

Religion, Law and Conflicting Concepts of Legitimacy

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On almost a daily basis the world is confronted with the barbaric atrocities of Islamist terrorism. Those dramatic headlines can obscure the strategic objective of Islamists, which is to establish radical Islam, or Islamism, as the standard of religious and political legitimacy among Muslims, who will soon outnumber Christians as the world's largest religion.¹ This portends a battle for legitimacy in the Muslim world between the ideologies of authoritarian Islamism and libertarian democracy that is more about winning the hearts and minds of Muslims than winning military battles. In this it echoes the Cold War conflict between communist and democratic ideologies.

Legitimacy is a requirement of any stable government, and it is based on public perceptions of what is right.² In Islamic cultures concepts of legitimacy are shaped by Islamic law, or Shari'a, that severely constrain individual freedom. For example, apostasy and blasphemy laws deny the freedoms of religion and speech. This creates conflicting concepts of legitimacy and law that jeopardize those fundamental civil and political human rights protected by international law.

Radical Islamists are expected to be parties in the UN Security Council's plan for a Syrian peace process, along with Islamic nations that put Shari'a at the foundation of their rule of law, as well as nations that have a secular rule of law, such as the U.S., Russia and European nations. With such conflicting concepts of law and legitimacy, any negotiated settlement of the Syrian civil war has to be considered a longshot.³

Religion, 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 imbued in the Declaration of Independence and the Bill of Rights in the US Constitution. They proclaimed the inalienable rights to life, liberty and the pursuit of happiness and made the freedoms of religion, assembly and expression first among those civil rights in the Bill of Rights.

Democratic upheavals 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 and demanded freedom from authoritarian rule, but the relationship between religion and freedom and resulting concepts of legitimacy in the Middle East have been quite different from that in libertarian democracies. In the Islamic cultures of the Middle East and Africa Muslim majorities favor an authoritarian Shari'a that denies fundamental freedoms, so that democracies can create a tyranny of the religious majority.

Laws by necessity limit liberty, but are necessary to protect it and provide for the common good. Democracies that do not have human rights to protect minorities from government power can produce a tyranny of the majority, and religious majorities can produce the worst kind of tyranny.

Religion has a symbiotic relationship with liberty and law that is reflected in contrasting concepts of legitimacy. In libertarian democracies religions have conformed their doctrines to libertarian human rights and the secular rule of law, while in Islamic cultures Shari'a stifles libertarian democracy, human rights and the secular rule of law.

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, Shari'a is an authoritarian rule of Islamic law based on the dictates of the Qur'an and interpreted by Islamist jurists. In its purest form Shari'a provides comprehensive, unyielding and unchanging laws that demand supremacy over man-made laws, thus precluding libertarian concepts of democracy and human rights.

But shari'a is seldom found in its purest form; Saudi Arabia is the exception, not the rule. Muslim democracies like Indonesia and Turkey have demonstrated that Shari'a can coexist with libertarian human rights and secular law. But the relationship between Shari'a and liberty is uneasy, and the jury is out on the role of Shari'a in the Middle East and Africa—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.⁴

Most Muslim democracies oppose radical Islamist terrorism, but where shari'a subordinates secular law it stifles democracy and human rights. And if the recent evolution of Islamic democracies is any indication of the future, Shari'a will continue to predominate in Islamic cultures. As a result the role of Shari'a in shaping concepts of legitimacy is critically important to U.S. foreign policy.

Tribal traditions have been as much a factor in shaping Islamic culture and standards of legitimacy as the Shari'a of Muhammad; and because the tribal cultures of the Middle East and Africa have had little experience with Western libertarian values some of their oppressive tribal traditions have been incorporated into Shari'a.

This is in contrast to the libertarian ideals articulated in the Declaration of Independence and the U.S. Constitution. The idea of sacrificing individual liberty to unyielding and comprehensive holy laws interpreted and administered by religious officials is anathema in libertarian democracies, but it has widespread support in emerging Muslim democracies in the Middle East and Africa. And the fear that Shari'a will spread and suppress fundamental human rights around the world has generated suspicion and hostility toward Islam in libertarian democracies.

Blasphemy laws illustrate the problem. They are prevalent in Islamic nations where Shari'a is the rule of law and effectively suppress the freedoms of religion and expression; and blasphemy laws have been correlated with radical Islamist terrorism.⁵ Blasphemy was once a crime in Puritan America, where trials for witchcraft were common.⁶ While blasphemy is no longer a crime in the U.S., there remain tensions between fundamentalist religious beliefs and the freedoms of religion and speech.⁷

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

Sovereignty is about the source of political power, and until the Treaty of Westphalia in 1648 the sovereign power of God to make laws and ordain monarchs with the divine right to rule was absolute. 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 further 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 1700.⁸

The U.S. Constitution is founded on the sovereignty of man, not God, in matters of governance; and the First Amendment to the Constitution prohibits government from promoting or interfering with religion and provides the freedoms of religion and speech. Where Shari'a is the rule of law there is no separation of religion and politics and no freedom of religion or speech. As a result, in Islamic nations like Egypt, politicians can use religious laws to stifle political criticism.⁹

Even in America there remains an uneasy relationship between God's law and man's law that requires the pervasive power of religion in politics to be held in check by constitutional civil rights. The U.S. remains a religious nation in which most people believe that God's law is higher than man's law, and mandates *liberty in law*. That belief is 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.*¹⁰

