

NATURAL LAW THEORY AS COMMON  
GROUND BETWEEN INTERNATIONAL  
HUMAN RIGHTS LAW AND ISLAMIC  
LAW: A LITERATURE REVIEW AND  
PHILOSOPHICAL ANALYSIS

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INTRODUCTION

This note will examine the question of whether Islamic law and international human rights law can find common ground, and if so whether that common ground may be found in natural law theory. First I will outline the problem using an article by Neville Cox which argues that such rapprochement is impossible. Then I will question whether this is really so by examining an article by David A. Westbrook that argues it would be possible, but only under certain conditions. Then, drawing out the implications of one of Westbrook's footnotes, I will examine Western and Islamic approaches to natural law theory. I will first examine Western natural law theory using Buszizewski's line-by-line commentary on St. Thomas Aquinas's Treatise on Law, Mark Tebbit's Philosophy of Law, and The Cambridge Dictionary of Philosophy, and then Islamic natural law theory using A. Ezzati's Islam and Natural Law. After this, I will show that there is tangible hope for rapprochement by discussing a note by Jason Morgan-Foster that provides examples of certain areas of international human rights law where some degree of convergence is bringing it closer to Islamic law. And after this I will draw my conclusions.

## I. ARE ISLAM AND INTERNATIONAL LAW FOREVER LOCKED IN CONFLICT?

Neville Cox, in an article published in the Oxford Journal of Law and Religion, has outlined the problem.<sup>1</sup> On the one hand, many of those who uphold international law regard Muslim ethical and social mores as “primitive and consequently wrong,” and would prefer to see governments that implement Muslim law replaced with democracies.<sup>2</sup> They also see Islamic mores as violating universally valid principles of freedom of speech and equality of the sexes.<sup>3</sup> In such cases, “the Western value is sincerely believed to be universally right, therefore as a result the Islamic value must, by definition be (objectively and universally) wrong.”<sup>4</sup>

On the other hand, many Muslims similarly regard Western mores “as being repugnant to *universally applicable* principles.”<sup>5</sup> They see liberalism as no more than “a legitimization of licentiousness,” and its emphasis on rights as the path to “a dysfunctional society whose members are focused on their own interests rather than the common good and misunderstand the role and nature of authority, government and law.”<sup>6</sup>

Such conflicts often seem to arise in the area of international human rights law, for this is something that liberalism sees as absolute, whereas Islam asserts that only the Law of God can be absolute rather than any manmade law.<sup>7</sup> When conflict arises, “the mainstream Western observer and the mainstream Muslim will both claim that their approach is right and the other’s approach is wrong and by that they will mean universally wrong and not merely locally or culturally unacceptable.”<sup>8</sup> Not that Muslims reject human rights laws, but that they insist on

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<sup>1</sup> Neville Cox, *The Clash of Unprovable Universalisms-International Human Rights and Islamic Law*, Ox. J. Law Religion, LEXIS (Oct. 01, 2016 3:10), <https://advance.lexis.com>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

selectively appropriating them only to the degree that they conform to Muslim beliefs.<sup>9</sup>

Ultimately, says Cox, international human rights law and Muslim law are “two fundamentalisms . . . , both of which profess the universal truth of their most basic propositions and are challenged by and challenge the other.”<sup>10</sup> Neither can be empirically proven and each must be taken on faith—even international law, its secularism notwithstanding.<sup>11</sup>

International human rights law, says Cox, is based on three propositions that its adherents take to be universally true: (1) “that, for whatever reason, rights are the possession of all individual humans, wherever they are born,” (2) “that there are certain very broad elements of human rights law which are regarded as being so basic and so inherently morally right that any contravention thereof must (by definition) be wrong irrespective of when or where it happens,” and (3) “that it is the individual who is the possessor of these rights and that [s]he is an entity whose distinct individuality must be respected and vindicated by his or her state.”<sup>12</sup>

But why should these propositions be true?<sup>13</sup> Several sources have been proposed, none of which can be empirically proven: (1) One suggestion is that God is the source of human rights.<sup>14</sup> However, this cannot be empirically proven because (a) it is not persuasive to non-believers, (b) the existence of God cannot be empirically proven, and (c) depending on the religion, it may not be clear how to determine God’s will in the matter.<sup>15</sup> (2) Another suggestion is that human rights are grounded in “the inherent and equal status, dignity and value of each human being, such that simply by virtue of being a human . . . one is possessed of certain rights.”<sup>16</sup> However, this is not proven but merely

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

asserted and is unconvincing to those who, like Muslims, hold a different worldview.<sup>17</sup> (3) The final suggestion is “that there are certain core moral principles or rules in respect of which there is virtual global agreement, such that these principles thereby become de facto universal.”<sup>18</sup> However, (a) what global consensus gives, global consensus can take away; (b) if global consensus universalizes international human rights law, then the existence of Muslims who dissent from it means it is not actually universal; (c) global consensus was explicitly *not* the justification given for the Universal Declaration Of Human Rights; and (d) even if there *was* a global moral consensus, that alone does not mean it should be enshrined in law.<sup>19</sup> For all these reasons, the universalist claims of international human rights law are unprovable, and its insistence that Islam must conform to its standards are quite odd.<sup>20</sup>

