



The Informative E-Newsletter for the International Practice Section of the Washington State Bar Association Summer 2010 (Vol. 5, No. 3), Fall 2010 (Vol. 5, No. 4), & Winter 2010–2011 (Vol. 6, No. 1).



## Thoughts from the Section Chair

~ *Glen E. M. Yaguchi*,  
*Section Chair*  
2010-2011 ~

Founded in 1984, the International Practice Section has a broad focus that includes current developments in international law, immigration law, international transactional work, and international litigation or arbitration. Members have a wide variety of backgrounds and practices, including government, business, foreign lawyers, academia, internationally focused law students and those simply intellectually interested.

The Section provides valuable member benefits, including a quarterly e-newsletter, mini-CLEs at no cost to members, and annual receptions for foreign lawyers and law students. Upcoming events are posted on the Global Gavel News Blog, [www.globalgavelnews.org](http://www.globalgavelnews.org), and via e-mail blasts.

I wish to introduce Communications Committee Chair, Braden Pence; Newsletter Editor-in-Chief, KoKo Huang; Blog Editor, Linh Tran; and Law Student Liaison Coordinator, Sarah Sprinkle. Each individual volunteers time to the Section. Ms. Huang has been instrumental in getting this edition of the newsletter to press. The aim of the newsletter is to provide timely articles of interest to the international practitioner. Please submit any article ideas to Ms. Huang at [eic@globalgavelnews.org](mailto:eic@globalgavelnews.org).

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## Introduction from the Student Liaison Coordinator

~ Sarah Sprinkle,  
Student Liaison Coordinator  
2010-2011 ~

I would like to take this opportunity to introduce myself as the new student liaison coordinator. I am working on my JD and MA in International Studies at the University of Washington and am currently a 2L (although I am in the third year of the joint degree program). I joined the International Practice Section last year after attending the student reception and am excited to get more involved.

I am interested in international trade law and had the opportunity to spend this past summer in Sao Paulo, working for a Brazilian firm on arbitration and trade matters. I hope to continue similar work this summer and after graduation, either in Washington state or Washington, DC.

I look forward to working more closely with members of the Section in this position.

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## Justice and Human Dignity Under the Law of Afghanistan: An Imperative in the Ongoing War and a New Perspective on Shari'a

~ Brandon Chan ~

[The following is the second installment of a two-part series in *The Global Gavel*. The first part appeared in the [previous edition](#).]

*Disclaimer: This article describes inconsistencies between the principles of conservative Shari'a law and modern liberalism. It is not intended as a critique of the religion of Islam.*

*III. Reasons and methods for ensuring a progressive application of Afghan laws.*

The analysis in part one illustrates the fact that Afghanistan's commitment to the principles of traditional *Shari'a* law will most certainly conflict with its commitment to guaranteeing basic civil and human rights to its citizens. But this does beg the question: Why does the Afghan state's willingness or ability to protect the rights of its citizens matter? I submit that the most obvious answer is that there is a moral imperative to ease the continued suffering of the most vulnerable segments of the Afghan population, especially given the chaos and hardship that our military campaign against the Taliban has inflicted upon Afghan society. Despite the gains made by Afghan women since 2001, including gaining freedom of movement and access to education and economic opportunities, a recent report by the Human Rights Watch indicates that they are still the target of rampant discrimination and violence, often with the complicity of the Afghan state. In particular, the report found that women in public life faced with death threats, women who are victims of sexual violence, and girls forced into arranged marriages are unable to get members of law-enforcement or the courts to respond to their plight.<sup>1</sup> Instead, the state consistently detains women and girls for committing "moral crimes" such as adultery or running away from home.<sup>2</sup> Furthermore, the Afghan government passed the *Shi'a* Personal Status law that limits the rights of *Shi'a* women with respect to freedom of movement and child custody.<sup>3</sup> In the meantime, child slavery continues to be a problem in Afghanistan. Families are compelled to enter into exploitive loan or opium production agreements, and then forced to offer their children for servitude when they default on these agreements.<sup>4</sup> To make matters worse, these families are unable to turn to the courts for justice

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<sup>1</sup> *Afghanistan: Keep Promises to Afghan Women*, News (Human Rights Watch, New York, NY), Dec. 6, 2009, available at <http://www.hrw.org/node/86997>.

