



DATE DOWNLOADED: Sat Jul 9 08:19:57 2022

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

Abdullahi Ahmed An-Na'im, Globalization and Jurisprudence: An Isalmic Law Perspective, 54 EMORY L.J. 25 (2005).

ALWD 7th ed.

Abdullahi Ahmed An-Na'im, Globalization and Jurisprudence: An Isalmic Law Perspective, 54 Emory L.J. 25 (2005).

APA 7th ed.

An-Na'im, A. (2005). Globalization and jurisprudence: an isalmic law perspective. Emory Law Journal, 54(5), 25-52.

Chicago 17th ed.

Abdullahi Ahmed An-Na'im, "Globalization and Jurisprudence: An Isalmic Law Perspective," Emory Law Journal 54, no. 5 (2005): 25-52

McGill Guide 9th ed.

Abdullahi Ahmed An-Na'im, "Globalization and Jurisprudence: An Isalmic Law Perspective" (2005) 54:5 Emory LJ 25.

AGLC 4th ed.

Abdullahi Ahmed An-Na'im, 'Globalization and Jurisprudence: An Isalmic Law Perspective' (2005) 54(5) Emory Law Journal 25

MLA 9th ed.

An-Na'im, Abdullahi Ahmed. "Globalization and Jurisprudence: An Isalmic Law Perspective." Emory Law Journal, vol. 54, no. 5, 2005, pp. 25-52. HeinOnline.

OSCOLA 4th ed.

Abdullahi Ahmed An-Na'im, 'Globalization and Jurisprudence: An Isalmic Law Perspective' (2005) 54 Emory LJ 25

Provided by:

Provided by Hugh F. MacMillan Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

GLOBALIZATION AND JURISPRUDENCE: AN ISLAMIC LAW PERSPECTIVE

*Abdullahi Ahmed An-Na'im**

INTRODUCTION

I am in agreement with the vision and rationale of Professor Harold J. Berman's approach to an integrative jurisprudence, subject to an overriding concern about its ability to incorporate different historical experiences and conceptions of law. As I understand it, the basic thrust of his approach is to revive the historical school of legal theory and re-integrate it with its two rivals, positivism and natural law theory. The premise and rationale of this proposal draws heavily on the nature and dynamics of increasingly intensified multifaceted globalization, which underpins Berman's call for the clarification and institutionalization of what he calls "world law."¹ It is to be expected that Berman would explain and illustrate his proposal with references to the historical experiences and conceptions of law that are most familiar to him, what he calls the "Western legal tradition."² But the question is whether the concepts and methodologies of an integrative jurisprudence are *capable* of incorporating significantly different legal traditions from other parts of the world, even at a theoretical or conceptual level. Is such a project possible at all, and, if so, in what sense?

Since his approach is already drawing on preexisting conceptions of Western schools of legal theory, I am concerned about the philosophical and political nature and scope of such constituent elements when integrated into a global school of jurisprudence. The fact that shared legal and philosophical principles operate through different national jurisdictions does not necessarily

* Charles Howard Candler Professor of Law, Emory University School of Law. L.L.B. (Honors), University of Khartoum, Sudan (1970); L.L.B. (Honors) and Diploma in Criminology, University of Cambridge, England (1973); Ph.D. in Comparative Criminal Procedure, University of Edinburgh, Scotland (1976).

¹ Harold J. Berman, *Integrative Jurisprudence and World Law*, in *THEORIE DES RECHTS UND DER GESELLSCHAFT* 3 (Manuel Ahenza et al. eds., 2003).

² See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

preclude the formulation of a more inclusive, integrative jurisprudence. The scope of the proposed jurisprudence can of course be limited to so-called national legal traditions, like that of the United States of America or what Berman calls the Western legal tradition. It seems to me that such limited claims raise serious questions about the concept and methodology of the proposed integrative jurisprudence. At the national level, one may wonder about whose history or vision of history and whose conceptions of law are taken seriously in the formulation of this approach. Does it include minority or marginalized perspectives, like those of Native Americans or Hispanic communities? Indeed, are notions like “positivism” and “natural law” meaningful for such minority or marginal perspectives?

If the scope of an integrative jurisprudence is supposed to be broader than a specific national jurisdiction, an initial question is how its scope is determined to the exclusion of others. To take a geographic criterion for the Western legal tradition would require accounting for the experiences of Spain under Franco, Nazi Germany, and Soviet Russia, which requires some ideological and political analysis. A geographical scope would also leave out Latin America, Australia, and other parts of the world that are generally considered to be part of this legal tradition. Founding the determination on some normative or ideological ground begs the question of the basis of such categorization. For instance, how does the Western legal tradition account for socially conservative and economically capitalist perspectives as well as liberal, socialist, or welfare ideologies that do not share the same ideological or philosophical assumptions? However conceived, it seems to me, such broad categories like the Western legal tradition raise corresponding questions of inclusion and exclusion in defining law and elaborating its jurisprudential framework.

Berman’s use of the term “world law” and emphasis on multifaceted globalization may indicate that he is speaking of a global scope for the proposed integrative jurisprudence. At that level, the same questions arise even more strongly when one considers the meaning of underlying notions of positivism, natural law, and how such views of law and jurisprudence can be integrated. It is not clear, for example, how this approach applies to drastically different concepts of law, such as Islamic or Jewish law, which claim a divine source for legal authority, or to other significantly different legal traditions like those of China? How and to what extent can one speak of law and jurisprudence in the various legal traditions of the world in comparative terms that make an integrative jurisprudence possible at all?

In this light, it seems that Berman's call for an integrative jurisprudence raises similar questions at whatever level it is applied. For the purpose of this Essay, I take his proposal to be applicable at various levels according to the degree of integration of the legal system in question. This does not mean that any legal system must be totally integrated since there can be variations within even the same national system, as can be observed among federal and state jurisdictions in the United States. Rather, it is a matter of a sufficient degree of integration according to some foundational principles which make it a coherent system. From my perspective, whether that is supposed to happen in a national, regional, normative, or ideological system—or at a global level as Berman suggests for world law—the basic question is whether and to what extent the analysis is inclusive of competing perspectives within the purported scope of the system.