Cox then turns to Islam, and lists five major points he has in mind when he speaks of Islamic Orthodoxy:

1. God exists, reigns over all things, and has revealed His law to the Muslim community.<sup>21</sup>
2. *Shari'ah* (Muslim law), therefore, is perfect.<sup>22</sup>
3. One's relationship to God and to the Muslim community are more important than one's relationship to the state.<sup>23</sup>
4. Islam and thus *shari'ah* are about submission to the revealed will of God, and the peace that comes from that. As a result, and in contrast to Western law, fighting the law to defend one's rights (a) means fighting God and (b) is against one's best interests.<sup>24</sup>
5. The role of reason is not to improve the law, but to learn how to better submit to it.<sup>25</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Now, as Cox observes, “something is not simply rational or irrational; rather its rationality depends on the intuitive starting point from which the actor proceeds, and actions which appear rational to persons who come from a particular intuitive starting point will appear profoundly irrational to persons who do not.”<sup>26</sup> Thus, the first source of conflict between *shari’ah* and international human rights law is their distinct starting points. In the West, the starting point is that law must “fit the needs of society” and defend the rights of individual citizens, and thus it follows that law must change as society changes.<sup>27</sup> In Islam, the starting point is that the law is perfect, and thus it follows that the individual must change to more perfectly submit to the law.<sup>28</sup>

But *shari’ah*’s universalist claims are also empirically unprovable, because they are grounded in the will of God, and His existence is empirically unprovable.<sup>29</sup> More specifically, *shari’ah* is derived first from the *Qur’an*; then from the *sunna* and *hadith* (Muslim traditions about Muhammad’s life); thirdly from the consensus of Muslim legal scholars; and finally, when all else fails, by analogy with what these other sources have determined.<sup>30</sup> But it is God working through these four sources to reveal His will to man.<sup>31</sup>

Consequently, “proponents of each [*shari’ah* and international human rights law] will see the approach of the other as wrong and false because and to the extent that it does not correlate with their view of right and wrong as laid down in their grounding moral vision—yet whether or not either viewpoint is actually true, supporters of neither will be able to offer proof confirming that what they are proposing does actually represent universal truth.”<sup>32</sup> In other words, they are “two competing ‘faith claims,’” neither of which can disprove the other.<sup>33</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

## II. ISLAMIC LAW AND INTERNATIONAL LAW COMPARED AND CONTRASTED

In an article published in the *Virginia Journal of International Law*, David A. Westbrook asks, "Is an Islamic international law possible?"<sup>34</sup> He seems to think that it *is* possible, but only if certain difficulties are met.<sup>35</sup> He discusses these conditions in Section III of his article.<sup>36</sup> The fundamental issue is that Islam "simply holds a different conception of law than does [contemporary] Western law, and hence public international law."<sup>37</sup>

The first contrast Westbrook draws is between Western "rule-law" and Islamic "instance-law."<sup>38</sup> The former is the idea, familiar to Western lawyers, that "law is a general and abstract body" in which all the parts are interconnected; which is distinct from the social order, just or unjust, though related to it; and which abstracts general rules from concrete circumstances and then applies those rules to like cases.<sup>39</sup>

Islamic "instance-law," by contrast, "is epitomized . . . in a unique decision of individual conscience issued in evaluation of a concrete act" by which one seeks "to draw near God's true evaluation for each particular event" by means of God's law as revealed in Scripture.<sup>40</sup> Not that Western law lacks instances, or that Islamic law lacks rules, but that, in general, the former emphasizes rules while the latter emphasizes instances.<sup>41</sup>

Another contrast between Western rule-law and Islamic instance-law is in their different ways of grounding order and consistency.<sup>42</sup> In the latter, it is primarily in the will of God that law finds its order and consistency rather than in a nexus of man-made decisions.<sup>43</sup> This order is

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<sup>34</sup> David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 Va. J. Int'l L. 819, 859 (1993).

<sup>35</sup> *Id.* at 884-86.

<sup>36</sup> *Id.* at 859-84.

<sup>37</sup> *Id.* at 870.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 870-71 (citations omitted).

<sup>41</sup> *Id.* at 871-72.

<sup>42</sup> *Id.* at 872-73.

<sup>43</sup> *Id.*

best seen from a distance, much as Islamic art is built up from multiple geometric shapes, or a pointillist painting of numerous individual points.<sup>44</sup> It may appear to lack internal consistency, but by that very token it “reaches upwards towards and including God, and downwards towards and including the particular facts of each decision”<sup>45</sup>

In rule-law, on the other hand, the order and consistency sought are those of an internally self-consistent abstract system prescinding from concrete instances and organized into broader categories.<sup>46</sup> This order is more like a matrix, and as such “aspires to be coherent, a closed system,” especially as expressed in positivism.<sup>47</sup> As such, “Western law . . . mediates between abstract purposes, justice, and particular facts,” whereas Islamic law “is itself the figure of justice.” Insofar as it “stretches seamlessly from God to the facts.”<sup>48</sup>

