English Common Law and Islamic Shari’a: Principled Agreement in the Path Towards Democracy

A Capstone Study By
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Thesis: Developmental similarities between Sunni legal theory and English common law have played a key role in the rapid development of a democratic judicial system in the United Arab Emirates.

**Introduction**

As social unrest threatens Iraqi civil formation, as Iran is further isolated from the West, as diplomatic ties with Saudi Arabia fall under growing scrutiny, questions surrounding the future of the Middle East pervade international discourse. Democracy has not fully taken hold in Iraq, and seems a far off notion for many surrounding states. The region’s elevated economic power and disproportionate political influence frequently demand the attention of the international community, forcing Western states to consider both what should be done and what may be possible.

Western discourse over the region continues to reflect a sense of the Middle East as inextricably ‘other,’ a strange land where nothing is familiar, where normal rules of civilization do not apply. This viewpoint has not yielded useful discussions, nor aided in crafting policy objectives or even a consistent direction. Rather than continuing to exacerbate dissimilar elements, it is wiser to begin to look towards key commonalities that may serve as a basis for diplomatic and political advancement – ideological bridges that connect East and West.

While it would be naïve to altogether deny or ignore real differences between Western and many Islamic cultures, there do exist striking similarities that may serve as a basis for
encouraging developmental endeavors. These parallels are more likely found in structural and systematic, rather than cultural, arenas. If identified and understood, these structural elements may prove better tools and exhibit more force in ultimately developing democratic systems than many purely cultural or power approaches to promoting democracy in the Middle East.

In consideration of this point, it is critical to examine those elements of essential support that uphold democratic rule. After all, the notion underlining analysis of any socio-structural model is one based on the idea that if certain criteria are present, the model will work, regardless of other variations in context and culture. In the same way, democracy itself depends on certain components necessary to its function; outside of those essentials, the variables are endless. Culture, history, geography, beliefs, all mold how a democracy works, how people organize themselves around ideas. They do not, however, intrinsically nullify a state’s status as a democracy. By seeking out the necessary democratic components within Islamic culture, we can find ways to encourage and cultivate those elements. This must be done with an ultimate understanding that an end result may look very different from past democracies.

The rule of law, protected by a strong and independent judiciary, is one of the necessary components of a democracy. A superficial glance at both European and Middle Eastern judicial systems conveys a world of differences. The largely secular legal tradition of common law and the religious basis of shari’a diverge from their starting points and maintain differing claims to legitimizing authority. Common law developed out of a
fusion of Saxon tradition and feudalism in 13th century Britain, whereas shari’a’s primary legal context stems from the Q’uran and the traditions of first century Islam. Common law set out to establish and protect individual rights from the tyranny of lords and kings; shari’a lays out specific norms and codes to produce a righteous Q’uranic society. Though these divergences are significant, both legal systems share structural similarities that contribute to the development of similar political aims.

When viewed as theoretical frameworks used to develop a legal tradition, shari’a and common law share several key traits. They each contain three core sources of law: decisions reached by consensus, precedent as a source of internal legitimacy, and textual references for law. Additionally, both traditions have developed similar definitions of legally protected rights and community standards within the context of their own cultures. Fundamentally, both legal systems aim to create a functioning society, and hold governments accountable to a higher authority –the people in one case, and the will of Allah in the other. Though the cultures behind these goals are different, that does not negate the potential for a viable discourse centering on democratic development rooted in such similarities.

Both legal systems constitute complex traditions that have experienced many transformations and evolutions through their respective developments. In order to gain greater academic depth in the research of this paper, I have chosen to look specifically at Sunni shari’a and at English common law. Sunni shari’a is the most common form of shari’a practiced in the Middle East, and presents a far fuller record of historically
documented development that its Shia counterpart. English common law is the original common law form, and has served as the basis for other common law traditions in the greater United Kingdom, the United States, and other former British colonies.

The movement from a theoretical comparison of these two legal traditions to application is best served through analysis of a case study. I have chosen to use the United Arab Emirates for several reasons. First, the UAE is the best regional example of a formerly colonized country that has largely succeeded to-date in efforts to move beyond a colonial past to create a personalized developmental pattern along democratic lines. Second, the country has a dual legal system that implements both English common law and shari’a law simultaneously, which allows for realistic study of the similarities between the two legal systems. Third, the successful economic and political development of the UAE in the past thirty years warrants study, and the dominant scholarship on its development focuses on economic incentives, not political advancement. Fourth, determining how the UAE has succeeded in advancing thus far can serve as a knowledge base for encouraging similar development in other countries, and allows for calculation on potential future development.

The unique union between English common law and shari’a law in the context of the UAE is a factor that I believe plays an integral role in promoting the continuing democratic development of the country. In fact, much of the UAE’s legal success is owed to shared legal developmental patterns between its own Sunni legal theory and English common law. These commonalities, when considered in the development of the UAE,
have contributed to democracy, largely in spite of the much-emphasized differences in culture. These two legal traditions produced a synergy that has promoted adaptation and growth within the country, an experience that would be useful to encourage in other regional states.