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 exclusivist beliefs and are suspicious and even hostile to those of other religions. Like fundamentalist Muslims, many Christians in the U.S. believe that God condemns all unbelievers to eternal damnation, as evidenced by the strong public reaction to a noted evangelical who questioned the existence of hell.¹¹

Such religious exclusivism is bad theology and produces bad law, not to mention religious prejudice, hatred and 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. It is through peaceful civil disobedience like that demonstrated by Dr. Martin Luther King 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 standards of legitimacy over those of 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 theocracies where God's laws are considered perfect and immutable; but in Islamic democracies like Turkey and Indonesia Shari'a is a part of a secular rule of law that recognizes the sovereignty of man, and the morality of any law can be challenged by democratic processes, and even civil disobedience.

Free Will, the Enlightenment and the Backlash of Religious Fundamentalism

Religion undermines *liberty in law* whenever believers try to impose their sacred laws on others. Fortunately most Jews and Christians in libertarian democracies consider their religious standards of legitimacy to be voluntary moral standards that are subordinate to human rights and secular law; and most Muslims who live in Western democracies have conformed their religious beliefs to accept secular libertarian values.¹²

While most Jews, Christians and Muslims in Western libertarian democracies embrace the freedoms of religion and expression, there are many devoutly religious fundamentalists in the world who reject libertarian values and seek to impose God's laws on others. That is evident by the many young Muslims who have been recruited by ISIS from libertarian democracies, not to mention many other Islamist zealots from Islamic cultures. They represent a real threat to freedom and democracy.

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 mystical relationship between the believer and God, but exoteric and practical in defining the moral relationships between people. It acknowledges the freedom to accept or reject any religious belief and leaves judgment on such choices to God, not man. All religions acknowledge that a free and voluntary will is necessary to produce a true faith.¹³

The Enlightenment brought the concept of free will into the realm of politics. It challenged the infallibility of religious truths with advances in knowledge and *reason*. Before the 17th century reason was primarily deductive and based on divine revelation, but new discoveries challenged divine revelation as the sole source of 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 U.S. Declaration of Independence and Constitution, and most religions in the West have since conformed to the libertarian ideals of the Enlightenment; but those ideals are not yet prevalent in the Islamic East.

The Enlightenment opened the door to progress and modernity in the West, but it also created a religious backlash among fundamentalist believers who felt threatened by new discoveries and reason and defended their traditional religious doctrines against the threat of change with inerrant and infallible scriptures and holy laws that they believed were divine revelations.¹⁴ Islamists are fundamentalist Muslims who embrace a pure form of Shari'a and defend it against the incursions of reason, progress and modernity with a perfect and immutable Qur'an. Fundamentalist Jews and Christians are much like Islamists, with the Bible their source of immutable truths and holy laws.

Democratic processes allow believers to assert the moral supremacy of God's law without undermining human rights and the secular rule of law. Peaceful civil disobedience is the ultimate means to assert the moral supremacy of God's law over man's law, as was demonstrated by Dr. Martin Luther King when he used the moral strength of the Christian religion to provide true justice in the Jim Crow South.

All religious fundamentalism conflicts with the progressive ideals of democracy, human rights and the secular rule of law, and militant Islamists, or jihadists, go beyond other fundamentalists and use violence to promote their views. While moderate Muslims are in the majority in the U.S. they seem to be a minority in the Middle East and Africa where turmoil reflects a battle of legitimacy within Islam that will ultimately define it as a religion of liberty, peace and justice or one of coercion, violence and oppression.

In Islam the nature and role of Shari'a is at the heart of the battle of legitimacy. It is a contest between individual freedom and oppressive religious law, and the main issue is whether shari'a is considered an unyielding code of divine law that demands complete submission or a voluntary code of 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 a code of sacred law that is forced on others. Jews have provided an example of how that can be done. Over the years they have reconciled their religious obligations under ancient Mosaic Law, which has been incorporated into Shari'a, with the ideals of libertarian democracy.¹⁵

Moses, Jesus and Muhammad and a Common Word of Faith

Moses brought God's law as a standard of righteousness to the 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 dictated the Qur'an. It supplemented Mosaic Law with Arabic standards of legitimacy and declared them to be God's perfect and immutable law (Shari'a). It would be another 1,000 years before the Enlightenment would challenge the sovereignty of God's law with the sovereignty of man-made law.

The Enlightenment transformed religions in the West with advances in knowledge and reason and with concepts of democracy, human rights, the secular rule of law—even with capitalism. Those secular libertarian concepts were not mentioned by Moses, Jesus or Muhammad, but they are compatible with the altruistic love of *the greatest commandment* to love God and our neighbors as ourselves taught by Jesus; and Saint Paul affirmed that the love of one's neighbor was the fulfillment of God's law.¹⁶

Islamic scholars have since recognized *the greatest commandment* to be a *common word* of faith for Jews, Christians and Muslims alike, but apostasy and blasphemy laws prevalent in Islamic cultures negate the obligation to love one's *unbelieving* neighbor, which is an interfaith imperative.¹⁷ Fundamental human rights begin with the freedoms of religion and speech, and until apostasy and blasphemy laws are eliminated, there can be no real political freedom or free will in Islam, and a *common word* will lack credibility as an interfaith standard of legitimacy.

