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ISLAM, THE WEST, AND THE RULE OF LAW

Mark David Welton*

In the 21st century, the security of the United States, the defeat of terror, the end of tyranny, and the peace of the world depend on the advance of liberty in other nations, and this advance will be achieved by promoting democracy. Democracy leads to liberty, and liberty leads to peace and freedom. This is a paraphrase from a recent speech by the President of the United States of America.¹ A few months later, on the other side of the world, the President of the Islamic Republic of Iran offered a different perspective in a letter to President Bush:

Liberalism and Western-style democracy have not been able to help realize the ideals of humanity. Today these two concepts have failed. Those with insight can already hear the sounds of the shattering and fall of the ideology and thoughts of the liberal

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¹ See George W. Bush, President Discusses Freedom and Democracy in Iraq, Speech at the Dorothy Betts Marvin Theatre, The George Washington University (March 13, 2006), transcript *available at* <http://www.whitehouse.gov/news/releases/2006/03/20060313-3.html>. President Bush stated:

The mission of this Foundation [for the Defense of Democracies] is to defeat terror by promoting democracy — and that is the mission of my administration. Our strategy to protect America is based on a clear premise: the security of our nation depends on the advance of liberty in other nations. On September the 11th, 2001, we saw that problems originating in a failed and oppressive state 7,000 miles away could bring murder and destruction to our country. We saw that dictatorships shelter terrorists, feed resentment and radicalism, and threaten the security of free nations. Democracies replace resentment with hope, democracies respect the rights of their citizens and their neighbors, democracies join the fight against terror. And so America is committed to an historic, long-term goal: To secure the peace of the world, we seek the end of tyranny in our world.

democratic systems. Whether we like it or not, the world is gravitating towards faith in the Almighty and justice and the will of God will prevail over all things.²

Persians, like Arabs, are heirs to a great literary tradition; they choose their words carefully, and President Ahmadinejad's rebuttal to President Bush is clear: liberal democracy is a Western value incompatible with Islam. We are tempted to ask if any further evidence is needed to validate Samuel Huntington's thesis that the Western and Islamic worlds are engaged in a fundamental "clash of civilizations."³

However, our postmodern awareness should caution against accepting such politically convenient but misleading dichotomies. Like the West, the Islamic world is hardly monolithic. A multitude of political views can be found within the many cultures, ethnicities, languages, and religious variations that exist where Islam is the dominant faith. It has been accurately noted that the violent upheavals in the world of Islam are more a manifestation of internal conflicts working themselves out within the Islamic community, the *umma*, as it searches for an authentic voice in the new century, than a result of a clash of beliefs, principles, and values with the West.⁴ The contesting voices of liberal, radical, traditional, moderate, militant, and conservative Islam – the list of possible appellations is long – can be heard in virtually every country where Muslims live. Certainly the post-Saddam Iraqi national elections, as well as the recent city council elections in Iran, which were widely seen as a rebuff to government hard-liners,⁵ demonstrate that democracy has a place even in the Islamic heartland, President Ahmadinejad's assertions notwithstanding.

Nor are the Western and Islamic worlds themselves any longer geographically distinct. The Muslim population in Europe and North America is large and growing, and the first Muslim candidate was recently elected to the United States

² Elaine Sciolino, *From Iran, With Something Less Than Love*, N.Y. TIMES, May 14, 2006, § 4 at 5 (quoting the letter from President Mahmoud Ahmedinejad to President George Bush).

³ SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

⁴ See REZA ASLAN, *NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM* (2005).

⁵ See *A Rebuff for the President; Iran*, ECONOMIST, Dec. 23, 2006.

Congress.⁶ Some 600,000 Muslims live in New York City, where their imams respond to a multitude of social, religious and legal questions and problems that arise within their community.⁷ *Hejab*, the proper attire for Muslim women, is a significant issue not just in Tehran,⁸ but also in the streets of Blackburn, England⁹ and the schools of Paris, France.¹⁰ In the other direction, the post-colonial penetration of Islamic Africa and Asia by the West – economically, militarily, and culturally – continues to deepen, with all the benefits and problems that such encounters engender.

Nevertheless, there are important differences in Islamic and Western perceptions of the “Other” that must be acknowledged. Here again, postmodern thought requires that we pay close attention to problems of language. In the West, especially since 2001, the world of Islam, suddenly prominent in the media and popular imagination, is often perceived and portrayed in terms like stagnation, oppression, and terrorism. Books about Islam on my library shelves, sandwiched between more specialized academic works, contain words in their titles such as “rage,”¹¹ “trouble,”¹² “radical,”¹³ “crisis,”¹⁴ “war,”¹⁵ and “wrong.”¹⁶ In the Islamic world, words may carry significance that pose difficulties for Western comprehension beyond those of translation. For example, the word “martyr” has an histori-

⁶ In November, 2006, Keith Ellison of Minnesota, a Muslim, was elected to the U.S. House of Representatives. See *First Muslim Congressman Elected*, BBC NEWS, Nov. 8, 2006, available at <http://news.bbc.co.uk/2/hi/americas/6127234.stm>.

⁷ See generally Andrea Elliott, *An Imam in America: A Muslim Leader in Brooklyn, Reconciling 2 Worlds*, N.Y. TIMES, Mar. 5, 2006, at A1; Andrea Elliot, *An Imam in America: To Lead the Faithful in a Faith Under Fire*, N.Y. TIMES, Mar. 6, 2006, at A1; Andrea Elliot, *An Imam in America: Tending to Muslim Hearts and Islam's Future*, N.Y. TIMES, Mar. 7, 2006, at A1.

⁸ See Neil MacFarquhar, *Iranian Women's Dress Code is Modest but Golf Friendly*, N.Y. TIMES, Jul. 5, 2005, at A6.

⁹ See *Deconstructing the Veil*, ECONOMIST, Oct. 14, 2006,.

¹⁰ See *The War of the Headscarves – Integrating Minorities*, ECONOMIST, Feb. 7, 2004,.

¹¹ ROBIN WRIGHT, *SACRED RAGE: THE WRATH OF MILITANT ISLAM* (1985).

¹² IRSHAD MANJI, *THE TROUBLE WITH ISLAM* (2003).

¹³ *RADICAL ISLAM'S RULES* (Paul Marshall ed., 2005).

¹⁴ BERNARD LEWIS, *THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR* (2003).

¹⁵ GILLES KEPEL, *THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST* (2004).

¹⁶ BERNARD LEWIS, *WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* (2002).

cal, religious, and political context of meaning within Shi'ism¹⁷ that puzzles many Westerners who wonder at the motivation of children who use their bodies to clear minefields and detonate bombs.

Political words are especially problematic. "Democracy," highlighted by President Bush's speech and President Ahmadinejad's letter, is a high-value term loaded with positive connotations for Americans and Europeans. It resonates with Muslims in the Middle East, too, when elections offer the opportunity to express dissent or desire for change, as previously noted in Iraq and Iran. But the same term, used so indiscriminately by Western politicians, is also widely perceived in the Arab Middle East as a codeword, a "guise for Western efforts to reconquer Arab territories and plunder their natural resources."¹⁸ America's past and current support for authoritarian regimes in Arab countries seems to undermine our expressed commitment to the spread of democracy throughout the Middle East. In Iranian minds, America's fidelity to democracy is belied by the still-fresh recollection of the American-engineered overthrow of the popular, democratically-elected government of Mohammad Mosaddeq and the reinstallation of the Shah in 1953. Our common roots in monotheistic religious tradition seem overwhelmed by the historical baggage and contradictions that attend our words and practices.

Must we then submit ourselves to a post-modern resignation that denies the possibility of meaningful communication across the divisions between the West and the Islamic world? Here, I suggest that the concept embodied in the term "rule of law" is in fact a legal and political value shared by both the West and Islam, and if properly refined, can provide a useful framework for more effective discourse and understanding between these two traditions.