**Democracy and Rule of Law**

Before presenting why it is a good thing that shari’a could support democracy, it is important to briefly discuss the value of a democratic government. It is first necessary to understand that democracy is a universally relevant system of government; there is not one people group who is incapable or undeserving of the right to self-rule. Believing in the importance of life and the value of individuals is the root of a democratic government in a way like no other government type. A truly democratic government responds to its people’s needs and protects them from harm, because of this recognition of the intrinsic value in individual people. Additionally, a democracy is the only form of government that creates an active exchange between the government’s power and the citizens’ freedoms. This dynamic relationship between the governed and the government gives democracy a unique value over other authority structures. Whereas other government may be more efficient or more powerful, democracies have the potential to have the best relationship with the people. It is important to point out here that Islam agrees with

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democratic theory so far; all people are believed to have inherent value and should work for a stable government based on the solidarity and unity of its people.\(^4\)

The rule of law is a key criterion for a functioning democracy. Fundamentally, it is the expression of civil society’s norms and values onto their government as well as the articulation of expectations from the government.\(^5\) Citizens must have a judicial system that acts to protect them from undue infringement on the part of their government, delineating between those who are able to make laws and those who apply them.\(^6\)

Without the rule of law, there is no accountability of the government to its peoples, which negates the freedom of civil and political society.\(^7\) Without a free civil and political society, democracy does not exist. It is in this way that the judicial system of a society acts as its most important institutional check against the abuse of power by its government; though this is true in all different types of rule, it is especially true for democracies.\(^8\) A democracy is a fragile institution, dependent on the balance of many interests, structures and organizations. Its policies and job description change over time, as new developments and new scenarios challenge its society. The rule of law is a buffer against the government changing its role without the people’s consent, but also acts as an

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impediment to improper methods of change within the government itself.

While the rule of law alone does not guarantee a just society, it does create “a society that does a better job of protecting people from intolerance, prejudice, and oppression.” Such a society is one that is most conducive to and necessary for a democracy with protected freedoms and rights of the people. Protecting its people is a role of any government, but democracy defines what needs to be protected in an inclusive, values-oriented way. Another key role of the rule of law is to provide a protected method of control on the various powers of society – political, popular, economic, etc. The rule of law offers checks against the various power holders from infringing on the rightful authority of others. It provides the ground rules for the relationships between the various authority institutions, both political and civil, ensuring both a peaceful and constructive coexistence.

**English Common Law**

There are many legal systems throughout the world, all of them with various historical roots and legitimacy as governing structures. However, the system of English common law, first developed in England and later instituted in many countries of the world because of colonialism, has proven to be an effective institution for the development of a strong legal system. Sandra Joireman’s 2004 study found that English common law has been the most effective means of constructing a strong judiciary among colonized

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nations, at least when compared to civil law systems. As such, the history and methodology behind English common law is an appropriate frame to establish a comparison of legal systems that support democracy.

English common law (ECL) began as the municipal law of Norman England in the 11th century. The process of transformation that ECL experienced was very gradual, occurring over the course of two centuries. These changes were not far-reaching ideological transformations; instead, they were small institutional and procedural evolutions that combined to develop into the modern form of common law we know today. Emerging out of a mix of Saxon traditions and feudalism, coupled with some Roman influences brought over by the Normans, English common law developed into a comprehensive legal framework. As it grew into the definitive legal construct of England, it provided definitions and protections of individual rights. This protection extended throughout the levels of government, and at times was even used to deny the king’s ruling if they were judged as overstepping their natural bounds of authority. This strength of the law was largely due to the English attitude towards ECL. The English people had an almost mythic view of their law – it was seen as having no history, of having simply existed unchanged since the beginning of England. ECL was seen as,

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“The best laws because they represented the product of immemorial custom, a kind of mystical process by which the common had proven itself to be satisfactory to the English through constant usage from a time beyond the written records or memories of men.”

In a way, this concept was the early version of later arguments surrounding natural law applied by theorists such as John Lock and Thomas Hobbes. The nature of common law’s origin was very much tied to its structure, which adapted with the times and allowed for later scholars to expand upon it. The structural framework of ECL’s development lay in three core elements: informal and formal consensus, reliance on precedent, and legislative input.

A definitive aspect of ECL was the role that consensus played in its development on multiple levels. Even though the king played an important role in determining the outcomes of cases, he was not the sole, or even the primary, decision maker. Common law’s heritage was founded in the ancient traditions of the English people – it was the time honored, unwritten, yet generally agreed upon codes of conduct for society. By defining individual rights and responsibilities in traditions and then enforcing them through judicial proceedings, ECL is inherently a consensual and contractual legal tradition based on agreements between the people and their government. Even in the midst of a monarchical and aristocratic government, democratic traditions and values were being laid into the foundation of the legal system. The English, however, might say that

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those principles were simply inherent in their values. This traditional view of rights stemming from ancient history gave the English a measure of authority against the king, and the various levels of society were able to use these unwritten rules to produce an overall sense of order over which even kings could not long tread.\footnote{Hamowy, Ronald. “F. A. Hayek and the Common Law.” \textit{Cato Journal}. Washington. Fall 2003. Vol. 23, Iss. 2.}