Despite their many differences Judaism, Christianity and Islam share many similarities. Mosaic Law is remarkably similar to Shari'a, reflecting their common Semitic origin, but unlike Islamic law punishments under Mosaic Law are in this world, not the next. While Judaism and Islam are deontological, or law-based, religions, Christianity is more teleological with its guiding principle of *love over law*. The principle of altruistic love for others must be embraced by all religions for them to be compatible with the ideals of libertarian democracy, human rights and the secular rule of law.

Unlike Jesus, Moses and Muhammad were religious leaders who assumed major political responsibilities. They had to be both law-givers and enforcers to prevent anarchy and that required divine authority and sanction. Circumstances were different for Jesus in 1st Century Palestine, where the Roman Empire governed and dictated the law. Muhammad, like Jesus, had no political power 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 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 was a precedent for ethnic cleansing in the name of God, such as that in the Balkans during the 1990's.¹⁸

While Jesus eschewed politics, they swirled around him. Around 66 CE Jewish zealots instigated a successful uprising against Roman rule, but in 70 CE 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. Jews would not rule Israel

again until 1948 when it became a democracy, but it has remained a crucible of religious conflict.

There is little reason to be optimistic about peace in the Middle East, unless Shari'a is conformed with libertarian human rights, beginning with the freedoms of religion and speech, and that would require the elimination of apostasy and blasphemy laws. In Europe there is increasing suspicion of Muslims, and in the U.S. GOP presidential aspirants Donald Trump and Ted Cruz have galvanized crowds—many who claim to be Christian—by appealing to their fear of Muslim immigrants.

The remedy for the religious hatred and violence that has plagued interfaith relations throughout history is for Christians and Muslims to embrace *the greatest commandment* to love God and their *unbelieving* neighbors as *a common word* of faith. Unfortunately, most Muslims accept the Qur'an's condemnation of unbelievers and blasphemers, so the jury is still out on whether they can love their non-Muslim neighbors.

A Balancing Act for Legitimacy and Law in Libertarian Democracies: Protecting Individual Rights and Providing for the Common Good

Libertarian democracy is an amalgam of reason, natural law and politics. It has no precedent in ancient scriptures that emphasized collective obligations to provide for the common good but said nothing about individual rights. That presents challenges for fundamentalists who believe their ancient scriptures are God's last word on legitimacy and law. While religions in libertarian democracies have embraced fundamental freedoms since the Enlightenment, in Islamic cultures human rights remain more about providing social and economic benefits than protecting individual rights.¹⁹

In the U.S. there is political gridlock between GOP conservatives like Donald Trump and Senator Ted Cruz who emphasize promoting national power and individual rights, and Democratic liberals like Senators Bernie Sanders and Elizabeth Warren who emphasize providing for the common good, especially welfare programs for the poor and needy. Social welfare was not an issue 200 years ago, but public expectations today require compromise between neo-libertarians who emphasize individual rights and liberals who promote social welfare programs.²⁰

The future of democracy depends upon balancing individual rights with providing for the common good, and the contrasting priorities of human rights reflect a need to balance those contrasting objectives. Protecting the fundamental freedoms of religion and speech and providing for equal rights under law should have a high priority, not only as individual rights but also in providing for the common good. The Qur'an mandates *no compulsion in religion*, but where apostasy and blasphemy are made crimes there is compulsion in religion and there can be no freedom of religion or speech.²¹

In Western democracies, secular constitutions enumerate civil rights that protect fundamental freedoms against government encroachment, and in Islamic nations Shari'a functions much like a constitution and prohibits any conflicting secular law. For example, the constitutions of Iraq and Afghanistan provide that all secular law 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 1966.²² Muslim nations are parties to both the Declaration and Covenant, but Islamic human rights differ from those libertarian civil and political human rights in Western democracies since they are limited by Shari'a.

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."²³

Libertarian democracy and human rights cannot coexist with rigid religious laws like those of Shari'a that limit the freedoms of religion and speech and the rights of women and non-Muslims. Religious rules or standards of legitimacy must be considered voluntary moral standards rather than coercive laws to be consistent with fundamental human rights. That is the rule in libertarian democracies, but not in Islamic cultures.

Most Muslims who live in libertarian democracies prefer their freedoms and the secular rule of law to an immutable and oppressive Shari'a. They have not renounced Islam but have reconciled the mandates of the Qur'an and Shari'a with libertarian values. While they believe in the moral supremacy of God's law over man's law, most have accepted the primacy of human rights and democratically made laws as consistent with God's will.

The Enlightenment made individual rights a priority of legitimacy and law in Western libertarian democracies, and their religions now share that priority. Islamic cultures can do the same if they recognize *the greatest commandment* to love God and their neighbors—including their unbelieving neighbors—as a guiding principle of legitimacy and law; but that will require eliminating the crimes of blasphemy and apostasy and ending discrimination against women and non-Muslims.

True justice and the moral legitimacy of any government are based on how well it can balance the protection of individual rights with providing for the common good. The U.S. has often emphasized the former at the expense of the latter, while Islamic nations have done the opposite. Balancing those two objectives is a moral and political challenge for all people of faith, but Shari'a makes it more difficult for Muslims than for others.

