

# Legal Perspectives for Civil-Military Operations in Islamic Nations

Lieutenant Colonel Vincent Foulk, U.S. Army Reserve

THE EVENTS OF 11 September 2001 brought forth the possibilities of U.S. forces being deployed as peacekeepers and nationbuilders in Muslim nations. As such, the military will be a major contributor to civil law and order. Previous operations in Haiti, Somalia, and the Balkans have shown that military officers providing assistance to civil authorities should understand the legal underpinnings of civil and criminal law to operate effectively. Where this understanding is available, military and civil authorities have made considerable strides in establishing civil normalcy. Where this understanding is not available, there has been resistance from local and international civilian authorities. Most personnel that civil-military operators are likely to support would certainly come from a nation with an Islamic legal tradition.

While working within an Islamic nation, civil-military operators must keep in mind the tension between secular nationalism and Islamic religious principles. Unlike many other religions familiar to American non-Muslims, Islam inserts itself into the body politic far more aggressively than other religions.<sup>1</sup> To misunderstand both points of view is to risk losing credibility and alienating the very people the mission depends on to succeed. It is important to remember that among some Muslims, westernization and globalization are threats. Some secular nationalist and Islamic adherents are likely to oppose government programs that advance these ends, resulting in a rallying point for both points of view.<sup>2</sup> Most Western military operators easily grasp the concepts of secular nationalism, but the Islamic facet is often completely misunderstood.

The first concept U.S. forces must abandon when dealing with any dimension of an Islamic legal system is the concept of separation of church and state. Islam has long traditions of involving religion with

---

*Unlike many other religions familiar to American non-Muslims, Islam inserts itself into the body politic far more aggressively than other religions. To misunderstand both points of view is to risk losing credibility and alienating the very people the mission depends on to succeed. . . . Among some Muslims, westernization and globalization are threats. Some secular nationalist and Islamic adherents are likely to oppose government programs that advance these ends, resulting in a rallying point for both points of view.*

---

law. Approaching any aspect of the legal system without first understanding Islamic principles is likely to result in misunderstandings and misinterpretations. For non-Muslims, another difficult concept to grasp is that Muslims and non-Muslims are not held to the same standard under Islamic law.<sup>3</sup> This difference remains an aspect of law in many Islamic states and results in different laws and punishments for different religious groups.

American lawyers, as well as others charged to keep the peace and regulate behavior, are accustomed to a system with a foundation of constitutional statutes that reflect political will, regulations that reflect public policy, and precedent-setting court rulings. All these tools balance basic rights with political expediency. Grasping these concepts is essential to work within the American legal system.

Islamic legal systems rest on the Koran and the rights endowed by the Creator. The right to govern people in any Islamic state comes from God, as do all individual rights. A government is obliged to follow the law of God in defending those individual

rights and obligations.<sup>4</sup> Islamic law or government is not likely to accept the principle of democracy of the people. The question of whether democracy is even compatible with Islam is debated among many Islamic commentaries.<sup>5</sup> The concept that authority to make laws and regulations comes from God, not the governed, poses an obvious problem

---

***The question of whether democracy is even compatible with Islam is debated among many Islamic commentaries. . . . Some Islamic scholars have made distinctions between fundamental sovereignty, in which God grants and protects fundamental freedoms, that are unchanging and popular sovereignty, which deals with expedient policy and is thus subordinate to fundamental sovereignty. This results in an analysis that is foreign to Americans—first look at the religious law and obligations, and then to any national constitution.***

---

for democratic governments. Some Islamic scholars have made distinctions between fundamental sovereignty, in which God grants and protects fundamental freedoms, that are unchanging and popular sovereignty, which deals with expedient policy and is thus subordinate to fundamental sovereignty.<sup>6</sup> This results in an analysis that is foreign to Americans—first look at the religious law and obligations, and then to any national constitution. To understand government and law in any Islamic regime, it is as important to first understand the Koran just as it is important in the United States to understand the Constitution.<sup>7</sup>

Most Islamic states use a parliamentary code to establish specific laws, and all Islamic states use a system of religious law known as Shari'a, which is similar to the West's common law. In its purest form, Shari'a regulates every form of public and private life; however, its influence varies among Islamic societies. Mazalim courts, or grievance courts, that follow the statutory laws created by parliaments are similar to European civil courts; even so, these courts still follow Islamic principles. Often, a parliamentary court hears criminal and business law cases while a religious court guided by Shari'a hears family law cases. In the case of Islamic states, even parliamentary laws and courts interpreting those laws must formulate and interpret the law according to sound Islamic principles.

