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Religion and the Rule of Law: Sharia, Democracy and Human Rights

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Introduction

The theme of this issue is *Religion and the Rule of Law: Shari'a, Democracy and Human Rights*. How are religion and the rule of law related to military legitimacy? *Legitimacy* is the common denominator of both religion and the rule of law, and the standards of legitimacy go beyond the obligations of law and include moral standards and values that are derived from religion and define what is right. Because military legitimacy is about might and right, both religion and the rule of law have had prominent operational roles in Iraq and Afghanistan, and even with the US exiting those operational areas, it is obvious that religion and the rule of law will continue to be critical to US strategic interests in the region.

The articles in this issue focus on strategic issues that transcend military operations. Since the Arab Spring the evolving role of Shari'a as the rule of law in the Middle East and Africa has created serious implications for democracy and human rights in the region. Strategic policy decisions relating to US security interests will require an understanding of the role of religion and the rule of law that is unfamiliar to Western thought. Religion is not part of the rule of law in the West, but they are often one and the same in the Muslim East where Shari'a provides a comprehensive and immutable rule of law with no separation between religion and government. Without human rights to protect minorities, democracy can produce a tyranny of the majority, and there is no worse tyranny than a religious one.

Religion and the rule of law have always had a somewhat incestuous relationship. Judaism, Christianity and Islam are religions that include God's commands, and those commands are evident in the Mosaic Law of Judaism, the greatest commandment of Christianity, and the Islamic laws of Shari'a. Judaism and Islam both originated as deontological or law-based religions, with their many similarities reflecting their common Semitic origins. By way of contrast, Christianity evolved out of Judaism as a more teleological religion based on the principle that God's sacrificial love as taught and exemplified by Jesus fulfilled the legalistic commands of God's law.

Most modern Jews and Christians have come to consider their religious laws as moral standards of what is right and proper—as voluntary standards of legitimacy rather than coercive standards of law enforced by government authorities. But most Muslims in the Middle East and Africa consider Shari'a to be both comprehensive and coercive and that it should be enforced by government authorities. That is because most Muslims believe the Qur'an and its laws are the inerrant and infallible word of God. There are also fundamentalist Jews and Christians in the West who believe their holy books are the inerrant and infallible word of God, but they are in the minority.

Culture shapes religions just as religions shape their culture. The Enlightenment and capitalism have shaped the religions of the West just as tribal customs and traditions have shaped Islam in the East. The result is that Christians and Muslims in the West may have more values in common with each other than with those of their own religion in the tribal cultures of the Middle East and Africa. The following Western values are often in conflict with those prevalent in Eastern Muslim cultures:

(1) *The primacy of individual freedom and democracy.*
(2) *The need for human rights to protect individual freedom from unnecessary government coercion and to prevent a tyranny of the majority in democracies.*

(3) *The need for religious rules to be voluntary moral standards of legitimacy rather than coercive standards of law*.

Shari'a should not be an issue in the US, but Newt Gingrich has stoked fears by alleging that "Shari'a is a mortal threat to freedom in the US and the world as we know it." While there is no credible evidence to support Shari'a as a threat to freedom in the US, it could well threaten freedom and human rights in Muslim nations now experiencing political transition, and that makes Shari'a a matter of strategic importance to the US.

Freedom and its theological counterpart *free will* prevail in Western democracies where laws are made by elected legislators and interpreted and enforced by officials accountable to the public. Constitutions define fundamental human rights, such as the freedoms of religion and expression that protect minorities from the tyranny of a majority—whether a political or religious majority. In Western democracies religions are diverse and separated from government (Great Britain is an exception with the Anglican Church still the state church); but even with a legal separation of government and religion, Western government officials are often religious.

Turkey and Indonesia provide examples of Muslim democracies where secular law, customary law and Shari'a have an uneasy but functioning relationship in hybrid systems of jurisprudence; but in Saudi Arabia, Iran and Pakistan there is no real separation of government, law and religion. In those and other Muslim nations emerging from the Arab Spring, Shari'a is an immutable rule of law made by God and interpreted and enforced by religious authorities and there are no human rights to protect the freedom of religious minorities from the tyranny of a religious majority, as evidenced by apostasy and blasphemy laws and continuing discrimination against women and non-Muslims.

Differences in religion and the rule of law define a cultural divide between the East and West, but it is one being moderated by globalization and the good will of those Jews, Christians and Muslims who have embraced *a common word* of faith. That common word is *the greatest commandment* to love God and neighbor. By equating the love of God with love of neighbor—including those of other religions—*a common word* embraces individual freedom, democracy and human rights, and provides a moral imperative for Jews, Christians and Muslims to seek reconciliation and peace with one another rather than division, hatred and war. When *a common word* of love of God and neighbor becomes the governing principle to interpret Shari'a, then Shari'a will be a rule of law compatible with democracy and human rights.

The first article in this issue expands on the above overview, and it is followed by an article by Kevin Govern on Shari'a and human rights under US and international law. Govern addresses contrasting concepts of human rights in the West and Islamic East and the need to distinguish between provisions of Shari'a that are derived from the Qur'an and those laws derived from tribal customs and traditions.

In the third article David Linnan addresses how Shari'a coexists with national secular law and customary law and how issues of legitimacy are resolved in the pluralistic jurisprudence of Indonesia. He describes a struggle for "hearts and minds" in the world's most populous Muslim country where Islam is a superior fount of legal legitimacy in social terms, but where the question remains which of the many forms of Shari'a will prevail in a practical sense. From the Islamic perspective it is like asking which version of the many forms of Christianity should prevail in the US. Linnan also addresses efforts to ban Shari'a in US courts, including proposed legislation in South Carolina.

In the last article David Gordon addresses the relationship between religion, culture and Shari'a in military rule of law operations in Islamic countries. His focus is on the pragmatic necessity for Westerners to step outside their own religious and cultural biases in order to fashion solutions acceptable to the local populace. He points out that in Islamic countries, Shari'a can contribute to stability because it is a culturally acceptable source of standards of behavior; and that while US representatives will attempt to promote Western notions of democracy and human rights as a matter of national policy, those notions will often be viewed as foreign impositions rather than universal truths.

The articles underscore a major issue of legitimacy in US foreign policy and military operations: The conflict between the oft-stated strategic ideal to promote democracy, human rights and the rule of law as integral components of legitimate governance and the practical necessity to tolerate lesser standards of legitimacy in order to gain the local public support needed to achieve political objectives in Muslim nations. It is a classic conflict between the ideal and practical models of foreign policy, and will continue to haunt US security interests in the hostile cultural environments of Muslim nations.

Hopefully the articles in this issue of the *Military Legitimacy Review* will contribute to a better understanding of how Shari'a relates to democracy, human rights and the rule of law, and how we might resolve resulting issues of legitimacy. If so, we can have a more informed appreciation of political events unfolding in the Middle East and Africa where Shari'a seems destined to be an integral part of the rule of law.

Rudy Barnes, Jr.
December 31, 2011

Religion and the Rule of Law: Shari'a, Democracy and Human Rights

Rudolph C. Barnes, Jr.

Abstract

Religion and the rule of law have a long and incestuous relationship. Religion gave birth to the rule of law, first in theocracy then in democracy, and religions continue to provide standards of legitimacy—that is, what is right—for their believers. For Muslims Shari'a provides comprehensive standards of both legitimacy and law.

Today, political upheaval in the Middle East and Africa has made religion and the rule of law front page news. Whether those Muslim nations now in political transition choose democracy or theocracy, or a hybrid form of democracy with Shari'a as the rule of law, will have a major impact on geopolitics and US national security interests.

Over 3,500 years ago Moses introduced religious law and theocracy to the ancient Hebrews, and 1,500 years later Jesus came to fulfill Mosaic law with the principle of love over law. Then 600 years later, Muhammad restored the Mosaic model of theocracy and led religious conquests similar to those of Joshua, the successor to Moses. The Enlightenment dawned 1,000 years later, and with its emphasis on reason and scientific discovery it transformed religion and produced libertarian democracy and human rights in the West; but the Enlightenment had little effect on Muslim tribal cultures in the East.

Religion continues to shape the values and moral standards that produce cultural norms and secular laws. But just as religion shapes culture, so culture shapes religion, and that is evident in those progressive forms of Islam in the West compared with more fundamentalist forms in the tribal cultures of the East. Today religious conflict is not so much over theological differences as it is over social, political and economic differences made intractable by competing religious beliefs and sacred laws.

Globalization promises continued changes in both culture and religion, and it is clear that American exceptionalism has failed as a paradigm for US foreign policy. The US cannot reshape the world into its own image of libertarian democracy since Islamic nations do not share its preference for individual liberty. But Islam can be compatible with democracy and human rights if Shari'a is considered a body of moral standards of legitimacy rather than of coercive laws. Dr. Martin Luther King demonstrated how believers of all faiths can assert the moral supremacy of God's law over secular law through peaceful civil disobedience without undermining the secular rule of law.

Shari'a is not a threat to the supremacy of secular law in Western democracies as some have argued, but Shari'a does threaten fundamental human rights in Muslim cultures where blasphemy and apostasy are crimes and women and non-Muslims are denied equal rights. The danger is real, since Islamists advocating Shari'a as the rule of law have emerged as early victors in elections produced by the Arab Spring.

History has shown that true peace through justice requires the protection of fundamental human rights through democracy and a secular rule of law. Whether Shari'a can embrace democracy and human rights will be decided by how it is interpreted and whether it is enforced as an immutable code of God's law or as a more flexible code of legitimacy. Where *a common word* of faith in the love of God and neighbor is the guiding principle of interpretation for Shari'a, it is compatible with democracy and human rights and can prevail over the more oppressive and discriminatory interpretations of Shari'a that have dominated in tribal cultures.

The Role of Religion in Democracy, Human Rights and the Rule of Law

When Patrick Henry proclaimed, "Give me liberty or give me death!" he captured the spirit of the American Revolution, a spirit of freedom incorporated in the Declaration of Independence and the Constitution. The US Bill of Rights made the protection of freedom, especially the freedom of religion, assembly and expression, a priority of the individual civil (human) rights that are at the foundation of the rule of law.

The revolutions born of the Arab Spring have also resonated with demands for freedom. Crowds gathered in the public squares of Tunisia, Egypt, Libya, Yemen, Bahrain and Syria have demanded freedom from authoritarian rule, but the role of religion in the Arab Spring is quite different than in Western political revolutions. In the Middle East and Africa religion has a dominant political and social role, so that in any democracy extremist Islam, or Islamism, can create a tyranny of the religious majority.

Freedom and the rule of law are opposite sides of the same coin—one that is secular in the West and religious in the Muslim East. Laws by necessity limit liberty, but laws are also needed to protect liberty, and democracies can produce a tyranny of the majority. That's why civil rights are at the foundation of the rule of law.

Religion has a symbiotic relationship with liberty and law. Religion is the source of the standards of legitimacy that define the moral norms of human behavior, and the law defines those minimal standards of acceptable behavior that are enforced through the coercive powers of government. The relationship between religion, liberty and the rule of law can vary dramatically in the West and the Muslim East. In the West religion plays a supporting role for libertarian democracy and the rule of secular law, while in the East Islamic law, or Shari'a, often restricts democracy and individual freedom.

In Western democracies government is based on a social contract with laws made, interpreted and enforced by officials accountable to the public. In Muslim nations such as Saudi Arabia and Iran, Shari'a is an authoritarian rule of law based on God's law as defined in the Qur'an and interpreted by Islamist jurists. It provides unyielding and comprehensive laws that demand supremacy over libertarian ideals; and in its purest forms Shari'a precludes Western concepts of democracy and human rights.

But Shari'a is seldom found in its purest form; Saudi Arabia and Iran are the exception, not the rule. Muslim countries like Indonesia and Turkey have demonstrated that Shari'a can coexist with democratic institutions and human rights; but it is an uneasy relationship. And the jury is out on the role of Shari'a in the Middle East and Africa—and even in Iraq and Afghanistan, where democracy, human rights and the rule of law have been major US strategic objectives, they have yet to be achieved.[1]

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[1] See Thomas L. Friedman, *The End, for Now*, New York Times, December 20, 2011. Generally, on democracy, human rights and the rule of law as major components of US foreign policy and military operations since the time of Woodrow Wilson, see Barnes, Military Legitmacy: Might and Right in the New Millennium, Frank Cass, London, 1996, chapter 4; posted at www.militarylegitimacyreview.com); on the rule of law as a strategic objective of US counterinsurgency operations in Afghanistan and Iraq, see Daniel L. Rubini, *Justice in Waiting: Developing Rule of Law in Iraq*, 2009 Military Legitimacy and Leadership Journal, p 53, at www.militarylegitimacyreview.com; also, David Stott Gordon, *Promoting the Rule of Law in Stability Operations: Myths, Methods and the Military*, p 93, and Rudolph C. Barnes, *The Rule of Law and Civil Affairs in the Battle for Legitimacy*, p 2, both articles posted in the 2009 Military Legitimacy and Leadership Journal, at www.militarylegitimacyreview.com.

Emerging Muslim democracies are not likely to promote Islamist terrorism, but if and when Shari'a becomes the rule of law it can threaten democracy and human rights in Muslim nations. And if the Arab Spring is any indication of the future, Shari'a will indeed shape the rule of law and politics in emerging Muslim democracies in the Middle East and Africa so that the role of Shari'a is critically important to US foreign policy.

The conflicts between Islamic and Western concepts of democracy, human rights and the rule of law are more a factor of cultural than religious differences. The tribal cultures of the Middle East and Africa have little experience with Western libertarian values, and the current democratic upheavals seem motivated more by a desire to overthrow oppressive regimes than to embrace secular Western democratic values.

This is in contrast to the libertarian ideals that motivated the US Revolution and were articulated in the Declaration of Independence. The idea of sacrificing individual liberty to unyielding and comprehensive holy laws interpreted and administered by religious officials is anathema in Western democracies but it has widespread support in those Muslim nations now experiencing democratic upheavals in the Middle East and Africa. The fear that Shari'a will spread and threaten US security interests around the world has generated suspicion and hostility toward Islam as a whole.

An example of the perceived threat of Shari'a to liberty and human rights are blasphemy and apostasy laws that are common in Muslim countries. They criminalize nonconforming religious beliefs and conflict with the fundamental rights of free speech and religion. But it should be noted that blasphemy was also once a crime in America.[2]

Today blasphemy is no longer a crime in the US and the freedoms of religion and speech reign supreme,[3] but the influence of religion on US law remains evident. It can be

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[2] Alexis DeTocqueville was a French aristocrat who came to America in 1831 and noted the unique blend of politics and religion: "The legislators of Connecticut begin with the penal laws, and strange to say, they borrow their provisions from the text of the Holy Writ [citing *the Connecticut Code of Laws of 1650, Hartford, 1830*]: *Whosoever shall worship any other God than the Lord shall surely be put to death*. [emphasis added] This is followed by ten or twelve enactments of the same kind, copied verbatim from the books of Exodus, Leviticus, and Deuteronomy. Blasphemy, sorcery, adultery and rape were punished by death…. The consequence was that the punishment of death was never more frequently prescribed by the statute, and never more rarely enforced towards the guilty." Alexis Charles Henri DeTocqueville, Democracy in America, Volume 1, The Cooperative Publication Society, The Colonial Press, New York and London, 1900, at p. 37. Jon Meacham cites DeTocqueville and others in describing Christian religious oppression in American Gospel, Random House, 2006, at pp 39-58. David Sehat has noted that "Blasphemy was forbidden in Delaware in 1826, and officeholders in Pennsylvania had to swear that they believed in 'the being of a God and a future state of rewards and punishments.'" Sehat also noted that blasphemy laws "went on the chopping block" in the 1947 Supreme Court case of *Everson vs Board of Education*. See David Sehat, *Five Myths About Church and State in America*, Washington Post, April 22, 2011. Apostasy, which is abandoning faith or converting to another faith, is also a crime under Islamic law and like blasphemy, punished severely. They have been criticized for violating both the freedom of religion and *a common word* of love for God and neighbor that is shared by Jews, Christians and Muslims alike. (see notes 43, 46, 58 and 59, *infra*)

[3] On March 20, 2011, Pastor Terry Jones, Head of World Dove Outreach Center in Gainesville, Florida, made good on his promise to burn the Qur'an. He had originally announced plans to burn the Qur'an on September 11, 2010, to protest the building of a mosque in New York; but after highly publicized criticism from President Obama, Secretary of Defense Gates and General Petraeus, Jones indicated he would abandon his incendiary protest. The burning on March 20, 2011, received little publicity in the US, but on April 1 angry Mullahs stirred up a firestorm of violent protests throughout Afghanistan, with protestors reportedly killing eight people in Mazar-I-Sharif. See Peter Catapano, *Freedom to Inflame*, New York

seen in South Carolina where Blue Laws that were enacted to protect the sanctity of the Sabbath continue to restrict retail sales on Sunday. On the other hand, the repeal of most of the Blue Laws indicates how secular cultural preferences and democratic processes have mitigated the effect of religious rules on US laws.

God's Law and Man's Law

The dynamic and symbiotic relationship between religion and culture shapes the rule of law of every nation. In America the uneasy relationship between God's law and man's law is reflected in political processes at all levels where laws are made, interpreted and enforced by public officials, and the basic structure for those political processes are provided in the US and state constitutions.

The role of God's law in the US has become more subtle since blasphemy and most Blue Laws have been repealed, but it remains significant. The US is a nation of religious people who believe that there is a higher law than man's law that should protect liberty and justice for all. In *America the Beautiful* we sing: *America! America! God mend thine every flaw. Confirm thy soul in self control, thy liberty in law*.[4]

But the role of religion in the US is often contaminated by a religious exclusivism common to both Christianity and Islam. Many fundamentalist believers are convinced that God condemns those who do not share their religion and are suspicious and even hostile to those of other religions. Should there be any doubt that Christians in the US believe that God condemns to hell all those who do not share their religious beliefs, then consider the strong public reaction to a noted evangelical who questioned that idea.[5]

Such religious exclusivism is bad theology and produces bad law, not to mention religious prejudice, hatred and even violence; but there is a legitimate way that believers can assert the supremacy of God's law, or morality, over man's law. It is through peaceful civil disobedience, which does not violate the integrity of the secular rule of law.

Dr. Martin Luther King demonstrated this when he protested against racially discriminatory *separate but equal* laws in the South. His demonstrations asserted the moral supremacy of God's law—or God's will—over man's secular law, and also

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Times, April 8, 2011. Pastor Jones then took his show on the road to Dearborn, Michigan to protest in front of the largest mosque in the US on Good Friday; but when Jones failed to pay a $1 peace bond for a permit to demonstrate, he was jailed for a short time in spite of protests from the ACLU and local lawyers. See *Koran-burning pastor jailed in Dearborn*, UPI, April 23, 2011.

[4] *America the Beautiful*, words by Katherine Lee Bates, 1904, taken from The United Methodist Hymnal, the United Methodist Publishing House, Nashville, TN, 1989, p 696.

[5] Rob Bell provides a convincing case that Scripture does not support a hell to which God condemns unbelievers to eternal damnation. Rob Bell, Love Wins: A Book About Heaven, Hell and the Fate of Every Person Who Has Ever Lived, Harper One, 2011, chapter 3. In commentary on Bell's book, Jon Meacham notes that Bell begins his book questioning an anonymous note that Mohandus Gandhi is in hell, and that many evangelicals, of which Bell is one, apparently share the view that condemnation to hell for unbelievers is an essential element of the Christian faith. In North Carolina, a United Methodist pastor who preached Bell's idea that condemnation to eternal damnation is not biblical was removed from the pulpit. See Jon Meacham, *Is Hell Dead*, Time, April 14, 2011.

reminded Americans of the meaning of *equal justice under law*. At the same time Dr. King's actions demonstrated that those who resort to civil disobedience must be willing to suffer the legal consequences of their disobedience, including arrest and incarceration, and rely entirely on the moral power of their actions to change immoral laws.