Another aspect of consensus that was important in the development of ECL was the role of the jury and of lawyers. The jury served as a reliable form of fact-finding in cases, and was a way to involve the community in the legal process.\footnote{Adams, George Burton. “The Origin of the Common Law.” \textit{The Yale Law Journal}. Vol. 34, No. 2. December 19247.} It was seen as a wholly legitimate source of input because the history of common law lay intermittent with the traditions of those same people – the history of ECL was the history of the English.\footnote{Elliott, J. E. “Conjecturing the Common in English Common Law: Donaldson v. BECLett and the Rhetoric of Ancient Right.” \textit{Forum for Modern Language Studies}. Vol. 42, No. 4. 2006. Pg. 4} This is why community members had input into legal matters even before the institution of the jury was established, such as in 1213 when knights were invited “to speak … on the affairs of the kingdom” and help determine its course.\footnote{Musson, Anthony. \textit{Medieval Law in Context: The growth of legal consciousness from Magna Carta to the Peasants’ Revolt}. Manchester University Press. 2001. Pg. 185.} Professional lawyers played multiple roles in ECL – they were pleaders, attorneys, bailiffs, stewards, sheriffs, clerks, etc. They were involved in every aspect of the law, and their input into its formation and application was marked by an exchange among individuals of different backgrounds and levels of education.\footnote{Palmer, Robert C. \textit{The County Courts of Medieval England}. Princeton University Press. Princeton, NJ. 1982. Pg. 89.} This was largely due to the fact that lawyers in medieval England came from differing sectors of society: landowners, gentry, peasant, and even nobility.
The ties that lawyers maintained with their home neighborhoods greatly affected the
types of cases that were considered, generating a locally derived and diverse docket of
cases.\textsuperscript{23}

Though consensus is an integral part of the informal and developmental side of ELC, the
truly defining aspect of the doctrine is its reliance on the role of precedent in the
formation of legal decisions. ECL originated a wholly precedent-derived system, where
every case was decided by appealing to some kind of pre-established authority, either
customs and traditions or past legal reasoning. The credibility of the decision-making
process depended on internal consistency.\textsuperscript{24} These principles developed into the legal
tradition of \textit{stare decisis} – “to stand by things decided.”\textsuperscript{25} All decisions made by a high
court became binding for those beneath it, by it consistency was gradually built into the
ECL system. Lower courts could also establish precedent, though their decisions were not
binding upon their colleagues until upheld by a higher court. Traditions and customs were
considered legitimate precedent at the time, for common law was inherently “a
generalized and standardized form of custom.”\textsuperscript{26} The role of precedent in the judicial
system was one of both legal and social value; it espoused the views that man had
ancient, inherent rights, and that those rights were equal to any claims of rulership.\textsuperscript{27} The

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majority of precedents came from the King’s Court, the early version of supreme courts.\textsuperscript{28} As the King’s Court grew in importance during the thirteenth century, the British judicial structure experienced greater centralized and exhibited more hierarchical qualities. The decisions of the King’s Court defined “just judgments” for the whole of England, and were set as the common law of the land.\textsuperscript{29} It is important to note that even though ECL depended on precedent, it was not a static system. By applying old case methods to new situations, precedent maintained the consistency of methodology while still adapting to changing circumstances.\textsuperscript{30}

Textually based law was the result of a fundamental shift in English politics. The movement towards a larger legislative doctrine of law began in 1215 with enactment of the Magna Carta. As the formerly rare interventions of the ‘great councils’ in legal matters developed into an institutionalize and textual zed format, legislative agreements grew in emphasis as a source of legitimate law.\textsuperscript{31} Additionally, the role of councils, later taking form as Parliament in the 14\textsuperscript{th} century, personified the pre-existing values of consensus; a body wherein various members contributed their experiences and educations to the role of lawmaker.\textsuperscript{32} As it developed, ECL began to derive a significant amount of reasoning from writs, ordinances and royal regulations that came from the king, the \textit{curia}

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regis (the king, his advisors, courtiers and administrators), and parliament.\textsuperscript{33}

Ultimately, ECL is a procedurally based legal tradition which has more recently been drawn towards and supplemented by a written foundation.\textsuperscript{34} Its various procedures gave rise to unified principles that continued to influence and shape England’s development. The common traditions that first inspired ECL built into the system goals of equality and representation, structural values which culminated in the English Parliament.\textsuperscript{35}

\textbf{Shari’a}

Moving on from the more familiar ground of common law, let us now make a historical survey of the development of Islamic \textit{shari’a}. The same three basic concepts that defined ECL also exist in \textit{shari’a}, though in differing forms. Despite diverging understandings, it is still notable that consensus, precedent, and textual sources are all present in the Islamic legal methodology.

Islamic legal decisions have longer interlaced elements of community within their rulings – ultimately, all decisions were determined by \textit{groups} of legal scholars. Though an individual lawyer, a \textit{mujtahid}, could and did present individual arguments, they would be defended and argued before an entire school of law of which that lawyer was part.\textsuperscript{36} The

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consensus reached by such a group would, in its entirety, determine what the law—
leading some scholars to refer to shari’a as “a lawyer’s law.” The entire process of
argument and consensus was termed ijtihad, a method of collective agreement utilized in
reasoning shari’a decisions. The idea was that, as different arguments and opinions were
heard and discussed among the group of scholars, the best-defended opinion survived.”
Truth was viewed to invariably survive the scrutiny of communal inquiry.