Promoting Libertarian Democracy in Foreign Policy and Military Operations

Since the early 20th century *American exceptionalism* has put libertarian democracy, human rights and the secular rule of law at the forefront of U.S. foreign policy, and those ideals have been promoted with a missionary zeal that has often shown little respect for conflicting concepts of legitimacy.

Military operations are the ultimate extension of a nation's politics (by other means), and they require legitimacy in both the U.S. and in the area of operations to achieve the public support needed for strategic political objectives. Conflicting standards of legitimacy are exacerbated when the U.S. uses military force in Islamic cultures to attain its political objectives. Painful experience in Afghanistan and Iraq has prompted some commentators to conclude that the era of American exceptionalism is over.²⁴

Today U.S. security interests in the region are more threatened than before 9/11 with an increase in Iranian influence and Islamist terrorism. It is a challenging political environment that calls for Islamic leaders to embrace libertarian democracy and human rights to undermine the legitimacy of radical Islamism and shape Islam for a modern world. That may take a while, and U.S. foreign policy and military operations can help Muslims achieve that strategic objective.

Any future U.S. military operations in Islamic cultures will likely be conducted by a relatively few Special Operations Forces (SOF) advisors and trainers rather than by large deployments of U.S. conventional combat forces that undermine U.S. military legitimacy in Islamic cultures. But it will be a daunting challenge for those SOF diplomat-warriors to achieve the public support and legitimacy needed for mission success. They must defer to local standards of legitimacy to gain public support and also promote fundamental human rights, even when they conflict with Shari'a.²⁵

U.S. diplomats have a similar challenge to promote libertarian democracy, human rights and the secular rule of law in Islamic cultures hostile to libertarian values. Like SOF diplomat-warriors, civilian diplomats must acknowledge that religion is a major factor in building the local public support needed to achieve U.S. strategic political objectives. Faith-based diplomacy is needed to achieve legitimacy while promoting libertarian values in Islamic cultures.²⁶

Heavy-handed American exceptionalism may be over, but promoting libertarian concepts of legitimacy and law should remain a priority of U.S. foreign policy and military operations. They are incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and they should remain the centerpiece of U.S. foreign policy even when they conflict with Shari'a. That is because authoritarian dictators and would-be caliphates use Shari'a to support their oppressive regimes by denying their opponents any freedom of thought or expression.

Promoting libertarian human rights, beginning with the freedoms of religion and speech, should be a priority of U.S. foreign policy and military operations to undermine the legitimacy of Islamist terrorists and authoritarian despots who use Shari'a to oppress people in the name of God. Democracy is not enough; without human rights to protect minorities, democracy can produce a tyranny of the majority, as in Egypt; but the Obama administration has vacillated on the priority of human rights in U.S. foreign policy.²⁷

In a democracy, military power is the last bastion of defense for libertarian values, but it can also be a threat to them. In the U.S. military power is held in check by Constitutional provisions for civilian supremacy and a separation of powers; but those safeguards are not present in Egypt and Pakistan where military power has subverted democracy and human rights. Even in Turkey there has been continuing conflict between the civilian government and the military.²⁸

Western forms of libertarian democracy are not likely in Islamic cultures, but U.S. foreign policy and military operations can help emerging Islamic democracies in the Middle East and Africa defeat Islamist violence and provide equal justice under law. Just as the political freedoms of the Enlightenment liberated the Western world from oppression in the name of God, they can do the same for the Islamic world.

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

Emerging Islamic democracies in the Middle East and Africa will no doubt incorporate Shari'a in their rule of law. Turkey and Indonesia are long-standing examples of how Islamic democracies can blend Shari'a with libertarian democracy and human rights; but Egypt, Syria, Libya, Yemen and Pakistan have more theocratic forms of democracy that subordinate human rights and the secular rule of law to the dictates of Shari'a. Tunisia could go either way. Any of them could become a quasi-theocracy presided over by Islamic clerics, as in Iran, or a military regime with a façade of democracy, as in Egypt and Pakistan.

Just how democracy evolves in those Muslim nations depends on how Shari'a is interpreted as it relates to libertarian democracy, human rights and the secular rule of law; and Muslim scholars are deeply divided on that issue.

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 the collective needs or the common good of the nation, tribe or the current despot rather than individual rights.²⁹

Neither of these models is a political ideal for Islamic cultures, where the authoritarian values of Shari'a clash with the libertarian values of Western democracies and where the Eastern authoritarian model denies the fundamental freedoms of religion and expression as well as equal justice under 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,³⁰ but there are progressive Muslim scholars who favor a Shari'a more compatible with libertarian democracy and human rights.³¹

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 of reasoning—deductive and inductive—that are sources of truth in 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 ancient Hebrews and modern fundamentalist Jews, while fundamentalist Christians consider both the Old and New Testaments of the Bible the inerrant and infallible word of God. For Muslims the Qur'an is the immutable word of God and Shari'a is the highest standard of legitimacy in matters of governance, law and justice. All of these sacred scriptures emphasize the need for believers to provide for the common good, but none mention either democracy or individual human rights.

Unlike deductive reasoning, inductive reasoning relies on secular knowledge and reason to discover truth rather than on divine revelation; but progressive believers employ both forms of reasoning, complementing those truths discovered through human knowledge and reason with mystical truths of faith that lie beyond human knowledge. The use of inductive reasoning is what distinguishes progressive believers from religious fundamentalists who rely entirely on deductive reasoning to discover truth.