Islamic law conceives of judgments of the court “as momentary, atomistic events, with no precedential effect, even for the judge who issued them . . . .” Minor concerns like consistency with past rulings must not be allowed to obstruct the search for truth and greater consistency with the revealed will of God.<sup>49</sup> It is, to use Westbrook’s term, “microcosmic interpretation,” whereby the revealed will of God in Scripture is used to ascertain God’s will for the particular case being judged.<sup>50</sup>

The differences between Western and Islamic law make it difficult for the latter to either assimilate to or develop anything like international law, grounded as it is in the former.<sup>51</sup> First, given that in the Muslim view, each judgment is a new opportunity to either succeed or fail in approaching Divine perfection, “[l]aw does not progress, but is rather eternally the same,” and with the passage of time comes not progress but

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 873-74.

<sup>50</sup> *Id.* at 874, n. 136.

<sup>51</sup> *Id.* at 874-75.

rather danger of error.<sup>52</sup> Thus, in the Muslim view, mere legal tradition “is not authoritative.”<sup>53</sup> On the other hand, international law, though lacking “a formal doctrine of precedent,” is in fact very much dependent on past decisions and well-established customs.<sup>54</sup>

Furthermore, “instance-law precludes the intentional creation of international law.”<sup>55</sup> This is because international law requires confidence that “appropriate political structures . . . can be consciously constructed” based on generally applicable laws.<sup>56</sup> Under instance law, this would not work, because, in the absence of precedent, no individual judge can hope to build for the future in the sense of laying a foundation on which others can build.<sup>57</sup> International law is grounded in consent and the principle that agreements ought to be kept, whereas Islamic law is grounded in the revealed will of God and “cannot adduce consent . . . as the justification for public order.”<sup>58</sup>

Indeed, “the [Muslim] believer finds authority within the framework of the Islamic narrative, the cumulative account of the revelation,” into which fits the believer and which provides all Muslims with a common frame of reference.<sup>59</sup> Now, while “narrative is not completely foreign to . . . international law, it is certainly not the primary source of legitimacy,” whereas in Islam it is a primary source, insofar as the history of the Muslim community is believed to manifest the will of God.<sup>60</sup>

However, the “Islamic narrative cannot serve to order international relations, cannot be the grammar of international law,” for three reasons.<sup>61</sup> First, because it is only effective to the degree that it is accepted as one’s own narrative, and thus only effective for Muslim

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<sup>52</sup> *Id.* at 875.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 875, n. 139.

<sup>55</sup> *Id.* at 876.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 877-78.

<sup>59</sup> *Id.* at 878.

<sup>60</sup> *Id.* at 879.

<sup>61</sup> *Id.* at 879.

believers and not the rest of humanity.<sup>62</sup> Second, because it seeks authority in an authoritative exegesis of an idealized past whereas international law seeks it in positive laws that build for an idealized future.<sup>63</sup> Third, because the Islamic narrative traditionally has no “authoritative place” for nations and institutions, regarding them at best as necessary evils, whereas international law regards them as indispensable for a just world order.<sup>64</sup>

In the end, Westbrook believes that an Islamic approach to international law *is* possible, but only if Islam finds ways “(1) to discuss the legitimacy and authority of institutions, particularly the nation; (2) to view law as a progressive enterprise, the construction of a polity; and (3) to see Islamic politics as morally legitimate and legally authoritative, even if it does not attain ultimate truth.”<sup>65</sup> He then bases his hope for a genuinely Islamic international law on the fact “that the Islamic tradition is rich, heavy with the possibility of political authority.”<sup>66</sup> He then lists as examples *siyasa* (policy or administration), *ijtihad* (private reasoning on uncertain cases), *ijma* (consensus of Muslim legal scholars), and *shura* (a council of Muslim believers), and states that the real issue “is whether or not Islam can vest the activities of believers with moral and ultimately legal legitimacy, so that Muslims feel their politics, including their international politics, to be an effort in good faith and therefore legally authoritative.”<sup>67</sup>

What may be more promising is a comment Westbrook made earlier, in one of his footnotes: “At certain points, Western Law has shared more with the conceptual structure of Islamic law than does contemporary public international law. Ideas of natural law, for instance, may be closer to shari’a than more positivist notions of law.”<sup>68</sup> There is a real insight here—one that might well resolve all the other issues he raises if it were fully developed.

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<sup>62</sup> *Id.* at 879-80.

<sup>63</sup> *Id.* at 880-81.

<sup>64</sup> *Id.* at 881-83.

<sup>65</sup> *Id.* at 885-86.

<sup>66</sup> *Id.* at 886.

<sup>67</sup> *Id.* at 887.

<sup>68</sup> *Id.* at 871 n.128.