There were many legal schools in the first three centuries of Islamic precedence—the
deeply formative years of shari’a. However, four schools rose in prominence as main
scholarly institutions for Sunnis—Hanafi, Maliki, Shafi’I, and Hanbali. During this
period, the schools did not often agree with one another in various rulings, creating a
dynamic atmosphere of agreement on procedure coupled with disagreement on
outcome. This dichotomous synergy contributed to a deepening compilation of shari’a
jurisprudence. The process of reasoning itself, was held as an important tool in the life of
every Muslim, and especially for those whose role in life was to determine and
administer the law and applicable precepts of the Q’uran. Communal input and
consensus-based truth seeking while viewed as authoritative, was not though infallible.
The idea behind ijtihad was that scholarly jurists who considered the arguments and came
to a consensus were more likely to find the truth than would a single person. Such

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scholars engaged in *ijtihad* were not, however, guaranteed to produce rightly guided decisions – such absolute certainty in matters of righteous living lay solely in the realm of the divine.\(^{41}\) However, *ijtihad* proved a socio-structural support for arbitration between competing views of Q’uranic application.

Need for consistency prompted the practice of integrating past *ijtihads* into later decisions. Precedents established correct application of Q’uranic principles and were used to draw parallels between earlier cases and new ones. Thus, the deductive process of related past decisions was applied to new cases.\(^{42}\) Analogies and hypothetical situations were employed as tools to draw out parallels between past and new cases such that similar reasoning patterns might be considered and applied.\(^{43}\) The focus was on the reasoning used in past cases, not actual similarities in the detail of a case. As long as the analytic process could be argued as analogous to a current situation under consideration, the precedent was deemed applicable. An underlying presupposition of precedent was that they were guides, not binding, and never absolute. Precedents could be challenged, for man was not divine. If past decisions could be demonstrated to fallen short of following true Q’uranic principles, they could be overruled. This process originally led to a pluralistic legal attitude in early *shari’a* law.\(^{44}\)

The Q’uran provided the basic textual starting point for all legal decisions. However, it


was not viewed as a comprehensive regulatory text stipulating specific rules of what a
person could and could not do as an obvious basis for legal decisions – in fact, there were
very few specific rules of that nature in the Q’uran. Instead, in it the principles, values,
and techniques of reasoning were used as the defining path by which each scholar was
meant to arrive at a decision. The principles of justice in the Q’uran were absolute, and so
any policy or decision had to follow in pursue that ideal.45

The Sunna, documented expressed attitudes and actions of Muhammad, were also used as
a core text for decisions. Since shari’a was supposed to establish righteous behavior, and
Muhammad was deemed to have lead a perfectly righteous life, accounts of his life were
considered primary examples of the principles of the Q’uran in full expression.46 This
attitude towards Muhammad grew out of a tradition of understanding that whatever
Muhammad had said, done, or decided was infallible.47 Jurists were expected to look at
the accounts of Muhammad’s life and find correlations or analogies to their cases, and
from this basis, extrapolate and apply what exemplary behavior would be, how
righteousness would appear. This reliance on interpreting the Sunna was later, after much
conflict and disagreement, transformed into a mass acceptance of many Hadiths –
stories about Muhammad transferred verbally across generations.48

In an ultimate sense, shari’a was not originally a religious law per se; while it used

45 Khalafallah, Haifaa. “The Elusive ‘Islamic Law’: Rethinking the Focus of Modern
46 Khalafallah, Haifaa. “The Elusive ‘Islamic Law’: Rethinking the Focus of Modern
religious principles to guide its decisions and establish the goals of law, the decisions themselves were rooted in reason and consensus. Instead of existing as a body of strict and precise rules (as it is widely considered today), *shari’a* originally resembled more a living discussion on proper Islamic behavior than a unchanging writ. Ironically, the introduction of the Hadiths halted the dynamic interplay of change and traditions, ending the original legal methodology. When Hadiths were confirmed as infallible accounts of Muhammad and given legal power, political and religious leaders began to usurp the role of the jurist, diminishing the role of *ijtihad*. The practice of *ijtihad* was eventually elevated to such an idealized notion, and its originators held in so high regard, that it seemed impossible to continue; a development few likely imagined in earlier times. Thus, the methodology that might have encouraged growth and the evolution of nuanced jurisprudence morphed into rigid code of conduct that has moved little since around the fourteenth century.

It is important to note that there were many factions during the development of *shari’a* legal doctrine. The four dominant schools differed in application of the Q’uran and even in their underlying framework, which inhibited the rise of a uniform and consistent legal theory fitted to outlive its early years. Additionally, unlike England which benefited from a relatively unified people and leadership, Arabia of the time was still torn by tribal allegiances and opposing leaders. This fragmented environment made *shari’a* vulnerable

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at times, as a tool of rulers trying to consolidate and justify their power.\textsuperscript{52}

\textbf{Parallels}

Even though many dominant viewpoints simplistically characterize the value hierarchy of common law as \textit{individualistic} and shari’a as \textit{communal}, the actual impacts these systems had on their communities reveals that the situation was not so cut and dry. Though ECL defined individual rights and offered protection from tyrannical infringement on those rights, the compounding of consensus-driven decisions prescribing social expectations worked to create “common” rights. As that body of understanding formalized individual rights and extended them to all British citizens, we can see the development of a communal attitude on underlining principles of community expectations very similar to aspects of certain Muslim communities.\textsuperscript{53}

Both legal traditions share important procedural similarities that have contributed to their development. Moreover, these similarities have given rise to correlative outcomes in areas of jurisprudence for both societies in spite of differences in background and religious ideals on either side. The consensus-driven nature of input in the two systems, whether it be the structure of judicial proceedings or the practice of \textit{ijtihad}, formed a basis for notions of representation and justice within a society. ECL emphasized a jury that may be comprised of cross-class participants, resulting in deeply enshrined ideals of equality and inherent abilities to identify truth. A similar value of equality and input also


exists in shari’a-based societies, though it has not yet experienced the same type of expression as in the West, or been implemented in a widespread fashion throughout the Middle East. Still, the jointly-held presupposition that truth can be identified, and justice enforced, as a result of consensus cannot be taken lightly.