As Fareed Zakaria has written, "[e]veryone accepts that 'the rule of law' is the foundation of liberties in the Western

¹⁷ See generally A. Ezzati, *The Concept of Martyrdom in Islam*, <http://www.al-islam.org/al-serat/concept-ezzati.htm> (last visited Apr. 8, 2008); Reza Aslan, *In the Footsteps of the Martyrs*, SLATE, Feb. 16, 2004, <http://www.slate.com/id/2095326/>.

¹⁸ Uriya Shavit, *The Road to Democracy in the Arab World*, AZURE (Autumn 5767/2006), at 44, available at http://www.azure.org.il/download/magazine/2154AZ_26_Shavit.pdf.

world.”¹⁹ Though critical jurisprudence questions the possibility of a meaningful rule of law, one astute scholar of the subject has correctly observed that “there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the ‘rule of law’ is good for everyone. Among Western states this belief is orthodoxy.”²⁰ American constitutions – state and federal – “are specifically rooted in an English constitutionalism based on the rule of law.”²¹ The preamble to the Treaty on European Union affirms the members’ primary commitment to the rule of law.²²

The Islamic world, too, has a devotion to the rule of law that has prevailed through much of its history and, while severely impaired in the nineteenth and twentieth centuries by Western colonialism and its aftermath, has resurfaced as a desired virtue, fully compatible with Islamic law and tradition. In 1999, Abdurrahman Wahid, the president of Indonesia (the world’s largest Muslim country), cited the establishment of the rule of law as one of his major achievements.²³ After the fall of the Taliban, an Afghan tribal leader and notorious warlord campaigned for a government position on the platform urging “now is the time to defend ourselves not with tanks and armed corps but by the rule of law.”²⁴ Saad Eddin Ibrahim, a recent candidate for the Egyptian presidency, cited the rule of law as the key to the evolution of political Islam.²⁵ There are many other examples.

Perhaps most significant in this regard is the recent Iranian presidency of Mohammad Khatami. A mid-level cleric in the Shi’ite hierarchy, he is nevertheless a recognized scholar of

¹⁹ Fareed Zakaria, *The Enemy Within*, N.Y. TIMES BOOK REVIEW, Dec.17 2006, at 8 (reviewing JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* (2006) and BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006)).

²⁰ BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 1 (2004).

²¹ THE OXFORD COMPANION TO AMERICAN LAW 150 (Kermit L. Hall ed., 2002).

²² TREATY ON EUROPEAN UNION, pmbl. (Office for Official Publications of the European Communities, 1992).

²³ JOHN L. ESPOSITO & JOHN O. VOLL, *MAKERS OF CONTEMPORARY ISLAM* 114 (2001); TAMANAHA, *supra* note 20, at 2.

²⁴ TAMANAHA, *supra* note 20, at 2.

²⁵ See Saad Eddin Ibrahim, *Islam Can Vote, If We Let It*, N.Y. TIMES, May 21, 2005, at A13.

both Islamic and Western legal and political philosophies.²⁶ The main theme of his overwhelmingly successful 1997 election campaign was the institutionalization in Iran of the rule of law and the development of civil society²⁷ within the framework of the *Shari'a*.²⁸ Although the rule of law reforms promoted during his presidency and eagerly anticipated by a large majority of the Iranian people were unsuccessful in the near-term, as discussed later, the long-term impact of his eight-year tenure and his call for a dialogue of civilizations based on the rule of law may yet prove to be his most important legacy.

So what is the rule of law, and is it a concept on which the West and the Islamic world can find common ground to begin a more productive dialogue of civilizations that President Khatami proposed? Let's first summarize briefly what the rule of law has come to mean in the Western legal tradition.

There is no lack of scholarly debate in Western legal thought about the meaning of the rule of law.²⁹ Nevertheless,

²⁶ Khatami's published works (in Persian) include, among others, *RELIGION AND INTELLECT TRAPPED IN TYRANNY* (2000), *FROM THE WORLD OF THE CITY TO THE CITY OF THE WORLD* (1994), and *FEAR OF THE WAVE* (1993). A selection of addresses and quotes in English can be found in *MOHAMMAD KHATAMI, HOPE AND CHALLENGE: THE IRANIAN PRESIDENT SPEAKS* (Alidad Mafinezam trans., 1997).

²⁷ ALI M. ANSARI, *IRAN, ISLAM, AND DEMOCRACY: THE POLITICS OF MANAGING CHANGE* 125-26 (2000).

²⁸ The *Shari'a*:

is the expression of the will of Allah manifested in his guidance of Muhammad and preserved by the community in their scripture, the Qur'an . . . Each individual who personally chooses to obey [Allah] directly confronts the divine will expressed in the Shari'a and strives to conduct his or her life according to that imperative . . . The law, as the concrete expression of Allah's will and guidance, is therefore central to the individual and collective Muslim identity. It constitutes the sole blueprint for the good society.

DAVID WAINES, *INTRODUCTION TO ISLAM* 63 (2d ed.1995).

²⁹ See *THE RULE OF LAW* (Ian Shapiro ed., 1994) (containing a collection of essays on the meaning of the rule of law); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999) (contrasting views on the dimensions of the rule of law in a cultural framework); RICHARD POSNER, *FRONTIERS OF LEGAL THEORY* 182-92 (2001) (a critique of Kahn's broad view). The possibility of the rule of law is questioned by much critical and postmodern legal scholarship. See, e.g., Morton Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977); Joel Edan Friedlander, *The Rule of Law at Century's End*, 5 TEX. REV. L. & POL. 317 (2001); Jeffrey E. Thomas, *Symposium: The Law and Popular Culture: Legal Culture and the Practice: A Postmodern Depiction of the Rule of Law*, 48 UCLA L. REV. 1495 (2001); Francis J. Mootz, III, *Rethinking*

beyond the generally accepted notion that an important *purpose* of the rule of law is to limit arbitrary governmental power, there are at least three modern approaches to identifying the *elements* of the rule of law: a narrow approach, a middle approach, and a broad approach.³⁰

The narrow approach restricts itself to the characteristics of the rules, and of the rule-making and rule-enforcement procedures, in a legal system.³¹ Often depicted as formal legality, and as elaborated on more fully by Lon Fuller and Joseph Raz, among many others, it insists that the rule of law means that legal rules, and the procedures that create, change, and enforce these rules, should have certain characteristics, namely: clarity, prospective applicability, stability, and publicity of rules; transparent law-making guided by clear and stable general rules; accessibility to the courts; basic procedural due process; and rule-based restraints on the activities of law-enforcement agencies.³² These are characteristics of legal rules and procedures that allow people to plan for the future with reasonable assurance that the rules of the road will not suddenly and secretly change. They are expressly not to be equated with other virtues such as

the Rule of Law: A Demonstration that the Obvious is Possible, 61 TENN. L. REV. 69 (1993).

³⁰ See RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001). Cass states:

At one extreme, a starkly positivist conception of the rule of law encompasses the notion of control to whatever extent and by whatever means the state chooses so long as certain formal requisites of laws' enactment and application are met. It is a conception of *law-boundedness* irrespective of the ends served by law At another extreme are conceptions of the rule of law that would make the concept synonymous with *justice*. These conceptions see the widespread appeal of the rule of law as dependent on the morality of the laws that rule In between the extreme views are numerous particular conceptions of the rule of law differing in the ends the concept serves and the requisites imposed in the concept's name.

Id. at 1-2. See also GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* (1996). There are in fact two versions of the rule of law, a modest version of adhering to the rules and a more lofty ideal that incorporates criteria of justice. We shuffle back and forth between them because we are unsure of the import of the term 'law' in the expression 'rule of law.' *Id.* at 11.

³¹ See CASS, *supra* note 30, at 1-2.

³² See *id.* at 1; see also FLETCHER, *supra* note 30, at 11-14.

democracy, justice, or human rights.³³ This is essentially a procedural, rather than a substantive, approach to the rule of law.