It is not possible in this brief response to enumerate or closely examine the variety of possible factors that can limit or constrain the scope of analysis that warrants some degree of generalization about law and its jurisprudential framework. At one level, such analysis can reflect differentials in power relations within and among various societies, whereby some conceptions of law and jurisprudence prevail over others. That, in turn, can be seen as representing concrete economic and political conditions or reflect some normative ideological or cultural superiority of some models. In my view, the latter type of reasoning is illustrated by the ideology of European colonialism during the mid-nineteenth to mid-twentieth centuries that asserted the superiority of Western legal traditions over those of colonized societies in Africa and Asia.³ Similar reasoning apparently asserted the irreversible triumph of Western economic liberalism upon the collapse of Soviet Marxism

³ HISTORICAL PROBLEMS OF IMPERIAL AFRICA 102 (Robert O. Collins et al. eds., 1994); J.D. FAGE & WILLIAM TORDOFF, A HISTORY OF AFRICA 411 (4th ed. 2002); John Strawson, *Islamic Law and English Texts*, in LAWS OF THE POSTCOLONIAL 109–26 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999). Charles Hamilton's 1791 translation of *al-hidaya al-marghiniani* is "the earliest complete Islamic legal text in English." *Id.* at 113. In discussing Hamilton's translation, Strawson observes that "orientalism is not necessarily a crude science." *Id.* at 115. The Orientalist scholar Hamilton did convey some of the intricacies and core methodology of Islamic law. But, ultimately, "the Orientalist discourse establishes the superiority of European values." Strawson points out that for Hamilton, "[w]hatever the value of a particular norm of Islamic law, the whole system is invalid." *Id.* at 119. He also maintains that this legal Orientalism can be seen in more recent works. *See, e.g.*, Joseph Schacht, AN INTRODUCTION TO ISLAMIC LAW (1964); *see also* Michael Mann, *Dealing with Oriental Despotism: British Jurisdiction in Bengal 1772–93*, in COLONIALISM AS CIVILIZING MISSION: CULTURAL IDEOLOGY IN BRITISH INDIA 29–48 (Harald Fischer-Tiné & Michael Mann eds., 2004).

by the early 1990s.⁴ I am not concerned here with an assessment of such claims or their theoretical underpinnings.

Instead, I wish to explore the possibility of constructing a theoretical framework that can inform and guide a more inclusive cross-cultural dialogue about an integrated jurisprudence. In my view, this line of thinking can contribute to advancing Berman's proposal in the present global context and its implications for different types of legal systems at the national, regional, and global levels. From this perspective, it seems clear to me that Berman's analysis indicates the need for an integrative jurisprudence but does not address the limitations of legal imagination and political will that can frustrate this initiative. A more inclusive, systematic, and creative approach to comparative legal studies than what prevails at present can improve the imagination of scholars and opinion leaders about the theoretical possibilities and practical benefits of the sort of integrative jurisprudence I would support. But this will have little sustainable impact unless it is accompanied by the necessary political will to overcome apprehensions about its policy implications at home and abroad.

In the last section of this Essay, I will briefly examine the possibility of applying Professor Berman's proposal to Islamic law in light of the concerns and suggestions I make below. Both aspects of my response, however, are premised on my strong rejection of Samuel Huntington's simplistic and dangerous notion of the "clash of civilizations" that Professor Berman seems to accept.⁵ As already indicated regarding the Western legal tradition, purported dichotomies of civilizations or cultures are both simplistic and problematic. By any reasonable definition of the term, a so-called Western civilization would not only include the brutal conquest and colonization of the Americas, Africa, and much of Asia by European powers—and the United States in a few cases—but also Nazi Germany, fascist Spain, and Italy only a few decades ago. These substantial, recent experiences of Western societies are hardly consistent with the enlightened liberal values that are supposed to distinguish Western civilization from African, Islamic, or Chinese civilizations. My stronger objection to Huntington's thesis is that it can easily be turned into a self-fulfilling prophecy, when each tradition conceives its relationship to others in terms of confrontational clash, instead of cooperation and mutual respect.

⁴ See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

⁵ BERMAN, *supra* note 1, at 10–11. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

In my view, each civilization or culture contains competing values that correspond to similar values existing within other cultures. There are those who thrive on hostility and violent confrontation in Islamic as well as Western societies and those who seek cooperation and peaceful coexistence among both groups of societies. To take Huntington's thesis seriously would promote hostile and confrontational elements on both sides of his purported divide, while rejecting this dangerous view would support cooperative elements among them. From this perspective, I am suggesting that if lawyers and policymakers of different societies study each other's legal traditions in a constructive and respectful manner, they will find many more grounds for cooperation than for confrontation.

I. GLOBALIZATION AND COSMOPOLITAN JUSTICE

A critical part of Berman's proposal that I find compelling is that increasing economic, cultural, and demographic globalization makes it impossible to maintain isolationist or parochial views of law and jurisprudence.⁶ The realities of the mobility of capital and labor, the decentralization of production, the intensification of trade, and the increase of population movements are now affecting the social and economic relations within societies in their domestic settings as well as their relations with other societies. This is particularly true of the complex societies of Western Europe and North America, with their highly developed economies and global trade links throughout the world, but can also be seen to a less drastic degree in developing African and Asian countries. These realities call for legal and jurisprudential responses that are genuinely inclusive of the wide variety of cultural and social composition of national populations and their global interactions. National as well as international law and jurisprudence must therefore take into account the requirements of global economic and security interdependence within and among all countries, regardless of their level of economic and social development, political stability, and military power. For our purposes here, in particular, the challenge facing American lawyers is to appropriately respond to the increasing ethnic and cultural diversity of the country.⁷ This view of legal and jurisprudential reflection is what I refer to in this section as "cosmopolitan justice," as outlined below.

⁶ Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 20–24 (2005).

⁷ For example, there are now an estimated five to six million Muslim citizens in the United States. See Woodrow Wilson International Center for Scholars, Event Summary, *Conference—Muslims in the United*

This view may sound naïve or misguided in light of current international relations and the domestic environment in United States in particular, which seem to be moving in the opposite direction. From my perspective, the atrocities of 9/11 emphasize the need for an integrative jurisprudence in support of international legality and the rule of law on a global scale. The fact that a small group of determined fanatics were able to inflict such massive loss of life and suffering—with far reaching economic, political, security, and other consequences within the most powerful and developed country in the world—emphasizes what I call our shared human vulnerability. This is also underscored by the fact that atrocious terrorist attacks continue to occur in all parts of the world, in the name of all sorts of alleged causes or justifications. Moreover, since we cannot morally condemn and effectively combat these serious threats if we descend to the same level of barbarity, the nature and methods of international terrorism clearly confirm the need to uphold and promote the norms, institutions, and processes of lawful protection of security and effective accountability in accordance with the rule of law.

Yet the United States is doing the exact opposite by undermining, indeed repudiating in my view, the existing norms, institutions, and processes of international legality through its global military campaign and related activities.⁸ For instance, it is ironic that the United States continues to resist and to actively undermine the broad international initiative to establish the International Criminal Court in The Hague, which would have had jurisdiction over crimes against humanity, such as the 9/11 attacks, if it was operational at the time.⁹ Despite opposition by the United States, the court was formally inaugurated on July 1, 2002, and will hopefully make useful contributions to the credibility of international legality and accountability, thereby rendering self-help and unilateral retaliation even more unnecessary.

