

ARTICLE

A CORDOBA INITIATIVE PROJECT

JUSTIFICATION & THEORY OF
SHARIA LAW: HOW THE
AMERICAN DECLARATION OF
INDEPENDENCE, BILL OF RIGHTS AND
CONSTITUTION ARE CONSISTENT
WITH ISLAMIC JURISPRUDENCE

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In the first half of the twentieth century, the hitherto European concept of “nation-state” with new national identities was introduced in much of the world. With the end of the First World War in 1917 and of the Ottoman Caliphate in 1924, new nation-states were created and emerged from the previous Ottoman empire and its areas of influence: among these new nation-states were Iraq, Jordan, Syria, Lebanon, and Saudi Arabia in the Arab Middle East; and Greece, Turkey, Yugoslavia, and Albania in Europe. Other new nation-states were born in South and South East Asia, drawn around the boundaries of British and Dutch colonies (such as Malaysia and Indonesia respectively) and the vestiges of the Mogul empire in India.

The rise of ethnic and language-based nation-states catalyzed the notion of a *religious* nation-state—the idea of a Jewish and Islamic State having been conceived in the late nineteenth century—resulting in the almost simultaneous birth in 1947–1948 of the Islamic nation-state of Pakistan in

1. Founder and Chairman of the Cordoba Initiative. Liberally incorporating comments from: MOHAMMED ARKOUN, *RETHINKING ISLAM* (Robert D. Lee trans., 1994); KHALED ABOU EL FADL, *ISLAM AND THE CHALLENGE OF DEMOCRACY* (Joshua Cohen ed., 2004); Ebrahim Moosa, *The Poetics and Politics of Law After Empire*, 1 *UCLA J. ISLAMIC & NEAR E. L.* 1 (2002) [hereinafter Moosa, *Poetics*]; Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 *J.L. & RELIGION* 185 (2001) [hereinafter Moosa, *Dilemma*]; FEISAL ABDUL RAUF, *WHAT'S RIGHT WITH ISLAM* (2004); FEISAL ABDUL RAUF, *ISLAM: A SACRED LAW* (2000); ABDULAZIZ SACHEDINA, *THE ISLAMIC ROOTS OF DEMOCRATIC PLURALISM* (2001); and International Crisis Group, *Understanding Islamism*, 2005 *MIDDLE E./N. AFR. REP.* 37.

the Indian sub-continent, and of the Jewish nation-state of Israel in Palestine.

Muslim political activists, not Muslim scholars and theologians, created Pakistan. This late-nineteenth/early-twentieth century idea of “Islamic State” originated as a reaction to powerful forces acting upon the Muslim World. Among these forces were nationalist movements that divided the notion of a pan-Islamic concept of the *ummah* (previously united by the Ottoman Caliphate and therefore seen by many as a way to break up the Muslim World); the colonial influence of Western Europe; and the new rise of Soviet Communism—all of which sought to influence the Muslim World away from its culture, norms, and beliefs.

In the post–World War II bipolar world, pressure was placed upon many countries to align themselves with either the West or the Communist bloc. In reaction, Muslim majority nations established in 1969 the Organization of the Islamic Conference, a fifty-seven-nation bloc that sought to protect Islamic values.

In almost every one of these nations, Islamic political parties emerged whose purpose was the establishment of an Islamic State. But what did this mean? As these nations were majority Muslim, the term “Islamic State” obviously meant something more. However, no consensus on the definition of the term Islamic State exists.

To this end, therefore, I conceived of a project called the Sharia Index Project.

Phase One of this project explored the degree of attainable consensus among a broad spectrum of contemporary Muslim scholars (Sunni and Shia) on defining the term Islamic State. The proposed understanding of Islamic State is a state that abides by a list of Islamic Law (Sharia)–based criteria that it should protect, provide for, and further. Phase One involved research by scholars, followed by discussion and refinement.²

In Phase Two, a methodology was developed to qualitatively and quantitatively gauge countries (Muslim and non-Muslim majority States) on how well they have actually fulfilled and met each of these criteria, and thereby determine which institutional systems have currently achieved the most in furthering the set of criteria established in Phase One. The Cordoba Initiative had discussions with Zogby International, Gallup, Pew, and others, to explore how to develop a methodology to measure and index other nations according to their level of compliance with Sharia.³

2. I have convened six meetings in Kuala Lumpur, Malaysia, of such a group of scholars from Morocco to Indonesia, from 2006–2009 wherein a working definition of an Islamic State was benchmarked.

3. Among the possibilities is to conduct a poll where citizens are asked to rate their own country on how well it meets each of the criteria Islamic jurists will have established in Phase One. Thus, while the role of the Islamic jurists will be to list the principles and rights an Islamic State should safeguard, citizens themselves would rate their own countries on how well their own

The blend of Phase One results, namely providing an ends-driven definition of an Islamic State to counterpoise and complement institution-driven definitions, combined with the data from Phase Two, namely measurable data on which countries achieved the highest scores in Sharia-compliance, will contribute to the continuing scholarly debate on what comprises “Islamically authentic” institutional forms and criteria of governance. The Sharia’s emphasis on social justice and safety nets for the poor may well result in certain non-Muslim majority nations scoring higher on these line items than certain Muslim majority nations.

By establishing a methodology that demonstrates which states have maximally succeeded on the ground in establishing “Islamic ends,” the Sharia Index Project hopes to shift the discourse away from a demographic- or institution-based definition of an Islamic state to showing which institutional forms have best succeeded in achieving said ends and why. Byproducts of this will be detailing the points of similarity and difference between Western and Islamic understandings of law and justice and improving the nature of the discourse on Sharia between the West and the Muslim world.

In this paper, where my intent is to show how the American Declaration of Independence, Bill of Rights, and Constitution are consistent with Islamic jurisprudence, I shall first have to tell the reader the story of:

- The objectives of the Sharia Index Project, the rationale for rating nations according to Sharia compliancy, the coherence of the term Islamic State, recent trends in shifting from an institutional- to an ends-based definition of the term Islamic State, and some terms that have been used to differentiate non-Islamic States from Islamic States;
- Challenges in developing a coherent theory of Sharia compliance on governance. This includes the issue of political power and how those holding political power have shaped the discourse on the subject, the concept of human rights and comparing the rise of human rights in recent Western discourse to the Islamic concept of human rights;
- How an Islamic human rights doctrine might be established; and
- How the American Declaration of Independence, Constitution, and Bill of Rights are consistent with Islamic jurisprudential thought.

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governments meet these standards. This takes the burden of grading off the shoulders of the scholars and makes it as objective as possible.

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I. INTRODUCTION AND GENERAL REMARKS

A. *Objectives of the Sharia Index Project*

Among the objectives of this project are:

1. To inform the public both in the Muslim world and in the West—especially decision makers in the United States and abroad—and clarify their understanding on the nuances of what an “Islamic State” substantively means.

2. To decouple the nomenclature “Islamic State” from a demographic definition and anchor it to one based on criteria of governance.
3. To posit and test the possibility of establishing a broad consensus on an ends-driven definition of Islamic governance, and to differentiate that from an institution-driven definition.
4. To clarify the relationships between institutions of religion and of political power according to Islamic law.
5. To make the discourse on “religious” versus “secular” states more sober and dispassionate, and to delineate and nuance differences and overlaps.
6. To provide Muslim societies with an informed and objective basis on how they define and grade themselves as “Islamic,” and how they might improve themselves on that scale.
7. To reduce Western nations’ fear of “Islamic States.” We believe that United States policy vis-à-vis Muslim nations would be well served, and more coherent, if it revealed a nuanced understanding of the role of religion, especially Islam, in Muslim societies. The United States has historically had intimate relations with pivotally oil-important Saudi Arabia and Gulf countries, is engaged in critical negotiations with Iran on its nuclear aspirations and support of Hizbollah, and has sought to broker relations between its nuclear ally Pakistan and its nuclear neighbor India (and other geopolitically important neighbors). The United States is, moreover, supporting democratic aspirations in Egypt, and involved with Turkey’s desire to enter the European Union (“E.U.”), despite concomitant European angst about allowing an Islamic country to be part of Europe—not to mention European perplexity on how to deal with its Islamic immigrant and second-generation communities.

The United States is involved in nation-building in Iraq, Afghanistan, and indirectly in Palestine. In all of these areas, we suggest that an understanding of the role of religion—and especially Islam—and its intersections with politics and policies, is vital. This project aims to make an important contribution in shedding light, and reducing the heat, on this important subject.

8. In discussions with scholars of other religions, this project may catalyze similar analyses on what a “Jewish,” “Christian,” or “Hindu” state might look like. (The sense of many was that they may not be that different in the ethical sense.)

B. Is There a Rationale for a Sharia-Compliant Rating of States?

The Qur’anic rationale for rating nations is provided by Qur’an 3:110, which asserts to the Prophet’s companions, “You are the best community [*khayra ummah* or nation] raised from humankind: you enjoin the good [or

the right] and forbid evil and believe in God.”⁴ Muslim scholars point out that God calls the Prophet’s companions the “best community” not *merely* because they were the Prophet’s companions and practiced the liturgy and the Prophet’s rituals of worship (the class of actions called *‘ibadat*). Rather, they were the “best community” *because* they were his companions in partnering with the Prophetic impulse to uphold and proactively implement the principles of enjoining the right, forbidding the wrong, and believing in God. If they only believed in God, but neither enjoined right nor forbade wrong, this would not have sufficed to qualify them as the “best community.”⁵

University of Virginia Professor Abdulaziz Sachedina adds that this verse “is constitutive of God’s purpose of creating an ethical order responsible for ‘commanding the good and forbidding the evil,’ and does not connect the status of being the best with a self-righteous presumption of the need to convert others; rather, it ascribes the status of the best to a community charged with the responsibility of instituting good and preventing evil.”⁶ This verse is just as concerned with the ethical norms of man-man relations as it is with enhancing man-God relations. Four verses later, the Qur’an nuances this point: “Of the People of the Book [Jews and Christians] there is an upright community [*ummah*] who . . . believe in God and the Last Day, enjoin the good and forbid evil *and vie with one another in good deeds*.”⁷

This Qur’anic text arguably provides Muslims with some Divine criteria on how to determine the “best community or nation.” It also suggests that among Jews and Christians there are communities that meet these criteria; thus, it is possible for followers of the Prophet Muhammad’s form of worship to slip away from the “best nation” position and lose it to communities that, while not formally “Islamic,” are technically so by virtue of fulfilling this verse’s requirements. This can happen because it is possible to score well in one or more of the above four categories and poorly in others. For example, a community may believe in God while at the same time neither enjoining the good nor forbidding evil, and find massive social wrongdoing its norm, vying with each other in evil deeds.

Moreover, the Divine imperative in 3:114, and repeated in several other Qur’anic instances,⁸ implicitly suggests competition, and thus the ex-

4. QUR’AN 3:110.

5. QUR’AN 48–54 differentiates between mere “submitters” (*muslim*), “believers” (*mu’mins*) and in the well-known hadith of Gabriel, “doers of good” (*muhsins*), thus establishing at an individual level grades of religious accomplishment. Other verses, such as 3, mention, among degrees of striving *laysu sawaa’a* and those who go out in jihad are *a’zamu darajatan min alladhina qa’aduu*. Thus grading both between good and bad, and between the good and the better is part of the Qur’anic worldview and supported by *ahadith* that speak of grades of heaven and of hell.

6. SACHEDINA, *supra* note 1, at 135.

7. QUR’AN 3:113–14 (emphasis added).

8. See QUR’AN 21:90, 23:61.

istence of a rating. Some textual examples are: “*compete* with one another in good works”⁹—a command addressed to those with different goals, not only to Muslims but to members of other religions—and “*race* [one another] towards forgiveness from your Lord and a heaven whose extent is that of the heaven and earth.”¹⁰ Competition and racing toward a set of Divine rewards clearly implies the existence of a Divine scorecard. The Sharia Index Project seeks to explore and probe how to establish this scorecard from an Islamic jurisprudential point of view.

C. *The Term “Islamic State” (dawla islamiyya)*

A review of the semantic uses of the term “Islamic State”¹¹ in the media, in common parlance, and in literature on the subject shows that this

9. See QUR’AN 3:113–14 (emphasis added). QUR’AN 2:148 reads: “To each is a goal to which God turns him; then strive together (as in a race) towards all that is good.” QUR’AN 5:51 reads: “For every one of you [Jews, Christians, Muslims] We have appointed a law and a way. Had God willed, He would have made you one community; but that [He has not done in order that] He may try you in what has come to you.” Sachedina argues that this verse also entails a Divine imperative for religious pluralism, and “can serve to overcome discrimination based on exclusive religious claims and entitlements and can provide humankind the vision of a global community bound together to achieve the common good for all citizens of the world.” SACHEDINA, *supra* note 1, at 134; *see also id.* at 63.

10. QUR’AN 57:21 (emphasis added).

11. Before we proceed in our discussion of an Islamic State, an important observation needs to be made on the nomenclature “Islamic” and its semantic uses in the general and juridical aspects.

(a) The term “Islamic” has been generally used—especially by non-Muslims as well as increasingly by Muslims—to signify all that Muslims do, or that is of Muslims, so much that terms like “Islamic Civilization,” “Islamic Studies,” “Islamic art,” “Islamic food,” “Islamic architecture,” “Islamic literature,” “Islamic history,” and more recently “Islamic fundamentalism,” “Islamism,” “Islamic terrorism,” and thus including our subject “Islamic State,” are terms often used to signify entities and activities that are not always logically or popularly regarded as *religious* in either the Muslim or non-Muslim ways of looking at things, and which in fact are more accurately secular, un-Islamic or even anti-Islamic, or explicable in terms of local customs unrelated to Islam. While many of these activities would not generally be labeled “Christian,” “Buddhist,” or described by a religious adjective in other religious traditions and contexts, Muslims have bought into this nomenclature, which has in some contexts created a self-fulfilling prophecy and a vicious and occasionally pernicious cycle of wanting to “Islamize” that which cannot coherently be “Islamized.” Generally people assume that Islamic in this context means that it is in accordance with Islamic theology or law, i.e., “Sharia-compliant,” or even required by it.

(b) “Islamic law” approximates the above use in the field of law; it includes the sum total of “what Muslims juridically did.” Juridically, the term “Islamic” is also often used in common parlance to mean “approved by, consistent with, or required by Islamic law.” It is necessary to bear in mind, while all of Qur’anic law is Islamic, not all of Islamic law is Qur’anic. Islamic law is used to describe more than just Qur’anic laws and ordinances and those from the Sunnah. It therefore includes the legal writings, opinions, precedents, judgments, rulings and growing body of consensus among jurists, and the legislation of succeeding rulers after the death of the Prophet Muhammad. It also includes pre-Islamic customs and laws which are not inconsistent with Qur’anic and Hadith injunctions that populations continued to practice once they became liturgically Muslim; this happened because Islamic jurists regarded custom (*adah* or *urf*) as a subsidiary source of law when not in conflict with Qur’an or Sunnah.

Where matters are made more complex to the lay Muslim—Muslim jurists agreed that certain differences of opinion are deemed equally valid, thus “equally Islamic,” which led to the rise

term is used in two senses: one is demographic (meaning a state with a majority population practicing the faith of Islam), the second is vis-à-vis governance (generally understood to mean a state governed by Sharia Law). While most Islamic legal scholars will agree with the second sense in principle, a wide divergence of opinion exists on how this should be practically accomplished, let alone best accomplished.

This should not be surprising, for the question of how to accomplish a state governed by Sharia law has historically cleaved the Islamic community, and eventually split Islam into the Sunni and Shia sects. This was the question that gave rise to the Kharijis, who after first having followed the fourth Caliph Ali, seceded from him—one of whom eventually assassinated him—because they believed he was not vigorous enough in his campaign against Muawiyah.¹² Passions became so aroused in response to this question that it was politically difficult and dangerous for some to make their opinions public. Many people felt it would be safer to “punt” and defer the question to God, who would decide this question in the hereafter—those holding this position becoming known as the “deferrers”—the *murji’ a*. It is not surprising, therefore, that various views of rule and theories on the Caliphate arose, nor should it be surprising that this question continues to passionately divide contemporary Islamic scholars and lay Muslims.

In the early days of Islamic history, the focus of the question was about how to ensure right governance. The Shia position centered on *who* had the inherent right to rule, i.e., the inherent legitimacy of the ruler. The assumption was that the right “who” would rule in accordance with divine ordinances; in other words, the right “who” would guarantee rule by Sharia.¹³ Their opposition to the Umayyad, and later the Abbasid autocratic monarchies that clung to power, were about placing the right “who” in a position of power. The political power of autocratic monarchs forced the Sunni juristic tradition to evolve to a position that accepted the ruler’s legitimacy as long as he ruled in accordance with divine ordinances, i.e., the Shariah, even if he obtained the power to rule illegitimately.

of five major schools of law between the Sunni and Shia, and a few minor ones. The non-specialist is rarely able to discern when a difference of opinion among contemporary scholars lies within the boundary of “differences of legal opinion equally Islamically valid” and when a position is “outside the pale of what is Islamically valid,” even in the domain of matters of worship that have been established centuries ago. The poor lay reader is therefore completely lost when reading the writings of modern Islamic legal scholars and watching their sometimes passionate disagreements on the subject of an Islamic state; as to whether these are differences within the domain of what is Islamically valid, or whether one position is beyond the pale “Islamically speaking,” notwithstanding the accusation of one scholar that the other indeed is Islamically “off the wall.” We therefore urge Muslim jurists—for the sake of the *ummah*—to help the lay Muslim delineate this boundary.

12. Muawiyah was the governor of Damascus who challenged the fourth Caliph Ali (the Prophet’s cousin and son-in-law) upon the death of the third Caliph Uthman, until which time the Caliphate’s capital was based in Medina.