Civil disobedience has no place in a theocracy where God's laws are considered infallible, but in democratic governments where laws are fallible religion can thrive and challenge the morality of secular law. That is the case in Muslim democracies like Turkey and Indonesia, where Shari'a remains part of the rule of law.

That begs the question whether Shari'a is a threat to democracy, human rights and the rule of law in the US. That question is addressed later in this article, but suffice it to say here that fundamentalist Christians are more likely to enact into law their version of God's law—perhaps a codification of their family values—before Muslims can enact any provision of Shari'a into law. After all, the US is a democracy and there are many more fundamentalist Christians than Muslims; but even if American Muslims had the political power to change the law, it is not likely that many would sacrifice their *liberty in law* for the restrictions of Shari'a.

Law, Morality, Legitimacy and Reason

Shari'a is a threat to liberty in Muslim nations when it makes obligatory by law moral rules that would otherwise be voluntary. Jews, Christians and Muslims consider God's will to be the source of moral standards, but religious fundamentalists—those who consider their holy Scriptures to be the inerrant and infallible word of God—seek to make the moral obligations of their faith obligatory by law. Most Jews and Christians are not fundamentalist believers, but most Muslims are, and that can be a problem.

The volatile mix of religion, politics and law requires that a distinction be made between the obligations of law and the voluntary standards of morality. Legitimacy is a concept that includes both legal obligations and moral standards of what is right.[6] When legal and moral standards conflict, democratic processes most often conform the law to moral norms; but when that doesn't work, then civil disobedience is an option to assert the moral supremacy of God's law over man's law. Dr. Martin Luther King did just that in the Jim Crow South, and his actions actually strengthened the rule of law.

Religious standards of behavior should be considered voluntary moral standards of legitimacy rather than obligatory laws to ensure the supremacy of law and freedom of religion in any culture of diverse religions. Most American Jews and Christians consider

[6] Legitimacy defines what is right, and includes more than the law. It is often used to evaluate the actions of governments and military operations, as with the expressions that *might makes right* versus *might must be right*. See generally, Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996. Because legitimacy is based on values, moral standards as well as laws derived from religions and secular traditions (pp 53-60), moral standards can be asserted as superior to secular law without challenging the integrity of the rule of law, as when Dr. Martin Luther King used civil disobedience to challenge the legitimacy of separate but equal laws in the US South in the 1960s. Jesus set the precedent over 2,000 years ago when he asserted the primacy of love over Jewish law similar to Shari'a, and the principle of love over law is equally relevant in the US today, as evidenced by those religious leaders who have protested against immigration laws that they consider unjust. See Campbell Robertson, *Bishops Criticize Tough Alabama Immigration Law*, New York Times, August 13, 2011.

their religious rules as voluntary standards of legitimacy and morality, but not of law; and it appears that most Muslims who have assimilated to US culture have done the same.

Making a distinction between law and morality within the context of legitimacy is consistent with the concept of *free will,* a theological doctrine accepted by Jews, Christians and Muslims. The doctrine is esoteric in how it relates to salvation, but pragmatic in acknowledging the freedom of an individual to accept or reject any religious beliefs or sacred rules or rituals, leaving judgment on religious matters to God, not man. Islam is no exception and requires free will to produce a true and voluntary belief.[7]

The Enlightenment challenged the infallibility of religious dogmas in the West with new scientific discoveries and inductive reasoning. Previously reason had been deductive and based on divine revelation; but in the 17th century the power of knowledge and reason began to challenge the divine right to rule with freedom and democracy; later the ideals of a secular rule of law, democracy and human (civil) rights were incorporated in the Declaration of Independence, the Constitution and the Bill of Rights. Since then religions in the West have been conformed to the secular ideals of the Enlightenment, while Islam in much of the East has remained largely unaffected by those ideals.

The Enlightenment opened the door to progress and modernity in the West, but it also created a religious backlash among those who felt their faith was threatened by new discoveries and reason. Religious fundamentalists defend their religious doctrines against the threat of change with inerrant and infallible holy books and holy laws that are the source of divine revelation and truth upon which their deductive reasoning is based.

Islamists are fundamentalist Muslims, and Salafists are the most extreme of Islamists, embracing Shari'a in its original form. They all defend the traditions of their faith against the incursions of reason, progress and modernity with an inerrant and infallible Qur'an and a comprehensive and immutable Shari'a. Fundamentalist Jews and Christians are much like Islamists, but with their own holy books and holy laws.

All religious fundamentalism conflicts with the progressive ideals of democracy, human rights and the secular rule of law, but militant Islamists (jihadists) go beyond their Jewish and Christian counterparts in violently opposing secular and libertarian democracy. Moderate Muslims oppose fundamentalist Islamists, but while moderates are the majority in the US they are often a minority in the Middle East and Africa. Even so, Islam is now experiencing something of a reformation in which moderates and fundamentalists are engaged in a battle of legitimacy to define their religion either as one of peace and reconciliation or one of coercion, violence and oppression.[8]

The role of Shari'a is at the heart of this battle. The main issue between Islamist fundamentalists and progressive moderates is whether Shari'a is to be an unyielding rule of obligatory law or an ancient code of legitimacy appropriate for its time and place, but unsuited to be a code of law for modern times. Islam will not be compatible with

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[7] See www.wikipedia.com on *Free Will in Theology*. The Apostle Paul wrote of freedom from religious law and free will in matters of faith without using the term when he concluded that love of neighbor fulfilled the Jewish law. (see note 10, *infra*)

[8] Karen Armstrong has traced religious fundamentalism, which is a relatively recent development in Judaism, Christianity and Islam, to a reaction to progress and modernity in The Battle for God: A History of Fundamantalism, Random House, 2000.

progress and modernity until most Muslims consider Shari'a to be a moral code of legitimacy rather than of coercive law, and one interpreted to conform with the requirements of democracy and human rights in much the same way that most Jews have reconciled the ancient Mosaic laws of the Torah with democracy and human rights.[9]

Moses, Jesus and Muhammad and a Common Word of Faith

Moses brought God's law and theocracy to the ancient Jews around 3,500 years ago, and 1,500 years later a Jew named Jesus asserted the primacy of God's love over both religious and secular laws. The foundation for human rights can be found in *the greatest commandment* that called for love of God and neighbor, and the Apostle Paul affirmed love of neighbor as the fulfillment of the law.[10]

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[9] *Ijtihad* is the Arabic term for interpreting Islamic law. It has been described as "…a creative but disciplined effort in Islamic law to give fresh views on old issues, or derive legal rulings for new situations, including warfare, from the accepted juridical sources of Islam, i.e. Quran, hadith, concensus, etc…" While Osama bin laden misused ijtihad to justify his violence, ijtihad has also been used to conform Shari'a with democracy, human rights and the secular rule of law. See Waleed El-Ansari, *Confronting the "Teachings" of Osama bin Laden*, p. 18, 2010 Journal on Military Legitimacy and Leadership, at www.militarylegitimacyreview.com. Harkristuti Harkrisnowo, a law professor and Director General for Human Rights in the Indonesian Ministry of Justice and Human Rights, leaves to Islamic scholars the debate over how ijtihad relates Shari'a to the secular human rights provided in Indonesia which she compares to the US Bill of Rights, noting that there are many different interpretations of Islam. Harkrisnowo acknowledges the difficult task: "Some Indonesian Muslims are textualists who embrace the Qur'an very narrowly, in a manner somewhat reminiscent of those Christians who believe in a literal interpretation of the Bible. But, seriously, how many Muslims believe in stoning adulterers and cutting off the hands of thieves? Others believe that Shari'a requires only an ethical basis, which can be satisfied for some by an all-things-considered judgment, and for others by well-considered secular law. Whomever's viewpoint prevails makes a real, practical difference for anyone trying to implement the rule of law in the Islamic world." Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice*, Muslim and Christian Understanding: Theory and Application of "A Common Word", Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, p 191. (See also notes 43, 44 and 57-59, *infra*)

[10] *The greatest commandment* to love God and neighbor is found in Matthew 22:34-40, Mark 12:28-33, and Luke 10:25-29, with *the story of the good Samaritan* following in Luke 10:30-36 as the response of Jesus to the question of "And who is my neighbor?" It was an apostate Samaritan who was the good neighbor to the Jew in the story, much like a Muslim stopping to help a Christian or a Jew today. The Apostle Paul affirmed the love of neighbor to be the fulfillment of the law in his letter to the Romans church: "The commandments 'Do not commit adultery', 'Do not murder', 'Do not steal', 'Do not covet', and whatever other commandments there may be, are summed up in this one rule: 'Love your neighbor as yourself.' Love does no harm to its neighbor. Therefore love is the fulfillment of the law." (Romans 13:8-10) And he wrote to the Galatians: "The entire law is summed up in a single command: Love your neighbor as yourself." (Galatians 5:14). Recognizing the supremacy of love over law represented a dramatic turnaround for Paul, who had been a Pharisee who believed that Jewish laws very similar to those of Shari'a were God's laws, and who had been especially zealous in persecuting Christians for blasphemy. Paul struggled with the relationship of holy laws with God's will and came to believe that love of God and neighbor were voluntary and a matter of free will (see note 7, *supra*), and could not be made obligatory by holy law. (Romans 2:17-24; 3:19-28; 7:4-60; 2d Corinthians 3:17; Galatians 5:1, 13) Paul believed that God sent Jesus Christ to fulfill the law with God's love, as he elaborated to the Ephesians: "For he himself is our peace, who has made the two one and has destroyed the barrier, the dividing wall of hostility, by abolishing in his flesh the law with its commandments and regulations." (Ephesians 2:14,15) If more Jews, Christians and Muslims could, like Paul, make love of God and neighbor the common foundation of their faith and law—whether that law is religious or secular—then peace could well be at hand.

A distinguished group of Muslim clerics and scholars have proposed the greatest commandment, with its love of God and neighbor, as *a common word* of faith for Jews, Christians and Muslims alike.[11] That offer of religious reconciliation provides hope that through enlightened leadership and interfaith cooperation love of neighbor will fulfill and reform Islamic law just as it once fulfilled the Law of Moses, enabling Islam to overcome the negative stigma of terrorism and be seen as a religion of peace and reconciliation compatible with democracy, human rights and the rule of law.

The history of Judaism, Christianity and Islam reveals significant commonalities despite their many differences. Moses established a Hebrew theocracy with holy laws remarkably similar to those of Shari'a, evidence of their common Semitic origin. Both Judaism and Islam are deontological religions based on sacrosanct religious rules and rituals, while Christianity is a teleological religion based on the principle of sacrificial love taught and exemplified by Jesus. Both Judaism and Islam accept Jesus as a prophet, so that they can accept his teachings as God's will. Of those teachings, the primacy of love over law and the principle of free will in matters of faith are needed to support the progressive ideals of liberty, democracy, human rights and the secular rule of law.

In contrast to Jesus, Moses and Muhammad created theocracies ruled by God's law for reasons that were as practical as divinely inspired. Both Moses and Muhammad had to be law-givers to prevent anarchy, and laws needed divine sanction to be obeyed. Circumstances required that both be political and religious leaders; but circumstances were different for Jesus, for whom politics and law were dictated by the Roman Empire. Muhammad was subject to tribal rule in Mecca; but when he left Mecca for Medina, he, like Moses, had to provide law and order for his people in a lawless desert.

The lawless desert forced Muhammad to be both a political leader and a warrior, having the traits of both Moses and Joshua. But to his credit Muhammad never advocated a policy similar to *the ban* found in Mosaic Law and implemented by Joshua at Jericho. That holy law mandated the slaughter of all non-Hebrew men, women and children in the Promised Land, and would become a precedent for ethnic cleansing in the name of God, most recently in the Balkans.[12]

It was a practical necessity for Moses and Muhammad to exercise autocratic political authority and to be the keepers of God's law in their ancient theocracies, but that was not the case for Jesus, who lived under Roman rule. In fact, the political and cultural situation for 1st century Palestinian Jews under Roman rule was somewhat analogous to Muslims living in Western democracies today. Both were religious minorities in a secular state who could not maintain a religious rule of law.

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[11] See www.acommonword.com. Note that the greatest commandment has two parts, both of which were taken from the Hebrew Bible. The first part, to love God, was first given by Moses in his preface to the Deuteronomic Law; for Moses, loving God meant loving and obeying every provision of the Law (see Deuteronomy 6:1-9; 10:12,13; 31:10-13). The second part, to love your neighbor as yourself, was part of God's instructions to Moses (see Leviticus 19:18), and like the first part, it was an integral part of Mosaic Law. Rabbi Akiva once called the requirement to love your neighbor as yourself the greatest principle of the Torah. Jesus brought these two commandments together to show that we love God by loving our neighbors as ourselves, and that our neighbors include those of other faiths. (see Luke 10:30-36)

[12] *The ban* is mandated as part of the ancient Hebrew law of war in Deuteronomy 20:16-18 (see also Deuteronomy 7:1,2), and its implementation by Joshua at Jericho is described in Joshua 6:20,21.

The rule of Jewish law during the time of Jesus was subject to Roman secular law, and the Romans used Jewish leaders to help control the often unruly Jews. But the relationship was tenuous at best, with Jewish zealots constantly seeking ways to overthrow Roman rule and restore the power and glory of ancient Israel.

Around 66CE Jewish zealots initiated an abortive uprising that the Romans put down with brutal force. Jerusalem and the temple were destroyed around 70CE and Jews fled to all parts of the ancient world. It would not be until 1948 that Jews would once again rule Israel—thanks to the United Nations—and since then Jerusalem and Israel have been a crucible of religious conflict.

It is interesting to speculate on the course of history had Jews accepted Jesus as their Messiah and avoided conflict with the Romans. Jerusalem would not have been destroyed and Jews would have likely found a way to live peaceably under Roman rule. If history is a preview of the future, the sequence of events may tell us something. Jesus came about 1,500 years after Moses gave the law to the Hebrews, and that is about the same period of time since Muhammad gave the law to Muslims in the 7th century.

There is no need to look for a Muslim Messiah. Those Muslim scholars who offered a common word of faith to Jews and Christians represent a reform movement within Islam. *The greatest commandment* to love God and neighbor is taken from the Hebrew Bible and summarizes the teachings of Jesus. It is a word of sacrificial love that can fulfill Shari'a today just as Jesus fulfilled Jewish law 2,000 years ago. But that word of love, peace and reconciliation is opposed by Islamist Jihadists with hate and violence; and if they succeed in initiating a Jihad, there is little doubt that Muslims will suffer much as did the ancient Jews. It brings to mind the folk song of Peter, Paul and Mary: *When will we ever learn? The answer, my friend, is Blowin' in the Wind*.

The answer to the religious hatred and violence that has cursed Jews, Christians and Muslims throughout history lies in believers sharing a common word of faith based on love of God and neighbor. Translated into political terms, love of God and neighbor requires democracy, human rights and the secular rule of law. For Muslims, that means interpreting Shari'a to embrace democracy and protect fundamental human rights.

Democracy, Human Rights and the Rule of Law: Where East Meets West

Democracy and human rights have little precedent in the ancient religions, but they are political derivatives of the love of God and neighbor and have been enshrined in the US Constitution and also recognized as universal human rights. The purpose of civil or human rights, especially the freedoms of religion and speech, is to protect minorities from the tyranny of a majority, and history has shown that religious majorities are notorious for their tyranny toward those of other religions.

Since the Enlightenment liberty and human rights have been an integral part of politics and religion in the West, but not in the East. Only since the 20th century have Eastern cultures embraced individual freedom and human rights, and their priorities have been more about aspirations for government entitlements than about protecting civil liberties.[13] Even in Western democracies there has been a trend toward making

[13] Ibrahim Kalin attributes the Islamic rejection of Enlightenment ideas to their association with European secularism and colonialism. Kalin asserts that the Enlightenment was primarily directed to the Catholic Church, and cites Pope Benedict's defense of a "reason-based Christianity" against an allegedly irrational and violent Islam, a defense based in part on the Christian separation of faith from law—something that has

entitlements into human rights. Libertarian priorities in the US have given way to preferences for social welfare entitlements like social security and health care; and there have been demands to make collective bargaining a right for all public employees.[14]

Despite the trend to expand human rights into government entitlements, the basic freedoms of religion and speech continue to have the highest priority, and Muslims cite the Qur'anic prohibition of any compulsion in religion in support of those freedoms.[15] But many Muslim countries make apostasy and blasphemy crimes under Shari'a, creating compulsion in religion that conflicts with the freedoms of religion and speech.[16]

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not yet happened in Islam. Kalin acknowledges the secularization that followed the Enlightenment, and asserts that Islam developed its own system of rationality and free will that compensates for Western secularism, so that the Islamic intellectual tradition is able to meet the needs of modernity. Still, Kalin finds "The ideas of progress, individualism, rationalism and secularism [that] have been imposed by top-down state policies as part of the sociopolitical modernization of Muslim societies…have not found a home in the hearts and minds of ordinary Muslims who still live in a 'sacred' and 'enchanted' world." Ibrahim Kalin, *Islam, Christianity, the Enlightenment: A Common Word and Muslim-Christian Relations*, Muslim and Christian Understanding: Theory and Application of "A Common Word", Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, pp 41-54. As to the conflicting priorities of human rights in the West and East, Harkristuti Harkrisnowo explains the traditional Asian preference for collective state interests over individual rights, and argues that a distinction should be made between social and economic benefits or entitlements provided by government and legal (human) rights that are enforced in the courts. Harkrisnowo refers to government entitlements as political aspirations or *moral* rights as distinguished from *legal* (human) rights, and notes increasing divisions in the West over these same issues. Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice*, Muslim and Christian Understanding: Theory and Application of "A Common Word", Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, pp 189-191. Joseph Isanga, a Catholic priest and law professor notes the dichotomy between human rights and political aspirations, but argues that conditions in Africa require that social and economic rights be guaranteed as human rights. Joseph M. Isanga, *The "Common Word," Development, and Human Rights: African and Catholic Perspectives*, Muslim and Christian Understanding: Theory and Application of "A Common Word", Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, pp 189-191. Mark R. Amstutz has noted the "increasing conceptual pluralism of human rights" in the West and East and efforts to resolve the differences in Amstutz, International Ethics: Concepts, Theories and Cases, Third Edition, Rowman & Littlefield Publishers, Inc., New York, 2008, at pp 95-98. See also note 22, *infra*.

[14] In February 2011 the prospect of legislation in Wisconsin to limit the collective bargaining rights of public workers for matters other than pay produced mass public demonstrations and the flight of Democratic legislators out of the state to shut down the legislative process. Even President Obama entered the fray, saying Republican efforts to restrict the collective bargaining rights of public employees "…seem like more of an assault on unions." See Brady Dennis and Peter Wallsten, *Obama joins Wisconsin budget battle opposing Republican anti-union bill*, Washington Post, February 18, 2011.

[15] *Let there be no compulsion in religion. Truth stands out clear from Error. Whoever rejects Evil and believes in Allah has grasped the most trustworthy hand-hold that never breaks. And Allah hears and knows all things.* (Qur'an, Al Baqara 2:256)

[16] Apostasy is defined as abandoning religion or conversion to another religion. Blasphemy is defined as any speech or act disrespectful of God. See Webster's New World Dictionary, 1976. (See references to apostasy and blasphemy in note 2, *supra*) There are other forms of religious compulsion or discriminatory treatment under Shari'a that violate human rights, such as discrimination against women and non-Muslims. See notes 43, 46, 47, 51 and 59, *infra*.