Nevertheless, and perhaps because of the threat of international terrorism and the counterproductive militant response of the United States, I suggest that

States: Demography, Beliefs, Institutions, and Political Participation (June 18, 2003), at http://www.wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=15883.

⁸ See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 677–94 (2002); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004).

⁹ See generally ROBERTA ARNOLD, *THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM* (2004); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2d ed. 2004); *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* (Sarah B. Sewall & Carl Kaysen eds., 2000).

it is becoming clear that there is no alternative to peaceful cooperation within and among human societies everywhere. In relation to Professor Berman's analysis in particular, the constituent elements of the integrative jurisprudence he proposes should reflect the historical, cultural, and legal diversity of national populations and their global interdependence. On a basic existential level, this view is premised on the reality of our cosmopolitan existence, as we are continuously crossing borders and sharing identities throughout the world. Even as to those who are physically confined to specific places, the realities of mounting globalization mean that their economic and security interests, as well as social relations and cultural identities, are not determined exclusively by their respective locations. But the notion of crossing borders and relating to different geographies is only a metaphor for reframing the same basic questions. Consciousness of this global cosmopolitanism of crossing borders and belonging to new geographies does not mean that it is possible to evade the fundamental questions of politics, identity, and justice, wherever one happens to be located. Whenever we cross boundaries, we are forming new boundaries or redefining old ones, rather than extinguishing all boundaries and must therefore respond to the challenges of our new or modified location.

Thus, cosmopolitanism cannot mean complete detachment from time and place. As no human being can exist in suspended animation, he or she is always somewhere and constituted as someone in relation to other human beings, individually and collectively, in social and political relations to each. In this light, the question is one of social and political location, one of which boundaries, notions of inclusion and exclusion, and membership apply or need to be negotiated in one's specific location in time and place. The question is also one of power relations in these processes of shifting boundaries of inclusion and exclusion. Wherever the boundaries may be, and whatever membership or identity applies, such notions and their policy and legal implications must be negotiated through a specific set of power relations. If one talks about justice, then what is the measure of justice? Who defines it? How, in relation to which frame of reference and context, is it defined? What are its policy and practical implications, and for whom? These questions should lead to reflection on a normative and institutional framework for achieving and sustaining cosmopolitan justice, whereby law and jurisprudence are responsive to the needs and aspirations of increasingly diverse populations and their national and global interdependence.

The notion of cosmopolitan justice can of course be invoked in a wide variety of settings and in relation to an extensive range of issues and concerns.

Consequently, an equally wide variety of actors, speaking of a correspondingly extensive range of experiences and priorities, should continue to negotiate the meaning and implications of justice in each case. This can be in relation to problems of terrorism and retaliatory violence, as in the 9/11 attack and its aftermath, or over issues of race, health, development, the environment, and so forth. Instead of speculating about what the principle of cosmopolitan justice means in such a wide range of settings, I wish to propose a sufficiently broad framework where the concept and its implications can be negotiated and mediated among competing claims and perspectives. That is, what are the underlying guiding principles or standards for assessing success or failure in achieving a measure of justice that is responsive to the needs and aspirations of the wide variety of national populations in their global interaction with other populations? Regarding 9/11 and its aftermath, for instance, what is the frame of reference for determining what the United States is entitled to do at home and abroad, and what should it expect from other governments and societies?

From this perspective, I propose that international human rights law provides a practical set of safeguards to ensure sufficient “space” for all perspectives to emerge and be considered as well as an institutional framework for realizing specific objectives. In my view, however, all human rights, whether classified as civil and political, economic, social and cultural, or individual or collective, contribute to this combined framework for cosmopolitan justice. For example, civil and political rights like freedom of expression and association are obviously necessary to ensure the space for the articulation of claims, but the right to education, commonly regarded as a social right, is equally necessary for that to happen. That is, people need education to be able to effectively exercise their freedoms of expression and association.¹⁰ Furthermore, while both sets of rights belong to individual persons, they can only be realized in a meaningful and sustainable manner in group or collective settings, as no individual person exists in isolation from other persons and groups—like families and communities.¹¹

It is equally clear to me, moreover, that the success of the candidacy of human rights for this role is contingent on a variety of factors, especially the possibility of the universality of these rights, which is the fundamental and

¹⁰ Abdullahi A. An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29, 63 (1997).

¹¹ Abdullahi A. An-Na'im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANISATIONS AND FOREIGN POLICY* 3 (Monique Castermans-Holleman et al. eds., 1998).

essential prerequisite of the concept itself. The universality of human rights means that they are the rights of every human being, everywhere, without any requirements of membership or location other than being human. As such, *human rights cannot be defined or implemented except through constant and dynamic inclusion of all perspectives, experiences, and priorities.* In other words, the universality of human rights can only be defined and realized, in practice, through the most globally inclusive, multilateral process. In view of shared human vulnerability, as emphasized earlier, we need to invest in human rights as a normative system that can protect all of us, whoever we are and wherever we happen to be. This view of human rights also requires them to be constantly evolving because, as new constituencies emerge and new identities are framed, formed, or negotiated, more or different priorities and concerns also need to be addressed. This is not to say that every claim of a new right has to be conceded, but for the concept to retain its universal quality, new claims must be taken seriously and judged through the widest possible multilateral process.

II. NORMATIVE AND INSTITUTIONAL FRAMEWORK

In promoting the candidacy of human rights as a framework for cosmopolitan justice, due consideration must be given to the normative and institutional sides of the equation, as well as the dialectic between the two. On the one hand, the content of internationally recognized human rights standards must be inclusive of all priorities and concerns, as already emphasized. On the other hand, the mechanisms and processes for their implementation must be *multilateral in an institutional manner and not just through ad hoc coalitions of convenience*, as happened with the unilateral military campaign of the United States in retaliation for the terrorist attacks of 9/11. In fact, such unilateral or extra-institutional actions undermine the very possibility of cosmopolitan justice. This plea for universality of human rights as a normative and institutional framework for cosmopolitan justice must also challenge several dominant assumptions about economic and political relations at the national, as well as international, level.

For example, the universality of human rights must transcend its liberal antecedent in Western political history and philosophy, in relation to economic, social, and cultural rights (“ESCR”), as well as claims of collective or group rights. On the first count, ESCR must be fully accepted as fundamental human rights and not just benefits or outcomes of fair and open

political processes that are secured and facilitated through the protection of civil and political rights. At present, the human rights standing of ESCR is more acknowledged than it used to be, but not at the same level of immediate obligation as civil and political rights, while even the idea of collective or group rights is resisted as incoherent and dangerous. These traditional views must be challenged, I believe, because of their serious implications for the possibility of the universality of human rights itself as well as for the practical implementation of any of these rights.