13. This gave rise to the Shia theory of the Imamate, the Righteous Imams.

Spanning the history of the Muslim peoples until the contemporary scene, what governance by Sharia law means—or ought to mean—in practice, is and has been somewhat unclear. It has been interpreted institutionally in a variety of ways:

- A state governed by descendants of the Prophet.¹⁴
- A state ruled by Muslim theologians (more accurately jurists, *faqih*s)—what we may call in English a theocracy (more accurately a “jurist-ocracy,” implying thereby and establishing the means of the rule of law).¹⁵
- A state that is governed along the lines of the historical political theory and practice of Muslim rulers. This has been interpreted in a number of ways—most see in historical precedent a “Caliphate,” whereas others see a democracy.
- A state that is liberal and democratic. The argument given by exponents of democracy is based less on democratic institutional forms as part of Islamic historical precedent, than it is based on the argument that it provides the best chances of achieving the justice and human dignity that the Prophet and his closest companions sought to preserve.

The historical political theory approach begins chronologically by analyzing the Prophet’s “Medina Constitution,” which was established between the Prophet and his followers on his emigration from Mecca with the Jewish tribes and Arab polytheist tribes of Medina. Next it layers the precedents of the Orthodox Caliphs onto the ideal of rule by a “Successor to the Prophet” (Caliph). It draws from these historical formulations to develop either a theory of Caliphal rule, or alternately a theory of what would grant legitimacy to such rule.

Parallel and adjacent to the political theory approach is the *juridical* approach that examines and emphasizes the collective writings of Islamic jurists over the past fourteen centuries regarding this subject. In light of the precedent of the Prophet and the Orthodox Caliphs, many of these jurists worked to build a counterculture—an “opposition party”—to the court culture of many Caliphs and protest movements that sought to “transform the corrupt political order of their day and make it submit to [what they recog-

14. This is the historical Shia position, further nuanced by a definition that means rule by the descendants of Husayn son of Ali. We note that a Sharifian (Prophet’s descendants) dynasty of rule prevailed in the Maghrib (i.e., the area of Morocco) that was descended through the line of Hasan, son of Ali; but this latter was not considered Shia in the jurisprudential sense because they followed one of the Sunni schools of jurisprudence (Maliki). We also note that the modern Islamic Republic of Iran, a Shia State, has had Rafsanjani, a non-descendant of the Prophet as their head of State. Therefore, the original political intent of the Shia impulse has been overtaken and “dissolved” by the on-the-ground political reality. *See infra* note 15.

15. It is interesting that Ayatollah Khomeini established in Shia Iran the notion of *vilayeti-faqih*, rule by the jurisprudent, a notion that arguably sidesteps rule by descendants of the Prophet, and brings this a big step closer to the Sunni model.

nized as being in accord with] God's will."¹⁶ Such studies attempt to extract from these precedents principles that may be considered "Islamic," since they flow out of the Prophet's own normative practice (Sunnah) and of his closest companions. These companions, by consensus of Islamic scholarly opinion, understood the importance of the Qur'an and the Sunnah better than any future generations.¹⁷

Lay readers are bound to be confounded by the strong disagreement existing among scholars concerning which hermeneutic, or approach to their identical conclusions, is superior, even among those who believe in the same institutional forms. If the end result is the same, why quibble, let alone have heated arguments about how we get there?¹⁸

D. *Is an Islamic State a Coherent Idea?*

Some argue that the notion of an "Islamic State" is incoherent, even illegitimate, because it stands in opposition to the more rigorous and fundamental idea of the *ummah*—the supra-national community of believers,¹⁹ and because the modern nation-state did not flow out of traditional Islamic institutional norms.²⁰ In spite of this being the intuitive sense of most Mus-

16. RAUF, WHAT'S RIGHT WITH ISLAM, *supra* note 1, at 188 (quoting KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 46 (2000)).

17. What complicates the historical approach is that it is possible to find precedents for a range of possibilities. Since 656 CE, Muslims were ruled by dynastic and often autocratic monarchies—even though the rulers called themselves "Caliphs"—until the Ottoman Caliphate which ended in 1924. And just as it was possible to have atheistic fascism (e.g., the Soviet Union) and atheistic liberal democratic societies (e.g., France); Christian fascist societies and Christian liberal democratic societies; we believe it is possible to provide an Islamic veneer to any form of government. It is therefore possible, in our opinion, to create an "Islamic" fascist society, an "Islamic" autocracy, an "Islamic" meritocracy, an "Islamic" monarchy, an "Islamic" republic, and an "Islamic" liberal or illiberal democracy. For just as there are always lawyers who argue opposite sides of a case before the Supreme Court of the United States, each side sincerely believing its position is constitutional (a situation generally possible within any system of jurisprudence) it is and has always been possible for any government to find Islamic jurists who would argue for the Sharia-compliance of one form of institutional governance over another. During the Nasser regime in the 1960s, books were written on how socialism flowed from Islamic thought and ideals.

18. In the United States, for example, while Muqtedar Khan and Khaled Abou El Fadl both believe in democracy as the best institutional form, Khan argues that the Medina Constitution establishes the *institutional* precedent for an Islamic democratic polity. El Fadl passionately disagrees with Khan and argues that a *juridical* and *theological* approach provides a more "Islamically authentic" basis and argument for democracy. EL FADL, *supra* note 1, at 66; *see also, id.* at 112–15. The latter approach is the hermeneutic used by Abdulaziz Sachedina in arguing from Qur'anic texts for a democratic pluralism rooted in Islamic texts and jurisprudence. SACHEDINA, *supra* note 1.

19. International Crisis Group, *supra* note 1, at 6.

20. The Indian Muslim thinker Abu'l Ala al-Mawdudi was opposed to the Muslim nationalism of Ali Jinnah, the founder of Pakistan, arguing that nationalism implied sovereignty of the people, whereas the true Islamic State was founded on the principle that sovereignty belongs to God (*al-hakimiyya li-llah*). In contextualizing Mawdudi's thoughts, we note that he was opposed to the adoration (*al-'ubudiyya*) of political leaders and parties in God's place that dominated political thought in the first half of the twentieth century, and that he viewed *religious nationalism within the construct of a nation-state* as a vehicle for, if not in itself a new form of, *jahiliyya*.

lims, Islamic political parties in much of the Muslim world have accepted the nation-state as their primary framework. Thus, they have de facto legitimized the idea of the nation-state, and defined the term Islamic State [*dawla islamiyya*] to mean a nation-state where “governance is according to the principles of Sharia.” Jurists, therefore, must respond to this on-the-ground reality; either they must condemn the “Islamic nation-state” as an invalid concept under Islamic law (as the Indian Muslim thinker Abu’l Ala al-Mawdudi felt), or they must find a way to give the phrase “Islamic State” a coherent definition within an ummah-wide framework. For the sake of both Muslim and non-Muslim communities, they need to do this as rapidly as possible—to find a way to generate the broadest consensus possible across the spectrum of intra-Islamic sectarian jurists on points of agreement, and amplify that message.²¹

It should also be noted that Islamic political movements are shifting away from a definite *institutional* conception of “the Islamic State” that is contrasted with existing states in the Muslim world and promoted at the latter’s expense. Indeed, Islamic political movements have begun to acknowledge that scriptural texts (the *Qur’an*, the *sunna*, and the *hadith*) do not contain a clear definition of the “Islamic State” and hence it can, accordingly, take different institutional forms. At the same time, recognition of the scriptural limitations in this respect has led these movements to drop the simplistic slogans, such as “*al-Islam huwa al-hall*” (“Islam is the solution”) and “*al-Qur’ân dusturna*” (“the *Qur’an* is our Constitution”), which they previously favored. The movements also dissociate themselves from the conceptions of fundamentalist Islamic movements inclined to invoke the original Islamic community of first century AH/seventh century CE Arabia as the political model to emulate.

This occurs, in part, because these slogans need to be examined in the context of nation-building, and also because of the diversity of Islamic activist political forms in the current Muslim world. For example, in Saudi Arabia, there is a strong partnership between a monarchy and a clergy; in the Islamic Republic of Iran, a theocratic rule of the jurisprudent (*vilayeti-faqih*) prevails; in Jordan, the Islamic Action Front (the party established by the Jordanian Muslim Brothers) has accepted and even defended the Hashemite monarchy as legitimate in Islamic terms; in Morocco, the Justice

Comparing this to Jack Donnelly’s presentation of three models of international human rights, Mawdudi, and Muslims generally, believe more deeply in what Donnelly posits as the “cosmopolitan” model which starts with individuals as part of a truly global community (the *ummah*), and who therefore regard states as “the problem.” JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 28 (1998).

21. For example, if as mentioned above El Fadl and Khan agree that a democracy is the best institutional form from an “Islamic point of view” but passionately disagree on how they arrive at that decision, the former conclusion (their point of agreement) ought to be amplified more than the latter point (namely how they arrived at that conclusion) for the benefit of positive political reform in the Muslim world.

and Development Party (PJD) has similarly made its “royalist” credentials very clear in proclaiming its recognition of the king’s status as “the commander of the faithful” (*amir al-mu’minin*); in “republican” Egypt, meanwhile, the Muslim Brothers have endorsed the Islamic credentials not only of the state but also of the government, and in Turkey the Justice and Development Party (AKP), currently in government, has similarly made clear its acceptance (and thus in effect its endorsement) of both the secularist and the republican aspects of the Kemalist constitution.²² In ethnically pluralist Malaysia, where ethnic Malays are *constitutionally* Muslim and the United Malay National Organization (UMNO) runs the government, former Prime Minister Abdullah Badawi (2003–2009) ran and won election by the widest historical margin on a platform of “Progressive (or Civilizational) Islam” (*Islam hadari*). Not surprisingly, American and Western Muslim legal scholars have generally preferred and argued in favor of a democratic polity.

E. Twentieth-Century Political Dynamics in the West

In the West, the nineteenth and twentieth centuries were marked by the rise of an anti-religious secular humanism that ejected religiosity from the hallways and boardrooms of power. This coincided with the rise of Communism and its socialist ideas in Russia and Eastern Europe—ideas that were resonant in the United States through the depression era, and which furthered the antipathy to religion in Europe and populous regions of the Far East, which came under the influence of Communism and Socialism, such as in China and India respectively. While anti-religiosity was more widespread in Europe than in the United States, Europe exerted a strong intellectual influence upon American intelligentsia, and European colonialism exerted powerful political influence upon the Muslim world and its intelligentsia. This secularism affected the religious interpretations of laws in American courts, and influenced the development of ideologies in the Muslim world.

From the second half of the nineteenth century through the first half of the twentieth century, Muslims desired—and attempted—to establish Islamic democratic regimes.²³ The geopolitical realities of the twentieth century, namely the remnants of colonial military power succeeded by the Cold War calculus, prevented this from happening. Instead, authoritarian regimes arose in the major intellectual capitals of the Islamic world: particularly in Egypt, Turkey, and Iran. These historically multi-cultural and multi-religious societies were increasingly replaced by ethnic and religious national-

22. International Crisis Group, *supra* note 1, at 6.

23. The Wafd party in Egypt attempted to establish a nascent democratic polity, and had on its platform Egyptian Muslims, Copts, and Jews, expressing the religious diversity and multi-religious demographic of Egypt.

isms, such as Turkish and Arab, and Islamic nationalism (most notably in the establishment of Pakistan). The most influential of these regimes either abolished or gutted political opposition parties and furthered a militant anti-religious secularism that spawned a militant fundamentalist reaction. Western powers tolerated regimes when they abused their own peoples' human rights, leading many Muslims to believe that the West wanted to humiliate, subjugate, and oppress the Muslim world, and that it was unconcerned with human rights abuses conducted by regimes friendly to the West.²⁴

Europe also underwent changes in the first half of the twentieth century. From 1914 through 1945, the technological advances in warfare and new post-Industrial Revolution socio-economic disruptions in human relations precipitated the First World War. A decade later, a lengthy economic depression caused starvation and human suffering on a historically unprecedented scale. Then, Europe suffered in the Second World War from the loss of civilian and military human life of unprecedented magnitude, genocide of Jews, gypsies, and others deemed racially impure by the fascist Nazi regime (the Holocaust), and from the invention of weapons of mass destruction capable of destroying the whole human race.

World War II destroyed the European powers, and birthed two global superpowers: the United States and Soviet Union—both seeking to proselytize their notions of societal constructs upon the whole world. Believing in the superiority of their worldviews, they cooperated in some areas, and disagreed in others. They shared an egalitarian and secular worldview, and, not wanting to see the world self-destruct, established the United Nations (U.N.) from the ashes of the League of Nations. The United Nations' first task was to establish its Universal Declaration of Human Rights (UDHR),²⁵

24. This belief is sustained by the human rights abuses conducted in Guantanamo, Abu Ghraib in Iraq, and Bagram Air Force Base in Afghanistan.

25. The Universal Declaration of Human Rights was prepared by the Commission on Human Rights of the Economic and Social Council (ECOSOC) of the United Nations. Eleanor Roosevelt, widow of President Franklin D. Roosevelt, niece of Theodore Roosevelt, and social activist, chaired the commission. We observe a resonance with her late husband's "Four Freedoms Address" he delivered in his annual message to Congress on January 6, 1941. Clearly inspired by the ideas and idealism of Wilson's New Freedom and Teddy Roosevelt's Square Deal, Roosevelt declared, "Just as our national policy in internal affairs has been based upon a decent respect for the rights and the dignity of all our fellowmen within our gates, so our national policy in foreign affairs has been based on a decent respect for the rights and dignity of all nations, large and small." Franklin D. Roosevelt, 1941 State of the Union Address: Four Freedoms Address (Jan. 6, 1941). In it he identified the four basic freedoms as follows:

- Freedom of speech and expression—everywhere in the world.
- Freedom of every person to worship God in his own way—everywhere in the world.
- Freedom from want, which, translated into world terms, means economic understandings that will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.
- Freedom from fear, which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—everywhere in the world.

declared to both legitimize the United Nations²⁶ and to prevent the horrors and abuses that a generation of Europeans had suffered through. The combined political influence of the United States and the Soviet Union rapidly eroded the historical division of humanity into social classes of royal, noble, mercantile, feudal, and serf. Paradoxically, the then European colonies utilized the UDHR, both within the framework of the United Nations and without, to agitate for political independence and freedom from their colonial masters. Thus, a Western secular human rights doctrine resulted, which maintained the ethical dimensions of the Abrahamic religious doctrine, but completely divested it of any metaphysical attachment to its religious origins. Human rights emanating from this viewpoint were deemed “universal” and “inalienable” just because people are human.

Egalitarian doctrines took root and gained force even in far eastern societies whose traditional religious and societal doctrines embraced unequal classes of human beings (such as India and Japan where a caste system regarded the lowest caste levels of human life as dispensable). It is remarkable that secular humanists and atheist communists have succeeded in making a religion out of the Abrahamic Ethic’s second commandment (to love your fellow humans), absent the first commandment (to love God), and that they have been able to globalize this “religion” via international political activity.

The Universal Islamic Declaration of Human Rights (UIDHR) of 1981 parallels the UDHR in that it was made in reaction to the abuses Muslim populations underwent. In its own words, “It is unfortunate that human rights are being trampled upon with impunity in many countries of the world, including some Muslim countries.”²⁷ Unlike (as we shall detail below) the American Declaration of Independence, the UIDHR did not—and could not—address the issue of governmental power, any more than to remind governments ruling over Muslim populations to fulfill their duties to their populations and aver that “human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.”²⁸

The end of the Cold War in 1989 created a new global geopolitical landscape, but the need for a revision of Western policies towards the Islamic world was not felt until 9/11. Even the Iranian revolution in 1979 against the Shah and the rise of Islamic militancy in much of the Muslim world targeted against their own regimes did little to make Western policy-

26. Marnia Lazreg, *Human Rights, State and Ideology: An Historical Perspective*, in *HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES* 37–39 (Adamantia Pollis & Peter Schwab eds., 1979).

27. Universal Islamic Declaration of Human Rights, Foreword, para. 4.

28. *Id.* at para. 3.

makers aware of their need to address the issues of concern to the Islamic masses.

F. Modern Trends in Shifting from an Institutional Definition to an Ends Definition that Describes Muslim Aspirations

In order to create political space for themselves, contemporary Islamic political movements have explicitly broken away from fundamentalist perspectives. Abandoning the revolutionary utopian project of *dawla islamiyya* in the strictly *institutional* sense has led them to emphasize other themes—what I call “ends”—most notably the demand for justice (*al-'adala*) and freedom (*al-hurriyya*). In articulating these demands, these movements have insisted that the key to their realization is the consecration by the state of Islamic law, the Sharia. This reliance on Sharia, however, while remaining a central feature of Islamist political agendas and rhetoric, is itself now qualified by two key elements.

First, the recognition of the need for Muslims to “live in harmony with their time” (instead of trying to recreate the original Islamic community of seventh-century Medina), has led these movements to stress the need for *ijtihad*, the intellectual effort of interpretation, to establish how the principles embodied in the Sharia may be translated into actual legislation in contemporary Muslim countries.²⁹ Second, recognition of the need for *ijtihad* has led to the recognition of the need for deliberation, and thus acceptance of the role of deliberative instances representative of the community, namely representative assemblies and parliaments, in the law-making process. This evolution in political thinking has taken Islamic political movements away from theocratic conceptions of the Muslim polity, from the (originally Khariji) cry in which sovereignty (*al-hakimiyya*) is conceived as belonging to God alone (*al-hakimiyya—or al-hukm—li-Llah*), to more democratic conceptions, which recognize that sovereignty belongs to the people.³⁰

Therein lies a potential problem. As El Fadl points out, “Muslim jurists have argued that law made by a sovereign monarch is illegitimate because it substitutes human authority for God’s sovereignty. But law made by sovereign citizens faces the same problem of legitimacy,”³¹ leading to the next

29. In this way, the Islamist political movements have come to reject literalist readings of scripture and have reverted to the perspectives of the “Islamic-modernist” movement of the late nineteenth and early twentieth centuries, whose leading theorist, the Egyptian Mohammed Abduh (1849–1905), was preoccupied precisely by the problem of adapting Islamic law to take account of modern conditions.