In Western democracies, constitutions enumerate those civil (human) rights that are protected against government encroachment, but that is not the case in Islamic nations where Shari'a functions much like a constitution, prohibiting any secular law in conflict with Shari'a. For example, the constitutions of Iraq and Afghanistan provide that all secular laws must be in conformity with Shari'a. But unlike Western constitutions, there is no written Shari'a to specifically delineate the limits of secular law, and Muslim religious scholars (jurists) define and interpret Shari'a rather than secular courts.

The freedoms of religion and speech are considered basic human rights in both the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966.[17] Muslim nations are parties to both the Declaration and Covenant, but they understand human rights differently than Western nations because the Shari'a is their frame of reference. The Preamble to the 1990 Cairo Declaration of Human Rights asserts that human rights are "…an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them as they are divine commands, which are contained in the Revealed Books of Allah…."[18]

The divine commands of Shari'a define and limit the freedoms of religion and speech and the rights of women and non-Muslims. If there are to be universal human

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[17] The First Amendment to the US Constitution (part of the Bill of Rights) provides: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.* Articles 18, 19 and 20 of the Universal Declaration of Human Rights (1948) provide for the freedom of religion and free expression; and Articles 18, 19 and 20 of the International Covenant of Civil and Political Rights (a 1966 treaty signed by the US in 1977 and ratified in 1992) protect those rights. Most Western and Muslim nations are signatories to both the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, with the latter treaty making obligatory upon the signatories what was declared earlier as nonbinding policy in the Universal Declaration.

[18] The Cairo Declaration on Human Rights in Islam of 1990 has no provisions comparable to Articles 18, 19 and 20 of the Universal Declaration of Human Rights or the International Covenant of Civil and Political Rights (see note 17 *supra*), but following a Preamble that asserts the primacy of Shari'a in defining human rights, the following articles reveal the Islamic perspective of human rights. Article 11 provides in part: *Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High….* Article 18 provides in part: *Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property….* Article 19 provides in part: *All individuals are equal before the law, without distinction between the ruler and the ruled….* Article 22 provides: *(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah. (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah. (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith. (d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.* Article 24 provides specifically what the Preamble implies: *All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.* Article 25 provides: *The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.* (For further elaboration of Islamic perspectives on human rights, see notes 22-59, *infra*)

rights in Muslim nations, they must first be recognized by Muslim jurists who define and interpret Shari'a based on a common word of love of God and neighbor.

American Exceptionalism: Unrealistic Idealism with a Military Punch

Since the early 20th century the US has promoted the ideals of democracy, human rights and the rule of law in its foreign policy and even in military operations. Built on Woodrow Wilson's idealism, *American exceptionalism* has made libertarian democracy and culture a model for the rest of the world. Its ideals have been promoted with a missionary zeal to reshape the world in the American image. But American crusades to change the world have produced mixed results at best and prompted some commentators to conclude that the era of American exceptionalism is over.[19]

Military operations are the ultimate extension of US foreign policy, and while Vietnam can be counted a failure of American exceptionalism, Iraq and Afghanistan remain in question. We may have a chance to see democracy in its purest form—with little or no Western influence—in one or more of the countries experiencing democratic upheavals in the Middle East and Africa; but it is unlikely that any democracy emerging from a Muslim tribal culture in that region will resemble the Western model.

Both nature and politics abhor vacuums. We can be sure that some kind of political power will fill any political vacuum in the Middle East or Africa, and it is likely that Islamists will play a major role in filling any such political vacuum. Radical Islam may well gain power through a popular movement, as happened in Iran, Palestine and Lebanon; and with the growing power of Islamists in democratic political organizations like Hamas, Hizballah, and the Muslim Brotherhood there are new threats to US security interests—even to the existence of Israel. Turkey and Indonesia have been congenial to Western interests in the past, but even in those countries there is continuing tension between Islamism and democracy, human rights and the rule of secular law.

US foreign policy has long promoted democracy, human rights and the rule of law in Muslim nations, even to the point of regime change in Iraq and Afghanistan. But despite massive US efforts, Muslims overseas have not embraced Western concepts of democracy and human rights; and continuing government corruption and public demonstrations are reminders that many in those Muslim nations do not share our political ideals.[20]

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[19] Seymour Martin Lipset has defined American exceptionalism in religious terms, citing Alexis DeTocqueville, Max Weber and Samuel Huntington in support of the idea that the unique and prolific American religions (mostly Protestant sects) provided the moral energy for its progress and economic success. See Lipset, American Exceptionalism: A Double-Edged Sword, W. W. Norton & Company, New York, 1996, pp 60-67. In a more recent work focused on US military interventions in Afghanistan and Iraq, Andrew J. Bacevich has predicted the end of American exceptionalism. Bacevich, The Limits of Power: The End of American Exceptionalism, Henry Holt and Company, New York, 2008. Richard Cohen has described American exceptionalism as a misguided mix of patriotism, politics and religion that has caused Americans to sanctify traditional values and ignore their flaws, contributing to the decline of America in relationship to other nations. See Richard Cohen, *The Myth of American Exceptionalism*, The Washington Post, May 9, 2011.

[20] See note 3, *supra*.

The democracy promoted by the US in the Middle East has arguably weakened US security interests. Iran is a theocracy that began with a popular revolution and is now the greatest threat to US security interests in the region. The regimes of Saddam Hussein and Hosni Mubarak both opposed the expansion of Iranian power before they were deposed. Now Islamists are courting those populist movements unleashed by the "Arab Spring," raising new concerns for US security interests in the region.

Democracy has proven to be an unpredictable force in the Middle East. The evolution of Iran, Palestine and Lebanon justify concerns about what populist politics will produce in the region—even in Iraq and Afghanistan. An unintended consequence of promoting democracy in Muslim nations may be the creation of theocratic regimes that are hostile to US security interests in the region—even to the existence of Israel.

Democracy and Theocracy: Different Strokes for Different Folks

It is obvious that the democratic model promoted by American exceptionalism is no panacea for the Middle East and Africa, but neither is Islamic theocracy. Could it be that both have a legitimate place in the world?

The virtues and vices of democracy and theocracy vary with different perspectives of religion and culture, and a virtue for some is a vice for others. Most Muslims who have had the opportunity to live in a progressive democracy prefer it to a theocracy, but other Muslims aren't so sure. Many Muslims in the Middle East and Africa seem to favor the sacred certainty offered by Islamism and Shari'a over the uncertainty of libertarian democracy and its dynamic rule of law.

But even those Muslims in the West who prefer democracy to theocracy have not given up Islam. They have reconciled their political preferences with their faith through progressive interpretations of the Qur'an and Shari'a.[21] The difference between progressive and conservative interpretations of the Qur'an can be attributed to the role of reason in religion, but since the Enlightenment had little effect on Muslim nations, the concept of critical reason is relatively new in Islam and is battling fundamentalist forces.

In the West the focus of faith on love of God and neighbor has endured the challenges of both reason and scientific discovery, while ancient holy laws have little following. Jews, Christians and Muslims in the West have not abandoned their belief in the supremacy of God's will over man's law, but they have reconciled it with reason and the belief that God's will is better served through democracy than theocracy. In this way

[21] See notes 26-44, *infra*. Alan Wolfe has argued that the so-called secular American culture is actually religious, with a commitment to secular law which trumps those Shari'a religious laws that conflict with democracy and human rights. As a result Wolfe sees a moderation of radical Islam coming from Muslims living in the West. See Alan Wolfe, *And the Winner Is…*, The Atlantic, March 2008, p 56). Wolfe has used a poll on wealth and religiosity to demonstrate that where religions have become secularized by surrounding culture—that is, where religions have made peace with capitalism and secular laws that protect individual freedom and human rights—there is little religious extremism, although people remain religious. That helps explain why Muslims in America are more moderate than those in the Middle East. A survey of Muslims by the Pew Research Center in May 2007 indicated that Muslims in the US are "highly assimilated, close to parity with other Americans in income and overwhelmingly opposed to Islamic extremism." Libertarian values in the US have moderated more radical and militant forms of Islam. See Alan Cooperman, *Survey: US Muslims Assimilated, Opposed to Extremism*, washingtonpost.com, May 23, 2007.

they recognize God's law as the highest form of legitimacy, but limit enforcement to man-made laws.

Theocracies are authoritarian by nature and incompatible with liberty, democracy and human rights; but even democratic movements can lead to oppressive authoritarian regimes, as occurred in Hitler's Nazi regime in Germany and in theocratic Iran. Can it happen again? It is too soon to predict what will come out of the turmoil in the Middle East and Africa, or what will evolve in Iraq and Afghanistan, despite US efforts there.

History has proven that no matter what their religion, people in power will exploit others to promote themselves. Without human rights to protect the powerless from the powerful, neither democracy nor theocracy is a panacea. Short of a benevolent despot or divine intervention, human rights are essential for justice in all forms of government.

Democracy is not for everyone. For some tribal cultures theocracy might be a better alternative than still-born democracy, such as in those post-colonial regimes in the Middle East and Africa. When a culture cannot sustain the institutions of democracy, human rights and the rule of law, then liberty becomes license and an Islamic theocracy is preferable to either anarchy or oppressive dictatorship—that is, so long as Shari'a is interpreted in accordance with *a common word* of faith in love of God and neighbor.

Whether future Muslim nations subject to Shari'a choose democracy or theocracy as a form of government, human rights, beginning with the freedoms of religion and speech, will remain a measure of their legitimacy. Jews, Christians and Muslims all share *a common word* of faith based on love of God and neighbor, and when translated into a principle of justice it requires human rights and the rule of law; and since Islam is a religion of law, its legitimacy depends upon Shari'a including basic human rights.

The moral quality of a government is not determined by its form but by how well it protects fundamental human rights. Western democracies have made human rights a priority of their rule of law, and Western religions share that democratic priority. The same thing can happen in Muslim nations if *a common word* of love of God and neighbor is recognized to be a guiding principle of Shari'a. It would eliminate the crimes of blasphemy and apostasy and end discrimination against women and non-Muslims.

If, however, history is a preview of the future, then Islamic tribal cultures are not likely to embrace a Western model of democracy. Fundamentalist Islamists see Western democracies as decadent and evil, even as more progressive Muslims favor their progress and modernity and have used the traditional concept of *ijtihad* to interpret the Qur'an and Shari'a in ways compatible with progress and modernity. That progressive trend is evident at the theological level in *a common word* of faith, and at the political and legal level in progressive interpretations of the Qur'an and Shari'a that embrace the ideals of democracy, human rights and the secular rule of law.

The unanswered question is whether Muslim nations now experiencing political upheaval in the Middle East and Africa embrace a Shari'a that is congenial to democracy and human rights or one that perpetuates traditional tribal inequities in the name of Allah.

Shari'a and Democracy, Human Rights and Rule of Law: the Scholars Speak

Those governments that evolve from the political turmoil in the Middle East and Northern Africa will no doubt have a rule of law that reflects Shari'a principles. Turkey and Indonesia are long-standing Muslim democracies that have blended Islam and Shari'a with human rights and the secular rule of law. But Egypt, Syria, Tunisia, Libya,

Yemin and other evolving nations in the region seem to be moving toward a more Islamic model of democracy than that of Turkey or Indonesia. One or more may become a quasi-theocracy presided over by Islamic clerics, such as Iran, or a military regime with a façade of democracy, such as Pakistan.

Just how democracy and human rights evolve in those Muslim nations is dependent on how Shari'a is interpreted as the rule of law; and Muslim scholars are deeply divided on how that might happen.

Generally speaking there are two contrasting models of democracy and human rights: The Western libertarian model has been shaped by the Enlightenment and emphasizes the protection of individual freedom against government encroachment, while the Eastern model emphasizes communitarian or government interests (those of the nation, tribe or the current despot) over the rights of the individual.[22]

The Eastern model has been prevalent in Muslim nations since antiquity, and most Islamists favor it since it is more compatible with an immutable Qur'an and Shari'a, and that view is reflected in the Cairo Declaration on Human Rights in Islam.[23] But there are progressive Muslim scholars who favor a Shari'a compatable with modern views of democracy and human rights.[24]

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[22] Mark R. Amstutz (Amstutz, International Ethics: Concepts, Theories and Cases in Global Politics, Third Edition, Rowman & Littlefield Publishers, Inc., 2008, pp 95-102) has summarized the differences between Western and Eastern concepts of human rights in the International Covenant on Civil and Political Rights (ICCPR) favored by the West (see note 17, *supra*), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) favored by the East, illustrating the pluralism of human rights well before the Cairo Declaration of 1991. (see notes 13 and 18, *supra*) Amstutz notes "The limited consensus on human rights doctrines, coupled with the ever-expanding list of rights, has had a deleterious effect on the moral foundations and priority of international human rights claims." (page 97) And he asserts "The idea of human rights is subversive because it establishes norms that if not fulfilled by a state can undermine its international legitimacy." (p 99) Captain Brian J. Bill has argued that military lawyers should become more knowledgeable of human rights even though the law of war supplants them in wartime, since "…human rights are now the prism through which all military operations are viewed and judged." (p 60) and that "…the continued development of human rights law has arguably eclipsed that of the law of war." (p 62) Captain Bill noted that the ICCPR, which was ratified by the US in 1992, includes most of the universally recognized human rights, while those in the ICESCR, which has not yet been ratified by the US, are more aspirational in nature. See Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, The Army Lawyer, June 2010, pp 54-64. Special Operations Forces have long considered human rights an operational priority in overseas training and advisory missions. The political objectives of such missions include building public support for a supported government and require strict compliance with human rights as well as with other standards of legitimacy applicable in the operational area. When US mission success depends upon public support in a hostile cultural environment, US military operators must have values that are consistent with the golden rule which is at the foundation of human rights (see also, Na'm at note 45, *infra*). Legitimacy is a mission priority for US Special Operations Forces, and legitimacy depends not only upon compliance with human rights but also with local religious and cultural standards. See Rudolph C. Barnes, Jr., *Human Rights and Legitimacy in the Foreign Training Mission*, Special Warfare, Spring 2001, pp 2, 7, 8-11.

[23] See note 18, *supra*, and notes 48 and 51, *infra*.

[24] See note 17, *supra*.

The debates between Muslim scholars over Shari'a, democracy, human rights address three major issues: (1) The role of *reason*; (2) the role of individual *freedom*; and (3) the nature of *justice*. A short description of these issues should provide a useful frame of reference to consider the conflicting views of Islamic scholars on Shari'a, democracy and human rights.

There are two forms of reason—deductive and inductive—that shape the debate over religion and the rule of law. Deductive reasoning assumes the absolute truth of divine revelation and derives laws from holy scriptures, as the ancient Jews embraced Mosaic Law and many modern Muslims embrace Shari'a. Inductive reasoning allows knowledge and experience to limit revelation as the sole source of truth. But all believers accept divine revelation as a source of truth for concepts of freedom and justice, so that inductive and deductive reasoning are destined to conflict as to matters of law.

Freedom under law was defined by Thomas Jefferson in the US Declaration of Independence as the inalienable right to life, liberty and the pursuit of happiness; and in Article Three of the Universal Declaration of Human Rights it is affirmed that everyone has the right to life, liberty and personal security. Human rights give meaning to those libertarian assertions of freedom, both in secular constitutions that prohibit unnecessary government encroachment, and in the Shari'a which defines and limits freedom in a sacred and comprehensive code of conduct. In the context of religion and the rule of law, the issue becomes the freedom to sin versus the bondage of righteousness as defined by holy law, and Saint Paul addressed that issue for Christians.[25]

Like freedom, justice has a different meaning in secular law and in Shari'a. In the West justice means equal protection under a democratic and dynamic secular law, while under the divine and unchanging law of Shari'a justice is the judgment of God. It pits the sovereignty of God against the sovereignty of man, and God's law against man's law.

Differing concepts of reason, freedom and justice shape the debate among Muslim scholars over Shari'a, democracy and human rights; but culture is an external factor that may have more influence over the evolution of Shari'a than the most compelling logic. Muslims in the Middle East tend to favor Shari'a as their rule of law, while Muslims in the West tend to embrace democracy, human rights and the secular rule of law.[26]

Islamic scholars on Shari'a have wide-ranging differences of opinion on how reason, freedom and justice relate to democracy and human rights, and their views reflect their differing cultural orientations. The following sampling of scholarly views on Shari'a provides a glimpse into the future of Islam and geopolitics as well.

Khaled Abou El Fadl is a law professor at UCLA who is both an Islamic jurist and an American lawyer. He argues forcefully that "…democracy is an appropriate system for Islam because it both expresses the special worth of human beings…and at the same time deprives the state of any pretense of divinity by locating ultimate authority in the hands of the people rather than the ulema (Islamic jurists)."[27] In reaching his

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[25] See note 10, *supra*.

[26] See notes 21 and 22, *supra*.

[27] Khaled Abou El Fadl, Islam and the Challenge of Democracy, Princeton University Press, Princeton & Oxford, 2004, at p 36.

conclusion El Fadl goes beyond deductive reasoning to question the traditional view that God is the sole legislator, noting that achieving justice under Shari'a requires human agency in defining, interpreting and applying Islamic law. He asserts that Shari'a is more a set of "fundamental moral commitments—in particular to human dignity and freedom" than a "codebook of specific regulations."[28] El Fadl's views are consistent with Shari'a being a code of moral legitimacy rather than specific provisions of coercive law.

As to matters of justice and mercy, El Fadl says: "In essence, the Qur'an requires a commitment to a moral imperative that is vague but recognizable through intuition, reason and human experience. …The divine mandate for a Muslim polity is to pursue justice by adhering to the need for mercy."[29] This resonates with Micah 6:8: "He has showed you , O man, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God."

But El Fadl's enlightened understanding of human rights, and specifically the freedom of religion and expression, is burdened by a Shari'a that provides comprehensive provisions that ensure the welfare of the people and considers religion a necessity that requires protection through the laws of apostasy and blasphemy. El Fadl attempts to distance himself from that traditional rationale by asserting that protecting religion should be interpreted to mean protecting the freedom of religion.[30]

El Fadl questions the traditional premises that Shari'a is focused on collective rather than individual rights and that God's rights supersede human rights, antinomies that have been used to protect oppressive autocracies from democratic movements. He asserts that individual rights are a priority under Shari'a and that any dichotomy between individual and collective rights is "largely anachronistic."[31] El Fadl also discounts any conflict between God's sovereignty and popular sovereignty as expressed through democratic institutions of law and governance by referring back to the fallibility of Shari'a based on the requirement of human agency in interpretation and application.[32]

John L. Esposito, a non-Muslim professor of religion and international affairs at Georgetown University, responded affirmatively to El Fadl's essay by noting how culture shapes religion, and that "…democracy itself has meant different things to different people."[33] Esposito also affirmed Fadl's distinction between Shari'a as an infallible set of divine principles and its application as law through fallible human agency (God's sovereignty versus the popular sovereignty of democracy), and the distinction in Shari'a

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[28] 28. *Ibid* at pp 4, 10, 13.

[29] *Ibid* at pp 19, 22.

[30] *Ibid* at pp 23, 24 and note 27.

[31] *Ibid* at pp 25-30.

[32] *Ibid* at pp 30-36.