The notion of collective rights is problematic, in comparison to individual rights which are more familiar and better developed, but that does not deny any possibility of at least some collective rights. In fact, the collective right to self-determination is already enshrined in Article 1 of the International Covenant on Civil and Political Rights¹² and the International Covenant on Economic, Social, and Cultural Rights,¹³ both of 1966. This principle can be interpreted to authorize some collective rights claims, like rights to cultural or ethnic identity, or more broadly a right to development. But the possibility of collective rights should extend beyond this to give serious consideration to such claims regardless of whether they fit any specific understanding of the right to self-determination as such. Since not every collective or group right claim can or should be conceded, the question is how to agree on the nature, rationale, and scope or content of this category of human rights. In particular, it is necessary to address concerns about the risk of abuse of collective or group rights, as when elites appropriate the collective voice of a community to promote a fascist agenda or justify the suppression of dissidents within the same community. But the main point, for our purposes here, is that challenging the liberal bias against the very idea of a collective right, as well as its reticence to fully endorse ESCR as human rights, is critical for the universality of human rights. To allow any cultural, philosophical, or religious tradition to dominate the determination of what constitutes human rights for all of humanity is by definition a negation of the universality of these rights. In the same way that the Islamic tradition is challenged on the rights of women, for example, the liberal tradition should be challenged on collective rights, the Hindu tradition on discrimination on grounds of caste, and so forth.

¹² Mar. 23, 1976, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

¹³ Jan. 3, 1976, G.A. Res. 2000A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

Another sort of challenge to the universality of human rights comes from a double paradox in the idea that any set of rights that are due to all human beings everywhere are due simply because of their humanity. First, since human rights standards are contained in international treaties that are negotiated, ratified, and supposed to be enforced or implemented by states, there is a paradox in expecting a state to effectively regulate itself to protect human rights against violation by its own officials and organs. The second paradox is that human rights are for all human beings everywhere, while both the domestic and international law principles we rely on for the practical implementation of these rights are premised on the sovereignty of states over their own territory and citizens. Since, as clearly affirmed by the Charter of the United Nations,¹⁴ sovereignty means non-interference in the internal affairs of states, how can one redress a state's failure to respect the rights of persons who are subject to its territorial jurisdiction? Moreover, since there are legitimate grounds for distinguishing between citizens and other persons living within the territory of a state, what are the implications of that distinction for the human rights of noncitizens?

To mediate the first paradox of self-regulation by the state, we need to expand the concept and relevance of human rights beyond its present state-centric, legalistic, and reactive focus. While it is important to strive to expand the legal obligation of states to respect and promote these rights under international treaties, as many may not be willing to assume such obligations under their national constitutional systems, we should appreciate the profoundly political nature of the whole system. Given the organic and dialectic relationship between state and society, respect for and protection of human rights must be seen as a high priority for the whole society, rather than being left to state officials and institutions. However clear and categorical a legal obligation may be, it is unlikely to be respected in practice without a political constituency that is willing and able to push for enforcement. The broader implementation of human rights in ways that preempt and avoid actual violations, instead of reacting to them after they happen, also requires the political will to allocate human and material resources and to adopt and implement necessary policies and legislation. The sustainable realization of human rights in any setting would therefore require an interdisciplinary approach to human rights education and scholarship, as well as action at the political, social, and economic level.

¹⁴ U.N. CHARTER art. 2, para 7.

The second paradox of universal human rights in a world of national sovereignty and citizenship can be mediated by viewing respect for these rights as integral to the definition of sovereignty itself, coupled with a more effective implementation of these rights everywhere as “a common standard of achievement for all peoples and all nations,” as proclaimed in the Preamble of the Universal Declaration of Human Rights in 1948.¹⁵ When viewed as such and equally applied to all countries, none would have reason to complain that its sovereignty is compromised more than everybody else. The common human resistance to being judged is mitigated by the knowledge that all are being judged by the same standard equally and consistently. That is why the conduct of the United States—having one of the poorest records of ratification of human rights treaties and resisting the establishment of the International Criminal Court as noted earlier—so seriously undermines the principle of universality of these rights. While thereby implying that its own sovereignty is superior to that of other countries, the United States claims the right to judge others for their human rights violations, but only when that suits its own foreign policy objectives. The United States is willing to overlook the horrendously poor human rights records of its allies in “the war against terrorism,” while justifying its policy of isolation and harassment of Cuba for more than four decades as designed to improve respect of civil and political rights in that country.

Regarding the distinction between citizen and alien, it should first be noted that all rights are always violated or protected on the ground, within the territorial jurisdiction of some country or another. The antecedents of human rights are often traced to the English Magna Carta, the American Declaration of Independence, and the French Declaration of the Rights of Man and the Citizen; but all those documents were concerned exclusively with the rights of citizens, and on a very limited understanding of citizenship at that. The idea of universal rights for all human beings only emerged after World War II and the establishment of the United Nations. Still, this revolutionary idea does not seek to equate human rights with the rights of citizens, but only to set a minimum standard of universal human rights for all human beings everywhere. For example, freedom from torture and the right to due process of law is due to all human beings, but citizens have additional rights, like the right to vote and hold public office in their own country. The human rights doctrine requires the territorial state to respect the human rights of all persons who are subject to its

¹⁵ G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

jurisdiction, while recognizing that the citizens of the state in question have additional rights that are not due to aliens.

We should also note that current models of the nation-state, and notions of citizenship on which it is premised, are the product of specific historical developments in Europe since the seventeenth century. Since these ideas are the product of a historical process, they can change over time. Indeed, they are already changing through the dialectic of regional integration that is most clearly illustrated by the European Union, now, and globalization, in general. But such changes are likely to happen through a gradual diminishing of the supremacy of sovereignty and relaxation of the exclusivity of citizenship into regional, and eventually global, inclusion, rather than in a sudden and categorical manner. The recent economic drive for trade liberalization and the work of World Trade Organization, and regionally through the European Union and the North American Free Trade Agreement, are all contributing to diminishing preexisting notions of sovereignty and exclusive citizenship. Yet, these same developments also have negative economic and social consequences that have to be confronted and mediated, especially in relation to developing countries.