### III. NATURAL LAW IN THE WEST

In the West, natural law theory began with the ancient Greeks and Romans, who held that there were “eternal laws directing the actions of all rational beings and built into the very structure of the universe,” and therefore recognizable to “all civilized peoples” as a common foundation they all shared.<sup>69</sup>

Natural law theory was then taken up by the Roman Catholic Church, and its foremost Catholic expositor was St. Thomas Aquinas.<sup>70</sup> In his writings, he distinguishes four kinds of law: eternal, divine, natural, and human.<sup>71</sup> Eternal law is “the very Idea of the government of things in God the ruler of the universe,”<sup>72</sup> whereby He guides all to act for His glory and the common good.<sup>73</sup>

The natural law is the eternal law of God as revealed in nature, and especially through human reason.<sup>74</sup> More specifically, the natural law is the eternal law as found in everything to the degree that God gives everything its natural goals and inclinations.<sup>75</sup> Among the creatures, the human person uniquely participates in Divine Providence insofar as human reason can recognize the common good of the community and enable one to discern how to provide for oneself and others.<sup>76</sup> The first principle of the natural law, held to be self-evident, is “Good is to be done and pursued, and evil is to be avoided.”<sup>77</sup> Furthermore, insofar as “good has the nature of an end,” our natural inclinations show us the goods we ought to pursue.<sup>78</sup> These natural inclinations are those to knowing the good and the true, especially God; living by the good and the true; self-

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<sup>69</sup> THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 599 (Robert Audi et al., eds.) 2<sup>nd</sup> ed. (1999) [hereinafter CAMBRIDGE].

<sup>70</sup> *Id.*

<sup>71</sup> J. BUDZIZEWSKI, COMMENTARY ON THOMAS AQUINAS'S *TREATISE ON LAW* 59-60 (2014) [hereinafter BUDZIZEWSKI].

<sup>72</sup> *Id.* at 64.

<sup>73</sup> CAMBRIDGE at 599.

<sup>74</sup> BUDZIZEWSKI at 79-80.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 79-80.

<sup>77</sup> *Id.* at 244.

<sup>78</sup> *Id.* at 246.

preservation; preservation of the species; and living harmoniously in society.<sup>79</sup> By applying the first principle of the natural law to these inclinations, we can discover the demands of the natural law.<sup>80</sup> However, it does not follow that the commands of the natural law are equally known to everyone, for bad habits and faulty reasoning can get in the way of our ability to understand it, as when ancient Germanic tribesmen held that it was not wrong for them to raid the property of neighboring tribes.<sup>81</sup>

The institution of marriage is a good example of how all this may work in practice. Human persons have a natural inclination toward the preservation of the species and a natural inclination toward harmonious life in society. When the inclination toward harmonious social life becomes expressed in romantic love between members of opposite sexes, those members of opposite sexes will most likely act so as to propagate the species. But once a child is born, it needs to be raised over many years, which becomes more difficult if the parents of that child do not stay together. And once a pair has bonded romantically, it is painful to them and disruptive to society to tear them apart. For these and other such reasons, it is good for spouses to remain faithful to each other, and bad for them to be faithless. And because the natural law instructs us that good is to be done and evil avoided, the institution of marriage was founded in prehistoric times to encourage spouses to be faithful to one another. A similar analysis could be applied to any number of things that the natural law commands.

The divine law is the eternal law of God as revealed in the Old Testament and the New, not so much an alternative to the natural law as a clearer manifestation of its demands and implications.<sup>82</sup> Finally, human laws are “particular determinations, devised by human reason” that apply the principles of the natural law to particular circumstances.<sup>83</sup> Thus, the natural law tells us that one should preserve one’s life, the

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<sup>79</sup> *Id.* at 241-53.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 268-72.

<sup>82</sup> *Id.* at 98-109.

<sup>83</sup> *Id.* at 88.

divine law tells us that the unjustified killing of a human person is morally wrong, and the human law specifies that the unjustified killing of a human person is the crime of murder and assigns it a fitting punishment. Furthermore, the human law is limited and constrained by the natural law from which it is derived and which gives it the only binding authority it may legitimately ever have.<sup>84</sup> In this light, natural law theory is clearly the most perduring Western alternative to legal positivism.<sup>85</sup>

#### IV. NATURAL LAW IN ISLAM

In fact, natural law has a place not only in Western thought but also in Islam. In his book, *Islam and Natural Law*, A. Ezzati has expounded upon the role it plays in Islam. He notes, first, that there are many passages in the Qur'an that refer to the natural order, man's place in it, and God's role as its creator and guarantor.<sup>86</sup> Building on this, he notes that the Mu'tazilite school taught that God, being wise and just, created a perfect and harmonious natural order, by which He can be known to man.<sup>87</sup> This provides the basis for what Islam calls *din al-fitrah* (natural religion), which includes every human person's natural capacity to know and serve God, and thus provides the basis for every fully developed religious tradition.<sup>88</sup>

This natural religion, in other words, includes certain basic laws of human nature, of which Ezzati lists four:

1. The desire to know and trust God, and the responsibility to serve as his *khalifah* (viceregent) on earth.<sup>89</sup>
2. The desire to worship God alone, and to be free from serving anything else.<sup>90</sup>

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<sup>84</sup> MARK TEBBIT, *PHILOSOPHY OF LAW* 11-14 (2nd ed., 2005).

<sup>85</sup> *Id.* at 9-10.

<sup>86</sup> A. EZZATI, *ISLAM AND NATURAL LAW* 60-61 (2002).