[33] John L Esposito, *Practice and Theory*, Islam and the Challenge of Democracy, see note 27, *supra*, at pp 93, 95.

between duties to God (a matter of faith) and duties to others (a matter of morality), all of which are consistent with Shari'a being a code of legitimacy rather than law.[34]

Esposito cited Abdurrahman Wahid, the first democratically elected president of Indonesia, on the role of Shari'a in democracy and human rights:

> "In contrast to many 'fundamentalists', [Wahid] rejects the notion that Islam should form the basis for the nation-state's political or legal system, which he characterized as a Middle Eastern tradition, alien to Indonesia. Indonesians should apply a moderate, tolerant brand of Islam to their daily lives in a society where 'a Muslim and a non-Muslim are the same'—a state in which religion and politics are separate….Its cornerstones are free will and the right of all Muslims, both laity and religious scholars (*ulema*), to 'perpetual reinterpretation' (*ijtihad*) of the Qur'an and tradition of the Prophet in light of ever changing human situations.'"[35]

M. A. Muqtedar Khan, an assistant professor and director of International Studies and chair of the Department of Political Science at Adrian College, challenged El Fadl's ideas regarding Shari'a, democracy and human rights. He criticized El Fadl's essay by saying, "…instead of concluding with a sketch of Islamic democracy, he imposes Shari'ah-based limitations on democracy." And Khan goes on to say that "…El Fadl's arguments suggest that an Islamic democracy is essentially a dictatorship of Muslim jurists" and that "Insisting on the centrality of a fixed Shari'ah is a recipe for authoritarianism. ...In short, the content of law in an Islamic democracy should be a democratic conclusion emerging in a democratic society."[36]

Khan goes on to say: "Ideas such as the primacy of Shari'ah and God's sovereignty—which make states accountable to God alone and free them from accountability to the people—undermine freedom and encourage authoritarian states and totalitarian ulema. To establish an Islamic democracy, we must first create a free society in which all Muslims can debate what constitutes Shari'ah. Freedom comes first, and only the faith that is found in freedom has any meaning."[37]

In his reply to Khan, El Fadl criticizes him as being too liberal, saying "…Kahn believes that Shari'ah should be either whatever Muslims wish it to be or subordinated to everything else, including common sense, logic, human experience, social and political aspirations, and the will of the majority."[38]

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[34] *Ibid* at pp 97, 98.

[35] *Ibid* at p 99.

[36] M. A. Muqtedar Khan, *The Primacy of Political Philosophy*, Islam and the Challenge of Democracy, see note 27, *supra*, at pp 63, 64.

[37] *Ibid* at p 99. Jon Meacham cited Roger Williams as a proponent of the freedom of religion in early America "…because it was the only way to reach the true God." Meacham, American Gospel, Random House, 2006, at pp 54,55. See also note 7, *supra*.

[38] Khaled Abou El Fadl, *Reply*, Islam and the Challenge of Democracy, see note 27, *supra*, at pp 109, 122.

Abdullahi Ahmed An-Na'im is a Professor of Law at Emory University, and a liberal reformer like Kahn who envisions a secular Islamic state with a Shari'a that provides for the freedom of religion and an end to discrimination against women and non-Muslims. An-Na'im rejects Shari'a as coercive law with a radical premise: "…the claim of a so-called Islamic state to coercively enforce Shari'a repudiates the foundational role of Islam in the socialization of children and the sanctification of social institutions and relationships."[39]

An-Na'im asserts that Shari'a cannot be codified as state law since it consists of moral obligations of faith rather than of enforceable laws; and like El Fadl, he challenges the mandates of Shari'a as the infallible law of God since those mandates have always been interpreted by human agency.[40] An-Na'im goes beyond arguing the impracticability of Shari'a as enforceable law and asserts that when Shari'a is enforced as law it is a form of religious compulsion that violates the Qur'anic prohibition against compulsion in religion.[41] Like Kahn, An-Na'im asserts that Muslims, like other believers, must have the free will to accept or reject their faith for it to be valid, and this requires that Shari'a be a voluntary moral code of faith rather than an obligatory code of law—a standard of legitimacy rather than law.[42]

An-Na'im acknowledges that fundamental human rights are lacking in Shari'a, which tolerates apostasy and blasphemy laws as well as discrimination against women and non-Muslims, and he asserts that Shari'a properly understood requires the enforcement of human rights through secular law to achieve God's justice.[43] To achieve

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[39] Abdullahi Ahmed An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a, Harvard University Press, Cambridge, Massachusetts, 2008, p 1.

[40] *Ibid* at pp 3, 10, 12-15, 26, 27.

[41] *Ibid* at pp 2, 5; see also note 15, *infra*.

[42] *Ibid* at pp 3, 5, 14, 17, 28-30; on free will see note 7, *supra*. Traditional Islamic doctrine acknowledges that Shari'a provides both voluntary moral standards of legitimacy and compulsory legal obligations: "Not only does the Shariah tell people what they must do and what they must not do, it also tells them what they should do and what they should not do, and it tells them explicitly that many things are indifferent." Sachiko Murata and William Chittick, The Vision of Islam, First Edition, Paragon House, St. Paul, Minn, 1994, p 23. John Esposito has identified five different categories of Shari'a mandates which "…are ethically categorized as (1) obligatory; (2) recommended; (3) indifferent or permissible; (4) reprehensible but not forbidden; and (5) forbidden." Esposito then categorizes all Shari'a rules and rituals as either "(1) duties to God (ritual observances)… and (2) duties to others (social transactions)…." If there is no compulsion in religion (see note 15, *supra*) then it would seem that none of the duties to God would be considered compulsory or obligatory and the rest would be considered voluntary moral standards of legitimacy. See John Esposito, Islam: The Straight Path, Revised Third Edition, Oxford University Press, New York, 2005, pp 87, 88. As to which acts are categorized as obligatory and forbidden under Shari'a, An-Na'im has pointed out that distinction was made by humans, not God. (See notes 37 and 40, *supra*)

[43] *Ibid* at pp 6, 8, 13, 19-21, 24, 25, 38, 106-128.

this end An-Na'im proposes a process of mediation through a form of *ijtihad* enlightened by *civic reason* and affirmed by Muslim *consensus*.[44]

An-Na'im's rationale of Shari'a as a moral standard of legitimacy rather than of law and its relationship to human rights is based on the principle of reciprocity found in the golden rule, and is similar to Saint Paul's rationale of Mosaic Law being fulfilled through the revelations of Jesus. Paul wrote to the Romans that God's law had been fulfilled in the greatest commandment to love our neighbors as ourselves.[45] That is *a common word* of faith for Jews, Christians and Muslims alike, and it supports human rights, beginning with the freedom of religion and speech, as a common right for all.

Frank Griffel is professor of Islamic Studies at Yale University. In his introduction to *Islamic Law in the Contemporary Context* he provides an overview of the methodologies of Shari'a and notes its similarities to Mosaic law, explaining that it includes both legal and moral standards and functions much like a constitution, or legal template, for secular laws in Muslim nations. He acknowledged the problem of apostasy citing a saying by Muhammad: "Whoever changes his religion, kill him!" But rather than question the legitimacy of apostasy, Griffel explains that the crime of apostasy was rarely punished before the 20th century, and that since then Islamists have erroneously interpreted Shari'a as a code of laws rather than a code of legitimacy.[46]

Gudrun Kramer is professor of Islamic studies at the Free University of Berlin, and in her essay on *Justice in Modern Islamic Thought* she emphasizes the spirit of Islamic law as governing the interpretation of Shari'a and identifies justice as its supreme value. But unlike El Fadl her concept of Islamic justice favors protecting the collective interest of the state over individual rights. Kramer asserts that "…justice can be realized by various means, as long as they do not conflict with the immutable elements of divine law", but finds flexibility since those immutable elements are "…hardly ever defined." Kramer seems to lament the subordinate role of women to men under Shari'a, noting that husbands have a right to beat disobedient wives, but she does not advocate sexual equality. Instead she recommends limiting harsh laws that oppress women and non-Muslims by limiting them to their specific ancient context and thereby marginalizing

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[44] *Ibid* at chapters 1, 3 and 7; on *ijtihad*, see note 9, *supra*. An-Na'im's inclusion of *civic reason* (or reason by analogy) and *consensus* along with the Qur'an and the Sunna (hadith) as sources of law for Shari'a is consistent with traditional Islamic doctrine. See John Esposito, Islam: The Straight Path, Revised Third Edition, Oxford University Press, New York, 2005, pp78-84.

[45] As to reciprocity and the golden rule, see *ibid* at pp 24, 95. As to Paul, he was a Jewish lawyer (a Pharisee) while An-Na'im is a Muslim lawyer. The writings of both reflect an understanding of the uneasy relationship between religion and the rule of law. While Paul never considered how democracy, human rights and the secular rule of law were related to the supremacy of love over law, he understood—from first-hand experience—just how oppressive religious law could be. See note 10, *supra*.

[46] Frank Griffel, Introduction to Islamic Law in the Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, p 13.

them. Her traditional views of how reason, freedom and justice relate to Shari'a are thus in marked contrast to the more liberal views of El Fadle, Esposito, Khan and An-Na'im.[47]

Noah Feldman is a Professor of Law at New York University School of Law, and in his essay on *Shari'a and Islamic Democracy in the Age of Al-Jazeera* he profiles Yusuf al-Qaradawi, a prominent Islamic jurist associated with the Muslim Brotherhood who is highly influential in Egyptian politics. Qaradawi defies categorization. He has condemned terrorism as a violation of Islamic law, but at the same time endorsed suicide bombing in "occupied Palestine" and jihad against the US occupation in Iraq. Qaradawi is not as liberal as El Fadl, but neither is he a rigid Islamist. He is a modernist but not a progressive. He advocates democracy, but only because it is not specifically prohibited by Shari'a. His limited democracy would elect leaders but not make laws, since for him God is the sole legislator and Shari'a the immutable law of God. Like Gudrun Kramer, Qaradawi would limit human rights to the dictates of Shari'a and exempt them from reform through any democratic process.[48]

Qaradawi is just one voice in Egypt. A more progressive voice—and perhaps the most influential—is that of Sheik Ali Gomaa, the Grand Mufti of Egypt. But, as Michael Gerson has noted, Sheik Gomaa can hardly be called a liberal. He told Gerson: "The Egyptian people have chosen Islam to be their general framework for governance. The Qur'an and the tradition are what we depend on. They were true 1,400 years ago, they are true today, they will be true tomorrow." Gomaa insists that morality and its sources are absolute, but his focus is on "the intent of Shari'a to foster dignity and other core values," as well as "a commitment to the public interest." Gerson pointed out that Gomaa has made a number of progressive rulings that recognize women's rights, restrict corporal punishment and forbid terrorism.[49] As one of the originators of *a common word*, Sheik Gomaa has said, "It is a personal joy to be able to focus our exchange on the aspect that is most often ignored between us: the principle of a supreme love."[50] It is on that principle of supreme love that human rights have their moral foundation.

Seyyed Hossein Nasr is a distinguished Muslim scholar with more traditional views than El Fadl, Esposito, Khan and An-Na'im, and a sponsor of *a common word*. He has noted that the concept of Shari'a as God's Law differs from the Catholic perception of canonical law as well as the Christian perception of God's law, which are more

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[47] Gudrun Kramer, *Justice in Modern Islamic Thought*, Islamic Law in the Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, pp 20-37.

[48] Noah Feldman, *Shari'a and Islamic Democracy in the Age of al-Jazeera*, Islamic Law in the Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, pp 104-119. See also, David Kirkpatrick, *After Long Exile, Sunni Cleric Takes Role in Egypt*, New York Times, February 18, 2011.

[49] Michael Gerson, *The Grand Mufti's Mission*, Washington Post, October 23, 2009.

[50] HE Shaykh Ali Goma'a, *A Common Word Between Us and You: Motives and Application*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, 2010, p 18.

spiritual and ethical than positive law. Nasr considers Shari'a closer to the Jewish idea of *halakhah* than to Christian concepts of divine law. And as to human rights, Nasr asserts that Christians and Muslims "…believe in human rights, but ones that are combined with human responsibility toward God, human society and the natural environment." Like Kramer and Qaradawi, Nasr subordinates individual rights to traditional concepts of responsibility and communitarian interests.[51]

Ibrahim Kalin is a faculty member at the Center for Muslim-Christian understanding at Georgetown University and the official spokesman for *a common word.* In exploring Muslim and Christian responses to the Enlightenment within the context of *a common word*, Kalin notes that "The Enlightenment project took aim at what came to be known as "institutional religion" in Europe (i.e., the Catholic Church)," and Kalin goes on to quote from an essay by Pope Benedict on the merging of Greek thought and Christianity in Europe and Islam's rejection of both. The Pope's essay was also critical of Islam and Shari'a for failing to separate faith and law, and asserted that Islam maintained "…a more or less archaic system of forms of life governed by civil and penal law…a legal system which fixes it ethnically and culturally and at the same time sets limits to rationality at the point where the Christian synthesis sees the existence of the sphere of reason."[52]

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[51] Seyyed Hossein Nasr, *A Common Word Initiative: Theoria and Praxis*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, 2010, p 25. In a widely used text on Islam, Nasr presented a traditional view of Islam and Shari'a. He defined Shari'a as "The Divine Law [which is] the ideal pattern for the individual's life and the Law which binds the Muslim people into a single community. …It is therefore the guide of human action and encompasses every facet of human life." (pp 85, 86) Nasr acknowledged the similarity between Judaism and Islam and the contrast between those deontological religions and the more teleological Christianity, in which "…the Divine will is expressed in terms of universal teachings…but not in concrete laws which would be stated in the New Testament." (p 86) He went on to say "The Semitic notion of law which is to be seen in revealed form in both Judaism and Islam is the opposite of the prevalent Western concept of law. It is a religious notion of law, one in which law is an integral aspect of religion." (p 88) While Nasr affirmed the free will of man to accept or reject the "straight path" of Islam he criticized revisionist views that would make Islam and Shari'a compatible with modern culture: "The creative process…is not to remake the Law but to reform men and human society to conform to the Law." And characterized as an "anomaly…Those modern movements which seek to reform the Divine Law rather than human society." (pp 88, 89) Nasr observed that "…the modern mentality…in the West with its Christian background cannot conceive of an immutable Law which is the guide of human society…." (p 89) As for interpreting Shari'a, Nasr noted that "The gate of *ijtihad* has been closed in the Sunni world…whereas in Shi'ism, the gate must of necessity be always open." (p 98) As for democracy, Nasr, like Qaradawi, asserted that "In the Islamic view God is ultimately the only Legislator. Man has no power to make laws outside the Shari'a, he must obey the laws God sent for him." (p 100) As for human rights, Nasr supported those traditional patriarchal standards that deny equal rights to women by giving husbands dominance over their wives, allowing polygamy and denying women the right to choose their husbands. (pp 104-108) If Nasr's ideals of Islam and Shari'a are realities, it is difficult to imagine them being reconciled with modern concepts of democracy, human rights and the secular rule of law. Sayyed Hossein Nasr, Ideals and Realities of Islam, New Revised Edition, ABC International Group, Inc., Chicago, 2000 (page references listed above).

[52] Ibrahim Kalin, *Islam, Christianity, the Enlightenment: A Common Word and Muslim-Christian Relations*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, NY, 2010, p 51.

Miroslav Volf is a professor of theology at Yale Divinity School who has argued persuasively that *Allah* is Arabic for the same God worshiped by Jews and Christians. In his support of *a common word*, Volf says that "…the commands of God (AKA Allah) unite Muslims and Christian much more than they divide them. Properly understood, God does not widen the chasm between Muslims and Christians as Benedict XVI suggested, but bridges it." In accordance with *a common word*, Volf relates God's love with justice: "God loves. God is just. God's love encompasses God's justice."[53] Volf cites Qur'anic verses that are a Muslim version of the golden rule, and asserts "The common word sums up the Muslim position: Without love of neighbor there is no true faith in God and no righteousness."[54]

As for Islam and the freedom of religion, Volf argues that apostasy and blasphemy laws under Shari'a violate the principle of love and are a form of compulsion in religion. He cites Augustine and An-Na'im on the principle that faith is a matter of the heart and cannot be coerced, and cites Sheik Gomaa as supporting the right of Muslims to change their religion. Volf summarizes his position with two principles on faith and law: "1. All persons and communities have an equal right to practice their faith (unless they break widely accepted moral law), privately and publicly, without interference by the state. 2. Every person has the right to leave his or her own faith and embrace another."[55]

Nicholas Adams is the Academic Director of the Cambridge Inter-Faith Programme at the University of Cambridge. Adams has explored the philosophical foundation of human rights since the Enlightenment, beginning with Kant, who proposed universal and invariant moral rules that were secular, based on "pure" (inductive) reason and unrelated to self-interest, tradition, culture or religion. Hegel sought to balance the Kantian approach with moral rules based on a form of reason that considered social and historical factors—that is, traditional and cultural norms. Adams notes that Christian and Muslim theologians favor the Hegelian over the Kantian approach to morality and law.

In looking at human rights, Adams contrasts the maximalist rules and reason of the Enlightenment with minimalist rules and reason that reflect the pluralism of cultural norms, and he favors the latter for a "new secular" that would define human rights in varying norms that reflect cultural and religious diversity. That would favor multiple standards of human rights that reflect cultural and religious diversity, but Adams implies that the love of God and neighbor in *a common word* would insure that the different expressions of human rights meet the requirements of justice in a new secular regime.[56]

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[53] Miroslav Volf, A Christian Response, Harper One, New York, NY, 2011, p 21.

[54] *Ibid* at pp 156-159.

[55] *Ibid* at pp 231-234.

[56] Nicholas Adams, *In Pursuit of a New Secular: Human Rights and A Common Word*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, NY, 2010, pp 175-186.

Harkristuti Harkrisnowo is a Muslim lawyer, professor and Director General for Human Rights in the Indonesian Ministry of Justice. She acknowledges the influence of culture and religion in shaping the law, and puts the issue of human rights in practical perspective, noting dichotomies between the West and East: An emphasis on individual rights with universalist (maximalist) application in the West versus the more culturally diverse (minimalist) and collective rights favored in the East. As a lawyer and not a theologian, Harkrisnowo emphasizes the need to distinguish enforceable legal rights from political aspirations: "The difference may not seem great to some theologians, but it is important in practice to the extent legal claims are enforceable in this world, while moral claims perhaps only in the next."[57]

In determining whether Shari'a is in accord with international human rights standards, Harkrisnowo has first hand experience with the island of Aceh, where local provincial law based on Shari'a principles has been implemented, and she is frustrated by the inability to define Shari'a. "The immensely practical problem is whose view of Shari'a the law should control. In fact, the elephant in the room that arguably motivates *a common word* is the cacophony in Islam between competing viewpoints of traditionalist, modernist and fundamentalist Islam." Harkrisnowo notes that there are many different Islams or interpretations of Islam in Indonesia, and she leaves it to theologians to resolve conflicting viewpoints on Shari'a and *ijtihad*. It is a lawyer's dilemma left to theologians to resolve, with little hope of finding consensus:

> "Some Indonesian Muslims are textualists who embrace the Qur'an very narrowly, in a manner somewhat reminiscent of those Christians who believe in a literal interpretation of the Bible. …Others believe Shari'a requires only an ethical basis, which can be satisfied for some by an all-things-considered judgment, and for others by well-considered secular law. Whomever's viewpoint prevails makes a real and practical difference for anyone trying to implement the rule of law in the Islamic world."[58]

Despite the uncertainty of Shari'a dictates, in Indonesia human rights are defined in a constitutional bill of rights. But the freedoms of religion and expression in Indonesia are fundamentally different than those in the US. There is no freedom to believe in any religion or no religion, but only the freedom to choose from a menu of religions approved by the state. Indonesians are required to believe in one God, understood as encompassing both the Christian Trinity and Muslim Allah. Disputes involving blasphemy and heresy among different sects of Muslims arise because the law regulates religion. It is a mix of politics, law and religion that is common in the East but not in the West.[59]

The above sampling of Islamic scholars reveals a broad divergence of opinion on the how Shari'a relates to democracy and human rights, and it is too early to tell which views will prevail in the emerging democracies of the Middle East and Africa.

