Arguments for the Global Interconnection of Law and Religion: A View from Australia

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Purpose

This paper argues that there is an intimate, beneficial and necessary connection between law and religion, and that this connection has generally been present, until recent times at least, in most of the various forms of human society down through recorded history (to a greater or lesser degree). That this connection has in the past also exhibited negative features, depending on the particular circumstances of each society, is admitted. There is no doubt that many abuses have occurred down through history, perpetrated by those in positions of power, and often using a particular religion as a tool or excuse to further their personal ambitions. But putting to one side these past abuses of religion, it is argued that there was and still are significant beneficial advantages to society in such a connection, particularly if that connection is made by reference to the universal spiritual principles and values common to all the great religions. Further, it is argued that until this connection is reestablished in this emerging global age, on a global basis, there will continue to be profound disruptions to civilised society and to the quest for world peace and a just world order.

Historical Background

Most jurists and other observers would accept that law is fundamental to an ordered and peaceful society. Many people would argue that religion[1] is also essential to humanity's life on this planet[2]. A broad sweep of recorded history indicates that generally both these two aspects have been present,

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[1] The term "*religion*" is used here in a very broad sense, not limited to the traditionally recognised great monotheistic religions of the Middle East. It is not, however, intended in this paper to enter upon that difficult and contentious issue of arguing what is essentially "*religious*" and what is not.

[2] The Universal House of Justice, The Promise of World Peace, (2001, Baha'i Publications Australia), 7-8. Arnold Toynbee wrote that religion was an essential ingredient in human nature, found in all human beings - Change and Habit, (1992, One World), 14; William James said that religion "*must necessarily play an eternal part in human history.*" - The Varieties of Religious Experience, (1961, Collier Books Ed.) 390. No doubt similar views have been expressed by other writers, but of course there are many today who would not accept this view.

existing side by side, in most civilising human arrangements of the past. Thus, for example, there was the codification of the laws by the Babylonian King Hammurabi as early as 1800 BC[3], at a time when religion was central to the life of that Kingdom[4]. And then there were the laws of the great Persian Empire of antiquity, which according to the Old Testament were unalterable[5]. The Persian Empire was intimately connected with the Zoroastrian Religion and its forerunner[6]. And the Israelite Kingdom of the pre-Christian era existed under a complex set of Hebraic religious laws[7]. There are many other examples. Law and religion generally acted to reinforce one another, and in many cases there was no clear differentiation between the two. It is fair to say that usually law and religion were interconnected[8].

This connection was carried forward into the Middle Ages in Europe and elsewhere in the Christian era. This paper concentrates on the European situation, from which Australia has inherited its social and political systems[9], but no doubt parallels can be found elsewhere. That there were elements of disunity and abuse caused, or contributed to, by religion in the Middle Ages there is no doubt. Equally there were significant elements of superstition and ignorance. But at the same time the church and its law also provided an element of unity and cohesion across much of Europe for a very long time.

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[3] John Huddleston, The Search for a Just Society, (1989, George Ronald, Oxford), 8-9.

[4] The Sumerian Shamash religion - see Marc van de Mieroop, King Hammurabi of Babylon: A Biography, (2004, Blackwell).

[5] Book of Daniel, Chapter 6, verse 8 - "*..the law of the Medes and Persians, which altereth not*"; and verse 15 - "*..the law of the Medes and Persians is, That no decree nor statute which the king establisheth may be changed.*"

[6] R C Zaehner, The Dawn and Twilight of Zoroastrianism, (1961, Phoenix). The position of Zoroastrianism and its earlier version in Avestanism vis-a-vis the Persian Empire and its rulers fluctuated. It was not always the state religion.

[7] It is not uncommon to translate the Hebrew Holy Book the "*Torah*", as the "*law*", although as Carl S Ehlich points out, such a translation is not quite accurate - see *Moses, Torah and Judaism*, in David Noel Freedman and Michael J McClymond (Eds.), The Rivers of Paradise, (2001, William B Eerdmans Publishing), 13-14. Some Christians may still regard the Ten Commandments as revealed to Moses, and possibly other aspects of the Bible, as part of the "*law*". The position of the courts in England and Australia on this issue is discussed below.

[8] This is not to argue that there were never tensions between law and religion, nor that law and religion basically coincided in such examples. Henry J Steiner and Philip Alston state that "*Few religious establishments have ever been so totalistic as to achieve complete identification of church and state.*" - International Human Rights in Context, ((2nd Ed., 2000, Oxford), 448. But it seems that in some historical cases at least the law grew out of religion and religious teachings/beliefs and therefore there was a very close correlation between the two.

[9] Apart from those inherited from traditional Aboriginal society.

As the contemporary notion of the sovereign nation-state began to emerge towards the end of the Middle Ages in Europe, and as Europe began to divide politically into more precise geographical areas, this element of cohesion was threatened. The head of state often began to assume a more independent role in law-making, followed in some cases by the emergence of legislative institutions. This movement accompanied the Renaissance, which was marked by new religious thought movements and by a growth in religious pluralism. In some countries this development was dealt with by adopting the notion of a "state religion" or "established church"[10], that is, a particular religion, or a particular church or other branch of a religion, that had special links with the state, being in a favoured position vis-a-vis other religions under the law of that state. Not infrequently this had a down-side in that it was accompanied by an intolerance by the state towards other religions. In such a situation there was generally no room for any concept or doctrine of the separation of church[11] and state[12]. In other cases a measure

[10] The notion of a "state religion" of course had origins in much earlier times. The comments here made connect the Westphalian concept of the sovereign nation-state to the particular religion officially recognised by that state.

[11] The writer favours the use of the term "*religion*" rather than "*church*" in this context, as the word "*church*" is usually associated only with the Christian religion. The concept or doctrine posits that these two aspects, religious matters and governmental matters or matters of state, occupy, or should occupy, separate and unconnected fields of action and responsibility. It is not necessarily limited to the Christian religion. Thus the writer refers to the concept or doctrine of the separation of "*religion and state*" in subsequent comments.

[12] No precise meaning can be given to this concept or doctrine of separation of religion and state, and it is not one that is recognised as having any precise force or effect in the law of England or of Australia. The reason is because it is not a concept or doctrine that has been enunciated or defined by the secular law, the relationship between religion on the one hand and secular law and the nation-state on the other hand being one that is flexible (within certain constitutional limits), evolving and situation dependent. Steiner and Alston state: "*...the slogan 'separation of church and state' can be used to cover a fairly broad and diverse range of regimes"* - op. cit., 451. The origins of this concept or doctrine owes much to the American Puritans of the 17th century onwards, who conceived of the church and the state as being two separate covenantal associations, two seats of Godly authority in the community, each with a distinctive polity and calling - John Witte Jr and M Christian Green, "*The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*", in Johan D van der Vyver and John Witte Jr, (Eds.) Religious Human Rights in Global Perspective: Legal Perspectives, (1996, Martinus Nijhoff), 504. It was given impetus by the writings of John Locke - see Ron Manuto, "*Historical Perspectives on Contemporary Freedom in America*", in Joel Thierstein and Yahya R Kamalipour (Eds.), Religion, Law and Freedom , (2000, Praeger), 2-6. Thomas Jefferson later stated in his famous Danbury letter, in talking of the disestablishment clause in the USA Constitution, that it was intended to erect *"...a wall of separation between church and state'* " - see the High Court of Australia in Attorney-General (Vict.) Ex Rel Black v The Commonwealth (1981) 146 CLR 559 per Gibbs J at 599, 601, Murphy J at 626, 628. Australian courts have taken a narrower view of the equivalent section 116 in the Australian Constitution. While there may have been moves to give effect to the concept or doctrine in early colonial Australia, it does not exist today as some sort of general legal principle apart from the limited effect of relevant constitutional and legislative provisions, and an uncertain reticence in the courts - see the same High Court case per Stephen J at 608-609, Wilson J at 652-653. Australian courts remain sensitive about intruding too much into what has been called "*the traditional separation of church and state*" - Hanna v ACT Commissioner for Community and Health Services Complaints [2002] ACTSC 111 per Crispin ACJ at paragraph 24.

of religious toleration emerged, but a considerable degree of connection remained between state law and religion. Of course the exact nature of that interconnection varied according to the circumstances of each case from time to time.

In more recent centuries, some connection between law and religion usually continued to be apparent to a greater or lesser degree, but in the West it was a gradually reducing connection. This process was accelerated in some Western societies by the more rigid adoption of principles of the separation of religion and state, a process that was accompanied by the emergence of legalised human rights principles[13]. In other Western countries the change was not so rapid. The growth of religious pluralism, it must be said, whilst no doubt gratifying in terms of assisting in the development of fundamental human rights, has not always been conducive to the maintenance of the connection between law and religion. The emergence of secular human rights has been accompanied by a widespread rejection of religion within an ideology of secularism, as if human rights can only be universalised through that secular approach[14]. This is part of a wider movement which has been associated with or resulted in an overall decline in religious belief. The great increase in secular thought and literature in recent centuries has helped to reduce the role of religion in the public sphere. In the area of the Western law it has commonly manifested itself through the rise to predominance of secularism[15] in the law. But as will be seen, this has been a relatively recent phenomenon[16], is not globally universal, and does not detract from the fact that throughout recorded history up until this time this connection between law and religion was generally present to a significant degree. A brief survey of history from this viewpoint is therefore useful.

This historical connection can perhaps be best illustrated by brief reference to the history of the relationship of law and religion in England, a history which still has an effect on the contemporary position in Australia as a

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[13] Beginning with the USA Bill of Rights added to the new USA Constitution in 1791, note in particular Article I thereof, as subsequently applied to the States of the USA by the 14th Amendment , and the French Declaration of the Rights of Man and the Citizen of 1789 , in particular Article 10 thereof.

[14] Nazila Ghanea-Hercock, "*Faith in Human Rights: Human Rights in Faith*", in Joel Thierstein and Yahya R Kamalipour, (op. cit.), 217, citing B Wilson, " "*Secularisation*": *Religion in the modern world",* in S Sutherland and P Clarke (Eds.), The world's religions: The study of religion, traditional and new religion, (1988, 1991, Routledge), 196.

[15] As to the meaning of "secular", see John Witte Jr., and Johan D van der Vyver (Eds.), Religious Human Rights in Global Perspective: Religious Perspectives, (Martinus Nijhoff, 1996), 391 fn 16.

[16] Leo Pfeffer, Church, State, and Freedom, (1953, Beacon Press), 3, 223, cited by Roshan Danesh, "*Beyond Integration and Separation: The Dynamic Nature of Baha'i Law*", The Baha'i World 1999-2000.

former British colony, and one in which the writer was educated. This history demonstrates the historically close connection between law and religion in England, a connection which still exists today to some very limited degree despite the rise to predominance of secularism in the law[17]. It is a connection which we find easy to loose sight of in present times.

Some Historical Matter - Law and Religion in England

Christianity came to Britain with the Romans in the 5th century[18]. Prior to that there had been other religious communities scattered across the land, such as the druids. The relationship between these earlier religions and the business of government must have been complex and varied, as Christianity took time to establish. And England did not emerge as a single kingdom until the 10th century. The unity of the ecclesiastical authorities, once established, lead the way to civil unity. From the time of the conversion of significant numbers of the population to Christianity, England came under the jurisdiction of the Catholic Church and its hierarchy. Despite one view that Christianity was essentially concerned with another spiritual world, the ideas of normality, regulation and of subordination gradually percolated into English Christian society, and the Church with its clerical literacy and organisation was well placed to make its mark on that society and its laws[19]. Constantine had started the process on the Continent of integrating Church and state in a formal way[20], leading to Church involvement in the law-making process[21], and this situation carried over into England as it was later Christianised.