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

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

<sup>4</sup> *See Afghanistan: Child servitude resembles modern-day slavery*, InfoSud Human Rights Tribune (InfoSud, Geneva, Austria), Feb. 5, 2009, available at <http://www.humanrights-geneva.info/Afghanistan-Child-servitude.4089>.

because the judicial system is believed to be utterly corrupt and biased.<sup>5</sup> Under these circumstances, it is vital for the Afghan government to ensure that its Constitution acts as an instrument for securing the rights of these vulnerable Afghans instead of being a tool for those with a narrow view of Islam and its principles.

It is also in the interest of the United States to ensure that the Afghan Constitution's guarantees of fundamental civil and human rights are real and undiminished. Although the Obama administration has formally repudiated the goal of "nation-building" in Afghanistan, it still maintains that the war effort there depends in large part on our ability to stabilize the Afghan government to the extent that it can effectively run the country. However, an Afghan government that is mired in corruption and gross incompetence cannot fulfill basic functions like developing an infrastructure and the economy, building a military and police force, operating a fair and efficient judicial system, or holding non-fraudulent elections. And the average Afghan citizen cannot fully participate in the political process to hold government officials accountable to standards of integrity and competence if he or she is always living in fear of oppression, exploitation, or violence from the state or private parties. Thus, until Afghans are secure in the knowledge that they possess basic rights which cannot be violated, and assured that they will be treated equally and fairly by the law, we cannot break down the institutions of corruption and criminality that is so prevalent in Afghanistan or hope to see the first signs of a vibrant Afghan society. If we do not make a sincere effort to hold the Afghan government to a progressive application of their laws, all of our expenditure in lives and money in Afghanistan will be for naught. Worse yet, we may see the Afghans turn back to the Taliban in frustration and disgust.

There are immediate steps that the United States and international community can take to ensure that internationally prescribed standards of human dignity and liberty are protected through the Afghan legal system. First, the 2004 Afghan Constitution and the

Afghan Penal Code should be amended. Currently, Article 121 of the Constitution only allows the Afghan Supreme Court to exercise its review power upon specific request by the Afghan government or the lower courts.<sup>6</sup> This provision should be changed to provide some kind of mechanism for members of Parliament, political parties, and average Afghan citizens to initiate constitutional review proceedings, and to give authority to the Supreme Court to review and, if necessary, strike down parliamentary legislation, executive regulations, and lower-court decisions. Because government officials can be complicit in human and civil rights abuses through neglect and omission as well as action, the Constitution should include new provisions that set forth the state's obligation not just to refrain from violating citizens' rights of equality and liberty, but also to affirmatively fulfill these rights and advance social welfare and access to justice. Such an approach would be similar to the one taken in the South African Constitution,<sup>7</sup> and would allow the Supreme Court to order the government to take action to remedy any shortfalls in its duties to the Afghan people. Concurrently, the Penal Code should be revised to criminalize human and civil rights abuses by government officials, including deliberate omissions that can be construed as complicity in such acts.

Second, a task force should be established to advise the Afghan judiciary, and to audit the performance of Afghan courts and law-enforcement agencies in delivering justice to Afghans. The task force would include an international cadre of prominent Muslim lawyers and legal scholars with a progressive view towards Islam and *Shari'a* law. These advisors would be employed to train Afghan judges and prosecutors in interpreting and applying *Shari'a* law in a manner that is consistent with international standards of human rights and civil liberties. Judges and prosecutors in Afghanistan would be more receptive to advice from their Muslim brethren, and such an arrangement would demonstrate the coalition's respect for the expertise of Muslims in advancing the welfare of the Muslim community. The task

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

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<sup>6</sup> AFG. CONST. art. 121.