<sup>87</sup> *Id.* at 61.

<sup>88</sup> *Id.* at 61-62.

<sup>89</sup> *Id.* at 62-63.

<sup>90</sup> *Id.* at 63.

3. The unity of the human race, grounded immediately in the unity of creation and ultimately in the unity and sovereignty of God, and thus our responsibility to do God's will.<sup>91</sup>
4. The denial of the Christian doctrine of Original Sin, and thus the affirmation of an essentially Pelagian view of ethics and spirituality, according to which one's own efforts are enough to live a virtuous life and grow closer to God.<sup>92</sup>

Ezzati then elaborates on the third point above, stressing that "[t]he entire edifice of Islam is placed on the doctrine of [the] unity of God."<sup>93</sup> In Islam, everything begins and ends with God's unity. Because He is one, His creation is one. Because mankind is part of this unified creation of the one God, the human race too is one. Because the human race is one, all human persons ought to live in harmony with one another, with creation, and with God.<sup>94</sup> As God created everything with balance, order, and harmony, so mankind must do in relation to God, others, and the created world.<sup>95</sup> But if man falls short of this high calling, evil results.<sup>96</sup> Thus, "man's will, if surrendered to God, will produce good; but if his free will is exercised apart from God's will[,] evil must result."<sup>97</sup>

After a lengthy but flawed digression contrasting an idealized version of Islam with straw-man fallacies purporting to be doctrines of Hinduism, Judaism, and Christianity,<sup>98</sup> Ezzati discusses the two classical schools of Islamic thought, the aforementioned Mu'tazilites and their victorious rivals the Ash'arites. He notes that the latter, unlike the former, professed to reject speculative reason, natural law, and secondary causality for fear of committing *shirk*, the sin of associating lesser beings

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<sup>91</sup> *Id.* at 63-64.

<sup>92</sup> *Id.* at 64-66.

<sup>93</sup> *Id.* at 66.

<sup>94</sup> *Id.* at 66-67.

<sup>95</sup> *Id.* at 68.

<sup>96</sup> *Id.* at 69.

<sup>97</sup> *Id.* at 69. Indeed, "Islam" means "submission."

<sup>98</sup> *Id.* at 70-75. As examples of these straw man fallacies, consider how he says that "Hindu cosmology regards nature as an unfortunate event that happened to Brahman, the Absolute" and "Christian cosmology regards nature as the creation of God which was once perfect, but which was corrupted in the 'fall of man' and hence became evil."

with God.<sup>99</sup> Thus, they wound up insisting that God alone causes everything, with no intermediate causes.<sup>100</sup> Whatever concept of natural order they retained was derived only from those verses of the Qur'an that emphasize it, though he does believe they *did* have such a concept no less than the Mu'tazilites.<sup>101</sup> However, they did not use the term "natural order," preferring to call it a "habit of nature."<sup>102</sup>

After another lengthy digression contrasting various modern Western philosophers with Islamic views, Ezzati turns to Muslim theories about the origin of law.<sup>103</sup> On this point, the Mu'tazilites held "that the foundation of law is divine reason and that divinely gifted human reason is capable of appreciating it," whereas the Ash'arites held that "the foundation of law is divine will."<sup>104</sup> So while the Ash'arites did not accept all the principles of natural law theory, the Mu'tazilites did, and through their influence so did the Shi'ites.<sup>105</sup>

In this context, Ezzati explains the reservations many Muslims have about the Universal Declaration of Human Rights (henceforth: Universal Declaration).<sup>106</sup> He begins by noting that the first reservation Muslims have is that the Universal Declaration was devised primarily by Western thinkers and thus embodies Western thought and Western cultural biases.<sup>107</sup> It embodies liberalism, individualism, and moral relativism, in contrast to Islam and all other major world religions, which instead emphasize "absolute and primordial values."<sup>108</sup> In fact, the Universal Declaration is self-referentially inconsistent, insofar as "it promotes ethical absolutism (absolute human rights) on the basis of philosophical relativism...."<sup>109</sup> Attempting to base it in majority rule is no better, as the differences between cultures that gave rise to relativism in

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<sup>99</sup> *Id.* at 75.

<sup>100</sup> *Id.* at 75.

<sup>101</sup> *Id.* at 75-76.

<sup>102</sup> *Id.* at 79.

<sup>103</sup> *Id.* at 86-87.

<sup>104</sup> *Id.* at 86-87.

<sup>105</sup> *Id.* at 90.

<sup>106</sup> *Id.* at 193-206.

<sup>107</sup> *Id.* at 195-96.

<sup>108</sup> *Id.* at 196.