III. MEDIATING DIFFERENTIALS IN POWER RELATIONS

The idea of universal human rights is yet to be fully realized, but there are good beginnings in the impressive set of international standards adopted since the Universal Declaration of 1948 and various implementation mechanisms at the international, regional, and national levels.¹⁶ This standard-setting and implementation process has also been accompanied by certain favorable political developments, with rapid decolonization resulting in the membership in the United Nations tripling, thereby bringing many new voices and concerns to the international level. This expansion and diversity in the membership in the United Nations gradually transformed the composition of its relevant organs, like the Human Rights Commission, and agencies like UNESCO. Technological advances in communications, travel, and a series of United Nations conferences on the environment, development, human rights, and women's rights have also facilitated the development of global networks of nongovernmental organizations ("NGOs") and groups cooperating on these

¹⁶ INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 520 (W. Michael Reisman et al. eds., 2004).

issues at the local as well as global level.¹⁷ The development of regional systems in Europe, the Americas, and Africa have also fostered a stronger sense of relevance and legitimacy for human rights standards and reduced charges of Western cultural imperialism in the field. For example, the provision of the same rights under the African Charter of Human and Peoples' Rights of 1981¹⁸ cannot be dismissed within the continent itself as a neocolonial imposition of Western values. At the same time, the African Charter, and its limited implementation system, has enabled African governments, scholars, and activists to express their concerns about collective rights to development, peace, and the protection of the environment, while confronting them with the difficulty of the practical implementation of these rights.

While these developments have certainly enhanced the prospects for a more truly universal notion of human rights, and of more inclusive processes of implementation, the question remains whether real and sustainable advances have been made since the adoption of the Universal Declaration. It is of course difficult and misleading to generalize about the actual protection of human rights around the world not only because of the lack of systematic and comprehensive monitoring but also because of the difficulty of assessing the positive success of these rights, as distinguished from other factors. On the first count, the model of human rights monitoring and advocacy by NGOs set by Amnesty International in the 1960s, and adopted by national and international NGOs since, tends to focus on limited instances of violation of the civil and political rights of elites, rather than general assessment of compliance with human rights standards. The "Human Development Index" of the United Nations Development Program is the closest we have to a systematic and comprehensive assessment of the development of various populations around the world according to a wide range of indicators. However, and perhaps because of the clear connections between development and human rights, it is difficult to identify the causes of human rights violations as such, as opposed to a wide range of historical and contextual factors that affect the human development of a society in general.¹⁹ Subject to

¹⁷ Reference here is to such international events as the United Nations World Summit on Sustainable Development in Johannesburg, South Africa, 2002, the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa, 2001, and the Thirteenth International Aids Conference in Durban, South Africa, 2000.

¹⁸ African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.

¹⁹ As Mahbub ul Haq, the author of the concept of "human development," of the United Nations Development Programme, said:

these and related conceptual and methodological difficulties, one can still appreciate at least the strong and clear association of low levels of respect for human rights standards with such factors as political instability, poverty and economic underdevelopment, and weakness or corruption of institutional structures and resources, like the civil service, judiciary, and police.

A realistic assessment of what has been achieved, and what remains to be done, should therefore raise the question of how to mediate differentials in power within and among countries and societies as a clear part of the solution. To say that poverty and underdevelopment should end through more investment and development assistance or better trade terms between rich and poor countries only begs the question of how that is going to happen. Decrying bad planning and mismanagement of the economy by corrupt local elites or the weakness of national structures and institutions, does not address the issue of how or why any of this will change. My earlier critique of the United States for undermining international legality as the basis of the universality of human rights begs the question of how that is going to change.

The key to significant and sustainable change, in my view, is in framing the issue in terms of what needs *to be done*, rather than simply what needs to happen. That is, the question is about what people do or fail to do, the role of the *human agency* of all us, everywhere, in realizing sustainable change in practice. To move away from the symptoms to the underlying causes, we need to focus on the human beings whose behavior can create resources, reform weak or corrupt national and international institutions, or change the foreign policies of countries like the United States. In terms of the proposed framework, the question is how to motivate and empower people to address the conceptual and practical difficulties of realizing the universality of human rights as the normative and institutional framework of cosmopolitan justice.

The basic purpose of development is to enlarge people's choices. In principle, these choices can be infinite and can change over time. People often value achievements that do not show up at all, or not immediately, in income or growth figures: greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms and sense of participation in community activities. *The objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives.*

United Nations Development Programme, *What Is Human Development*, at <http://hdr.undp.org/hd/default.cfm> (last visited Oct. 5, 2004); see also UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT AND HUMAN RIGHTS REPORT ON THE OSLO SYMPOSIUM (2000); UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT AND HUMAN RIGHTS REPORT ON THE OSLO SYMPOSIUM (1998).

It should first be acknowledged that the universality of any normative system, like human rights, is profoundly problematic because it goes against the grain of our inherent and protracted relativity as the inevitable product of the individual and collective conditioning of our social and material location. We can only understand the world and relate to notions of right and wrong and just and unjust—locating our entitlements and responsibilities in the web of human relations—in terms of who we are and where we live. Upon reflection on presumably established paradigms of modernity and rationality that are implicit in Professor Berman's proposal from the perspective of cosmopolitan justice that I am suggesting, questions arise about whose understanding of modernity and whose measure of rationality should be preferenced—as there are no abstract definitions or criteria of these notions independent of the social and material context of the people making the claim or asserting the value in question. As experiences of colonialism by post-Enlightenment Europe and postcolonial Islamic fundamentalism in the Middle East and South Asia clearly show, neither the claims of rationality and secularism as universal values by the former, nor of religious piety and divine guidance by the latter, guarantee against inflicting pain and suffering on others.

This universal difficulty of escaping our respective relativities, in a world of profound and permanent cultural, religious, ideological, and contextual diversity, can be mediated through an overlapping consensus on commonly agreed principles, despite disagreement on our respective reasons for that shared commitment.²⁰ However, to establish genuine universality of human rights, as explained earlier, this process must be fully inclusive and genuinely open-ended for all of us to be both appreciative of other perspectives and critical of our own. The more we are sensitive to our own ethnocentricity and the tendency to project our assumptions and perceptions on other people, the more we can challenge ourselves about assumptions, values, and practices that are closer to home. The more we can do that everywhere in practice, and not only in theoretical assertions or rhetorical proclamations, the closer we get to the universality of human rights. As I emphasized earlier, the more multilateral and globally inclusive the source and standards for judging each other, with a willingness to apply the same standards to our own actions, the more our judgment will be acceptable to others and will motivate them to

²⁰ Abdullahi A. An-Na'im, *Introduction to HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 2–6 (Abdullahi A. An-Na'im ed., 1992); Abdullahi A. An-Na'im, *Problems of Universal Cultural Legitimacy for Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES* 331 (Abdullahi A. An-Na'im & Francis M. Deng eds., 1990).

change objectionable practices. There is no doubt that a quandary exists in this, but it is one that we should negotiate over time through promoting an overlapping consensus, instead of the illusion that we can overcome it by universalizing our own relativities.