30. See International Crisis Group, *Islamism, Violence and Reform in Algeria*, 2004 MIDDLE E. REP. 29.

31. EL FADL, *supra* note 1, at 4. The nuanced point here is that the substitution of the *absolute* sovereign will of the citizens over the *absolute* sovereign will of a monarch both theoretically override the *absolute* sovereign will of God—this, Muslim jurists say, is incorrect. What is “Islamically correct” is that the worldly sovereign power, whether it resides in a monarchy or a

question: *Who* interprets God's law? This is partially an issue of limiting *power*, and is partially an issue of safeguarding the *intentions* of the Sharia. Otherwise, the *mechanisms* of the Sharia become used by the power structure to undermine and thwart the *intentions* of the Sharia.³²

For the reasons given above, I believe that a coherent “ends” approach that embraces a set of values and Islamic human rights doctrine that flows out of both the intent of the Sharia and the core Islamic worldview is the contemporary demand. This is where the determination of an “Islamic State” could currently use the most traction: there is a need for Muslim jurists to come up with an *ijtihad* road map, list of issues and methodology—in effect a set of criteria—that helps a lay audience of opinion leaders and those in decision-making positions objectively judge what best determines an “Islamic” or “Sharia-compliant” governance.

This type of *ijtihad* would revive spirituality, intellectuality, and ethics, based on the two commandments common to the three Abrahamic faiths: a love of God and a simultaneous love of our fellow human beings. The result will be an *ijtihad* that:

1. Revives classical Islam's historic pluralism—an understanding that created space for at least four major Sunni and several Shia schools of legal interpretation to coexist, and recognized them as equally valid in God's eyes. Sunni-Shia tensions and the uphill nature of nation-building in Iraq and Afghanistan are concrete demonstrations of this particular challenge.
2. Recreates a nuanced understanding of the difference between separation of mosque and state (which Professor Ali Mazrui has eloquently demonstrated is “Islamically do-able”) and between

democracy, must recognize that it needs to be delimited by God as absolute sovereign. This is the meaning of “acting in accordance with Sharia”; it is that in an Islamic State, the worldly ruler (monarch or citizens) cannot be whimsical and must abide by a set of (Shar'i) principles and fulfill certain objectives that flow from God. We believe that in spite of what some modern Americans may believe, the authors of the American Declaration addressed this very issue by declaring the rights of citizens as God-given (in the language of the American Declaration of Independence, “endowed by the Creator with certain inalienable rights”) and again emphasized the point with the phrase “a nation *under God*.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). See *infra* Part IV for further discussion of the American democracy.

32. El Fadl illustrates this point as follows:

Islamist models, whether in Iran, Saudi Arabia, or Pakistan, have endowed the state with legislative power over the divine law. For instance, the claim of precautionary measures (blocking the means) [*sadd adh-dhari'a*] is used in Saudi Arabia to justify a wide range of restrictive laws against women, including the prohibition against driving cars. This is a relatively novel invention in Islamic state practices *and in many instances amounts to the use of Shari'ah to undermine Shari'ah*. The intrusive modern state invokes Shari'ah in passing laws that create an oppressive condition—a condition that itself is contrary to the principles of justice under Shari'ah.

EL FADL, *supra* note 1, at 15 (emphasis added).

religion and politics (which he suggests may not be “Islamically doable”).³³

3. Returns to what Mazrui has called Islam’s authentic spirit of eternal modernism, defined as a continuous creative synthesis. This involves learning from others, letting others learn from Islam, and maintaining Islam’s own core of authenticity.³⁴

G. *Revisiting the Dar al-Islam/Dar al-Harb Divide*

Over the last two centuries, the classical legal differentiation between the *Dar al-Islam* (Abode of Islam) and the *Dar al-Harb* or *Dar al-Kufr* (Abode of War or of Unbelief) has undergone a revision among leading Muslim thinkers. This is partly the result of the increasing presence of Muslim communities living under non-Muslim rule, giving rise to the notion that these countries were, at the very least, to be considered as *Dar al-Aman* or *Dar al-'Ahd* (Abode of Security or of Treaty).

For example, when Bosnia was brought under Austro-Hungarian rule at the end of the nineteenth century, the Bosnian mufti Azapagic resisted the idea that Bosnian Muslims were obliged to emigrate to Istanbul, a position which Rashid Rida supported. Rida stressed that “Hijra is not an individual religious incumbency to be performed by those who are able to carry out their duties in a manner safe from any attempt to compel them to abandon their religion or prevent them from performing and acting in accordance with their religious rites.”³⁵

33. See Ali A. Mazrui & Albert Schweitzer, *Islam Between Secular Modernism and Civil Society*, AM. SOC’Y FOR MUSLIM ADVANCEMENT, http://www.asmasociety.org/perspectives/article_12.html (last visited Nov. 19, 2010).

34. In the words of Professor Ali Mazrui:

The Muslim world went modernist long before the West did—but then the Muslim world relapsed back into pre-modernization . . . What made Islam at the time compatible with the spirit of modernity was Islam’s own spirit of creative synthesis. Islam was prepared to learn philosophy from the Greeks, architecture from the Persians, mathematics from the Indians, jurisprudence from the Romans—and to synthesize what was borrowed with Islam’s own core values. That was a modern spirit . . . Islam was born pre-modern, but receptive to modernism. Then it went modernist in the heyday of its civilization. Then Islam relapsed into pre-modernism, where it has been stuck to the present day.

Id. Mazrui adds, however, that

in the political culture of Muslim Senegal we see signs of the historical proposition that Islam went modernist long before the Western world did. Most of the Muslim world then relapsed into a premodernist culture of legalistic lethargy and social conservatism. But even today elements of modernist Islam can be found in unexpected places—from poverty-stricken Bangladesh ready to follow women in hijab as Prime Ministers to post-colonial Senegalese Muslims ready to elect a Christian [Leopold Senghor, a Roman Catholic] for executive President.

Id.

35. Rida made these statements in a pamphlet he published in 1909 in his journal concerning the situation of Bosnian Muslims. Rashid Rida, *Al-hijra wa hukm muslimi al-Busna fiha*, AL-MANAR, 1909; see also Wasif Shadid & Sjoerd van Koningsveld, *Loyalty to a non-Muslim Government: An Analysis of Islamic Normative Discussions and of the Views of Some Contemporary*

Muslim leaders, like al-Afghani, Muhammad ‘Abduh, and Rashid Rida, saw Western Civilization as a model for Muslims to emulate. These views became popular at the end of the nineteenth century, and advanced the notion that Western countries were no longer the Dar al-Harb. These views also laid the groundwork for later Muslim scholars and Muslim leaders in the West to regard the concepts of Dar al-Islam and Dar al-Harb as outmoded and irrelevant. Seeking to reinterpret Islamic tradition in light of the prevailing conditions of the modern age, modern scholars like Shaykh Faysal Mawlawi, advisor of the Sunni High Court in Beirut, pointed out that defining the House of Islam and House of Unbelief is problematic in our day. If the criterion for defining a country belonging to the “Territory of Islam” is that Muslims are free to practice their religious ceremonies and observances, then what can be said about the “many non-Muslim countries where Muslims live safely and practice their religious ceremonies, sometimes with greater freedom than in some ‘countries of the Muslims’?”³⁶

The Moroccan scholar ‘Abd al-‘Aziz ibn al-Siddîq goes even further than Mawlawi in reviving the Shafi’i doctrine that says that the Dar al-Islam exists wherever a Muslim is able to practice the major religious rites and observances. Ibn al-Siddîq notes that Muslims in Europe and America have created numerous religious institutions, including mosques and schools, and enjoy great liberty,

including the preaching of Islam and the conversion of Europeans and Americans to Islam[. H]e concludes that “*Europe and America, by virtue of this fact, have become Islamic countries fulfilling all the Islamic characteristics by which a resident living there becomes the resident of an Islamic country in accordance with the terminology of the legal scholars of Islam.*”³⁷

The safety of those who live in Europe (including Muslims) is also evident in the fact that Muslims travel to Europe “as refugees from those who claim to be Muslims” because they are “afraid to profess their religious convictions in their own countries.”³⁸

The primary intellectual leader of the Tunisian Islamist Nahda-movement, Rached al-Ghannouchi, also adopted Ibn al-Siddîq’s vision:

In 1989, at the occasion of a congress of the Union of Islamic Organizations in France (UOIF), al-Ghannouchi declared that France had become *Dâr al-Islâm*. The leading circles of the UOIF adopted this view which was to replace the doctrine, previously adhered to, that France was merely part of *Dâr al-‘Ahd*. This view

Islamists, in POLITICAL PARTICIPATION AND IDENTITIES OF MUSLIMS IN NON-MUSLIM STATES 84, 90 (Wasif Shadid & Sjoerd van Koningsveld eds., 1996) (quoting this part of Rida’s pamphlet).

36. Shadid & van Koningsveld, *supra* note 35, at 97.

37. *Id.* at 98 (quoting ‘CABD AL-‘AZİZ IBN MUHAMMAD IBN AL-SIDDÎQ, HUKM AL-IQÂMA BI-BILÂD AL-KUFFÂR WA BAYÂN WUJÛBIHÂ FĪ BA‘D AL-AHWÂL 31, 61 (1985)).

38. *Id.*

was confirmed in 1991 by the Committee for the Reflection about Islam in France (CORIF), when it proclaimed in a circular letter of February 1991 that France had become *Dâr al-Islâm* due to the fact that deceased Muslims could be buried in its territory in special sections of cemeteries destined for Muslims.³⁹

II. CHALLENGES IN DEVELOPING A COHERENT THEORY OF SHARIA-COMPLIANT GOVERNANCE

A. *Speaking to Power—And Why This Work Must Be Led by Muslim Scholars in the West*

In developing an intellectually (structurally and analytically) coherent theory of Sharia-compliant ideas on governance centered around rights (both human and Divine rights), Duke University Professor Ebrahim Moosa points out that Muslim scholars have to be prepared to engage in political thought in the widest sense of the word. Often this means scholars have to contend with being at odds with the forces of political power. “In many Muslim countries,” Moosa points out, “like Egypt, Syria, Saudi Arabia, Iraq, Iran, Bangladesh, Pakistan and Tunisia, intellectuals are subjected to harassment by traditionalist and fundamentalist quarters alike as well as by governments for their critical study of religion and for opinions that do not meet with approval from the religious establishment.”⁴⁰

Sorbonne Professor Mohammed Arkoun laments the absence of genuinely independent, creative work on the Islamic tradition . . . in the Arab world. The close ties between nationalist, authoritarian governments who are adamant about using Islam for their own purposes or are preoccupied with fending off militant Islamist movements . . . makes genuine scholarship impossible. The capacity of social science to generate the liberating truth about Islam depends on a political atmosphere conducive to academic freedom and scientific discovery. Rethinking Islam depends upon

39. *Id.* (internal citations omitted).

40. Moosa, *Dilemma*, *supra* note 1, at 185–86. Arguably the most notable example of paying a price for one’s integrity was what happened to eighty-year-old Grand Ayatollah Hussein Ali Montazeri, once the heir apparent to the leadership of the 1979 Iranian Islamic revolution. He was stripped from his title of Grand Ayatollah and placed under house arrest in 1997 (and released in 2003 because of ill health) for criticizing the regime’s human rights abuses, for suggesting that clerics should not interfere in government, for suggesting changes in the distribution of power, and that Ayatollah Khamenei should submit himself to popular elections, curtail his power, and be accountable and open to public criticism for his actions.

Another example is Professor Abdolkarim Soroush, who once was a high-ranking ideologue in the Islamic Republic of Iran and was later appointed to the Advisory Council on the Cultural Revolution by Ayatollah Khomeini. ABDOLKARIM SORUSH, REASON, FREEDOM, AND DEMOCRACY IN ISLAM xi (2000). He was fired from his job for criticizing “the theological, philosophical, and political underpinnings of the regime.” *Id.* In addition to being barred from teaching and discouraged from speaking in public, “[h]e [was] routinely threatened with assassination and [was] occasionally roughed up by organized gangs of extremists.” *Id.*

the freedom to think[,] . . . and thus, for now at least, it must be done in the West;⁴¹

although, even there, Western Islamic scholars have not been immune from rebuke.⁴²

Arkoun depicts two additional fronts Western Muslim intellectuals have to fight on: one against social science as practiced by Orientalism in a disengaged, narrative, descriptive style; the other against the offensive/defensive apologia of Muslims who compensate for repeated attacks on the “authenticity” and the “identity” of the Islamic personality with dogmatic affirmations and self-confirming discourse.⁴³

Regarding the first, Muslim intellectuals must contribute to an even more fundamental diagnosis through the Islamic example, especially regarding questions of ethics and politics: to expose “the blindspots, the failings, the non sequiturs, the alienating constraints, [and] the recurrent weaknesses of modernity,”⁴⁴ for “the West has not accepted the challenge that has arisen from within its own culture”⁴⁵—despite a generalized crisis of the soul bequeathed by the end of Marxist eschatology.⁴⁶ Critical voices expressing solidarity with the history of Muslims must constantly submit to demands that their arguments be more “objective,” more “neutral,” less “polemical,” and less engaged in recurrent forms of protest against the West. Those who are aligned with Muslim peoples also find themselves surrounded by a Western worldview that insists on maintaining its pressure on the rest of the world, and refuses to entertain external views.

Moosa emphasizes Muslim scholars’ concern that human rights schemes are deployed by Western non-governmental organizations (NGOs). He believes that these human rights schemes are a weapon to subordinate, as well as to colonize lands, minds, and bodies⁴⁷ (namely those who point out that the models of Western thought are inadequate to current needs), or are perceived as a strategy of cultural domination from which Muslims must protect themselves. This point merits some attention. Writing in 1978,

41. ARKOUN, *supra* note 1, at xi.

42. Professor Abdulaziz Sachedina avers:

It took the crisis I faced with the Muslim religious establishment in 1998 to convince me that the time had come to state my firm belief in the Koranic notions of human dignity and the inalienable right to freedom of religion and conscience. Attempts were made to silence me through a religious edict (*fatwâ*) and to stop Muslim audiences in North America from listening to my well-articulated plea for better inter-communal relationships through mutual tolerance, respect, and acceptance of the religious value in all world religions.

SACHEDINA, *supra* note 1, at xi.

43. ARKOUN, *supra* note 1, at 1–2.

44. *Id.* at 119.

45. *Id.* at 4.

46. That modern science has banished from human consciousness the sense and sensibility of the sacred is a subject most cogently addressed by writers of the perennial philosophy, who include Rene Guenon, Frithjof Schuon, S.H. Nasr, and Charles le Gai Eaton among others.

47. Moosa, *Poetics*, *supra* note 1, at 205.

City University of New York Professor Marnia Lazreg suggested that “the drive for fundamental human rights [was] primarily an ideological one meant to legitimize the state structure of governments that supported it.”⁴⁸

In a review of the historical circumstances in which the UDHR was made in 1948—the contextual *historicity* of the UDHR—Lazreg reminds the reader that

fundamental human rights do become ideological when they cease to be viewed historically and are therefore detached from the sociopolitical and economic life situations of concrete individuals or groups. The ideological character of the 1948 Declaration and the prevailing drive for human rights on the part of the U.S. leadership operate[d] on two levels: First, precedence [was] implicitly given to human as opposed to citizen rights, thereby incorporating all human beings across nations and cultures into an abstract universal community [(an analog of the Islamic global *ummah*)] of which the U.S. government [was] the champion. Second, the “declaring” of such fundamental rights [had] the effect of “informing” individuals throughout the non-Western world of abstract rights that may not be implemented locally and [were] increasingly encountering obstacles in Western societies themselves.⁴⁹

Lazreg also critiqued the U.S. policy of using human rights as a tool of international power politics, of applying principles selectively, and of supporting regimes despite evidence of human rights violations, such as Iran and Morocco because of their support of U.S. geopolitical positions.⁵⁰ Her most important observation, for our purpose of developing an Islamic doctrine of human rights, is that “if the ultimate goal . . . is to free [a state’s] citizens from deprivation, then there are ways of going about this task that are equally or more efficient than those proposed by Western powers.”⁵¹ The pursuit of the idea of God for Muslims is an equally valid alternative, at least at the theoretical level.

This discussion recalls Arkoun’s reminder—that a critical and historical re-examination of our belief systems, whether about human rights or about the actual contents of the Holy Scriptures, is still an urgent and indispensable intellectual task. This undertaking offers an excellent opportunity to bolster religious and non-religious thought in general, by forcing it to recognize that our beliefs, our religious teachings, and revelation are subject to *historicity*.

48. Lazreg, *supra* note 26, at 32–33.

49. *Id.* at 34.

50. *Id.* at 39–40.

51. *Id.* at 40.

B. *The Epistemological Historicity of Human Rights Discourses*

Moosa reminds us of this point. Thinking and deliberating on human rights (including women's rights) in the modern and contemporary context requires a careful analysis of some of the more complex and foundational presumptions in Muslim legal and ethical philosophy. It also requires an awareness of post-Empire Islam, where Muslims have (at least in practice) abandoned the idea of a universal political empire (like the Caliphate ruling over an ummah) in favor of the nation-state, but have not yet made the necessary epistemological shift. What we see as the current Muslim crisis, namely the idea that "the critical hermeneutics of rival epistemologies" is battling "to establish their relevance to the moral compass of society," exists, because, as Moosa posits, the knowledge that needs to be employed in defining the crisis is lacking.⁵² This void led to genres of questions based upon different paradigms—and specifically Western paradigms—of thought; some may now wonder, "Does Islam need to undergo its own 'reformation' or 'enlightenment,' as Christianity underwent in the West?"

While it may be more accurate to say that the *West* underwent the Enlightenment than it is to suggest that "*Christianity* underwent the Enlightenment," Arkoun points out that the West⁵³ escaped the clutches of Christian religious dogma by invoking Enlightenment thought—the progenitor of the Western articulation of human rights schemes—as the opposite of and replacement for Christian mythology.⁵⁴ At the same time that Western reason performed this "liberating" critique, it simultaneously fell back into a nostalgic celebration of the putative *origins* of its civilization, especially the Greek polis and the first Christian communities, which were for Western reason the equivalents of the Muslims' "Pious Elders" (*as-salaf as-salih*). Peculiarly, Arkoun points out, Western scholars moved beyond pre-Enlightenment thought not by eliminating myth, but by integrating a different myth into their cognitive activity of reason. Every belief set, religious or otherwise, has its "accumulated symbolic capital carried and maintained," and no form of expression, religious or otherwise, can be detached from its accumulated symbolic capital, nor can the forms of religious expression be detached from symbolic and artistic creativity.⁵⁵

52. Moosa, *Poetics*, *supra* note 1, at 7.

53. We exclude America from this, for as we will see below, we believe that America did not go as far as Europe in eliminating religion and religious thought from its societal worldview.