<sup>109</sup> *Id.*

the first place mean that on at least some moral and ethical issues there is significant disagreement between cultures.<sup>110</sup>

The only way that you can have moral and ethical absolutes is by grounding them in something absolute, such as the nature of God.<sup>111</sup> This, Ezzati says, Islam does by grounding human rights in primordial human nature as established by the will of God.<sup>112</sup>

In contrast, none of the three main Western approaches can fully ground and justify human rights as understood in the world today.<sup>113</sup> The “individualist-liberal theory” of John Locke promotes life, liberty, and property, but fails to fully incorporate “economic, social justice, and social rights.”<sup>114</sup> The socialism of Marx and the populism of Rousseau, on the other hand, incorporate the latter but tend to disregard and distrust the former as “essentially bourgeois rights” that the elites use to repress the common folk.<sup>115</sup> Nonetheless, despite the tension between these strands of modern thought, they together gave rise to the modern Western concept of individualism.<sup>116</sup>

The problem with individualism is that it “puts the individual at the center of the universe instead of God” and “supports . . . belief in the human being as the ultimate locus of knowledge, power, rights, and truth.”<sup>117</sup> Thus, “[i]ndividual rights . . . , branded as human rights, replaced . . . society’s rights and divine rights.”<sup>118</sup> However, because liberalism generally “rejects the concept and philosophy of absolutism in the field of ethical values . . . [,] [i]ndividualism in its essence negates the concepts of absolute rights and universal moral values.”<sup>119</sup> Again, the liberal approach to international human rights is self-referentially inconsistent, insofar as it *claims* absolute universal validity while *denying*

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 198.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 199.

*the very possibility* of absolute universal validity.<sup>120</sup> Islam and other major world religions are more balanced, stressing that individuals also have responsibilities to God and society “without the fulfillment of which their individual potentials are not realized.”<sup>121</sup>

According to Islam, other major world religions, and traditional natural law theory alike, it is because human nature and human reason are gifts from God that we can justify our decision to rely upon them to ground our concepts of universal human rights.<sup>122</sup> On the other hand, liberalism denies that there can be any absolute truth, and thus rejects natural law, but “[o]nce human rights [become] divorced from natural law, spiritual values, and divine purpose, they do not have any solid ground to stand on” and “[t]hose who take this position cannot consistently and fundamentally defend and support universal human rights.”<sup>123</sup> Put another way, only an absolute God can ground absolute rights, and without Him all rights become relative, mere “construct[s] of our mind.” In that case, there is no independent standard by which to judge truth and goodness and “man no longer has any moral leg to stand on to be able to pass judgment on human rights” or to condemn infractions thereof or to pretend that there is any such thing.<sup>124</sup>

The same dilemma arises, says Ezzati, when people attempt to keep public and private matters separate, “because a sharp distinction between [them] is is not an easy position for anyone to maintain.”<sup>125</sup> Islam recognizes this, insists that salvation cannot be attained in isolation but must be worked out within the community, and regards sacrifice for the greater good as a virtue.<sup>126</sup> Ezzati does not see these virtues embodied in the Universal Declaration, grounded as it is in liberalism and individualism.<sup>127</sup>

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<sup>120</sup> *Id.* at 196.

<sup>121</sup> *Id.* at 199.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 200.

<sup>125</sup> *Id.* at 201.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

Like Westbrook, Ezzati notes that some Muslim thinkers have “associated and identified the principle of consultation in Islam with the concept of human rights and the rights of people to govern and administer their own affairs . . . . [as] viceregents of Allah.”<sup>128</sup> He interprets this as a Muslim opening toward democracy and international human rights, one more appropriate to their cultural traditions than Western, secular models.<sup>129</sup> Indeed, forcing liberal, secular, Western models of democracy and human rights on non-Western populations is no more than cultural imperialism.<sup>130</sup> Islam’s distinct basis for grounding human rights should be recognized. First, unlike secular human rights theories, Islam proclaims that “rights belong first to Allah, then to the community[,] and then to individuals.”<sup>131</sup> Second, rights and responsibilities are one.<sup>132</sup> Third, they “enjoy divine blessings and sanction.”<sup>133</sup> Such an approach, one that respects Muslim traditions, is more likely to take root in Islamic nations than the current secularist cultural imperialism.<sup>134</sup>

Ezzati concedes that human rights “need to be set within a universalistic concept and context [insofar as] they concern the rights which human beings should have regardless of their ethnic, cultural, or religious identities and other backgrounds.”<sup>135</sup> It must simultaneously “transcend the concepts of any particular cultural grouping” while somehow drawing from and being accessible to all of them.<sup>136</sup> Here, Ezzati rightly notes that “[c]ontrary to what is publicized by secularists, religions and religious loyalty, tendencies[,] and commitment are much more universal than secular ones.”<sup>137</sup> Religious believers, after all, are still in the majority worldwide, and “[h]uman rights declarations therefore

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 201-02.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 203-04.

<sup>135</sup> *Id.* at 204.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

have to respect the feelings and aspiration[s] of the majority of the world population.”<sup>138</sup>

The Universal Declaration’s failure to take non-Western, non-liberal, non-secularist convictions into account vitiates its claim to be universal, as it is ignoring a significant part of the aspirations of the majority of the human race.<sup>139</sup> It cannot be *truly* universal unless it draws from universal and absolute sources.<sup>140</sup> Ezzati, of course, proposes Islam as such a source, observing that in Islam both the rights of the individual and the rights of the community are grounded in the true Absolute, the One God.<sup>141</sup> He insists that “[i]n Islam, man is born free[,] [b]ut his freedom is within the limits of ‘his responsibility towards his Creator . . . , and his responsibility towards his fellow human beings.”