Thus from an early date we have documents attesting to the direct influence of the Papacy on English-based clerics, including as to matters such as the law of marriage[22]. Some other English laws were the outcome of English clerical assemblies. They went well beyond matters of concern to the clergy and church property only. And they were gradually applied to all people as the earlier religions were displaced. As courts were developed to

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[17] It is argued in this paper that secularism has so come to dominate the concept of law in the West, that apart from some surviving historical anomalies, religious or divine law are generally now seen as having little or anything to do with the "law" of the state as such.

[18] J H Baker, An Introduction to English Legal History, (3rd Ed.), (Butterworths, 1990).

[19] J M Kelly, A Short History of Western Legal Theory, (Clarendon Press, 1992), 89.

[20] Paul Johnson, A History of Christianity, (Penguin Books, 1980), 126.

[21] Ibid, 133.

[22] For example, the directive of Gregory the Great to St Augustine of Canterbury of AD 601 - see Henry Gee and William John Hardy, Documents Illustrative of English Church History, (1896, MacMillan & Co, London), 3-9.

administer justice, clerics and laymen sat together on the bench[23], administering the law without differentiation as to its source. There was no real notion at that time that royal sovereignty overrode church law or papal authority[24]; any such assertions had to await the Norman invasion. There was thus a close connection between Catholicism, once firmly established, and the pre-Norman English system of government and law. It was on the whole a harmonious system that offered many benefits to English society[25].

The arrival of Norman feudalism in England from AD 1066 changed the position to a considerable degree, but did not break the link between law and religion. The King became regarded as the source of the law, albeit claiming to act with divine authority[26], and within certain limits that King William laid down, under Papal jurisdiction[27]. New manorial and other civil courts were set up, and in AD 1070 the King separated the lay and ecclesiastical jurisdictions of the various courts. Henceforth clerics were not to sit in the civil courts but to deal with ecclesiastical offences and other Church matters in the ecclesiastical courts[28]. Lay officers were still to assist in the enforcement of orders of the ecclesiastical courts. The ecclesiastical courts were still left with wide jurisdiction in matters that today are dealt with by the general law[29]. Clerics also received privileges; they were only to be dealt with in the ecclesiastical courts and there was a limitation on the severity of their penalties[30]. Taxes continued to be paid to Papal authorities overseas.

All this laid the ground for future tension between civil and Church authorities. This was exacerbated by mid-11th century Church reforms elsewhere that tended to divide Church and national systems of law into two distinct streams[31]. Various attempts were made in England over the next

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[23] Goldwin Smith, A Constitutional and Legal History of England, (1990, Dorsett Press, New York), 77-78.
[24] See Documents Illustrative of English Church History, op. cit., 49-51.
[25] This is not to deny that there were many disruptions to English society in this period, usually arising from sources other than the connections between religion and law/state, such as from Scandinavian invasions. . As to the beneficial value of the medieval Christian notion of harmony between virtue, law and practice, see Paul Johnson, op. cit., 191.
[26] Goldwyn Smith, op. cit., 70.
[27] Thomas Pitt Taswell-Langmead, English Constitutional History, (10th Revised Ed., Sweet & Maxwell, 1946), 50-51.
[28] Doris Mary Stenton, English Society in the Early Middle Ages (1066-1307), (Pelican/Penguin Books, 3rd Ed. 1962) , 209-210.
[29] George Burton Adams, Constitutional History of England, (Jonathan Cape, London, 1963), 244; A R Myers, England in the Late Middle Ages (1307-1536), (Pelican/Penguin Books, 2nd Ed., 1963), 207.
[30] George Burton Adams, op. cit., 77-78; J H Baker, op. cit., 147.
[31] Paul Johnson, op. cit., 204-205.

few centuries to bring the ecclesiastical courts, the clergy and Church property under the control of the civil courts and the general law, to limit the jurisdiction the ecclesiastical courts and the privileges of the clergy, and to exclude Papal taxes and Papal involvement in clerical appointments[32]. But these were strenuously resisted, reliance being placed on Papal authority. There was no clear notion of separation of Church and state at this time, nor was there any notion that the Christian teachings were not relevant to the law and its content. And given the relative lack of development and spread of the common law of England[33], plus the immaturity of statute law and the legislative process in this period, the contribution of the Church through its canon law to English society in this period was significant. There has been a tendency in legal writings since to overlook the value of this contribution. It was a period that coincided with the revival of Roman law in the West through the Church, reflecting the Catholic Church's interpretation of the Christian teachings, to be applied to the "people of God" as an ordered community under Papal sovereignty[34]. This canon law[35] was taken to apply to all Christians in all places, and virtually everyone in England was by this time deemed to be Christian[36]. Thus there was considerable impact of this development in England through the Church and Church law.

However the position was bound to change. The privileges and autonomy of the clergy and the extent of Papal and Church involvement in English public affairs caused a rising level of resentment and antipathy[37]. It only needed Royal support and intervention for the scales to be tipped in favour of Royal supremacy at the expense of the Church, and this was provided by the Tudor Monarch, Henry VIII[38]. Under the new constitutional arrangements he put in place, the Church in England became wholly subordinate to the Crown, and not to the Papacy. The Church became the national church, of which the King was the head and protector[39]. It was essentially a revolution, not supported by any agreement with or acquiescence by the Catholic Church,

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[32] Ibid, 89, 182-187; J H Baker, op. cit., 148 - 150; Thomas Pitt Taswell-Langmead, op. cit., 287 - 300.
[33] It was not until the 14th century that the Royal courts were able to cease traveling around with the Royal household (when not at Westminster) and were able to secure the common law's application throughout England, excluding in the marches - A R Myers, op. cit., 23, 30-31.
[34] Brian Tiernan, Religion, Law and the Growth of Constitutional Thought, (Cambridge Uni Press, 1982), 13.
[35] For a history of Canon Law and its development, see A Boudinhon, Canon Law, (The Catholic Encyclopedia, 2003 online ed.), <http://www.newadvent.org/cathen/09056a.htm>.
[36] J H Baker, op. cit., 148.
[37] Ibid, 150-152.
[38] Sir David Lindsay Keith, The Constitutional History of Modern Britain 1485-1937, (3rd Ed.) (Adam and Charles Black, 1948), Chapter II .
[39] Thomas Pitt Taswell-Langmead, op. cit., 315.

although there was an effort to maintain the appearance of continuity and to treat it as mere reform.

The Tudor King was as a result able to influence decisions made in and for the Church much more directly and forcefully, such as in clerical appointments and the disposal of Church property[40]. Ecclesiastical courts continued in existence, and although they initially expanded their jurisdiction and business[41], as time passed it gradually became easier for the Royal courts to intrude into their jurisdiction and to exercise controls over them[42]. The Canon law continued in force as ecclesiastical Anglican law, except where contrary to the common law or statute or the King's prerogative[43]. The common law of England was extended and refined by the Royal courts at the same time. Parliament also began to assert, with Royal assent, its authority to attack clerical privileges and the role of the ecclesiastical courts, and it legislated to limit recourse by way of appeals to Papal authority[44]. For most purposes the legal and religious connection with the Papacy and the Catholic Church on the one hand, and the English sovereign nation-state and its Crown on the other, ended, although not in all cases reflected in the termination of the loyalty of individual English people to that Church and its head.

But of course the connection between Christianity, as now interpreted and applied in England, and the Crown, the state and its laws, remained - in fact in some formal senses it was strengthened. There was now a constitutional and legal connection between Church and state, a "state religion". The Tudor King, the Parliament and the Royal courts were directly concerned with matters of religion and belief and the uniformity thereof[45]. The revolution of Henry VIII was political and legal rather than a religious reformation[46]. The law-makers and administrators of the time continued in most cases to be concerned that any new laws and legal judgments met Christian standards as far as possible. The Biblical teachings were still seen as part of the law of the land. It is difficult for those grounded in

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[40] Many monasteries were confiscated - see Keith, op. cit., 67-68.
[41] J H Baker, op. cit., 151-152.
[42] A R Myers, op. cit., 207.
[43] J H Baker, op. cit., 151.
[44] See in particular the Act in Restraint of Appeals, 1533 - see Keith, op. cit., 63; Thomas Pitt Taswell-Langmead, op. cit., 311.
[45] To be seen, for example, in the Statute of the Six Articles of Belief, 1539, operative by force of legislation of the Parliament. See Keith, op. cit., 79, Thomas Pitt Taswell-Langmead, op. cit., 321.
[46] Thomas Pitt Taswell-Langmead, op. cit., 287. However the events are usually called the "Reformation" of Henry VIII.

contemporary secularism to adequately conceive of the pervasiveness of the intellectual and spiritual links to religion that existed among English people at that time, but these meant that law and religion continued in England to have, and were perceived as having, a very close connection to one another, even after the Tudor reformation.

The subsequent history of Church and State in England fluctuated. At times there were attempts to reestablish the influence of the Catholic Church on the state; these eventually came to nothing, Catholicism was suppressed, and it was only by the 19th century that full toleration of Catholicism was guaranteed by the law[47]. Tolerance of Christian worship other than in strict Anglican form had earlier beginnings in the Toleration Act of 1688, following the puritanism of the Cromwellian revolt and later the Glorious Revolution of that same year. Tolerance of Judaism had to wait a little longer than Catholicism. Now full legal toleration of all religions is the norm. But the Anglican Church, or Church of England, remains the established Church in England, headed by the Crown. The Crown must be occupied by a person in communion with the Church of England[48]. Disestablishment has occurred in Wales and in Northern Ireland, but not in England. In Scotland the Church of England never became the established Church of Scotland from the time of the Act of Union of 1707[49].

But while the outer framework of the connection between law and religion may have in some respects remained unchanged in England to present times, the substantive position has changed radically from that in Tudor times. The Church ceased to have any independent legislative power from the time of Henry VIII[50], and from the time of the Glorious Revolution[51], the supremacy of Parliament over all matters, religious or otherwise, was firmly established[52]. Ecclesiastical taxation ended in the 17th century. Remaining

[47] Thomas Pitt Taswell-Langmead, op. cit., Chapter XX; also Grace Bible Church v Reedman (1984) 54 ALR 571 per White J.
[48] Act of Settlement of 1701, clause III (1).
[49] Presbyterianism remained the established Church in Scotland after union.
[50] Although note the Church of England Assembly (Powers) Act 1919, giving clerics some say in the making of legislation, but only under a complicated procedure involving supporting resolutions of both Houses of Parliament.
[51] 1688-1689, marked by the end of the Stuart Monarchy and its replacement by the Hanoverian line of Royal succession, and the adoption of the Bill of Rights of 1689.
[52] This gave rise to the strong English constitutional principle of the supremacy of Parliament, that is, that Parliament was supreme in all matters arising within national borders, subject of course to Royal assent, the giving of which was later established as being a matter to be exercised on Ministerial advice. This supremacy principle was exported to English colonies including Australia upon the establishment of responsible government in those colonies.

clerical privileges under the law were abolished. Ecclesiastical courts had survived the revolution of Henry VIII, but after a while they gradually lost jurisdiction and influence to the Royal courts. By the early 19th century, the jurisdiction of the remaining ecclesiastical courts had been limited to Anglican Church matters, such as faculties to alter or sell consecrated property and to disciplinary proceedings against clergy[53]. Papal canon law had long ceased to be treated as part of the law of the land, although Church of England ecclesiastical law continued to operate in relation to the Church and its members. The common law, built up by the Royal courts, had triumphed as the basis for the general law[54], capable of being trumped only by an Act of the Parliament under the doctrine of the supremacy of Parliament. However the Royal courts continued for several centuries after the reign of Henry VIII to regard the Christian religion as part of the law of England[55], and enforceable as such, an influence that continued even into the 19th century in England and in Australia[56].

But this attitude of the civil courts was a waning influence. The rise of the tide of disbelief following in the wake of 19th century Darwinism,

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[53] J H Baker, op. cit., 152.

[54] Noel Cox, "*The Influence of the Common Law on the Decline of the Ecclesiastical Courts of the Church of England*" 3 Rutgers J of Relig. 1.3 (2001).

