

Religion, Legitimacy and the Law: Shari'a, Democracy and Human Rights

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Introduction/Abstract

Religion, legitimacy and the law have had a long and intimate relationship. Religion gave birth to the rule of law in ancient theocracies and continues to provide standards of legitimacy—that is, what is right—for believers in modern democracies. Legitimacy includes both voluntary standards of morality and coercive laws, and making that distinction is critical to the fundamental freedoms of religion and speech.

Today, political upheavals in the Middle East and Africa have made religion and the rule of law front page news. Whether Muslim nations now in political transition choose democracy, theocracy, or a hybrid form of democracy with Shari'a as the rule of law, will have a major impact on geopolitics and US national security interests.

Over 3,500 years ago Moses introduced religious law and theocracy to the ancient Hebrews, and 1,500 years later Jesus came to emphasize the principle of love over law. Then 600 years later, Muhammad restored the Mosaic model of holy law and theocracy and led religious conquests similar to those of Joshua, the successor to Moses. The Enlightenment dawned 1,000 years later, and its emphasis on reason and advances in knowledge transformed religion and produced libertarian democracy and human rights in the West, but it had little effect on Muslim cultures in the East.

Religion continues to shape the standards of legitimacy that represent our cultural norms. But just as religion shapes culture, so culture shapes religion, and that is evident in the progressive evolution of religions in the West compared with Islam in the East. Today religious conflict is not so much over theological differences as it is over dynamic social, political and economic issues and conflicting concepts of legitimacy.

Globalization promises continued changes in both culture and religion, and while it is clear that American exceptionalism has failed as a paradigm for US foreign policy, the ideals of democracy and libertarian human rights should not be abandoned. While the US cannot reshape Islamic cultures into Western democracies, it should support Muslim leaders who are trying to make Islamic law compatible with democracy and libertarian human rights, beginning with the elimination of the crimes of apostasy and blasphemy and providing women equality under the law.

The legitimacy of these issues is being debated by Muslim scholars who are seeking to define justice in the modern era by balancing the individual freedoms of the Enlightenment with the divine commands of the Qur'an. Westerners have a related challenge to balance the individual freedoms of libertarian democracy with the collective responsibility to provide for the common good, which is a requirement of justice made clear in Judaism, Christianity and Islam.

True peace through justice requires that governments balance the protection of individual rights with providing for the common good. That requires a blending of the human rights of the Enlightenment with the ancient commands of scripture to care for the poor and needy. Balancing individual rights with our obligations to others is a challenge, but it is possible if Jews, Christians and Muslims make *a common word* of love for God and their neighbors—even their unbelieving neighbors—the guiding principle for their standards of legitimacy in both faith and politics.

The Role of Religion in Democracy, Human Rights and the Rule of Law

When Patrick Henry proclaimed, “Give me liberty or give me death!” he captured the libertarian spirit of the American Revolution, a spirit that motivated the Declaration of Independence and the Bill of Rights in the US Constitution. It made the protection of the freedoms of religion, assembly and expression first among the civil or human rights that are at the foundation of the rule of law.

The revolutions born of the Arab Spring in the Middle East have resonated with similar demands for freedom. Crowds gathered in the public squares of Tunisia, Egypt, Libya, Yemen, Bahrain and Syria demanded freedom from authoritarian rule, but the role of religion in the Middle East has been quite different from that in Western politics. In the Middle East and Africa extremist religion has often had a major political and social role, so that democracy has created a tyranny of the religious majority.

Freedom and the rule of law are opposite sides of the same coin. Laws by necessity limit liberty, but laws are also necessary to protect liberty. While democracies begin with freedom they can produce a tyranny of the majority without human rights to protect minorities. That’s why human rights must be at the foundation of the rule of law.

Religion has a symbiotic relationship with liberty and law. Religion is the source of those standards of legitimacy that define voluntary behavioral norms as well as the coercive standards of law that represent the minimal standards of acceptable behavior. Behavioral standards and the relationship between religion, liberty and law can differ dramatically in Western and Eastern cultures. In the West religion plays a supporting role for libertarian democracy and the rule of secular law, while in the East Islamic law, or Shari’a, often restricts democracy and individual freedom.

In libertarian democracies government is based on a social contract with laws made, interpreted and enforced by officials who are accountable to the public. In Muslim theocracies such as Saudi Arabia and Iran, Shari’a is an authoritarian rule of law based on God’s law as defined in the Qur’an and interpreted by Islamist jurists. In its purest form Shari’a provides unyielding and comprehensive laws that demand supremacy over popular preferences, thus precluding libertarian concepts of democracy and human rights.

But Shari’a is seldom found in its purest form; Saudi Arabia and Iran are the exception, not the rule. Muslim countries like Indonesia and Turkey have demonstrated that Shari’a can coexist with democratic institutions and human rights. But it is an uneasy relationship, and the jury is out on the role of Shari’a in the Middle East and Africa—and even in Iraq and Afghanistan, where democracy, human rights and the rule of law have been major US strategic objectives but have yet to be achieved.¹

Emerging Muslim democracies are not likely to promote Islamist terrorism, but if and when Shari’a becomes the rule of law it can stifle democracy and human rights in Muslim nations. And if the Arab Spring is any indication of the future, Shari’a will indeed shape legitimacy, law and politics in emerging Muslim democracies in the Middle East and Africa so that the role of Shari’a is critically important to US foreign policy.

The conflicts between Islamic and Western concepts of democracy, human rights and the rule of law are more a factor of cultural than religious differences. The tribal cultures of the Middle East and Africa have little experience with Western libertarian values, and current democratic upheavals seem motivated more by a desire to overthrow oppressive regimes than to embrace secular Western libertarian values.

This is in contrast to the libertarian ideals that motivated the US Revolution and were articulated in the Declaration of Independence. The idea of sacrificing individual liberty to unyielding and comprehensive holy laws interpreted and administered by religious officials is anathema in Western democracies, but it has widespread support in those Muslim nations now experiencing democratic upheavals in the Middle East and Africa. And the fear that Shari'a will spread and threaten US security interests around the world has generated suspicion and hostility toward Islam as a whole.

Blasphemy and apostasy laws are an example. They are prevalent in Muslim countries where Shari'a is the rule of law and criminalize nonconforming religious beliefs so there can be no real freedom of religion or expression. But such laws are not unique to Islam. Blasphemy was once a crime in Puritan America.²

Today blasphemy is no longer a crime in the US and the freedoms of religion and expression reign supreme, but the influence of religion on US law remains evident. In South Carolina so-called Blue Laws that were enacted to protect the sanctity of the Sabbath continue to restrict retail sales on Sunday; but the repeal of most of the Blue Laws indicates how secular cultural preferences and democratic processes have mitigated the effect of religious traditions on US laws.

God's Law or Man's Law? A Question of Sovereignty

Sovereignty is about ultimate power, and until the Treaty of Westphalia in 1648 no one questioned the ultimate power of God to govern and make laws, and kings claimed the divine right to rule. The legal concepts of national sovereignty and the sovereignty of man in matters of governance were introduced by Hugo Grotius in the late 17th century and then developed by Enlightenment thinkers such as John Locke and Thomas Jefferson. Their libertarian theories were truly radical since there had been no real distinction made between religion and politics before 1700.³

The distinction between religion and politics is now fundamental in Western democracies, where the symbiotic relationship between religion and dynamic secular values shapes politics and the rule of law. The distinction between religion and politics remains ambiguous in Islamic cultures, and even in America there remains an uneasy relationship between God's law and man's law that is evident in the political processes through which laws are made, interpreted and enforced. This requires the pervasive role of religion in politics to be held in check by constitutional civil rights.

The role of God's law in the US has become more subtle since blasphemy and most Blue Laws have been repealed, but it remains significant. The US is a nation of religious people who believe in a higher law than man's law that mandates *liberty in law*, a belief reflected in the lyrics of *America the Beautiful: America! America! God mend thine every flaw. Confirm thy soul in self control, thy liberty in law.*⁴

But liberty in law in the US can be threatened by religious fundamentalism that is common to both Christianity and Islam. Many fundamentalist believers are convinced that God condemns those who do not share their religion and are suspicious and even hostile to those of other religions. Like extremist Muslims, many Christians in the US believe that God condemns to hell all those who do not share their religious beliefs, as evidenced by the strong public reaction to a noted evangelical who questioned that idea.⁵

Such religious exclusivism is bad theology and produces bad law, not to mention religious prejudice, hatred and even violence. But there is a legitimate way for believers

to assert the supremacy of God's law, or morality, over man's law without violating the integrity of the secular rule of law. Dr. Martin Luther King demonstrated the power of peaceful civil disobedience when he intentionally violated discriminatory *separate but equal* laws in the South and willingly submitted to arrest and incarceration. In this way he asserted the moral supremacy of God's law—or God's will—over man's secular law, and reminded Americans of the meaning of *equal justice under law*. Dr. King relied on the moral power of his civil disobedience to change immoral laws.

Civil disobedience will not work in Islamist theocracies where God's laws are considered infallible, but in Muslim democracies like Turkey and Indonesia where Shari'a is a part of a secular rule of law that recognizes the sovereignty of man, the morality of laws can be challenged by democratic processes and even civil disobedience.

Legitimacy, Free Will and Reason, and the Backlash of Religious Fundamentalism

Religion undermines *liberty in law* whenever believers try to impose their beliefs on others. Religious standards of legitimacy include both voluntary moral standards and mandatory laws, and most Jews and Christians consider their religious standards to be voluntary moral standards that are subordinate to human rights and secular law; and most Muslims who have assimilated to Western libertarian democracies also share that belief.⁶

While most Jews, Christians and Muslims in Western libertarian democracies embrace the freedoms of religion and expression, there remain many religious fundamentalists who believe their religion is the source of God's perfect law and seek to impose their standards of legitimacy on others. There can be no freedom of religion and expression when a religious majority uses apostasy and blasphemy laws to outlaw religious dissent, as in Islamic democracies like Pakistan and Egypt.

In libertarian democracies believers can assert the moral supremacy of God's law without undermining human rights and the secular rule of law through democratic processes, and when that doesn't work, believers can resort to peaceful civil disobedience to assert the moral supremacy of God's law over man's law. Dr. Martin Luther King did just that in the Jim Crow South, and his actions demonstrated both the moral strength of the Christian religion and concepts of justice under the secular rule of law.

Free will is a theological concept in Judaism, Christianity and Islam that is closely related to political freedom and human rights. Free will is esoteric in defining the relationship between the believer and God (grace and salvation), but exoteric in defining human relationships. It acknowledges the freedom to accept or reject any religious belief and leaves judgment on such choices to God, not to man's law. All religions acknowledge that a free and voluntary will is necessary to produce true faith.⁷

The Enlightenment brought the concept of free will into the realm of politics. It challenged the infallibility of religious truths with scientific discoveries and *reason*. Before the 17th century reason was primarily deductive and based on divine revelation, but new discoveries challenged divine revelation as the source of all knowledge, and inductive reason challenged the divine right to rule with freedom and democracy. The libertarian ideals of the Enlightenment—democracy, human rights and the secular rule of law—were incorporated in the Declaration of Independence and the Bill of Rights in the US Constitution, and most religions in the West have since conformed to the libertarian ideals of the Enlightenment while those ideals have made few inroads in the Islamic East.

The Enlightenment opened the door to progress and modernity in the West, but it created a religious backlash among believers who felt threatened by new discoveries and reason. Religious fundamentalists have since defended their religious doctrines against the threat of change with inerrant and infallible holy books that are the source of divine revelation, holy laws and immutable truths that defy advances in knowledge and reason.

Islamists are fundamentalist Muslims who embrace Shari'a in its purist form, and Salafists are the most extreme of Islamists who defend the traditions of their faith against the incursions of reason, progress and modernity with an inerrant and infallible Qur'an and a comprehensive and immutable Shari'a. Fundamentalist Jews and Christians are much like Islamists, with the Bible their source of immutable truths and holy laws.