<sup>7</sup> See S. AFR. CONST. 1996. sec. 7.

force would also utilize auditors to root out official malfeasance at the local level. Specifically, Afghan prosecutors, and U.S. and NATO military personnel should permanently staff offices at various locations throughout the country and take complaints from Afghan citizens of neglect, abuse, or corruption by judges, officials, and police officers. These auditors would also aggressively solicit complaints by traveling into the surrounding community to listen to the grievances of locals. Instead of simply conveying these complaints to the “authorities,” such as the Independent Human Rights Commission does under the Constitution, the auditors can promptly initiate criminal investigations and prosecutions upon receiving the complaints.

Third, and most importantly, the Afghan judiciary must be advised of ways of interpreting *Shari’a* law and conducting judicial review that promotes fundamental civil and human rights, and abides by the noblest principles of Islam. To this end, I would recommend that the judiciary and its advisors draw inspiration from the teachings of Sudanese reformer Mahmoud Mohamed Taha, and the positive experience of the Supreme Constitutional Court of Egypt.

#### *IV. Evolutionary methods for interpreting and construing Shari’a law.*

According to *Ustadh* Taha, there are two levels or stages to the message of Islam: one from the earlier Mecca period and the other from the later Medina period.<sup>8</sup> The message of Mecca comes from the first thirteen years of the Prophet Muhammad’s mission to propagate Islam and is characterized by the values of justice, peace, and the inherent equality and dignity of all human beings.<sup>9</sup> For example, in verse 16:125 of the Quran, the Prophet was instructed to persuade the people to join the religion of Islam “in ways that are best and most gracious,” and in verse 18:29, the Prophet is told to “let him who believes do so, and he who wishes to

disbelieve do so.”<sup>10</sup> Furthermore, in verse 17:70 of the Quran, God says that He has “honored the children of Adam,” and in verse 49:13, God declares that, “We have created you into male and female, and made you into people and tribes so that you may be acquainted with each other.”<sup>11</sup> In contrast, the message of Medina is from the period after the Prophet when his followers were forced to flee from Mecca under threat of death from the Arabs, and is characterized by a call to defend and propagate Islam through the use of force and discrimination against women and non-Muslims.<sup>12</sup>

*Ustadh* Mahmoud believes that the shift in the message of Islam was triggered by the violent rejection of the Prophet’s preaching in Mecca, and the subsequent need to address the teachings of Islam to an audience in Medina with a different set of needs and understanding.<sup>13</sup> To justify his position, *Ustadh* Mahmoud points to the difference between the term used to refer to revelation to the Prophet (*anzallna*) and the one used to refer to the act of teaching the people in general (*nuzila*).<sup>14</sup> He also quotes the verse from the *Sunna* that reports the Prophet as saying, “We the Prophets have been instructed to address people in accordance with their own level of understanding.”<sup>15</sup> In order to reconcile the difference between the two messages, the early Islamic jurists had held that, for the purpose of construing *Shari’a* public law, the Quran and Sunna of the Medina period would repeal or abrogate (*naskh*) the inconsistent portions of the message of Mecca. However, *Ustadh* Mahmoud believes that *naskh* can now be reversed in order to return the emphasis of Islam and *Shari’a* law to the earlier message of Mecca, which he believes to be the eternal and fundamental message of Islam.<sup>16</sup> He argues that the process of abrogation should be reversed because implementation of the message of Mecca was postponed until the right circumstances should arise, and to

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<sup>8</sup> Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* 52 (Syracuse Univ. Press 1996).

<sup>9</sup> *See id.* at 53–54.

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

<sup>11</sup> *Id.* at 54.

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

<sup>13</sup> *Id.* at 55–56.

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

<sup>15</sup> *Id.* at 56.