The middle approach, like the narrow view, usually rejects the inclusion of qualities such as justice as too subjective to constitute a necessary element of the rule of law.³⁴ Yet the middle approach also requires more than certain formal characteristics of rules and rule-making.³⁵ This approach often insists that constitutionalism must be present within a rule of law system.³⁶ Constitutionalism in a rule of law context consists of a structural design of the political system that distributes governmental power, usually focused on separation of legislative and executive powers and especially on an independent judiciary capable of exercising some form of judicial review.³⁷ It also requires an intangible but deep-seated commitment to the supremacy of law by both the governed and the government.³⁸

³³ See JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 211-14 (1979). Raz insists that the rule of law "is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man . . ." *Id.* at 211. "[T]he law must be capable of guiding the behavior of its subjects . . . It says nothing about fundamental rights, about equality, or justice." *Id.* at 214. See also FLETCHER, *supra* note 30, at 11-14; LON FULLER, *THE MORALITY OF LAW* (1964).

³⁴ See generally, CASS, *supra* note 30, at 2.

³⁵ See *id.*

³⁶ LARRY ALEXANDER, *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 4 (1998). "Constitutionalism implements the rule of law: It brings about predictability and security in the relations of individuals to the government by defining in advance the powers and limits of that government." *Id.* Andrew Altman identifies five principles of the rule of law, the first and last of which are aspects of constitutionalism:

1. Government must operate under the law.
2. Government must regulate society through a system of general and authoritative rules.
3. The general and authoritative rules should give individuals fair warning [by being] (a) made public, (b) reasonably clear in meaning and specific in what they prohibit, (c) in force for a reasonable period of time, (d) applied prospectively, (e) applied impartially, (f) possible to comply with, and (g) enacted in accordance with preexisting legal rules.
4. All persons must be given due process, that is a fair chance to defend themselves against formal charges that they have violated the rules.
5. The sovereign people ought to establish constitutional government and abide by its laws.

ANDREW ALTMAN, *ARGUING ABOUT LAW* 7 (2d ed. 2001).

³⁷ Raz includes judicial review as one of the principles in his narrow view of the rule of law, but notes that "in itself it is a very limited review – merely to ensure conformity to the rule of law." Raz, *supra* note 33, at 217.

³⁸ See *id.*

This latter requirement has frequently been expressed in terms of a civic reverence towards the law by all the actors within the system.³⁹

³⁹ Constitutionalism was defined by Walter Hamilton in 1930 as “the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order.” Richard S. Kay, *American Constitutionalism*, in ALEXANDER, *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS*, *supra* note 36, at 16. Ulrich Preuss has also expressed an understanding of the requirement for a bond between the people and the law as the essential element of constitutionalism. The distinctiveness of constitutionalism is:

not to be found in certain ideas or institutional devices, ingenious as they may be, like, for example, the idea of the separation of powers, or the conception of the accountability of the rulers *vis-à-vis* the ruled; the essence of constitutionalism which has prompted both the admiration and the constant reasoning of the most spirited political philosophers of many centuries is the mystery of its binding force.

Ulrich K. Preuss, *The Political Meaning of Constitutionalism: British, French, and American Perspectives*, in READINGS IN THE PHILOSOPHY OF LAW 531 (John Arthur and William H. Shaw eds., 4th ed. 2006). See also James W. Torke, *What is This Thing Called the Rule of Law?* 34 IND. L. REV. 1445 (2001). Torke views the components of the rule of law as constraints on state power that operate at three levels (as if in a pyramid). See *id.* at 1448. The top level consists of formal constraints of rules and texts (such as constitutions, statutes, regulations, doctrines, and decisions). See *id.* The middle level consists of institutional constraints, such as constitutionalism, open governmental processes, judicial review, a free press, decentralized law publishers, and widespread access to legal education resulting in an independent legal profession. See *id.* The bottom level, on which the other two constraints rest, consists of the informal constraints derived from a “rule of law culture.” *Id.* This means that the law is “the ruling myth of our civic faith,” accepted by all as definitive of what governs us. *Id.* Although Torke places constitutionalism on a different level from the informal constraints of the “rule of law culture,” others more commonly combine them. Semonche states that “American nationhood rests upon a common faith in a civil theology . . . housed within the concept of a rule of law.” JOHN SEMONCHE, *KEEPING THE FAITH: A CULTURAL HISTORY OF THE SUPREME COURT* 6 (1998). He goes on to note that “the writing at the pinnacle of the civil religion’s theological hierarchy is the Constitution,” with the U.S. Supreme Court the “priestly interpreter of the holy writ.” *Id.* at 7. On the other hand, Posner’s critique of Kahn’s theory of the cultural study of law (and by implication of Semonche’s vision of a “civic religion”) centers on Kahn’s promotion of this aspect of constitutionalism as necessary to the rule of law. Posner, who subscribes to the narrow view of the rule of law, asserts that:

the law plays an essentially pragmatic role in social governance . . . its success in this role depends on a degree of adherence to such rule of law virtues as impartiality, impersonality, publicity, and predictability. But [Americans] don’t think of their commitment to the rule of law as something that ‘defines’ themselves as Americans . . . Law is not our civic religion; freedom, work, wealth, and religion are . . . The rule of law is both more and less than myth.

POSNER, *supra* note 29, at 191-92.

The broad approach also consists of rules with particular character, as well as constitutionalism, but adds additional qualitative elements to the legal system.⁴⁰ These may include respect for human rights and inviolability of private property. However, this approach most consistently focuses on the requirement for justice to exist in and be served by the legal system.⁴¹ Although many scholars argue for the inclusion of

⁴⁰ See CASS, *supra* note 30, at 2.

⁴¹ A broad conception of the rule of law is reflected in the following:

If the rule of law remains the one rational tool of mankind standing between anarchy and total oppression, it must be responsive to the ethical sense of fairness and justice of those it governs. Without this ethical underpinning the best that can be said for the rule of law is that its main function is to maintain order, and it matters not what type of order is maintained. An essential purpose of a true rule of law, therefore, is that the members of the legal community are willing to live together under rules which embody the value of order and the value of justice These then are the attributes of a true rule of law: a society or community consensus seeking to secure justice – that which is felt to be right, reasonable, and proportionate for a particular time and place; and order which requires continuity, certainty, consistency – a balance between rights and duties, effectiveness and restraint on power, plus the ability to meet changing conditions.

ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., A WORLD RULE OF LAW 4-5, 8 (1975). See also JENNIFER A. WIDNER, BUILDING THE RULE OF LAW 27 (2001). Widner notes that:

Both the rule of law and judicial independence had attracted attention in the late 1950s and early 1960s, although then, as now, the terms were difficult to define. In the popular imagination, *rule of law* usually connoted the antithesis of disorder, vigilantism, corruption, abuse of power, and arbitrariness. Lawyers distilled three important elements from this mix. One concern was for predictability and publicity. No one should be . . . punished or disadvantaged by the retrospective application of a new standard; rules should be public, not secret, so that people could reasonably know them. A second concern was for “due process,” the opportunity for a fair hearing. To have one’s story told by an impartial adjudicator was an entitlement that lay at the foundation of most justice systems, including those in Africa. Third, the concept of the rule of law also contained an appeal to a sense of fairness not satisfied by a “law of rules” based solely on adherence to statutes and careful attention to procedure. Content or substance mattered too. As the example of apartheid in South Africa brought home forcefully, due process in the presence of abhorrent statutes also offended the sense of justice.

Id. at 27. In discussing the rule of law as a unifying principle of American society, Semonche has stated that “to describe a rule of law without talk of justice, equality, and common decency – as has so often been done – is to purge that concept of the very ideals that bind the diverse people called Americans together.” SEMONCHE, *supra* note 39, at 3.

justice within the rule of law, this poses definitional problems similar to those that attend democracy. As one commentator has noted, thinking about justice in non-Western cultures involves a range of experiences and behaviors that possesses unfamiliar and disparate semantic and cultural boundaries.⁴²

Beginning with the Qur'an itself, which emphatically enjoins Muslims to dispense justice,⁴³ it is clear that the ideal of justice resonates throughout the course of Islamic history.⁴⁴ The ideal of justice is a consistent theme in Muslim perspectives on the current conflict between Israel and the Palestinians. It is especially significant in Shi'ism, as is evident from the earliest times in the discourses of Imam 'Ali as reported in the *Nahj al-Balaghah*.⁴⁵ In modern times, the ideal of justice is strongly asserted in Ayatollah Khomeini's speeches and writ-

⁴² Lawrence Rosen, *Justice in Islamic Culture and Law*, in PERSPECTIVES ON ISLAMIC LAW, JUSTICE, AND SOCIETY 33 (R.S. Khare ed., 1999).