[55] Eg: Williams' case (1797) How St Tr 654, per Kenyon CJ at 703, cited in Keith Mason, Constancy and Change, (Federation Press, 1990), 4; Taylor's case, 1 Ventris 293, 3 Keble 607, where Sir Matthew Hale is reported as saying - "*the Christian religion is part of the law itself.*" - see John Corway v Independent Newspapers Limited and ors [1999] IESC 5 per Barrington J for the Supreme Court of Ireland on appeal, at paragraph 13. Writing in 1900, John Quick and Robert Randolph Garran were able to say that "*The Christian religion is, in most English speaking countries, recognized as a part and parcel of the law of the land*", citing Cowan v Milbourn [1867], L.R. 2 Ex.234 per Kelly C.B. - The Annotated Constitution of the Australian Commonwealth, (Legal Books, 1976), 951.

[56] Keith Mason, Ibid, 4-5, citing R v Darling (1884) 5 NSWR 405, per the Chief Justice at 411. A similar judicial approach has been taken in the USA. In 1824, the Supreme Court of Pennsylvania declared that the true principles of natural religion were part of the common law. As late as 1955, it is reported that the Supreme Court of Washington relied on the Ten Commandments of the Old Testament (Decalogue) as a basis for State laws on adultery. See How the Ten Commandments are Expressed in Civil Law in American History, <http://users.ipa.net/~les/law.html>. Two cases are presently before the US Supreme Court challenging the constitutionality of displaying the Ten Commandments on public buildings - McCreary County, Kentucky v American Civil Liberties Union, No 03 - 1693. In view of the USA Bill of Rights as to freedom of religion and separation of church and state, it is clearly more difficult for USA courts to assert that particular religious teachings are part of USA law, although they may be seen a source of that law, and the courts do note that the prevailing religion in the USA is Christianity. See also the Sunday Closing Law Cases, 366 U S 420 (1961). In England an application of the law of the Church of England survives, which by state law is incorporated into the general law of the land - see Parochial Church Council of the Parish of Aston Cantlow and ors v Wallbank [2003] UKLL 37 (House of Lords) per Lord Hope of Craighead at paragraph 61. The process of establishment is said to mean that the State has accepted the Church of England as the religious body which in its opinion is truly teaching the Christian Faith - see Marshall v Graham [1907] 2 KB 112 per Phillimore J at 126, and cited by Lord Hope in Wallbank.

accompanied by the tolerance of pluralism and freedom of religion and belief, often accompanied by disagreement and conflict between different religions and sects, had doomed any such connecting view of law and religion to virtual extinction in the West, at least up until present times. No longer did the secular courts generally regard themselves as having any role in purely internal religious matters[57], except perhaps where there continued to be an established church, or in some cases where the church had no internal tribunal for dealing with church affairs and disputes[58], or as to property ownership issues. The legislatures themselves, as a general rule, ceased to intervene in internal religious affairs, except in so far as the circumstances were deemed to have wider implications requiring action in the interests of good order and the public welfare. Religion came to be seen as a purely internal matter, such that law and religion came to be seen as occupying different or disparate "fields". Law came to rely for its efficacy on the civil institutions of the state. Those institutions, and the laws for which they were responsible, in turn derived their existence and legitimacy from the "supreme" Westminster Parliament and the "sovereign" Crown[59]. In more recent times, at least in Australia, this source of law and its legitimacy has tended to be found in the principle of the "sovereignty" of the people, in accordance with democratic, representative principles[60], rather

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[57] Scandrett v Dowling (1992) 27 NSWLR 483; Presbyterian Church in the USA v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U S 440 (1969). The position is a little different in England in relation to the established Church. The decision in Mabo v Queensland (No 2) (1992) 175 CLR 1 can perhaps be seen as an intervention by the High Court of Australia to recognise aspects of Aboriginal customary and religious law by the common law of Australia, although note that it was limited to matters of property law and matters incidental thereto. This intervention is in one respect surprising, considering that in Aboriginal traditional religions and society, there is no separation at all between law and religion. The relationship of the Indigenous people in Australia to their land is more spiritual than proprietorial - see Kent McNeil, Common Law Aboriginal Title, (Clarendon Press, 1989), 194-195, citing the Gove Land Rights case (1971) 17 FLR 141 per Blackburn J at 270-271, also at 166-167. See also the Aboriginal Land Rights (Northern Territory) Act 1976 (Cwth).

[58] Foreword to Peter MacFarlane and Simon Fisher, Churches, Clergy and the Law, (Federation Press, 1996), iii-v.

[59] At least while the source was to be found in the person of the Crown, that is, the "Sovereign" or individual monarch, there could be said to be a link to religion, if only under the old principle of the divine right of kings. But such a view of the status of Crown has ceased to command wide respect in the West (where monarchical systems remain), in most cases from a long time ago. The powers of the monarch are seen as largely formal in nature, not substantive or sovereign, except perhaps at the time of a constitutional crisis in the country. And even in the latter case, those powers and their exercise tend to be very controversial, such as when exercised by former Australian Governor-General Sir John Kerr on behalf of the Crown in 1975. Interestingly, the Baha'i writings grant a very high spiritual status to a just King or other head of state.

[60] For a discussion of this change in source towards democratic popularism or popular sovereignty in Australia, see Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106. But see Anthony Dillon, "*A Turtle by any other Name: The Legal Basis of the Australian Constitution*", (2001) 29 (2) Federal Law Review, 241.

than in the legislature[61]. In substance the secularisation of the law was and is complete.

Contemporary Western Perceptions

It has been asserted that it is now a myth that Australia[62] has an inherently Christian legal system[63]. Religion, it is said[64], has largely been consigned to the category of human opinion and belief rather than knowledge[65]. Whilst the content of aspects of the law may to some extent continue to exhibit the influence of Christian and possibly other religious sources from time to time, the secularisation of the law is now largely complete. In the case of the Australian Constitution, apart from a brief and passing reference to the blessing of "Almighty God" in the first preamble to the Imperial Commonwealth of Australia Constitution Act, the Deity does not get a mention, and religion is only mentioned in the Constitution to prevent the Commonwealth from taking certain discriminatory actions[66]. And under the still prevailing jurisprudential approach broadly labeled as legal positivism[67], the law is widely recognised to be that which has been laid down by the secular authorities of the state as requiring obedience, and which is enforceable by or through the secular authorities of the state. The law is essentially an expression by the secular state of society's requirements for human conduct. More contemporary jurisprudential approaches have not, overall, indicated any significant change in approach in indicating a closer relationship between law and religion[68].

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[61] Although the accepted legal view remains that the legislature has unlimited plenary legislative powers within the country, subject only (in the case of Australia) to the restraints contained expressly or impliedly in the Australian constitutional documents including that of the federal division of powers, and that internationally each country is "sovereign".

[62] And also by analogy England - this was said to have been exploded by the House of Lords in Bowman v Secular Society Limited [1917] AC 416 - see Keith Mason, op. cit., at 11.

[63] Keith Mason, op. cit.; Dr Marion Maddox has written that Australian Law is characterised by a deep-seated secularism - see Indigenous Religion in Secular Australia, Research Paper No 11 1999-2000, Parliament of Australia Parliamentary Library.

[64] To which might be added morality.

[65] Keith Mason, op. cit., 105.

[66] Section 116.

[67] This still seems to be accurate in England and Australia. In the USA, there may be a shift to the social realist school of jurisprudence and to the Critical Legal Studies approach, more so than traditional positivism.

[68] The modern rise of natural law theories has largely been secular in approach. There has been a reluctance to advance jurisprudential theories that would appeal to transcendental legal or moral norms, although such an approach may sometimes still be found as an undercurrent of thought.

The secular nature of modern law in the West[69] makes it now difficult to conceive of law as having any meaningful religious or spiritual content or other direct connection to religion. In this regard humanity is now in a completely new legal arena, with few precedents in human history[70]. Secularisation of the law is, as stated, a comparatively new phenomenon, although to our modern minds this may not appear so. The depths to which the processes of secularisation have gone have created a new paradigm, resulting in a widespread and entrenched perspective that deny even the possibility of religion having any direct relevance to law, except in a most objective way[71]. The matter of the absence of such a connection has become one that is rarely even canvassed in the contemporary Western legal literature. Separation of religion and law, as a part of the separation of religion and state, may be seen as being axiomatic, as a progressive, natural, rational thing, one consequence of the establishment of liberal, democratic freedoms in a modern pluralistic order. Debate may exist about the location of the legal boundaries of that separation, and about the extent to which particular religious groups should be allowed to influence the content of secular law[72], with a wide range of views being expressed, but not about the wisdom of that separation as such. In some cases the separation is constitutionally entrenched, such as in the USA. In most cases it is simply assumed, without deep analysis. Even the relevant history tends to be seen through "coloured glass", discounting the significance of the past connection between religion and law, or in some cases emphasising the negative side of that connection without serious consideration of that which was beneficial. There may be many problems facing contemporary human society, but rarely is it argued in the West that one of them is the loss of the connection between religion and law[73].

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[69] As to legal secularism, see Harold J Berman, Faith and Order: The Reconciliation of Law and Religion, (Scholars Press, Georgia, 1993), 5-8.

[70] There may be some historical examples where there was a complete separation of law and religion, apart from modern cases, but this does not defeat the main argument in this paper. There is no need to discuss those few examples in this paper.

[71] This occurs in so far as the law seeks to deal with the phenomenon of religion and belief, and freedom of religion and belief, in a secular, spiritually neutral way. Examples are to be found in human rights legislation in dealing with freedom of religion and belief, or in planning legislation in relation to the building of religious structures.

[72] For example, the law as to abortion

[73] This is, to some degree at least, a different issue to that of the connection, if any, between law and morality, the latter being a matter of considerable jurisprudential debate. To many religionists, morality and religion are themselves intimately connected, they may even be one, and hence they may argue that you can't consider the issue of law and religion without also considering morality. Others would reject this view, or take some other intermediate position. It is not intended in this paper to enter into the debate about law and morality in any detail, other than to note the undoubted beneficial effect on law of notions of virtue and right behaviour.

One spin-off of this new paradigm, for religionists of certain particular persuasions who would not normally otherwise become involved in the affairs of the state, is that they increasingly see a need to engage the secular political process. There is no doubt that some religionists have sought to influence the law-making aspects of this process to try to bring the law, or at least certain aspects of the law, closer to their own religious views[74]. This is in fact a process that has developed over a long time, going back to the religious persecutions of earlier centuries. Those members of society who were in the mainstream political and religious elite of society were often already involved in this law-making process. Increasingly those on outer religious circles have tended either to be drawn into that process, where the law and practice allowed them, or they have sometimes chosen the alternate course of withdrawal and migration. The increasing adoption of the former alternative in recent times has become a very contentious issue in some Western countries. It has tended to result in a blurring of the boundaries between religion and politics, but not necessarily any de-secularisation of the law.

The position is quite different in some third world countries, even today, where religion and law continue to be intimately connected in various ways. The influence of Western secular modernism is still spreading around the globe, but is meeting strong resistance in some third world countries. The opposition often tends to be expressed by reference to religion, and may be leading to a global resurgence of religion in some places[75]. It has been suggested that religion is being used to challenge Western cultural, political and military hegemony and the Westphalian global order[76]. But it is also keenly directed against Western secularisation, and the evils which this is seen to bring. This opposition is now particularly apparent in Islamic countries, discussed below. Their approach, which is broadly integrationist in perspective as between law and religion, is one which is hard to grasp in a positive way by many Western minds. This has undoubtedly contributed to the misunderstandings and prejudices exhibited in current world tensions between East and West.

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[74] Again, in relation to the law as to abortion, among other examples.
[75] Unfortunately, often of a more fanatical nature.
[76] Scott Thomas, "*The Global Resurgence of Religion, International Law and International Society*", in Mark W Janis and Carolyn Evans (Eds.) , Religion and International Law, (1999, Martinus Nijhoff), 321 at 332.