<sup>16</sup> *Id.* at 52, 56.

deny the reversal would be to render the earlier revelation to the Prophet meaningless.<sup>17</sup> Under *Ustadh* Mahmoud's method of interpretation, modern Islamic law would be based on legitimate authority from scripture, affirming the equality of all human beings, freedom of choice in faith and religion, and protection of human dignity. According to this perspective of *Shari'a* law, Afghans should consider the practices of discrimination against women and non-Muslims, executing apostates, and condoning slavery to be abhorrent and blasphemous.

Similar to Article 3 of the Afghan Constitution, Article 2 of the Egyptian Constitution, after amendments in 1980, states that, "the principles of the Islamic *shari'a* are the chief source (*al-masdar al-ra'isi*) of legislation."<sup>18</sup> Like the term "beliefs and provisions ... of Islam" in the Afghan provision, the term "the principles of the Islamic *shari'a*" in the Egyptian provision are also broad and vague. The Supreme Constitutional Court of Egypt (SCC) was not given any guidance by legislative history and had to consider which one of a myriad of competing approaches to Islamic legal interpretation it should adopt.<sup>19</sup> One of the SCC's motivations was to develop an approach to interpreting *Shari'a* principles that would also be compatible with the liberal rule of law, including the protection of human rights.<sup>20</sup> Eventually, the SCC drew its inspiration from the neo-*ijtihad* method articulated by Rashid Rida and the neo-*taqlid* method articulated by Abd al-Razzaq al-Sanhuri.<sup>21</sup>

Under the neo-*ijtihad* method, an Islamic state would only incorporate into its law scriptural commands that are absolutely certain with respect to authenticity and

meaning.<sup>22</sup> There are only a limited number of these universally applicable rules under Rida's system because Rida limited the effect that binding juristic consensus (*ijma*) would have in establishing universality.<sup>23</sup> Absent explicit scriptural commands, Rida proposed that states abide by the command of "no harm and no retribution" (*la darar wa-la dirar*) in the *hadith*, and order the people to behave in a manner that reason suggests will enhance human welfare (*maslaha*) and not cause harm.<sup>24</sup> Under the neo-*taqlid* method, Islamic states cannot enact legislation inconsistent with universally applicable rules, which Sanhuri identified to be principles that explicitly or implicitly recurred in scriptures from different times and place.<sup>25</sup> These rules took the form of specific rules of behavior or abstract principles in the context of a variety of circumstances.<sup>26</sup> Both methods left significant discretion to judges and legislators to promote laws that furthered just or socially beneficial goals.<sup>27</sup>

The method of interpretation and review developed by the SCC is a fusion of the two methods. First, the SCC analyzes scriptural passages to derive universally applicable principles that are absolutely certain with respect to authenticity and meaning, with guidance from the consensus of traditional jurists.<sup>28</sup> Because of the stringent standards adopted for such an analysis, the SCC has found few of these principles and they are usually general in nature. Second, the SCC determines the specific goal of the reviewed legislation, or which one of the five human interests or classical "necessaries" of the *Shari'a* it purports to satisfy—religion, life, reason, property, and honor/modesty. Third, because the SCC adheres to the principle that God would want people to enjoy what reason reveals to be beneficial, the SCC determines whether the reviewed legislation will advance public welfare or be socially harmful.<sup>29</sup> In sum, the SCC will be

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<sup>17</sup> See *id.* at 56.

<sup>18</sup> EGYPT CONST. art. 2 (1971) (amended 1980).

<sup>19</sup> Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 393–394 (2006).

<sup>20</sup> *Id.* at 417.

<sup>21</sup> *Id.* at 408–13.

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<sup>22</sup> *Id.* at 409.

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

<sup>24</sup> See *id.* at 410.

<sup>25</sup> *Id.* at 412.

<sup>26</sup> *Id.* at 413.

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

<sup>28</sup> *Id.* at 418–20.

<sup>29</sup> See *id.* at 422–23.

more inclined to strike down a law if it contravenes a universally applicable principle, fails to fulfill its specific goal, and/or is harmful to the public. The SCC's method of interpretation seems to be one that regards *Shari'a* law as a guide to general moral principles, which must then be interpreted according to evolving standards of human welfare and justice.