⁴³ See FARID ESACK, THE QUR'AN: A USER'S GUIDE 177 (2005) ("Justice receives such prominence in the Qur'an that it is regarded as one of the reasons why God created the earth . . ."). See also *id.* ("Lo! Allah enjoineth justice . . .") (quoting the Qur'an 16:90); see also *id.* at 178 ("O you who have attained unto faith! Be ever steadfast in upholding justice . . .") (quoting the Qur'an 4:135).

⁴⁴ See *id.* at 33-52 (discussing the meaning of justice in Islam). See also MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE (1984). The rule of law in the Islamic context is often equated with the promotion of human rights, similar to the context in which it was used in President Clinton's national security strategy. See *id.* For example, Sabah al Mukhtar writes that:

Translating the term 'rule of law' into Arabic as *Hukm al-Qanun*, found almost no reference to these words [in Arabic law books] . . . [A]re we talking about a subject that Arab lawyers, jurists, judges and practitioners do not think or write about? Probably this is one of the questions which I will leave to others to consider. I have, however, found a number of terms which come near the subject, as a component of the rule of law or a consequence of the application of the rule of law in a country. These include terms such as human rights (*huquq al-insan*), limiting state powers (*taqid sultat al-dawla*), equality (*al-mussawat*), and basic freedoms (*al-hurriyat al-asasya*).

Sabah al Mukhtar, *The Rule of Law in Iraq: Does It Exist?* in THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 74 (Eugene Cotran & Mai Yamani eds., 2000). He attributes the absence of the rule of law in Iraq under Saddam Hussein both to the regime's failure to apply rights guaranteed to the people by the Constitution, and to the severe deprivations caused by U.S. and U.N. sanctions against Iraq. See *id.* at 74-80.

⁴⁵ MURTADA MUTAHHARI, GLIMPSES OF THE NAHJ AL-BALAGHAH 124 (1997). "Establishment of justice has been declared as being the objective of the mission of all the prophets. The sanctity of justice is so stressed that it is considered the aim of all the prophetic missions." *Id.* According to Imam 'Ali, "Justice is one of the values revived by Islam and given an extraordinary status . . . From 'Ali's view-

ings, in which it constitutes the touchstone for the 1979 Iranian revolution against the perceived injustices and Western dependency of the Shah's secular regime.⁴⁶ It is, however, really the promise of justice that sustains this ideal, just as it is the promise of the eventual return of the Imam Mahdi that is central to Shi'a faith.⁴⁷ The promise of justice inherent in the *Shari'a* has nourished Islamic civilization in the face of frequently corrupt, repressive governments.⁴⁸ A rule of law that is not somehow associated with the promise of justice, even if not part of its definition, is inconsistent with Islam and cannot survive. But like human rights, justice may better be viewed as a value served by, rather than an element of, the rule of law.

I suggest that the middle approach can best inform a study of the rule of law in the Islamic world that is both genuinely Islamic, that speaks to core Islamic values such as equality and justice, and at the same time is also accessible to a Western observer and consistent with Western tradition. To start, constitutionalism has a strong pedigree in classical Islamic history. The independence of the religious and legal scholars (the *ulama* and the *fuyaha*) from dominance and control by the secular leaders (the caliphs, sultans, and shahs) sustained a real separation of powers that limited the discretion of the rulers and protected the people to a significant extent from arbitrary control.⁴⁹ The judges and the scholars, not the secular rulers,

point, it is the principle of justice that is of crucial significance in preserving the balance of society" *Id.* at 131-39.

⁴⁶ See RAY TAKEYH, *HIDDEN IRAN* 12 (2006). See also IMAM RUHOLLAH KHOMEINI, *ISLAM AND REVOLUTION I: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI* (1941-1980) 65-66 (Hamid Algar ed. & trans., 1981). According to Khomeini:

To assume the function of government does not in itself carry any particular merit or status; rather it is a means for fulfilling the duty of implementing the law and establishing the Islamic order of justice . . . It is the duty of the Imams and the just *fuyaha* to use government institutions to execute divine law, establish the just Islamic order, and serve mankind.

KHOMEINI, *supra*, at 65-66

⁴⁷ See Sam Knight, *Al-Askariya Shrine: 'Not Just A Major Cathedral,'* TIMESONLINE, Feb. 22, 2006, available at <http://www.timesonline.co.uk/tol/news/world/iraq/article733713.ece>.

⁴⁸ SANDRA MACKEY, *THE IRANIANS: PERSIA, ISLAM, AND THE SOUL OF A NATION* 103 (1996). "As with the same concept in pre-Islamic Iran, the ideal of justice in Islam was, and is, ingrained in the yearnings of the soul rather than the logic of the mind." *Id.*

⁴⁹ WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 205 (2005).

owned the law. While the rulers exercised broad executive powers and could make rules supplementary to the *Shari'a*, their legitimacy and survival were dependent on the support of the scholars as the keepers of the only law that commanded the "civic reverence" of the people. As Professor Hallaq has noted, "It was this reality – which made the approval of the men of law indispensable to the acts of politics – that gave formative Islam what we call today the rule of law."⁵⁰

The compatibility of Islamic law and governance with the rule of law in its narrow sense was also evident during Islam's classical era. The work of the legal scholars in consolidating and compiling the *hadith*, the development of the *madhhabs* (the schools of law), and the reliance of the *muftis* (legal interpreters) on these works in issuing *fatwas* (legal rulings) to judges and interested parties, all led to a stability and consistency in the law and legal procedures that prevailed throughout the Islamic world.⁵¹ The courts were open to, and used often by, the people to seek redress of their grievances not only against each other, but also against the government and its officials.⁵² The judges were usually and sometimes famously noted for their independence from political control.⁵³ This sophisticated legal system in turn helped support the artistic, scientific, and commercial achievements of the classical era – achievements that a Western scholar like Joseph Raz might well argue are the virtues, if not inevitable outcomes, of a society based on the rule of law.

To be sure, as in any society and historical period, there were exceptions to the general observance of the rule of law;

The dire need for political legitimacy imposed on the ruling powers the imperative of compliance with the law, and if they manipulated their way out of such compliance – which at times they did – it was an act that could not have been so significant as to deprive them of the mantle of legally approved political legitimacy.

Id. See also KHALED ABOU EL FADL, *ISLAM AND THE CHALLENGE OF DEMOCRACY* (2004). Throughout Islamic history, the jurists (*ulema*) performed a wide range of economic, political, and administrative functions and, most important, acted as negotiatory mediators between the ruling classes and the laity. . . . While they legitimated and often explained the rulers to the ruled, the jurists also used their moral weight to thwart tyrannous measures and at times led or legitimated rebellions against the ruling classes. ABOU EL FADL, *supra*, at 14-16.

⁵⁰ HALLAQ, *supra* note 49, at 205.

⁵¹ See *id.* at 200-04; see also FAZLUR RAHMAN, *ISLAM* 80-81 (2d ed., 1979).

⁵² EL FADL, *supra* note 49, at 14-16.

⁵³ See *id.* at 16.

judges were not always altruistic, and rulers could be arbitrary and brutal. Moreover, this history eventually saw constraints placed on the continued development of Islamic jurisprudence that has affected the rule of law in modern times. Reasoning by analogy (*qiyas*) eventually became for many Sunni scholars the only legitimate source of developing new legal rulings.⁵⁴ While the promulgation of positive legal rules (*qanun*) by secular rulers was increasingly used to supplement the *Shari'a*,⁵⁵ mainstream Sunni jurisprudence began to resist renewed interpretation of the original legal texts. The principle of consensus (*ijma*) of the legal scholars as a source of law led to the famous "closing of the door" to *ijtihad* (intellectual effort to derive new legal rulings from the sources of the divine law) after the first three centuries of the Islamic era, that is, around the mid-tenth century (though the extent of this closure is debatable).⁵⁶ By then, the immense volume of *hadith* had been collected, thoroughly examined, and agreed upon, with some variations among the four Sunni schools of law. The inherent conceptual difficulty of deriving through *ijtihad* a consistent, clear, and relatively permanent set of rules from the sources of Islamic law to meet modern social conditions is perhaps the most important problem facing modern scholars and leaders today who seek to renew or expand the scope of the *Shari'a* as a basis for their states' legal systems.⁵⁷ Nevertheless, when

⁵⁴ See RAHMAN, *supra* note 51, at 71-75.