54. ARKOUN, *supra* note 1, at 1–2.

55. *Id.* at 119. We believe that the ethics of secular humanism, and therefore what is called secular human rights, in fact flows out of the second of the two major religious commandments in the Abrahamic faiths—stated separately and de-linked from the first—as part of the West's accumulated symbolic capital. The two commandments being: to love the Lord the One God with all of one's heart, mind, soul and strength, and to love one's neighbor—i.e., all of humanity—as one loves oneself. *Mark* 12:33 (New International Version). From the contemplative tradition, the second commandment is the first contemporaneously restated as "love the image of God in all six

Moosa addresses the subject of symbolic creativity by reminding the Muslim reader that “[j]urisprudence, like architecture, is a form of art and has to do with creation.”⁵⁶ Classical Muslim jurists, including ash-Shafii, ash-Shatibi, al-Ghazali, and al-Tufi, among others, collectively *created* a system of juridical and legal thought. It behooves modern Muslim jurists and scholars to recall this “memory of creativity” of a “hermeneutics” narrative and fold it into their contemporary creative efforts in expanding the hermeneutics envelope.⁵⁷ This is a necessary step in engaging the inherited legacy of Muslim thought as we move forward.

More than their modern counterparts, Moosa reminds us that scholars of Muslim antiquity were extraordinarily aware that during the Prophet’s time and in subsequent eras, there was a politics of interpretation at work. This made scholars aware of the need to interpret the canonical sources within their own social contexts, without being shackled to the history and culture—and in particular the *politics*—of the original founding moment. What they actually executed was a creative act of intellection that “extracted” from the canonical sources a supra-historical and supra-contextual legal theory. It provided coherence for the moral and epistemological framework of Muslim legal and ethical thought on one hand, and on the other provided a post-hoc rationalization and justification for the legal practices that were already in circulation in the post-Prophetic period.⁵⁸

billions of the world’s inhabitants,” or to submerge the self (ego) in the *alter* Self and *alter* selves, or to see the Divine “I” both in oneself and in others.

56. Moosa, *Poetics*, *supra* note 1, at 2.

57. *Id.*

58. An analogy from the physical sciences may be helpful to the lay reader on this point. When scientists study physics, for example, they study the observable physical world, and by observation they notice that the varieties of physical forms obey certain patterns—such as the laws of conservation of energy and momentum in physical interactions. Although *they* did not create the physical world of forms, of time, space, and matter—God the Creator did—the science of physics is a *human perception and understanding* of that reality. Scientific laws are not “given” to us by God but “discovered” or “unveiled” by humans; they consist of the *human* attempt to discover and express patterns of natural laws in human language and formulas. The sum of these laws, as a body of science, has to be logically consistent. And as time goes on, earlier beliefs about these laws stand to be corrected as scientific knowledge, tested by experiments in real situations, advances. Physicists’ knowledge is by definition incomplete and in some instances incorrect, but over time as more and more physicists deepen their research and discuss among themselves the results of their studies, they weed out incorrect understandings. Their base of correct or firm knowledge grows and expands.

Over years, physicists may argue over many issues. Crises develop when new discoveries show the inadequacy of old models, which worked in certain dimensions, such as the discoveries at the end of the nineteenth century that could not be explained by Newtonian physics, and that led to the rise of relativity theory (dealing with physics at speeds approximating the speed of light) and quantum physics (dealing with the physics of sub-atomic particles) during the first half of the twentieth century. It was necessary to show that these theories were consistent with and equivalent to Newtonian physics at low speeds and large masses.

Thus, the body of scientific knowledge grows and in time a growing consensus develops among scientists as differences of opinion get ironed out. Applying the principles we learn from physics, we develop a technology that is useful in advancing the quality of our lives. In addition to helping us understand God’s creation, by applying our understanding of the laws or science of

For example, in the Hijaz at the time of Shafi'i (d. 204/820), the term "Sunna" did not exclusively mean the precedents of the Prophet but was understood to include accepted precedents in general, equivalent to the organic and embodied practices of successive generations of Muslims beyond the precedents of the Prophet and the four Orthodox caliphs. Shafi'i was uncomfortable with this evolving idea of Sunna as being the living tradition of the community; it appeared logically incoherent and a potential slippery slope. He therefore gave precedence to the Sunna of the Prophet as the second source of law, second only to the Qur'an, and standing above the praxis of those who came after the Prophet. Since his time and down to our

physics, we can "work with God," so to speak, to invent machines and technology that are useful to us. When we do this, we are not really overcoming or denying physical reality; we are enhancing the quality of our life with our knowledge and understanding of physical laws.

Usul al-fiqh is analogous to the science of physics above in that the *Shari'a* is God-given via a series of injunctions, comprising prescriptions and prohibitions embodied in the Qur'an and expanded/adumbrated by the Prophet's precedents and rulings (the Sunna whose sayings are collected in the Hadith), for these two sources are respectively God-given and God-modified when the occasion warranted.

Jurists in later centuries began to examine this body of injunctions and prohibitions, including opinions and decisions made by the Prophet's companions, most notably the second Caliph Umar b. al-Khattab and the fourth Caliph Al b. Abi Talib. They sought to "discover" underlying principles and laws of the *Shari'a* to develop a logically consistent science of the *Shari'a*; this study became known as *usul al-fiqh*. It includes the philosophy, theory, understanding, rationale, and impulse of the *Shari'a*. Just like physicists in the above analogy or any other class of scientists, the scholars of *fiqh*, known as *fuqaha'* (singular *faqih*), had differences of opinion on matters some of which are of greater, and some of lesser, consequence to the average Muslim. This is because jurists' knowledge is incomplete and in some instances incorrect (just like scientists) but also because there is often more than one correct answer, even a plurality, based on the Qur'anic verse 29:69, which reads: "*Walladhina jahadu fina lanahdiyannahum subulana; wa innallaha lama'a-l-muhsinin,*" which means: "And those who strive in Our (Cause),—We will certainly guide them to Our Paths: for verily God is with those who do right." QUR'AN 29:69. The scholars have interpreted this verse to mean that there is on some issues more than one way to approach God, all equally valid and acceptable to God. Also, the hadith that "whoever does *ijtihad* and gives a right judgment will have two rewards; but if he errs in his judgment, he will have earned one reward," Muslim, *Sahih*, V, 131, shows that God values sincere effort, that sincere effort is in itself valuable and that jurists engaged in this process of *ijtihad* received a reward even when wrong as long as they are sincere. Differences of opinion occurred and still do, but, in time, after centuries of interaction, a growing consensus developed, and the growing science of *usul al-fiqh* became increasingly accepted by Muslim scholars ('*ulama'* singular '*alim*') as a valuable science.

By understanding this science, we can apply it to situations—some of which may be new—to find answers to questions that, although not originally addressed directly in the Qur'an and Hadith, are consistent with the primary laws and principles of the *Shari'a*. The value of understanding the reasoning behind the *Shari'a* becomes particularly evident when it enables us, in new circumstances and when faced with modern dilemmas, to apply our reasoning to arrive at a *comfortably correct* decision. The decision may not be unique, but contemporary Muslims should well remember that Muslim jurists recognized the possibility of differing decisions deemed equally legitimate and, in their accepting of the different schools of law, created the ideological and juridical space for such differences to occur and to flourish.

The challenge of our time is not dissimilar to that faced by physicists at the end of the nineteenth century. The job at hand is to expand the principles of *usul al-fiqh* so that they not only apply in a relevant way to the twenty-first century global Islamic ummah but that, when projected to the classical contexts of time and place, can also be shown to be consistent with the classical understanding of *fiqh*.

day, Shafi'i's idea of Sunna as being exclusively the practice of the Prophet has dominated.⁵⁹

To provide posterity with a coherent, interpretive framework, intellectuals sought to engineer models of Muslim legal hermeneutics that were coherent and contextually appropriate to their times—and, we must emphasize, to contexts that were in fact hybrids of various experiences and influences. In doing so, they *shaped* the subsequent direction of Islamic legal thought.

C. *Was Man Made for the Sharia, or the Sharia Made for Man?*

The tension among jurists, today and in medieval times, centered on how to regard the relationship between the canonical text and the believing Muslim. For some, the texts enjoyed priority over the Muslim as the “legal subject”; for other jurists, starting with the Caliph Umar through the Hanbali jurist Najm ad-Din al-Tufi (d. 716/1316), the believer is the legal subject of the law. Umar's decisions conflate with a host of jurists' writings leading up to Tufi's nearly 700 years later. The decisions culminate in the idea that public interest, or the common good (*maslaha*), was the operative meta-purpose of the revealed law, and that all the Qur'anic textual ordinances and Prophetic injunctions were “coagulations” of *maslaha* in the contexts of revelation. The interest of the believer, therefore, stands above and before the law, and not vice versa; in several instances Umar suspended textual ordinances in favor of a decision he made,⁶⁰ arguing that the core objective of all Sharia laws was the same: to avoid harm and promote the common good. This argument is reminiscent of Jesus's announcement that “[t]he Sabbath [and thus the law] was made for man, not man for the Sabbath [Law].”⁶¹

Thus, when the context differs from the context of revelation, the jurist's role is to identify and determine the original *maslaha* and “re-coagulate” it into his new context. Religion is about human ethics, both toward God and toward Man, and religious law is not about fixing eternally what “once was” or “now is” the common good, but it is about “*the continuous becoming* of the eternal common good.”⁶²

59. As a partial counterpoise to this “fixing” of the Sunnah that de-links it from the continuing evolving praxis of the community is the Shia notion that the live (contemporary) jurisprudent can in fact override the fatwas of his predecessors, thus giving life to the notion of an evolving praxis of the community.

60. For examples of this, see Moosa, *Poetics*, *supra* note 1, at 12–14, and RAUF, ISLAM: A SACRED LAW, *supra* note 1, at 76–78.

61. *Mark* 2:27.

62. Tufi's point of view, cited in Moosa, *Poetics*, *supra* note 1, at 22–23. This opens the discussion into the issue of gnosis, of spiritual discernment that comprises the eternal and timeless content of every *Prophetic* impulse; an opening into a fresh “receiving” or “radiation” from Divine inspiration.

The Maliki jurist from Granada Abu Ishaq al-Shatibi (d. 790/1388) subscribed to this view, promulgated by the Shafi'i jurist al-'Izz ibn Abd as-Salam (d. 660/1261) in the words:

All obligations refer to the interests of God's creatures in this world and the next. God is not in need of people's worship, nor is He benefited by the obedience of those who obey, nor is He harmed by the disobedience of those who disobey.⁶³

The majority of jurists accepted that the Sharia's meta-purpose of *maslaha* meant the promotion of human interests (*masalih al-'ibad*). Asserting that laws were only instituted for the benefit of people in this world and the next, and because laws are only the means of achieving God's aims and intentions, the laws themselves hold no intrinsic value. If, occasionally, the strict application of the law compromises the aims of the Sharia, then the law can be set aside or modified so that God's intentions may be fulfilled.

Jurists adduced this point from the Qur'an itself. In the "vertical" God-man dimension of religious acts of worship, these acts are never ends in themselves but means to the greater end, namely remembrance of God (*dhikrullah*).⁶⁴ If and when these means are performed without their intended goals and content of divine remembrance, they are deemed void and ineffective, at best, and at worst a major sin—defined as an offense against God. Means—including acts of worship—are therefore sanctified or accursed by the degree to which we respectively embed in them remembrance of their proper intent or thwart them by embedding in them contrarian ends.⁶⁵

Accepting, then, the view that all Sharia injunctions are "coagulative instances" of the meta-purpose of the public good (*maslaha*), Shatibi's schema is that all of the Sharia laws—and their *maslaha* content—radiate into and manifest in five subject areas and at three degrees of essentiality or necessity. The six subject areas that all of Sharia laws are intended to protect and further are: life; dignity or honor (*'ird*); religion; family (lineage or progeny); property; and mind (mental well-being and intellect) at either the most necessary level (*darura*), at a lesser level of need (*haja*) or at the level of adornment or beautification (*tahsin*, i.e., not necessary or needed).

The importance of life, for example, is indicated by Qur'anic passages emphasizing the importance of life and condemning those who take a life without right,⁶⁶ by the magnitude of the Shar'i punishment for murder, and

63. Qawa'id al-Ahkam fi masalih al-anam (Cairo, 1934), vol. II, 70.

64. Remembrance of God trumps (literally, "is greater than") prayer, avers QUR'AN 29:45.

65. Prayer, for example, is a major obligation; yet God issues a severe warning to those who pray ostentatiously, "[t]o be seen," the vitiating clause being "neglectful of [the purpose of] their prayers," who pray yet hinder helpful action to others. QUR'AN 107:1–7.

66. See, e.g., QUR'AN 5:35 ("On that account: We ordained for the Children of Israel that if any one slew a person—unless it be for murder or for spreading mischief in the land—it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people.").

by the compensation for unintentional manslaughter. The importance of family, progeny, and clarity of lineage is given on one hand by the Sharia's urging marriage upon reaching puberty, granting men the right to marry more than one wife, granting women the right to divorce for lack of sexual gratification, but on the other hand establishing severe penalties for adultery. The recognition of material well-being is proven by the importance of *zakah* (charity and tax paid on income and assets to the Treasury to help take care of the poor), and in modern times through employment or public welfare to assure a minimum standard of food, clothing, and shelter; while the importance of property rights is indicated by the Sharia's severe penalty on theft. These *maqasid* (ends, aims, or objectives) can be thought of as *general* human rights, on which a broad consensus of Islamic jurists agrees that proper governance should protect, provide for, and further.⁶⁷

God protects these aims on Judgment Day, when He calls every person to account, and determines how humanity has either honored or violated the rights of God and the rights of creation—including people and animals—down to “an atom's weight” of good or evil done.⁶⁸ God, as Supreme Judge, will determine every human being's ultimate and eternal disposition on Judgment Day (*yawm ad-din*). Moreover, according to Islamic juristic tradition, “[t]he rights [or claims] of human beings are not forgiven by God [even on Judgment Day] unless the human being concerned forgives them first, and the claims for such rights are not dismissed [by God] unless they are dismissed by the person concerned.”⁶⁹ The magnitude of Judgment Day, and the reality that all beings' rights will be honored and compensated for by the Supreme and Absolute Being is the source of the notion of *universality* and *inalienability* of this understanding of Islamic human rights. This sensibility is additionally implanted by God in our very nature (*fitrah*), wherein God's presence as the immanent (*al-Batin*) lies.⁷⁰ The Qur'an and the Sunnah moreover reveal the equality of humankind and reject any preferential treatment accorded to race, ethnicity, or tribalism. In other words, individual rights—everyone's rights, including animals—are so important to God that the *raison d'être* of Judgment Day is to *ensure absolute justice* when all claims based on justice are fully and completely settled.

67. Comparing these to the inalienable human rights of the American Declaration of Independence, we see in common life and property (in the original draft, later changed to pursuit of happiness). THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

68. QUR'AN 99:7–8. A hadith speaks of a woman who tortured a cat until it died and for that was rewarded with hell, while a prostitute was forgiven and rewarded with paradise for having given a thirsty dog water from a well. Thus, even animals have rights, which humans shall be responsible for having denied or granted. From these hadiths, we note that God acts on behalf of these creatures to exact their right or claim against the wrongdoer and rewards the right-doer for his act.

69. EL FADL, *supra* note 1, at 26 (quoting the Maliki jurist Ibn al-'Arabi).

70. “We are nearer to him [humankind] than (his) jugular vein,” says the QUR'AN 50:16.

Abou El Fadl believes that the *juristic* tradition reduced the five *maqasid* to technical objectives, but notes that “the broad values asserted could serve as a foundation for a systematic theory of individual rights in the modern age.”⁷¹ One contributing factor (but not the only reason) why the classical jurists describe these as *aims of actions rather than rights* is because they operated under a *verb*-paradigm of language and thought, rather than a *noun*-paradigm (explained further below).

The above considerations are among “the difficulties in trying to explain the Islamic past to contemporary Muslims” that Moosa laments; which “is to disabuse them of a misconception that the past [referring to the situation that the classical jurists found themselves contending with] was perfect and untainted and [in all respects was] therefore a model worthy of imitation.”⁷² Lacunae in the imagination of contemporary Muslims that need filling (in addition to that mentioned above) include: 1) an admission that the past developed as—and is—a hybrid; 2) a recognition that early Muslim jurists admitted with great candor that issues of language theory, rhetoric, and hermeneutics were implicated in the understanding of revelation; 3) that jurists in the pre-modern examples of Ghazali and Tufi—including Caliph Umar as *primus inter pares* in this category of “jurist” (among Sunni jurists as our caveat)—were not unwilling to “engage” the canonical texts to “re-coagulate divine intent”; 4) that subtle epistemological and hermeneutical transformations have always taken place in Muslim thought in dealing with the primary sources; and, 5) that the modern experience has fundamentally changed our notions of self and society from the role and meaning of these concepts in pre-modern society.

Understanding these pieces of hermeneutical history equips us, and provides necessary tools in helping us move forward, to ensure that we do not detach ourselves from the symbolic and artistic creativity of Islamic thought, but rather that we continue in the tradition of al-Shafi’i, ash-Shatibi, al-Ghazali, and al-Tufi, and continue to build upon their work.