In light of the preceding analysis and reflections, I suggest that the mediation of power relations in the sustainable promotion of cosmopolitan justice has to be done by all of us, in our own lives, before it can materialize in the world around us. This will entail taking many serious risks, and require sustained political action that may also attract a harsh response from those who feel threatened by it. Belief in cosmopolitanism as a global existential condition requires us to “step out of our skin” to critically perceive the limitations of our own ethnocentricity and to empathize with other human beings, especially when they are culturally different or physically far removed from us. We must also accept judgment by the same universal standards to have the moral credibility to judge others. This will entail many real and serious difficulties, but it is clearly better than the alternative, which is certain loss of freedom and human dignity for all of us—not only for those we deem to be “at risk” of drastic violation of their human rights. Recalling earlier remarks about our shared vulnerability, none of us are secure in our pretense that human rights violations happen to other people in different places than our own. Human dignity and freedom are more at risk when the democratic will of our societies is undermined by deliberately cultivated ignorance and public indifference, more than through foreign invasion, because the former negates our human agency while the latter unites us in resistance.

IV. AN INTEGRATIVE JURISPRUDENCE OF ISLAMIC LAW

In this final section, I will briefly highlight the nature and sources of Islamic law and its relevance in the modern context in order to consider the possibility and implications of an integrative jurisprudence for that extremely diverse tradition. As emphasized at the end of the Introduction of this Essay, however, constructive engagement of the different legal traditions of the world is premised on mutually respectful acceptance of difference and rejection of Huntington’s notion of the “clash of civilizations,” which can be a dangerous self-fulfilling prophecy of doom.

To begin with a caveat, the term Islamic law is misleading in that Shari’ah, the normative system of Islam, is both more and less than “law” in the modern sense of this term. It is more than law in that it encompasses doctrinal matters

of belief and religious rituals, ethical and social norms of behavior, as well as strictly legal principles and rules. Shari'ah is also "less" than law in the sense that it can be enforced only as positive law through the political will of the state, which would normally require statutory enactment or codification as well as practical arrangements for the administration of justice. When these two features are taken together, it becomes clear that the corpus of Shari'ah includes aspects that are supposed to be voluntarily observed by Muslims, individually and collectively, independent of state institutions, and other aspects which require state intervention to enact and enforce them in practice. In this light, I prefer to use the term Shari'ah, rather than Islamic law.

The primary sources of Shari'ah are the Qur'an (which Muslims believe to be the final and conclusive Divine Revelation) and *Sunnah* (traditions of the Prophet) as well as the general traditions of the first Muslim community of Medina, the town in western Arabia where the Prophet established a state in 622 CE.²¹ Other sources of Shari'ah include *ijma* (consensus), *qiyas* (reasoning by analogy), and *ijtihad* (juridical reasoning if there is no applicable text of Qur'an or *Sunnah*).²² But these were matters of juridical methodology for developing principles of Shari'ah, rather than substantive sources as such. The early generations of Muslims are believed to have applied those techniques to interpreting and supplementing the original sources (Qur'an and *Sunnah*) in regulating their individual and communal lives. But that process was entirely based on the understanding of individual scholars of these sources and the willingness of specific communities to seek and follow the advice of those scholars. Some general principles also began to emerge through the gradually evolving tradition of leading scholars at that stage which constituted early models of the schools of thought that emerged during subsequent stages of Islamic legal history.

The more systemic development of Shari'ah began with the early Abbasy era (after 750 CE). This view of the relatively late evolution of Shari'ah as a coherent and self-contained system in Islamic history is clear from the time-frame for the emergence of the major schools of thoughts (*madhabib*, singular *madhhab*), the systematic collection of *Sunnah* as the second and more detailed source of Shari'ah and the development of the methodology (*usul al-fiqh*). All these developments took place about 150 to 250 years after the Prophet's

²¹ FAZLUR RAHMAN, ISLAM 11-29 (2d ed. 1979).

²² WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH 1-35 (1997).

death. In other words, the first several generations of Muslims did not know and apply Shari'ah in the sense this term came to be accepted by the majority of Muslims for the last one thousand years.

The early Abbasy era witnessed the emergence of the main schools of Islamic jurisprudence, including the main schools which survive to the present day which are attributed to Abu Hanifah (died 767), Malik (died 795), al-Shafi'i (died 820), Ibn Hanbal (died 855), and Ja'far al-Sadiq (died 765—the founder of the main school of Shi'ah jurisprudence). However, the subsequent development and spread of these schools has been influenced by a variety of political, social, and demographic factors. These factors sometimes resulted in shifting the influence of some schools from one region to another, confining them to certain parts, as is the case with Shi'ah schools at present, or even the total extinction of some schools like those of al-Thawri and al-Tabari in the Sunni tradition. Another factor of note is that Muslim rulers tended to favor some schools over others throughout Islamic history. But until the late Ottoman Empire, as noted below, state sponsorship of certain schools traditionally happened through the appointment of judges trained in the chosen school and specification of their geographical and subject matter jurisdiction, rather than legislation or codification in the modern sense of these terms. For example, having originated in Iraq, the center of power of the Abbasy dynasty, the Hanafi School enjoyed the important advantage of official support of the state and was subsequently brought to Afghanistan and later to the Indian subcontinent, where emigrants from India brought it to East Africa. This connection with the ruling authority was to remain a characteristic of the Hanafi School down to the Ottoman Empire.²³

The timing of the emergence and early dynamics of each school also seem to have influenced the content and orientation of their views on Shari'ah. For instance, the Hanafi and Maliki Schools drew more on preexisting practice than the Shafi'i and Hanbali Schools which insisted that juridical elaborations must have more direct textual basis in the Qur'an or *Sunnah*. These differences reflect the influence of the timing and intellectual context in which each school emerged and developed—which partly explains the similarities in the views of the latter two schools—in contrast to the stronger influence of reasoning and social and economic experience on the Hanafi and Maliki Schools. However, the principle of *ijma* (consensus) apparently acted as a unifying force that tended to draw the substantive content of all these four

²³ BERNARD WEISS & ARNOLD H. GREEN, A SURVEY OF ARAB HISTORY 155 (1987).

Sunni schools together through the use of juristic reasoning (*ijtihad*). Moreover, the consensus of all the main schools has always been that if there are two or more differing opinions on an issue, they should all be accepted as equally legitimate attempts to express the particular rule.²⁴

But a negative subsequent consequence of the strong emphasis on consensus is the notion that creative possibilities of *ijtihad* drastically diminished in the tenth century on the assumption that Shari'ah had already been fully and exhaustively elaborated by that time. This rigidity was probably necessary for maintaining the stability of the system during the decline, sometimes breakdown, of the social and political institutions of Islamic societies. Some historians question this commonly held view,²⁵ but the point is of course relative. It is true that there were some subsequent developments and adaptations of Shari'ah through legal opinions and judicial developments after the tenth century. But it is also clear that these took place firmly within the already established framework and methodology of *usul al-fiqh*, rather than through significant innovation outside that framework and methodology. In other words, there has not been any change in the basic structure and methodology of Shari'ah since the tenth century, although practical adaptations continue in limited scope and location. While our understanding of how Shari'ah worked in practice at different stages of its history will continue to improve,²⁶ the fact remains that, in my view, the traditional nature and core content of the system continues to reflect the social, political, and economic conditions of the eighth to tenth centuries, thereby growing increasingly out of touch with subsequent developments and realities of society and state, especially in the modern context.