The role of precedent has also had a similar effect in both legal traditions, encouraging a view of established rights pre-dating their recognition by law. Both theories consider justice and injustice to be items of discovery, not items of invention. Otherwise stated, ECL and shari’a attempt to reflect common rights, or a common righteousness, rather than claiming to be the source of either freedom or prohibition. This notion rejects the idea that previous jurisprudence is inherently inferior or tainted – if the ultimate reality of rights and righteousness are constant, all previous discourse serves an important role. Therefore, precedent is a source of validity, or at least worth consideration.

Textual writ within the two systems has not given rise to any great procedural similarities. Due to the fact that formal legislative input into shari’a is a very recent and modern phenomenon it is difficult to gauge in which real concrete direction it may evolve. Additionally, there exists no strong corollary between the role the authoritative role both Q’uran and Sunna played in shari’a and any text of equivalent application in ECL. Shari’a without ijtihad is left starkly rigid, and thus faces deep decisions as application problems and pressures build within society. However, current trends in Middle Eastern countries do seem to be shifting towards a legislative approach. If so, such a movement would prove similar to that of England in ceding ever-greater power to
legislative bodies, and in this way, parallels between the two methodologies may continue.

Differences between the two systems do, of course, exist. Common law is based on the idea that individuals are responsible for decision-making, and should be protected in that right from overreach by oppressive powers. It is, therefore, more proscriptive than anything – the Magna Carta being a case in point. Differently, shari’a prescribes practices meant to produce a society in which right decisions are legal, and wrong decisions are not. This research does not negate these diverging aims, nor does it mitigate the bodies of discourse surrounding either. Rather, it proposes structural similarities steeped in cultural realities, the impact of which contributes to a fuller observation of each, and opens possibilities for the future.

Applying an understanding of the similarities that exist between ECL and shari’a deeply valuable. Since we know that ECL has contributed to the development of the rule of law, critical component in a democracy, parallel developments could find expression through shari’a. The Islamic method of *ijtihad* was an important tool for the poor and oppressed of Muslim societies to be heard, potentially furthering a historical foundation for minority rights and protection. The idea of communal input into the law could be an important step toward representative democratic developments as well. The principle-driven nature of shari’a endowed it with a high status in early Muslim society, establishing the supremacy of law.

aspects of Islamic societies that, if encouraged, could develop along democratic lines similar to those followed by the countries of English common law.

**Case Study: United Arab Emirates**

As we have considered the theoretical implications of legal parallels in the traditions of both the West and Islam, application will help further our understanding. One country that has integrated both legal systems into its government has been the United Arab Emirates. A former colony of the British Empire, its colonial history introduced common law into the governing structure, an introduction that did not end with the UAE’s independence. The melding of these two legal structures in a rapidly democratizing country is worth considering, especially given the difficulty of democracy taking root in its surrounding neighbors.

Britain’s presence in the UAE began December 31, 1600, when the East India Company arrived in the country and drove out the Portuguese who had previously occupied the territory. Its economic presence transformed into a political presence, and after suppressing tribal opposition the Trucial emirates were created in 1835. Britain began to take over more and more policymaking responsibilities in the emirates, and by 1892, Britain had implemented a series of treaties that allowed it to subsume all foreign policy aspects of the trucial states. Strong economic and political ties were thus created, and a relationship of colonial dependence on Britain was begun. By the early 20th century, the


previously warring tribal leaders had formed themselves into seven emirates, each led by a ruler and his family. In 1968, Britain decided that its presence in the emirates was no longer beneficial, and ended its treaties with the trucial states by the end of 1971, terminating the colonial relationship between the countries.

In 1971 the Trucial Emirates gained their independence and created the United Arab Emirates. Having known that Britain would be leaving, the seven rulers of the emirates, the emirs, determined that they would be stronger if they remained unified afterward than if they split; with neighboring countries claiming border disputes and with the discovery of large oil reserves in their country, the interest of security persuaded the emirs to agree to forming a joint government. They created a federal government system, with theoretically separate executive, legislative and judicial branches.

Though the branches are technically separate, there is much overlap between the executive and the legislative. Though there is a National Assembly in the UAE, it does not have sole discretion over the passing of laws, and acts as more of an advisory body to the rulers than as true law-making legislature. The power to pass laws also lays with the Council of Ministers, compiled by appointees of the president, who has so far always been the emir of Abu Dhabi, the wealthiest emirate. The transition from Trucial

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Emirates to the UAE was one wholly supported, engineered and created by the emirs of the seven emirates. The changes made to the governments of the Emirates all came from the leadership of the rulers, and that impetus of development has continued through to today.  