Freedom is mentioned in the holy scriptures, but in a theological or spiritual context rather than a political context. Religions did not give serious consideration to the concepts of freedom, democracy and human rights until the Enlightenment of the 17th century; and while its ideals of libertarian democracy and human rights soon transformed Western cultures and 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.³²

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.³³ 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)."³⁴ 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."³⁵ 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."³⁶ 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.³⁷

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."³⁸ 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.³⁹

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."⁴⁰ 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.⁴¹

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."⁴²

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."⁴³

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.”⁴⁴

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.”⁴⁵

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.”⁴⁶

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.⁴⁷ 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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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*.⁵¹

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 greatest commandment* to love our neighbors as ourselves.⁵² 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.⁵³

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) as defined by Shari'a 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 conflict with modern concepts of justice is 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.⁵⁴

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.⁵⁵

Sheik Ali Gomaa is a respected scholar and former Grand Mufti of Egypt who has taken issue with Qaradawi over the legitimacy of President El Sissi's regime. While considered to be more progressive than Qaradawi, Gomaa is not a liberal. He told Michael 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."⁵⁶

Gerson pointed out that Gomaa has made a number of progressive rulings that recognize women's rights, restrict corporal punishment and forbid terrorism. 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." But Sheik Gomaa has supported the oppressive policies of Egypt's President El-Sissi, so that his understanding of love as a moral standard of legitimacy for law and politics, whether of God or man, is not compatible with libertarian democracy.⁵⁷

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, Qaradawi and Sheik Goma'a, Nasr subordinates libertarian human rights to concepts of responsibility and communitarian interests in Shari'a.⁵⁸

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."⁵⁹

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."⁶⁰ 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."⁶¹

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 Goma'a as supporting the right of Muslims to change their religion, noting that Goma'a reportedly later reversed his position. Volf summarizes his views 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."⁶²

Nicholas Adams is the Academic Director of the Cambridge Inter-Faith Programme at the University of Cambridge. He explores 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” reason 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.⁶³

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.”⁶⁴

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.”⁶⁵

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.⁶⁶

The above sampling of Islamic scholars reveals a broad divergence of opinion on how Shari'a relates to libertarian democracy and human rights, and whether its mandates are considered voluntary moral standards of faith or immutable and coercive laws beyond the reach of reason and interpretation. The contrasting views echo debates in the evolution of Judaism and Christianity over heresy and blasphemy laws that prevailed in theocratic and authoritarian regimes up to the Enlightenment, when Jews and Christians embraced libertarian democracy with its freedoms of religion, expression and equal justice under the rule of secular law for women and unbelievers.

As for Islam, it is still too early to tell which views will prevail.

Shari'a, Liberty and the Law

The great prophets of Judaism, Christianity and Islam taught God's standards of legitimacy—that is, what is right and wrong—for their believers. Moses and Muhammad brought God's law for Jews and Muslims, while Jesus taught the supremacy of *love over law*. Shari'a provides the standards of legitimacy for Muslims, and where it is a rigid rule of law it precludes libertarian democracy and human rights. While most Muslim scholars now accept limited democracy, Shari'a denies the freedoms of religion and expression with apostasy and blasphemy laws and discriminates against women and non-Muslims.

There cannot be equal justice under law so long as Shari'a precludes libertarian human rights. That has been the case in Islamic nations like Egypt since the Arab Spring of 2011. A typical view was expressed by a 26-year-old student at a protest in Cairo: "Is democracy the voice of the majority? 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."⁶⁷

That view reflects a lack of understanding of how Shari'a relates to liberty and equal justice under law. Without human rights to protect minorities, democracy can produce a tyranny of the majority, as in Egypt, where there has been continued religious violence. The Vatican estimates that 100,000 Copts have fled Egypt since Mubarak's fall, and the story is the same throughout the Middle East and Africa. "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."⁶⁸

Egypt was initially thought to be a bellwether for democracy in the Middle East, but a repressive military regime and the lack of any viable political alternative to it or to an Islamist regime of the Muslim Brotherhood has stifled any hope for libertarian democracy in Egypt, and the outlook is bleak.⁶⁹

The outlook is little better in Pakistan, where large crowds rallied to support blasphemy laws that carry a mandatory death sentence after 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.⁷⁰

Can democracy and the freedom of religion and expression coexist under Shari'a as a rule of law? That question is complicated by the lack of a uniform Shari'a. The Shari'a in Turkey and Indonesia is relatively compatible with libertarian democracy and human rights, while Shari'a in Saudi Arabia, Iran, Pakistan and Egypt conflict with libertarian democracy.

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, including women and non-Muslims.

Conclusion

The Enlightenment transformed politics and religion in the Western world with libertarian concepts of democracy, human rights and the secular rule of law, but not in Islamic cultures where Shari'a continues to stifle libertarian democracy and human rights. Many Islamic nations enforce apostasy and blasphemy laws that prevent any real freedom of religion, speech or politics, and Islamist terrorists use barbaric forms of Shari'a to eliminate their enemies.

That is nothing new. Judaism, Christianity and Islam have all used religious laws to oppress and defeat their opponents in the name of God. For there to be true *liberty in law*, religions must consider their religious rules or standards of legitimacy to be voluntary moral standards rather than laws that are enforced by governmental powers. There can be no free will in faith or political freedom when religious laws like those prohibiting apostasy and blasphemy are enforced.