All religious fundamentalism conflicts with the progressive ideals of democracy, human rights and the secular rule of law, but militant Islamists, or jihadists, go beyond other fundamentalists using violence to promote their views. Moderate Muslims are in the majority in the US but seem to be a minority in the Middle East and Africa. Even so, there is a battle of legitimacy within Islam that will ultimately define it as a religion of peace and reconciliation or one of coercion, violence and oppression.⁸

The nature and role of Shari'a is at the heart of this battle. The main issue between Islamist fundamentalists and progressive moderates is whether Shari'a is considered an unyielding code of divine law or moral principles that can be adapted to modern times. Islam will not be compatible with progress and modernity until most Muslims consider Shari'a to be a voluntary moral code of legitimacy rather than of coercive law, and one that can be conformed with the requirements of democracy, human rights and the secular rule of law in much the same way that most Jews have reconciled the ancient Mosaic laws of the Torah with the ideals of libertarian democracy.⁹

Moses, Jesus and Muhammad and a Common Word of Faith

Moses brought God's law and theocracy to the ancient Jews 3,500 years ago, and 1,500 years later a Jew named Jesus asserted the primacy of God's *love over law*. Then 600 years later Muhammad restored and supplemented Mosaic Law as God's immutable law with the Qur'an. It would be another 1,000 years before the Enlightenment would provide a philosophical foundation for the sovereignty of man over that of God, and those libertarian concepts of democracy, human rights and the secular rule of law are consistent with *the greatest commandment* to love God and neighbor, and the Apostle Paul affirmed the love of one's neighbor to be the fulfillment of God's law.¹⁰

A distinguished group of Muslim clerics and scholars have proposed that the love of God and neighbor is a *common word* of faith for Jews, Christians and Muslims alike.¹¹ That offer of religious reconciliation provides hope that through enlightened leadership and interfaith cooperation the love of one's *unbelieving* neighbor will fulfill and reform Islamic law just as Jesus and Paul asserted that it fulfilled the Law of Moses, enabling Islam, like modern Judaism and Christianity, to become predominately a religion of peace and reconciliation compatible with democracy, human rights and the rule of law.

The history of Judaism, Christianity and Islam reveals significant commonalities despite their many differences. Moses established a Hebrew theocracy with holy laws remarkably similar to those of Shari'a, evidence of their common Semitic origin. Both Judaism and Islam are deontological religions based on sacrosanct religious rules and rituals, while Christianity is a teleological religion based on the principle of sacrificial

love taught and exemplified by Jesus. Both Judaism and Islam accept Jesus as a prophet, so that they can accept his teachings as God's word. Of those teachings, the primacy of loving one's neighbor and of love over holy law are needed to support the progressive ideals of liberty, democracy, human rights and the secular rule of law.

In contrast to Jesus, Moses and Muhammad created theocracies ruled by God's law for practical reasons, if not by divine inspiration. Moses and Muhammad were both political and religious leaders who had to be law-givers to prevent anarchy, and in those ancient times laws needed divine sanction to be obeyed. Circumstances were different for Jesus in 1st Century Palestine, where the Roman Empire governed and dictated the law. Muhammad was subject to tribal rule in Mecca; but when he left Mecca for Medina, he, like Moses, had to provide law and order for his people in a lawless desert.

Competing tribes in the lawless Arabian desert forced Muhammad to be both a political leader and a warrior, combining the traits of both Moses and Joshua. But to his credit Muhammad never advocated a policy similar to *the ban* found in Mosaic Law and implemented by Joshua at Jericho. The ban mandated the slaughter of all non-Hebrew men, women and children in the Promised Land, and would become a precedent for ethnic cleansing in the name of God, as in the Balkans during the 1990's.¹²

It was a practical necessity for Moses and Muhammad to assert the divine authority of God's law to support their political authority in their ancient theocracies, but that was not the case for Jesus, who lived under Roman rule. The political and cultural situation for 1st century Palestinian Jews under Roman rule was analogous to Muslims in Mecca in the 7th century and to Muslims in Western democracies today. They were religious minorities who could not assert their own rule of law.

Even though Roman law superseded Jewish law and authority during the time of Jesus, the Romans collaborated with Jewish leaders to help control the often unruly Jews. But the relationship was tenuous at best, with Jewish zealots constantly seeking ways to overthrow Roman rule and restore the power and glory of ancient Israel.

Around 66CE Jewish zealots initiated an uprising that provided a short period of freedom from Roman rule, but in 70CE Roman legions ousted the upstart Jewish regime with brutal force and destroyed Jerusalem and the temple, forcing Jews to flee to all parts of the ancient world. It would not be until 1948 that Jews would once again rule Israel, and since then Jerusalem has remained a crucible of religious conflict.

If history provides a preview of the future, the timing of these events may tell us something. Jesus came 1,500 years after Moses brought the Law to the Hebrews, and he asserted the supremacy of God's love over Mosaic Law. It has been almost 1,500 years since Muhammad brought Islamic law to Muslims in the Arabian desert. Could it be time for that ancient law to be fulfilled by libertarian democracy and human rights?

Muslim scholars have affirmed the love for God and one's unbelieving neighbor to be *a common word* of faith for Jews, Christians and Muslims alike. Both parts of the greatest commandment are from the Hebrew Bible and they summarize the teachings of Moses, Jesus and Muhammad. That common word of love can fulfill Shari'a today just as it fulfilled Mosaic Law 2,000 years ago. But that word of peace and reconciliation has been opposed by Jewish, Christian and Islamist fundamentalists who promote religious exclusivism, and Islamist jihadists continue to promote violence in the name of God. It brings to mind the folk song of Peter, Paul and Mary: *When will we ever learn? The answer, my friend, is Blowin' in the Wind.*

The answer to the religious hatred and violence that has plagued religion throughout history lies in believers sharing *a common word* of faith in love for God and neighbor. Translated into political terms, love of God and neighbor requires that all religions embrace libertarian democracy, human rights and the secular rule of law. For Muslims, that means interpreting Shari'a to embrace libertarian human rights.

Democracy, Human Rights and the Rule of Law: Where East Meets West

Democracy and libertarian human rights have no precedent in the ancient religions but are modern amalgams of religion, natural law, reason and politics. The purpose of civil or human rights, beginning with the freedoms of religion and speech, is to protect minorities from the tyranny of a majority, and history has shown that there is no tyranny so terrible as a religious tyranny.

Since the Enlightenment liberty and human rights have been an integral part of politics and religion in the West, but not in the East. Only since the 20th century have Eastern cultures embraced individual freedom and human rights, and their priorities have been more about government entitlements than about protection from government oppression.¹³ Even in Western democracies there has been a trend toward more welfare entitlements like social security and health care—even for the unionization of public employees and college football players.¹⁴

Healthy political debate and compromise in the US has given way to gridlock between neo-libertarians like the Tea Party who promote individual freedom to the exclusion of all social welfare programs and social liberals who support welfare programs without regard for their costs and infringement on freedom. These were not issues 200 years ago when there was little demand for social welfare programs, but modern public expectations require some political compromise between purist neo-libertarians and social welfare advocates, or Western democracy is doomed to fail.¹⁵

The future of democracy in both the East and West depends upon balancing individual freedom with the need to provide for the common good, and the contrasting priorities of human rights reflect a need in the East to emphasize individual rights and in the West to provide for the common good. The fundamental freedoms of religion and speech and equal rights for women should have a high priority not only as individual rights but also as necessary for the common good. And while Muslims cite the Qur'anic mandate of no compulsion in religion, where apostasy and blasphemy are crimes under Shari'a that compulsion exists and there can be no freedom of religion or speech.¹⁶

In Western democracies, secular constitutions enumerate those civil rights that protect fundamental freedoms against government encroachment, and in Islamic nations Shari'a functions much like a constitution, prohibiting any secular law that conflicts with it. For example, the constitutions of Iraq and Afghanistan provide that all secular laws must be in conformity with Shari'a. But unlike Western constitutions, there is no written Shari'a to delineate the limits of secular law, and Muslim religious jurists define and interpret Shari'a rather than secular jurists who are accountable to the public.

The freedoms of religion and speech are considered basic human rights in both the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966.¹⁷ Muslim nations are parties to both the Declaration and Covenant, but because Shari'a defines and limits Islamic human rights they can differ dramatically from human rights in Western libertarian democracies.

The Preamble to the 1990 Cairo Declaration of Human Rights asserts that human rights are "...an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them as they are divine commands, which are contained in the Revealed Books of Allah..."¹⁸

Libertarian democracy and human rights cannot coexist with an immutable Shari'a that limits the freedoms of religion and speech and the rights of women and non-Muslims. Shari'a must be considered a voluntary code of moral principles rather than one of coercive laws to conform to principles of libertarian democracy and human rights.

American Exceptionalism and Military Legitimacy

Since the early 20th century *American exceptionalism* has made libertarian democracy and human rights the centerpiece of its foreign policy and has promoted these ideals with a missionary zeal and with little tolerance for diversity. As the ultimate extension of a nation's foreign policy, military operations require public support to achieve their political objectives both at home and in the area of operations. Where Islam is the dominate religion, public support for US political objectives and ideals has been difficult to achieve, and experience in Afghanistan and Iraq has prompted some commentators to conclude that the era of American exceptionalism is over.¹⁹

While Western styles of democracy are not likely in Islamic cultures, we can expect to see theocratic variations of democracy developing in the Middle East and Africa. The Arab Spring has sparked revolutions against authoritarian leaders, and the political vacuums created will be filled by governments with popular backing. As in Egypt, Islamists and authoritarian leaders will compete to fill those political vacuums.

Radical Islam has proven it can gain public support in popular uprisings in Iran, Palestine and Lebanon, and with the growing power of Islamists in political organizations like Hamas, Hizballah, and the Muslim Brotherhood that are competing for political power, they represent new threats to US security interests, and even to the existence of Israel. Turkey and Indonesia have been congenial to Western interests in the past, but even in those Islamic democracies there is growing tension between Islamism and libertarian democracy, human rights and the rule of secular law.

Given these unsettled conditions it is likely that US military personnel will be deployed to protect US security interests in Islamic cultures, but they will likely be a relatively few advisors and trainers rather than a large deployment of conventional combat forces. Lessons in legitimacy have been learned. In such hostile cultural environments US military personnel must be diplomat warriors who can keep a low profile and lead from behind to achieve mission success. And while they must defer to local standards of legitimacy to gain public support, they must also promote fundamental human rights, even when they conflict with local standards.²⁰

Members of the military who have served in Iraq and Afghanistan have a better understanding of Islamic culture than most Americans.²¹ And because US military personnel serve in an authoritarian regime within a libertarian democracy, they can appreciate the lack of fundamental freedoms in authoritarian regimes. They are sworn to support and defend the Constitution with its libertarian civil/human rights, even though the military mission requires them to obey authoritarian rules and regulations that deny US military personnel many of the freedoms of the civilians they protect.²²

The military is a two-edged sword. It is the last bastion of defense for freedom and democracy and also a lethal threat to them. In the US it is a paradox of an armed and authoritarian regime within a libertarian democracy. Pakistan and Egypt provide examples of how the military can subvert democracy and human rights when there is no civilian supremacy or separation of political powers to prevent the concentration of military power. In Turkey and Pakistan there has been continuing conflict between the civilian government and the military²³ and in Egypt the military has once again assumed political power after a short Islamist interlude.²⁴

Despite—or perhaps because of—military interventions in the Middle East there is increasing violence and little real democracy. The theocratic Iranian regime began in 1979 with a popular revolution against an authoritarian Shah who was supported by the US. Saddam Hussein in Iraq and Hosni Mubarak in Egypt opposed the expansion of Iranian power until they were deposed, either by the US or with its support. And in Syria and Iraq the Islamic State, or ISIS, is setting new standards of terror with beheadings and defying the efforts of the US and moderate forces in the region to contain them.

Democracy or Theocracy: Different Strokes for Different Folks

Neither libertarian democracy nor Islamist theocracy is a panacea for the Middle East and Africa. A virtue for some is a vice for others. Most Muslims who have had the opportunity to live in a libertarian democracy prefer its freedoms to an authoritarian theocracy, but those overseas seem to favor the sacred certainties offered by Islamist theocracy and Shari'a over the moral depravity prevalent in libertarian democracies.