The development of the UAE has proceeded along democratic lines, though there is a continual process of improvement. This process towards an open and democratic government has been relatively quick and has had few significant problems, especially in the legal realm. The method that has been used by the emirs to pursue their goal of democratization has been gradual, methodological, and extensive, changing nearly every aspect of their politics in some way. The activities of the National Assembly are open to the public unless the head of the assembly or one-third of the members ask for secrecy. There has been continued progress towards economic and political unification of the seven emirates, ultimately leading towards the creation of a centralized and democratic state. The development of the legal and executive branches has contributed to the opening of the country as well as to the development of civil society.

As quickly as the political growth of the UAE seems to have been, the process of

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developing a cogent legal structure has been a complicated process. It predated independence, and is composed of traditional, religious, and British forces. At the beginning of the Trucial Emirates, there was very little judicial structure. Individual tribal courts existed with almost no oversight, and the law that was practiced was mostly traditional, with variations among each tribe.\(^68\) Emirs were almost always the sole arbiters, and as such there was almost no formal law. Moreover, people who sought legal proceedings could choose whether or not they agreed with the outcomes. Effectively, there was no true independent legal system, and no recognizable rule of law. As commerce grew in the coastal regions of the emirates, increased migration required that a formal legal structure be developed. The emirates began that process by providing shari’a courts for its citizens. They believed that a system employing would be less contentious that trying to standardize traditional cultures and norms into law. However, these courts were very informal, with little consistency in procedures or ruling.\(^69\)

During its relationship with the UAE, Britain decided in the 1940s that there needed to be courts capable of handling disputes involving British citizens and other foreign nationals. This led the Trucial Emirates in 1945 to cede jurisdiction of British subjects and all other foreign nationals to the British. British legal theory, common law, was thus introduced into the Emirates.\(^70\) Britain created and established the laws that would apply to the region, using its needs and experience there to determine the nature of the decisions. It


employed the same principles that had created its own legal code in modifying it to fit the UAE; the uniqueness of the setting and the peculiarity of the law in a foreign country were all considered. Secular British courts with British judges were established in the Emirates alongside the shari’a courts.\textsuperscript{71} This agreement created two court systems in the Trucial Emirates, one run by the Emirates and another run by Britain. The general agreement between the two nations was that in the case of a mixed dispute, where both a foreign and a local citizen were involved, a judge from each judicial system would be represented in hearing the case and announcing the decision.\textsuperscript{72} These two systems continued to work informally together until 1971, when the emirates became independent and determined how they were going to establish a permanent legal structure.

When the Emirates gained their independence, they also gained control of the British court system that had been instituted. They left the courts intact, and began a process of merging the two disparate systems together.\textsuperscript{73} The UAE stated that its intention was to develop a secular legal system, where the codes left by the British would be dominant and the shari’a courts would be integrated into the system on a subsidiary level.\textsuperscript{74} The focus of restructuring the judicial system was designed to accommodate the different populations and interests within the UAE’s borders while still remaining true to its

Islamic principles. This involved strengthening and formalizing the dual judicial procedures from within the government. Additionally, this process has required the difficult work of finding compromises between so-called “modern” Western ideas and traditional Islamic ones. In 1971, the UAE defined a dual-legal system in its constitution, with both secular and religious aspects. The constitution of the UAE and legislative acts are the sources of legitimacy for decisions, and the UAE’s Supreme Court acts as the official interpreter of those documents. The structure of the judicial system is federal, with primary, appeals, and a Supreme Court. The local courts have both shari’a and rulers’ courts. Shari’a dominates in personal status issues. As such, precedent from the Supreme Court acts as unifying and stabilizing decisions in the UAE, serving to further integrate the two legal traditions. This federal and moderately independent judicial system is unique in the Middle East.

The rule of law in the UAE is a principle of government upheld and protected by the constitution, and guarantees its citizens equality in Article 25: “All persons are equal before the law, and there is no distinction between citizens of the Union on account of origin, place of birth, religious belief or social position.” Additionally, the independence of the judiciary is assured under the constitution, establishing another necessary criterion for the rule of law. However, while the presence and codification of these ideals is

encouraging and speaks well of the democratic trend for the UAE, the reality does not meet the ideal.

Judges of the federal courts are appointed by the Supreme Council only; the emirs are the only body that has a voice in the nomination and confirmation process. They are to be “ruled by the law and their conscience only.”\textsuperscript{80} They have legal autonomy from the rest of the government, and cannot be removed from their position while adjudicating a case.\textsuperscript{81} This gives the court the important independence from the executive and legislative branches so crucial to implementing rule of law. However, this is still just a step in the right direction, not an arrival. Without some kind of citizen-based oversight of the judiciary, true government accountability does not exist. The lack of input from the National Assembly, and even its lack of a strong democratic foundation, leaves the judiciary too closely linked to the executive emirs.

The most unusual aspect of the UAE’s judicial system is its dual federal nature. As discussed before, the government inherited two legal systems when it gained independence, and retained both. The basic division of power between the two legal codes lies in the type and significance of each case and what level of the court it is heard at. While other colonized countries have similar dual systems, the UAE’s combination of religious and secular law, a federal court system, and its democratic progress makes it a unique case study. The federal system supports rule of law by removing the power of the


government to arbitrarily make, implement and defend a decree simultaneously. The system breaks down the system's power, divides the accountability of the court, and lets the people have more say in their local courts.