The freedoms of religion and speech have minimized religious violence in libertarian democracies, and they can do the same in Islamic cultures by undermining the legitimacy of Islamist terrorists as well as authoritarian despots. If Muslims are free to choose and openly criticize their religion, then Shari'a cannot be used as a means of religious and political oppression.

True justice requires that individual rights are balanced with the collective obligation to provide for the common good. The U.S. 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 requirements of political legitimacy. That requires accepting *the greatest commandment* to love God and our neighbors as ourselves—even our *unbelieving* neighbors—as *a common word* of faith.

The future of Islam will be decided by competing interpretations of the Qur'an and Shari'a. Only Muslims can conform Islam and Shari'a with libertarian democracy and human rights, but U.S. national security policy can and should assist progressive Muslims accomplish that objective through economic and security assistance. It could help resolve existing religious violence and be a deterrent against future violence.

End Notes:

1. Islam is the world's fastest growing religion, and the Pew Research Center has predicted that it will be on a parity with Christianity by 2050 and surpass Christianity as the world's largest religion by 2070. See *The Future of World Religions: Population Growth Projections, 2010-2050*, Pew Research Center, April 2, 2015 at <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/>. For commentary on this religious growth, see Barnes, *The Future of Religion: In Decline and Growing*, posted on Jesus Meets Muhammad website, June 7, 2015, at <http://www.jesusmeetsmuhammad.com/search?updated-min=2015-01-01T00:00:00-08:00&updated-max=2015-06-14T00:00:00-07:00&max-results=50&start=29&by-date=false>.
2. Legitimacy defines what is right and its standards include both voluntary moral standards and mandatory legal standards. Military legitimacy is a subcomponent of political legitimacy, and is described in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, London, 1996, at chapter 3 (hereinafter cited as Military Legitimacy); posted on Jesus Meets Muhammad website at <https://drive.google.com/file/d/0B3gvZV8mXUp-VmpMUV9sSU9kaDA/view>.
3. See Karen De Young, *U.N. Security Council approves plan for Syrian peace process*, Washington Post, Dec. 18, 2015, at https://www.washingtonpost.com/world/national-security/global-leaders-struggle-to-agree-on-a-way-to-end-the-crisis-in-syria/2015/12/18/8c194686-a5ab-11e5-9c4e-be37f66848bb_story.html?wpmm=1&wpisrc=nl_headlines.
4. 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, chap. 4, posted at <https://drive.google.com/file/d/0B3gvZV8mXUp-VmpMUV9sSU9kaDA/view> and 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; 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, in the 2009 Military Legitimacy and Leadership Journal, at www.militarylegitimacyreview.com.
5. See Amjad Mahmood Khan, *How Anti-Blasphemy Laws Engender Terrorism*, Harvard International Law Journal Online, Volume 56, May 2015, page 1, at http://www.harvardilj.org/.../Antiblasphemy-Laws_0608.pdf.

6. 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. Apostasy and blasphemy laws preclude the freedoms of religion and speech. 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. Carlos Lozado affirmed the contemporary relevance of DeTocqueville’s observations in *The book every new American citizen — and every old one, too — should read*, *Washington Post*, Dec. 17, 2015, at https://www.washingtonpost.com/news/book-party/wp/2015/12/17/the-book-every-new-american-citizen-and-every-old-one-too-should-read/?wpmm=1&wpisrc=nl_headlines.

7. On the conflict between fundamentalist religion and the freedoms of religion and speech and how they relate to issues of legitimacy and law, see commentary in *Archives* at <http://www.jesusmeetsmuhammad.com/> in the following blogs: *Faith and Freedom*, December 15, 2014; *Religion and Human Rights*, February 22, 2015; *Religion, Human Rights and National Security*, May 10, 2015; *Fear and Fundamentalism*, July 26, 2015; *Freedom and Fundamentalism*, August 2, 2015; *Balancing Individual Rights with Collective Responsibilities*, August 9, 2015; *Legitimacy as a Context and Paradigm to Resolve Religious Conflict*, August 23, 2015; *The Power of Freedom over Fear*, December 12, 2015; and *The Four Freedoms, Faith and Human Rights*, January 9, 2016.

8. 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.

9. On the mix of religion and politics in Egypt, see Declan Walsh, *Egypt’s President Turns to Religion to Bolster His Authority*, New York Times, Jan. 9, 2016, at <http://www.nytimes.com/2016/01/10/world/middleeast/egypt-abdel-fattah-el-sisi-islam.html>.

10. *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.

11. 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.

12. 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, at <http://www.theatlantic.com/magazine/archive/2008/03/and-the-winner-is/306654/>.

13. The Apostle Paul wrote of free will and freedom from religious laws in concluding that love of neighbor fulfilled the Jewish law. (see note 16, *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*.

14. 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.

15. Whether shari'a can be interpreted as compatible with libertarian democracy depends on the concept of *ijtihad*, 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. Mustafa Akyol has suggested that the concept of *irja*, which leaves judgment on issues of right belief to Allah rather than opposing religious factions (and which ISIS considers a heresy), could be a theological means to overcome the rigidity and violence of Islamism. See Akyol, *A Medieval Antidote to ISIS*, *New York Times*, Dec. 21, 2015, at <http://www.nytimes.com/2015/12/21/opinion/a-medieval-antidote-to-isis.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&r=0>.

