues at the time of writing, as press reports assert that Islamic Law court rulings are now issuing binding judgments as arbitration tribunals under the Arbitration Act of 1996.⁸¹ A similar debate in Ontario, Canada, resulted in the abolition of religious arbitration by the enactment of the *Family Statute Law Amendment Act* in 2006.⁸²

I strongly disagree with conceding such demands by Muslim minorities for two main reasons. First, as I have shown in the examples cited above, the premise that this will result in the application of Islamic Law as such is false because the outcome will always be state law on its own terms. Secondly, conceding such demands is detrimental to the interests of the Muslim minorities as well as to the integrity and legitimacy of the state legal system as a whole. Detrimental consequences for Muslims include perpetuating negative stereotyping as an alien and regressive community which is demanding exceptional treatment. For example, concerns about the effect of Sharia-based arbitration expressed during the fierce public debate in Ontario, Canada, leading to the above-noted change in policy included: the limited involvement of courts in arbitration, especially due to the fact that parties can agree to waive their right to appeal; case precedent in Ontario that sets a high threshold for a finding of duress in making an agreement (usually requiring actual physical force); the assertion that following Sharia, when possible, is a religious imperative that puts powerful pressure on women to agree to arbitration; the lack of legal representation in arbitration; and lack of uniformity in interpreting Sharia that makes it difficult to assess the effect that Sharia-based arbitration tribunals would have on women.⁸³

The perception of Muslim minorities as regressive ghettos seeking relativist exemption from fundamental constitutional and human rights standards will surely lead to general political and social marginalisation of Muslims among other citizens and society at large. The false perception of Muslims that they can 'address' their concerns in this 'exceptionalist' manner will also discourage them from serious engagement with the political and social mainstream of their country, thereby diminishing their ability to influence more substantial domestic and foreign policy. The apparent dilemma raised by the demands of Muslim minorities for exceptional treatment in the name of freedom of religion is detrimental to the integrity and legitimacy of the state legal system as whole. On the one hand, if Muslim demands are conceded, the legal system would be discriminating among

79 Estin, n 72 above, 467–468.

80 E. Goldstein, 'Shariah in Europe' *The Chronicle of Higher Education* 29 February 2008; M. Rice-Oxley, 'Archbishop controversy: does Sharia have a role in Britain?' *The Christian Science Monitor* 12 February 2008.

81 A. Taher, 'Revealed: UK's First Official Sharia Courts' *The Sunday Times* 14 September 2008.

82 T. Farrow, 'Re-Framing the Sharia Arbitration Debate' (2006) 15 *Constitutional Forum* 80.

83 N. Bakht, 'Family Arbitration Under Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women' (2004) 1 *Muslim World Journal of Human Rights* 14–18; A. Korteweg, 'The Sharia Debate in Ontario' (2006) 18 *ISIM Rev* 50.

citizens and communities on grounds of religion. If Muslim demands for exceptional treatment are rejected, the legal system could be charged with discriminating against Muslims. In either case, the integrity and legitimacy of the state legal system would be at risk. Both scenarios, it seems to me, reflect a failure to take Islamic Law seriously on its own terms.

CONCLUDING REMARKS: ENGAGED CITIZENSHIP THROUGH CIVIC REASON

The term 'dialectic' in my title and analysis in this lecture is to emphasise not only that there is a realm of compatibility as well as incompatibility between Islamic Law and state law, but also that the two realms are mutually re-enforcing. As stated in the Introduction of this lecture, the proposed approach to mediating this dialectic is premised on a distinction (not dichotomy) between Islamic Law and state law to avoid confusing the function, operation, and nature of outcomes when the two systems co-exist in the same space and apply to the same human subjects. I have attempted to substantiate this premise by explaining the nature of Islamic Law as a religious normative system and the nature of state law as a secular political institution and process. The objective of the mediation I am proposing between these normative systems is to uphold the integrity and legitimacy of both of them, each on its own terms and within its legitimate domain, while promoting legitimate interaction between the two. Any attempt to enforce principles of Islamic Law as state law is futile because the outcome will still be a matter of state law and not Islamic Law and cannot have the religious significance of compliance with a religious obligation. This inevitable outcome is clearly seen in the experiences of Muslims, whether they constitute the majority or minority of the population, as shown in the preceding section. The different nature of the two systems also means that compliance with Islamic Law cannot be legal justification for violating state law.

My conclusion is therefore that for Islamic Law and state law to be complementary normative systems, instead of being in mutually destructive conflict, each system must operate on its own terms and within its field of competency and authority. As I see, the proposed compatibility dialectic works as follows:

First, the constructive and legitimate relationship of Islamic Law and state law can be promoted by upholding the true nature and purpose of each system. Islamic Law remains binding on Muslims from a religious point of view, which can only be fulfilled through voluntary personal compliance that is undermined by futile attempts of coercive enforcement as state law. That religious obligation is fully consistent with, indeed facilitated by, the religious neutrality of the state and integrity of its necessarily secular law. The role of state law in facilitating this dialectic relationship is not only to protect freedom of religion and other human rights for all citizens, Muslims and non-Muslims equally and without discrimination, but also to safeguard the integrity and religious neutrality of the state and state law.

Secondly, the role of Islamic Law in facilitating the dialectic is to support and sustain over time this dual role of state law. For instance, the successful mediation

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

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

In the final analysis however, while I agree with Kurt Lewin that 'there is nothing so practical as a good theory',⁸⁴ I also believe that a good theory should be practical. Yet we cannot know what is practical until we try to act on it. I hope this lecture can make some contribution to a good theory of mediating the compatibility dialectic of Islamic Law and state law. More importantly, in my view, I hope to have encouraged some to join me in trying to act in the shared commitment that such mediation is indeed necessary and possible.

84 C. C. Lunberg, 'Is There Really Nothing so Practical as a Good Theory?' (2004) 47/5 *Business Horizons* 7, 7.