D. *The Universal Islamic Declaration of Human Rights (UIDHR)*

At a United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris on September 19, 1981, Salem Azzam, Secretary General of the Islamic Council of London, put forth a Universal Islamic Declaration of Human Rights.⁷³

Its foreword reads as follows:

Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity

71. EL FADL, *supra* note 1, at 24; *see also id.* at 41 n.27.

72. MOOSA, *Poetics*, *supra* note 1, at 40.

73. SALEM AZZAM, UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS 1 (Islamic Council 1981) [hereinafter UIDHR].

on mankind and eliminating exploitation, oppression and injustice. Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights. Due to their Divine origin, no ruler, government, assembly or authority can curtail or violate in any way the human rights conferred by God, nor can they be surrendered.

Human rights in Islam are an integral part of the overall Islamic order and it is obligatory on all Muslim governments and organs of society to implement them in letter and in spirit within the framework of that order.

It is unfortunate that human rights are being trampled upon with impunity in many countries of the world, including some Muslim countries. Such violations are a matter of serious concern and are arousing the conscience of more and more people throughout the world.

I sincerely hope that this Declaration of Human Rights will give a powerful impetus to the Muslim peoples to stand firm and defend resolutely and courageously the rights conferred on them by God.

This Declaration of Human Rights is the second fundamental document proclaimed by the Islamic Council to mark the beginning of the 15th Century of the Islamic era, the first being the Universal Islamic Declaration announced at the International Conference on The Prophet Muhammad (peace and blessings be upon him) and his Message, held in London from 12 to 15 April 1980.

The Universal Islamic Declaration of Human Rights is based on the Qur'an and the Sunnah and has been compiled by eminent Muslim scholars, jurists and representatives of Islamic movements and thought. May God reward them all for their efforts and guide us along the right path.

Paris 21 Dhul Qaidah 1401
19th September 1981
Salem Azzam, Secretary General⁷⁴

The UIDHR identifies twenty-three rights, which are enumerated in its twenty-three articles:

- I Right to Life
- II Right to Freedom
- III Right to Equality and Prohibition Against Impermissible Discrimination
- IV Right to Justice
- V Right to Fair Trial
- VI Right to Protection Against Abuse of Power

74. *Id.*

- VII Right to Protection Against Torture
- VIII Right to Protection of Honour And Reputation
- IX Right to Asylum
- X Rights of Minorities
- XI Right and Obligation to Participate in the Conduct and Management of Public Affairs
- XII Right to Freedom of Belief, Thought and Speech
- XIII Right to Freedom of Religion
- XIV Right to Free Association
- XV The Economic Order and the Rights Evolving Therefrom
- XVI Right to Protection of Property
- XVII Status and Dignity of Workers
- XVIII Right to Social Security
- XIX Right to Found a Family and Related Matters
- XX Right of Married Women
- XXI Right to Education
- XXII Right of Privacy
- XXIII Right to Freedom of Movement and Residence⁷⁵

E. Why Muslim Scholars Are Conflicted About the Universal Islamic Declaration of Human Rights (UIDHR)

As a Muslim, Mohammed Arkoun agrees that the virtue of this declaration is that it expresses the convictions, thoughts, and demands that contemporary Muslims are beginning to embrace. He points out that no references were made to the canonic corpus of Shi'i Hadith, which would have made it more "Islamically universal," although the effort to "cloak such precious rights as religious freedom, freedom of association, freedom of thought, and freedom of travel in the full authority of the Islamic tradition is not a negligible accomplishment."⁷⁶ The *political* value of such a document is in creating a legal arsenal useful in bringing about positive change in the Muslim world, and thus Arkoun endorses the utility of finding authorities within the religious tradition who would be willing "to consecrate rights that need to be taught and defended in the oppressive political contexts unfortunately so widespread in today's world."⁷⁷

As a powerful illustration of this, Arkoun cites the instance where jurists tried, for example in Algeria, to form a league for human rights to protect citizens. The state felt that it was under attack and retaliated by refusing to grant permission to organize; it prosecuted the instigators and solicited the formation of a competing association to seize the initiative in this domain without threatening the establishment. "At that moment," he adds, "the Islamic Declaration of Human Rights acquired its ideological and psychological purpose: to reassure . . . believer-citizens by proclaiming that

75. *Id.*

76. ARKOUN, *supra* note 1, at 107.

77. *Id.*

God guaranteed rights; to undercut the [notion that these were merely] secular demands of Western origin, and to re-establish confidence in the ‘modernity’ of Islamic law and its universal and intangible character.”⁷⁸

As an intellectual and a scholar, however, Arkoun finds the apologetic function and inspiration of the text “undeniable,” a discourse “based on mimetic overbidding [that] picks up the enunciations of Western declarations and confers upon them an Islamic origin”;⁷⁹ and as a historian, he is shocked by an anachronism that projects modern concepts backward toward the founding age of Islam. He reckons these apologetic streams of theological discourse coming from Islam (and as well when they emanate from Judaism and Christianity) as strategies of self-justification and thus of reciprocal exclusion aimed at preserving a monopoly on *control of revelation and all the symbolic capital that flows from it*. Historical criticism is too often missing, he asserts. Each side seeks to annex for itself the ethical-legal privileges and the ideological functions that—now more than ever—are attached to the bewitching theme of human rights, an error, he admits, that he has tried hard to avoid.

If someone of Arkoun’s intellectual rigor has had to try hard to keep from falling into this error, how can we not then empathize with social actors for whom such considerations are either too abstruse or at best minor glosses, and are unable to resist the temptation of de-contextualizing ideas, beliefs, and doctrines advanced by their culture out of context? Arkoun deplores how the Qur’an

has been ripped from its historical, linguistic, literary, and psychological contexts and then continually recontextualized in various cultures and according to the ideological needs of various actors. This comment, though trivial for the historian, the linguist, and the anthropologist, is rejected by the theologian and understood poorly if at all by the ordinary believer.⁸⁰

In his judgment, both Muslim liberals and Islamist movements have fallen into this same hermeneutic trap: The latter brought about an ideological hardening that rejects modernity and restores elements of the Sharia—utterly out of context and juxtaposed with legal codes borrowed from the West—and from which the status of women suffered most, especially from legislation where intent diverges widely from effect. He therefore questions the *hermeneutic propriety* (not the political propriety) as less of an apologetic showing that Islam as a religion is open to the proclamation and defense of human rights, but rather that the Qur’an, the Word of God, defined these rights at the beginning of the seventh century, well before Western revolutions.⁸¹

78. *Id.* at 110.

79. *Id.* at 109.

80. *Id.* at 5.

81. *Id.* at 107–09.

Others share this general view. Ebrahim Moosa regards the work on human rights in Islamic thought as being

very mediocre: there is too often a haste to equate Muslim genealogies of rights discourse to be the equivalent of liberal and secular rights. The Islamic Council of Europe's human rights charter has fallen into this trap; and so have the best of minds, like my friend Rashid Ghannushi. Often there is a rhetorical flourish to make equivalences whereas in fact such alignments are out of step with other aspects of even the most reform minded jurisprudence of say a Yusuf al-Qaradawi or say Allal al-Fasi, more than a half century ago.⁸²

F. *Non-Muslim Critiques of Islamic Human Rights Discourses*

One of the most pointed critiques of Islamic human rights claims comes from University of Denver Professor Jack Donnelly. Lest he be misunderstood, he clearly points out that his critique is *structural* and *analytical* rather than *cultural* and *normative*. He “readily agree[s] that the notions of democracy, pluralism, and human rights are . . . in harmony with Islamic thought,”⁸³ but argues that—despite the fact that Islam, like Christianity, can, and even ought to, be read as inherently compatible with those modern values—“traditionally, as with Christianity throughout most of its history, [Islamic legal thought] has not been read in that way.”⁸⁴

Donnelly observes that the extensive, *contemporary* Arab or Muslim human rights literature almost invariably includes “a listing of the basic rights established by modern conventions and declarations, and . . . a serious attempt to trace them back to Koranic texts”⁸⁵ and takes as its standard argument the idea that “Islam has laid down some universal fundamental rights for humanity as a whole, which are to be observed and respected under all circumstances . . . [as] fundamental rights for every man by virtue of his status as a human being.”⁸⁶ Despite his belief in the compatibility of Islamic thought and human rights, Donnelly views such assertions of *historical* connection as “almost entirely baseless.”⁸⁷

In this vein, Donnelly faults Muslims for citing scriptural passages of divine injunctions not to kill and to consider life inviolable, and equating that to the “right to protection of life.”⁸⁸ In fact, he points out, the “right to justice” is the duty of rulers to establish justice; the “right to freedom,” a duty not to enslave *unjustly* (narrower, even, than a general duty not to

82. Letter from Ebrahim Moosa to Feisal Abdul Rauf (Mar. 8, 2005) (on file with author).

83. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 75 (Cornell Univ. Press 2d ed. 2003) (internal quotation omitted).

84. *Id.* at 74.

85. *Id.* at 72.

86. *Id.* (quoting ABUL A'LA MAWDUDI, *HUMAN RIGHTS IN ISLAM* (1976)).

87. *Id.*

88. *Id.*

enslave); “[e]conomic rights,” duties to help to provide for the needy; and “the purported ‘right to freedom of expression’ is actually an obligation to speak the truth—that is, not even an obligation of others but an obligation of the alleged right-holder.”⁸⁹ He observes that Abdul Aziz Said, Majid Khadduri, and others talk about *precepts* and *values* that either involve rights-less duties of others “or are rights held because one has a certain legal or spiritual status [(e.g., Muslim or non-Muslim, man or woman)], *not simply because one is a human being.*”⁹⁰

He agrees with Arkoun’s point above, however, that rooting contemporary human rights ideas and practice in such sources and resources will, for many Muslims, give them a depth, meaning, and impact they could not otherwise attain—just as rooting the rights of the Universal Declaration in the Bible gives them a special meaning and force to many Christians.⁹¹

Donnelly admits that Muslims are “regularly and forcefully called upon—by scripture, tradition, religious leaders, and ordinary believers—to treat others with respect and dignity. They are enjoined, in the strongest possible terms, to pursue both personal well-being and social justice.”⁹² But these injunctions reflect “the *values* of the Universal Declaration of Human Rights, [and] they appeal to divine commands that establish duties, not (human) rights. The *practices* traditionally established to realize these values simply did not include equal and inalienable rights held by all human beings.”⁹³ What matters in Islam, he asserts, in the realm of “human rights” (i.e., human dignity) “[are duties] rather than rights, and the rights one does hold are a consequence of one’s status or actions, not on the moral fact of being human.”⁹⁴

He urges his Muslim reader not to be deluded about the past “historically dominant [legal] practice of most Muslim societies”; just as he chides “most Christian societies throughout most of [Christian] histor[y]” for having “treated non-Christians as inferior, despite the apparently universalistic egalitarianism of the New Testament.”⁹⁵ Donnelly recognizes that “the Holy Qur’an certainly does not require Muslims to accept such legal ideas and their associated practices,” and is supportive of the “many contemporary Muslims who (entirely justifiably) reject such views.”⁹⁶ This should not, however, “obscure central elements of the meaning and importance of human rights today.”⁹⁷

89. *Id.* at 72–73.

90. *Id.* at 73 (emphasis added).

91. *Id.* at 75.

92. *Id.* at 73.

93. *Id.*

94. *Id.* at 74.

95. *Id.*

96. *Id.*

97. *Id.* at 76.

After critiquing human rights in the pre-modern West, traditional Africa, Confucian China, and the caste system of India, Donnelly says that “human rights are, among other things, means to realize human dignity.”⁹⁸ It is simply not true, he asserts,

that all peoples at all times have had human rights ideas and practices, if by “human rights” we mean equal and inalienable paramount moral rights held by all members of the species. Most traditional legal and political practices are not just human rights practices dressed up in different clothing. And those who insist that they are, whatever their intention may be, make an argument that not only can be, but also regularly has been used by repressive regimes to support denying their citizens internationally recognized human rights.⁹⁹

Donnelly favors (with Penna and Campbell)

cross-cultural dialogue that “will allow the incorporation of non-Western symbolism into the international human rights discourse, and make support for human rights more powerful in non-Western societies.” But that dialogue must be based on a clear and accurate understanding of the nature of internationally recognized human rights and a reading of the historical record that can bear empirical scrutiny.¹⁰⁰

The literature he critiqued (including that of Muslim writers on human rights) is, he concludes, “theoretically muddled or historically inaccurate (and often both)”:¹⁰¹

Nothing is gained by confusing human rights with justice, fairness, limited government, or any other values or practices. . . . [H]uman rights will be threatened if we do not see that the human rights approach to, say, fairness is very different from other approaches. . . . Thus I continue to insist that the claims that I address in this chapter merit the most vigorous rebuttal.¹⁰²

III. HOW MIGHT AN ISLAMIC HUMAN RIGHTS DOCTRINE BE ESTABLISHED?

Catholic thinker Raimundo Pannikar says that “instead of trying to transliterate the concept of human rights into another culture,” which is what the above-mentioned critiques of Islamic human rights reveal, “we should search for the homeomorphic equivalent for human rights in another culture.”¹⁰³ If the meta-objective of “modern human rights is to protect and

98. *Id.* at 85.

99. *Id.* at 87.

100. *Id.* (internal citation omitted).

101. *Id.* at 87.

102. *Id.*

103. Moosa, *Dilemma*, *supra* note 1, at 207.

show respect for human dignity, then we” must investigate how (in our case) Islamic law satisfies that need.¹⁰⁴ Where historically Muslims may have veered from this Islamic ideal, we need to demonstrate how Islamic law can be re-deployed to remedy this.

We believe that a supra-contextual analysis of the structural and paradigmatic differences between the modern Western concept of a human right and the classic juridical Islamic concept of a human right will reveal a remarkable overlap—and arguably an *identity*—between them. The apparent difference, as we will show, arises from the blending of several meanings in the Western understanding.

Then we examine the *substance* of a right in each narrative. This, in our opinion, requires examining the contextual metaphysical and historical narratives that explain how the values or objectives of the rights are sourced, how they are selected, and, finally, what political enforcement mechanisms exist to enforce them. In doing so, we believe that a perspective can be found from which parity exists between Donnelly’s Western and Ghannushi’s Islamic understandings of a human right—an understanding that makes us see that the differences are not as different as some assert, and are, in fact, bridgeable. Moosa suggests that while “secular human rights and Islamic rights . . . are indeed conceptually different things[,] . . . contemporary Muslim thought may be able to produce a rights system . . . not dissimilar to secular human rights declarations in their outcomes.”¹⁰⁵

Before proceeding, we wish to highlight two important differences that have bearing on our discussion. The first difference is between the language paradigms of Arabic and Western thought, which has arguably resulted in the second difference, namely a “corporate” mental grid in Western thinking about the nature of reality. Understanding these two differences will help bridge Islamic human rights and Western human rights discourses.

A. *The Arabic Verb-Based Language and Thought Versus the Western Noun-Based Language and Thought*

A key difference between the Arabic verb-based language approach and the noun-based language approach of Greek and post-Enlightenment Western languages is that between the Semitic and Indo-European languages. The late professor Wilfred Cantwell Smith, one time Head of Harvard’s Center for the Study of World Religions, pointed out that in Semitic (and classical Japanese), verbs are primary:

Studying Arabic, a Semitic language, starts with studying verbs and their varieties. . . . The Indo-European languages, especially Greek, gave the noun a much higher rank, “so that ever since in Western thought *reality has tended to be conceived in terms of*

104. *Id.*

105. *Id.* at 187.

entities, while in the Old Testament [and the Qur'an], it is conceived primarily in terms of events."¹⁰⁶

The Qur'an, for example, speaks often of Jews and Christians, *but never once does it mention the terms "Judaism" or "Christianity,"* suggesting that such nouns, although semantically sensible, are ontologically incoherent or unreal.¹⁰⁷

The Qur'an and Sunnah utilize the Semitic verb-based language; the Sharia's "raw data" consists of a list of do's and don'ts—analogue to an expanded Ten Commandments—between ontologically real actors. Muslim jurists thought in a verb-based paradigm rather than a noun-based one; we believe this contributed to their paradigm as starting from a frame of reference of *duties* and *obligations*. They therefore described the *maqasid* of the Sharia as *objectives* of laws governing human action within a narrative of ontological actors and the *functional* relationship between them—their respective status towards each other (God, the Caliph, Sultan, or Governor and the ruled; the judge and his judgment of others, parent-child, husband-wife, employer-employee, etc.).

106. RAUF, WHAT'S RIGHT WITH ISLAM, *supra* note 1, at 113 (quoting WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION (1962)). Smith additionally demonstrated that the use of the terms *Judaism*, *Christianity*, and *Islam* to refer to systems of observances and beliefs—of an institutionalized historical tradition—is a modern one that did not appear until the seventeenth century. Through a study of Muslim book titles through the centuries, he noticed that "since the latter part of the nineteenth century, there has demonstrably been a sudden and almost complete shift to a use of the term *Islam* to name a religion." *Id.* at 114. Prior to that, it always meant "the act of submission," as in Qur'an 49:17 where God commands the Prophet to inform the Bedouin Arabs, "Don't favor me with your *islam* [*la tamunnu 'alayya islamakum*]." Similarly, being "*Christian*" until the sixteenth century meant being "Christ-like," rather than being "*a Christian*," i.e., a member of the "institution of Christianity."

We believe this shift in language was also a result of the invention of the corporation (the Chartered Company) and its impact upon language in post-sixteenth century Europe and the West, which resulted in the greater frequency of the "personification" of ideas and ascribing to them "action capacity." That modern Muslims have bought into this language paradigm is indicated by their often asking, "What does Islam, the Quran, the Hadith *say* about something?" whereas classical scholars of Islam would never use such language. They would ask, "What does God, or the Prophet, *say*?" Today an English speaking imam in a sermon would say: "The Quran *says* such and such" or "there is a hadith that *says* such and such." An Arab speaker would never say that, *for it would sound absurd* to say *qal al-qur'anu*, or *qala hadithun*; he would say, instead: "God the Exalted *says* in His Noble Book [*qala-llahu ta'ala fi kitabih-i-karim*] such and such" or "The Messenger of God, peace and blessings be upon him, *said* in an authentic report [*qala rasul ullahi fi hadithin sahih*] such and such." *God* and the *Prophet* are speakers; the Qur'an and Hadith are "*reports*" of Divine and Prophetic speech respectively. The difference, though subtle, is huge—and often ignored—and we believe is of import in our discussion on human rights.