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[57] Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, NY, 2010, pp 189, 190.

[58] *Ibid* at p 191.

[59] *Ibid* at p 195.

The Paradox of the Military in Its Relationship to Democracy and Human Rights

The libertarian and individualistic values of Western culture make it difficult for Westerners to relate to the authoritarian and communal values of Eastern cultures; but within every Western nation there is a unique culture that shares some of the same authoritarian and communal values of Eastern cultures.

Every Western nation has a military establishment that defends its existence, its democratic institutions and its civil rights. But the military is a two-edged sword. It is both the last line of defense against the enemies of democracy and human rights and also a threat to democracy and human rights by virtue of its overwhelming lethal power.

The real paradox is that the military is an authoritarian regime within a democratic and libertarian society. The military requires comprehensive laws and regulations to ensure the good order and discipline needed for mission success. Its members pledge to protect and defend a Constitution that defines democracy and civil rights, but ironically they have fewer liberties than those of the civilians they protect.[60]

Though few of them are Muslims, US military personnel have been better able to relate to Islam and Shari'a than most US civilians. That is because their missions in Iraq and Afghanistan have required an understanding of the hostile cultural human terrain in Islamic operational environments.[61]

Pakistan and Egypt are examples of how the military can be a threat to democracy and human rights since there is no real civilian supremacy in those nations to control military power. In Pakistan there is continuing conflict between the civilian government and the military[62] and in Egypt Islamist groups are now demonstrating against a military that seems to be delaying the establishment of a democratic civilian government.[63]

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[60] Generally, on the paradox of the military as an authoritarian regime in a democratic society, see Rudolph C. Barnes, Jr., Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996, pp 2, 3, 105-107, 118-126.

[61] On Shari'a and human terrain, see Timothy K. Bedsole, *Religion: The Missing Dimension in Mission Planning*, Special Warfare, November-December 2006, p 8. On religion as a strategic operational priority, see Raymond Bingham, *Bridging the Religious Divide*, Parameters, Autumn, 2006, p 6. For an example of how a US Navy Chaplain supported his Afghan (mullah) counterparts in countering Taliban claims that Islam prohibited Muslims from working with those of other religions who were helping them, see Brian Mockenhaupt, *Enlisting Allah*, The Atlantic, September 2011, p 28. At a *shura* that the chaplain helped organize in contested territory, one of the mullahs said: "We should take charge of our own land and protect people ourselves. It is shameful that they had to send Marines to do what we should be doing ourselves." The article ended noting that the Navy chaplain "…who sat quietly through the discussion, had perhaps shaped the battlefield as powerfully as any bullet fired or bomb dropped across Afghanistan that day." (p 30)

[62] The most recent crisis between the civilian government of Pakistan and its powerful army was precipitated by an alleged request by President Asif Ali Zardari to the US to help prevent a military coup after the US raid in Pakistan that killed Osama bin Laden.
"Zardari's government has nominally been leading Pakistan since 2008. But real power remains in the hands of the military, which has ruled the South Asian nation for half of its 64-year existence and was livid after the US operation against Osama bin Laden. Though both the army and the civilian government receive billions of dollars in American assistance, the military views the US, and its support for Zardari's unpopular administration, with deep distrust." Karen Brulliard and Karen DeYoung, *In Pakistan, a deep civil-military divide*, www.washingtonpost.com, November 19, 2011.

Shari'a and Islamic Democracy as a Threat to Human Rights

In the Islamic world Shari'a is the rule of law and defines human rights in the Muslim state. Since the Arab Spring debates between Muslim scholars have shifted from Shari'a versus democracy to Shari'a maintaining religious purity in a Muslim democracy, even at the expense of those fundamental freedoms of religion and expression.

> In Turkey and Tunisia culturally conservative parties founded on Islamic principles are rejecting the name "Islamist" to stake out what they see as a more democratic and tolerant vision. …A backlash has ensued, as well, as traditionalists have flirted with timeworn Islamist ideas like imposing interest-free banking and obligatory religious taxes and censoring irreligious discourse. The debates are deep enough that many in the region believe that the most important struggles may no longer occur between Islamists and secularists, but rather among the Islamists themselves, pitting the more puritanical against the more liberal. "Is democracy the voice of the majority?" asked Mohammed Nadi, a 26-year-old student at a recent Salafist protest in Cairo. "We as Islamists are the majority. Why do they want to impose on us the views of the minorities — the liberals and the secularists? That's all I want to know."[64]

That question reflects the threat of Islamic democracy to human rights. In nations where a majority of Muslims demand religious purity, democracy can produce a tyranny of the majority that denies the freedom of religion and expression. This has been evident in Egypt where there has been continued violence between Muslims and minority Coptic [65]Christians. The Vatican estimates that 100,000 Copts have fled Egypt since Mubarak's fall, and the story is the same wherever democracy has transformed Muslim politics. "From Lebanon to North Africa, Christian enclaves have been shrinking steadily since decolonization. More than half of Iraq's 1.5 million Christians have fled the country since the American invasion toppled Saddam Hussein."[66]

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[63] A rally of tens of thousands of Islamists in Cairo's Tahrir Square on November 18, 2011, "…represented the beginning of a new battle between Egypt's most powerful political forces, the military and the once-outlawed Muslim Brotherhood, that leaves Egyptian liberals and leftists anxious and divided on the sidelines. …But the Brotherhood was not the only Islamist group present in force…thousands of other Islamists—mostly ultraconservatives known as Salafis—were setting up tents and preparing to stay the night. …Some said they would welcome the civil liberties provisions in the declaration, if only they had come from the public rather than the military. But others suggested that they wanted the next government to have the freedom to impose more restrictive interpretations of Islamic law, or Shari'a." David D. Kirkpatrick, Egypt Islamists Demand the End of Military Rule, www.nytimes.com, November 18, 2011.

[64] Anthony Shadid and David D. Kirkpatrick, *Activists in Arab World Vie to Define Islamic State*, New York Times, September 27, 2011.

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[66] Ross Douthat, *Democracy's Collateral Damage*, Washington Post, October 15, 2011. See also, David D. Kirkpatrick, *Church Protests in Cairo Turn Deadly*, New York Times, October 9, 2011. David Ignatius, *Cairo's Christians Worry About Egypt's Next Chapter*, Washington Post, November 8, 2011.

Egypt is a bellwether for Islamic democracy in the Middle East, and it seems dangerously close to the dysfunctional Pakistan model of Muslim politics given the economic and political power of the Egyptian military and the lack of any mature democratic institutions to balance that military power.[67] In Pakistan large crowds have rallied to support blasphemy laws that carry a mandatory death sentence, and the governor of Punjab province, an outspoken critic of blasphemy laws, was killed by his own bodyguard to protest his opposition to blasphemy. Pakistan's young lawyers support both the assassin and the blasphemy laws that motivated his crime, and neither the civilian government nor the military has acted to prosecute the assassin.[68]

Can democracy and the freedom of religion and expression coexist under Shari'a as a rule of law? Turkey and Indonesia have a Shari'a that is compatible with democracy, human rights and the secular rule of law, but a less tolerant Shari'a in Saudi Arabia, Iran and Pakistan makes the coexistence of democracy and fundamental human rights problematic.

Whatever forms of democracy and rule of law emerge in Muslim nations, they are not likely to resemble the Western model. But if Muslim nations embrace the spirit of *a common word* of love for God and neighbor as a guiding principle of *ijtihad*, then the crimes of apostasy and blasphemy can be eliminated and Shari'a can provide *equal justice under the law* for all—women and non-Muslims alike.

Shari'a as a Threat to Democracy and the Rule of Law in the United States

We have seen that Shari'a can be a threat to democracy and human rights in Muslim nations when considered an immutable rule of law. This makes Shari'a a major concern of US foreign policy. But some have raised the fear that Shari'a is also a threat to democracy and the rule of law in the US.

That fear has been raised by warnings from politicians appealing to the religious right that there is a dark conspiracy of Islamists seeking to subvert US jurisprudence with Shari'a. That subversion is the premise of a 2011 study prepared by David Yerushalmi

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[67] On the incompatibility of the power of the Egyptian military with democracy, see Rudolph C. Barnes, Jr., Democracy and the Egyptian Military: Friends or Foes? www.militarylegitimacyreview.com, February 12, 2011.

[68] Salman Masood, *Pakistanis Rally in Support of Blasphemy Law*, New York Times, December 31, 2010. See also, Carlotta Gall, *Pakistan Faces A Divide of Age on Muslim Law*, New York Times, Jauary 10, 2011; Fareed Zakaria, *Can Pakistan Rid Itself of Religious Fanaticism?*, Washington Post, January 10, 2011; *Pakistan: A great deal of ruin in a nation—why Islam took a violent and intolerant turn in Pakistan and where it might lead*, The Economist, April, 2, 2011, pp 35-39. Doug Bandow of the Cato Institute has put Pakistan at the top of the list of Muslim nations that persecute Jews, Christians and other minorities (Pakistan, Saudi Arabia, Iran, Iraq, and Egypt), quoting a report from the US Commission on International Religious Freedom: "Pakistan continues to be responsible for systematic, ongoing and egregious violations of freedom of religion or belief." The Commission pointed to the blasphemy laws as creating "…an atmosphere of violent extremism and vigilantism." Bandow noted that both the Commission and the US State Department "…emphasize the blasphemy laws as a particular problem" and that while "…the majority of those prosecuted for blasphemy are Muslim…at least 35 Christians charged with blasphemy have been murdered since 1986." Doug Bandow, *Target Pakistan for Religious Persecution*, Assyrian International News Agency, posted July 5, 2011, www.aina.org/news.

for The Center for Security Policy. It cites a number of state cases (including one in SC) that make reference to Islamic law and warns of

> "…organizations and individuals within the US actively and openly advocating for the establishment of Shariah law in America, especially for personal status and family law. A prominent one is the Assembly of Muslim Jurists of America (AMJA) with more than 100 members including local Imams and Shariah authorities across America, as well as Shariah authorities from other countries. AMJA promotes the adherence to Shariah law when possible in all legal and civic activities by Muslim Americans, and in some cases, by non-Muslims."[69]

The study makes a distinction between Shari'a and other religious laws like Jewish law and Catholic Canon that are routinely considered in US state courts. It suggests that Shari'a is a seditious threat to the integrity of US law based on

> "…fundamental Shariah doctrine that Islamic law must rule supreme in any jurisdiction where Muslims reside. In the case where Muslims are few, they are permitted to comply as minimally necessary with the secular 'law of the land,' but according to authoritative and still quite extant Shariah law, Muslim adherents to this legal doctrine may not accept secular or local laws as superior to or even equal to Shariah's dictates. This creates an explicit doctrine to introduce Shariah law and replace US legal systems with Shariah for the local Muslim population."[70]

Based on the fear of such a seditious plot to subvert US law to Shari'a, the states of Oklahoma, Tennessee and Arizona have passed laws that ban Shari'a, and other states are considering similar legislation.[71] But there is no reason to fear Shari'a or any other

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[69] Shariah Law and American State Courts, An Assessment of State Appellate Court Cases, The Center For Security Policy, 1901 Pennsylvania Avenue, Washington, DC, May 20, 2011, p 9. Andrea Elliott has profiled David Yerushalmi, the Hasidic Jew and general counsel for the Center for Security Policy who spearheaded this report and other anti-Shari'a efforts, including the drafting of a model act for states to prohibit Shari'a. According to Elliot, Yerushalmi's research of Islam and Shari'a "…made clear that militants had not 'perverted' Islamic law, but were following an authoritative doctrine that sought global hegemony—a mission, he says, that is shared by Muslims around the world." In this monolithic and hostile view of Islam and Shari'a, Yerushalmi and his followers have succeeded in generating an unfounded fear of Shari'a as a threat to Western legal systems, and a hot-button issue used by conservative politicians (see note 51, *infra*). On one point, however, Yerushalmi and most Muslim authorities agree: They want people to ask the question: *What is Shari'a?* See Andrea Elliott, *Behind an Anti-Shariah Push*, New York Times, July 30, 2011.

[70] *Ibid* at p 14.

[71] In November 2010 70.8 percent of the Oklahoma electorate voted to approve a "Save Our State" Amendment barring "courts from considering or using Shariah law." Roger Cohen interviewed several octogenarian Oklahomans who confirmed the vote was based on fear raised by the neoconservative Center for Security Policy that described Shariah as "the pre-eminent totalitarian threat of our time" and the shrill call of politicians to pass the law as a "pre-emptive strike" against the threat. See Roger Cohen, *Shariah at the Kumback Café*, New York Times, December 6, 2010; see also note 67, 48 *supra* and note 72, *infra*. Before the vote in Oklahoma, Newt Gingrich had told the Values Voter Summit: "We should have a federal law that says sharia law cannot be recognized by any court in the US." And earlier, speaking to the American Enterprise Institute, Gingrich likened the shari'a threat to a stealth campaign to impose Islam on all of us. In one questionable 2009 case in New Jersey a judge improperly considered Shari'a in finding that a man did not have the intent to sexually assault his wife because his acts were "consistent with his

religious law as a threat to the integrity of US law.[72] In fact, state courts have long considered Jewish law in their decisions and Jewish rabbinical courts have been adjudicating disputes between Orthodox Jews in the US for some time.[73]

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practices"; but that decision was overturned on appeal with the court stating that the man's religious beliefs did not exempt him from state law. See Eugene Robinson, *Sharia as the New Red Menace?* Washington Post, September 21, 2010. Michael Gerson confirmed a growing fear of Shari'a being generated by conservative politicians and the study Shariah Law and American State Courts, An Assessment of State Appellate Court Cases (see above), and then put the issue of Shari'a and democracy in perspective. Gerson acknowledged that the Taliban version of Shari'a would be a threat to a pluralistic democracy, but …"if Shari'a is interpreted as a set of transcendent principles of fairness and justice, applied in a variety of times, places and governmental systems, it more closely resembles he Christian and Jewish idea of social justice." Gerson summarized the progressive view of Shari'a set forth above in notes 27-45, 49-59, *supra*. Michael Gerson, *Oklahoma's Faith-Baiting Initiative*, Washington Post, November 16, 2010. Gerson has also quoted Newt Gingrich as saying: Shari'a is a mortal threat to the survival of freedom in the United States and the world as we know it." Gerson went on to note that if elected "…Gingrich would be the United States' first elected anti-sharia president. …And how would President Gingrich deal with predominantly Muslim nations if the war against terrorism were transformed into a struggle against sharia? …Wouldn't Islamic radicals welcome the civilizational struggle that Gingrich offers? No strategy would be more likely to undermine the cause of the United States and the safety of its people." Michael Gerson, *The Problem with Gingrich's Simplistic Attack on Sharia*, Washington Post, December 12, 2011. Scott Shane quotes Newt Gingrich describing Shariah as a "stealth jihad" and mortal threat to the US, comparing it to the threat of Cold War communism: "Stealth jihadis use political, cultural, social, religious, intellectual tools; violent jihadis use violence. But in fact they're both engaged in jihad, and they're both seeking to impose the same end state, which is to replace Western civilization with a radical imposition of Shariah." Shane cites others who debunk the claim of Gingrich as political demagoguery, but acknowledge a debate within Islam over the role of Shariah. Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to US*, New York Times, December 21, 2011.
At the local level there have been bills filed in the South Carolina Senate (S.0444) and House (H.3490) "…To prevent a court or other enforcement authority from enforcing foreign law in this state from a forum outside of the United States…" The bills provide, *inter alia*: "The General Assembly finds it necessary to protect the citizens of the State from the application of foreign law…that will result in the violation of a constitutionally guaranteed right including, but not limited to, the right to due process, freedom of religion, freedom of speech, freedom of the press, or any right of privacy or marriage as specifically delineated in the constitution of this State or of the United States."

[72] Eliyah Stern has noted that more than a dozen states are considering outlawing Shari'a law, and has taken David Yerushalmi and other fear-mongers to task over their assertions that Shari'a is a threat to US jurisprudence: "That is exactly wrong. The crusade against Shariah undermines American democracy, ignores our country's successful history of religious tolerance and assimilation, and creates a dangerous s divide between America and its fastest growing religious minority." Citing historic examples of Jewish law being condemned for similar reasons and its negative effect, Stern noted that American Muslims are not like Muslim extremists overseas and "..are natural candidates for assimilation.…Given time, American Muslims, like all other religious minorities before them, will adjust their legal and theological traditions, if necessary, to accord with American values." Stern, *Don't Fear Islamic Law in America*, New York Times, September 2, 2011.

[73] Orthodox Jews have been utilizing Jewish courts in the US for some time. In Maryland, Aharon Friedman was assailed by the Jewish press and public demonstrations for failing to give his wife, Tamar Epstein, a Jewish decree of divorce known as a *get*. He and Epstein had already been divorced in civil courts, "…but they are still married according to Jewish law. And without a get neither he nor Ms. Epstein can remarry within the faith. She is considered an *agunah*, or chained woman." Controversy between rabbinical courts and civil law over the case continues. Mark Oppenheimer, *Religious Divorce Dispute Leads to Secular Protest*, New York Times, January 2, 2011. David Yerushalmi, a Jewish lawyer and

There has also been debate in Great Britain over whether Islamic law can function there without undermining the rule of secular law. In February 2008 Dr. Rowan Williams, the Archbishop of Canterbury, created a stir in Parliament when he suggested the "unavoidability" of having supplementary jurisdictions of Shari'a within the British legal system. Even though Dr. Williams advocated that Shari'a would only supplement and not replace British law and only be utilized when all parties consented, much like Jewish law, his comments caused an outcry from many quarters, reflecting a widespread public fear of Shari'a, much like that in America.

Despite continuing controversy and fear-mongering, there is no credible evidence that Shari'a has contaminated, subverted or in any way threatened the secular rule of law in any Western jurisdiction. Unless and until democratically elected law-makers in the West choose to replace secular law with the Shari'a—and that eventuality seems highly unlikely—there is no reason to be concerned.

Conclusion

Religion and the rule of law have a long and incestuous relationship. The Enlightenment opened Western religions to democracy, human rights and a secular rule of law, but it had little effect in the East where Shari'a continues to make apostasy and blasphemy crimes and to deny women and non-Muslims their basic human rights.

The future of Islam will be decided by competing interpretations of Shari'a. Strict Islamists consider Shari'a an immutable rule of law, while more progressive Muslim scholars consider Shari'a a collection of divine moral principles of legitimacy. The progressive view of God's law as voluntary moral standards of legitimacy rather than enforceable law is compatible with democracy, human rights and a secular rule of law; and, as demonstrated by Dr. Martin Luther King, people of faith can assert the moral supremacy of God's law over secular law through peaceful civil disobedience.

When Shari'a is considered a code of legitimacy rather than of coercive law and interpreted according to *a common word* of love for God and neighbor, the altruistic ideal of love fosters responsible individual freedom, the protection of human rights and equal justice for all under the law—for women and non-Muslims alike. On the other hand, when Shari'a is considered an immutable code of coercive law it denies the freedoms of religion and expression and the equal rights of women and non-Muslims. Even in a Muslim democracy, Shari'a can produce a tyranny of the majority that denies these fundamental human rights.