It should be noted that those Muslims in the West who prefer democracy to theocracy have not renounced Islam. They have reconciled their faith with their politics through progressive interpretations of the Qur'an and Shari'a.²⁵ Like their Jewish and Christian neighbors, most Muslims in the West have abandoned the immutability of their ancient holy laws and accepted the benefits of knowledge and modern democracy without sacrificing the traditional values of Islam, including the love of God and neighbor. They recognize the moral supremacy of God's law over man's law, but accept the primacy of human rights and democratically made laws as consistent with God's will.

History has proven that without human rights to protect the powerless from the powerful, neither democracy nor theocracy is a legitimate form of government. Democracy is not a practical option where the majority imposes religious law that denies fundamental human rights for minorities. Likewise, Islamic theocracies are only legitimate if they provide the freedoms of religion and expression and the equality of women and non-Muslims under Islamic law. That is a tall order for an Islamic theocracy, but it is possible if Shari'a is interpreted in accordance with *a common word* of love for God and one's unbelieving neighbor.

The legitimacy of a government is not determined by its form but ultimately by how well it protects individual freedoms and provides for the common good. Western democracies have made human/civil rights a priority of their rule of law and Western religions share that priority. It can also be a priority in Muslim nations if *a common word* of love for God and one's unbelieving neighbor is recognized to be a guiding principle of Shari'a, but that will require eliminating the crimes of blasphemy and apostasy and ending discrimination against women and non-Muslims.

That is not likely in the short term. Fundamentalist Islamists see Western democracies as decadent and evil, even as more progressive Muslims have used the traditional concept of *ijtihad* to interpret the Qur'an and Shari'a as compatible with progress and modernity. That is evident at the theological level in *a common word* of faith, and at the political and legal level in interpretations of the Qur'an and Shari'a that embrace the ideals of libertarian democracy, human rights and the secular rule of law.

Differing Scholarly Views of Democracy and Human Rights under Shari'a

Governments that evolve from the political turmoil in the Islamic Middle East and Northern Africa will no doubt incorporate Shari'a in their rule of law. Turkey and Indonesia are long-standing examples of how Muslim democracies can blend Shari'a with human rights and the secular rule of law. But Egypt, Syria, Libya, Yemen and other nations in the region seem to be moving toward a more theocratic model of democracy than that of Turkey or Indonesia. One or more may become a quasi-theocracy presided over by Islamic clerics, as in Iran, or a military regime with a façade of democracy, as in Pakistan and Egypt.

Just how democracy, human rights and secular law evolve in those Muslim nations is dependent on how Shari'a is interpreted as the rule of law; and Muslim scholars are deeply divided on how that might happen.

Generally speaking there are two contrasting models of democracy and human rights: The Western libertarian model that has been shaped by the Enlightenment and emphasizes the protection of individual freedoms against government encroachment, and the Eastern authoritarian model that emphasizes collective needs or the common good of the nation, tribe or the current despot rather than individual rights.²⁶

Neither of these models is a political ideal. Islamic cultural values clash with the Western libertarian model with its emphasis on individual freedom, and the Eastern authoritarian model emphasizes national interests and social welfare to the exclusion of the fundamental freedoms of religion and expression and the equal protection of law for women and non-Muslims.

The Eastern model has been prevalent in Muslim nations since antiquity, and most Islamists favor it since it is more compatible with an immutable Qur'an and Shari'a. That view is reflected in the Cairo Declaration on Human Rights in Islam,²⁷ but there are progressive Muslim scholars who favor a Shari'a more compatible with libertarian democracy and human rights.²⁸ The differing scholarly views of legitimacy and law under Shari'a can be considered according to their differing perspectives of *reason*, *freedom* and *justice*.

As to *reason*, there are two contrasting forms—deductive and inductive reasoning—that provide legitimacy for matters of governance and law. In theology deductive reasoning derives immutable truths and law from divine revelations taken from holy scripture and rejects any knowledge and reason to the contrary. The Hebrew Bible gave Mosaic Law its legitimacy with the ancient Hebrews, while the Church used its Bible as the inerrant and infallible source of God's truth. For Muslims the Qur'an is the immutable word of God, giving the Shari'a absolute authority in matters of governance, law and justice. All of these scriptures emphasize the need for believers to provide for the common good, but none mention either democracy or individual human rights.

Inductive reasoning is not dependent upon divine revelation, but relies on secular knowledge and reason to discover truth. Progressive believers use both forms of reason, complementing truths discovered through human knowledge and reason with the mystical truths of their faith that lie beyond human knowledge. This distinguishes progressive believers from religious fundamentalists who rely entirely on deductive reasoning.

Freedom is mentioned in the holy scriptures, but in a theological or spiritual context rather than a political context. The concepts of freedom, democracy and human rights were not given serious consideration until the Enlightenment of the 17th century, and while the ideals of those libertarian concepts transformed Western cultures and their religions, they had little impact on Eastern Islamic cultures.

Thomas Jefferson was a child of the Enlightenment who incorporated its libertarian ideals in the US Declaration of Independence as the inalienable rights to life, liberty and the pursuit of happiness. Those ideals are preserved in Article Three of the Universal Declaration of Human Rights as the right to life, liberty and the security of persons. Unlike the US Constitution which emphasizes protecting individual freedom from government abuses, Shari'a, like Mosaic Law, emphasizes providing for the common good with no mention of political freedom. The Apostle Paul did note, however, that the love of neighbor fulfilled Mosaic Law and liberated believers from the bondage of holy law, an idea that is congenial to political freedom.²⁹

Justice, like reason and freedom, has a different meaning in libertarian democracies than in Islamic regimes under Shari'a. In libertarian democracies justice requires the protection of fundamental freedoms against government action, while in Islamist regimes justice is the enforcement of God's law under a Shari'a that sanctifies government action as a divine right. This puts the sovereignty of God over the sovereignty of man and precludes democratically made laws and human rights.

The differing concepts of reason, freedom and justice among Muslim scholars as they apply to democracy and human rights may be shaped more by cultural norms than by theology or by the most compelling logic. Muslims in the tribal cultures of the Islamic East favor Shari'a as their rule of law, while Muslims in Western cultures favor libertarian democracy, human rights and the secular rule of law over Shari'a.³⁰ That dichotomy is reflected in the following sampling of scholarly views on Shari'a:

Khaled Abou El Fadl is a law professor at UCLA who is both an Islamic jurist and an American lawyer. He argues forcefully that "...democracy is an appropriate system for Islam because it both expresses the special worth of human beings...and at the same time deprives the state of any pretense of divinity by locating ultimate authority in the hands of the people rather than the ulema (Islamic jurists)."³¹ In reaching his conclusion El Fadl goes beyond deductive reasoning to question the traditional view that God is the sole legislator, noting that achieving justice under Shari'a requires human agency in defining, interpreting and applying Islamic law. He asserts that Shari'a is more a set of "fundamental moral commitments—in particular to human dignity and freedom" than a "codebook of specific regulations."³² El Fadl's views are consistent with Shari'a being a voluntary code of legitimacy rather than an immutable code of coercive laws.

As to matters of justice and mercy, El Fadl says: "In essence, the Qur'an requires a commitment to a moral imperative that is vague but recognizable through intuition, reason and human experience. ...The divine mandate for a Muslim polity is to pursue justice by adhering to the need for mercy."³³ This resonates with Micah 6:8: "He has

showed you , O man, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God.”

El Fadl’s enlightened understanding of human rights, and specifically the freedom of religion and expression, is challenged by a Shari’a that considers religion a necessity and seeks to protect its integrity through the laws of apostasy and blasphemy. El Fadl takes the position that protecting religion requires protecting the freedom of religion.³⁴

El Fadl also questions the traditional view that Shari’a is focused on collective obligations for public welfare to the exclusion of individual rights and its corollary that God’s rights conflict with and supersede human rights, both of which have been used to support authoritarian regimes from democratic movements. He asserts that individual rights are a priority under Shari’a and that any dichotomy between individual and collective rights is “largely anachronistic.”³⁵ El Fadl also discounts any conflict between God’s sovereignty and popular sovereignty as expressed through democratic institutions of law and governance by referring back to the fallibility of Shari’a based on the requirement of human agency in interpretation and application.³⁶

John L. Esposito, a non-Muslim professor of religion and international affairs at Georgetown University, responded affirmatively to El Fadl’s essay by noting how culture shapes religion, and that “...democracy itself has meant different things to different people.”³⁷ Esposito also affirmed Fadl’s distinction between Shari’a as an infallible set of divine principles and its application as coercive law through fallible human agency, and the distinction between duties to God (a matter of faith) and duties to other people (a matter of morality), views consistent with Shari’a being a flexible code of voluntary moral standards rather than a sacred and immutable code of coercive laws.³⁸

Esposito cited Abdurrahman Wahid, the first democratically elected president of Indonesia, on the role of Shari’a in democracy and human rights:

“In contrast to many ‘fundamentalists’, [Wahid] rejects the notion that Islam should form the basis for the nation-state’s political or legal system, which he characterized as a Middle Eastern tradition, alien to Indonesia. Indonesians should apply a moderate, tolerant brand of Islam to their daily lives in a society where ‘a Muslim and a non-Muslim are the same’—a state in which religion and politics are separate....Its cornerstones are free will and the right of all Muslims, both laity and religious scholars (*ulema*), to ‘perpetual reinterpretation’ (*ijtihad*) of the Qur’an and tradition of the Prophet in light of ever changing human situations.”³⁹

M. A. Muqtedar Khan, an assistant professor and director of International Studies and chair of the Department of Political Science at Adrian College, challenges El Fadl’s ideas regarding Shari’a, democracy and human rights, arguing for more freedom in Islam. He criticized El Fadl’s essay by saying, “...instead of concluding with a sketch of Islamic democracy, he imposes Shari’ah-based limitations on democracy.” And Khan goes on to say that “...El Fadl’s arguments suggest that an Islamic democracy is essentially a dictatorship of Muslim jurists” and that “Insisting on the centrality of a fixed Shari’ah is a recipe for authoritarianism. ...In short, the content of law in an Islamic democracy should be a democratic conclusion emerging in a democratic society.”⁴⁰

Khan goes on to say: “Ideas such as the primacy of Shari’ah and God’s sovereignty—which make states accountable to God alone and free them from accountability to the people—undermine freedom and encourage authoritarian states and totalitarian ulema. To establish an Islamic democracy, we must first create a free society in which all Muslims can debate what constitutes Shari’ah. Freedom comes first, and only the faith that is found in freedom has any meaning.”⁴¹

In his reply to Khan, El Fadl criticizes him as being too liberal, saying “...Kahn believes that Shari’ah should be either whatever Muslims wish it to be or subordinated to everything else, including common sense, logic, human experience, social and political aspirations, and the will of the majority.”⁴²

Abdullahi Ahmed An-Na’im is a Professor of Law at Emory University, who, like Kahn, envisions a secular Islamic state with a Shari’a that provides for the freedom of religion and an end to discrimination against women and non-Muslims. An-Na’im rejects Shari’a as coercive law with a radical premise: “...the claim of a so-called Islamic state to coercively enforce Shari’a repudiates the foundational role of Islam in the socialization of children and the sanctification of social institutions and relationships.”⁴³

An-Na’im asserts that Shari’a cannot be codified as state law since it consists of moral obligations of faith rather than of enforceable laws; and like El Fadl, he challenges the mandates of Shari’a as the infallible law of God since those mandates have always been interpreted by human agency.⁴⁴ An-Na’im goes beyond arguing the impracticability of Shari’a as enforceable law and asserts that when Shari’a is enforced it is a form of religious compulsion that violates the Qur’anic prohibition against compulsion in religion.⁴⁵ Like Kahn, An-Na’im asserts that Muslims, like other believers, must have the free will to accept or reject their faith for it to be valid, and this requires that Shari’a be a voluntary moral code of faith rather than an obligatory code of law.⁴⁶

An-Na’im acknowledges that fundamental human rights are lacking in Shari’a, which tolerates apostasy and blasphemy laws as well as discrimination against women and non-Muslims, and he asserts that Shari’a properly understood requires the enforcement of human rights through secular law to achieve God’s justice.⁴⁷ To achieve this end An-Na’im proposes a process of mediation through a form of *ijtihad* enlightened by *civic reason* and affirmed by Muslim *consensus*.⁴⁸

An-Na’im’s rationale of Shari’a as a moral standard of legitimacy rather than of law and its relationship to human rights is based on the principle of reciprocity found in *the golden rule*, and is similar to Saint Paul’s rationale that Mosaic Law was fulfilled through the revelations of Jesus. Paul wrote to the Romans that God’s law had been fulfilled in *the greatest commandment* to love our neighbors as ourselves.⁴⁹ That is a *common word* of faith for Jews, Christians and Muslims alike, and it supports human rights for all people, beginning with the freedoms of religion and expression.