Whether arguing in court or advising on social policy, civil-military operators must keep in mind the hierarchy of sources for Islamic law. From highest to lowest, these sources of law are the Koran, the Sunna, the Ijma, the Qiyas, then all other sources of wisdom.<sup>8</sup> The Koran, which was written by the Prophet, is the highest source and overrules all other sources. Any effort to contradict this source is certain to be rejected. The Sunna consists of the teachings of the Prophet Muhammad not explicitly found in the Koran and overrules all but that found in the Koran.

Muslims do not see their faith as one of evolution but a constant truth. Still, new issues emerge in a changing world. To address these issues, a council of clerics reaches a consensus, which becomes part of the Ijma. Just as in the common law, there are prior rulings by prior councils that can be persuasive from one case to another. These are called Qiyas. Finally, all other sources of wisdom can be used to argue or persuade. These range from declarations of rights from other cultures to religious teachings of the earlier and lesser prophets. Non-Muslims often mistakenly begin arguments using the lowest level of precedence to support their positions. Such arguments should be made to either support an argument of a higher source or to show that the higher level did not argue the issue; therefore, the traditional Islamic interpretation does not apply.<sup>9</sup>

Another important distinction that causes misunderstandings is in applying criminal law. Americans are comfortable with the distinction between misdemeanors and felonies. Islamic law also distinguishes between greater and lesser crimes. Some Western legal scholars even draw parallels between Islamic and Western distinctions in crimes; however, this simplistic view can be perplexing when watching Islamic courts apply their distinctions. Islamic crimes are divided into three classes: Hudoud, Ta'zir, and Qisas. The better classification can be described as crimes against God, society, and individuals respectively.

Hudoud crimes are crimes identified in the Koran. Some commentaries have equated them to felonies, but that label would mislead most Americans. There are seven crimes: murder, apostasy, theft, adultery, false accusation of adultery, robbery, and alcohol consumption. For the first four of these crimes, the Koran specifies punishment, and a clerical judge has no discretion in that punishment. The

last three mentioned do not have specific punishments.<sup>10</sup> Several liberal Islamic countries, however, do not treat apostasy or drinking beer or wine as Koranic offenses. Punishments can range from death to corporal. An aspect that escapes Western understanding is that the Koran requires specific evidence to prove these crimes. Only a confession or testimony by two witnesses—four in the case of adultery—can support a conviction. Less proof, however, can still result in a conviction as a Ta'zir crime.

Ta'zir crimes are those offenses that are not described in the Koran but are deemed necessary to a working society. In these crimes, judges have nearly complete discretion over punishment unless limited by parliamentary law. Although Ta'zir crimes are often punished only by admonition on first offenses, it would be a mistake to refer to them as being similar to misdemeanors. Espionage or similar crimes against the state are classified as Ta'zir and can carry the death penalty.

Qisas are crimes that are mentioned either in the Koran or Ta'zir. They are crimes in which victims have some say in the punishment and have the right to recover damages. Damages paid to victims or their families are referred to as Diya. Crimes of this sort are usually limited to those causing physical harm but can include crimes of negligence. In a traditional court system, the victim's family can demand that similar bodily offenses be inflicted on

the defendant or the family can grant forgiveness.

Any military officer supporting civil authorities in a traditional Islamic nation must fully understand these concepts to have credibility and to avoid imposing views the local populace might perceive as

***Islam has long traditions of involving religion with law. Approaching any aspect of the legal system without first understanding Islamic principles is likely to result in misunderstandings and misinterpretations. For non-Muslims, another difficult concept to grasp is that Muslims and non-Muslims are not held to the same standard under Islamic law.***

unacceptable. In planning operations to support civil authorities, the following actions should be employed: civil-military personnel should be familiar with the legal underpinnings of civil authority in the host Islamic nation; a civil affairs specialist familiar with legal issues and Islamic law should be deployed to work with other civil-military operators and with the local justice system to assist judge advocate generals and maneuver commanders with liaison; and matters concerning assistance in developing local responses for civil authorities should be framed within the Islamic principals likely to be accepted by Islamic clerics and government officials. **MR**

**NOTES**

1. Colonel Syed Tahir Hussain Mashhadi, "Political Philosophy of Islam," *Globe* (Pakistan: February-March 1999). This is possible because Islam is not only a religion but also a four-fold phenomenon. It is a strong monotheistic faith. It is a state based on the Holy Koran, and it is a way of life, with every activity down to the smallest detail regulated by Koranic prescriptions. Thus, Islam is a complete integration of religion, a political system, a way of life, and an interpretation of history.