It is now appropriate to look briefly at an example of this approach, choosing the Islamic religion founded by the Prophet Muhammad[77].

Islam - Law and Religion

There are a number of crucial aspects of Islam and Islamic law that differentiate them from secular society and secular law. This is because Islam is a monotheistic religion, and Islamic Law is based on the teachings of that religion. Western secular society and law are not based on a "religion", except perhaps in a very loose sense of that word; for example, by equating them with some belief system such as materialism, capitalism or consumerism. Religion, as applied to Islam, is conceived of as a divine ordinance given by the Creator to humanity; people can accept or reject it as being divinely given, and upon acceptance it binds them to observe Islamic laws applicable to them[78]. "Allah" alone, that is, God alone, is described in the Holy Quran as "sovereign"[79]. As such, the teachings of Muhammad, as recorded in the Holy Quran, and incorporating the primary laws of Islam[80], are said to be fixed and unchangeable[81]. Secular law, on the other hand, can be changed from time to time by following the prescribed secular procedures. Islamic law applies to all Muslims, but not (usually) to non-

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[77] 570 CE - 632 CE.

[78] For a different view of this relationship, see Said Ramadan, Islamic Law: Its Scope and Equity, (Muslim Youth Movement of Malaysia, (1987), 25, in which he asserts that people have no freedom to choose or to discuss the application of Islam to them. The Holy Quran does state that that Book is a revelation from God (Surah 56:80), but it also teaches freedom of choice in religion (Surah 2:256).

[79] This statement appears in numerous places in the Holy Quran. For example, Surah 2: 87 and 253 and 3; 26 and 189. It has its parallels in the Baha'i writings and in the Holy Bible.

[80] The other primary source of law in Islam is the Sunnah, or sayings of the Prophet, but there can be debate about which of these are authentic and the extent to which each can be used - see Tan Sri Dr Muhammad M Abdul Rauf, "*Al-Hadith: Its Authority and Authernticity",* (1989)1 Int Is ULJ 1. The Holy Quran and Sunnah together make up the Shari'ah. A secondary source is Fiqh, or laws said to be scientifically deduced from the primary sources, and which can change according to the circumstances under which it is applied. See Jamila Hussain, Islam: Its Laws and Society, (Federation Press, 2004), 28; Abdur Rahman L Doi, Shari'ah: The Islamic Law, (AS Noordeen, Malaysia, 1989); Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, (Pelanduk Publications, 1989).

[81] Certainly no human being can change them, the words revealed in the Holy Quran by Allah (God) being fixed (Surah 10:64). But according to Baha'i teachings, a new Manifestation or Messenger of God can bring new Divine laws at a later time. The Holy Quran states that Muhammad is the "*Seal of the Prophets*" (Surah 33:40), but there is no doubt that the Holy Quran contemplates an "end of time" revelation, a future Day of Judgment. Baha'is believe that Baha'u'llah, the Prophet/Founder of the Baha'i Faith, has fulfilled these prophesies, broken that Seal, and brought a fresh revelation from God at the end of one great human cycle and at the beginning of a new, unified cycle, that revelation being appropriate to this contemporary age and its needs - see Nabil I Hanna (compiler), Prophesies in Harmony, (Baha'i Publishing Agency, Kenya, 1993), Part 3; Zekrullah Kazemi, The Great Call, (Baha'i Publishing Agency, Kenya, 1999), 22; Mohsen Enayat, "*Commentary on the Azhar's Statement regarding Baha'is and Baha'ism*", (1992) 2 (1) Baha'i Studies Review; Kamran Hakim, "*Personal Interpretation of the Term Seal of the Prophets - Six Meanings Associated with the Terms Seal of the Prophets and Messengers*", <http://bahai-library.com/?file=hakim_seal_prophets>.

Muslims. Secular law applies to all people within the jurisdiction of the particular law-area[82], irrespective of their religion or belief (or lack of them). It may be that the benefit of Islamic law is felt by non-Muslims[83], but they are not normally regarded as being subject to its religious obligations. In addition, the laws of Islam include aspects of beliefs and practices that would not be considered "law" in most secular systems. These include rules relating to belief, prayer, fasting, pilgrimage, voluntary donations to charity[84], and aspects of everyday life such as behaviour towards other people, dietary rules, dress, manners and morals[85].

It is to be noted that these various differences between Islam and Islamic law of the one hand, and secular society and secular law on the other, have many parallels in the Baha'i Faith[86]. Both Islam and Baha'i are monotheistic religions, with their own Founders and Holy Writings, and the Baha'i teachings can be described as containing Baha'i "law"[87]. The Baha'i Faith, of course, is a much later religion, having its beginnings in the 19th century, but it specifically recognises the divine source of Islam and the Prophethood of its Founder[88].

Thus in religious theory at least there is a direct connection between the law applicable to Muslims, and the Islamic religion itself - in fact, the two are inseparable[89]. Early Islam is said not to have conceived of a separation of religion and state[90]. Rather, the law given by God through Muhammad was,

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[82] Whether it be international law applying world-wide, national law applying within the boundaries of that nation-state, regional or state (of a federal system) law applying within that region or state, or local law only applying locally. See Knut S Vikor, *"The Shari'a and the nation-state: who can codify the divine law?"*, 4th Nordic Conference on Middle Eastern Studies, August 1998, <www.hf.uib.no/smi/pao/vikor.html>, 6-7.

[83] For example, by being the beneficiaries of Islamic charity.

[84] Zakat.

[85] Jamila Hussain, op. cit., 28.

[86] The Baha'i Faith does not utilise an equivalent of the Islamic Sunnah, but only the Writings directly attributed to the Founder of the Faith, plus those of the Forerunner of the Faith known as the Bab, and those of the son and successor of the Founder, known as Abdu'l-Baha. Also since the passing of the Grandson of Abdu'l-Baha and appointed Guardian of the Faith, known as Shoghi Effendi (1896-1957), authority in the Faith has been vested by Baha'u'llah in the Universal House of Justice, a body elected by Baha'is every 5 years and with power to make supplementary laws from time to time. It was first elected in 1963.

[87] Udo Schaefer, "*An Introduction to Baha'i Law: Doctrinal Foundations, Principles and Structures*", (2002-2003) 18 (2) Journal of Law and Religion, 307; see also by the same author, The Light that Shineth in the Darkness, (George Ronald, 1979), 116 et seq.

[88] In common with a belief in the Founders of all the other great religions.

[89] John Witte Jr., and Johan D van der Vyver, (Eds), op. cit., state at page 400 that law and theology are inseparable in Islam.

[90] Juan R I Cole, Modernity and the Millennium, (Columbia Uni Press, 1998), 21.

and still is, seen by many as being the only valid law or source of law which should determine the legalities of human conduct.

On the other hand, the Holy Quran did not provide for a distinct legislative and administrative order to follow the Prophet within which a comprehensive system of law could be developed. Nor did that Book incorporate a detailed code of laws[91]. And the Religion itself began to split into factions soon after the death of Muhammad, despite a Quranic condemnation of schism[92]. By a combination of these and other factors, the course of Islamic history indicates that the connection between Islam and the applicable law in each location where there were Muslims residing was not always that close in practice.

In this regard, Islam itself was a religion intended to apply to the "brotherhood of mankind", that is, beyond any notion of a nation-state in a universal manner. But from its inception in the 7th century, it had to operate within the confines of various tribal, ethnic, national and other loyalties and had to accommodate itself to a variety of social and legal regimes. Sometimes the strict dictates of Islamic law have tended to give way to secular and other legal requirements. This has particularly been the case where Islam was not the dominant religion. In addition, Islam was taught in Arabia at a time when nomadic lifestyles were still common in a desert environment. But as Islam expanded, it came in contact with radically different circumstances not of its own making. It had to adapt. And Islam itself lead the way to a great flowering of civilisation, in the arts, sciences and culture[93], so the religion had to adapt to these new circumstances of its own making.

In more contemporary times, Islam and Islamic law have had to adapt to modern conditions and expectations, including the processes known as globalisation. This has given rise to a great deal of debate within Islam itself[94], and outside of it[95] , concerning Islam and modernity. It is not necessary for present purposes to go into the detail of that debate.

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[91] N J Coulson, A History of Islamic Law, (Edinburgh Uni Press, 1990 reprint), 12-20.
[92] Surahs 3:103, 6:159, 21:92-93, 23:52-53, 30:32, 42:13.
[93] H M Balyuzi, Muhammad and the Course of Islam, (George Ronald, 1976), Chapter 27.
[94] Jamila Hussain, op. cit.; Said Ramadan, op. cit. Knut S Vilkor, op. cit., 7-14. As to Pakistan, see S Abul A'la Maududi, Islamic law and Constitution, (Islamic Publications, Lahore, 1986). The mass of comment on the net on this matter, particularly concerning the challenge to Islam by modernism, is astounding.

All of this has meant that there has often been ongoing tension between the requirements of strict Islamic law and the particular legal, social and other circumstances in which Muslims have found themselves from time to time, a tension that continues today. Various schools of thought have arisen in Islam as a response to this predicament and it has been the cause of much argument and dissension. It is little wonder that the relationship between the beliefs and teachings of Islam, and the law where Muslims resided, has not always been as close as the original teachings would seem to suggest they should be. Even in overwhelmingly Islamic countries there have been discrepancies between the prevailing law and Islamic teachings. Only in those countries where Islam is the state religion, and Shari'ah law is fully applied to all, has there been a direct and intimate connection between religion and law[96]. Demands for the full application of Shari'ah law and the rejection of Western legal concepts of law are still prevalent in many predominantly Islamic countries[97]. There is widespread disenchantment with such Western concepts, no doubt as part of an even wider disenchantment with Western secular ideas and ways.

But it would be a mistake to conclude from this that Islam has not exercised a profound effect on the law in predominantly Islamic states. Tensions there may have been, and still are, but any attempt to understand the law applicable in those countries would be doomed without a proper regard to Islam and Islamic teachings. And while it may seem easy for some Westerners to draw negative conclusions from this connection between law and Islam in these countries, particularly in relation to the treatment of minorities and minority religions, or based on biased Western perceptions of what may be seen as the harshness or inadequacies of Islamic law, there were undoubtedly many good aspects to Islamic law that may be conveniently overlooked. One only has to look again at the golden age of Islamic civilisation for proof, with its sophisticated systems of law, at a time

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[95] For example, Knut S Vikor, op. cit.; A Boudahrain, *"In Support of an Informed Symbiosis of Islam and the Law*" in Roger Blanpain (Ed.), Law in Motion; World Law Conference, (Kluwer Law International, 1997), 57; Alfred Guillaume, Islam, (Penguin, 1956), Chapter 9; N J Coulson, op. cit.

[96] Thus in Iran since the Islamic Revolution there has been a full application of Islamic Law based on the Shi'ia interpretation of Islam, with a substantial merging of state and religious authority, and with only Zoroastrianism, Judaism and Christianity having any constitutional recognition. See John Witte Jr. and Johan D van der Vyver, op. cit., 421. The Baha'i Faith is not recognised at all and Baha'is are persecuted .

[97] For example, there have been various attempts to introduce Islamic law generally in Indonesia as part of an Islamic State, despite its established constitutional grounding in religious and cultural diversity - the Pancasila. See Mohammad Fajrul Falaakh, "*Islam in Pluralist Indonesia: Challenges Ahead*", The Centre for Independent Studies, New Zealand, December 2002, <http://www.cis.org.au/Events/acton/acton02.htm>

when Europe was still in the dark ages[98]. These benefits may be less evident today[99], particularly given the debate on the difficulties of reconciling Islamic law and modernity, already discussed.

We now move on to discuss some of the disenchantment with modern Western secular law and its lack of legitimacy. Then we will examine why this is related in large measure to the separation of law and religion.