Shari'a is not a threat to the rule of law in Western democracies, but it will shape the rule of law in those Muslim nations in the Middle East and Africa. It is clear that libertarian democracy is not a panacea for all Muslims and that Islamic variations of

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authority on Jewish law or *Halakha* and the author of the study Shariah Law and American State Courts, An Assessment of State Appellate Court Cases (see notes 47, 49 and 67, *supra*), has argued in that study and elsewhere that Shari'a is essentially different than Halakha in that Muslim jurists and courts seek to replace secular law with Shari'a while Jewish (rabinnical) courts merely augment secular civil courts and do not threaten them. See David Yerushalmi, *Is Shariah the Same as Jewish Law?*, www.bigpeace.com, posted September 18, 2010. But as noted by Seyyed Nasr (see note 51, *supra*) there are more similarities than differences between Shari'a and Halakha as comprehensive and unyielding norms of behavior for Muslims and Jews.

democracy that derive their rules of law from Shari'a will likely to emerge in the Middle East and Africa.

Promoting democracy, human rights and the rule of law have long been essential elements of US foreign policy. But democracy without human rights can produce a tyranny more oppressive than that of an authoritarian regime, as can a rule of immutable divine law that denies the fundamental freedoms so essential to human rights. Only a democracy with a rule of law that protects the freedoms of religion, expression and assembly and the equal rights of women and non-Muslims under the law can produce true peace through justice.

SHARI'A AND HUMAN RIGHTS UNDER U.S. AND INTERNATIONAL LAW:
CULTURAL AND LEGAL INFLUENCES AND IMPEDIMENTS
TO CULTIVATING AND ADVANCING PEACE ©

by

Kevin Hugh Govern*

Abstract

There are a multitude of cultural and legal influences that assist – and impediments that resist – the cultivation of peace and human rights in Islamic states. First, there is no one single "Islamic attitude" towards the legitimacy of international law and international agreements among the nations which have adopted Islam as their official state religion, those which have adopted Islamic law (*Shari'a*)[74] as their legal system, or those that have Muslims as the majority or sizeable minority of their populations. Second, the United Nation's Universal Declaration of Human Rights (UDHR) is perceived by some in Islamic nations as failing to take into account the cultural and religious context of non-Western, Islamic nations. Finally, where there is apparent or perceived differences in approaches to advancing peace and human rights, there is a fundamental requirement to understand what practices and policies in *Shari'a* are of tribal or ethnic origin and culturally significant but not Islamic, what is Islam and incapable of change, and which practices or policies are theoretical or aspirational but not enforced or enforceable.

This article will examine – both from a Western and non-Western perspective – the aforementioned cultural and legal influences and impediments. Part One considers the current context of war and peace in Islamic states, recounting the turbulence in large part inherent within most states and regions influenced by Islam. To understand why these conditions exist, and how they might change for the better or worse, Part Two examines how words and deeds matter under both Islamic law as well as binding obligations under International law. Consistent with that study of word and deed, there are contemporary and eternal ethical and legal covenants that rate commentary in Part Three, and how regional and international alliances and treaties under Islamic law affect peace and human rights. Part Four adds an additional layer of historical perspective of past being prologue regarding tribal influences, non-legal traditions, as well as laws and

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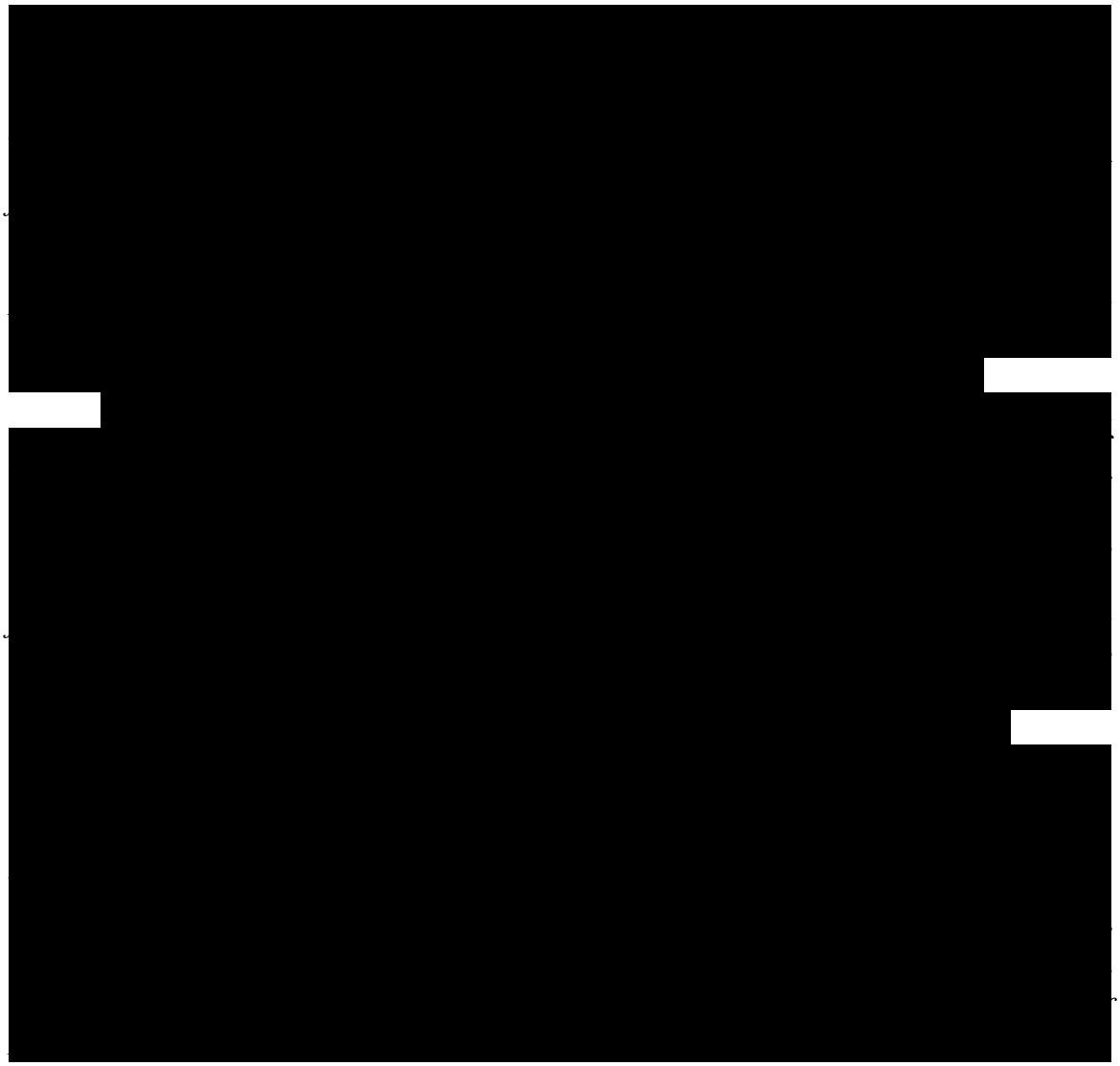
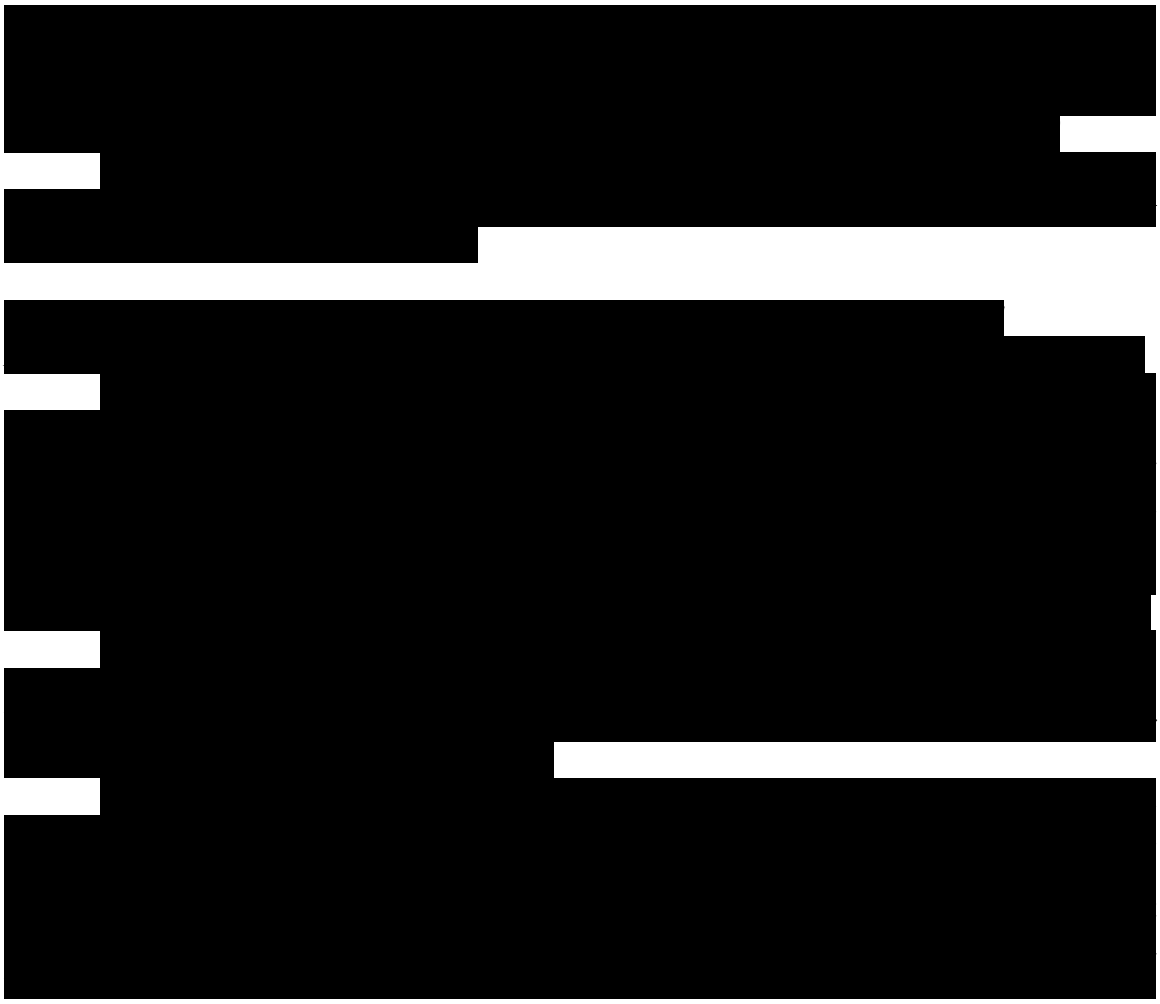
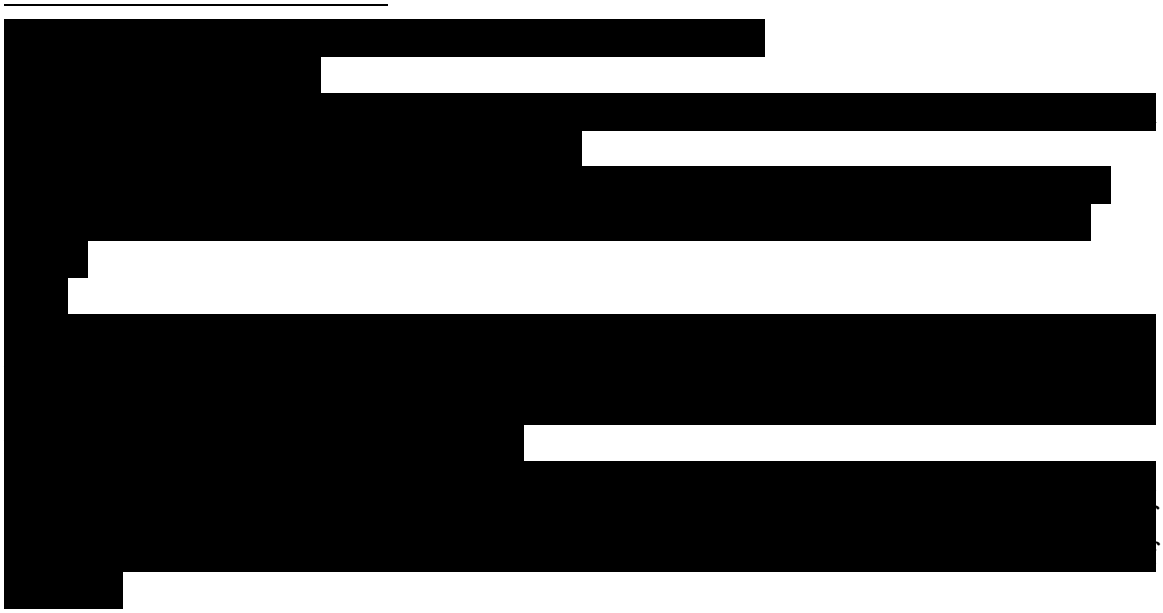
*Kevin H. Govern, J.D., LL.M., is an Associate Professor of Law at the Ave Maria School of Law and an Instructor of Legal Studies at the California University of Pennsylvania. He has also served as an Assistant Professor of Law at the United States Military Academy. Any errors or omissions are solely the responsibility of the author.

treaties which may affect the advancement of peace and human rights. Finally, in Part Five, the so-called "Twitter Revolutions" of 2010-2011 posits how social media and electronic dissemination of knowledge have been indispensable to the (re)establishment of peace, human rights, and political legitimacy in an ever-growing number of Islamic states. It is my hope that this five-part survey will aid readers to more deeply appreciate the matters discussed on the promotion of peace and waging of war, and the means of preserving and promoting the integrity and dignity of all human beings, Muslim and non-Muslim alike.







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Secretary-General's Remarks at General Assembly Tribute to Secretary-General and Oath of Office Ceremony of Secretary-General Designate Ban ki-Moon, (Dec. 14 2006) (transcript available at http://www.un.org/apps/sg/sgstats.asp?nid=2365

Legitimacy, Legal Pluralism and Sharia

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University of South Carolina School of Law

I. DEFINITIONS AND PROBLEM

"Legal Pluralism" is a familiar concept for US military lawyers stationed in places like Afghanistan, or specialized practitioners like Indian tribal lawyers (worrying about current issues such as the Cherokee freedmen controversy). Legal pluralism is less familiar to ordinary American lawyers in domestic practice (for background see "Legal Pluralism-- A Primer, Legal Frontiers, *McGill International Law Blog,* June 17, 2010 (N. Choudury), available at http://www.legalfrontiers.ca/2010/06/legal-pluralism-a-primer/, but can be easily understood by analogy (instead of law separated by geography or enumerated powers as under federalism, it is separated by religious or ethnic groups/tribes). Legal sociologists tend to define legal pluralism in opposition to "legal centralism" (entailing "equal protection" principles for ordinary lawyers), which assumes a single, unified legal system in which all persons are subject to the same national legal rules, but conflicts of laws undercuts that even domestically.

Formal definitions of legal pluralism focus on the idea of different legal systems co-existing. This is sometimes also extended to different "value" systems, reflecting arguments about "custom" versus customary "law," and the possibility of voluntary arrangements on the example of arbitration proceedings covering commercial, divorce

and child custody matters under religious law-- for example, Jewish law in the US as with the Beth Din courts for orthodox jews, see http://www.bethdin.org/, or sharia law in family law arbitrations as in the UK or Canada (analogous to "covenant marriage" in US law). But the ordinary problem in the eyes of a military lawyer remains a country deployment issue in places like Africa or Southeast Asia where 2-3 legal systems co-exist, typically secular national law, religious law (e.g., sharia law), and customary law (typically specific to tribes or ethnic groups, sometimes but not always recognizably distinct from religious law).

On a technical level, as matter of colonial legal heritage, oftentimes legal pluralism addresses 2-3 distinct areas of law. Formally, "conflicts of law" application rules are different from the "legal centralism" ideas about constitutionalism that Westerners assume. Classic areas of coverage are family law and inheritance, since membership in the religious or ethnic communities is often linked in practical terms to ideas about marriage and property, particularly in agricultural societies. Technical origins typically lie in history, since colonial powers' legislation often specified that customary law would apply to indigenous peoples (natives), and "metropolitan country" or European law would apply to colonial personnel and/or in commercial relations. However, now the pattern is expanding also into areas like sharia banking and capital markets supported by investment pools as in the Middle East (typically analogous to social conscience investing pursued by US religious groups, but including the novelty of sharia review boards and annual audits for compliance with sharia principles). There are local legitimacy problems oftentimes in developing country rural areas for secular national law versus local customary law (namely what the locals actually believe in, the problem of law on the books versus in practice). These are matched often by "consistency" clauses in many developing nation national constitutions (stating that national law shall be compatible with customary law or sharia, leaving open the question of who defines/interprets them).

II. BEHAVIOR VERSUS BELIEF

The typical modern tension in legal pluralism involves outsiders, whether foreign civilians doing legal development (democracy and governance) work, or military lawyers present with troops trying to make sense of local legal systems for operational reasons. Legitimacy works differently if you are focused on legal development in a relatively peaceful situation, versus being involved in counterinsurgency work. However, the underlying problem is the same, whether the true locals (meaning at the village level, rather than in the capital city) accept whatever views of "law" outsiders espouse. The typical problem involves arguments about human rights or gender equality from the Western viewpoint, and challenges to social forms and beliefs from the local

perspective. The missing piece of the puzzle is often a misunderstanding concerning even what are the legal sources in question when viewed from the foreign country's capital city, or through a typical democracy and governance lens. The problematic realization that you are "no longer in Kansas" comes when you confront affected parties overseas choosing to be governed by law presenting choices we might not like

personally. The question is why, and the problem arguably reflects issues of legitimacy.

From "Introduction to legal Development and Change," in *Legitimacy, Legal Development & Change: Law and Modernization Reconsidered,* David Linnan ed. (Ashgate in press):

"Shari'ah, customary law and secular national law's interplay in the world's most populous Islamic country

[O]ur book shifts the focus from religious versus social views at a higher theoretical level to the question of how legal development works on the ground in modern Southeast Asia as non-Western environment. We focus the inquiry on Indonesia as the world's most populous Muslim developing country with circa 240 million inhabitants, of which approximately 89% are Muslims, even though Indonesia is not a sectarian or Islamic state in technical terms. Indonesia itself is a legally pluralistic environment, importantly recognizing for our purposes traditional ethnic or tribally-based customary law (adat), Islamic (shari'ah) and secular national law. To that extent it is a veritable laboratory for questions of legitimacy and legal development in the non-Western setting.
To provide the necessary depth of understanding of Indonesia's complex law and society, [these] three chapters are intended to be read cumulatively. Robin Bush's chapter provides a historical framework for the political and legal interplay between Islamic forces and Indonesian nationalism at the constitutional level reaching back to the colonial period. Julia Suryakusuma's chapter is written from the modern female Muslim social commentator's viewpoint, addressing issues of conservative Muslim religious groups' voice, religious influence on women's place in society in the wake of Indonesia's veritable democratic explosion since 1998, and controversial anti-pornography legislation with differing significance for different social groups. Suryakusuma speaks implicitly from the position of "modern" Indonesia, meaning here Jakarta as major urban area comparable in size and sophistication to a New York or Tokyo. Erman Rajagukguk's chapter is a legal ethnographic work addressing the interplay between adat, shari'ah, and secular national law in women's inheritance matters among the Sasak ethnic group on Lombok Island, a more traditional rural society (although now exposed to tourism, since Islamic Lombok lies close by Hindu Bali with comparable beaches).