Frank Griffel is professor of Islamic Studies at Yale University. In his introduction to *Islamic Law in the Contemporary Context* he provides an overview of the methodologies of Shari’a and notes its similarities to Mosaic Law, explaining that it includes both legal and moral standards and functions much like a constitution or legal template for secular laws in Muslim nations. He acknowledges the problem of apostasy citing a saying by Muhammad: “Whoever changes his religion, kill him!” But rather than question the legitimacy of apostasy, Griffel points out that it was rarely punished before

the 20th century and has since been erroneously interpreted by Islamists as a law rather than as a moral standard of legitimacy.⁵⁰

Gudrun Kramer is professor of Islamic studies at the Free University of Berlin, and in her essay on *Justice in Modern Islamic Thought* she emphasizes the spirit of Islamic law as governing the interpretation of Shari'a and identifies justice as its supreme value. But unlike El Fadl her concept of Islamic justice favors protecting the collective interest of the state (the public welfare) over individual rights. Kramer asserts that "...justice can be realized by various means, as long as they do not conflict with the immutable elements of divine law", and finds such conflict minimized since divine law is "...hardly ever defined."

Kramer seems to lament the subordinate role of women to men under Shari'a, noting that husbands have a right to beat disobedient wives, but she does not advocate sexual equality. Instead she recommends limiting harsh laws that oppress women and non-Muslims by marginalizing them according to their ancient context. Kramer's traditional views of how reason, freedom and justice relate to Shari'a are in marked contrast to the more liberal views of El Fadl, Esposito, Khan and An-Na'im.⁵¹

Noah Feldman is a Professor of Law at New York University School of Law. In his essay on *Shari'a and Islamic Democracy in the Age of Al-Jazeera* Feldman has profiled Yusuf al-Qaradawi, a prominent Islamic jurist associated with the Muslim Brotherhood who has been influential in Egyptian politics. Qaradawi defies categorization. He has condemned terrorism as a violation of Islamic law but has endorsed suicide bombing in "occupied Palestine" and jihad against the US occupation in Iraq. Qaradawi is not as liberal as El Fadl, but neither is he a rigid Islamist. He is a modernist but not a progressive who advocates democracy, but only because it is not specifically prohibited by Shari'a. His limited democracy would elect leaders but not make laws, since for Qaradawi *God is the only legislator* and Shari'a is the immutable law of God. Like Gudrun Kramer, Qaradawi would limit human rights to the dictates of Shari'a and exempt them from reform through any democratic process.⁵²

Qaradawi is just one voice in Egypt. A more progressive voice is that of Sheik Ali Gomaa, a former Grand Mufti of Egypt. But as Michael Gerson has noted, Sheik Gomaa can hardly be called a liberal. He told Gerson: "The Egyptian people have chosen Islam to be their general framework for governance. The Qur'an and the tradition are what we depend on. They were true 1,400 years ago, they are true today, they will be true tomorrow." Gomaa insists that morality and its sources are absolute, but his focus is on "the intent of Shari'a to foster dignity and other core values," as well as "...a commitment to the public interest." Gerson pointed out that Gomaa has made a number of progressive rulings that recognize women's rights, restrict corporal punishment and forbid terrorism.⁵³ As one of the originators of *a common word*, Sheik Gomaa has said, "It is a personal joy to be able to focus our exchange on the aspect that is most often ignored between us: the principle of a supreme love."⁵⁴ The moral principle of love should be a test to measure the legitimacy of all laws, whether those of God or man, and it is the love for others that provides the moral foundation for human rights.

Seyyed Hossein Nasr is a distinguished Muslim scholar with more traditional views than El Fadl, Esposito, Khan and An-Na'im and who is also a sponsor of *a common word*. He has noted that the concept of Shari'a as God's Law differs from the Catholic perception of canonical law as well as the Christian perception of God's law,

which are more spiritual and ethical than positive law. Nasr considers Shari'a closer to the Jewish idea of *halakhah* than to Christian concepts of divine law; and as to human rights, Nasr asserts that Christians and Muslims "...believe in human rights, but ones that are combined with human responsibility toward God, human society and the natural environment." Like Kramer and Qaradawi, Nasr subordinates libertarian human rights to traditional concepts of responsibility and communitarian interests.⁵⁵

Ibrahim Kalin is a faculty member at the Center for Muslim-Christian understanding at Georgetown University and the official spokesman for *a common word*. In exploring Muslim and Christian responses to the Enlightenment within the context of *a common word*, Kalin notes that "The Enlightenment project took aim at what came to be known as 'institutional religion' in Europe (i.e., the Catholic Church)," and Kalin goes on to quote from an essay by the former Pope Benedict on the merging of Greek thought and Christianity in Europe and the rejection of both by Islam. The Pope's essay was also critical of Islam and Shari'a for failing to separate faith and law, and asserted that Islam maintained "...a more or less archaic system of forms of life governed by civil and penal law...a legal system which fixes it ethnically and culturally and at the same time sets limits to rationality at the point where the Christian synthesis sees the existence of the sphere of reason."⁵⁶

Miroslav Volf is a professor of theology at Yale Divinity School who has argued persuasively that *Allah* is Arabic for the same God worshiped by Jews and Christians. In his support of *a common word*, Volf says that "...the commands of God, or Allah, unite Muslims and Christian much more than they divide them. Properly understood, God does not widen the chasm between Muslims and Christians as Benedict XVI suggested, but bridges it." In accordance with *a common word*, Volf relates God's love with justice: "God loves. God is just. God's love encompasses God's justice."⁵⁷ Volf cites Qur'anic verses that are a Muslim version of *the golden rule*, and asserts "*The common word* sums up the Muslim position: Without love of neighbor there is no true faith in God and no righteousness."⁵⁸

As for Islam and the freedom of religion, Volf argues that apostasy and blasphemy laws under Shari'a violate the principle of love and are a form of compulsion in religion. He cites Augustine and An-Na'im on the principle that faith is a matter of the heart and cannot be coerced, and cites Sheik Gomaa as supporting the right of Muslims to change their religion. Volf summarizes his position with two principles on faith and law: "1. All persons and communities have an equal right to practice their faith (unless they break widely accepted moral law), privately and publicly, without interference by the state. 2. Every person has the right to leave his or her own faith and embrace another."⁵⁹

Nicholas Adams is the Academic Director of the Cambridge Inter-Faith Programme at the University of Cambridge. Adams has explored the philosophical foundation of human rights since the Enlightenment, beginning with Kant, who proposed secular universal and invariant moral rules that were based on "pure" (inductive) reason and unrelated to self-interest, tradition, culture or religion. Hegel sought to balance the Kantian approach with more flexible moral rules that considered social and historical factors—that is, traditional and cultural norms. Adams notes that Christian and Muslim theologians tend to favor the Hegelian over the Kantian approach to morality and law.

In looking at human rights, Adams contrasts the maximalist rules and reason of the Enlightenment with minimalist rules and reason that reflect the pluralism of cultural

norms, and he favors the latter for a “new secular” that would define human rights in varying norms that reflect cultural and religious diversity. That would favor multiple standards of human rights that reflect cultural and religious diversity, but Adams implies that the love of God and neighbor in *a common word* would insure that the different expressions of human rights meet the requirements of justice in a new secular regime.⁶⁰

Harkristuti Harkrisnowo is a Muslim lawyer, professor and Director General for Human Rights in the Indonesian Ministry of Justice. She acknowledges the influence of culture and religion in shaping the law, and puts the issue of human rights in practical perspective noting dichotomies between Western views that emphasize individual rights with universalist (maximalist) application versus the more culturally diverse (minimalist) and collective rights favored in the East. As a lawyer and not a theologian, Harkrisnowo emphasizes the need to distinguish specific and enforceable legal rights from political aspirations: “The difference may not seem great to some theologians, but it is important in practice to the extent legal claims are enforceable in this world, while moral claims perhaps only in the next.”⁶¹

In determining whether Shari’a is in accord with international human rights standards, Harkrisnowo has first hand experience with the island of Aceh, where local provincial law based on Shari’a principles has been implemented, and she is frustrated by the inability to define Shari’a. “The immensely practical problem is whose view of Shari’a the law should control. In fact, the elephant in the room that arguably motivates *a common word* is the cacophony in Islam between competing viewpoints of traditionalist, modernist and fundamentalist Islam.” Harkrisnowo notes that there are many different Islams or interpretations of Islam in Indonesia, and she leaves it to theologians to resolve conflicting viewpoints on Shari’a and *ijtihad*. She sees it as a lawyer’s dilemma left to theologians to resolve, with little hope of finding consensus:

“Some Indonesian Muslims are textualists who embrace the Qur’an very narrowly, in a manner somewhat reminiscent of those Christians who believe in a literal interpretation of the Bible. ...Others believe Shari’a requires only an ethical basis, which can be satisfied for some by an all-things-considered judgment, and for others by well-considered secular law. Whomever’s viewpoint prevails makes a real and practical difference for anyone trying to implement the rule of law in the Islamic world.”⁶²

Despite the uncertainty of Shari’a dictates, in Indonesia human rights are defined in a constitutional bill of rights. But the freedoms of religion and expression in Indonesia are fundamentally different than those in the US. There is no freedom to believe in any religion or no religion, only the freedom to choose from a menu of religions approved by the state. Indonesians are required to believe in one God, understood as encompassing both the Christian Trinity and the Muslim Allah. Disputes involving blasphemy and heresy among different sects of Muslims arise because the law regulates religion. It is a mix of politics, law and religion that is common in the East but not in the West.⁶³

The above sampling of Islamic scholars reveals a broad divergence of opinion on the how Shari’a relates to democracy and human rights, and whether its mandates are considered voluntary moral standards of faith or immutable and coercive laws that are beyond the reach of reason and interpretation to meet changing times.

The scholarly views echo debates in the evolution of Judaism and Christianity, from the days when heresy, blasphemy and apostasy laws prevailed in theocratic and authoritarian regimes up to modern times when religions embraced libertarian democracy with the freedoms of religion, expression and the equal protection of the law for women and unbelievers. As for Islam, it is still too early to tell which views will prevail.

Shari'a as a Threat to Democracy and Human Rights

In Islamic cultures Shari'a remains the rule of law either as a guiding principle or as positive law and it defines the limits of democracy and human rights. While most Muslim scholars now accept limited democracy, the freedoms of religion and expression are restricted by blasphemy and apostasy laws and there remains discrimination against women and non-Muslims.

In Turkey and Tunisia culturally conservative parties founded on Islamic principles have rejected the name "Islamist" to support what they consider a more democratic and tolerant vision. But there has been a backlash and the consideration of traditional Islamist principles such as interest-free banking, religious taxes and religious censorship. The debates no longer seem to be between Islamists and secularists but between the Islamists themselves, pitting the puritanical against the more progressive. "Is democracy the voice of the majority?" asked Mohammed Nadi, a 26-year-old student at a recent Salafist protest in Cairo. "We as Islamists are the majority. Why do they want to impose on us the views of the minorities — the liberals and the secularists? That's all I want to know."⁶⁴

That question reflects the threat of Islamic democracy to libertarian human rights. In nations where a majority of Muslims demand religious purity, democracy can produce a tyranny of the majority that denies the freedom of religion and expression to minorities. This has been evident in Egypt where there has been continued violence between Muslims and minority Coptic Christians. The Vatican estimates that 100,000 Copts have fled Egypt since Mubarak's fall, and the story is the same wherever democracy has transformed Muslim politics. "From Lebanon to North Africa, Christian enclaves have been shrinking steadily since decolonization. More than half of Iraq's 1.5 million Christians have fled the country since the American invasion toppled Saddam Hussein."⁶⁵

Egypt was formerly a bellwether for Islamic democracy in the Middle East, but it has regressed to authoritarian military rule similar to the dysfunctional Pakistan model, and given the economic and political power of the Egyptian military and the lack of any democratic institutions to balance that military power the outlook is bleak.⁶⁶

In Pakistan large crowds have rallied to support blasphemy laws that carry a mandatory death sentence, and the governor of Punjab province, an outspoken critic of blasphemy laws, was killed by his own bodyguard to protest the governor's opposition to blasphemy. Pakistan's young lawyers support both the assassin and the blasphemy laws that motivated his crime, and neither the civilian government nor the military has acted to prosecute the assassin.⁶⁷

Can democracy and the freedom of religion and expression coexist under Shari'a as a rule of law? That question is complicated by the multiple variations of Shari'a, with those in Turkey and Indonesia being relatively compatible with democracy, human rights and the secular rule of law, while those in Saudi Arabia, Iran, Pakistan and Egypt are less tolerant of libertarian democracy and human rights.