The Qur'an moreover refers to humans as "actions." For example, Jesus Christ is called in 4:171 as a (*spoken*) word of God (i.e., a Divine *act*) conveyed to Mary (*kalimatu-hu alqaha ila maryam*). Also see 11:46, where God informs Noah that his *son* who drowned as a result of rejecting Noah's message "was a bad *action*" (*inna-hu 'amal-un ghayru salih-in*).

107. Continuing the point made in our previous footnote, modern Westerners often ask, "How might we compare what Islam *says* versus what Christianity *says*?" on a particular issue. This is not a coherent statement in classical Islamic language.

B. Comparing the Western and Islamic Formal Analytic Structures of a Human Right

The Islamic juridical concept of an individual's "right" starts with an examination of how rights come into being—what we might call an "ontology" or "etiology" of rights. In this picture an individual's right to something (the right-holder) is the corollary of another's duty to fulfill that right (the duty-bearer). For example, if Ann employs Bob for a task, Bob—upon agreeing to the employment—receives the "obligation" to complete the task. Bob's obligation in turn grants Ann the corollary "right" to demand Bob's work. Ann's right, in the Islamic legal view, only "arises" as a claim if Bob does not fulfill his contractual obligation. Bob has a right to get paid; but this right does not "exist" as a claim until he completes the task, and, even when the right is available, is not "exercised" unless Ann fails in fulfilling her obligation to pay Bob; her "duty" to pay Bob arising upon Bob's completion of the task. Bob's freely agreeing to take on the job is important; if Ann enslaved Bob, the rights narrative is substantially altered. Both have to be happy with the deal; they both have to find it adding to their pleasure and satisfaction.

Bob's right to get paid emerges from a contractual narrative that provides the context to the claimed right; while his right to get paid is simultaneous to, and is the existential corollary of, Ann's *failing* her obligation to pay him, they both are dependent on a prior *action*—Bob's completing the job. Bob's failure to complete the job gives rise to Ann's right to demand his work, both of which emerged out of a prior *action*—namely Ann's employing Bob and Bob's freely accepting to take on the job.

Our narrative of mutual rights and obligations started with Ann's act of employing Bob. The only way we can start earlier in the narrative is to assert that Ann had an antecedent right to employ someone, which brought about the *event* of Ann's seeking and finding Bob, and her employing Bob after perhaps a negotiation, which in turn created the succeeding narrative of mutual rights and obligations.

In this story so far, we see that rights are first and dependent on *interaction* between two or more players. (It takes two to tango—otherwise the *concept* of tango, and thus in our case a "right," cannot even be said to exist, for a right is a claim against someone else). Second, rights "flow" out of antecedent *actions*. (If there is no *prior agreement* between Ann and Bob, neither has an obligation towards, nor possesses a right against, the other—the specific right disappears.) Third, someone's rights are *always* the flip side of another's "obligations." An obligation is either a self-imposed or externally imposed *imperative*, a command to do (or not do) a given action from the viewpoint of the actor of the action. From the viewpoint of the recipient of the action, the obligatory action is seen and experienced as a "rightful claim" against the actor for his omission of obligation

or duty, or a “right” for short.¹⁰⁸ Fourth, a storyline, or narrative, of causes exists that brings a respective right and obligation into being from a prior action, which itself may be dependent on another right and obligation.

A contextual, contractual narrative, therefore, is the ontological source for the simultaneous creation of the right and its corollary obligation.

The post-modern Western (secular humanist) notion of a fundamental, universal, and inalienable human right is that it is an *entitlement* that a person has just because he or she is human, and which flows out of the mere *fact* of the person’s human-being-ness. It starts from a perspective that posits a set of unwavering and generalizable (human) rights for each individual at all times that gives rise to obligatory actions from the duty-bearers. It allows the individual to make a claim against society, or the state, for its satisfaction, and generally ignores any contextual narrative prior to the existence of the individual human being as irrelevant.

If that was all there was to the structural definition of the Western concept of a human right, it would be easier to correlate it to the Islamic structural definition of a human right. The Western definition of human rights, however, conflates several ideas as axiomatic:

- The *object* of the right (that which is to be *enjoyed*);
- A set of conventionally agreed upon *selected values* that find their expression in the determination of rights;
- An implied (but unstated Biblical) narrative of what a human being is (within an implied but not always expressed *societal contract* and narrative of justice, mercy, etc.); and
- An implied political enforcement mechanism (a legal mechanism that translates into power) by which the right may be exercised.¹⁰⁹

This theory of human rights blends the above ideas. Thus, Donnelly is forced to make statements like:

- “Rights are not reducible to the correlative duties of those against whom they are held.”¹¹⁰
- “Neither is having a right reducible to enjoying a benefit.”¹¹¹
- “Most good things are not the *objects* of human rights. The emphasis on human rights in contemporary international society thus implies *selecting certain values for special emphasis* But it also in-

108. Moreover, the actor who fulfills his obligation commits a “right”; the one who rejects, denies, and does not fulfill his obligation commits a “wrong.”

109. Unless one grasps these components, the non-Western religious reader is either bound to be confused by Western theoretical descriptions of human rights, find them ontologically incoherent, feel himself subjected to a moral proselytizing from an alien moral ethic (usually secular humanistic), subject to a political and/or intellectual manipulative power play from a Western source, or any combination thereof.

110. DONNELLY, *supra* note 83, at 8.

111. *Id.*

volves *selecting a particular mechanism—rights—to advance those values.*¹¹²

- “The source of human rights is man’s moral nature.”¹¹³

We observe that Donnelly blends different meanings of rights together; thus, one meaning of “rights”—as conveyor of *values*—is blended with another meaning of “rights”—as a (presumed) political power mechanism, to ensure the fulfillment of the object of the right. Because the ontological narrative of the rights is left unmentioned, such a rights model requires structural modifications to make them ontologically coherent, such as: “Rights are actually put to use, *and thus important enough to talk about, only when they are at issue, when their enjoyment is questioned, threatened, or denied.*”¹¹⁴ Donnelly is further forced to tweak the analytical structure of rights by positing what he calls the “possession paradox”: “‘having’ a right is of most value precisely when one does not ‘have’ (the object of) the right,” thereby embedding in the very concept of the right its defining “object.”¹¹⁵

Muslim jurists operated under a paradigmatic frame of reference and narrative that started with the list of a human being’s obligatory actions or duties. In this case, as El Fadl points out, “they thought of individual rights as *arising from a legal cause brought about by the suffering of a legal wrong*. A person does not ‘possess’ a right until he or she has been *wronged* and obtains a claim for retribution or compensation as a result.”¹¹⁶ More accurately, we would say that the right certainly existed as the corollary of the obligation of the duty-bearer, but that the *exercise* of the right can only arise when the duty-bearer fails to fulfill his duty. Looked at from an Islamic duty-holder’s frame of reference, Donnelly’s “possession paradox” cannot even exist, because the right is ontologically dependent on a “dere-liction of duty” within a values narrative; *it is not even dependent on a fulfillment of duty*. To use Donnelly’s language, “a world of saints[where] rights [are] widely respected, rarely asserted, and almost never enforced,”¹¹⁷ is in fact a world where everyone does their duty. We may ask therefore if in such a world wherein *rights are almost never enforced and rarely asserted*, can we still truly say they exist? If so, how can we know

112. *Id.* at 11 (emphasis added).

113. *Id.* at 14.

114. *Id.* at 8 (emphasis added).

115. *Id.* at 9.

116. EL FADL, *supra* note 1, at 27.

117. DONNELLY, *supra* note 83, at 9. Another correction that Donnelly is forced to introduce [in order to introduce the societal *contractual* aspect into the picture] is to differentiate between “*assertive exercise*” of the right: when it is exercised to “activat[e] the obligation of the duty-bearer”; “*active respect*” of the right: when “the duty-bearer takes the right into account” in his behavior “without it ever being claimed”; and “*objective enjoyment*” of the right: when “rights apparently never enter into the transaction . . . [where] neither right-holder nor duty-bearer gives them any thought.” *Id.*

such rights exist, much less even measure the extent to which they exist? The question remains unanswered by Donnelly.

From such an Islamic paradigmatic perspective, Western human rights (within a corporation-style conceptual narrative that personifies non-ontologically real actors: the state, the law, the courts, etc.) are not “real” assets but are a useful legal fiction, like saying that the ontologically unreal corporation is in fact a “person” that acts. Its value lies in ensuring that duty-bearers will in fact discharge their obligations—or, *more importantly*, *will not fail to discharge their obligations*—on a conventionally agreed-upon set of essential duties that are fundamentally required to ensure a threshold level of human dignity.¹¹⁸

Michael Perry best expresses, in a duty-holders frame of reference, that human rights doctrines are essentially to *prevent* the abuse of one human being by another. He asserts that there are certain actions or “things” that “ought not to be done to any human being and certain other things [that] ought to be done for every human being.”¹¹⁹ It is this basic threshold set of “ought-to’s” and “ought-not-to’s” that from a duty-bearer’s frame of reference underlies the modern notion of human rights.

The values and benefits enjoyed under the Islamic system flow from a narrative between God and Man. The main difference between the contemporary West and the Muslim World is that Muslim nations long for an empowering mechanism to guarantee these rights.

C. *An Islamic Narrative of Rights*

The classical Islamic juridical notion of human rights flows out of a contractual narrative between God and Man. It also presumes ontologically real players. God *created* humankind, and Man freely entered into a contractual agreement or covenant with God. This is given by verse 33:72 of the Qur’an: “Indeed we offered the Trust to the heavens, the earth and the mountains, but they refused to assume it, fearing it; but Man [freely] assumed it. Indeed he is unjust, [and] ignorant.”¹²⁰ Humanity agreed to take on the task of divine vicegerency on earth, and, prior to being incarnated on earth, took an oath with God, bearing witness against itself that it would not forget its duty to God.¹²¹

118. This opens the door to the questions of how truly universal and inalienable these rights are. At face value, some of these rights will have to be abridged to those who violate others’ rights. Thus, for example, a convicted murderer would forfeit his “inalienable right” to life by his action.

119. MICHAEL PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 5 (1998).

120. QUR’AN 33:72.

121. This event is given in QUR’AN 7:172, wherein God asks humanity “Am I not your Lord?” to which humanity answered, “Yes, we bear witness; lest you should say on the Day of Resurrection ‘We were unaware of this.’”

The relationship between God and Man is analogous to that between Ann and Bob above; it is a covenantal one, wherein Man freely assumed a contractual *obligation* to fulfill a set of tasks, the *farai'id*, comprising both acts prohibited and prescribed (the “thou shalt not’s” and “thou shalt do’s” respectively)—both towards God (i.e., acts of worship) and toward fellow human beings and the rest of creation (acting justly, mercifully, generously, etc.). Simultaneously with this set of obligatory duties, a set of corollary rights arises for the recipients of the duties. Specifically from the list of duties Man has toward God, thus, arises “God’s rights,” and from God’s duties to Man and from Man’s duties to fellow-man arise human rights.

In this worldview, if Ann existed all by herself with no Bob, or vice versa, neither the right nor the obligation could exist. Both are *dependent*, first, on the existence of a relationship between Ann and Bob, and, secondly, on the nature of the contractual relationship. A dynamic narrative plays out: a scenario between right-holders and simultaneous duty-bearers. Failed duty-bearers elicit claimed and exercised rights, which in turn elicit other duty-bearers to fulfill their obligations. Rights followed by subsequent duties arise between two or more players; they arise concurrently like two sides of a coin. One side of the coin may be minted before the other, but in general there can be no right-holder without a duty-bearer.

How the narrative plays out is a function of the sum of the language paradigm and its underlying metaphysics. Although not required, a verb-based paradigm (like Arabic) that starts with verbs will start with actions between ontologically real entities that in turn emphasize the “obligatory duties” of players that simultaneously create corollary “rights” that accrue to the recipients of the duties. Again, although not required, a noun-based paradigm will start with “ontologically real” rights that each player possesses, and out of which entitlements to corollary obligatory duties fall upon those responsible for their discharge.

Shifting to a noun-based rights paradigm would mean a change from the frame of reference where the actors are obliged to perform a set of obligatory duties to the frame of reference of the *recipients* of the obligatory actions. To do this we have to map the duties required of the various parties into their corresponding rights, and start there. Then the paradigm “plays out” with the idea that the actors possess a number of rights which in turn entitle the right-owners to a set of obligatory duties from those obliged to perform them. In this frame of reference, actors possess rights, and obligations or duties are either ontologically dependent on the rights or “flow” out of them. The Islamic metaphysical narrative would in this case have had to sound like something along the following lines:

God created humankind to fulfill certain antecedent Divine “rights.” The Divine rights “create” a set of human obligations, both toward God and toward creation as recipients of these obligatory human actions. Out of human rights flow a set of obligations from God to humankind, and from

humankind to each other, where humans are recipients of this set of obligatory actions. Such a frame of reference—of Divine rights that are ontologically prior to human obligations—did indeed develop within the spectrum of Islamic thought via a creative *esoteric* reading of the Qur'an à la the thirteenth-century Sufi thinker and philosopher Muhyiddin Ibn al-'Arabi.¹²²

The difference in the starting point of the narrative does not affect the cause-effect relationships between successive rights and duties in the narrative. Neither does it affect the logical structural ontology of rights, of how they come into being. Whether we start with God's "rights" resulting in the creation of humankind with resulting human obligations, or begin our story with God's creating Man and Man's agreeing to assume certain obligations, the net result is that Man's set of obligations to God is the same. Analogous to the Ann and Bob relationship above, the Qur'anic metaphysical picture is that of God "employing" Man to assume the task of being God's vicegerent on earth. Man's freely agreeing to take on this task creates a simultaneous set of mutual obligations and rights between God and Man.

The Qur'anic narrative is that God created Man, and gave him life, free will, and the urge to find his happiness/personal fulfillment in the free exercise of his will. Man's nature is God-given, and only God has the authority to take it back or alter it.¹²³ Thus, human *life*, human *liberty/freewill*, and the human's pursuit of his or her *happiness/fulfillment* are the three meta-attributes—therefore *universal and inalienable*—of Man. The "guarantor" of both the universality and inalienability of these meta-attributes is God; the "moment" or time—thus the cause—of this guarantee is God's absolute judgment on Judgment Day. Anyone who violates another's life, freewill (i.e., liberty), and makes another unhappy (without just cause, such causes to be consistent with the divinely given set of ethical considerations) will have to account for his or her action before the Creator at that time. Without

122. For example, the "right" of God to forgive, personified in the Divine Attribute of The Forgiver (and other similar Divine Attributes) "demands" in the archetypal world that the Divine Will order the Divine Attribute of "Creator" to create a being that is free to disobey God (i.e., sin), feel remorse, and ask for Divine forgiveness so that the Divine "right" of Forgiver can manifest. This Divine right embodied in the Attribute, the "Just," in turn, demands of this created (human) being a set of human obligations or duties. But this Divine "right," to be just, simultaneously requires the manifestation of the Attribute of The Avenger to exact remedial claims and sanctions that God controls. This narrative could possibly be seen to emerge from Qur'an 33:72–73 which read, in a loose exegetical translation to highlight the narrative: "*Indeed We offered the Trust to the heavens, the earth and the mountains, but they refused to assume it, fearing it; but Man assumed it—indeed he is an ignorant tyrant—in order that God may [exercise His right to] torment the hypocrites [men and women] and polytheists [men and women]; and that God [exercise His right to] relent mercifully to the believing men and women. And God was [even before the creation of Man] Ever-Forgiving, Merciful*" (emphasis added to highlight narrative). See FEISAL ABDUL RAUF, *ISLAM: A SEARCH FOR MEANING* 54 (1996).

123. This is consistent with the American Declaration of Independence's statement that all of humanity has been "endowed by their Creator with certain unalienable rights." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

such a guaranteeing cause, they cannot coherently be deemed either universal or inalienable.

Muslim jurists predominantly operated in the Arabic verb-based paradigm, and developed a system of valuation of *actions*: the obligatory, recommended, permitted, disliked-but-allowable, and forbidden actions. They extracted from the “raw data” of Divine commandments in the Qur’an and as adumbrated by the Prophet a set of obligatory—prescribed and prohibited—actions (the *fara’id*) whose corollary was a set of rights, both of God and of Man. Since then, Muslim thinkers have continually insisted that rights flow out of duties and obligations,¹²⁴ but need to make their case clearer as to why that is so.

124. Moosa points out several instances of this:

One is A.K. Brohi, who remarks that “the believer has only *obligations* or *duties* towards God since he is called upon to *obey* the Divine Law, and such *human rights* as he is made to acknowledge *stem from his primary duty* to obey God. Yet *paradoxically, in these duties lie all the rights and freedoms.*” Moosa, *Dilemma*, *supra* note 1, at 198 (emphasis added). In other words, Brohi implicitly asserts the primacy of the verb-based paradigm in *Shari’a*, i.e., mutual duties and obligations between God and Man, and between Man and fellow-Man. In this paradigm, as we have shown above, human rights as “things possessed” are not ontologically independent, but are contingent entities, ontologically dependent on the actions between ontologically real players; i.e., *rights are personifications of verbs* and therefore emanate from a specific cluster of duties or responsibilities between men. Struggling to link these paradigmatic notions leads him to add that “[m]an *acknowledges* the rights of his fellow men because this is a *duty* imposed on him by the religious law to obey God and the Prophet and those who are constituted as authority to conduct the affairs of state.” *Id.* (emphasis added). Italics in this and following quotes are mine, used to highlight importance of verbs and verbal nouns.

Another is Seyyed Hossein Nasr, who comments that

[h]uman rights are, according to the *Shari’ah*, a *consequence* of human obligations and not their *antecedent*. We possess certain obligations towards God, nature, and other humans, all of which are delineated by the *Shari’ah*. As a result of *fulfilling* these obligations we gain certain rights and freedoms which are again outlined by the Divine Law. Those who do not fulfil [sic] these obligations have no legitimate rights, and any *claims* of freedom that they *make* upon the environment or society is illegitimate and a usurpation of what does not belong to them, in the same way that those persons who *refuse to recognise* [sic] their theomorphic nature and *act accordingly* are only ‘accidentally’ human and are *usurping* the human state which by definition implies centrality and Divine vicegerency.