⁵⁵ *Id.* at 80. A small body of secular legislation was created as early as the Abbasid Caliphate in order to supplement the *Shari'a*, but became more developed during the era of the Ottoman Empire. *Id.* The term *qanun* has the connotation of scientific as well as positive law. Letter from Dr. Khosrow Badiozamani to author (Mar. 28, 2002) (on file with author).

⁵⁶ See, e.g., Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, XVI INT'L. J. MIDDLE E. STUD. 3 n.1 (Mar. 1984).

⁵⁷ See generally WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997). Hallaq states: "[T]here is little question that dissatisfaction with the means and results of legal reform permeates many levels of Muslim society, particularly the educated religious elite." *Id.* at 211. He describes two current responses to this problem: the secular, which favors the complete displacement of Islamic law by western codes and procedures; the traditional, which seeks to return to a system based on a "pure" (traditional) version of the *Shari'a* (such as in Saudi Arabia); and two trends he calls "religious utilitarianism" and "religious liberalism" that together seek "the reformulation of legal theory in a manner that brings into successful synthesis the basic religious values of Islam, on the one hand, and a substantive law that is suitable to the needs of a modern and changing society, on the other." *Id.* at 213-14.

viewed from the perspective of the rule of law as described here, the contours and issues of this struggle should be easily recognizable to a Western student.

The Ottoman and Safavid empires, along with the Mughal Empire to the East, initiated the “modern” era of Islam in the sense that, to a much greater extent than in the past, the state and its law became dominant and significant in the lives of virtually all the people.⁵⁸ The rulers themselves exercised greater personal authority to make and enforce law.⁵⁹ In a system in which God is sovereign and democracy historically absent, did the conditions for the rule of law (constitutionalism and formal legality) exist either in theory or in practice in these empires?

The short answer is yes. Despite increased centralization and bureaucratization of the regimes, including greater control by the state over its legal actors and institutions, in terms of constitutionalism the political class and the legal class continued to operate in a rough balance of power, with the Sultans and Shahs observant of and subservient to the *Shari’a*.⁶⁰ In terms of formal legality, despite the proliferation of *qanun* and state-controlled courts, the *Shari’a* maintained its importance in providing legitimacy to, and relative stability and clarity of, legal rules throughout the system. In these empires, the *Shari’a* courts were more independent of political control and less open to corruption and abuse of discretion than the state tribunals. Contrary to “a regular theme in Western discourses on the subject,” *Shari’a* courts in Ottoman and Safavid times tended to “operate consistently and predictably with its particular combination of *Shari’a*, government statutes and custom relating to time and place.”⁶¹

⁵⁸ See WILLIAM L. CLEVELAND, *A HISTORY OF THE MODERN MIDDLE EAST* 39-40 (2004).

⁵⁹ See *id.*

⁶⁰ See BERNARD LEWIS, *FROM BABEL TO DRAGOMANS: INTERPRETING THE MIDDLE EAST* 115 (2004). The Sultan was not a true despot, but the supreme custodian of the God-given Holy Law of Islam, to which he himself was subject. It is true that the Holy Law granted him almost despotic power, and that it did not provide for its own enforcement against him. But ultimately the Holy Law remained the basis of the social and political structure of the Empire, and was observed by the Sultans, whose sovereignty was accepted and respected by the people, both Muslims and Christian, as right and inevitable. *Id.* at 118.

⁶¹ SAMI ZUBAIDA, *LAW AND POWER IN THE ISLAMIC WORLD* 70 (2003).

But in the late modern period, dominated in the nineteenth and twentieth centuries by European colonialism, which resulted in the widespread introduction of Western legal codes and institutions and the relegation of the *ulama* to the periphery of the political-legal system, the rule of law as it had existed previously broke down. In the words of one scholar, “[h]aving codified the law on the basis of Western legal models, and having virtually decimated the infrastructure of the traditional legal profession, the nation-state jettisoned Islamic law altogether and reigned supreme as the unchallenged center of legal and political power.”⁶² Both aspects of constitutionalism were disrupted by the experience of Western colonialism. Structurally, the marginalization of the *ulama* removed an effective check on the power of the secular rulers. As a result, it has been noted that modern Arab constitutions are used to consolidate power, not disperse it.⁶³ Additionally, despite the views of many reformers that modernity required the adoption of European-style codes and laws, the new legal frameworks, especially constitutional structures, were, and still are, often seen as foreign and illegitimate. In terms of formal legality, relegation of the *Shari’a* to a few areas such as family law, or in some cases its abolition, removed those restraints that had been reasonably effective even in Ottoman and Safavid times in limiting the complete discretion of the rulers to create and change law (*qanun*) and control the personnel and work of the courts, to the detriment of stability and clarity in the law, of judicial independence, and of due process in judicial procedures. Of course there were and are many exceptions, including judges who have maintained their independence in the face of official pressure to conform to government policies.⁶⁴ But the contours of the problem when measured against the rule of law criteria are clear.

⁶² Wael B. Hallaq, “Muslim Rage” and Islamic Law, 54 HASTINGS L.J. 1705, 1713 (2003).

⁶³ See NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 161-80 (2002). Brown notes that the first Islamic state in Medina was based on the rule of law, in which the organs and agencies of the government were subject to the same legal system (the *Shari’a*) that governed the individual citizen. That model, however, was almost immediately abandoned in the political struggle over leadership of the Islamic empire and the development of the caliphate. *Id.* at 168-69.

⁶⁴ See *Not Yet a Democracy*, ECONOMIST, Dec. 10, 2005 (regarding politics in Egypt).

As a result of these historical developments, the rule of law remains undernourished in the modern Islamic Middle East. In many of the successor states to the Ottoman Empire – Syria and Iraq, for example – where Islamic law has receded, one clearly sees the consequences of this history for the rule of law: arbitrary government, constitutions without constitutionalism, and a serious deficit in formal legality. In post-Safavid Iran, although the country was never formally colonized, these developments triggered escalating conflicts between the *ulama* and the government.⁶⁵ They destabilized the separation of powers and reduced the legitimacy and authority of the secular Qajar and Pahlavi shahs which, despite the aggressive Westernization program of Reza Shah and his son in the twentieth century, eventually led to the revolutionary assumption of governmental power by the *ulama* in 1979.⁶⁶

Yet the idea of the rule of law, as noted earlier, has enjoyed a resurgence in the current debate over the future direction of the Muslim world. Today, it is in Iran that the struggle over reviving the rule of law within an Islamic framework is perhaps most visibly being played out. Although it is a predominantly Shi'ite country, the struggle for the rule of law in Iran, and arguments over its compatibility with Islamic law, are closely followed throughout the Middle East as well as the West.⁶⁷ Iran is, in many respects, one of the most modern countries in the Middle East, with a relatively large urban population of young, educated and active men and women, many of whom openly express admiration for the West and America.⁶⁸ At the same

⁶⁵ See generally Washington State University Website on World Civilizations, <http://www.wsu.edu/~dee/SHIA/MODERN.HTM> (last visited Apr. 8, 2008).