Robin Bush addresses Islam and constitutionalism in Indonesia. Nationalist and religious elements have coexisted in Indonesian politics under varying degrees of tension since late colonial times. To avoid threatened secession by the Christian majority islands of Eastern Indonesia, something of a grand bargain was struck at independence under which religion was recognized as important constitutionally, but Islam as such was specifically not given any special or superior status. For the next 50+ years much of Indonesia's Islamic religious and political leadership periodically tried to revisit and reverse this grand bargain in the name of

recognizing some kind of special status or treatment for Indonesia's Muslim majority.

Tracing electoral results over time, however, a majority of Indonesian Muslims have aligned themselves with nationalist rather than Islamic parties (and at this point it would appear that fewer than one in three Indonesian Muslims votes for Islamic parties). Thus, a majority of the population has seemingly embraced a pluralist, nationalist identity, but that does not entail any embrace of secularism as such. There are geographic exceptions such as the introduction in Aceh of kanun or local Islamic law as part of the 2005 resolution of Aceh's long running insurgency. However, a relatively high proportion of the Indonesian population has "voted with their feet" by implicitly rejecting Islamic political party proposals in recent electoral campaigns for the general introduction of shari'ah law (in voting for nationalist parties, a majority of whose members may be Muslims, but who would reject such changes as a threat to national unity). But the very act of periodically revisiting the appropriate role of Islam within Indonesia's political and legal system speaks to the complexity of Indonesian attitudes towards religion and its proper place within their society. There seems currently strong political will for increased public expression of Islam, and for the increased integration of "Islamic values" into the political system. This on-going process of integrating Islamic values seems a prime example of the chicken or egg question in non-Western legal development.

Julia Suryakusuma addresses current legal developments and Indonesian politics as they affect women in particular. Her focus is on the controversial recent enactment of Indonesia's Anti-Pornography Law No. 44 of 2008, which was strongly supported by conservative Islamic groups and politicians, but drew equally strong opposition from women's advocacy, progressive and non-Muslim groups generally. How could women's groups in particular oppose any measures against pornography?

A comparison is drawn between the role of the Christian and Muslim right wings in American and Indonesian politics, creating moral panics under which religious groups embrace a conservative social agenda, to the general detriment of women. The definition of pornography is broad enough to regulate women's dress and behavior, which is viewed as problematic. The political fight casts those who speak against the law as being in favor of pornography, while in the face of general non-enforcement it would appear that the law's stance is more symbolic than real. This is regarded as evidence of "Arabization" of Indonesian Islam, understood as encroachment of Middle Eastern (typically Salafist) views that differ from traditional Islam within Indonesia, and the use of religion for political purposes. The question is whether this represents an effort at non-Western modernization (insofar as it represents an attempt to change social norms, and in Suryakusuma's view is undertaken by a small number of activists).

At the political level, the democratic flowering which followed the 1998 end of authoritarian government freed not only the progressives, but also resuscitated traditional leadership on the local level of society, including socially conservative Islamicists. Julia Suryakusuma sees the social debate growing in complexity and extending over time, paralleling the sentiment expressed by Robin Bush of increasing integration of Islamic views into the political system. The question within Indonesian Islam, however, is whose Islamic views?

Erman Rajagukguk approaches the problem of legal change in women's inheritance rights among Lombok's Sasak ethnic group as a legal ethnographic problem tracing the overlap of adat, shari'ah, and secular national law. He has the eye of someone who has been responsible for legal development within the executive branch of the Indonesian government, and as the responsible (Muslim) lawyer within government considered the technical details surrounding introduction of kanun or local Islamic law consistent with international human rights law pursuant to the 2005 Helsinki MOU ending the Acehnese insurgency. For his chapter, however, he travelled as academic the rural back roads of Lombok, interviewing ordinary people about the resolution of inheritance disputes (also often outside the court system), reading local court decisions, and talking with elders about changes in the customary law community. He captures women's inheritance as demonstrating the process of legal change, documenting evolution towards a plurality of legal resolutions among which individuals may choose presumably based upon legitimacy concerns.

Lombok's Muslim Sasak ethnic community divides into three groups in inheritance matters. The first represents a continuation of the traditional Sasak patriarchal customary law rule under which women are ineligible to receive any inheritance in the form of real property or similar core family goods. This group has been reduced to small numbers, but traditional adat can retain its authoritative status within rural villages where inheritance matters never go to court (and challenging the traditional rules amounts to electing out of the customary law community, which may go so far as to exclude in and out-marriage). The second community group represents those Muslims who accept the Islamic legal principle that a daughter should receive half the inheritance portion of her brother. Government religious courts in Lombok always firmly adhere to that principle, which is sometimes implemented also under an alternative dispute resolution (ADR) approach when inheritance complaints are brought to respected local Islamic scholars as mediators in lieu of going to court. The third community group represents that part of the Muslim Sasak community willing to bring their inheritance disputes to the secular district courts, where social change has been recognized to the extent that both the traditional customary law resolution of no inheritance by women, and the traditional Islamic law resolution of half inheritance shares for women, are rejected in favor of equal inheritance by women on the basis of equal protection principles in modern Indonesian law and society.

There are two notable aspects to this tripartite resolution given our focus on legitimacy. The first is that, despite having appellate (cassation) jurisdiction over both the religious and secular district courts, the Indonesian Supreme Court has been willing to postulate changes in women's status only in reviewing decisions from the (secular) district courts technically applying adat or national law. It has never exercised its review power to change distributions determined in the religious courts. Thus, the Supreme Court seems very cautious if confronted with traditional Islamic law argued in terms of Qur'anic text and haddiths. The second is the implicit question of why and how a potential claimant chooses between the district and religious courts (or chooses ADR also via leadership of the customary law community versus Islamic scholars), which coexist in Lombok's relatively traditional, rural or small town devout Muslim communities.

In ordinary economic terms, it seemingly would make no sense for Sasak women in Lombok to accept less than a full inheritance share (so the assumption is that they should always choose the secular district court as dispute resolution venue in the classic ROL sense). However, living in Lombok, recognized within Indonesia as a relatively devout Islamic region, and living within the Sasak ethnic group with its own customary law, it would appear that many if not most women seek greater legitimacy in challenging the traditional "no female inheritance" Sasak customary law rule under the tenants of Islamic law, where they have the benefit of the "female half inheritance share" rule. The perception that Islamic law enjoys special social legitimacy is reinforced by the idea that not only many women elect to resolve the disputes under religious law in choosing the religious court or Islamic scholars for ADR purposes, but the Indonesian Supreme Court implicitly has chosen to "modernize" customary or secular national law, but seemingly hesitates to do the same when faced with Islamic law.

In terms of our chicken or egg question, in the context of Lombok's mostly traditional society, it would appear that social beliefs must change, as under Islam versus presumably pre-Islamic customary law, before merely changing law changes behavior. But the most striking aspect may be that social legitimacy affects individual decisions, since in a pluralistic legal setting the individuals implicitly choose their own rules in choosing to pursue dispute resolution through different venues applying the differing legal resolutions. ... Those looking at cultural or institutional explanations of behavior presumably note that the "mental map" in legitimacy involves choice among multiple, sometimes conflicting legal sources, which infers that there is arguably more than one appropriate choice in legitimacy terms, since the women in question choose their own outcomes based upon their venue choices."

Of course, the hidden question is whether the women choose their outcomes in Lombok based on a full acceptance of the belief behind the religious or customary law rule, versus simply conforming their behavior to local social expectations lest they be considered "gold diggers" in seeking more than their recognized share of an inheritance. Meanwhile, outsiders typically assume that the best strategy is simply to

assert whatever their view is of human rights or gender equity in a modern centralized legal system without regard to local perceptions of legitimacy at the rural village level. The practical problem is actually one of the chicken or the egg, that local social ideas about legitimacy have to change before changing formal law really has any effect (so better to expend resources on measures like educating women or training them in trades on the local level to improve their economic position, which will lead to social changes in the long run, at which point legal changes in either national law, or development of customary law, can follow in the context of legal pluralism).

Claims to legitimacy seem to be the problem here, no less than arguments in the US pro and con concerning gay marriage, so be aware what the locals may think whenever someone tries to dictate to them their social beliefs in trying to suppress legal pluralism in favor of Westernized, secular national law (with the current analogous Islamic social argument being about the abolition of polygamy recognized in the Qur'an as a means to advance women; it generates similarly heated discussions within Islamic societies to US discussions of legalizing gay marriage). The obvious risk in taking on someone else's social views is a serious backlash at the local level (remember the DOD's fears of the likely threat to deployed troops of that Florida pastor burning Qur'ans?). And as a strategic matter, visible foreign support for one side within the local heated social argument as often as not is counterproductive, because it leads to claims the party enjoying foreign support, typically an NGO, has been "bought." Judging by the Indonesian example (Lombok), even affected women seemingly embrace Islamic law rather than formally more favorable secular national law, when they challenge the traditional Sasak customary law rule that women cannot inherit core family property like real property (and behind this lies a whole further thicket of family law rules concerning marriage). So be aware of the legal pluralism context and concerns about legitimacy, which is more than a simple argument about cultural sensitivity from the lawyer's viewpoint.

III. LEGAL PLURALISM AND THE LOCAL CONFLICTS OVERLAY

Without getting into technical arguments about the character and differing interpretations of sharia law visible also in the Indonesian example (because distinctions among modernist, traditionalist and Salafist Islam involve technical niceties and a very hot debate within the Islamic world, and there are complex linkages into public law as visible in the Indonesian example), does the above tell us anything concerning also the recent movement at the level of US state legislatures concerning "banning" sharia law (for example, H.3490, http://www.scstatehouse.gov/cgi-bin/web_bh10.exe, and S.0444, see http://www.scstatehouse.gov/cgi-bin/web_bh10.exe?bill1=444&session=119&summary=T, in the SC Legislature)? Concerning background of the US controversy, see A. Elliott, "The Man Behind the Anti- Shariah Movement," New York Times, July 30, 2011, available at http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all, but there is a broader principle at stake also in terms of worries about foreign law generally impinging upon first amendment and similar concerns (compare the libel tourism controversy in

which federal and state legislation like the SPEECH Act have been enacted recently to prohibit the enforcement of libel judgments from jurisdictions like Great Britain typically against US-based critics, see "US Libel Tourism Protection Act Signed into Law, British Activists See Call for Reform," available at http://www.stinkyjournalism.org/editordetail.php?id=840).

I would judge the movement to "ban" sharia as more an argument about legitimacy than legal effect, analogous to splitting legislative hairs over "gay marriage" versus "civil unions." I think the legitimacy problem lies in expressing dissatisfaction with someone else's law, which raises its own complications.

Presumably, US standard "public policy of the forum" exceptions or "significant interest" analysis applicable under conflicts of law principles reach far enough to exclude egregious effects under foreign law if you consider comity in enforcing foreign judgments, recognizing foreign divorces, etc. Constitutionally speaking, trying to ban any source of law based solely upon formal religious identification would be suspicious, while diluting the open identification while replacing it with claims about general denial of due process under foreign law are, charitably, an open-ended invitation to litigation (which seems an unusual position in an atmosphere where current legislative focus is more on minimizing litigation under tort reform efforts, etc.). From the commercial lawyer's viewpoint, those who would avoid the constitutional challenge in trying to undercut foreign law generally go too far (because under the law of unintended consequences, they may in the end undercut the enforceability of ordinary commercial contracts with a basis in foreign law concerning things like property ownership or the financial sector, which would be undesirable in a state wishing to participate in foreign commerce and investment). From the family law point of view, problems like competing child custody claims in divorce could be addressed from the perspective of "best interests of the child" under existing legislation.

Arguably, all problems can be resolved in treating such cases under existing law, via conflicts of laws, or public policy of the forum approaches, avoiding a host of difficulties in trying to enact legislation expressing dissatisfaction about someone else's law. Legitimacy is well enough served in a judge already making a decision in the comity or conflicts of law context whether any individual matter entails public policy concerns. I would suggest reliance on the judiciary's common sense to catch a potential infrequent problem would be the better and more realistic approach, rather than enacting legislation potentially creating more problems than it solves.

Cultural Context, Religion and *Shari'a* in Relation to Military Rule of Law Operations

David Stott Gordon[140]

1. Introduction and Background

a. For the last ten years, the US military has been engaged in conducting operations in Afghanistan and Iraq to bring stability to those countries, in part by "strengthening the rule of law." This paper will examine the issues of culture, ethnic divisions, and religion encountered by US military personnel tasked to strengthen the rule of law.[141] As these countries are almost exclusively Muslim, any consideration of these issues must take into account Islamic law, or *Shari'a.*

b. In general, instability in these countries is the result of conflict between differing groups which is frequently violent and destructive. These conflicts are generally based in religious, cultural and ethnic differences. In both these conflicts, the US military has been tasked to reduce the violence and enhance the stability of the government of the host nation; not surprisingly, the US military, with its different culture and view of religion, has become an additional participant in the conflict.

c. The systems of laws, courts, informal adjudication mechanisms, law enforcement, corrections and the governmental structures that support them—what in this paper are referred to as "rule of law systems"—are the primary methods by which a society confronts and resolves conflicts without resorting to self-help and violence; thus, the US military and other international interveners can increase stability by strengthing and improving the host nation's rule of law systems.

d. In all countries, the interrelationship between culture, ethnic divisions, and religion must be considered before addressing rule of law and rule of law systems. In predominately Muslim countries, such as Afghanistan and Iraq, one critical consideration is the influence and impact of Islamic law—*Shari'a*—on the culture and legal norms of the society.

2. What is Rule of Law?

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[140] Member of the bars of North Carolina and Georgia. Colonel (Retired) US Army Judge Advocate General's Corps. Principal Subject Matter Expert—Rule of Law, General Dynamics Information Technology. The opinions expressed herein are the author's, and are not the official positions of the Department of Defense or of General Dynamics Information Technology.

[141] Much of the material in this paper is discussed in greater detail in a recent publication by the US Joint Forces Command entitled the *Handbook of Military Support to Rule of Law and Security Sector Reform*. This handbook is designed to assist military planners understand the rule of law environment and how the actions of the US military can favorably influence the host nation's rule of law systems. The Handbook is available for public access at http://www.dtic.mil/doctrine/doctrine/jwfc/ruleoflaw_hbk.pdf.

a. "Rule of law" is frequently declared to be a very important strategic goal of the United States. The term "rule of law" is found in major official strategy documents, including the *National Security Strategy 2010*, the *National Military Strategy 2011*, National Security Presidential Directive (NSPD)-44,[142] and DOD Instruction 3000.05. However, none of these documents define "rule of law." There are numerous, and occasionally conflicting, definitions used by the US government and the international community. The most frequently used definition in the US government is one stated by the UN.

United Nations Definition of the Rule of Law[143]

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

b. The US Army has adopted a modified version of the UN definition,[144] and elements of its terminology are found in numerous publications.[145]

3. Desired Conditions

Generally, strengthening the rule of law includes promoting the following conditions:[146]

a. ***Just Legal Frameworks:*** Laws are consistent with international human rights standards, legally certain, fair, transparent, and responsive to the entire population, not just the elites. While the international community has some input, primarily the host nation populace determines if the frameworks are "just."

b. ***Public Order:*** The laws are enforced fairly, the lives, property, freedoms and rights of all segments of the populace are protected, criminal and politically motivated violence is minimized, and criminals are pursued, arrested and detained for trial.

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[142] National Security Presidential Directive (NSPD) 44, Subject: Management of Interagency Efforts Concerning Reconstruction and Stabilization, December 7, 2005. This Directive places the responsibility for coordinating the reconstruction and stabilization efforts of all US agencies, including DOD, under the Secretary of State. The Office of the Coordinator for Reconstruction and Stabilization is organized to carry out that function on behalf of the Secretary.

[143] USAID, DOD, and DOS *Security Sector Reform*, page 4, Jan 15, 2009. See also UN Doc. S/2004/616 (2004), para.6. See also UN Doc. A/61/636-S/2006/980 (2006).

[144] FM 3-07, *Stability Operations* (2008), Para. 1-40.

[145] See, e.g., the US Institute of Peace and US Army Peacekeeping and Stability Operations Institute, *Guiding Principles for Stabilization and Reconstruction* (2009).

[146] Adapted from Para. 7.3, US Institute of Peace and US Army Peacekeeping and Stability Operations Institute, *Guiding Principles for Stabilization and Reconstruction* (2009).

c. ***Accountability to the Law:*** all members of the populace, public officials, and perpetrators of conflict-related crimes are held legally accountable for their actions, the judiciary is free from political influence, and mechanisms exist to prevent the abuse of power.

d. ***Access to Justice:*** all members of the populace are able to seek remedies for grievances and resolve disputes through formal or informal systems that apply just legal frameworks equally, fairly and effectively for all.

e. ***Culture of Lawfulness:*** The populace generally follows the law and uses the formal and informal justice systems to resolve disputes, rather than resorting to violence or self-help.

4. Legitimacy and Acceptability

a. Local Legitimacy. Every society has a set of rules and methods of adjudicating and enforcing those rules. In order for the populace to view the rules as legitimate, they must be perceived as being validly imposed, in harmony with their moral views, and as being obligatory. Other characteristics of local legitimacy are that the rules are perceived by the populace as being applied fairly (e.g., crimes are adjudicated and punished the same for all groups; disputes between members of different groups are adjudicated and the decisions enforced on the basis of the established rules, rather than group affiliation) and are administered effectively (e.g., the enforcement mechanisms usually work, even against the powerful and well-connected). The ultimate result of local legitimacy is the existence of a culture of lawfulness--that the majority of the populace generally chooses to follow the established rules and adjudication and enforcement mechanisms.

b. International Acceptability. Military and civilian programs are always tied to the policy considerations of the donor nations. In many cases, there will be tension between what the donors from the international community want and what the host nation populace sees as legitimate. There will generally be an ongoing negotiation between host nation individuals and groups and external actors regarding local legitimacy and international acceptability.

5. Cultural Context

a. A lesson learned quite painfully from the long military engagements in Iraq and Afghanistan is that it is essential to understand, respect and work in consonance with the culture of the peoples in the area of operation. Often, US interveners, both military and civilian, have assumed that they understood the problems facing the host nation, and that we would make progress by simply implementing the same sort of practices that work in the US or Europe. Often we have tried to solve host nation problems by bringing in experts with much experience in doing things in the American way, but who have little to no understanding of how other societies with different cultures handle similar problems. In some fields, such as water treatment systems, electrical grids, or road and rail

networks, it is possible to translate concepts, techniques and processes from the US into solutions for that work in the host nation without much difficulty; water and electricity work the same in Columbia and Kabul.

b. However, law and governance are based on social relationships, which vary much more widely than do the principles of physics and engineering, and are rooted in the cultures of the host nation. In understanding the rule of law systems of a foreign country, culture cannot be viewed as minor cosmetic differences which overlie universally held beliefs; rather, the beliefs, attitudes and values of the host nation culture can create profound and deep differences in the way a host nation individual perceives very fundamental concepts such as right and wrong, truth and fallacy, logic and illogic.

c. For instance, in Western societies, we tend to place our faith in abstract ideas, which are often expressed as written rules and concepts. We think in terms of "defending and protecting the Constitution," or as "the law as being supreme." In many other cultures, there is no real loyalty to abstract ideas; rather, a person is loyal to a family, tribe or ethnic group because the group protects him and gives him his identity, and because he believes he owes a duty to the group. The law, as an abstract, is not supreme; while the group will be governed by norms of conduct, they generally will insure the survival of the group, even at the expense of the individual. Thus, our efforts to instill loyalty to the host nation constitution or a respect for individual rights will very often be strange and incomprehensible to members of the host nation populace, security forces, and even members of the judiciary and legal professions.