Whatever forms of democracy and human rights emerge in Muslim nations, they are not likely to resemble Western libertarian models. But if Muslim nations embrace the spirit of *a common word* of love for God and neighbor as a guiding principle of *ijtihad*, then the crimes of apostasy and blasphemy would be eliminated and Shari'a could provide *equal justice under the law* for all, women and non-Muslims alike.

The Fear of Shari'a as a Threat to Western Systems of Jurisprudence

Intolerant and immutable forms of Shari'a (also referred to as Shariah) can threaten democracy and human rights in Muslim nations, but Shari'a is not a threat to Western systems of jurisprudence. In 2011 some right-wing conservatives led Newt Gingrich raised fears of a dark conspiracy of Islamists seeking to subvert US jurisprudence through Shari'a. That is the false premise of a report prepared by David Yerushalmi for The Center for Security Policy that cites a number of US cases that make reference to Islamic law, and it warns of

“...organizations and individuals within the US actively and openly advocating for the establishment of Shariah law in America, especially for personal status and family law. A prominent one is the Assembly of Muslim Jurists of America (AMJA) with more than 100 members including local Imams and Shariah authorities across America, as well as Shariah authorities from other countries. AMJA promotes the adherence to Shariah law when possible in all legal and civic activities by Muslim Americans, and in some cases, by non-Muslims.”⁶⁸

The report makes a distinction between Shari'a and other religious laws like Jewish law and Catholic Canon law that are routinely considered in US state courts. It suggests that Shari'a is a seditious threat to the integrity of US law based on

“...fundamental Shariah doctrine that Islamic law must rule supreme in any jurisdiction where Muslims reside. In the case where Muslims are few, they are permitted to comply as minimally necessary with the secular 'law of the land,' but according to authoritative and still quite extant Shariah law, Muslim adherents to this legal doctrine may not accept secular or local laws as superior to or even equal to Shariah's dictates. This creates an explicit doctrine to introduce Shariah law and replace US legal systems with Shariah for the local Muslim population.”⁶⁹

Based on the fear of a seditious plot to subvert US law, the states of Oklahoma, Tennessee and Arizona have passed laws banning Shari'a, and other states are considering similar legislation.⁷⁰ But there is no reason to fear Shari'a or any other religious law as a threat to the integrity of US law.⁷¹ State courts have long considered Jewish law in their decisions and Jewish rabbinical courts have been adjudicating disputes between Orthodox Jews in the US for some time.⁷²

There has also been contentious debate in Great Britain over whether Islamic law can function there without undermining the rule of secular law. In 2008 the Archbishop of Canterbury, Dr. Rowan Williams, created a stir in Parliament when he suggested the “unavoidability” of having supplementary jurisdictions of Shari'a within the British legal

system. Even though Dr. Williams made it clear that Shari'a would only supplement and not replace British law and only be utilized when all parties consented, much like Jewish law, his comments caused an outcry from many quarters, reflecting a widespread fear of Shari'a much like that in America.⁷³

Despite continuing controversy and fear-mongering, there is no credible evidence that Shari'a has contaminated, subverted or in any way threatened the secular rule of law in any democratic Western jurisdiction. Unless and until democratically elected law-makers in the West choose to replace secular law with the Shari'a—and that eventuality seems highly unlikely—there is no reason to be concerned.

Religion and Politics: Balancing the Protection of Individual Rights with Providing for the Common Good

The fear of Shari'a in the West reflects a basic ignorance of the relationship between religion and the rule of law in a democracy. Shari'a is part of the rule of law in Islamic democracies like Indonesia because it is the will of a majority of people in those democracies to consider their religious obligations as part of their law.

Human rights in the East emphasize the importance of government providing for the common good, while those in the West emphasize protecting individual rights. Just as regimes in the East need to consider balancing the common good with protecting fundamental individual rights, libertarian democracies in the West need to do the same thing, but from the opposite perspective. Those in the West can learn something from Muslim scholars in how to balance secular libertarian principles with those of scripture.

The Preamble to the US Constitution provides that the purpose of government is to "...establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." There was little need for public welfare programs 200 years ago, but today many are dependent upon government for their welfare, and the future of democracy in the US depends upon our overcoming political gridlock and balancing individual freedom with providing for the common good.

The communal duty of Jews, Christians and Muslims to provide for the common good is a matter of faith emphasized in the Hebrew Bible, the Christian Bible and the Qur'an, and the communal duty to protect fundamental freedoms is derived from natural law and reason and set forth in domestic and international law. Both obligations are related and should be considered as the will of God as well as obligations of secular law.

Ironically, most neo-libertarians are evangelical Christians who seem to have forgotten the mandates of their scripture. Their moral and political priorities are closer to those of the self-centered objectivist philosophy of Ayn Rand than to the altruistic communal teachings of Moses, Jesus and Muhammad that are summarized in *the greatest commandment* to love God and neighbor. Jesus also taught that to do both required making difficult choices in what to give to government (Caesar) and to God.

True justice and the moral legitimacy of any government are based on how well it protects individual rights and provides for the common good. The difficulty comes in balancing individual rights with communal obligations. The US has emphasized the former at the expense of the latter while Islamic nations have done the opposite. The moral and political challenge for all people of faith is to balance these two objectives.

Conclusion

Religion, legitimacy and the law have had a long and intimate relationship. The Enlightenment opened religions in the West to democracy, human rights and a secular rule of law, but it had little effect in the East where apostasy and blasphemy remain crimes and women and non-Muslims are denied equal rights under Shari'a.

The future of Islam will be decided by competing interpretations of Shari'a. Strict Islamists consider Shari'a a comprehensive and immutable code of law, while more progressive Muslim scholars consider Shari'a a voluntary code of moral standards of legitimacy. The latter view is compatible with democracy, human rights and a secular rule of law, and as demonstrated by Dr. Martin Luther King, people of faith can assert the moral supremacy of God's law over secular law through peaceful civil disobedience.

Shari'a is not a threat to the rule of law in Western democracies, but it will shape democracy and the rule of law in Islamic regimes. If Shari'a is considered a voluntary moral code of legitimacy rather than of coercive law and interpreted according to *a common word* of love for God and neighbor, then libertarian human rights and equal justice under the law are possible for women and non-Muslims alike; but in Muslim regimes where Shari'a is considered an immutable code of coercive law, it is likely to produce a tyranny of the majority that denies these fundamental human rights.

Promoting democracy, human rights and the rule of law have long been essential elements of US foreign policy. But democracy without human rights can produce a tyranny of the majority that is as oppressive as an authoritarian regime. That is likely in Islamist regimes in which a comprehensive and immutable Shari'a precludes the fundamental freedoms of religion and expression and discriminates against women and non-Muslims.

In the final analysis only democracies that provide libertarian human rights and the equal protection of law for all people can provide true justice, and that requires that all religions promote their standards of legitimacy as personal and voluntary standards of morality rather than as coercive laws. For there to be free will in faith and individual freedom in politics all laws must be made by elected representatives, not by God, and they must ensure the freedoms of religion and expression and the equal protection of women and minorities under the law.

True justice and the moral legitimacy of any government require that the protection of individual rights is balanced with the providing for the common good. The US has emphasized the former at the expense of the latter while Islamic nations have done the opposite. The moral and political challenge for all people of faith is to balance these two objectives. It is the way that we show our love for God and our neighbors.

End Notes:

1. See Thomas L. Friedman, *The End, for Now*, New York Times, December 20, 2011. Generally, on democracy, human rights and the rule of law as major components of US foreign policy and military operations since the time of Woodrow Wilson, see Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996, chapter 4; posted at www.militarylegitimacyreview.com); on the rule of law as a strategic objective of US counterinsurgency operations in Afghanistan and Iraq, see Daniel L. Rubini, *Justice in Waiting: Developing Rule of Law in Iraq*, 2009 Military Legitimacy and Leadership Journal, p 53, at www.militarylegitimacyreview.com; also, David Stott Gordon, *Promoting the Rule of Law in Stability Operations: Myths, Methods and the Military*, p 93, and Rudolph C. Barnes, *The Rule of Law and Civil Affairs in the Battle for Legitimacy*, p 2, both articles posted in the 2009 Military Legitimacy and Leadership Journal, at www.militarylegitimacyreview.com.

2. Alexis DeTocqueville was a French aristocrat who came to America in 1831 and noted the unique blend of politics and religion: “The legislators of Connecticut begin with the penal laws, and strange to say, they borrow their provisions from the text of the Holy Writ [citing *the Connecticut Code of Laws of 1650, Hartford, 1830*]: *Whosoever shall worship any other God than the Lord shall surely be put to death.* [emphasis added] This is followed by ten or twelve enactments of the same kind, copied verbatim from the books of Exodus, Leviticus, and Deuteronomy. Blasphemy, sorcery, adultery and rape were punished by death.... The consequence was that the punishment of death was never more frequently prescribed by the statute, and never more rarely enforced towards the guilty.” Alexis Charles Henri DeTocqueville, Democracy in America, Volume 1, The Cooperative Publication Society, The Colonial Press, New York and London, 1900, at p. 37. Jon Meacham cites DeTocqueville and others in describing Christian religious oppression in American Gospel, Random House, 2006, at pp 39-58. David Sehat has noted that “Blasphemy was forbidden in Delaware in 1826, and officeholders in Pennsylvania had to swear that they believed in ‘the being of a God and a future state of rewards and punishments.’” Sehat also noted that blasphemy laws “went on the chopping block” in the 1947 Supreme Court case of *Everson vs Board of Education*. See David Sehat, *Five Myths About Church and State in America*, Washington Post, April 22, 2011. Apostasy, which is abandoning faith or converting to another faith, is also a crime under Islamic law and like blasphemy is punished severely. They preclude the freedom of religion and conflict with *a common word* of love for God and neighbor that is shared by Jews, Christians and Muslims alike. (see notes 11, 16, 47, 50, 62, 63 and 67, *infra*) Karen Armstrong cited De Tocqueville’s recognition that the US public combined two disparate elements “...that have elsewhere made war with each other... the *spirit of religion* and the *spirit of freedom*.” Karen Armstrong, Fields of Blood: Religion and the History of Violence, Alfred A. Knopf , 2014, at p 275.

3. In arguing that religion was not responsible for most violence throughout history, Karen Armstrong cited John Bossy in asserting that “...before 1700 there was no concept of religion as separate from society or politics.” Karen Armstrong, Fields of Blood: Religion and the History of Violence, Alfred A. Knopf , 2014, at p 256.

4. *America the Beautiful*, words by Katherine Lee Bates, 1904, taken from The United Methodist Hymnal, the United Methodist Publishing House, Nashville, TN, 1989, p 696.

5. Rob Bell provides a convincing case that Scripture does not support a hell to which God condemns unbelievers to eternal damnation. Rob Bell, Love Wins: A Book About Heaven, Hell and the Fate of Every Person Who Has Ever Lived, Harper One, 2011, chapter 3. In commentary on Bell's book, Jon Meacham notes that Bell begins his book with an anonymous note that Mohandus Gandhi is in hell, and that many evangelicals, of which Bell is one, apparently share the view that condemnation to hell for unbelievers is an essential element of the Christian faith. In North Carolina, a United Methodist pastor who preached Bell's idea that condemnation to eternal damnation is not biblical was removed from the pulpit. See Jon Meacham, *Is Hell Dead*, Time, April 14, 2011.