Disenchantment with Western secular law - the crisis of legitimacy

It is said that foremost among the crises now threatening the law in the West is the crisis of disillusionment[100]. This is said to be due to a lack of respect for the law, a lack of understanding of the role and importance of the law, a lack of effectiveness of the law and a lack of vision. The disenchantment is said by Weeramantry to begin with the obscurity and doubtfulness of the law as it constantly changes[101]. But beyond that there are multiple causes. No doubt one of them is the growing volume and complexity of the law in so many different secular jurisdictions, international, regional, national, sub-national and local, and the difficulties of enforcement. And this at a time when global interaction is increasing exponentially and the world is coming

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[98] This civilisation developed rapidly after Muhammad's death, and with it the development of Islamic theology and law. It flourished in literature and the arts and sciences around Baghdad until destroyed by the Mongols in the mid-13th century. It spread over a vast area of the globe, and reached great heights in other places such as Spain. It was a brilliant civilisation, with many benefits that subsequently carried over into Europe in the Renaissance. Abdu'l-Baha wrote -

> "*..those savage denizens of Yathrib (Medina) and Batha (Mecca), miraculously, and in so brief a time, were drawn out of the depths of their ignorance, rose up to the pinnacles of learning, and became centers of arts and sciences and human perfections, and stars of felicity and true civilization, shining across the horizons of the world.*"

The Secret of Divine Civilization, (Baha'i Publishing Trust, 1975), 5. See also in the same work at 89-91, 94. See also H M Balyuzi, op. cit., Chapter 27 "*The Civilization of Islam*".

[99] The Baha'i explanation for this relates to the teaching that the great religions are revealed with two aspects to their revelation - that which is spiritual, common to all the great religions and eternal, and that which is social and tailored to the particular needs of the age in which it was revealed. The Islamic Revelation is from the one supreme God, but in so far as it includes social and related laws which were appropriate for the age on and from the time of that Revelation, many of those laws have since ceased to be appropriate to those needs. On this view, humanity must now turn to the Revelation of Baha'u'llah for the new laws for this age.

[100] CG Weeramantry (Professor of Law, former Sri Lankan Supreme Court Justice and Judge and then President of the International Court of Justice 1991 - 2000), The Law in Crisis, (Capemoss, 1975), 3. Needless to say, in a world bent on material, self-centred ends, and obsessed with the triple tools of politics, money and power as (allegedly) being capable of solving every human problem, Weeramantry's call to action in his book has received little response.

[101] Ibid, 8. The same sort of criticism has been directed at some religions, where the process of sectarian division has resulted in competing interpretations and internal dissent, often exacerbated by the external demands of modernism.

together under the pressures of globalisation. Other causes are value related. The end product has been described as a crisis in the legitimacy of the secular law, one that threatens the very core idea of law and its purpose in society and hence the creation and maintenance of an orderly and just civilisation. Lord Denning, in a telling Foreword to Weeramantry's book, sets the scene very well -

> "*This book appears at a critical moment in the history of mankind. Civilised society appears to be disintegrating. Minorities openly defy the law for their own ends. Terrorists seize hostages and threaten to kill them. Workmen set up picket lines outside power stations and threaten to bring the country to a standstill. Students occupy buildings and prevent the running of their Universities. Only too often their threats succeed. The peaceful majority give in. They surrender.*
>
> *Moral and spiritual values, too, appear to be at a low ebb. The sanctions of religion have lost their force. Schools and teachers take much interest in social sciences. They explain how people behave. They seek to help the misfits. But they do not set forth standards of conduct. They do not tell people how to behave. The only discipline to do this is the discipline of the law. It is the law which teaches that men must not resort to violence to obtain their ends: that they must keep their promises: that they must not injure their neighbour: that they must act fairly: and the like. The law covers the whole range of human behaviour and says what men must do and must not do.....*
>
> *He (Weeramantry) is concerned to show that the law - which is the very foundation of civilised society - is in peril. All our traditional concepts are being challenged.....* "[102]

This is not a theme unique to these eminent jurists. Harold J Berman has written of an integrity crisis affecting Western man. He writes -

> "*One major symptom of this threatened breakdown is the massive loss of confidence in the law - not only on the part of law-consumers but also on the part of law-makers and law-distributors. A second major symptom is the massive loss of confidence in religion - again, not only on the part of those who (at least at funerals and weddings) sit in*

[102] Ibid, ix-x. See also Lord Denning, The Influence of Religion on Law, reviewed by Andrew Phang in (2001) 16 Journal of Law and Religion, 719; Lord Denning, The Influence of Religion on Law, Canadian Institute for Law, Theology and Public Policy, <www.ciltpp.com/cha_infl.htm>.

the pews of our churches and synagogues, but also on the part of those who occupy the pulpits.....

What makes this an integrity crisis rather than some other kind of crisis is precisely its relation to the loss of confidence in religion and law. In the centuries prior to World War I religion and law - especially in America - were the patrimony of our collective life. They embodied our sense of common purpose and our sense of social order and social justice - "the style of integrity" (in Erikson's words) "developed by [our] civilization."2[103] *Our disillusionment with formal religion and with formal law is thus symptomatic of a deeper loss of confidence in fundamental religious and legal values, a decline in belief in and commitment to any kind of transcendent reality that gives life meaning, and a decline of belief in and commitment to any structure and processes that provide social order and social justice....*

How are we to explain our disillusionment with law and with religion? There are, of course, many causes. One of them, I believe, is the too radical separation of one from the other. That in turn is partly the result of our failure to make the right connections between formal legal and religious systems, on the one hand, and the underlying legal and religious values to which I have referred, on the other. Both the law schools and the schools of theology bear their share of responsibility for the narrowness and the rigidity of our thoughts on these matters."[104]

The sociologist Pitirim Sorokin has written of the crisis of our age by reference to law and ethics. He writes:

"The essence of the crisis consists in the progressive devaluation of our ethics and of the norms of our law. This devaluation has already gone so far that, strange as it may seem, they have lost a great deal of their prestige as ethical and juridical values. They have little, if any,

[103] This is a cross reference to Erik H Erikson, Childhood and Society, (New York, 1963), 268.

[104] Bergman, Faith and Order, op. cit., 2-3. Bergman's extensive writings on this subject are dealt with by Roshan Danesh in his paper, op. cit. Danesh refers to the crisis of internal and external fidelity in the law. He says that this can lead to the questioning of the authoritative nature of legal rules. More destructive, he says, is the erosion that occurs when the aspirative frame of the internal fidelity of the law has either been lost or is deemed obsolete by those subject to the law. If either of these conditions prevails, the law loses the functional ability to order society because individuals no longer recognise within the law the prerequisites that would determine adherence. See also Roshan Danesh, "*Internationalism and Divine Law: A Baha'i Perspective*", (2003-2004) 19 (2) Journal of law and Religion, 209.

of the sanctity with which such values and norms were formerly invested. More and more, present day ethical values are looked upon as mere "rationalisations", "derivations", or "beautiful speech reactions" veiling the egotistic interests, pecuniary motives or acquisitive propensities of individuals or groups. Increasingly they are regarded as a smoke screen masking prosaic interests, selfish lusts and, in particular, greed for material values. Legal norms, likewise, are increasingly considered as a device of the group for exploiting other, less powerful, groups - a form of trickery employed by the dominant class for the subjugation and control of the subordinate classes....

Having lost their "savour" and efficacy, they opened the way for rude force as the only controlling power in human relationships....

Under such conditions no logic, no philosophy and no science can invoke any transcendental value to mitigate the struggle and to distinguish the right moral relativism from the wrong, the right means for the pursuit of happiness from the wrong, or to distinguish moral obligation from selfish arbitrariness, and right from might."[105]

Other writers have commented on the crisis in the legitimacy of the law, although not necessarily advocating solutions relating to religion and religious values. The legal philosopher Habermas has noted that since the middle of the 19th century, the public sphere has lost its critical function. Instead of a consensus based on what he calls rational discourse, the focus has gradually shifted to reaching compromises based on the relative strengths of temporary coalitions. The pursuit of the rational life based on ethics was in retreat and was being replaced by what is politically possible. The public, he said, had been transformed from a culturally and politically argumentative force, to a consuming audience. The language of commercial interests has come to permeate the public sphere and ideas are subjected to fashion trends. Modern societies were no longer legitimated through traditional values such as religious beliefs. Instead, legitimation depends on public acceptance of the justice of the commercial market (and state administration). The liberal-capitalist process of production had at the same time become 'a dialectic of the moral life'[106].

[105] The Crisis of our Age, (Oneworld Publications, 1992 edition).
[106] Bo Carlsson, "*Jurgen Habermas and the Sociology of the Law*", in Reza Banakar and Max Travers (Eds.), An Introduction to Law and Social Theory, (2002, Hart Publishing), 80 - 81.

This is not to say that there have not been attempts, by some jurists, academics and practitioners in the law, some political leaders and others, to suggest remedies, or to try to remedy, such perceived deficiencies and crises. There is little doubt that global perspectives on law and religion were severely shaken and recast by the two World Wars of the 20th century and the terrible failures in world order that occurred in that century. The severity of these Wars and other conflicts, often accompanied by the most tyrannical and murderous of regimes and the grossest abuses of civilians and their fundamental rights, has lead to considerable rethinking in many disciplines, including those spiritually and legally based. This is seen, for example, in a revival of natural law theories[107] and in the growth and internationalisation of human rights law and practice[108]. But rather than improving the position, these developments have had severe limitations in themselves, and in many respects have fueled the crises in law and in religion, and the lack of connection between the two, rather than mitigated them[109]. The appeal to higher principles in natural law theory, to that which is said to occupy a superior legal status to that of the general law, is often received with great skepticism and cynicism, and in secular Western courts has now been largely rejected[110] (absent some constitutional or legislative direction to the contrary[111]). Nor is it now common for Western courts to appeal to

[107] This occurred mainly after the Second World War, and, apart from the Catholic world, was in a form independent of denominational religious doctrine - J M Kelly, op. cit., 418. It was essentially a secular theoretic movement. It has not commanded widespread acceptance among those in the practice of the law, and has had to compete with a host of other new jurisprudential theories, virtually all of which are secular in orientation.

[108] Its origins predate the Second World War, extending back to ancient natural law theories and the teachings of the great religions of antiquity, and then to the national constitutional Declarations of the late 18th century in USA and France. The emergence of modern human rights law was particularly influenced by the war crimes trials at Nuremberg and elsewhere, and found concrete expression in the Universal Declaration of Human Rights of 1948 under the auspices of the United Nations Organisation. Like natural law theories, to which it is loosely connected, modern human rights law is essentially a secular development. It incorporates the legal recognition of religious pluralism and the entitlement not to adhere to any religion or belief.

[109] See discussion below.

[110] For example, Liyanage v The Queen {1967] 1 AC 259, British Railways Board v Picken [1974] ! All ER 609, Union Steamship Co of Australia v The King (1988) 166 CLR 1, the majority in Building Construction Employees and Builders Labourers Federation v Minister for Industrial Relations (1986) 7 NSWLR 372, and the majority in Wake and Gondarra v Northern Territory (1996) 109 NTR 1. The earlier view to the contrary can be found in cases like Dr Bonham's case (1607) 8 Co Rep 107a, 77 ER 638. Attempts are still occasionally made by courts to revive the theory of "rights that run so deep" as to be beyond change, but they don't get very far.