SEYYED HOSSEIN NASR, ISLAMIC LIFE AND THOUGHT 18 (2001) (quoted in part in Moosa, *Dilemma*, *supra* note 1, at 199).

Nasr here has conflated a number of points. First he implicitly suggests that rights are ontologically dependent on action. In the worldly sense he is speaking of those who violate certain prescriptions: for example, a murderer would forfeit his right to life under Sharia law. In the *context of the moral pro-actions* of an individual, Nasr is referring to human rights in the absolute metaphysical sense: the point of view of human beings’ eschatological rights on Judgment Day, whose *Judge is only God*. The Qur’an and Sunnah make it explicitly clear that this area of judgment belongs to God alone, whose right to judge on, no human being or human court may usurp. Qur’an 18:104–105 states that those whose efforts are null although they think they are doing good are those who disbelieve in the messages of their Lord and of meeting Him; their works are vain—therefore, “We shall not set up a balance for them [to weigh their actions] on the day of Resurrection.”

The Qur’an explicitly paints a very different order between that of earth and that of heaven, and that the “game of life” that God has ordained for humankind, out of which flows a set of human obligations, is expected to be protected by Qur’anically compliant laws on earth, which has

Even the UIDHR explicitly states that in “terms of our primeval covenant with God our *duties* and *obligations* have priority over our rights,”¹²⁵ leading Moosa to suggest that the UIDHR may have been more appropriately named the “Universal Islamic Declaration of Human *Duties*.”¹²⁶ Here Moosa makes a key suggestion. If in fact the Islamic paradigm is duty-based, then the first step is to generate a Universal Declaration of Sharia-Required Human Duties that demonstrably flows out of Islamic legal, textual, and other sources. Mapping these into their correlative rights would give us a truly Universal Islamic Declaration of Human Rights. Comparing that to the UDHR would then be a more objective comparison between the Western and Islamic components of these rights.

This is what the UIDHR either implicitly attempted or explicitly ignored (depending on whether one’s point of view is charitable or not). To the reader, the UIDHR feels much like the Universal Declaration of Human Rights at the beginning; then it was projected onto and compared with the “verbal sources” of commands and prohibitions in the Qur’an and Sunni sources of Hadith. Those that matched were then re-stated in a human rights paradigm. While this was a valuable exercise, it needs to be subjected to a more rigorous methodology, and expanded to include Shia sources of Hadith.

Those who have chosen to short-circuit or ignore the paradigm issue are less concerned about such mental peregrinations, and prefer to focus on the ends or outcomes of both the Islamic ethic and the secular ethic on what a notion of the common good must mean. The liberal Tunisian Islamist ideologue Rashid al-Ghannushi is among those who fall into this category. By following a purely ethical standpoint, he finds it easy to assert:

major implications for an earthly jurisprudence. We believe that is where a potential pitfall lies that has led Muslims to have gone wrong in their treatment of other religious minorities. After the death of the Prophet, and as the Islamic empire expanded, some pre-Islamic (*jahili*) notions inconsistent with the Qur’anically mandated rules of societal conduct crept back into society. In all societies (even the United States), treason earned a capital punishment. The distinction between taking a position differing from that of the rulers in matters of religion purely as a matter of freedom of thought, (i.e., without switching political allegiance) and doing so in a context where it necessarily means that one’s political allegiance became allied with an enemy (thus an act of political treason) is often unclear to the reader of history, and often as well to those in power. This distinction needs to be made however, between Islamic theology and Islamic history where rulers in some instances lost this distinction. One example where the State’s role as “judging on behalf of God” vis-à-vis people’s religious beliefs peaked (whether towards non-Muslims regarding their religion or to Muslims regarding some of their ideas) was that of the Caliphate of the Abbasid al-Ma’mun (who ruled from 196/812 to 223/838). The Qur’anically mandated Divine intent regarding how we rule ourselves on earth, giving humanity the right to freedom of religious conscience as the Divine intent for this “game of life” and for which God will judge us on how we played it in the hereafter, was abridged. People have confused human obligations towards society with an attempt to impose their eschatological views on others, thus “depriving God” of His “sole and exclusive right”—or anticipating Him in the exercise of His right—to judgment on Judgment Day.

125. UIDHR, *supra* note 73, at pmb1. para. f (emphasis added).

126. Moosa, *Dilemma*, *supra* note 1, at 197 (emphasis added).

A comparison between the principles of human rights in Islam and the modern human rights charters discloses that there is a large area of commonality, with few exceptions, which is the reason why the universal declaration of human rights, for example—in its general thrust—is so widely received by the Muslim who has a good understanding of his religion.¹²⁷

As I shall detail in the next section, articulations of human rights, like those found in the 1776 American Declaration of Independence—and in subsequent human rights declarations, such as the Universal Declaration of Human Rights and the European Convention on Human Rights—historically arose *as a reaction to great suffering and experiences of legal and moral wrongs*, thus validating the perspective of Muslim jurists on the etiology of rights as arising out of a failure in performing a morally contractual duty.¹²⁸ Again, the philosophical underpinnings of the American Declaration's unalienable rights to "Life, Liberty and pursuit of Happiness" were based on a metaphysical narrative that—in the eyes of its authors—came out of "the Laws of Nature and of Nature's God."¹²⁹ Although Christian, they were not Christian in the narrowest and most parochial sense of the word, but rather Christian formulations in the broadest sense, and held a perspective that expressed the supra-religious metaphysics of an Abrahamic religious ethic that embraces within its orbit the Jewish and Islamic worldviews.¹³⁰

Hence, placing an Islamic list of human duties into a rights-holders framework, and *within a governmental powers doctrine* could result in homeomorphic Islamic human rights "flowing out of the Islamic woodwork" that would overlap with much, if not most of the universal declaration of human rights. Hermeneutics, apologetics, and the tools of modern scholarship notwithstanding, most Muslim scholars (such as Moosa and Ghan-nushi) would agree that the majority of Muslims *intuitively* recognize the

127. Quoted in *id.* at 200.

128. The Universal Declaration of Human Rights in 1948 and the European Convention on Human Rights in 1953 came about as a result of the massive suffering Europe and the West (including the United States and the Soviet Union) underwent during the period from the Great Depression in 1929 through the end of World War II. During this time the application of technology to the advancement of war and abuses resulted in the scourges of Nazism, Fascism, and the Holocaust. See generally HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES, *supra* note 26, at chs. 1–3.

We may also note that these human rights declarations, in a general sense, "came out" of an attempt to attenuate the ravages of a rampant capitalism and an expansion of state powers as a result of the industrial revolution, and the ability of technology to leverage state power at the expense of the common man.

129. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

130. By *Abrahamic ethic*, we mean the belief in a strict monotheism of a personal providential God who commanded humanity with the two major commandments common to the Abrahamic faith traditions of Judaism, Christianity, and Islam: to love God with all the components of one's being (heart, mind, soul, and physical strength), and to love one's neighbors (fellow human beings) as oneself. See RAUF, WHAT'S RIGHT WITH ISLAM, *supra* note 1, at 14–18.

universal declaration of human rights as consistent and positively resonating with their emotional, intellectual, and spiritual understanding of their religion; such intuition flowing out of the Qur'anic idea of right religion as being *din al-fitrah*.

IV. HOW THE AMERICAN DECLARATION OF INDEPENDENCE,
CONSTITUTION AND BILL OF RIGHTS ARE CONSISTENT
WITH ISLAMIC JURISPRUDENCE

Such an *intuitively religious* approach to human rights discourse arises out of the American Declaration of Independence (declared on July 4, 1776) and subsequent Bill of Rights (comprising ten amendments ratified in December 1791) to the Constitution (itself signed in September 1787 and ratified by the states soon thereafter). Highlighting the context and narrative surrounding the Declaration reveals strong resonances with classical Islamic legal thought: First, El Fadl's point above, namely that Muslim jurists "thought of individual rights as *arising* from a legal cause brought about by the suffering of a legal wrong" and that "[a] person does not possess a right until he or she has been *wronged*" *is in fact* the historical contextual narrative, and is therefore arguably the ontological and legal cause of the rights enumerated in the American Declaration.

The Declaration devotes more than four times as much space to enumerating the "long train of abuses and usurpations"¹³¹ than to expressing the rights. Twenty-seven paragraphs (some of which are just clauses) scream pleadingly at the reader, detailing "a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny"¹³² by the King of Great Britain upon the American colonies. Among the wrongs committed were his having "plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people,"¹³³ mock trials to protect his armies from punishment for murders committed, and having made "judges dependent on his will alone."¹³⁴ The King was "deaf to the voice of justice,"¹³⁵ so the American states had to "acquiesce in the necessity" of announcing their separation, a "necessity which constrain[ed] them to alter their former systems of government."¹³⁶

The American Declaration's "unalienable rights" did not come out of thin air: the Sharia legal cause for expressing rights as arising from legal causes brought about by the suffering of a legal wrong is what historically midwived the Declaration. The long opening line of the Declaration makes this very clear:

131. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

132. *Id.* at para. 4.

133. *Id.* at para. 28.

134. *Id.* at para. 13.

135. *Id.* at para. 4.

136. *Id.* at para. 33.

When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the *Laws of Nature and of Nature's God* entitle them, a *decent Respect to the Opinions of Mankind* requires that they should declare the causes which impel them to the Separation.¹³⁷

The Declaration's authors, feeling that they were required to declare (before the Court of Public Opinion) the causes which impelled them to the separation, proceeded—in response to and arising from the legal cause brought about by the suffering of more than two dozen legal wrongs—to enumerate and claim the unalienable rights that had been infringed; thus,

We hold these Truths to be self-evident, that all Men are created equal,¹³⁸ that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.¹³⁹

The second point of similarity with Islamic legal thought is that the authors of the American Declaration held that these rights flowed out of a God-centered metaphysical world view and ethic. Roger Pilon, senior fellow and director of Cato's Center for Constitutional Studies, points out that “perhaps the most important line in the document [is]: ‘We hold these Truths to be self-evident.’”¹⁴⁰ These truths, he adds, ground the Declaration in reason, and

invoke the long tradition of natural law, which holds that there is a “higher law” of right and wrong from which to derive human law and against which to criticize that law at any time. It is not political will, then, but moral reasoning, accessible to all, that is the foundation of our political system.¹⁴¹

Replace “higher law” in this sentence with “Sharia law”—with the concomitant understanding of Shatibi that the meta-purpose of Sharia law is furthering the interests of humankind—and one gets precisely the classical Islamic viewpoint.

Unlike the present-day position held by many contemporary Westerners who regard human rights as emanating from a purely secular

137. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).

138. See DONNELLY, *supra* note 83, on what is intended by human equality. We must note however that although the original understanding that the authors intended came out of a religious moral viewpoint, historically they did not in practice treat other races and genders equally for two more centuries.

139. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

140. Roger Pilon, *Preface* to THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1, 2 (Cato Inst. 2002). The objective of reasoning, or the object of human intellect, is truth; thus, the objective of moral reasoning is moral truth. And the founders regarded these rights, emerging from their experience of a “long train of abuses and usurpations,” as *moral truths*.

141. *Id.* at 2–3.

worldview devoid of any religiosity, the Declaration's authors clearly embraced a religious worldview. The common denominator of their belief was a supra-religious Deist and moral worldview that included the Christian moral ethic based on the second Abrahamic commandment of loving one's neighbor as oneself, and which granted all citizens the freedom to express the first commandment (loving God with all one's mind, heart, soul, and strength) according to their individual preferential mode of expressing this love.¹⁴²

This is evident from the opening lines of the Declaration that entitle the wronged people to assume the rights of equality, which the "Laws of Nature and of Nature's God" entitles them to assume, namely that all men are created equal,¹⁴³ that their Creator endowed them with certain unalienable rights, and that those rights include "life, liberty, and the pursuit of happiness." The phrase "Laws of Nature and of Nature's God" makes it clear that this Declaration regards its "self-evident truths" as not only emanating from the long tradition of natural law, but it also places (if not equates) natural law as being something that is embraced by and flowing from "the Laws of Nature's God," and thus reveals an intuitive sense of Divine Law.¹⁴⁴

Muslims call this intuitive sense of religiosity *din al-fitrah*, which means *natural law* (or natural religion, the word *din* meaning both religion and law in Arabic) and is the core definition of Islam and of "right law or

142. But when the history of the legal causes that brought these rights into being is erased from a people's popular collective memory, and it becomes politically correct to be sacrilegious, it becomes understandable—though not excusable—why many reject the notion that human rights evolved within the Western, and specifically *American*, scene out of a deep religious heritage. The authoritarian and despotic political contexts of many Muslim societies have created the political and psychological contexts from which to establish an Islamic Declaration of Human Rights. But because the UIDHR, unlike the American Declaration, does not list its "legal parentage" (i.e., its legal causes of wrongs committed against Muslim peoples), this has in part contributed to the charge that it is the hermeneutically "illegitimate child" sired of a Westernized me-too apologetics.

143. Human equality flows from the Abrahamic faiths' common assertion that humankind was created from one male and one female [QUR'AN 49:13; *Genesis* 1:27], thus are all *equally* brothers and sisters. Therefore, there can be no classes or castes among humankind. It is this notion of human equality that is expressed in the American Declaration of Independence, and not that all human beings are equal in God-given talent.

144. In 1775, a year before the American Revolution began, Alexander Hamilton wrote, "*The sacred rights of mankind* are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, *by the hand of Divinity itself*, and can never be erased or obscured by mortal power." *The Farmer Refuted* (1775), in AMERICAN STATE PAPERS 123, quoted in FORREST CHURCH, THE AMERICAN CREED 32 (2002) (emphasis added). Almost fifty years later, in 1824, Thomas Jefferson noted in reminiscing about the drafting of the Declaration of Independence, "We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts." Thomas Jefferson, letter to John Hamden Pleassants, April 19, 1824, quoted in CHURCH, *supra*, at 33.

right religion” (*din al-haq*).¹⁴⁵ The authors of the American Declaration use *theistic* language by calling human rights the “sacred rights of mankind” written by the hand of Divinity.¹⁴⁶ Whatever might arguably have been the result of the Enlightenment in banishing religion—and specifically Christianity—from the boardrooms of European society, American *political* “secularity” defined itself not as anti-religiosity but as a distinct *pro-religiosity* based on the *ethics* and *metaphysics* of a divine and providential theistic religiosity, de-linked from Christian liturgy that allowed originally only Protestant and non-Catholic “Christian religions,” but later expanded to other varieties of Christian religious expression as part of the American societal contract. The contemporary need in the United States is to recognize the Islamic metaphysical view as consistent with this.

The third point of similarity with Islamic legal thought is the rights themselves, consistent with the opinions of Muslim jurists who said that the meta-purpose or meta-intent of Sharia is *maslaha*, i.e., the moral common good and best interests of the people *articulated within a context of moral reasoning that is delimited by moral truth*, and from which all man-made laws must be derived and against which they are criticized. This is true not only in the *derivation* of laws but also in the *application* of laws; otherwise, as I pointed earlier, the mechanisms of the law may come to be used to thwart the intentions of the law.

The phrasing “the Creator has endowed humankind with certain rights” (that they can claim against other players) is the precise equivalent and corollary of saying “Divine Law requires certain players [(the duty-bearers)] to fulfill certain obligations towards others [(the rights-holders)].”¹⁴⁷

The Qur’anic narrative of the meaning of man describes man as created by God for the purpose of worshipping and glorifying God.¹⁴⁸ Yet man was given freewill to either choose or reject God, to live a life consistent with this choice, and to find happiness in pursuing the purposes for which God had given him the natural ability, talent, and inclination.¹⁴⁹ The

145. The Qur’an states that monotheism and its social concomitants, as true or right religiousness, were embedded by God in human nature as part of human conscience and that God commanded humanity to honor it: “So set thou thy face steadily and truly [literally, *hanif*-ly] to the Faith [*fitrah*]: (Establish) God’s handiwork according to the pattern on which He has made mankind: No change (let there be) in the work (wrought) by God: that is the standard Religion: but most among mankind understand not.” QUR’AN 30:30. The idea of this verse is that any person who listens to his or her heart and conscience would recognize that God is One, that humanity is one family, that humans should be free, and should treat each other fairly and with justice.

146. See generally THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

147. *Id.*

148. “I have only created Jinns and men, that they may serve Me. No Sustenance do I require of them, nor do I require that they should feed Me.” QUR’AN 51:56–57.

149. This is given by verses like 18:29, which reads: “Say, ‘The Truth is from your Lord’: let him who *will*, believe, and let him who *will*, reject (it)” QUR’AN 18:29 (emphasis added). This is in conjunction with verse 2:256, which states, “Let there be no compulsion in religion,” and 5:51,

Qur'anic picture that this portrays is that the divine plan for human life on earth requires human free will, and requires divine help in achieving its acceptance or rejection of God.¹⁵⁰ Since part of the divine plan is to grant human beings the space to accept or reject God and to do so in a manner of their choosing, human configuration of society also must allow this space. Not to do so would thwart the divine will and reduce humanity's degrees of human freedom. This is the primary Qur'anic context of human liberty, and is a right implicit in the phrasing "liberty" as the over-arching inalienable right after "life."

The Declaration's final paragraph appeals "to the *Supreme Judge of the World* for the Rectitude of our Intentions," and concludes with the words, "And for the *support* of this Declaration, with a firm *Reliance on the Protection of divine Providence*, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."¹⁵¹ In other words, the Founders, in a manner that resonates and is consonant with the beliefs of devout Muslims, intended to establish America as a religious God-believing society and nation, a moral society whose ethics emanate from and reflect the underlying transcendent unity (and core) of religious beliefs of the Abrahamic Ethic.

A. *On the Form of Government that Could Protect Human Rights*

A careful reading of the American Constitution and its amendments sounds like an employment contract between the people (as employers) and those elected to government (as employees). It indicates a deep solicitousness that the people's representatives and government officials be beholden *solely* to the American people, and not to other U.S. government officials, nor to any foreign or domestic state. The Constitution is the means by which the people can retain power over government.