6. Legitimacy defines what is right and its standards include both voluntary moral standards and mandatory legal standards. The requirements or components of (military) legitimacy are values, cultural (moral) standards and the law. See Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996, at chapter 3. A survey by the Pew Research Center in May 2007 indicated that Muslims in the US are "highly assimilated, close to parity with other Americans in income and overwhelmingly opposed to Islamic extremism," evidence that libertarian values in the US have moderated more radical and militant forms of Islam. See Alan Cooperman, *Survey: US Muslims Assimilated, Opposed to Extremism*, washingtonpost.com, May 23, 2007. Alan Wolfe has argued that the so-called secular American culture is actually religious, but with a commitment to libertarian democracy and human rights that trumps any conflicting Shari'a laws. Based on a poll on wealth and religiosity Wolfe found that Islam in the West like other religions has become secularized by Western culture and accepts libertarian democracy, human rights and capitalism, so there is little religious extremism even though people remain religious. Wolfe sees a moderation of radical Islam coming from Muslims in the West. See Wolfe, *And the Winner Is...*, The Atlantic, March 2008, p 56. See note 25, *infra*.

7. The Apostle Paul wrote of free will and freedom from religious laws in concluding that love of neighbor fulfilled the Jewish law. (see note 10, *infra*) St. Augustine opined: "...If a commandment is kept through fear of punishment and not for love of righteousness, it is kept slavishly, not freely, and therefore is not [truly] kept at all. For fruit is good only if it grows from the root of love." Augustine, The Spirit and the Letter, pp 11, 26, 64, cited in Tony Lane, Harpers Concise Book of Christian Faith, Harper & Row, San Francisco, 1984, pp 43, 111, 112; on the conflict between Erasmus and Luther over grace and free will in the Reformation, see pp 113-120; on the rejection of original sin, free will and the moral law as preached by the 19th century English revivalist Charles Finney, see pp 176-178. See also www.wikipedia.com on *Free Will in Theology*.

8. Karen Armstrong has traced religious fundamentalism, which is a relatively recent development in Judaism, Christianity and Islam, to a reaction to progress and modernity in The Battle for Legitimacy: A History of Fundamantalism, Random House, 2000.

9. *Ijtihad* is the Arabic term for interpreting Islamic law. It has been described as "...a creative but disciplined effort in Islamic law to give fresh views on old issues, or derive legal rulings for new situations, including warfare, from the accepted juridical sources of Islam, i.e. Quran, hadith, consensus, etc..." While Osama bin Laden misused *ijtihad* to justify his violence, *ijtihad* has also been used to conform Shari'a with democracy, human rights and the secular rule of law. See Waleed El-Ansari, *Confronting the "Teachings" of Osama bin Laden*, p. 18, 2010 Journal on Military Legitimacy and Leadership, at www.militarylegitimacyreview.com. Harkristuti Harkrisnowo, a law professor and Director General for Human Rights in the Indonesian Ministry of Justice and Human Rights, leaves to Islamic scholars the debate over how *ijtihad* relates Shari'a to the secular human rights provided in Indonesia which she compares to the US Bill of Rights, noting that there are many different interpretations of Islam. Harkrisnowo acknowledges the difficult task: "Some Indonesian Muslims are textualists who embrace the Qur'an very narrowly, in a manner somewhat reminiscent of those Christians who believe in a literal interpretation of the Bible. But, seriously, how many Muslims believe in stoning adulterers and cutting off the hands of thieves? Others believe that Shari'a requires only an ethical basis, which can be satisfied for some by an all-things-considered judgment, and for others by well-considered secular law. Whomever's viewpoint prevails makes a real, practical difference for anyone trying to implement the rule of law in the Islamic world." Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice, Muslim and Christian Understanding: Theory and Application of "A Common Word"*, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, p 191. (See also notes 47, 48 and 61-63, *infra*)

10. *The greatest commandment* to love God and neighbor is found in Matthew 22:34-40, Mark 12:28-33, and Luke 10:25-29, and *the story of the good Samaritan* in Luke 10:30-36 defines one's neighbor to include apostates or unbelievers. Paul affirmed *love over law* in his letter to the Roman church: "The commandments 'Do not commit adultery', 'Do not murder', 'Do not steal', 'Do not covet', and whatever other commandments there may be, are summed up in this one rule: 'Love your neighbor as yourself.' Love does no harm to its neighbor. Therefore love is the fulfillment of the law." (Romans 13:8-10) And he wrote to the Galatians: "The entire law is summed up in a single command: Love your neighbor as yourself." (Galatians 5:14). Paul struggled with the relationship of holy laws with God's will and free will, and understood that love for others could not be made obligatory by law. (Romans 2:17-24; 3:19-28; 7:4-60; 2d Corinthians 3:17; Galatians 5:1, 13) In this Paul was a precursor of Enlightenment thinkers; while he never mentioned democracy or human rights, he recognized that no law was perfect and that all laws should be motivated by care and concern for others. Hugo Grotius (1583-1645) and John Locke (1632-1704) were both theologians and political theorists who picked up where Paul left off on politics and religion; but unlike Paul, who saw God as establishing all political authorities (Romans 13:1), Grotius and Locke invoked natural law and reason rather than revelation as the guiding principles of political theory. Grotius was a Dutch jurist who was considered the father of international law. In *The Law of War and Peace* (1625) he developed the concept of sovereignty to provide the political independence and integrity of each nation, making peace the natural state of international relations and holy war illegitimate. John Locke developed the social contract theory of democracy with

fundamental civil rights having primacy over other secular laws. Both Grotius and Locke asserted that natural law and reason were distinct from Christian theology in the realm of politics, but they saw no conflict between natural law, reason and God's law.

11. See www.acommonword.com. Note that the greatest commandment has two parts, both of which were taken from the Hebrew Bible. The first part, to love God, was first given by Moses in his preface to the Deuteronomic Law; for Moses, loving God meant loving and obeying every provision of the Law (see Deuteronomy 6:1-9; 10:12,13; 31:10-13). The second part, to love your neighbor as yourself, was part of God's instructions to Moses (see Leviticus 19:18), and like the first part, it was an integral part of Mosaic Law. Rabbi Akiva once called the requirement to love your neighbor as yourself the greatest principle of the Torah. Jesus brought these two commandments together to teach that we love God by loving our *unbelieving* neighbors as we love ourselves. (see note 10, *supra*)

12. *The ban* is mandated as part of the ancient Hebrew law of war in Deuteronomy 20:16-18 (see also Deuteronomy 7:1,2), and its implementation by Joshua at Jericho is described in Joshua 6:20,21.

13. Ibrahim Kalin attributes the Islamic rejection of Enlightenment ideas to their association with European secularism and colonialism. Kalin asserts that the Enlightenment was primarily directed to the Catholic Church, and cites Pope Benedict's defense of a "reason-based Christianity" against an allegedly irrational and violent Islam, a defense based in part on the Christian separation of faith from law—something that has not yet happened in Islam. Kalin acknowledges the secularization that followed the Enlightenment, and asserts that Islam developed its own system of rationality and free will that compensates for Western secularism, so that the Islamic intellectual tradition is able to meet the needs of modernity. Still, Kalin finds "The ideas of progress, individualism, rationalism and secularism [that] have been imposed by top-down state policies as part of the sociopolitical modernization of Muslim societies...have not found a home in the hearts and minds of ordinary Muslims who still live in a 'sacred' and 'enchanted' world." Ibrahim Kalin, *Islam, Christianity, the Enlightenment: A Common Word and Muslim-Christian Relations*, Muslim and Christian Understanding: Theory and Application of "A Common Word", Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, pp 41-54. As to the conflicting priorities of human rights in the West and East, Harkristuti Harkrisnowo explains the traditional Asian preference for collective state interests over individual rights, and argues that a distinction should be made between social and economic benefits or entitlements provided by government and legal (human) rights that are enforced in the courts. Harkrisnowo refers to government entitlements as political aspirations or *moral* rights as distinguished from *legal* (human) rights, and notes increasing divisions in the West over these same issues. Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice*, Muslim and Christian Understanding: Theory and Application of "A Common Word", Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, pp 189-191. Joseph Isanga, a Catholic priest and law professor notes the dichotomy between human rights and political aspirations, but argues that conditions in Africa require that social and economic rights be guaranteed as human rights. Joseph

M. Isanga, *The “Common Word,” Development, and Human Rights: African and Catholic Perspectives, Muslim and Christian Understanding: Theory and Application of “A Common Word”*, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, 2010, pp 189-191. Mark R. Amstutz has noted the “increasing conceptual pluralism of human rights” in the West and East and efforts to resolve the differences in Amstutz, *International Ethics: Concepts, Theories and Cases, Third Edition*, Rowman & Littlefield Publishers, Inc., New York, 2008, at pp 95-98. See also note 26, *infra*.

14. In February 2011 the prospect of legislation in Wisconsin to limit the collective bargaining rights of public workers for matters other than pay produced mass public demonstrations and the flight of Democratic legislators out of the state to shut down the legislative process. Even President Obama entered the fray, saying Republican efforts to restrict the collective bargaining rights of public employees “...seem like more of an assault on unions.” See Brady Dennis and Peter Wallsten, *Obama joins Wisconsin budget battle opposing Republican anti-union bill*, Washington Post, February 18, 2011.

15. In the name of preserving political freedom, neo-libertarians oppose government programs for the common good (other than those benefitting themselves) and government regulation of big banks and businesses that have undermined the economy and shrunk the middle class. Conversely social liberals pander to unrealistic public expectations that government can provide all things to all people. Citing the “privilege, corruption and mismanagement” that brought down democracy in ancient Athens and the century-old warning of Supreme Court Justice Louis Brandeis that “We may have a democracy, or we may have wealth concentrated in the hands of a few, but we can’t have both,” Stein Ringen has questioned the future of Western capitalist democracy. See Ringen, *Is American democracy headed to extinction?*, washingtonpost.com, March 29, 2014.

16. The Qur’an provides: *Let there be no compulsion in religion. Truth stands out clear from Error. Whoever rejects Evil and believes in Allah has grasped the most trustworthy hand-hold that never breaks. And Allah hears and knows all things.* (Qur’an, Al Baqara 2:256) Apostasy is defined as abandoning religion or conversion to another religion. Blasphemy is defined as any speech or act disrespectful of God. See Webster’s New World Dictionary, 1976. (See references to apostasy and blasphemy in note 2, *supra*) Where apostasy and blasphemy are crimes, there is compulsion in religion; and there are other forms of religious compulsion or discriminatory treatment under Shari’a that violate fundamental human rights, such as discrimination against women and non-Muslims. See also notes 47, 50, 51, 55, 63 and 67, *infra*.

17. The First Amendment to the US Constitution (part of the Bill of Rights) provides: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.* Articles 18, 19 and 20 of the Universal Declaration of Human Rights (1948) provide for the freedom of religion and free expression; and Articles 18, 19 and 20 of the International Covenant of Civil and Political Rights (a 1966 treaty signed by the US in 1977 and ratified in 1992) protect those rights. Most Western and Muslim nations are

signatories to both the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, with the latter treaty making obligatory upon the signatories what was declared earlier as nonbinding policy in the Universal Declaration.

18. The Cairo Declaration on Human Rights in Islam of 1990 has no provisions comparable to Articles 18, 19 and 20 of the Universal Declaration of Human Rights or the International Covenant of Civil and Political Rights (see note 17 *supra*), but following a Preamble that asserts the primacy of Shari'a in defining human rights, the following articles reveal the Islamic perspective of human rights. Article 11 provides in part: *Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High....* Article 18 provides in part: *Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property....* Article 19 provides in part: *All individuals are equal before the law, without distinction between the ruler and the ruled....* Article 22 provides: (a) *Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.* (b) *Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.* (c) *Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.* (d) *It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.* Article 24 provides specifically what the Preamble implies: *All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah.* Article 25 provides: *The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration.* (For further elaboration of Islamic perspectives on human rights, see notes 26-63, *infra*)

19. Seymour Martin Lipset has defined American exceptionalism in religious terms, citing Alexis DeTocqueville, Max Weber and Samuel Huntington in support of the idea that the unique and prolific American religions (mostly Protestant sects) provided the moral energy for its progress and economic success. See Lipset, [American Exceptionalism: A Double-Edged Sword](#), W. W. Norton & Company, New York, 1996, pp 60-67. In a more recent work focused on US military interventions in Afghanistan and Iraq, Andrew J. Bacevich has predicted the end of American exceptionalism. Bacevich, [The Limits of Power: The End of American Exceptionalism](#), Henry Holt and Company, New York, 2008. Richard Cohen has described American exceptionalism as a misguided mix of patriotism, politics and religion that has caused Americans to sanctify traditional values and ignore their flaws, contributing to the decline of America in relationship to other nations. See Richard Cohen, [The Myth of American Exceptionalism](#), [The Washington Post](#), May 9, 2011.