The SCC has had the opportunity to apply its method in different areas of social concern. In the area of human rights, the SCC has consistently stated that "justice" requires people to respect each other's human rights, and that the enjoyment of these rights is an essential part of human welfare.<sup>30</sup> Therefore, the SCC struck down laws that contravene international human rights on the grounds that they were inconsistent with the general goals of the *shari'a* of promoting human welfare and justice.<sup>31</sup> It is noteworthy that the SCC used the same progressive interpretation of Islamic law to uphold statutes that may contradict traditional Islamic rules but are consistent with international conventions protecting the rights of women and children.<sup>32</sup> On the subject of child alimony, the SCC upheld "Islamic" legislation that required husbands to pay alimony, reasoning that the classical jurist's view of denying alimony to divorced women was not clearly established in scripture and should be departed from based on a balance of harms.<sup>33</sup> Despite these decisions, most Egyptians, even among conservative Islamists, regard the SCC's method of interpreting the *Shari'a* as appropriate and worthy of serious consideration.<sup>34</sup> Thus, the SCC's method of construing modern Islamic law and judicial review deserves close examination and emulation by the Afghan judiciary.

## V. Conclusion

The Human Rights Report mentioned earlier in this article describes a particularly tragic story of an Afghan woman who was gang-raped by a local Afghan military

commander and his cohorts.<sup>35</sup> After a long struggle to bring her assailants to justice, they were freed by a decree from President Karzai, and soon after, the woman's husband was killed for fighting for her rights.<sup>36</sup> In the report, the woman is quoted as saying, "I have lost my son, my honor, and now my husband . . . But I am just a poor woman, so who will listen to me?"<sup>37</sup> I submit that our current effort to stabilize the Afghan government and set Afghan society on the path to recovery and vitality will depend primarily on our ability to listen to this woman, and others like her, who cry out for justice. And we cannot hope to achieve anything resembling peace and moral decency in Afghanistan until we assist the Afghan government in preserving and enhancing the protections for human and civil rights under Afghan law. It is fortunate that, in its effort to construe a progressive understanding of the precepts and requirements of Islam, the Afghan government will not be staring at an intellectual vacuum, but can receive guidance and inspiration from scholars like Mahmoud Mohamed Taha and the experiences of other Islamic countries such as Egypt. Ultimately, the success or failure of the Afghan state to deliver justice and security to its citizens will determine the fate of the new Afghan government and affect the motivation of well-meaning Muslims all over the world to continue struggling for a more enlightened view of their religion.

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*Brandon Chan is a recent graduate of the Seattle University School of Law in the areas of international and criminal law. He is the outgoing student liaison correspondent of the WSBA International Practice Section. He served in the United States Navy between 1998 and 2002.*

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<sup>30</sup> *Id.* at 424–25.

<sup>31</sup> See *id.* at 425.

<sup>32</sup> *Id.* at 425.

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

<sup>34</sup> *Id.* at 433.

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<sup>35</sup> *Afghanistan: Keep Promises to Afghan Women*, *supra* note 1.

<sup>36</sup> *Id.*

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

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### CONFERENCES

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### **Seattle Univ. School of Law**

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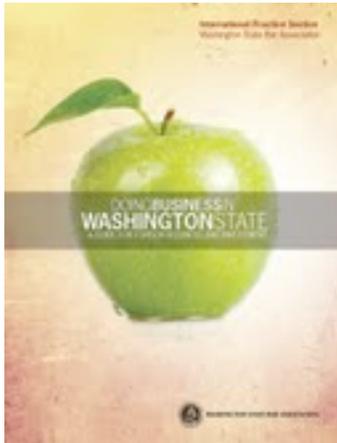
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**GLOBAL GAVEL CONTACTS:**

**Editor-in-Chief  
KoKo Huang**

[eic@globalgavelnews.org](mailto:eic@globalgavelnews.org)

**Student Liaison Correspondent  
Sarah Sprinkle**

[slc@globalgavelnews.org](mailto:slc@globalgavelnews.org)

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