An important power of the judiciary is the right of judicial oversight, where the Federal Supreme Court has the power to interpret any action taken by the executive and determine its constitutionality. The national court of the UAE was given this power by the Constitution, though it has not asserted this right as of yet. The potential exists for a more assertive court, which in and of itself would move the UAE even farther along the path towards democracy and is an important check against illegitimate government power, necessary for the rule of law.

As we have looked at how the UAE’s judicial system has developed and how it has supported the rule of law, it is relevant to consider what those laws are doing – what kind of society they are creating and how they are supporting citizens’ rights. Since a democracy is predicated on the conviction that people have value and a right to self-govern, a functioning democracy will give evidence of this value in reality. Additionally, as political science has expanded its definition of a good government to include human rights, any evaluation of a government must also look at the state of the citizens. This is particularly true for a democracy, whose legitimacy depends on its people.

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As the UAE crafted its constitution, it began a process of determining what it meant to be a citizen of the UAE. This process involved designating “a set of mutually enforceable claims relating categories of persons to agents of governments.”

Essentially this meant creating and describing what expectations the people could have of their government, and what expectations the government would have of the people. An important influence in these determinations was shari’a. Key definitions of an Islamic society in shari’a include justice, compassion, tolerance and peace, and it is the responsibility of the government to protect these values. Additionally, “one of the most important functions of Islamic government is to unify the umma.” These ideals were all kept in mind and used during the writing of the constitution. The result was that ideals of personhood and society, based on Islam, were incorporated into the definitions of citizenship and the relationship between the government and the people.

The UAE’s constitution gives certain rights to its people, defined by nationality. Among these include the democratically necessary rights to due process, to hold private gatherings and peaceful public gatherings, free association, and access to authorities. These rights correspond with similar Islamic values as well. In the constitution, the emirates began a process of establishing constitutional norms on human rights and rights of citizens at the beginning of its independence. It has established oversight and

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accountability standards of government, creating a framework of accountability of the rulers to the people.\textsuperscript{88} This necessary step of codifying these rights in the constitution was a considerable expression of commitment to unifying the emirates under a common dictate of rights and values, forging a coherent democratic government.

The development of a united country has not simply been ideological. The UAE has enjoyed a high income from large oil and gas reserves, which has fueled its rapid economic growth. However, the country realized that relying on those reserves alone would hurt them in the long run, and that diversification and internal growth were integral to future success. Because of this understanding, the UAE has focused on investing oil revenue into social infrastructure and diversification of the economy.\textsuperscript{89} This focus has entailed a very detailed and goal-oriented approach, which includes attracting tourism, creating economic conditions favorable to foreign companies and cultivating domestic technology-intensive industries that will attract skilled labor workers.\textsuperscript{90}

This strong priority placed on economic development and integration among the emirates has led to the development of a comprehensive economically-oriented legal code. All emirates are required to develop their natural resources in the interests of the union as a whole, so that the entire country can benefit instead of just one province, and the ultimate goal is for even further integration of the markets in the different provinces.\textsuperscript{91} Because of

the UAE’s strong economic focus, laws regarding property and commerce are some of the best developed. Private property ownership is extremely protected, and there are many legal guarantees against the government seizing property. The UAE has chosen to greatly encourage private industry growth, creating favorable conditions for business growth and innovation – even taking advice on business issues from local businesses. These conditions are for both domestic and international businesses. One could see it as an attempt to democratize the economy itself. The laws surrounding business are specific and far-reaching, covering contract law, dispute resolution, legal protection and legal recourse. Tax laws are very specific, with the country getting revenue from private property taxes, fees for services provided by the government and contributions from individual emirates. The desire to support businesses and attract international businesses was part of the driving force behind strengthening the legal system within the UAE.

Human rights in the UAE constitution fall under three general categories: personal security, social freedoms and political rights. For personal security, the constitution promises that no citizen will ever be tortured, his safety and peace will not be infringed on by the government unless it is following legal procedures and he is afforded due process, there is guaranteed freedom of movement, and guaranteed privacy of communication. Among the social freedoms are included freedom of religious worship,

freedom of expression, freedom of the press, and education. However, there are important restrictions placed upon these freedoms. Though citizens are allowed to abide by whatever belief system they want, there are restrictions against proselytizing or missionary work of any religion other than Islam within the country, and activities deemed dangerous to social stability can be prohibited by the government. Political rights include open and fair trials, equality before the law, the right to address authorities and the promise of electoral participation – this final step has not yet taken place. The continued development of these rights depends on the growth of a separate legislative power and the practical definition of the accommodation between shari’a and secular law.

The history of the UAE has been complicated, but relatively smooth. There have not been civil wars or coups to contend with, and the transition from colonial rule to developing democracy has been straightforward. Economically, the country is very strong and developing quickly, the constitution was written in a way that supports and protects the rights of the people, and altogether it seems like a full democracy will be attained. However, there are still challenges facing the UAE that, if not addressed, have the potential to derail the progress made by the country thus far and undermine the rule of

Today in the UAE, there is a movement to shift the society towards a more traditional Muslim society. One of the areas that this movement has taken place in is the laws, where a process of ‘Islamisation’ has begun. This process is designed to check the UAE’s laws and insure that they are properly ‘Islamic.’ This placement of religion as a check on the law is actually a change in their traditional roles. In traditional Islamic law, legal reasoning and rationality was the criteria applied to religious rules. The law provided legitimacy and moderation to society, for it had to depend on both the Q’ur'an and reason.\textsuperscript{101}