Moreover, the essentially religious nature of Shari'ah and its focus on regulating the relationship between God and human beings was probably one of the main reasons for the persistence and growth of secular courts to adjudicate a wide range of practical matters in the administration of justice and government in general. The distinction between the jurisdiction of the various state and Shari'ah courts under different imperial states came very close to the

²⁴ DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 14–17 (1998).

²⁵ See, e.g., HAIM GERBER, *ISLAMIC LAW AND CULTURE 1600–1840* (Ruud Peters & Bernard Weiss eds., 1999); WAEEL B. HALLAQ, *Was the Gate of Ijtihad Closed?*, in *LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM* 3 (1994).

²⁶ See, e.g., HALLAQ, *supra* note 22; Aziz Al-azmeh, *Islamic Legal Theory and the Appropriation of Reality*, in *ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXTS* 250–61 (Aziz Al-azmeh ed., 1988).

philosophy of a division between secular and religious courts.²⁷ This early acceptance of a “division of labor” between different kinds of courts has probably contributed to the eventual confinement of Shari’ah jurisdiction to family law matters in the modern era. Another aspect of the legal history of Islamic societies that is associated with the religious nature of Shari’ah is the development of private legal consultation (*ifta*). Scholars who were independent of the state issued legal opinions (*fatwa*) at the request of provincial governors and state judges in addition to providing advice for individual persons from the very beginning of Islam.²⁸ This type of private advice persisted through subsequent stages of Islamic history and became institutionalized in the mid-Ottoman period,²⁹ but there is a significant difference between this sort of moral and social influence of independent scholars and the enforcement of Shari’ah by the state as such.

It is not possible or necessary here to examine the variety of mechanisms to negotiate the relationship between Shari’ah and secular administration of justice over the centuries. The main point for our purposes is that varying degrees of practical adaptability did not succeed in preventing the encroachment of European codes from the mid-nineteenth century. As openly secular state courts applying those codes began to take over civil and criminal matters during the colonial era, and from independence in the vast majority of Islamic countries, the domain of Shari’ah was progressively limited to the family law field.³⁰ But even in this field, the state continued to regulate the relevance of Shari’ah as part of broader legal and political systems of government and social organization.³¹ A related development during the Ottoman Empire that dominated much of the Muslim world for more than five centuries was the patronage of the Hanafi School by the Ottoman dynasty that eventually resulted in the codification of that school by the mid-nineteenth century.³²

However, there was a tension between that reality of state sponsorship of a particular school and the need to maintain the traditional independence of Shari’ah, as rulers are supposed to safeguard and promote Shari’ah without

²⁷ See NOEL COULSON, A HISTORY OF ISLAMIC LAW 122 (1964).

²⁸ Mohammad Khalid Masud et al., *Muftis, Fatwas, and Islamic Legal Interpretation, in ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS* 3, 8–9 (Mohammad Khalid Masud et al. eds., 1996).

²⁹ HALLAQ, *supra* note 22, at 123, 143.

³⁰ COULSON, *supra* note 27, at 149–55.

³¹ *Id.* at 218–25.

³² *Id.* at 151.

claiming or appearing to create or control it.³³ This tension continues into the modern era, in which Shari'ah remains the religious law of the community of believers, independently of the authority of the state, while the state seeks to enlist the legitimizing power of Shari'ah in support of its political authority. This ambivalence persists as Muslims are neither able to repudiate the religious authority of Shari'ah, nor willing to give it complete control over their lives because it does not provide for all the substantive and procedural requirements of a comprehensive and sustainable modern legal system.³⁴ This came to be more effectively provided for by European colonial administrations throughout the Muslim world by the late nineteenth century. The concessions made by the Ottoman Empire to European powers set the model for the adoption of Western codes and systems of administration of justice. Moreover, Ottoman imperial edicts justified the changes not only in the name of strengthening the state and preserving Islam but also emphasized the need to ensure equality among Ottoman subjects, thereby laying the foundation for the adoption of the European model of the nation state and its legally equal citizens.

These reforms introduced into Ottoman law a Commercial Code of 1850, a Penal Code of 1858, a Code of Maritime Commerce of 1863, a Commercial Procedure of 1879, and a Code of Civil Procedure of 1880, following the European civil law model of attempting a comprehensive enactment of all relevant rules. Although Shari'ah jurisdiction was significantly displaced in these fields, an attempt was still made to retain some elements of it. The *Majallah*, which came to be known as the Civil Code of 1876, though it was not devised as such, was promulgated over a ten-year period (1867–1877) to codify the rules of contract and tort according to the Hanafi School, combining European form with Shari'ah content. This major codification of Shari'ah principles simplified a huge part of the relevant laws and made them more easily accessible to litigants, jurists, and lawyers.

The *Majallah* acquired a position of supreme authority soon after its enactment, partly because it represented the earliest and most politically authoritative example of an official promulgation of large parts of Shari'ah by the authority of a modern state, thereby transforming Shari'ah into positive law in the modern sense of the term.³⁵ Moreover, that legislation was immediately applied in a wide range of Islamic societies throughout the Ottoman Empire

³³ COLIN IMBER, *EBU'S-SU'UD: THE ISLAMIC LEGAL TRADITION* 25 (1997).

³⁴ GERBER, *supra* note 25, at 29.

³⁵ BRINKLEY MESSICK, *THE CALLIGRAPHIC STATE* 57 (1993).

and continued to apply in some areas into the second half of the twentieth century. The success of the *Majallah* was also due to the fact that it included some provisions drawn from other sources than the Hanafi School, thereby expanding possibilities of “acceptable” selectivity from within the Islamic tradition. The principle of selectivity (*takhayur*) among equally legitimate doctrines of Shari’ah was already acceptable in theory, as noted earlier, but not done in practice. By applying it through the institutions of the state, the *Majallah* opened the door for more wide reaching subsequent reforms, despite its initially limited purpose.³⁶

This trend toward increased eclecticism in the selection of sources and the synthesis of Islamic and Western legal concepts and institutions not only became irreversible but also was carried further, especially through the work of the French educated Egyptian jurist Abd al-Razzaq al-Sanhuri (died 1971). The pragmatic approach of al-Sanhuri was premised on the view that Shari’ah cannot be reintroduced in its totality, and could not be 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 Kuwait Code and Commercial law of 1960–61. In all cases, al-Sanhuri was brought in by an autocratic ruler to draft a comprehensive code that was “enacted” into law without public debate. In other words, such reforms would not have been possible if those countries were democratic at the time, as public opinion would not have permitted the formal and conclusive displacement of Shari’ah by what was believed to be secular, Western principles of law.