⁶⁶ See generally *id.*

⁶⁷ See Thomas Friedman, *Iran and the War of Ideas*, N.Y. TIMES, June 19, 2002, at A23. Friedman has stated, "If Iranian thinkers and politicians were ever to blend constitutional democracy with a redefined Islam that limits itself to inspiring social norms, not running a state, it could have a positive impact on the whole Muslim world, from Morocco to Indonesia, that Iran's Islamic revolution never had." *Id.*; see also Afshin Molavi, *The Disenchantment*, 27 WILSON QUARTERLY 48 (2003). Molavi notes, "Today, a different movement within Iran has caught the attention of Muslim intellectuals and dissidents: the movement toward democracy. The only internal argument seems to be over whether to seek a secular democracy or the Islamic democracy that leading reformists call for." *Id.* at 55.

⁶⁸ See generally Nazila Fathi, *Iran: The Next Revolution? Iran's Population is Mostly Young, Educated, and Frustrated with the Country's Social Restrictions. And They're Starting to Make Noise*, N.Y. TIMES UP FRONT, Jan. 10, 2003, avail-

time, the government flaunts its independent, even anti-Western credentials, and more than a few intellectuals are vocal in their rejection of Western cultural domination (what some have termed "west-toxification").⁶⁹ This dynamic and complex scene helps make developments in Iran especially relevant to many Muslims, Sunni and Shi'ite alike.

The opening act of the drama of the Islamic revolution and the rule of law was the Ayatollah Khomeini's establishment of government by the Islamic jurist (*velayat-e faqih*).⁷⁰ This concept of rule by Islamic jurists is not one that is consistent with Shi'a tradition, which was characterized throughout most of its history by the Shi'a *ulama's* distrust of and distance from government and political rule. The *velayat-e-faqih* is revolutionary in both Iranian political history and Shi'a tradition. In perhaps no other modern country (with the possible exception of Saudi Arabia) has the constitutional requirement, inherent within the

able at <http://www.thefreelibrary.com/Iran%3a+the+next+revolution%3f+Iran's+population+is+mostly+young%2c...-a096501241>; *Iran's Frustrated Generation*, BBC News, Jul. 10, 2003, http://news.bbc.co.uk/2/hi/middle_east/3053383.stm (last visited November 18, 2007).

⁶⁹ The term "west-toxification" (in Persian, *gharb zadegi*) has become popular among Iranian intellectuals. See ABDOLKARIM SOROUSH, REASON, FREEDOM, & DEMOCRACY IN ISLAM: ESSENTIAL WRITINGS OF ABDOLKARIM SOROUSH 161 (Mahmoud Sadri & Ahmad Sadri eds. & trans., 2000). A prominent and (among "liberals") extremely popular contemporary Iranian philosopher, Soroush has ascribed two meanings to the term. The first, and most common, is "the nauseating imitation of everything western even at the expense of immolating the most eminent cultural assets and legacies of our own: speaking with their tongue, thinking with their brain, looking through their eyes, and wailing their pain." *Id.* at 160. Soroush, however, also ascribes a second meaning to the term. "It maintains that our Islamic and native cultures are long past their prime, that they are exhausted and depleted. In this view the Islamic and native cultures are incapable of revival and renewal, having been superseded by the West." *Id.* at 161. The former view, he asserts, "implies a critical approach to the Western culture . . . the West must be carefully examined but vigorously resisted. The useful elements must be absorbed and the harmful rejected But the second interpretation inspires passivity and feebleness of merely observing ones [sic] own predestined fate." *Id.*

⁷⁰ A discussion of the *velayat-e faqih* can be found in Khomeini's various writings prior to the 1979 Iranian revolution. See KHOMEINI, *supra* note 46. Daniel Brumberg has summarized the doctrine as one that evolved through several iterations into a theory of government that combines primary judicial, legislative, and executive power in the hands of clerics, and particularly in one prominent religious guide (*marja'*), who is especially just, moral, and knowledgeable, and therefore has the duty to rule as the expert (*faqih*). See DANIEL BRUMBERG, REINVENTING KHOMEINI: THE STRUGGLE FOR REFORM IN IRAN 81-97 (2001).

velayat-e-faqih, that all laws be based on Islamic criteria been taken so seriously.⁷¹

The second act in this drama, commencing with the death of Ayatollah Khomeini in 1989,⁷² but most prominently following the 1997 election of Mohammed Khatami as President of Iran,⁷³ was the effort to convert the *velayat-e-faqih* into a repub-

⁷¹ Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran], art. 4 [1980], available at <http://www.iranonline.com/iran/iran-info/Government/constitution.html>. Article 4 of the Constitution requires that "All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all laws and regulations" *Id.*

⁷² The role of the rule of law in shaping the future of the Islamic Republic was debated extensively in the years immediately following the death of Ayatollah Khomeini in 1989. For example, the rule of law was discussed at length in the Parliament (*majles*) before and after the election of May 1992, where delegates debated many of the elements of the rule of law discussed here: creating a national consensus that the *Shari'a* is the constitutional basis for the rule of law, a better definition of separation of powers within the government, the absence of due process and therefore justice in the conduct of secret trials, and especially the current absence and need for stable and clear laws to guide political, economic, and social decisions. BRUMBERG, *supra* note 70, at 175-84. A review of major Iranian newspapers from 1999 to 2003, available in translation from the Foreign Broadcast Information Service (FBIS), reveals extensive and frequent references to the rule of law in speeches and commentary reported by the Iranian media. See, e.g., *MPs Say Corruption Can Be Uprooted Through Rule of Law, Gov't Accountability*, TEHRAN TIMES, July 3, 2001; *Khatami appeals to hard-liners*, THE IRAN BRIEF, June 7, 1999; *Interior Minister: Only Rule of Law Can Guarantee Security*, TEHRAN TIMES, Oct. 14, 2000.

⁷³ The main themes of President Khatami's 1997 election campaign have been described as "the institutionalization of the rule of law, the expansion of the press, addressing the needs of the young and elevating the role of women in society." ANSARI, *supra* note 27, at 125-26. It has been noted that Mr. Khatami, besides enjoying the support of the vast majority of his people, understands, and agrees with, those "nonnegotiable demands of human dignity" that Mr. Bush adumbrated during his state-of-the-union address: "the rule of law, limits on the power of the state, respect for women, private property, free speech, equal justice, and religious tolerance." *How Not to Make a Friend of Iran; Iran and America*, ECONOMIST, Feb. 9, 2002, at 40. Said Amir Arjomand writes:

His [Khatami's] advocacy of the rule of law and civil society has set in motion a constitutional crisis that marks a new phase in the history of post-revolution Iran. By far the most important and repeated slogan of Khatami's election campaign was *hokumat-e qanun* (the rule of law). The implicit contrast to *hokumat-e eslami* (Islamic government). . . stands out clearly in hindsight. A novel and consistent political discourse has grown around Khatami's theory of political development under the rule of law, a discourse which stands in sharp contrast to the Islamic revolutionary discourse and rhetoric.

lic based both on the *Shari'a* and the rule of law. The framework for understanding the rule of law as described here was clearly evident as this act unfolded.

As noted earlier, the Khatami presidential campaign was based on the promise to promote the rule of law and civil society. Said Amir Arjomand summarized the significance of this campaign, writing that:

[Khatami's] advocacy of the rule of law and civil society has set in motion a constitutional crisis that marks a new phase in the history of post-revolution Iran. By far, the most important and repeated slogan of Khatami's election campaign was *hokumat-e qanun* (the rule of law). The implicit contrast to *hokumat-e es-lami* (Islamic government) stands out clearly in hindsight. A novel and consistent political discourse has grown around Khatami's theory of political development under the rule of law, a discourse which stands in sharp contrast to the Islamic discourse and rhetoric.⁷⁴

During the Khatami era, the liberal Iranian press frequently emphasized the compatibility of the rule of law with the *Shari'a*, especially within Shi'ite tradition.⁷⁵ However, in terms of formal legality, there are difficulties in reconciling (and therefore legitimizing) new laws that are necessary to address the conditions and problems of a modern society, and that meet the rule of law criteria of clarity and stability, while also remaining wholly consistent with the *Shari'a* as required by the Constitution. These difficulties are evident in the confusing variety of legislation that, without a clear basis in the *Shari'a*, has been derived from such ambiguous and controversial legislative

Said Amir Arjomand, *Civil Society and the Rule of Law in the Constitutional Politics of Iran under Khatami*, SOC. RESEARCH, Summer 2000, at 1, available at http://www.findarticles.com/cf_dls/m2267/2_67/63787333/print.html.