#### V. CAN INTERNATIONAL HUMAN RIGHTS LAW LEARN FROM ISLAM?

Ezzati seems to think that international human rights law can learn from Islamic law. But is this so? In fact, Jason Morgan-Foster, while rejecting universalism, has argued that over the years certain areas of international human rights law have evolved toward a more Islamic approach.<sup>142</sup>

The first such area of convergent evolution discussed is one of the five pillars—five most basic obligations—of Islam: *zakat*, or almsgiving.<sup>143</sup> *Zakat* is essentially a tax collected by the Muslim state and used to help the poor.<sup>144</sup> It goes back to the beginnings of Islam, and there are at least twelve passages in the Qur’an that support it, such as Surah 51:19, “And those who seek help and are needy have due share in their wealth.”<sup>145</sup> Thus, “Islam has since the time of the Prophet placed a heavy concern on

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 204-05

<sup>140</sup> *Id.* at 205.

<sup>141</sup> *Id.*

<sup>142</sup> Jason Morgan-Foster, Note, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context* 10 ILSA J Int’l & Comp L 46-49 (Fall 2003).

<sup>143</sup> *Id.* at 49-50.

<sup>144</sup> *Id.* at 50-51.

<sup>145</sup> *Id.* at 51-52.

wealth distribution and the elimination of poverty by creating [an] individual duty incumbent on each Muslim to surrender a percentage of his or her income to the needs of others.”<sup>146</sup>

Likewise, international human rights law has produced “the International Covenant on Economic, Social, and Cultural Rights . . . [which] claims a right to social security, the right to an adequate standard of living, and the right to be free from hunger.”<sup>147</sup> Until the late 1990’s and early 2000’s, however, little was done to implement these rights, unlike Islam’s established 1,300 year practice of *zakat*.<sup>148</sup> Thus we can see that on this point Islamic law was far ahead of international human rights law until fairly recently, and that the latter could have learned from the former, if it had been paying attention.<sup>149</sup>

Second, Morgan-Foster, like Ezzati, observes that Islam seeks to balance the rights of the individual and the community rather than prioritizing the individual like Western liberals: “the individual is free in so far as [sic] it is of benefit to the community.”<sup>150</sup> In some cases, such as “retaliation and blood money,” the rights of the individual prevail over those of the state as representative of the community.<sup>151</sup> In others, such as slander, some Muslim schools of thought privilege the state and others the individual.<sup>152</sup> Thus, while Islam does place more emphasis on the right of the community than Western liberals would care to do, it does also recognize individual rights.<sup>153</sup>

International human rights law traditionally focused only on the rights of the individual and neglected the rights of human communities as such.<sup>154</sup> At least since the 1980’s, however, there has been a debate about “third generation” human rights, such as “the right of [group] self-determination, the right to development [for the group], and the right to

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<sup>146</sup> *Id.* at 12.

<sup>147</sup> *Id.* at 51-52.

<sup>148</sup> *Id.* at 53.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 54-55.

<sup>151</sup> *Id.* at 55.

<sup>152</sup> *Id.* at 55-56.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 57.

peace for the group.”<sup>155</sup> Morgan-Foster acknowledges that “third generation rights” were still controversial at the time of his writing, but nonetheless sees the debate itself as evidence that international law is moving in an Islamic direction in this area and beginning to acknowledge the rights of human communities and not just those of human individuals.<sup>156</sup>

Next, Morgan-Foster discusses the related point that Islam seeks to balance the rights and duties of the individual.<sup>157</sup> Duties (or “rights of God”) include both religious obligations like the Five Pillars of Islam and those we would identify as secular like paying taxes and punishing crime.<sup>158</sup> Rights of the individual (or “rights of man”) include secular matters like contract law and commercial law.<sup>159</sup>

International human rights law, as its name suggests, has traditionally focused only on the rights of the individual and not on the duties that may justly be demanded of him, except insofar as one person’s right implies another’s duty to respect that right.<sup>160</sup> However, since the mid-1990’s international human rights law has begun realizing that individuals do have duties and responsibilities to their communities, and multiple declarations have been issued by various groups to that effect.<sup>161</sup> Likewise, international human rights law has begun acknowledging concepts of “corporate social responsibility,” the duty to protect the environment, and collective guilt, all of which assume that human persons have duties and not just rights.<sup>162</sup> In this respect too, then, international human rights law appears to be moving in an Islamic direction.<sup>163</sup>

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<sup>155</sup> *Id.* Morgan-Foster also mentions that some have claimed a universal human right to affirmative action, but on the face of it this is absurd. If affirmative action were a universal human right, then it would seem that its benefits would have to be extended even to those for whom they were never intended, such as white males like me.

<sup>156</sup> *Id.* at 57-58.

<sup>157</sup> *Id.* at 58.

<sup>158</sup> *Id.* at 59.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 60-61.

<sup>161</sup> *Id.* at at 61-62.

<sup>162</sup> *Id.* at 62-63.

<sup>163</sup> *Id.* at 63.