Paradoxically, those reforms also made the entire corpus of Shari’ah principles more available and accessible to judges and policymakers in the process of selecting and adapting which aspects could be incorporated into modern legislation. In that process, the synthesis of the Islamic and European legal traditions also exposed the impossibility of the direct and systematic application of traditional Shari’ah principles in the modern context. The main reason for the impossibility is the complexity and diversity of Shari’ah itself, as it has evolved through the centuries. In addition to strong disagreement among and within Sunni and Shi’ah communities that sometimes coexist within the same country—as in Iraq, Lebanon, Saudi Arabia, Syria, and Pakistan—different Schools or scholarly opinions may be followed by the Muslim community within the same country, though not formally applied by

³⁶ PEARL & MENSKI, *supra* note 24, at 19–20.

the courts. In addition, judicial practice may not necessarily be in accordance with the school (*madhhab*) followed by the majority of the Muslim population in the country, as in North African countries that inherited official Ottoman preference for the Hanafi school, while popular practice is according to the Maliki school. Since the modern state can only operate on officially established principles of law of general application, Shari'ah principles can be influential politically and sociologically, but not automatically enforced as positive law without state intervention.

The legal and political consequences of these recent developments were intensified by the significant impact of European colonialism and global Western influence in the fields of general education and professional training of state officials. Curricular changes in educational institutions meant that Shari'ah was no longer the focus of advanced instruction in Islamic knowledge, and was displaced by a spectrum of secular subjects, many derived from Western models. In contrast to the extremely limited degree of literacy in traditional Islamic societies of the past, where scholars of Shari'ah (*ulama*) monopolized the intellectual leadership of their communities, mass basic literacy is growing fast throughout the Muslim world, thereby opening the door for a much more "democratic" access to knowledge. Thus, the *ulama* not only lost their historical monopoly on knowledge of the "sacred" sources of Shari'ah, but traditional interpretations of those sources are no longer viewed as sacred or unquestionable by ordinary "lay" Muslims. Regarding legal education in particular, the first generations of lawyers and jurists took advanced training in European and North American universities and returned to teach subsequent generations or hold senior judicial office.

Another extremely significant transformation of Islamic societies, for our purposes here, relates to the nature of the state itself in its local and global context. Although there are serious objections to the manner in which it happened under colonial auspices, the establishment of European model nation states for all Islamic societies, as part of a global system based on the same model, has radically transformed political, economic, and social relations throughout the region.³⁷ By retaining this specific form of political and social organization after independence from colonial rule, Islamic societies have freely chosen to be bound by a minimum set of national and international obligations of membership in a world community of nation states. While there are clear differences in the level of their social development and political

³⁷ See generally JAMES P. PISCATORI, *ISLAM IN A WORLD OF NATION-STATES* (1986).

stability, all Islamic societies today live under national constitutional regimes—including countries that have no written constitution such as Saudi Arabia and the Gulf states—and legal systems that require respect for certain minimum rights of equality and nondiscrimination for all citizens. Even where national constitutions and legal systems fail to expressly acknowledge and effectively provide for these obligations, a minimum degree of practical compliance is ensured by the present realities of international relations. The fact that countries where Muslims constitute the predominant majority of the population have acknowledged these principles as binding on them is used by foreign governments and global civil society to pressure for compliance. These changes are simply irreversible, though stronger and more systematic conformity with the requirements of democratic governance and international human rights remain uncertain and problematic for some of these countries. The same is true for Muslim minorities living in other countries, including Western Europe and North America, as noted below.

CONCLUSION

Reflecting on Professor Berman's analysis against the preceding background, I wish to conclude with the following remarks. First, the sort of transformations of what he calls the Western legal tradition also happened in the Islamic legal tradition over a long period of time. In fact, there are many parallels between the two legal traditions, as they each have negotiated the relationship among religion, state, and society over the last millennium. As to be expected, however, each legal tradition, or set of traditions to be more precise, has been doing that according to its own normative and institutional foundations as well as the specific political, economic, and social context of each society within the broader tradition. Consequently, there is a basic similarity in the notion of "natural law" in the Islamic and Western traditions but also significant differences due to the various theological and legal resources that were deployed in support of that idea in context. Moreover, there are also similarities and differences in the relationship between natural law and positivism within and among these two main legal traditions. I am therefore in agreement with Berman's strong emphasis on the critical role of history in understanding these developments and their jurisprudential implications in the Islamic as well as Western legal traditions.

Regarding the role of history, one should consider the internal history of each society as well as the history of its relationship with other societies. This

is not to say, of course, that the internal history of a society is completely independent of external influences but rather to indicate two sides of the same coin. For instance, the history of the Islamic societies in the Middle East of the twelfth and thirteenth centuries had a primarily internal dimension, as well as an external dimension, particularly in relation to the Christian Crusades of that period. A similar process is also true of the relationship of more recent Islamic societies with European colonialism and postcolonial Western hegemony. Yet, it can be argued that these features of recent and current relations of Islamic societies and Western countries are more the consequence than the cause of the internal weakness and stagnation of Islamic societies. At the same time, the nature of the power relations among both groups of societies has had profound effect on the nature and dynamics of internal transformation within Islamic societies, as outlined earlier.

I would therefore recall here my earlier emphasis on international human rights law, and international legality in general, as a framework for cosmopolitan justice among and within both Western and Islamic societies. Failure to adhere to that framework for mediating differentials in power relations raises the serious risk of the atrocious prospects of international terrorism and unilateral military retaliation that can only succeed in promoting more terrorism and arbitrary political violence. Professor Berman's proposal, subject to the concerns and suggestions I made earlier, is also necessary for the proper development and operation of international human rights law, and international legality in general. There is a critical need for an integrative jurisprudence in these legal fields and for history to mediate and supplement natural law and positivist theories of international law and its domestic application within national jurisdictions.

Finally, there is the question of the relevance of Shari'ah to Muslims living in Western societies. That is, why is it important to consider the possibility of an integrative jurisprudence of Shari'ah when it is no longer applicable as positive law for Muslims living in the United States or France, for instance? There are many ways or levels of responding to this question, but the one I would emphasize here is that these Muslim citizens are as entitled as citizens of Christian or European background to their legal tradition being taken seriously in the future development and application of American or French law. For the millions of American Muslims, Shari'ah principles should and can be relevant to the legal tradition of their adopted country. The question of what practical difference that will make to law and jurisprudence in the United States today cannot be addressed intelligently when American lawyers have

such little interest in comparative law, indeed even international law, as I believe to be the case now. This is therefore a plea for taking these critical fields of legal education seriously as well as an endorsement of Professor Berman's call for an integrative jurisprudence.