⁷⁴ Arjomand, *supra* note 73, at 1-2. Arjomand notes, however, that Khatami has not disassociated the rule of law from Islamic principles, only from certain constitutional problems that had arisen in the course of development of the *velayat-e faqih*. The President nevertheless took the occasion to emphasize that the rule of law was the most fundamental principle of the Islamic revolution, and that only through 'its main manifestation, the Constitution, can many of the principles of the revolution such as piety, justice, national reconciliation, national security and freedom find real meaning. *Id.* at 3.

⁷⁵ ANSARI, *supra* note 27, at 126-27.

principles as “interest of the state” and “emergency.”⁷⁶ Laws in Iran today often lack durability and consistency, and the creation of new law is not subject to open, general, and stable rules, which are essential rule of law characteristics. This has led many in Iran to question whether the regime has become Islamic in name only, and to reject or resist further reliance on these ambiguous legal categories.⁷⁷

Furthermore, political trials of journalists, intellectuals, and others viewed as threats to the regime have revealed an absence of due process and judicial independence in the legal system.⁷⁸ Criminal charges are often vague,⁷⁹ allegations of torture are frequent,⁸⁰ and some trials can be conducted in secret.⁸¹ Both the official and unofficial law enforcement organi-

⁷⁶ ASHGAR SCHIRAZI, *THE CONSTITUTION OF IRAN: POLITICS AND THE STATE OF THE ISLAMIC REPUBLIC* 161-253 (John O’Kane trans., I.B. Tauris Publishers, 1997).

⁷⁷ *Id.* at 171-72.

⁷⁸ The conduct of trials by Revolutionary Courts against “reformists” and others who criticize the regime has led the executive director of the Middle East and North Africa division of Human Rights Watch to comment that “[t]he judicial authorities are making a mockery of [the] rule of law in Iran.” Nazila Fathi, *Hard-Liners Put Iranian Journalist on Trial on Spying Charges*, N.Y. TIMES, Mar. 14, 2002, at A13. The former President of Iran, Ali Akbar Hashemi Rafsanjani, defended the closure of “reformist” newspapers on the grounds that “they’re putting freedom before Islam, freedom before faith.” Susan Sachs, *Top Iranian Cleric Defends Closing of Reformist Publications*, N.Y. TIMES, Apr. 29, 2000, at A1.

⁷⁹ See, e.g., *To Prison*, ECONOMIST, Jan. 20, 2001, at 42 (“setting up a group aiming to destroy national security”), *Green Danger*, ECONOMIST, Nov. 11, 2000, at 59 (“spreading propaganda against the regime”), Amy Waldman, *Iran Intensifies Crackdown on Opposition*, N.Y. TIMES, Dec. 8, 2001, at A8 (intending to “weaken the faith of students and youth in religion and Islamic principles”); Nazila Fathi, *Iran Sentences Reformist to Death for Insult to Prophet Muhammad*, N.Y. TIMES, Nov. 8, 2002, at A8 (“insulting the Prophet Muhammad” by saying that “Muslims should not follow religious leaders ‘blindly’”).

⁸⁰ See Elaine Sciolino, *A Lifelong Dissident Defies Iran’s Rulers on Torture*, N.Y. TIMES, Feb. 22, 2003, at A3.

⁸¹ Qanuni Assassi Jumhuri’i Isla’mai Iran, [The Constitution of the Islamic Republic of Iran] art. 165 [1980] available at <http://www.iranonline.com/iran/iran-info/Government/constitution.html>. Article 165 of the Iranian Constitution states: “Trials are to be held openly and members of the public may attend without any restriction; unless the court determines that an open trial would be detrimental to public morality or discipline, or if in case of private disputes, both the parties request not to hold open hearing.” *Id.* The exception for cases involving “public morality or discipline” has been applied frequently. See, e.g., Nazila Fathi, *Court Disbands Iranian Party, Sentencing 33 Members to Jail*, N.Y. TIMES, July 29, 2002, at A4. In May 2000, thirteen Iranians (eleven Jewish and two Muslim) were tried on charges of spying for Israel. The trials, which received extensive coverage in the Western press, were conducted in secret “for national security reasons.” Susan

zations are often selective and politically motivated in their activities, which are frequently directed at controlling certain groups, including women and students, rather than guided and restrained by impartial rules.⁸²

Moreover, despite the assumption of political power by the *ulama*, the elements necessary for the other aspect of the rule of law, the development of constitutionalism, have been subverted by the failure to create the constitutional framework necessary to disperse power, and by the failure of the government to acquire the legitimacy necessary to sustain constitutionalism.⁸³

Sachs, *First of Iranian Spy Suspects is Tried and Confesses on TV*, N.Y. TIMES, May 2, 2000, at A1; see also Susan Sachs, *10 Jews Convicted by Iranian Court in Espionage Case*, N.Y. TIMES, Jul. 2, 2002, at 11. Five of the accused were acquitted, and the remainder received jail sentences of up to thirteen years. *Iran Pardons Five Jews Jailed as Spies*, N.Y. TIMES, Feb. 22, 2003, at A3. Three were pardoned in October, 2002, two completed their sentences, and the others received pardons in February 2003. *Id.*

⁸² Along with the regular police and the armed forces, Iran's security forces include the Revolutionary Guards (a militia organization), the *basij* (a volunteer paramilitary organization), and the morals police. These are all under the control of the supreme leader (*rahbar*). See *Islam's Bully-boys*, ECONOMIST, Sept. 9, 2000, at 48. [T]he hardline establishment, when it is doing well, as it is now, regularly sets off one of its most powerful weapons, the ideologically-driven gangs of young men who believe that they are fighting for Islam. Some of these youngsters are members of the Revolutionary Guard, others belong to the Islamic *basij* militia. They are there to take on dissidents or, indeed, anybody who flouts the rules. *Id.* at 48.

⁸³ Between 1905 and 1911, Iran experienced a "Constitutional Revolution" in response to the corruption of the declining Qajar dynasty, poor economic conditions, and exposure to contemporary Western ideas. See MACKAY, *supra* note 48, at 136. Sandra Mackey has stated that:

[I]t was the Constitutional Revolution, through the establishment of a parliament, which defined a new source of authority in Iran – that of the people. Although originally conceived in terms of Western liberalism, Iran's "house of justice" took root in soil containing the Persian concept of the righteous king and the Islamic tradition of justice. Deprived of most of its goals by domestic dispute and foreign intervention [by Russia and Great Britain], the Constitutional Revolution had grappled with ideas introduced by the West, took a stand for national independence, philosophically limited the power of the king, and debated the relationship between the law of man and the law of God. All laid the foundation of contemporary Iran.

Id. at 124. Though short-lived, that period retains an importance and immediacy to modern Iranian reformers. See AFSHIN MOHLEVI, PERSIAN PILGRIMAGES 209-25 (2002). Arguably, the continuing relevance of the Constitutional Revolution to current reformers is due in part to its incorporation of rule of law themes, including justice and the source of laws that are not solely Western concepts, but are also consistent with Persian-Islamic tradition. Early drafts of the 1979 Constitution

Among other structural problems, the Iranian constitution places control of the judiciary exclusively in the hands of the unelected supreme leader (the *rahbar*).⁸⁴ All legislation must be approved by the Guardian Council,⁸⁵ a body whose members are appointed by the *rahbar*⁸⁶ without effective supervision by the parliament, and whose power of judicial review is virtually unlimited.⁸⁷ The Guardian Council consists of six religious men appointed directly by the *rahbar*,⁸⁸ and six legally-trained jurists selected by the Parliament (*majles*) from a slate of twelve individuals nominated by the head of judiciary,⁸⁹ who is himself appointed by the *rahbar*.⁹⁰ The Council reviews all laws for consistency both with the Constitution and with Islamic law.⁹¹ It also approves all candidates for political office on the basis of their Islamic suitability.⁹² President Khatami's modest legislative efforts to correct this structural problem at least demon-

reflected this relevance; in the words of one drafter, Nasser Katouzian, "We tried to mesh two very important points: the necessity of a democratic republic and the principles of Islamic law. We reasoned that sovereignty is essentially from God, but this sovereignty is a donation, a gift, from God to the people as a whole and not to any particular man." GENEIVE ABDO & JONATHAN LYONS, ANSWERING ONLY TO GOD: FAITH AND FREEDOM IN TWENTY-FIRST CENTURY IRAN 94-95 (2003).