[111] For example, in a national Bill of Rights, constitutionally entrenched in domestic law. The present writer does not necessarily support such an approach, but does not enter upon the debate as to the value of such national Bills of Rights. Note that Australia is one of the few countries that does not have such a national Bill of Rights.

religious teachings as a source of law[112]. Domestic national courts as a whole still have great difficulty in relying in their decision-making on internationally agreed principles and values except where they have been incorporated into or recognised by their own domestic law[113]. The frailties and failings of a segmented world order with its multiple legal systems, most of them now operating under the influence of Western ideas of individualism, secularism and liberal economic capitalism, and to a large extent floundering in their quest for a basis for the legitimacy of the law other than that grounded in popularism and human rationality, is all too obvious. This order exists in a world still divided along many lines, one which is increasingly overwhelmed by the display of intolerance and prejudices, and which in the main still clings to its allegiance to the doctrine of the absolute sovereignty of nation-states and non interference in national internal affairs[114]. The hypocrisy and double standards inherent in the present world order[115], and the patent injustices that result from or are contributed to by that order, greatly intensify the abovementioned crises in many profound ways**.**

It is hardly surprising, therefore, that we find a crisis in the legitimacy of Western, secular law. It may have been thought that the gaps left in the legal system by the loss of religious influences, and the element of legitimacy that those influences previously provided to the law, would have been filled by universalist/secular human rights principles and law. But the international human rights system is still a very weak and frail "animal", with limited effectiveness despite recent advances such as in the establishment of the International Criminal Court. It is a system that continues to be constrained by the assertion of perceived national interests, by resistance resulting from the threat of loss of power by national "sovereign" legislative and political institutions if given full legal effect, by much skepticism concerning its

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[112] See discussion above.

[113] Australia has inherited the English common law view that international law and domestic national law are quite separate - the dualist approach. The position in this regard differs from country to country. Some countries adopt a more monist position

[114] Subject to the dictates and vagaries of great power politics, which can sometimes result in intervention in other countries in selected cases on dubious international law grounds. This doctrine against intervention is incorporated into the United Nations Charter. Any question concerning an alleged right of state intervention remains contentious.

[115] There is much written on this theme. See, for example, Marianne Heiberg (Ed.), Subduing Sovereignty, (1994, Pinter); Nikolaos K Tsagourias, Jurisprudence of International Law, (2000, Juris Publishing); Joseph R Stromberg, "*Sovereignty, International Law, and the Triumph of Anglo-American Cunning*", (Fall 2000), 18 (4) Journal of Libertarian Studies, 29. For a Baha'i view, see Law and International Order, Proceedings of the First European Baha'i Conference on Law and International Order, De Poort, The Netherlands, 8-11 June 1995 (1996, Baha'i Publishing Trust in association with the Tahirih Instituut).

imprecision and its alleged impracticality, and by arguments about cultural relativism. At least one writer has expressed the view that the idea of international human rights became perverted very soon after its birth by the dictates of national politics and national self interest, to become largely a play-thing of governments and lawyers[116]. Others have commented on the legitimacy crisis as applied to human rights, based on a lack of credibility, and have sought a new basis of credibility based on belief[117]. Justification for human rights continues to be sought in secular argument[118], despite this legitimacy crisis and the self-evident grounding of human rights in morality and virtue. These writers may see religion as an unnecessary complication in human rights theory. But others are beginning to perceive the clear connection between the two and its value if approached in an appropriate, tolerant manner, combined with the serious limitations of the secular approach[119]. Indeed, the deprecation of religious rights has sharpened to a divide between East and West[120], such that the future of peace and wellbeing in the world may well, in part at least, depend upon a much closer correlation and cooperation between religion and the law, including as incorporated into the international human rights system. This is a theme we are now to investigate.

Barriers to the Re-Connection of Law and Religion

That we now live in a world that is increasingly characterised by global interdependence cannot now be doubted. The label "globalisation" and its meaning have tended to be somewhat controversial, but when taken in the more general sense of describing a phenomenon cutting across all areas of human activity on a global basis, it is still a convenient one. It does not deny that the world continues to be ordered around and dominated by the Westphalian concept of the "sovereign" nation-state", but it does indicate that the links between peoples and groups are increasingly transcending that concept. The interdependence of the planet is now an established fact; it is

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[116] Phillip Allott, Eunomia ((1990, Oxford UP), 287-288; See also the severe criticisms of the international human rights regime by Geoffrey Robertson QC, Crimes Against Humanity, (1999, Allen Lane, Penguin Press).

[117] Peter Saladin, "*Christianity and Human Rights: A Jurist's Reflection"*, in E Lorenz (Ed.), How Christian are Human Rights? An Interconfessional Study on the Theological Bases of Human Rights (1981, Lutheran World Federation), 29f.

[118] Anthony J Langlois, The Politics of Justice and Human Rights: South-East Asia and Universalist Theory, (2001, Cambridge U P).

[119] Nazila Ghanea-Hercock, op. cit.; See also John Witte Jr., *"Introduction*" and Martin E Marty, "*Religious Dimensions of Human Rights*", in John Witte Jr. and Johan D van der Vyver, op. cit., xvii and 1 respectively, and the articles that follow in that publication; Michael J Perry, The Idea of Human Rights: Four Inquiries, (1998, Oxford U P).

[120] John Witte Jr., "*Introduction*", Ibid, xxxiii.

just a question of degree. And with it is a developing consciousness of our human commonality and the many vital common interests that we all share[121]. But unfortunately, the global organisation of the planet in all its many aspects, legal, political, institutional, etc., still lags behind and largely reflects the needs of a previous age. There is a great lack of unity of vision and purpose that is now needed to address the increasingly global nature of the crises that are threatening our global welfare as one human race. These crises can only be fueled by the lack of an effective and universal system of law that is fair to all.

One solution proffered to the many crises facing the world has been that offered by the leaders of the West to try to increase the elements of individual freedom and democracy in other countries. The USA and other Western allies have sought to do this in various ways, including in some cases by military force. While any reasonable attempt to confront tyranny and related abuses must be applauded, the attempts that are being made in this direction have often run into, and are still running into, much opposition. In part, this must be due to the fact the model which the West seeks to export is intimately tied up with secularism - in the idea of secular constitutionalism, in the idea of the secular rule of law, in the secular capitalist system of economics and in other important spheres. This extends to the matter of human rights. The Western concept of human rights is often incorporated in these export items[122], including the legal principle of freedom of religion and belief. This is generally a secular package that would seek to separate religion and law, and render the state as neutral in religious matters[123]. To the Westerner this is seen as obviously beneficial to religionists; it guarantees the rights of the recipients to adopt a particular religion or belief and to practice that religion or to follow and apply those beliefs, with a reduced risk of discrimination and persecution as a result. And it is seen as facilitating orderly, democratic government in any multi-religious national community. In order to apply the rule of law equally to all, there is seen to be a need to have one democratically formulated system

[121] Baha'is understand this to be the consciousness of the "oneness of mankind".
[122] Many people in third world counties continue to see the human right system as a Western imposition, not universal in application. This has been a major influence on the debate on cultural relativism, a debate which is still ongoing. It is also reflected in the debate about whether the human rights system places too much emphasis on individual rights, and not enough emphasis of duties and responsibilities.
[123] This aspect of state neutrality is generally seen as being central to the contemporary Western concept of separation of religion and state, particularly in the USA. This view has been carried over into the international human rights system, with the tendency to find guarantees of the right to religious freedom as also being based on state neutrality. But this is not necessarily the view in certain third world countries.

of secular law, which all are expected to obey, including by way of requiring respect for the legal rights of other religionists.

To many people in third world countries such an approach is not obviously beneficial at all, particular for those who follow religions where there is no separation between religion and law, such as in Islam. They may well see this Western approach as an attack on their religion and on their society[124]. Secularism, to the committed third world religionist, is often seen as an anathema, far worse than having some authoritarian regime where religion and law are closely connected. Secularism in the law in particular is seen as illegitimate, a groundless system that cannot possibly hope to attract widespread respect and obedience. That which the supreme Deity, the only truly sovereign law-giver, gives to humanity as law, is to them obviously superior. Western liberal democracy may be seen as weak and lacking adherence to virtue and the will of the Deity. Religious pluralism can still be accommodated in those third world countries if those in government have the wisdom and strength to allow the different religious communities to apply their own religious laws to their own adherents in a wide range of matters, and where conflict between those communities is contained.

Just as the Western approach has its limitations, so has this religiously-based approach. As has been noted already at the beginning of this paper, those in positions of power in religiously-based communities have frequently abused that power, usually in an arbitrary or capricious way, and not infrequently by way of reprisals and other acts of discrimination against religious and ethnic minorities within their national borders[125]. The lack of democratic checks

[124] There is no doubt, for instance, that one of the exacerbating factors surrounding any intervention by Western countries in Islamic countries has been the degree of ignorance demonstrated in the West of Islam, the resultant bias shown against that religion and the lack of acceptance of it as a valid expression of religious belief. It has resulted in much discussion as to whether there is a clash of civilisations between the so-called Christian West and the Islamic East - see S Huntington, The Clash of Civilisations and the Remaking of World Orders, (1996, Simon & Schuster); also "The Clash of Civilisations", 72 Foreign Affairs, Summer, 22-49, and also "The Coming Clash of Civilizations: Or, the West against the Rest", Chap 17 of C W Kegley Jr and E R Wittkopf (Eds), The Global Agenda: Issues and Perspectives, (6th Ed, 2001, McGraw Hill); B R Barber, "Jihad v McWorld", (March, 1992, Atlantic Monthly); also Jihad v McWorld: How Globalism and Tribalism are Reshaping the World, (1996, Ballentine). The subsequent lower level debate has often tended to concentrate on an "us versus them" approach. For a critique of Huntington, see J O'Hagan, "A 'Clash of Civilizations'?", Chap 10 of G Fry and J O'Hagan, Contending Images of World Politics, (2000, St Martins), 135. The writer does not support any simplistic approach to these issues, for example, that there is a clash of civilisations which must necessarily be fought out to some point of "victory".

[125] There have been many examples of this. All the great religions have had cases of persecution. In the case of the Baha'is in Iran, the persecution has been severe since the birth of that religion in the mid 19th

and balances, plus the weaknesses of the international human rights system and of the global system generally, have often allowed examples of the worst cases of abuse to go unaccounted for. Religion, it seems, is very susceptible to misinterpretation and distortion by humans. The principles of virtue and human brotherhood common to all the great religions can, in the wrong hands, be manipulated and misused. All the great religions of antiquity have been subjected to the human processes of disagreement, division, sectarianism and sometimes internal confrontation and conflict[126], the direct antithesis of the principles upon which they were founded. And when misdirected, the compelling inner forces of spiritual belief and commitment can be very forcibly and outwardly expressed in a detrimental way. That which is the greatest strength of religion can, by the processes of human intervention, become one of its greatest weaknesses. A close connection between law and religion undoubtedly can, and has at times, contributed to many abuses[127].

The intolerance and prejudice that continues to be shown in matters of religion and belief, and the many abuses that are still carried out in the name of religion, especially demand urgent international attention. While the principle of freedom of religion and belief has been a primary pillar of the international human rights regime since at least the Universal Declaration of Human Rights of 1948[128], the practice in many countries has been sadly lacking in meeting that standard. Unfortunately organised religion has often been one of the foremost obstacles to progress in this respect, particularly when expressed in terms of exclusivity, dogmatic bigotry and fanaticism[129]. This is a concern not just in the East. Movements to establish better understandings and commonalities between the great religions have not commanded the widespread support they deserve[130]. The world's religious

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century, and continues today - see Nazila Ghanea, Human Rights, the U N and the Baha'is in Iran, (2002, George Ronald).

[126] The world-wide Baha'i Faith, a separate religion in its own right, asserts that it is an exception in this regard. Many attempts have been made to cause division within its ranks over the last 150 years or so, but all have substantially failed. The Faith remains one unified body throughout the planet, under the one single administrative order the framework of which was established by its Founder.

[127] The fact that this has occurred in European history has already been noted above.

[128] This has been backed up by the United Nations Declaration on Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981. But this is not in the form of a binding international agreement, and the nations of the world have been unable to carry this forward to such an agreement or Convention on this subject, unlike in other areas of human rights such as freedom from racial discrimination, freedom from sex discrimination, etc.

[129] Universal House of Justice, To the World's Religious Leaders, (April 2002 letter).