20. Section 8058 of Public Law 112-10 and Section 2378d of Title 22, United States Code, also known as Section 6201 of the Foreign Assistance Act of 1961, as amended (the *Leahy Law*), requires that US military personnel report any violations of fundamental human rights. The operational implications of the Leahy law for trainers and advisors are

discussed in Rudolph C. Barnes, *Back to the Future: Human Rights and Legitimacy in the Training and Advisory Mission, Special Warfare*, January-March 2013, pp 42-47 and notes 18 and 19. On conflicting concepts of human rights, see note 26, *infra*.

21. Military personnel who have served in Iraq and Afghanistan understand that religion shapes the human terrain, and that navigating that terrain is as important to mission success as the geographical terrain in Islamic cultures. On Shari'a and human terrain, see Timothy K. Bedsole, *Religion: The Missing Dimension in Mission Planning, Special Warfare*, November-December 2006, p 8. On religion as a strategic operational priority, see Raymond Bingham, *Bridging the Religious Divide, Parameters*, Autumn, 2006, p 6. For an example of how a US Navy Chaplain supported his Afghan (mullah) counterparts in countering Taliban claims that Islam prohibited Muslims from working with those of other religions who were helping them, see Brian Mockenhaupt, *Enlisting Allah, The Atlantic*, September 2011, p 28. At a *shura* that the chaplain helped organize in contested territory, one of the mullahs said: "We should take charge of our own land and protect people ourselves. It is shameful that they had to send Marines to do what we should be doing ourselves." The article ended noting that the Navy chaplain "...who sat quietly through the discussion, had perhaps shaped the battlefield as powerfully as any bullet fired or bomb dropped across Afghanistan that day." (p 30)

22. On the paradox of the US military as an authoritarian regime in a libertarian democratic society, see Rudolph C. Barnes, Jr., *Military Legitimacy: Might and Right in the New Millennium*, Frank Cass, London, 1996, pp 2, 3, 105-107, 118-126.

23. A recent crisis between the civilian government of Pakistan and its powerful army was precipitated by an alleged request by President Asif Ali Zardari to the US to help prevent a military coup after the US raid in Pakistan that killed Osama bin Laden. "Zardari's government has nominally been leading Pakistan since 2008. But real power remains in the hands of the military, which has ruled the South Asian nation for half of its 64-year existence and was livid after the US operation against Osama bin Laden. Though both the army and the civilian government receive billions of dollars in American assistance, the military views the US, and its support for Zardari's unpopular administration, with deep distrust." Karen Brulliard and Karen DeYoung, *In Pakistan, a deep civil-military divide*, www.washingtonpost.com, November 19, 2011.

24. A rally of tens of thousands of Islamists in Cairo's Tahrir Square on November 18, 2011, marked the beginning of a new battle between Egypt's military and the once-outlawed Muslim Brotherhood that left Egyptian liberals and leftists anxious and divided on the sidelines. Some favored civil liberties and some favored the imposition of Shari'a. David D. Kirkpatrick, *Egypt Islamists Demand the End of Military Rule*, www.nytimes.com, November 18, 2011. Mohamed Morsi of the Islamic Brotherhood was elected President by a narrow margin in the summer of 2012 and deposed by the Egyptian military a year later. A Constitution that protects the continued economic and political power of the military was approved in January 2013, and continued US support of the military government has generated criticism by human rights activists. See Ahmad Maher, *The US is supporting oppression in Egypt*, *Washington Post*, February 7, 2014.

In March 2014 an Egyptian court in a mass trial sentenced 529 members of the Muslim Brotherhood to death for revolutionary activities, and a month later condemned another 683 to death. The Obama administration, which had recently sent 10 Apache helicopters to the Egyptian military, said the ruling “defied even the most basic standards of international justice.” The Egyptian foreign minister cautioned attendees at the Center for Strategic and International Studies not to “jump to conclusions” saying “that all Egyptian institutions, including the judiciary, are evolving” and that “When you face terrorism and exceptional circumstances, you respond.” Erin Cunningham and Abigail Hauslohner, *Egypt sentences 683 to death in latest mass trial of dissidents*, Washington Post, April 28, 2014.

25. See notes 6 and 9, *supra*, and notes 30-48, *infra*.

26. Mark R. Amstutz (Amstutz, International Ethics: Concepts, Theories and Cases in Global Politics, Third Edition, Rowman & Littlefield Publishers, Inc., 2008, pp 95-102) has summarized the differences between Western and Eastern concepts of human rights in the International Covenant on Civil and Political Rights (ICCPR) favored by the West (see note 17, *supra*), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) favored by the East, illustrating the pluralism of human rights well before the Cairo Declaration of 1991. (see notes 13 and 18, *supra*) Amstutz notes “The limited consensus on human rights doctrines, coupled with the ever-expanding list of rights, has had a deleterious effect on the moral foundations and priority of international human rights claims.” (page 97) And he asserts “The idea of human rights is subversive because it establishes norms that if not fulfilled by a state can undermine its international legitimacy.” (p 99) Captain Brian J. Bill has argued that military lawyers should become more knowledgeable of human rights even though the law of war supplants them in wartime, since “...human rights are now the prism through which all military operations are viewed and judged.” (p 60) and that “...the continued development of human rights law has arguably eclipsed that of the law of war.” (p 62) Captain Bill noted that the ICCPR, which was ratified by the US in 1992, includes most of the universally recognized human rights, while those in the ICESCR, which has not yet been ratified by the US, are more aspirational in nature. See Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, The Army Lawyer, June 2010, pp 54-64. Special Operations Forces have long considered human rights an operational priority in overseas training and advisory missions. The political objectives of such missions include building public support for a supported government and require strict compliance with human rights as well as with other standards of legitimacy applicable in the operational area. When US mission success depends upon public support in a hostile cultural environment, US military operators must have values that are consistent with the golden rule which is at the foundation of human rights (see also, Na'im at note 49, *infra*). Legitimacy is a mission priority for US Special Operations Forces, and legitimacy depends not only upon compliance with human rights but also with local religious and cultural standards. See Rudolph C. Barnes, Jr., *Human Rights and Legitimacy in the Foreign Training Mission*, Special Warfare, Spring 2001, pp 2, 7, 8-11; accord, Barnes, *Back to the Future: Human Rights and Legitimacy in the Training and Advisory Mission*, Special Warfare, January-March 2013, p 42.

27. See note 18, *supra*, and notes 52 and 55, *infra*.
28. See notes 6, 9 and 17, *supra*.
29. See note 10, *supra*.
30. See notes 6, 25 and 26, *supra*.
31. Khaled Abou El Fadl, Islam and the Challenge of Democracy, Princeton University Press, Princeton & Oxford, 2004, at p 36.
32. *Ibid* at pp 4, 10, 13.
33. *Ibid* at pp 19, 22.
34. *Ibid* at pp 23, 24 and note 31.
35. *Ibid* at pp 25-30.
36. *Ibid* at pp 30-36.
37. John L Esposito, *Practice and Theory*, Islam and the Challenge of Democracy, see note 31, *supra*, at pp 93, 95.
38. *Ibid* at pp 97, 98.
39. *Ibid* at p 99.
40. M. A. Muqtedar Khan, *The Primacy of Political Philosophy*, Islam and the Challenge of Democracy, see note 27, *supra*, at pp 63, 64.
41. *Ibid* at p 99. Jon Meacham cited Roger Williams as a proponent of the freedom of religion in early America "...because it was the only way to reach the true God." Meacham, American Gospel, Random House, 2006, at pp 54,55. See also note 7, *supra*.
42. Khaled Abou El Fadl, *Reply*, Islam and the Challenge of Democracy, see note 31, *supra*, at pp 109, 122.
43. Abdullahi Ahmed An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a, Harvard University Press, Cambridge, Massachusetts, 2008, p 1.
44. *Ibid* at pp 3, 10, 12-15, 26, 27.
45. *Ibid* at pp 2, 5; see also note 15, *infra*.

46. *Ibid* at pp 3, 5, 14, 17, 28-30; on free will see note 7, *supra*. Traditional Islamic doctrine acknowledges that Shari'a provides both voluntary moral standards of legitimacy and compulsory legal obligations: "Not only does the Shariah tell people what they must do and what they must not do, it also tells them what they should do and what they should not do, and it tells them explicitly that many things are indifferent." Sachiko Murata and William Chittick, The Vision of Islam, First Edition, Paragon House, St. Paul, Minn, 1994, p 23. John Esposito has identified five different categories of Shari'a mandates which "...are ethically categorized as (1) obligatory; (2) recommended; (3) indifferent or permissible; (4) reprehensible but not forbidden; and (5) forbidden." Esposito then categorizes all Shari'a rules and rituals as either "(1) duties to God (ritual observances)... and (2) duties to others (social transactions)..." If there is no compulsion in religion (see note 16, *supra*) then it would seem that none of the duties to God would be considered compulsory or obligatory and the rest would be considered voluntary moral standards of legitimacy. See John Esposito, Islam: The Straight Path, Revised Third Edition, Oxford University Press, New York, 2005, pp 87, 88. As to which acts are categorized as obligatory and forbidden under Shari'a, An-Na'im has pointed out that distinction was made by humans, not God. (See notes 41 and 44, *supra*)

47. *Ibid* at pp 6, 8, 13, 19-21, 24, 25, 38, 106-128.

48. *Ibid* at chapters 1, 3 and 7; on *ijtihad*, see note 9, *supra*. An-Na'im's inclusion of *civic reason* (or reason by analogy) and *consensus* along with the Qur'an and the Sunna (hadith) as sources of law for Shari'a is consistent with traditional Islamic doctrine. See John Esposito, Islam: The Straight Path, Revised Third Edition, Oxford University Press, New York, 2005, pp78-84.

49. As to reciprocity and the golden rule, see *ibid* at pp 24, 95. As to Paul, he was a Jewish lawyer (a Pharisee) while An-Na'im is a Muslim lawyer. The writings of both reflect an understanding of the uneasy relationship between religion and the rule of law. While Paul never considered how democracy, human rights and the secular rule of law were related to the supremacy of love over law, he understood—from first-hand experience—just how oppressive religious law could be. See note 10, *supra*.

50. Frank Griffel, Introduction to Islamic Law in the Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, p 13.

51. Gudrun Kramer, *Justice in Modern Islamic Thought*, Islamic Law in the Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, pp 20-37.

52. Noah Feldman, *Shari'a and Islamic Democracy in the Age of al-Jazeera*, Islamic Law in the Contemporary Context: Shari'a, Edited by Abbas Amanat and Frank Griffel, Stanford University Press, Stanford, California, 2007, pp 104-119. See also, David Kirkpatrick, *After Long Exile, Sunni Cleric Takes Role in Egypt*, New York Times, February 18, 2011.

53. Michael Gerson, *The Grand Mufti's Mission*, Washington Post, October 23, 2009.

54. HE Shaykh Ali Goma'a, *A Common Word Between Us and You: Motives and Application*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, 2010, p 18.