16. *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.

17. 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 16, *supra*)

18. *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.

19. 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 29, *infra*.

20. 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.

21. 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*.

22. 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.

23. 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*)

24. 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. Its real danger is in using overwhelming military force to achieve political objectives that are not essential to U.S. national security, as was the case in Vietnam and Iraq. See Richard Cohen, *The Myth of American Exceptionalism*, The Washington Post, May 9, 2011.

25. 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 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 26/29, *infra*. Lessons in legitimacy have been learned in Iraq and Afghanistan. It is understood that religion shapes the human terrain, and that in Islamic cultures navigating the human terrain is as important to mission success as the geographical terrain. 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)

26. The concept of faith-based diplomacy complements the concept of Special Operations Forces (SOF) trainers and advisors, emphasizing cultural engagement and the objective to prevent more extensive military engagement where religion plays a significant role in shaping concepts of legitimacy and law (see references in note 25, *supra*). Douglas

Johnston has outlined this symbiotic relationship between diplomacy and non-combat military operations in Faith Based Diplomacy, Oxford University Press, 2003, chapter 2.

27. On the ambiguity of President Obama on human rights in U.S. foreign policy, see the editorial in The Washington Post, *Trouble at the core of U.S. foreign policy*, September 26, 2013 at <http://www.washingtonpost.com/opinions/trouble-at-the-core-of-us-foreign-policy/2013/09/26>. On how the lack of human rights to protect fundamental freedoms in Pakistan and Egypt has created a tyranny of the majority, see note 28, *infra*.

28. On the paradox of the US military as an authoritarian regime in a libertarian democratic society, see Military Legitimacy (note 2, *supra*) at pp 2, 3, 105-107, 118-126. In Pakistan a crisis was precipitated between the civilian government and its army by an alleged request by President Asif Ali Zardari to the U.S. to help prevent a military coup after the U.S. 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 Pakistan for half of its 64-year existence and was livid after the U.S. operation against Osama bin Laden. Though both the army and the civilian government receive billions of dollars in American assistance, the military views the U.S. with deep distrust.” Karen Brulliard and Karen DeYoung, *In Pakistan, a deep civil-military divide*, www.washingtonpost.com, November 19, 2011. In Egypt, 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 anxious and divided on the sidelines. Some Egyptians favored civil liberties but most seemed to favor shari’a as a rule of law. 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 U.S. support of the military government in Egypt 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 sentenced 529 members of the Muslim Brotherhood to death for revolutionary activities in a mass trial, and condemned another 683 to death a month later. After sending 10 Apache helicopters to the Egyptian military the Obama administration said the ruling “defied even the most basic standards of international justice.” Erin Cunningham and Abigail Hauslohner, *Egypt sentences 683 to death in latest mass trial of dissidents*, Washington Post, April 28, 2014. The U.S. continued to provide aid to Egypt’s military government despite continuing human rights violations. See *Egypt’s state of repression*, Editorial Board, Washington Post, December 3, 2015, at https://www.washingtonpost.com/opinions/egypts-state-of-repression/2015/12/03/6fbf98dc-991c-11e5-8917-653b65c809eb_story.html?wpmm=1&wpisrc=nl_opinions.

29. On balancing individual freedom with providing for the common good, see notes 19-23, *supra*. Mark R. Amstutz 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 22, *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 15, 19 and 23, *supra*) Amstutz noted “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.” And he asserted “The idea of human rights is subversive because it establishes norms that if not fulfilled by a state can undermine its international legitimacy.” See Amstutz, International Ethics: Concepts, Theories and Cases in Global Politics, Third Edition, Rowman & Littlefield Publishers, Inc., 2008, pp 95-102. Craig A. Stern has argued that making economic and social benefits into human rights rather than leaving them as political aspirations undermines the rule of law since such social and economic benefits cannot be universally enforced as human rights. See Stern, *Human Rights or the Rule of Law—The Choice for East Africa?* March 6, 2015, SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574823. 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). He 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 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 Barnes, *Back to the Future: Human Rights and Legitimacy in the Training and Advisory Mission*, Special Warfare, January-March 2013, p 42.

30. See note 23, *supra*, and notes 52? and 55?, *infra*.

31. See notes 2, 12, 15 and 22, *supra*.

32. See notes 13 and 16, *supra*.

33. See notes 12, 19 and 29, *supra*.

34. Khaled Abou El Fadl, Islam and the Challenge of Democracy, Princeton University Press, Princeton & Oxford, 2004, at p 36.

35. *Ibid* at pp 4, 10, 13.

36. *Ibid* at pp 19, 22.

37. *Ibid* at pp 23, 24.

38. *Ibid* at pp 25-30.

39. *Ibid* at pp 30-36.

40. John L Esposito, *Practice and Theory*, Islam and the Challenge of Democracy, see note 34, *supra*, at pp 93, 95; in a later article, Esposito argues that Islamist terrorism is more political than religious but fails to note that in Islam there is no distinction between politics and religion, and he does not address how Islamism rejects libertarian values. See Esposito, *Why Have We Normalized Islamophobia?* Oxford Islamic Studies Online, December 27, 2015 at http://blog.oup.com/2015/12/oiso-islamophobia/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=oup_blog.

