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## Report of Working Group #2

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## REPORT OF WORKING GROUP #2

*Jeanmarie K. Grubert*

The Agenda created by Working Group 2 essentially attempts to address: Religious Perspectives on the Rule of Law. Professor Abdullahi An-Na'im's lead paper asked Group 2 to consider how to provide moral content to the Rule of Law in a religiously plural society without imposing the moral values of one religious tradition on members of a different faith. Group 2 was instructed to create a program for schools and the Bar to likewise confront this issue. The published agenda, however, does not entirely capture the discussion concerning many of the difficult questions which Group 2 attempted to resolve in the course of creating such a program. This report attempts to provide some fraction of the discussion which led to the finished Agenda.

Group 2 first attempted to define the "Rule of Law" as a necessary precursor to discussing its relationship to religion. The inquiry resulted in four possible views of the "Rule of Law" without a clear resolution. First, it was proposed that the Rule of Law may simply be the positive laws which bind us. Second, the Rule of Law may be a particular set of substantive values. Third, the Rule of Law may be viewed as a set of non-substantive values about law itself—the Jurisprudential value of having a set of rules to guide behavior, as opposed to a system of personal connections for example. Fourth, from a political theory perspective, the Rule of Law may embody notions of democracy or equality—or at least the idea that all similar cases should be treated similarly. In discussing this last view of the Rule of law, however, it was noted that in certain legal traditions, equality is not really a concern—the law is not applied equally to all people. Thus, it was suggested that the Rule of Law may vary in different legal traditions.

Group 2 also considered whether the moral content of the law makes the Rule of Law or whether it is the process by which the law is enacted which creates the Rule of Law. It was suggested that certain laws may be very clear to follow but morally abhorrent, such as the Fugitive Slave Act or the law of Nazi Germany. Thus, some argued that the moral content of the law should determine whether the Rule of Law exists. For example, the Nazi law may be attacked on the basis that it lacked moral content. There may be some overlap between the moral content and the process formulations of the Rule of Law, however. For example, it was noted that legal theorists in the Nazi era rejected the Nazi Rule of Law because Germany could not have a valid Rule of Law where the only basis for the law was the Rule of the Fuhrer.

In addition, Group 2 contemplated whether the law of the United States is morally neutral. Although it was recognized that the U.S.

system is far removed from systems such as the Islamic system—where there is no attempt to separate religious and secular law—it was argued that the United States is really a Christian state and was set up as such. If that contention is accurate, the Establishment Clause would function to protect Christianity if Christianity provided the moral content of the Rule of Law in the United States.

In addition, it was suggested that there may be a higher morality than the Rule of Law—this is contingent, however, on which definition of the “Rule of Law” one adopts. For instance, judges sometimes choose not to follow a positive law in order to have a seemingly more equitable resolution to a case.

Finally, Group 2 compared the legal structures of various countries and the degree of separation between church and state in these differing nations. For example, it was explained that in India, an accused is governed by his or her personal religious law rather than by some general body of law applicable to all. Thus, all attorneys must learn the personal law of several religious faiths.