55. Seyyed Hossein Nasr, *A Common Word Initiative: Theoria and Praxis*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, 2010, p 25. In a widely used text on Islam, Nasr presented a traditional view of Islam and Shari'a. He defined Shari'a as "The Divine Law [which is] the ideal pattern for the individual's life and the Law which binds the Muslim people into a single community. ...It is therefore the guide of human action and encompasses every facet of human life." (pp 85, 86) Nasr acknowledged the similarity between Judaism and Islam and the contrast between those deontological religions and the more teleological Christianity, in which "...the Divine will is expressed in terms of universal teachings...but not in concrete laws which would be stated in the New Testament." (p 86) He went on to say "The Semitic notion of law which is to be seen in revealed form in both Judaism and Islam is the opposite of the prevalent Western concept of law. It is a religious notion of law, one in which law is an integral aspect of religion." (p 88) While Nasr affirmed the free will of man to accept or reject the "straight path" of Islam he criticized revisionist views that would make Islam and Shari'a compatible with modern culture: "The creative process...is not to remake the Law but to reform men and human society to conform to the Law." And characterized as an "anomaly...Those modern movements which seek to reform the Divine Law rather than human society." (pp 88, 89) Nasr observed that "...the modern mentality...in the West with its Christian background cannot conceive of an immutable Law which is the guide of human society...." (p 89) As for interpreting Shari'a, Nasr noted that "The gate of *ijtihad* has been closed in the Sunni world...whereas in Shi'ism, the gate must of necessity be always open." (p 98) As for democracy, Nasr, like Qaradawi, asserted that "In the Islamic view God is ultimately the only Legislator. Man has no power to make laws outside the Shari'a, he must obey the laws God sent for him." (p 100) As for human rights, Nasr supported those traditional patriarchal standards that deny equal rights to women by giving husbands dominance over their wives, allowing polygamy and denying women the right to choose their husbands. (pp 104-108) If Nasr's ideals of Islam and Shari'a are realities, it is difficult to imagine them being reconciled with modern concepts of democracy, human rights and the secular rule of law. Seyyed Hossein Nasr, Ideals and Realities of Islam, New Revised Edition, ABC International Group, Inc., Chicago, 2000 (page references listed above).

56. Ibrahim Kalin, *Islam, Christianity, the Enlightenment: A Common Word and Muslim-Christian Relations*, Muslim and Christian Understanding: Theory and Application of A Common Word, Edited by Waleed El-Ansary and David K. Linnan, Palgrave McMillan, New York, NY, 2010, p 51.

57. Miroslav Volf, A Christian Response, Harper One, New York, NY, 2011, p 21.
58. *Ibid* at pp 156-159.
59. *Ibid* at pp 231-234.
60. Nicholas Adams, *In Pursuit of a New Secular: Human Rights and A Common Word, Muslim and Christian Understanding: Theory and Application of A Common Word*, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, New York, NY, 2010, pp 175-186.
61. Harkristuti Harkrisnowo, *Multiculturalism in Indonesia: Human Rights in Practice, Muslim and Christian Understanding: Theory and Application of A Common Word*, Edited by Waleed El-Ansary and David K. Linnan, Palgrave MacMillan, New York, NY, 2010, p 190.
62. *Ibid* at p 191.
63. *Ibid* at pp 189, 195.
64. Anthony Shadid and David D. Kirkpatrick, *Activists in Arab World Vie to Define Islamic State*, New York Times, September 27, 2011.
65. Ross Douthat, *Democracy's Collateral Damage*, Washington Post, October 15, 2011. See also, David D. Kirkpatrick, *Church Protests in Cairo Turn Deadly*, New York Times, October 9, 2011. David Ignatius, *Cairo's Christians Worry About Egypt's Next Chapter*, Washington Post, November 8, 2011.
66. On the incompatibility of the power of the Egyptian military with democracy, see Rudolph C. Barnes, Jr., *Democracy and the Egyptian Military: Friends or Foes?* www.militarylegitimacyreview.com, February 12, 2011.
67. Salman Masood, *Pakistanis Rally in Support of Blasphemy Law*, New York Times, December 31, 2010. See also, Carlotta Gall, *Pakistan Faces A Divide of Age on Muslim Law*, New York Times, January 10, 2011; Fareed Zakaria, *Can Pakistan Rid Itself of Religious Fanaticism?*, Washington Post, January 10, 2011; *Pakistan: A great deal of ruin in a nation—why Islam took a violent and intolerant turn in Pakistan and where it might lead*, The Economist, April, 2, 2011, pp 35-39. Doug Bandow of the Cato Institute has put Pakistan at the top of the list of Muslim nations that persecute Jews, Christians and other minorities (Pakistan, Saudi Arabia, Iran, Iraq, and Egypt), quoting a report from the US Commission on International Religious Freedom: “Pakistan continues to be responsible for systematic, ongoing and egregious violations of freedom of religion or belief.” The Commission pointed to the blasphemy laws as creating “...an atmosphere of violent extremism and vigilantism.” Bandow noted that both the Commission and the US State Department “...emphasize the blasphemy laws as a particular problem” and that while “...the majority of those prosecuted for blasphemy are Muslim...at least 35

Christians charged with blasphemy have been murdered since 1986.” Doug Bandow, *Target Pakistan for Religious Persecution*, Assyrian International News Agency, posted July 5, 2011, www.aina.org/news. The Daily Times in Pakistan reported that in March 2014 a Christian road sweeper was arrested, tried and sentenced to death for blasphemy after a friend accused him of making blasphemous remarks during an argument. *Pakistan: Christian man sentenced to death under blasphemy law*, Daily Times, www.dailytimes.com, March 29, 2014. See note 16, *supra*.

68. Shariah Law and American State Courts, An Assessment of State Appellate Court Cases, The Center For Security Policy, 1901 Pennsylvania Avenue, Washington, DC, May 20, 2011, p 9. Andrea Elliott has profiled David Yerushalmi, the Hasidic Jew and general counsel for the Center for Security Policy who spearheaded this report and other anti-Shari’a efforts, including the drafting of a model act for states to prohibit Shari’a. According to Elliot, Yerushalmi’s research of Islam and Shari’a “...made clear that militants had not ‘perverted’ Islamic law, but were following an authoritative doctrine that sought global hegemony—a mission, he says, that is shared by Muslims around the world.” In this monolithic and hostile view of Islam and Shari’a, Yerushalmi and his followers have succeeded in generating an unfounded fear of Shari’a as a threat to Western legal systems, and a hot-button issue used by conservative politicians (see note 51, *infra*). On one point, however, Yerushalmi and most Muslim authorities agree: They want people to ask the question: *What is Shari’a?* See Andrea Elliott, *Behind an Anti-Shariah Push*, New York Times, July 30, 2011.

69. *Ibid* at p 14.

70. In November 2010 70.8 percent of the Oklahoma electorate voted to approve a “Save Our State” Amendment barring “courts from considering or using Shariah law.” Roger Cohen interviewed several octogenarian Oklahomans who confirmed the vote was based on fear raised by the neoconservative Center for Security Policy that described Shariah as “the pre-eminent totalitarian threat of our time” and the shrill call of politicians to pass the law as a “pre-emptive strike” against the threat. See Roger Cohen, *Shariah at the Kumbuck Café*, New York Times, December 6, 2010; see also note 67, at note 52 *supra* and note 72, *infra*. Before the vote in Oklahoma, Newt Gingrich had told the Values Voter Summit: “We should have a federal law that says sharia law cannot be recognized by any court in the US.” And earlier, speaking to the American Enterprise Institute, Gingrich likened the shari’a threat to a stealth campaign to impose Islam on all of us. In one questionable 2009 case in New Jersey a judge improperly considered Shari’a in finding that a man did not have the intent to sexually assault his wife because his acts were “consistent with his practices”; but that decision was overturned on appeal with the court stating that the man’s religious beliefs did not exempt him from state law. See Eugene Robinson, *Sharia as the New Red Menace?* Washington Post, September 21, 2010. Michael Gerson confirmed a growing fear of Shari’a being generated by conservative politicians and the study Shariah Law and American State Courts, An Assessment of State Appellate Court Cases (see above), and then put the issue of Shari’a and democracy in perspective. Gerson acknowledged that the Taliban version of Shari’a would be a threat to a pluralistic democracy, but ...”if Shari’a is interpreted as a set of

transcendent principles of fairness and justice, applied in a variety of times, places and governmental systems, it more closely resembles the Christian and Jewish idea of social justice.” Gerson summarized the progressive view of Shari’a set forth above in notes 31-49 and 53-63, *supra*. Michael Gerson, *Oklahoma’s Faith-Baiting Initiative*, Washington Post, November 16, 2010. Gerson has also quoted Newt Gingrich as saying: Shari’a is a mortal threat to the survival of freedom in the United States and the world as we know it.” Gerson went on to note that if elected “...Gingrich would be the United States’ first elected anti-sharia president. ...And how would President Gingrich deal with predominantly Muslim nations if the war against terrorism were transformed into a struggle against sharia? ...Wouldn’t Islamic radicals welcome the civilizational struggle that Gingrich offers? No strategy would be more likely to undermine the cause of the United States and the safety of its people.” Michael Gerson, *The Problem with Gingrich’s Simplistic Attack on Sharia*, Washington Post, December 12, 2011. Scott Shane quotes Newt Gingrich describing Shariah as a “stealth jihad” and mortal threat to the US, comparing it to the threat of Cold War communism: “Stealth jihadis use political, cultural, social, religious, intellectual tools; violent jihadis use violence. But in fact they’re both engaged in jihad, and they’re both seeking to impose the same end state, which is to replace Western civilization with a radical imposition of Shariah.” Shane cites others who debunk the claim of Gingrich as political demagoguery, but acknowledge a debate within Islam over the role of Shariah. Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to US*, New York Times, December 21, 2011.

71. Elijah Stern has noted that more than a dozen states are considering outlawing Shari’a law, and has taken David Yerushalmi and other fear-mongers to task over their assertions that Shari’a is a threat to US jurisprudence: “That is exactly wrong. The crusade against Shariah undermines American democracy, ignores our country’s successful history of religious tolerance and assimilation, and creates a dangerous divide between America and its fastest growing religious minority.” Citing historic examples of Jewish law being condemned for similar reasons and its negative effect, Stern noted that American Muslims are not like Muslim extremists overseas and “...are natural candidates for assimilation....Given time, American Muslims, like all other religious minorities before them, will adjust their legal and theological traditions, if necessary, to accord with American values.” Stern, *Don’t Fear Islamic Law in America*, New York Times, September 2, 2011.

72. Orthodox Jews have been utilizing Jewish courts in the US for some time. In Maryland, Aharon Friedman was assailed by the Jewish press and public demonstrations for failing to give his wife, Tamar Epstein, a Jewish decree of divorce known as a *get*. He and Epstein had already been divorced in civil courts, “...but they are still married according to Jewish law. And without a *get* neither he nor Ms. Epstein can remarry within the faith. She is considered an *agunah*, or chained woman.” Controversy between rabbinical courts and civil law over the case continues. Mark Oppenheimer, *Religious Divorce Dispute Leads to Secular Protest*, New York Times, January 2, 2011. David Yerushalmi, a Jewish lawyer and authority on Jewish law or *Halakha* and the author of the study Shariah Law and American State Courts, An Assessment of State Appellate Court Cases (see notes 68, 69 and 71, *supra*), has argued in that study and elsewhere that

Shari'a is essentially different than Halakha in that Muslim jurists and courts seek to replace secular law with Shari'a while Jewish (rabbinical) courts merely augment secular civil courts and do not threaten them. See David Yerushalmi, *Is Shariah the Same as Jewish Law?*, www.bigpeace.com, posted September 18, 2010. But as noted by Seyyed Nasr (see note 55, *supra*) there are more similarities than differences between Shari'a and Halakha as comprehensive and unyielding norms of behavior for Muslims and Jews.

73. On the adverse public reaction to Williams' 2008 proposal, see Jonathan Petre and Andrew Porter, *Dr Rowan Williams, Archbishop of Canterbury, backs adopting parts of Islamic Sharia law*, The Telegraph, February 7, 2008. On current contentious issues with Islamic assimilation and multiculturalism in Britain, see Kenan Malik, *Assimilation's Failure, Terrorism's Rise*, New York Times, July 6, 2011. On the increasing use in Britain of Islamic courts in family law matters, see Jonathan Wynne-Jones, *Shari'a: A Law Unto Itself?* The Telegraph, August 7, 2011. There are many similarities between Islamic courts in Britain and Jewish (rabbinical) courts in the US since both deal with contentious religious and legal issues in marriage and divorce. (see note 72, *supra*)