Additionally, the shari’a being used as a guide to change these laws is not the procedural shari’a that incorporates debate and reason and people’s needs into the process; it is the modern form of shari’a, which has largely stagnated from a lack of input or discussion for several hundred years. Part of how this transformation of the legal tradition occurred is the fact that since shari’a is not an actual legal code but rather a methodology, it can be twisted to use political or religious goals.\textsuperscript{102} It is a framework that depends on a large community of educated legal scholars capable of acting as mutual checks for each other. The functioning reality of modern-day shari’a is one that, compared with its original form, is “restricted and often atrophied.”\textsuperscript{103}

This system was designed to be a type of legal reconciliation activity – wherever there was conflict between existing law and shari’a, new laws had to be created.\textsuperscript{104} There are dangers in this process, especially if it leads to the curtailment of civil liberties that are currently protected by the constitution. Constitutionally, rights are protected, but the power of the legislature to change the laws has very little check under the current system. As such, there is potential that without legislative restraints civil liberties could be diminished.\textsuperscript{105} This is concerning for several reasons. If the process of Islamisation goes unchecked, it would blur the division between religious and secular rights, and could infringe on the freedom of association and the freedom of belief articulated in the Constitution.\textsuperscript{106} Also, a main focus of this endeavor has been directed towards the criminal code, which could greatly undermine the secular legal system in the country and greatly change penal law, ignoring human rights values in the process.\textsuperscript{107} Various successes and failures in these attempts have led to a more disjointed legal system than existed prior to this process; if the UAE cannot find a way to cohesively unify its two systems while maintaining the rule of law and protection of citizen rights, its further democratic development could be severely impaired.\textsuperscript{108}

This model looks to return to a largely mythical view of a singular Muslim society that follows a strict legal code of conduct and behavior. The reality of past Islamic societies however is that shari’a was never a set code of law. It was a method of legal scholarship that often produced different conclusions on what was proper conduct. Also, the decisions of shari’a were grounded in the social reality of its time, and reflected the tribalism and political struggles of the time. Inherently, at the time of its development, shari’a was simply a methodology. The process of discovering what constituted a righteous society was not meant to stop, for the value of *ijtihad* and reason are not finite. This process added to a changing society that was capable of accepting new ideas and integrating them into society.\(^{109}\)

The role that the emirs have played in the UAE’s development has been a double-edged sword for the country. Their activities are almost wholly responsible for the progress the UAE has made so far. Strong leadership is one of the essential components of changing a country from an undemocratic system to a democratic one.\(^{110}\) However, they could also be a serious impediment to future growth unless certain steps are taken to internalize development.\(^{111}\) The emirs still have a very strong hold on the government, including control of the executive and legislative branches. Decisions regarding appointments, laws, pardons, enforcement, all are made within the circle of the seven emirs and their personally chosen representative.\(^{112}\) This setup has greatly facilitated growth in the


\(^{112}\) Ballantyne, W.M. “The Constitutions of the Gulf States: A Comparative Study.” *Arab*
country; with no barriers between decision-making and implementation, the possibilities are extensive. However, this structure is not optimal for a democracy, as it accords far too much power to unelected rulers.\textsuperscript{113} Though the federal government does have certain powers, there is still a great amount of legal autonomy given to each emir the rights and privileges that they maintain are theirs unless they choose to cede them.\textsuperscript{114} That includes the right to continued family rule of the emirates, guaranteed representation in the Supreme Council, an unelected body, and continued control over the president and vice president.\textsuperscript{115} The virtually unlimited power of the emirs to appoint whomever they choose to whatever position they choose also stands in the way of a functioning society. Though this ability was originally granted due to the lack of nationals with the education to perform ministerial roles, that is no longer the case. Oversight of government officials has to be handed over to elected officials of the National Assembly.\textsuperscript{116}

**Conclusion**

The spread and cultivation of democracy is a widely espoused goal, not only of governments, but of academics, civil rights workers, and people’s movements. If we believe, whether as political leaders, scholars, or individuals, that people have inherent worth and deserves the right to self-rule, then it is appropriate for us to learn how we

might best promote democracy. This is especially warranted in the Middle Eastern context. The methods used to promote democracy should match the ideals democracy promotes. That means believing that every society has inherent value, and that all societies deserve the right to self-rule – rule that is native to that specific culture, preserving and attached to ideals of historic significance. The natural implication is obvious: democracies may appear very different and incorporate different institutions into their government. However, so long as the fundamental criteria for a democracy exist, and oppression does not squelch dialog, those democracies are legitimate.

The rule of law is one of those criteria, a structural necessity which must always be present for a democracy to function as legitimate. By comparing English common law and Islamic shari’a, I have demonstrated the similarities between the frameworks of their legal structures. This does not mean that English and Islamic cultures are the same, nor does it mean that an Islamic democracy will look or act the same as an English one. They do not need to be the same in order to be valuable. Overarching principles and values could be upheld in both systems, claiming different historic jurisprudence, but upheld nonetheless. By encouraging the use of traditions present within cultures, and extending terms and entities already significant and familiar, the goal of creating free and democratic societies could be much better facilitated. By identifying the familiar in the other while acknowledging and appreciating differences, we recognize worth and avoid a dangerous and simplistic us or them equation.
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