⁸⁴ Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 157 [1980] available at <http://www.iranonline.com/iran/iran-info/Government/constitution.html>. Article 157 of the Iranian Constitution states: In order to fulfill the responsibilities of the judiciary power in all the matters concerning judiciary, administrative and executive areas, the Leader shall appoint a just *Mujtahid* well versed in judiciary affairs and possessing prudence and administrative as the head of the judiciary power for a period of five years who shall be the highest judicial authority. *Id.*

⁸⁵ *Id.* art. 94.

⁸⁶ *Id.* art. 91.

⁸⁷ See generally SCHIRAZI, *supra* note 76, at 175-248.

⁸⁸ Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] art. 91 [1980] available at <http://www.iranonline.com/iran/iran-info/Government/constitution.html>.

⁸⁹ *Id.* art. 91.

⁹⁰ *Id.* art. 157.

⁹¹ *Id.* arts. 94, 96.

⁹² See generally Nazila Fathi, *Iran's President Trying to Limit Power of Clergy*, N.Y. TIMES, Aug. 29, 2002, at A1. For a thorough analysis of the Islamic Republic's constitutional development and the ensuing contradictions between Islamic law and governance (*velayat-e faqih*) on one hand, and current actual legal and political practices on the other, see generally SCHIRAZI, *supra* note 76. Rule of law elements from the 1906-1911 Constitutional Revolution were contained in early drafts of the 1979 constitution, such as membership and voting restrictions on the Guardian Council that would limit the ability of any one group (such as the clerics) to dominate the Council's review of all legislation for consistency with the

strated his recognition of the importance of this aspect of constitutionalism to the rule of law.⁹³

President Khatami was also keenly aware of the importance of governmental legitimacy in developing the constitutionalism necessary to support the rule of law. He spoke and wrote of the need for an "intellectual and psychological acceptance" of the law and the legal system by every individual within the polity as fundamental to the rule of law in the Islamic Republic, noting that such acceptance had been absent in Iran's recent history.⁹⁴ The well-known stories of Tehran taxicab drivers refusing to pick up passengers dressed in clerical robes is anecdotal evidence of the problem of constitutional legitimacy in Iran today.⁹⁵

Despite these various rule of law problems, Shi'a tradition has always encouraged vigorous debate and interpretation of the *Shari'a*.⁹⁶ The minority status and persecution of Shi'ites throughout much of history led to a natural rejection of consensus (*ijma*) as a source of law. The acceptance of the law-making authority of the Imams, with highly qualified religious scholars (the *mujtahids*) gradually assuming this authority in the absence of the hidden Imam Mahdi, has allowed Shi'a jurisprudence to continue to develop on the basis of reason (*aql*).⁹⁷ In Iran, this tradition, coupled with periodic suppression of the religious class by Iran's secular rulers and resentment by intellec-

Shari'a. *Id.* at 19; see also ABDO & LYONS, *supra* note 83, at 90-97. These rule of law elements were later removed in the final version of the current constitution.

⁹³ The proposed legislation would restrict the Guardian Council's veto power over legislation, and would remove the power to approve political candidates from the Council to the Interior Ministry, which is controlled by the office of the President. It would also increase the power of the President over the courts, which are currently under the exclusive supervision and control of Ayatollah Ali Khomeini, the unelected *rahbar*. See Ali Akbar Dareini, *Khatami Challenges Hardliners*, N.Y. TIMES, Aug. 29, 2002, at A5; Nazila Fathi, *Iran's President Trying to Limit Power of Clergy*, N.Y. TIMES, Aug. 29, 2002, at A1; Editorial, *Fighting for Reform in Iran*, N.Y. TIMES, Nov. 19, 2002, at A30.

⁹⁴ ALI ASGHAR HAGHDAR, GOFT-E-MAN FARHANGI SIASI KHATAMI [THE CULTURAL-POLITICAL DISCOURSE OF KHATAMI] 86 (1999) (translated for the author by Dr. Manijeh Badiozamani, Feb. 27, 2002).

⁹⁵ Such a scene is depicted in the popular Iranian comedy film MARMOLAK (THE LIZARD) (Antlantis/Faradis, 2004).

⁹⁶ For studies of the historical development of Shi'a Islam, see HEINZ HALM, SHI'A ISLAM: FROM RELIGION TO REVOLUTION (1996), and MOOJAN MOMEN, AN INTRODUCTION TO SHI'I ISLAM (1985).

⁹⁷ See MOMEN, *supra* note 96, at 185-88.

tuals of growing Western influence and involvement in Iranian affairs in the nineteenth and twentieth centuries, enabled the Ayatollah Khomeini to promote and then implement his revolutionary theory of *velayat-e faqih*.⁹⁸ But it also constitutes a foundation for the continuing debate by intellectuals, jurists, and citizens in Iran over the possibility of constructing a modern Islamic society on a foundation of the rule of law. This is a debate with which Western lawyers can empathize.

What, then, does this brief survey, and the Persian story that I have related, teach us? In order to succeed, the rule of law in a modern Islamic state must be tied conceptually to the ideal of justice; a strictly positivist orientation will not suffice in an Islamic context. The constitutional foundation of the rule of law must not only relate to Islamic jurisprudential values and traditions, but also must contain structural provisions, including an independent judiciary, that effectively disperse rather than consolidate power. Finally, attention must be paid to key areas of rules and rule-making, especially the need for stable rules, due process, and rule-bound law enforcement agencies. None of these prescriptions are inherently inconsistent with Islamic law or history; they are not culturally dependent, and are applicable equally to a country with an Islamic tradition as to a Western liberal democracy. They are all still being tested in Iran today, which suggests that the rule of law can transcend the stigma of identification with Western culture, while retaining the elements essential to securing the conditions and values that I have discussed.

Paddy Ashdown, the United Nations High Representative for Bosnia in the 1990s, wrote that "in Bosnia we thought that democracy was the highest priority In hindsight, we should have put the establishment of the rule of law first."⁹⁹ Soon thereafter, just after the American invasion of Iraq in March of 2003, he again wrote, "[a]s in Bosnia, so in Iraq, everything depends on the early establishment of the rule of law: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and the courts. The

⁹⁸ See *id.* at 196, 282-98; see also SCHIRAZI, *supra* note 76, at 30, 33.

⁹⁹ Paddy Ashdown, *What I Learned in Bosnia*, N.Y. TIMES, Oct. 28, 2002, at A25.

process is sequential.”¹⁰⁰ He was right, although we did not listen.¹⁰¹ With the foundation of the rule of law in place, people have the ability to make choices and conduct their activities with a degree of confidence that they know the “rules of the road,” that those rules will not suddenly and arbitrarily change, and that the government and courts will enforce the rules fairly when problems arise. It is these conditions that give people a stake and confidence in the future of their country. It is not easy to build and sustain, but the rule of law has roots deep in both Western and Islamic history and political-legal culture. It offers common ground for the beginning of a more productive dialogue and interaction between the Islamic world and the West. It is a good place to start.

¹⁰⁰ Paddy Ashdown, *What Baghdad Can Learn from Bosnia*, THE GUARDIAN, Apr. 22, 2003, available at http://www.ohr.int/print/?content_id=29758.

¹⁰¹ In his State of the Union address on January 23, 2007, President Bush declared “Our goal is a democratic Iraq that upholds the rule of law, respects the rights of its people, provides them security and is an ally in the war on terror.” *The State of Our Union Is Strong; Our Cause in the World Is Right*, N.Y. TIMES, Jan. 24, 2007, at A16 (quoting President George W. Bush). Perhaps we are now beginning to get the sequence right.