2. Ali A. Mazrui, "Sharia Nigeria: Between Democracy and Globalization," *Muslim Democrat* (November 2001). Because globalization is a special scale of Westernization, it has triggered many identity crises from Uzbekistan to Somalia and from Afghanistan to Northern Nigeria. Fragile ethnic identities and endangered cultures are forced into new forms of resistance. Resisting Westernization becomes indistinguishable from resisting globalization.

3. Professor Tamara Sonn, "Elements of Government in Classical Islam," *Muslim Democrat* (November 2001). Those who followed Islamic law were considered Muslim, while Jews and Christians were not only allowed but also expected to follow their own law if it did not contradict Islamic law.

4. Allamah Abu al-'A'la Mawdudi, "Human Rights in Islam," *al Tawhid Journal*, Vol. IV, No. 3, Rajab-Ramadhan, 1407.

5. Ali R. Abootalabi, "Islam, Islamists, and Democracy," *Middle East Review of International Affairs Journal* (March 1999). Some, like Abul A'la Mawdudi, founder of the Jamaat-i Islami in India, have argued that if democracy is conceived as a limited form of popular sovereignty, restricted and directed by God's law, there is no incompatibility with Islam, but Mawdudi concluded that Islam is the very antithesis of secular Western democracy based solely on the sovereignty of the

people. On the other hand, Sayyid Qutb, a leading traditionalist theoretician of the Muslim Brotherhood, executed by the Egyptian government in 1966, objected to the idea of popular sovereignty altogether. Qutb believed that "the Islamic state must be based on the Koranic principle of consultation, or *shuriah* [on the interpretation of Shari'a], and that the Islamic law, or Shari'a, is so complete a legal and moral system that no further legislation is possible or necessary."

6. Dr. Raja Bahlul, "Divine Sovereignty vs. Popular Sovereignty," *Bir Zeit University*, unpublished paper for the First Annual Conference, Center for the Study of Islam and Democracy, Georgetown University, Washington DC, 30 April 2000.

7. Riffat Hassan, "Religious Human Rights and the Quran," *Emory International Law Review* (Spring 1996). This does not mean that similar issues of human rights cannot be raised and intelligently argued in an Islamic setting. Also see Donna E. Arzt, "Religious Human Rights in Muslim States of the Middle East and North Africa," *Emory International Law Review* (Spring 1996), online at <[www.law.emory.edu/EILR/volumes/spring96/arzt.html](http://www.law.emory.edu/EILR/volumes/spring96/arzt.html)>.

8. M. Fathi Osman, "Sovereignty of God or Sovereignty of the People," *Muslim Democrat* (February 2000).

9. *An-Nisa* 3:58, *Quran*. One important tip in dealing in an Islamic government context is that simple fairness is always a good position in which to start. Islam is very sensitive to equity and fairness. "Surely, Allah commands you to fulfill trust obligations toward those entitled to them and that when you judge between, judge with fairness."

10. Frank Schmalleger, *Criminal Justice Today* (Englewood Cliffs, NJ: Prentice Hall, 1993), 603.

*Lieutenant Colonel Vincent Foulk, U.S. Army Reserve, is an assistant attorney general for the State of Florida. He received a B.S. from Ohio State University and a J.D. from Capital University Law School. He is a graduate of the U.S. Army Command and General Staff College. As a reservist, he serves as commander, 415th Civil Affairs Battalion, Kalamazoo, Michigan. His staff positions include serving as a liaison officer, Headquarters, Kosovo Peacekeeping Force, to assist the UN mission to establish a judicial system; as the director of civil-military operations, Joint Task Force Bravo, Honduras; and as a tactical support team leader, Implementation Force, Bosnia.*