[130] There have been some notable exceptions in this regard, for example, the interfaith work of Pope Paul II. See also the discussion below as to the World Parliament of Religions.

leaders in the main are lagging behind the positive movement of the age towards globalisation and reconciliation, and are often to be found clinging to the divisions and prejudices of the past, and to the "safe-haven" of dogma and ritual[131]. Religious factors continue to provide one of the primary reasons for conflict and mass violence in the world[132]. There is an incredible lack of will to move organised religion to the forefront of the visionary global exercise now emerging, that of establishing a peaceful and united world, as prophesised to happen down through the ages by the prophets and sages of old. This in itself seriously prejudices the ability to reconnect law and religion in a beneficial manner.

The vast gulf between both these two approaches, in very broad terms here described as the Western and the Eastern approaches if you like, and the weaknesses inherent in each, have often seemed to result in an impasse that appears to be incapable of sensible resolution in the best interests of all. Those adopting each approach may view the other through a paradigm that is quite alien to themselves, making any resolution extremely difficult. Unfortunately, when viewed against these inherited forces of history behind each approach, and particularly if certain perceived material, strategic or political advantages are added to the mix, it has sometimes resulted in the forceful assertion of one particular approach against the other, ending up in mass conflict and violence[133].

And yet the forces of globalisation are pressing upon all humanity, demanding a more effective and just global system, fair to all. There is a common cry for a permanent, peaceful resolution to all such differences[134]. It is a demand that of necessity must address this yawning gulf between the East and the West, that must deal seriously with the misunderstandings, divisions, intolerance, hatreds and prejudices that characterise the present world order, particularly in matters of religion and belief. There is a critical need to establish a new and just world order, operating under one

[131] See discussion below.
[132] Universal House of Justice, To The World's Religious Leaders, op. cit.
[133] Witness the current events in Iraq, for example, involving intervention by a coalition of national forces outside of the United Nations system and on one view in breach of the United Nations Charter. It is not asserted that economic, strategic or political advantages were the sole reason for intervention in Iraq, or even the primary reason. Motivations said to be based on the existence of an objectionable tyrannical rule or on mass human rights abuses are not to be lightly discounted. The true motivations for intervention in Iraq are a matter for history to determine.
[134] Universal House of Justice, The Promise of World Peace, op. cit.

international rule of law[135] that incorporates the principles of equal human rights, human virtue and international "brotherhood"[136]. All these specific features, it is argued, find very strong support in the laws and teachings of all the great religions as properly interpreted and applied. Indeed, it is argued that without that support, the international rule of law, as part of a new world order, cannot be effectively and fairly sustained on a permanent basis[137]. And it is becoming critical for such a global resolution to happen. The forces of prejudice, division and destruction are gaining momentum and are threatening the stability of world order, its peace and security. In this increasingly globalised age, no one can escape these threats. Only the forces of true religion, based on the essential teachings of the Deity common to all the great religions, and free of any human manipulation and distortion, can, in this writer's view, hope to effectively combat them and to establish permanent world peace, justice and order[138]. And the essential principles that are the most important in this regard are those that are of universal application to all humanity[139]. As part of this imperative, it is argued that the connections between law and religion must be reestablished on a world-wide basis.

The Baha'i Approach on the Connection between Law and Religion

Different views have been expressed about whether the Baha'i Faith teaches the need for a separation of religion and state, or whether it is based on a

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[135] There has been much written on the need for a new international rule of law, or the significant enhancement of the existing rule of law. See, for example, Grenville Clark and Louis B Sohn, World Peace through World Law, (1960, Harvard Uni Press); Richard Falk, On Humane Governance, (1995, Polity Press)..

[136] That word is used in a generic sense.

[137] James A R Nafziger states that in a sense, the whole concept and practice of global order presupposes a moral and teleological viewpoint that is essentially religious - "*The Functions of Religion in the International Legal System"*, Chapter 9 of Mark W Janis and Carolyn Evans, op. cit., 159.
Baha'u'llah wrote-

"*Religion is the light of the world, and the progress, achievement, and happiness of man result from obedience to the laws set down in the holy Books*" and

"...the precepts laid down by God constitute the highest means for the maintenance of order in the world and the security of its peoples."

[138]The great theologian, Hans Kung, has declared that there will be no peace among the peoples of the world without peace among the world religions - Christianity and the World Religions, (1986, Doubleday), 443.

[139] The Universal House of Justice stated that-

"*World order can be founded only on the unshakeable consciousness of the oneness of mankind, a spiritual truth which all the human sciences confirm.*" and that

"*Acceptance of the oneness of mankind is the first fundamental prerequisite for reorganization and administration of the world as one country, the home of mankind. Universal acceptance of this spiritual principle is essential to any successful attempt to establish world peace.*" - Promise of World Peace, op. cit.

gradual movement towards the integration of law and state with religion. Thus one writer, writing largely from the historical perspective in which the Baha'i Faith emerged from Islam, and stressing the effect of modernity on Islam and on the Baha'i Faith, takes a distinctively separationist approach somewhat along the lines of the conventional Western model. Although asserting that the Baha'u'llah's views on this were fluid and evolving during his own lifetime, this writer sees the teachings of the Faith as asserting that Baha'i law is to operate alongside but separate from secular law and government[140]. Popular Baha'i belief and literature, on the other hand, generally assumes to the contrary. This approach looks to a future that will witness patterns of gradual integration of law and religion in which Baha'i law may come to predominate[141]. This view eventually looks to a future "*Golden Age*", one which will essentially witness the Kingdom of God on earth.

Roshan Danesh has taken a much more evolutionary approach, stressing the dynamism and fluidity of the Baha'i view in the relationship between secularisation, including the secular law, and Baha'i law and religion. He sees it as being based on the process orientation and dynamic nature of the Faith[142]. Overall he notes the movement towards unity advocated in that Faith, it being a spiritual movement depending on the emerging maturity of the Baha'is, but he does not see the need for its teachings to be contained within any static, black and white formulae, either separationist or integrationist. Danesh notes that the debate about securing the freedom of religion has in the past been buttressed by the doctrine of separation of religion and state, designed to prevent religious oppression. He asserts that this struggle for religious liberty has now been attained. It is now giving way to a new, forward looking and progressive global paradigm.

But where does this leave the connection between law and religion. Danesh accepts that Baha'u'llah, the Prophet/Founder of the Baha'i Faith, is a harsh critic of secularisation, including of the secular law. He cites what he says is Baha'u'llah's expectation that religion must gradually assert a greater influence on the law, but conditional upon religion being the cause of unity[143]. If it is the cause of disunity it should be rejected. Danesh calls for

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[140] Juan R I Cole, op. cit.

[141] Roshan Danesh, The Baha'i World 1999-2000, op. cit., citing Christopher Sprung . "*Baha'i Institutions and Human Governance*", in Law and International Order, (1996, Baha'i Publishing Trust), 151.

[142] Roshan Danesh, op. cit.

[143] Writers other than members of the Baha'i Faith have identified the centrality of unity as the most important criteria in genuine religion - Johan Galtung, "*The Challenge of Religion: Transcendent or*

a relationship between law and religion that is relative, necessarily changing as social meanings, individual orientation and mindset, and understandings of revelation, change.

Danesh's contribution to this debate is indeed valuable, although on one view it may be seen as a more well-developed version of the popular Baha'i view, one leading to the gradual integration of the wider law and the laws of the Baha'i Faith in an evolving way[144]. His view is openly seen as coming from a Baha'i perspective, one which accepts the claims of Baha'u'llah to be the revealer of the Word of God for this age[145]. Others that do not share that perspective and belief may find it much more difficult and his arguments emphasising the particular merit and relevance of the Baha'i Faith and its teachings less convincing. Particularly questionable is any implication that we can now afford to "drop our guard" (so to speak) as far as the threats to freedom of religion and belief are concerned[146]. Abuses by the followers of particular religions continue unabated in the world, a recorded public fact, often directed at religionists of other persuasions and their religious freedom. Any claims that a particular religion is in a special category and has a unique or exclusive contribution to make to world peace, harmony and unity must be strictly and independently tested. The writer once attended a United Nations Conference on Human Rights and got into a friendly but frank conversation with one of those brilliant translators who undertake instant translations for the participants of such multilingual events[147]. The translator was not at all impressed with the writer's claims about the particularly tolerant and inclusive nature of Baha'i belief and practice. He took the view that all religions are the same - they cry foul when they are a minority being persecuted, and adopt the moral "high ground", but if and when they later get to a position of wider influence and authority they start throwing their weight around and gradually change from the persecuted to persecutor. Arguments that are not well constructed[148] or compelling, suggesting that a particular religion was or is in a different category to others in this respect, are not likely to impress the wider audience. The fact that a Divine source is

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immanent, hard or soft?", in Alan Race and Roger Williamson, (Eds.), True to this Earth: Global Challenges and Transforming Faith, (1995, One World), 64.

[144] The writer is not sure that Danesh would himself take this view.

[145] The writer of this paper is also a Baha'i.

[146] This may be implied in Danesh's statement that as (religious) liberty has now been secured, the struggle for liberation which gave rise to the rhetoric of American separationism has reached an end time.

[147] In that case the English and French languages.

[148] The writer hastens to add that he does not put Danesh's arguments in this category. As a Baha'i the writer found them very stimulating and thoughtful.

claimed for a particular religion is not an argument by itself, because it is evident that all the great religions, whether divinely sourced or otherwise, that have taught the virtues in the past have later had those teachings subverted and abused. A broader approach is called for, one that sees relevance in the teachings of all the great religions.

Looking for Answers

Where, then, does one look for the right answers in the search for the right connection between law and religion? This is very difficult matter. If one accepts at least the possibility that human civilisation can be advanced by a closer relationship between human society and its laws on the one hand, and religion and religious laws on the other[149], then the answer may well lie in the nature of religion itself, as revealed in the human condition. Religion as practiced can be a force for good or bad, that is, it always has the potential for abuse. There are no religions that are an exception to this position. This is because religion is practiced by human beings, and they are all fallible, and always will be. It is submitted that it is in the essential or fundamental spiritual nature and teachings of all the great religions, as given by the founders of those religions to humanity, that one must look if a beneficial connection is to be made between religion and the law.

And it would not seem necessary, on this approach, to advocate some future position of full integration between a particular religion or sect and the law, that is, that the laws of society applicable to all people be entirely subsumed within the laws of a particular religion or sect, even as an end goal. The very fact of nominating one particular religion or sect, to be integrated in this manner to the exclusion of other religions, will not necessarily ensure a beneficial result. This approach is bound to lead to alienation among the different religionists and defeat the whole exercise. It is something that can better be left to the unveiling of events in the future, to the Divine Will if you like. Rather, on the basis that it is possible to identify the essentials of religion itself, that is, that which is universal in all the great religions as originally taught, then the answer may lie in those universals and in their application in society. In the writer's view, it would be enormously beneficial if there was to be some sort of a global consensus on these essentials and if the result was to be widely disseminated, accompanied by a widespread voluntary movement to put those essentials into practice in human society. Such a movement should extend to all peoples, their

[149] As indicated in the historical survey undertaken in this paper.

institutions and laws. A much wider allegiance to those essentials would greatly assist in the legitimisation of the law and of legal authority, wherever that authority may reside and whether secular or religious. At the same time, this would tend to reinforce the elements of tolerance, improved understanding and goodwill between different peoples and the abandonment of prejudice[150], factors of the greatest importance in a present divided world.