The Declaration was made in the context of securing individual human rights against overbearing and tyrannical rulers (read: securing that the government officials fulfilled their divinely ordained duties towards the citizens). The Founders recognized that a mere *declaration* of rights was insufficient; they needed to address the issue of *power*, and therefore paid very careful attention to the structure of government, realizing that its powers had to be carefully divided and severely restrained. They, therefore, explain:

which informs us that "If God had so willed, He would have made you a single People, but (His Plan is) to test you in what He hath given you: so strive as in a race in all virtues. The goal of you all is to God; it is He that will show you the truth of the matters in which ye dispute."

150. Qur'anic verses like 14:4 and 5:48 (respectively) reveal: "Now God misguides those whom He pleases and guides whom He pleases: and He is Exalted in Power, full of Wisdom" and "If God had willed, he would have made you a single nation, but He misguides whomever wills [or whomever He wills—both readings are valid] and guides whomever wills [or whomever He wills]. And you will surely be questioned about what you were doing."

151. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis added).

That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it,¹⁵² and to institute new Government, laying its Foundations on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.¹⁵³

This passage points out that the government's overriding *purpose*—its end—is to secure the human rights of its citizens (“men” who have already been *declared* equal, thus abolishing any class structures that posit human inequality). In addition, the *powers* the government may need to secure its citizens' rights (the ends) must be derived from the citizens' consent if the powers are to be just.¹⁵⁴

As Pilon comments, “Government is thus twice limited: by its *end* [i.e., it is obliged to protect our God-given rights], which any of us would have a right to pursue were there no government; and by its *means*, which require our consent.”¹⁵⁵ This is where the American Declaration made a major contribution to political thought; defining both an ends-driven definition of right governance, and a means that would ensure that the ends are achieved.¹⁵⁶

The Founders, therefore, structured the powers of government in a way that to them they appeared best suited to prevent an abuse of their rights. “Having recently overthrown oppressive English rule [in the Revolutionary War], they were not about to re-impose oppressive government on themselves Their basic task,” Pilon adds, “was to devise a government . . . strong enough to secure [the expressed] rights against domestic and foreign oppression, yet not so powerful or extensive as to be oppressive itself.”¹⁵⁷ Thus, they established a notion of limited government, granting government specific authorized powers, and “then checked and balanced those powers through a series of extraordinarily thoughtful measures.”¹⁵⁸

152. Note the language of the Declaration, that “the Right of the People to alter or to abolish” the government occurs when the “Government becomes destructive of these Ends.” What Muslims had not achieved in their 1400-year history was to effect such a change of government when it had become destructive of its ends from the point of view of Islamic principles of justice. This is, in our times, what Muslims dearly want to institute.

153. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

154. Pilon, *supra* note 140, at 3.

155. *Id.* (emphasis added).

156. This is what we hope the Sharia Index Project will do: establish both an ends-driven definition of Islamic governance, and determine which means have best achieved such ends.

157. Pilon, *supra* note 140, at 4.

158. *Id.*

They “intended the doctrine of enumerated powers to be our principal defense against overweening government.”¹⁵⁹ The government could hardly abuse a power that it did not have in the first place.

But they provided other defenses as well. In addition to dividing power between national and state governments, leaving most power with the states or with the people, they separated powers among the three branches of the national government—legislative, executive, and judicial—and devised a series of checks and balances to further restrain these powers.¹⁶⁰

The Preamble to the Constitution sets forth a number of basic principles, and further reminds the reader of the right of individual human free will through its emphasis on liberty:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹⁶¹

“We the People” serves to remind government officials that all power comes from the people; “to ourselves and our posterity” reminds government that it exists not only to act in the best interests of its generation, but also for the sake of succeeding generations of Americans.

The government received only strictly limited and enumerated powers to exercise on the people’s behalf, which is expressed in the first line of Article I of the Constitution: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁶² Thereby the people established a means of control via their elected senators and congresspeople to maintain their power over government. The first seven sections of Article I describe in great detail the elections of senators and congresspeople, the times, frequency, places, and manners of holding their elections, the compensation they may receive, and the powers they may exercise. That the people “herein granted” only limited legislative powers is additionally borne out by the enumeration of those powers in Section 8. Knowing that titles created classes of people in other societies (e.g., the noble classes), Section 9 sought to pre-empt any possibility of that happening in America. The drafters prohibited senators and congresspeople from being subjected to influ-

159. *Id.* at 6.

160. *Id.* (“Within the bounds of its enumerated powers, for example, Congress may enact legislation; but the [elected] president has a power to veto such legislation, which Congress may then override only by a supermajority vote. Likewise, in deciding cases or controversies before them, the courts may exercise the judicial power by reviewing the actions of the other two branches to ensure that they do not exceed the limits imposed by the Constitution . . . but the president and Congress determine who shall sit on the federal courts.”).

161. U.S. CONST. pmbi.

162. U.S. CONST. art. I, §1.

ence by governmental power by prohibiting them from receiving any titles from the government, including from domestic or foreign states. Allowing titles would have diluted the power people retained over their senators and congresspeople. Section 9 therefore ends with the statement, “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”¹⁶³

Article II of the Constitution turns to the powers of the President, granting him executive power. It goes into his election, including how often, the term,¹⁶⁴ and the various powers granted to the office of the Presidency. It also addresses the President’s compensation, and that he “shall not receive within that Period [of his term] any other Emolument from the United States, or any of them.”¹⁶⁵ To ensure his loyalty to the terms of the Constitution, Section 1 of Article II adds that,

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”¹⁶⁶

Article III then turns to the judicial powers granted to the U.S. Supreme Court and federal court system, their duties and the compensation of judges.

The Constitution was drafted in 1787—eleven years after the Declaration was made and the new nation won its independence from the British on the battlefield. And yet, in spite of the language of the founding documents and the new government, the drafters were still concerned that the new government might abuse its powers. Therefore, to the end of allaying this fear, in 1789 Congress transmitted to the state legislatures twelve proposed amendments, ten of which were adopted and became known as the Bill of Rights.

The preamble to the Bill of Rights shows how the founders attempted to further preempt the possibility of government abusing its powers and revealed their concern and uncertainty that their newly established government might in fact become destructive of its proper ends:

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers*, that further de-

163. U.S. CONST. art. I, §9, cl. 7.

164. The term was limited by the Twenty-second Amendment to a maximum of two terms, again to limit the power of the president after Franklin Roosevelt won four elections, gaining too much power in the process.

165. U.S. CONST. art. II, §1, cl. 7.

166. U.S. CONST. art. II, §1, cl. 9.

claratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, *will best ensure the beneficent ends*¹⁶⁷ of its institution.¹⁶⁸

The last two of the original ten amendments were added for greater caution. No bill could list all rights, so the drafters added the Ninth Amendment as a catchall and reminder clause: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”¹⁶⁹ This also means that the government, in the execution of its duties in accordance with the rights granted to it by the people, may not use the given right as an argument to deny or disparage other rights retained by the people; thus, the people’s rights trumped those of the government, and not the other way around.

Pilon points out that this concept

is reiterated, as if for emphasis, in the Tenth Amendment, the final member of the Bill of Rights that was drafted in 1789, then added, after ratification, in 1791: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁷⁰

To recapitulate, only certain powers were delegated or granted by the people to the government, and which were then enumerated in the Constitution. The rest were reserved to the states—or to the people, never having been granted to either level of government.¹⁷¹

Here, it should be pointed out that the Constitution and the Bill of Rights (the Amendments) speak of *duties*, things that each of Congress, the President and the Judiciary *may* or *may not do*.¹⁷² This shows that in addressing the institutions of power, and specifically government, the protection of rights can only be effectively established by enumerating the do’s and don’ts, the list of duties and limitations on action of the power-bearing duty-bearers toward the rights-holders. This is consistent with and explains why, in the Islamic frame of reference, the focus is on duties directed toward the duty-bearers; for if they fulfill their duty, human rights will be automatically addressed. It also shows that it is not possible to ensure human rights by just a declaration of rights alone; a simultaneous declara-

167. Note again how a Bill of “Rights” emerges out of a fear of the potential *abuse* of power.

168. BILL OF RIGHTS, pmb.

169. U.S. CONST. amend. IX.

170. Pilon, *supra* note 140, at 4–5.

171. *Id.*

172. For example, the First Amendment (or the first “right” of the Bill of Rights)—which includes the phrase known as the “establishment clause” and is the basis of the government not establishing a state religion—reads, “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.” U.S. CONST. amend. I.

tion of duties upon those who are in the positions of power is necessary to ensure the protection of any human right.

Even then, unless we can exercise power over those who exercise it on our behalf, the danger of abuse still exists; for “[i]n the end,” as Pilon points out,

no constitution can be self-enforcing. Government officials must respect their oaths to uphold the Constitution; and we the people must be vigilant in seeing that they do. The Founders drafted an extraordinarily thoughtful plan of government, but it is up to us, to each generation, to preserve and protect it for ourselves and for future generations. The Constitution will live only if it is alive in the hearts and minds of the American people. That, perhaps, is the most enduring lesson of our experiment in ordered liberty.¹⁷³

B. The American Democracy’s Creed, and the Constitutional Limits to the Government’s Sovereignty

The purpose of the founding of the United States was not only to establish a democracy, but to establish a *religious* democracy, the Biblical “City on the Hill,” a land where religious freedoms prevailed. The envisioned society secured both freedom *of* religion for those who wanted to practice their religion freely, and freedom *from* religion for those who wished to practice no religion at all. In this society, one was free to be an atheist if one chose to be, but no belief was imposed, including atheism, upon all of society. Yet the society would not behave in a manner that violated the norms of ethics and goodness—which were understood to originate from a religious moral viewpoint.

The second greatest commandment of the Abrahamic Ethic, namely to love one’s fellow human being as oneself, was in essence de-linked from the first commandment in the sense that the choice of whether one wanted to love the One God the Lord, and how one chose to express that love liturgically, was left up to the individual. The Founders, however, perceived the morality of the second commandment as flowing from the first. In his farewell address, George Washington summed up the role of religion in America:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens *And let us with caution indulge the supposition, that morality can be maintained without religion.* Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail

173. Pilon, *supra* note 140, at 7.

in exclusion of religious principle Cultivate peace and harmony with all. Religion and morality enjoin this conduct; and can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period, a great Nation to give to mankind the magnanimous and too novel example of a People always guided by an exalted justice and benevolence.¹⁷⁴

The moral boundary established by the Declaration is essential to contextualize the view of sovereignty. The Declaration points out that we institute government in order that it may fulfill its ends, namely its divinely mandated obligations to protect its citizens' inalienable rights that were endowed to us by the Creator. But "whenever any Form of Government becomes destructive of these Ends," i.e., it does not fulfill its divinely mandated obligations, "it is the Right of the People to alter or to abolish it, and to institute new Government," and if need be re-organize its powers in such a way that it will protect its citizens' rights and discharge the God-given obligations.¹⁷⁵ (Note here, as Muslim jurists averred, the right "appears" and is "exercised" at the point of dereliction of duty, when the obligation is unfulfilled, which occurs when the "Government becomes destructive of these Ends.")

When an American (or any other) government discharges its (God-given) *ends* (i.e., God-given obligations), it has *moral* authority; i.e., it derives its moral authority from God. If, however, the government has not discharged its God-given obligations, it has lost its moral authority and legitimacy.

Writing in 2002, Supreme Court Justice Antonin Scalia asserts that "[t]he mistaken tendency to believe that a democratic government, being nothing more than the composite will of its individual citizens, has no more moral power or authority than they do as individuals has adverse effects in other areas as well."¹⁷⁶ Scalia recommends that

the reaction of people of faith to this tendency of democracy to obscure the divine authority behind government should not be resignation to it, but the resolution to combat it as effectively as possible. We have done that in this country (and continental Europe has not) by preserving in our public life many visible reminders that—in the words of a Supreme Court opinion from the 1940s—"we are a religious people, whose institutions presuppose a Supreme Being." These reminders include: "In God we trust" on our coins, "one nation, under God" in our Pledge of Allegiance, the opening of sessions of our legislatures with a prayer, the opening of sessions of my Court with "God save the United States and this Honorable Court," annual Thanksgiving proclama-

174. CHURCH, *supra* note 144, at 138–39 (emphasis added).

175. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

176. Antonin Scalia, *God's Justice and Ours*, 123 FIRST THINGS 17, 19 (2002), available at <http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32>.

tions issued by our President at the direction of Congress, and constant invocations of divine support in the speeches of our political leaders, which often conclude, “God bless America.”¹⁷⁷

American government is therefore *theistic* democracy, not *atheistic* democracy. The “tendency of democracy to obscure the divine authority behind government” that Scalia warns of is subtle.¹⁷⁸ By obscuring the boundary of divine authority in the eyes of many, they then *equate* democracy to an *absolute* sovereignty of its nation’s citizens. If we bear in mind that it is possible to have any combination of *beliefs* and *forms* of government,¹⁷⁹ as Scalia implicitly suggests, then our reaction as “people of faith to this tendency of democracy to obscure the divine authority behind government should not be resignation to it, *but the resolution to combat it as effectively as possible.*”¹⁸⁰

Theistic democracy delimits governance by, and subjects it to, Divine and thus moral law. The Courts are, and have to be, the guardians and interpreters of this law in any *form* of governance. This holds as true for theistic democracies as it was for theistic monarchies. As a theistic democracy, the American Declaration in fact *principally* expresses the values and structures of Islamic legal thought, albeit in a non-parochially Islamic fashion; however, where it has gone further is in articulating the *form* of governance needed to assure achievement of its ends.

CONCLUSION

We have now identified several of the key threads involved in establishing an Islamic human rights doctrine, and, necessarily, compared them to the American Bill of Rights, from which we believe the UDHR flowed. They include the following:

Islamic law regards a right held by a right-holder as the ontological corollary of a duty mandated upon a duty-holder; the need to exercise the right “arises” at the time of dereliction of duty by the duty-bearer, and as part of a contractual narrative into which both parties freely entered.

Islamic law also regards the human rights-duties narrative as emanating from a covenantal relationship between God and Man that Man freely accepted of God; i.e., to be God’s vicegerent or ambassador on earth. This

177. *Id.* at 19–20.

178. *Id.* at 19.

179. This error occurs because many *presume* an equivalence between *religious beliefs* and *forms* of governance. It is possible to have an atheistic monarchy or an atheistic republic. Thus, it is possible to have an atheistic democracy, an atheistic socialism, and an atheistic fascism. Analogously, it is also possible to have a theistic monarchy or republic, a theistic democracy, a theistic socialism, and a theistic fascism. Thus, it is also possible to have a Jewish, Christian, or Islamic monarchy or republic; a Jewish, Christian, or Islamic democracy; a Jewish, Christian, or Islamic socialism; or a Jewish, Christian, or Islamic fascism. Conflating atheism with democracy is false historically and intellectually.

180. Scalia, *supra* note 176, at 19 (emphasis added).

provides the contractual narrative, in which Man is a free agent possessing free will, whose free will allows him the option to violate this contract. From the violation of this contract comes the idea of sin and violation of what is morally right. Fulfillment of this contract defines that which is morally correct.

The American Declaration's existential and metaphysical viewpoint is identical to the Islamic in that it:

- Posits a God-Man relationship and narrative out of which comes a list of mutual duties and corollary rights. The moral duty toward God is to encourage religion for the well-being of society. The command to love and adore God to their utmost, in the manner of their choice, and to love their fellow human beings as they love themselves, is one of two major commandments common to the three Abrahamic faiths: Judaism, Christianity, and Islam.
- Because all of humanity is considered to have been created from one original couple, this Abrahamic Ethic regards all humanity as "siblings"—thus *equal*. From this comes the moral "self-evident" truth of human equality.
- That all of humanity has moral free will, defined as the option to disobey God and commit sin; thus, the duty of the power structure is to protect human *liberty* in order that humans may exercise their free will, and allow humans the privilege of exercising their free will in a manner that does not prevent others within the society from exercising their free will. Implicit in this idea is that a power structure or system of rule that denies human liberty thwarts the Divine intent expected of Man.

The historic *event* of the American Declaration of rights is consistent with the Islamic juridical idea that a right arises when the duty-bearer violates his obligations. The specific legal and moral causes that led to the declaration of inalienable rights were the "long train of abuses"¹⁸¹ by the English king towards the American colonies. Parallel to this was the historic *event* of the Universal Declaration of Human Rights (as well as the subsequent European Convention on Human Rights). Both were caused by a three decades-long period of enormous human suffering in Europe. From 1914 through 1945, the technological advances in warfare and new post-Industrial Revolution socio-economic disruptions in human relations precipitated the First World War, followed a decade later by a lengthy economic depression that witnessed starvation and human suffering on a historically unprecedented scale, loss of civilian and military human life of unprecedented proportion in the Second World War, genocide of Jews, gypsies, and others deemed racially impure by the fascist Nazi regime (the Hol-

181. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

ocaust), and the invention of weapons of mass destruction capable of destroying the whole human race.

The historic contribution of the American Constitution and its Amendments (the Bill of Rights) was to establish a form of government (a democratic republic) that sought to preempt the possibility of governmental power from abusing its citizens. This was accomplished by creating a corporate model of State government: where the people were (initially landholding) stockholders of the "Corporation," conducting regular elections by the people of those representing them in government (senators, congresspeople, and the President), determining the amount, nature of and limits to their compensation, dividing government into sectors of power (legislative, executive, and judiciary), and creating checks and balances between them (for example, the President is commander-in-chief of the military, but its budget is determined by Congress). The Constitution and Bill of Rights therefore enumerated the powers granted to various segments of government, specified limitations to each segment's powers, and established the means by which excessive power by one segment may be checked by the other two.

The Constitution and Bill of Rights protect human rights by enumerating a list of *duties* that each segment of government has to abide by, thus confirming the corollary nature between rights and duties, and that rights are protected by mandating duties.

We hope that this discussion inspires more people to continue this area of study, and to develop this discussion further.