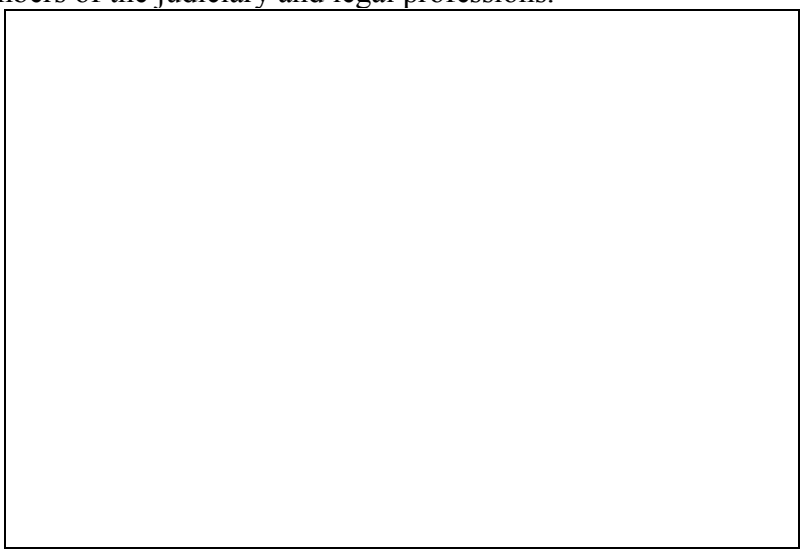

Figure 1. Rule of Law and Culture, Ethnicity, and Religion

d. Figure 1 shows the relationship between an individual, his or her family, clan, and community, and the some of the various factors that affects his or her behavior. The basic elements of rule of law—the laws, institutions, and government power contained and limited by the laws and institutions—are often separated from individuals and their social and cultural environments.

6. Ethnic Divisions

a. In many cases, ethnic differences will be the primary driver of conflict. The conflicts in Bosnia-Herzegovina between Serbs, Croats, and Bosnians, between Albanians and Serbs in Kosovo, and between Turks, Kurds, and Armenians in Turkey are examples. Often, ethnic divisions are reflected in the rule of law systems of a host nation, and inequities in those systems may be an important factor in the conflict.

b. Another aspect of ethnic divisions is that an ethnic group may have strong traditional and customary systems and codes of conduct which provide order within the group. One example is the *Pashtunwali* of the Pashtuns of Afghanistan and Pakistan. Often such codes are implemented in the group's communities by customary and informal justice systems. In many cases, interveners may take actions to reform and strengthen such systems so as to resolve disputes and increase stability.

7. Religion

a. It is imperative that military planners and operators understand the problems of the host nation's rule of law systems from the point of view of the host nation populace. Often, that viewpoint will be influenced, if not determined, by the religious views of the individuals and their communities. If planners and operators do not know why and how religious beliefs are important in host nation culture(s), they will fail to properly interpret the responses of the populace to US military actions.

b. However, Western biases concerning religion will often prejudice the planner's and operator's analysis of the host nation culture, and can limit, often fatally, his or her capability to understand the ideas which govern the thought processes of host nation individuals. The thought processes of Americans and the developed Western nations are dominated by belief in secular humanism, which holds that religion is a private matter, and should not have any role or consideration in public matters, including the functioning of rule of law systems.

c. The view of secular humanism is that any sort of religious belief may be tolerated, but it must affirm (or at least not go against) the fundamental tenants of secular humanism, including the tenant that religious belief must be irrelevant for public affairs. Adherents of the secular faith deem these fundamental tenants to be "self-evident" truths, although they cannot be proved in any empirical manner. In a very real sense, secular humanists are usually fundamentalists in that they have absolute beliefs that are not subject to criticism or evaluation by any criteria external to the secular belief system—either one accepts on faith the basic tenants of secular humanism, or one is an unintelligent, ignorant or evil unbeliever.

8. Failures to Communicate

a. The following diagrams attempt to illustrate the fundamental differences between the classic monotheism of Judaism, Christianity, and Islam on the one hand and secular

humanism on the other. Failure to understand these differences frequently contributes to the inability of Westerners to understand the thought processes of their host nation counterparts. Obviously, these are gross simplifications, and do not pretend to cover all possible nuances in concepts of religious and secular authority.

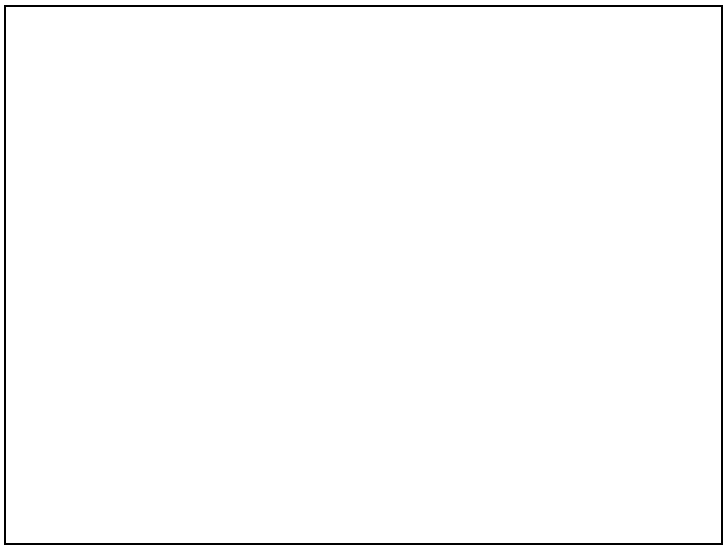

Figure 2. Classical Monotheistic Framework

b. Figure 2 depicts the manner in which classic Judaism, Christianity, and Islam view the relationship between God and the Law. In each case, God has spoken through prophets to mankind to reveal His requirements for human behavior. These requirements are translated into human law, in order that human law might comply with the Divine will. God is the highest value; obeying God the highest purpose of human law.

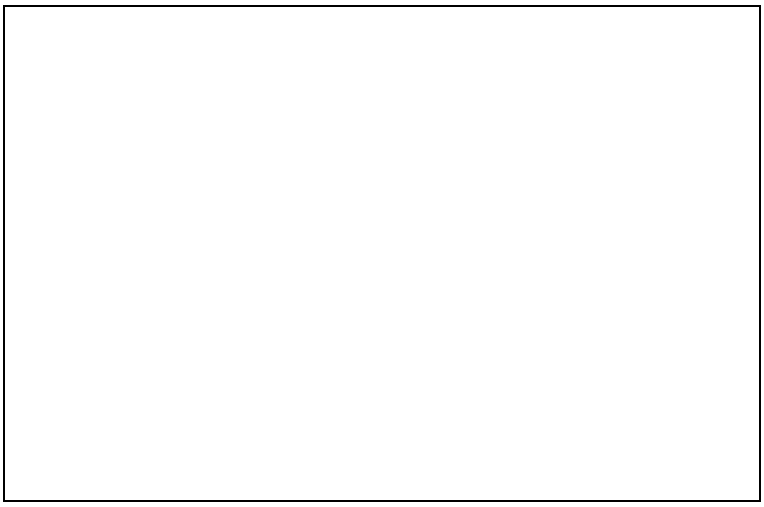

Figure 3. The Secular Humanism (Contemporary Western) Model

c. Figure 3 depicts the authority paradigm for secular humanism, which is the paradigm developed in the Western world during the Enlightenment. The philosophers determine what constitute the basic principles by which humanity should be governed. These principles are "self-evident." The principles are accepted by power elites and by

the People to a greater or lesser degree, and are translated into law. The law must comply with the Self-Evident Principles and the will of the People, but the Self-Evident Principles are superior to the will of the People and govern in case of conflict. Humanity is the highest good, but it is an abstract. It is the beneficiary of the "Self-Evident" Principles, but does not determine what those principles are—for instance, if a vote could be taken of all humans, past present and future, the Self-Evident Principles would govern, rather than the majority decision of the human species.

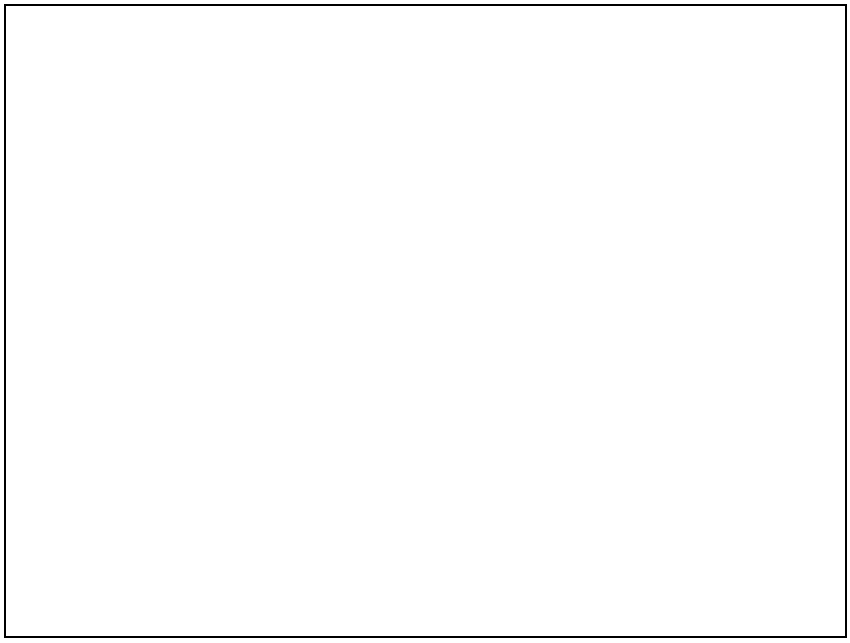

Figure 4. The Relationship between Secular Humanism and Religion

d. Figure 4 depicts the relationship between Secular Humanism and Religion. Religion is viewed a a private function, where individuals and groups seek to know God, but any understanding of God must not be imported into the public realm of the law and politics. Religious principles are blocked from influencing the public world of the Law, which must be governed solely by the Self-Evident Principles. Different religious faiths are viewed as having common principles which may be acceptable, provided they comply with and support the Self-Evident Principles; the Self-Evident Principles are the standard, rather than compliance with the will of the Diety. Many will hold that the Self-Evident Principles somehow express the will of God, but this is optional.

e. Those inculcated in the secular humanist world view often unconsciously assume that others from different cultures also "really" believe that religion should not be anything but a private activity; thus, when they encounter host nation people who make decisions based on their religious beliefs, secularists will look to find another motivator acceptable within the context of secularism, such as political ideology, economic privation, or ethnic conflict. It is often difficult for the secularist to comprehend that people can and do make political and legal decisions based on their religious beliefs;

indeed, most of the world actually sees religious belief as the foundation of all political and legal thought.

f. *Shari'a* is the foundation of all Islamic legal thought. It is literally "the Path to God." The issue in the Muslim world is not whether *Shari'a* has a place in legal thinking, but how much Muslims should insist on requiring the laws of society to be derived from the law of God as Islam teaches it, and how much should they permit the laws of society to be influenced by Western legal traditions and philosophical concepts. To most Muslims, to oppose *Shari'a* is to oppose Islam.

g. In order to influence host nation rule of law systems so as to accomplish US objectives, US military and civilian personnel must be able to temporarily suspend their own beliefs about religion, and attempt to understand how and to what degree religious beliefs affect the political and legal thought of the host nation populace.[147] In the case of Muslim nations, this means that *Shari'a* and how it is interpreted within that country and its subdivisions must be part of both the evaluation of the environment and the actions planned and taken to influence the systems.

9. US/International Cultural Biases

a. The biggest conceptual barrier to conducting effective rule of law operations is the inability of Western assistance personnel to recognize that what they subconsciously believe to be universal principles are in reality the products of their own culture, and are not only not acknowledged by the host nation individuals, but often will seem to them as outrageous violations of what they see as obvious truths. At best, this barrier will make it difficult, if not impossible, for the interveners to understand what will be effective in modifying conditions in the culture they are attempting to influence. At worst, their efforts may be seen as trying to impose foreign ideas on an unwilling populace, and may create a new cause of conflict.

b. The concept of "rule of law" itself is fundamentally culturally biased. While the UN definition quoted above may seem self-evident to those who have internalized Western social ideologies, many intelligent, well-intentioned individuals in non-Western societies will find the very concept of "rule of law" to be completely at odds with their fundamental cultural beliefs about religion, politics, and society.

c. This does not mean that US personnel should ignore or downplay the principles of rule of law; in many cases, promoting these principles is part of the US policies that the military deploys to advance. However, commanders, planners and operators should be able to examine their own beliefs objectively,[148] and see them, not as unalterable truths that every intelligent, well-intentioned person on earth already accepts, but as ideas in the marketplace, which others may or may not accept. We should also remember that part of

[147] Department of the Army, GTA 41-01-005, *Religious Factors Analysis* (January 2008).
[148] The idea of looking at one's own beliefs objectively as a requirement for examining other social systems was substantially developed by the sociologist Max Weber in the early 20th century. See his *Essays in Sociology*, New York, Oxford University Press, 1946.

our own Western ideology is the right of all peoples to self-determination: by our own standards, the people of the host nation are entitled "to freely pursue their economic, social and cultural development."[149] This is not mean that we cannot bring about significant and lasting changes, for cultures and laws do change over time, and in many cases do so because of external influences; however, the change must occur because the ideas are accepted and adopted by the host nation populace, not because they are imposed by external interveners by coercion.

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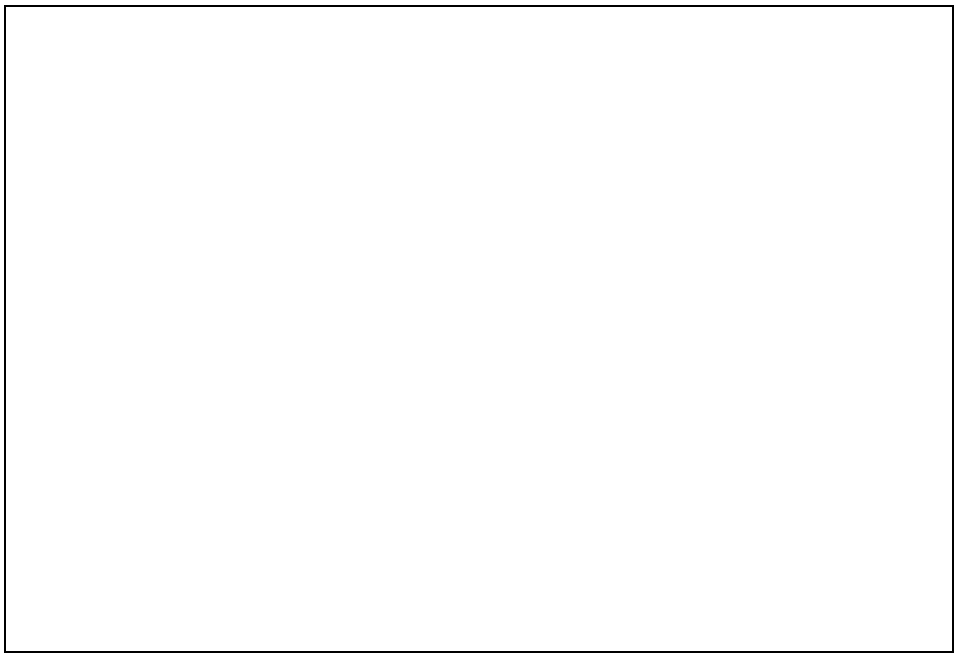

Figure 5. Rule of Law Operations and their Effect on the Social and Cultural Environment

d. Figure 5 shows the interaction between rule of law operations and their effect on the individual's social and cultural environment. Note that the rule of law elements are transparent—they should influence the society and the culture, but they should not replace or destroy them.

10. Conclusion

In thinking about how *Shari'a* integrates into US rule of law operations in Muslim countries such as Afghanistan and Iraq, there are some basic concepts that should be kept in mind:

[149] "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." UN International Covenant on Civil and Political Rights, Article 1, Paragraph 1. 999 *UNTS* 171, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec. Entered into force for the US 8 Sep 1992, 2010 *TIF* 377.

(1) The goal of a military intervention is to create stability, not Utopia. If our military operations, including those dealing with rule of law, create the conditions where host nation authorities can deal with conflicts through courts, other dispute resolution mechanisms, and law enforcement agencies to the extent that US military forces are no longer required, then the mission is successful. Let the host nation work out its own destiny in terms of its own culture; if *Shari'a* is part of that culture, accept that any solution resulting in stability will of necessity incorporate *Shari'a* principles.

(2) Local legitimacy is the most critical aspect of rule of law operations. Human rights principles revered by the West will have little impact if they contradict the fundamental beliefs of the host nation populace; on the other hand, principles which the host nation populace recognizes and accepts as being both right and obligatory can be the basis of creating just legal frameworks, public order, accountability to the law, access to justice, and a culture of lawfulness. In Muslim countries, *Shari'a* will, to a greater or lesser extent, supply or support principles legitimate in the eyes of the populace.

(3) Effective rule of law operations require more listening than talking, more learning than teaching. Our host nation partners will usually know far more about what their rule of law systems than we do, and will understand what will work in their society better than we will. In many cases, *Shari'a* can provide useful concepts that will be legitimate to the populace and can thereby contribute to strengthening the rule of law. By being open to such concepts, even though culturally foreign and religiously based, US interveners can facilitate their host nation counterparts' developing their own solutions that strengthen the rule of law.

Biographical Information on Authors:

David Stott Gordon is an attorney licensed to practice law in North Carolina and Georgia and a Principal Subject Matter Expert Rule of Law with General Dynamics Information Technology and provides rule of law expertise for US Forces Command. He holds AB and JD degrees from the University of Georgia, a MA degree in Church History from Trinity Evangelical Divinity School, is a graduate of the Army War College and has done graduate work at The Hague Academy of International Law and Georgetown University Law Center. He is a retired Colonel, US Army, JAGC, who served as the Staff Judge Advocate and Rule of Law Officer for the US Office of Military Cooperation in Afghanistan and Rule of Law Program Director for US Army Civil Affairs and Psychological Operations Command at Fort Bragg, NC, and as the International Law Attorney at the US Army Peacekeeping and Stability Operations of the Army War College in Carlisle, PA.

Kevin H. Govern is an Associate Professor of Law at the Ave Maria School of Law and an Instructor of Legal Studies at the California University of Pennsylvania. He holds JD and LLM degrees and is a retired Lieutenant Colonel, US Army, JAGC, who served in Special Operations assignments and as Assistant Professor of Law at the United States Military Academy. He is the author of numerous articles on rule of law issues and is Editor in Chief of the Military Legitimacy Review at www.militarylegitimacyreview.com.

David K. Linnan received a BA in humanities from Emory University (1976) and a JD from the University of Chicago (1979). He is a faculty member at USC in the School of Law and School of the Environment, and since 2000 has been the program director forthe Law & Finance Institutional Partnership run from Jakarta, Indonesia. With Waleed El Ansary, he published Muslim and ChristianUnderstanding: Theory and Application of "A Common Word", Palgrave,McMillan, 2010.

Rudolph C. Barnes, Jr. is an attorney and United Methodist pastor and is President-Elect of the Senior Lawyers Division of the SC Bar. He holds a BA in Political Science from The Citadel and a MPA and JD from the University of South Carolina, is a retired Colonel, US Army, JAGC, and a graduate of the Army War College, and has served as Staff Judge Advocate of the US Army Civil Affairs and Psychological Operations Command and as Staff Judge Advocate (IMA) of US Central Command. He is the author of Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996, and numerous articles in military journals.