Finally, Morgan-Foster discusses the Islamic concept of “gradualism,” as when the Qur’an first merely recommends that people should stop gambling and drinking, then issues a limited ban on such activities, and finally a general ban.<sup>164</sup> Likewise, international human rights law often acknowledges that signatory states may not be able to implement all its stipulations right away but will need to approach the ideal by gradual steps.<sup>165</sup>

### CONCLUSION

I will begin this conclusion by making some observations about some of the sources. First, Cox’s article is correct in saying that international human rights law as currently practiced is an unprovable orthodoxy, the basic propositions of which are taken as faith just as surely as any religion. Indeed, there is no purely secular reason why either the basic assumptions of international human rights law or the justifications commonly presented for them should be true. After all, as great a thinker as Aristotle seems to have never considered the idea that all human persons have equal dignity and value and maintained instead that women are naturally inferior to men and that some persons are naturally slaves and others naturally masters.<sup>166</sup>

Cox is also right to observe that secularists would never accept the idea of grounding human rights in the existence of God. He is also right to observe that neither Muslims nor proponents of secular international human rights law will ever be able to fully convince each other of their respective viewpoints. However, he fails to consider the possibility that adherents of each of these competing faith claims may convince each other of certain aspects of their respective views, even if they never convince each other of all of them. For all that, Cox’s views do not refute Ezzati’s, for the latter’s position seems to be that human rights law should have an Islamic grounding in Islamic countries instead of being presented to Muslims as a grasping, secularist cultural imperialism. And Muslims

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<sup>164</sup> *Id.* at 63-64.

<sup>165</sup> *Id.* at 64-65.

<sup>166</sup> A. EZZATI, ISLAM AND NATURAL LAW 21 (2002).

could use Morgan-Foster's four examples of areas in which international human rights law is convergently evolving toward a more Islamic approach as evidence that it cannot be held up as a superior standard to which Islamic law must conform.

Westbrook's distinction between Western "rule law" and Islamic "instance law" is very interesting and very much helps to illuminate some of the basic differences between Western and Islamic views. Like Cox, he is correct to observe that Islamic law could not ground universal human rights for non-Muslims. I believe he is also correct to observe that there can be an Islamic assimilation of international human rights law under the right conditions, especially since he unwittingly agrees with Ezzati that *shuja* may be a means by which to bring this about. Finally, his footnote about how natural law theory "may be closer to shari'a than more positivist notions of law"<sup>167</sup> is quite possibly true.

As for Ezzati, he provides a good presentation of Islamic views, but his book is marred by his tendency to reduce opposing views to caricatures and straw men. But in doing so he is no different than the liberals and secularists<sup>168</sup> who happen to be his main targets, and it is delightful to see them hoist on their own petard. Also, Ezzati's observation that Islam rejects Original Sin and thus has what I would identify as a Pelagian approach to salvation would admittedly be a point of contention between Islamic natural law theory and Western natural law theory, grounded as the latter is in Christianity.

What, then, of the issue this article seeks to explore? Can natural law theory be a bridge between Islam and international human rights law? Yes, in various ways. First, it should be clear that both Western and Islamic forms of natural law theory would agree that there is an Eternal law that is "the very Idea of the government of things in God the ruler of the universe,"<sup>169</sup> whereby He guides all to act for His glory and the common good.<sup>170</sup> Likewise, they would agree that the natural law is the

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<sup>167</sup> Westbrook, *supra* note 67, at 871 n. 128.

<sup>168</sup> After all, when have they ever *not* reduced religion and tradition to caricatures and straw men?

<sup>169</sup> BUDZIZEWSKI at 64.

<sup>170</sup> CAMBRIDGE at 599.

eternal law as revealed through nature and human reason. Both would ground human rights in the nature of God.

Both Western and Islamic natural law theories also have an idea of man's special place among the creatures, as Aquinas notes by saying man rationally participates in Divine Providence by providing for himself and others and Ezzati by expounding on the Muslim teaching that man is God's viceregent on earth, concepts which are not that different from one another. Likewise, Aquinas's idea that we discover the natural law by reflecting on our natural inclinations in light of the principle that "good is to be done and pursued and evil is to be avoided"<sup>171</sup> echoes in Ezzati's idea that we discover it by reflecting on "primordial human nature."<sup>172</sup> They would also agree that human laws are "particular determinations, devised by human reason" that apply the principles of the natural law to particular circumstances.<sup>173</sup> In that light, Aquinas and Ezzati would doubtless also agree that human law is limited by natural law. Furthermore, these last two points show that natural law theory can conceive of human law in terms of instance law, like Islam.

And finally, insofar as the ancients conceived of natural law theory as an exposition of "eternal laws directing the actions of all rational beings and built into the very structure of the universe," and recognizable to "all civilized peoples" as a common foundation they all shared,<sup>174</sup> its relevance to international human rights law should be clear. In conclusion, we can answer in the affirmative that natural law theory can indeed serve as a bridge between a Western-derived international human rights law and Islam.

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<sup>171</sup> BUDZIZEWSKI at 244.

<sup>172</sup> EZZATI at 196.

<sup>173</sup> BUDZIZEWSKI at 88.

<sup>174</sup> CAMBRIDGE at 599.