That there are such universal religious principles, which do not require the abandonment of particular religious affiliations by individuals, there can now be little doubt[151]. The recent adoption at the World Parliament of Religions in Chicago in 1993 of the text of a form of Global Ethic testifies to this fact[152]. This Conference commemorated the centenary[153] of the first World Parliament of Religions, also held in Chicago, in 1893[154]. The Global Ethic adopted in 1993 was subscribed to by representatives of virtually all the great religions as well as by other organisations. It rejected the agony, pain and despair of the present world order, declared its disgust at the misuse of religion, and declared that this appalling situation need not be, stating that the basis of a global ethic already existed. This was to be found in a common set of core binding values, irrevocable standards and fundamental moral attitudes found in the teachings of (all) the religions. For example, the golden rule, common to the teachings of all the great religions. These universals were now located in a situation of global interdependence and the unity of the human family. They required the global application of the virtues in a culture of non-violence, respect, justice and peace. The Global Ethic was said to provide the basis of spiritual renewal that was required to underpin the urgent social, ecological and other needs of humanity. It declared that the earth could not be changed for the better unless the consciousness of individuals was also changed through such a renewal.

This Global Ethic did not specifically deal with the question of a closer connection between law and religion, but it is evident that this naturally

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[150] Including lack of religious prejudice.

[151] It is in fact a teaching of the Baha'i Faith that all the great religions from the one supreme God have certain common spiritual and moral principles, this in turn being the basis for the teaching of the "oneness of religion".

[152] For the text, see Hans Kung and Karl-Josef Kuschel, A Global Ethic: The Declaration of the Parliament of the World's Religions, (1993, Continuum).

[153] Another inter-faith conference celebrating the same centenary was held in Bangalore, India at about the same time, which the writer attended.

[154] That first World Parliament of Religions was a remarkable achievement for its time, and one which then achieved wide publicity. But efforts to carry forward this achievement have been grossly inadequate.

follows from the views expressed in that document. The universal religious principles so identified must, to be consistent with the wider views expressed in that document, underpin all aspects of human society, including in the making and application of its laws.

Regrettably, the call of this Parliament has not received widespread serious attention and consideration. Those involved in the process have done their best to promote the search for a global ethic[155], but since 1993 the document as adopted has not been widely discussed, let alone implemented[156]. It deserves much wider interest and consideration, particularly among the different religious communities. The whole idea of a "global ethic", or agreement on a core set of universal spiritual principles and values, needs much more debate. But it seems that most of the leaders and followers of the various religions of the world have been more concerned with their own religious teachings and practices, their own dogma and ritual if you like, that which makes them distinct rather than that which they have in common. If any religionist happens to perceive a need for a closer connection between law and religion, it most likely will be expressed only in terms of a closer connection between the wider law and the teachings of his or her own religion[157]. And at the same time, there appears to have been a rise in religious fanaticism and intolerance in the world, the direct opposite of that contemplated in the Global Ethic, with disastrous consequences. One only has to consult the daily media reports for evidence of this.

The Universal House of Justice, in its letter to the worlds' religious leaders[158], has identified this conundrum -

> "*Tragically, organized religion, whose very reason for being entails service to the cause of brotherhood and peace, behaves all too frequently as one of the most formidable obstacles in the path; to cite a particular painful fact, it has long lent its credibility to fanaticism."*

The House referred to the 1893 Parliament of Religions -

> "*In 1893, The World's Columbian Exposition surprised even its ambitious organizers by giving birth to the famed "Parliament of Religions", a vision of spiritual and moral consensus that captured the*

[155] For example, Hans Kung, Global Responsibility: In Search of a New World Ethic, (1990, SCM Press).
[156] The writer attempted his own small contribution to the call for a global ethic in "*Toward a Global Ethic: The Baha'i Faith in a Global Society*", in Charles O Lerche (Ed.), Toward the Most Great Justice, (1996, Baha'i Publishing Trust), 171.
[157] It is not hard to find religious literature to this effect, particularly on the net.
[158] Letter of April 2002, op. cit.

popular imagination on all continents and managed to eclipse even the scientific, technological and commercial wonders that the Exposition celebrated."

But the House went on to note the subsequent disappointments that followed 1893 initiatives, stating that they lacked both intellectual coherence and spiritual commitment. Religious leadership, for its part, had generally been found wanting in its ability to reorientate the various religions away from their emphasis on claims of exclusivity to that which seeks for spiritual commonalities. It stated-

"*So fundamental a reorientation religious leadership appears, for the most part, unable to undertake. Other segments of society embrace the implications of the oneness of humankind.....Yet, the greater part of organized religion stands paralyzed at the threshold of the future, gripped by those very dogmas and claims of privileged access to truth that have been responsible for creating some of the most bitter conflicts dividing the earth's inhabitants.*"

It is deeply disappointing that the leaders and other prominent figures in particular religions and sects have not infrequently seen their task as essentially competitive, that is to say, to assert the superiority of their own religion or sect over others. This is a view that does not find support in the teachings of the Founders of the great religions. For example, Jesus chose as his central figure of one story a follower of another religious persuasion to that in which Jesus was brought up in, a Samaritan, to illustrate the Divine virtues, at the same time indicating that it was the Jewish priests and others who passed the injured Jew by on the side of the road[159]. Yet certain religionists twist this to justify discrimination, prejudice and other intolerant and confrontationist attitudes and practices, in the assumption that this is of benefit to their own religion and to themselves as members of it. In the writer's view, this is false religion. Some would call it religion becoming "evil"[160]. It may well stem from some lack of inner spirituality and faith on

[159] New Testament, Gospel of St Luke, Chapter 10: 30-37. This is a topic in itself and deserves much more analysis, but space does not permit it at this time.

[160] Charles Kimball, When Religion Becomes Evil, (2002, Harper Collins), where the author argues that when religious people become violent and destructive, when they cause suffering among their neighbours, then you can be sure that the religion has been corrupted and reform is desperately needed. Note the debate in Islam as to whether violence is every justifiable, the "jihad" question, in the promotion or protection of that Faith. Some would argue that the real "jihad" is the inner spiritual battle within each individual, the fight to subdue the ego or insistent self. One of the Hadith recites Muhammad as saying:

"*The most excellent Jihad is that for the conquest of self*".

the part of the perpetrator, or from some personal interest or prejudice, or from some other source. But it does not stem from the elevated, noble teachings brought to humanity by the founders of the great religions, those elements that alone can lead to a higher civilisation. It is an attitude and practice that lies at the core of much of the trouble and conflict in the world. It has also been a principal factor in the widespread rejection of all religion and the growth of secularism in society, including in its laws. The purveyors of this attitude and practice have let the cause of true religion down and have much to answer for.

The Universal House of Justice has called for a renewed commitment to the spiritual principles and values common to all the great religions. In doing so, it clearly can be taken as having totally rejected the secular approach, one that at worst would declare all religion as being false and worthless, or on a lesser scale would confine religion to the private sphere, of no relevance to society, its institutions and laws. On the contrary, the House is affirming the essential nature of religion, properly interpreted and applied, and its indispensability to ordered human society. The human being is seen first and foremost as a spiritual being, and until this aspect of human nature is seriously addressed, both individually and collectively, then there are no effective and lasting solutions to the crises of this age. Only by a concerted global application of these common spiritual principles and values is permanent world peace and prosperity seen as being possible.

This view of the great importance of religion in human affairs, when applied to the organs of society and its laws, does not require the adoption of a fully integrationist approach between law and any particular religion. At the same time, it does not require the wholesale dismantling of doctrines of separation of religion and state[161], nor other current legal/institutional protections designed to restrict opportunities for abuse in the name of religion. The adoption and promotion of universal spiritual principles and values is something that can be undertaken without any discrimination for or against any particular religion or sect of that religion.

In fact, in can be argued that a partial start to this process has already been made in the documentation already incorporated into the international human rights system, even though that documentation is not specifically and

[161] Except perhaps in the most severe form of that doctrine, which would outlaw any public reference to any religion or to religions generally in favour of a completely secular approach.

expressly sourced in religion and religious principles and values[162]. However it is clear that the international human rights system is no substitute for the universal principles and values to be found in all the great religions. Human rights express merely the irreducible minimum standards of the basic or fundamental rights of humanity, not the very highest and most noble aspirations of humanity in all its aspects- material, intellectual and spiritual. And written codes of human rights in legal form are in any event a fairly crude instrument to address a much more complex human societal issue[163]. This task of implementing in the global society the highest universal standards found in the great religions is only just beginning, and much more work and effort are required.

The suggested adoption and promotion of these universal principles and values in some form of global ethic would almost certainly be an ongoing, lengthy process, much in the manner indicated by Danesh, one in which existing doctrines and practices could be carefully scrutinised, consulted upon and where found wanting changed as the evolving circumstances required. It would be totally unrealistic to expect that a change from the prevailing Western secular approach, or even from some third world approach that emphasises one particular religion to the exclusion of others, could be accomplished in a short space of time. And in any event it may not be desirable. A process-orientated, gradualist approach would seem to have much more merit, one that emphasises the global perspective and the need for constructive dialogue, leading to world unity and peace.

This suggestion is also completely compatible with the promotion, in law and in other ways, of the human right to freedom of religion and belief[164].

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[162] Thus article 1 of the Universal Declaration of Human Rights recites that -

"*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*"

Increasingly many of the various religions of the world are supporting international human rights and are finding commonalities between them and their own teachings, although at least one writer continues to see a conflict between the two - Juan R I Cole, The Universal Declaration of Human Rights and the Baha'i Scriptures, (April 1999) Vol 3 No 2 Occasional Papers in Shaykhi, Babi and Baha'i Studies; See also Henry J Steiner and Philip Alston, op. cit., 445 et seq.: Professor Suheil Badi Bushrui, "*The Spiritual Foundation of Human Rights: A Baha'i Perspective*", (1997) Keynote address, Association for Baha'i Studies 21st Annual Conference, University of Maryland, USA.

[163] Charles Sampford, "*The Four Dimensions of Rights*", Chapter 4 of Rethinking Human Rights, (1997, Federation Press), 50 et seq.

[164] This particular right may have already reached the legal status of a peremptory norm of international law, not capable of being overridden by any international action. Unfortunately, the absurdity of the present world order is illustrated by the fact that such peremptory norms generally effect no legal restraint in national domestic law unless adopted by or incorporated into that national law by a voluntary national act.

Indeed, the writer believes that such a right should be incorporated into international law in a universally enforceable way though a binding international agreement[165], with effective enforcement mechanisms applicable to all nation-states and peoples. These mechanisms could perhaps include a new international human rights court, with world-wide compulsory jurisdiction, applying the relevant international law on an impartial, open and legally justifiable basis[166]. It is clear that there is an urgent need to stamp out the worst excesses and abuses carried out in the name of particular religions wherever they occur in the world, and the international community bears a heavy responsibility in this regard. The enhancement of international law in this respect could only be beneficial to global society, although it is not advocated as a substitute for the adoption and promotion of a new global ethic. Rather, the added legal protection so given to religious freedom could be a vital factor in any proposal to promote such a religiously-based global ethic, which can only be successfully advanced by widespread informed consultation and voluntary acceptance.

But it is clear that the adoption and promotion of such a religiously-based universal global ethic must be pursued with vigour and determination to have any chance of success. It is a task of particular concern to the present religious leaders of the world, as they are in the position of greatest influence in this regard. There are already some promising signs in this respect, but much more needs to be done to convince a skeptical and prejudiced world. The task is to convince people that religion, in the universal sense spoken of, lies at the core of the human condition, and must be seriously and earnestly taken into account in every aspect of human society. And ipso facto this must include those aspects of society concerned with the law. The holistic application of all elements of the human condition, physical, intellectual and spiritual, to the healing of the many ills now affecting the whole body of humanity, can be expected to reap a great and beneficial harvest for the future.

> "*Regard ye the world as a man's body, which is afflicted with divers ailments, and the recovery of which dependeth upon the harmonizing*

[165] There is no international agreement dealing specifically with this aspect of human rights at present.
[166] A useful start has already been made in this direction with the various regional human rights courts and with the commencement of the International Criminal Court.

of all of its component elements. Gather ye around that which We have prescribed unto you, and walk not in the ways of such as create dissension. Meditate on the world and the state of its people."

(Baha'u'llah)[167]

[167] Epistle to the Son of the Wolf, (1976, Baha'i Publishing Trust), 55-56.