41. *Ibid* at pp 97, 98.

42. *Ibid* at p 99.

43. M. A. Muqtedar Khan, *The Primacy of Political Philosophy*, Islam and the Challenge of Democracy, see note 34, *supra*, at pp 63, 64.

44. *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 6, *supra*.

45. Khaled Abou El Fadl, *Reply*, Islam and the Challenge of Democracy, see note 34, *supra*, at pp 109, 122.

46. Abdullahi Ahmed An-Na'im, Islam and the Secular State: Negotiating the Future of Shari'a, Harvard University Press, Cambridge, Massachusetts, 2008, p 1.

47. *Ibid* at pp 3, 10, 12-15, 26, 27.

48. *Ibid* at pp 2, 5; see also note 21, *infra*.

49. *Ibid* at pp 3, 5, 14, 17, 28-30; on free will see note 13, *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 21, *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 44 and 47, *supra*)

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

51. *Ibid* at chapters 1, 3 and 7; on *ijtihad*, see note 15, *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.

52. As to reciprocity and the golden rule, see *ibid* at pp 24, 95. Paul 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 and affirmed that love of one's neighbor as oneself was the fulfillment of the law. See notes 13 and 16, *supra*.

53. 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.
54. 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.
55. 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. Feldman has also asked, "Do Christians and Muslims worship the same God? ...if not, then neither do Christians and Jews." See <http://www.thestate.com/opinion/op-ed/article51328635.html>.
56. Michael Gerson, *The Grand Mufti's Mission*, Washington Post, October 23, 2009.
57. *Ibid.* As a sponsor of a common word, see 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 MacMillan, NY, 2010, p 18. More recently Goma'a has praised Egypt's President al-Sissi, who has maintained a "state of repression" in Egypt, and condemned Sissi's political opponents. See Editorial Board, Washington Post, December 3, 2015 at https://www.washingtonpost.com/opinions/egypts-state-of-repression/2015/12/03/6fbf98dc-991c-11e5-8917-653b65c809eb_story.html?wpmm=1&wpisrc=nl_opinions. See also Declan Walsh, New York Times, January 10, 2016 at <http://www.nytimes.com/2016/01/10/world/middleeast/egypt-abdel-fattah-el-sisi-islam.html>. On the opposing views of Goma'a and Qaradawi on the legitimacy of the Sissi regime under Islam, see <https://www.middleeastmonitor.com/articles/africa/8421-ali-gomaa-kill-them-they-stink> and <http://iumsonline.org/en/iums123/news/d4052/>. On how U.S. support for al-Sissi's repressive regime has undermined democracy, legitimacy and the stability of Egyptian politics by strengthening rather than weakening terrorist groups, see https://www.washingtonpost.com/opinions/how-to-rescue-egypt/2016/01/28/183fc432-c3a7-11e5-8965-0607e0e265ce_story.html?wpmm=1&wpisrc=nl_opinions.
58. 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 MacMillan, New York, 2010, p 25. In a widely used text on Islam, Nasr has presented a traditional view of Islam and Shari'a, defining 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) Sayyed Hossein Nasr, Ideals and Realities of Islam, New Revised Edition, ABC International Group, Inc., Chicago, 2000 (page references listed above). It is difficult to imagine Nasr's ideals being reconciled with modern concepts of democracy, human rights and the secular rule of law.

59. 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, New York, NY, 2010, p 51.

60. Miroslav Volf, A Christian Response, Harper One, New York, NY, 2011, p 21.

61. *Ibid* at pp 156-159.

62. *Ibid* at pp 231-234 (see Volf's note 27 at p. 307: Goma reportedly later reversed his position on apostasy, stating that "...apostasy is a crime which must be punished.")

63. 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.

64. 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.

65. *Ibid* at p 191.

66. *Ibid* at pp 189, 195.

67. Anthony Shadid and David D. Kirkpatrick, *Activists in Arab World Vie to Define Islamic State*, New York Times, September 27, 2011.

68. 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.

69. On the repressive regime of President (former General) al-Sissi of Egypt, see notes 2, 9, 28, 57 and 68, *supra*. On the danger of the vast political and economic power of the Egyptian military to democracy, see Barnes, *Democracy and the Egyptian Military: Friends or Foes?* Feb. 7, 2011, at http://militarylegitimacyreview.com/?page_id=157.

70. 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. Pakistan is at the top of the list of Muslim nations that persecute Jews, Christians and other minorities (Pakistan, Saudi Arabia, Iran, Iraq, and Egypt). According to the U.S. 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 U.S. 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.

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

Rudolph C. Barnes, Jr.©2014. All rights reserved. (11/17/14)

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.

Not Used:

(P 8) The Arab Spring of 2011 originated in Tunisia in December 2010 and sparked democratic uprisings in Egypt, Libya, Syria, Yemen and Bahrain. In Egypt, the Muslim Brotherhood won an initial election, but was deposed by the Egyptian military. In Tunisia, Islamists proved they can gain political legitimacy within a democratic framework, but it remains a work in progress. In Palestine and Lebanon, Hamas and Hezbollah continue to represent threats to Israel. Syria and Libya have become failed states, while the more stable Islamic democracies of Turkey and Indonesia have gravitated toward Islamism.