Democracy, Constitutionalism and Shariah

The Compatibility Question

*A.T. Shehu**

Abstract

This article is a contribution and a response to the debate on the compatibility, or rather the incompatibility, of Islam and Shariah with democracy and constitutionalism. The debate has been both inter and intra; Muslims as well as non-Muslims are divided among themselves on the issue. A careful synthesis of the arguments on both sides shows fundamental problems of semantics and lack of proper appreciation of the issues involved because of divergent construction of the basic rules and normative concepts. This article identifies as a problem the tendency for cultural prejudice and intolerance to largely determine the direction of the debate and endure not only a 'clash of civilizations', but also, in reality, a clash of normative concepts. This article contends that Islam is more democratic in nature and that Shariah itself is a system of constitutionalism; needless to say, the objectionists have long forgotten that, in essential formulations, Shariah is the foundation of thoughts on human rights.

A.   Introduction

There has been, for some time now, a great debate on whether Islam or Shariah is compatible with democracy. Sometimes, the debate is on whether Islam is compatible with constitutionalism and democracy. The debate has been usually between Western intellectuals and Islamic scholars. There is also no immediate resolution even among Muslims; Muslims are also divided among themselves, with some conceding to compatibility, while the other group argues against it.[1] It would appear that whichever direction the debate follows, the fundamental issues are the same. So whether the debate is on democracy and Islam or democracy,

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*   Dr. Ajepe Taiwo Shehu is a senior lecturer at University of Ilorin Faculty of Law, Nigeria.
1   There are Muslims who could be regarded as liberal or moderate in their handling of anything West, or those who are now called the Muslim Democrats whose concern is for a brand of Islamic democracy or who have some sort of support for Western democracy. On the other hand are those Muslims who would never want anything West in whatever form. A good example of this is the recently crushed sect in Nigeria, called 'Boko Haram'. The ideology of this group of Muslims is that Western education is a taboo to Muslims. Invariably, anything with a toga of the West would be un-Islamic in the estimation of this group. There are also some Western scholars whose preoccupation is to disparage anything Islamic to beat the drum of superiority of Western culture over Islamic culture. *See, generally,* A.M. Emon, 'The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law', <http:// ssrn .com/ abstact= 1086767>, last accessed 3 August 2009.

constitutionalism and Shariah, the fundamental argument remains the same. There is no way of talking about Islam without the Shariah. Islam is the religion, and Shariah is its legal system. I do agree that there is no way Islam will be compatible or incompatible with democracy without the Shariah falling in the same line; this is a logical sequence: once the head goes in a direction, the legs must accordingly follow. Thus, whether we say compatibility between Islam and democracy or between Shariah and democracy, we have the same thing in mind.

It may, however, be argued that the discussion may centre on Islam purely as a religion concentrating on spiritual matters alone. But any discussion of Islam that would necessarily involve touching on the political life of Muslims would essentially necessitate recourse to the Shariah. Therefore, since the argument has been political and legal in nature, any discussion of Islam in this direction would par excellence involve the Shariah because that is the regulatory aspect of the religion. By the same token, it would be inappropriate to discuss democracy without talking about constitutionalism; while democracy is a vehicle moving towards its destination, constitutionalism is its compass for navigation. Democracy is thus like a storied building, and constitutionalism is its pillar and the structural column without which the building would collapse. Essentially, therefore, discussion of one without the other may lead to an absurdity. So as we cannot talk of Shariah without Islam and vice versa, neither can we talk of democracy without constitutionalism.

The compatibility debate has been very illuminating, stimulating and, interestingly, rather enduring. This is because there appears to be no end to the debate in so far as each party in the debate is relentless in advancing his own cause, irrespective of the wrongness or the correctness of his or the group's position. Besides, the grounds of incompatibility are as wide as there are varieties of contributors holding that Islam and democracy are incompatible. Also, there are many grounds identified by those who believe in the compatibility theory for holding that Islam and democracy or Shariah, constitutionalism and democracy are compatible. Interestingly, however, some of the grounds either for or against are products of mere linguistic appreciation of the terms (democracy, Islam, constitutionalism and Shariah), and at times, also, they are simply the expression of intellectual sentiments and reliance on historical, traditional and cultural values to gauge the response of Islam or Shariah to democracy and constitutionalism, taking Islam or Shariah to be one and the same with its adherents.

It is true that the attitude, character or the value systems of the believers of a doctrine or a religion can portray the inner value systems of that doctrine or religion.[2] However, this is not always the case because attitude, character and value systems of men are shaped by many factors, including the environment.[3] This shows that overgeneralisation of conclusions in this debate would serve no useful

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2   For example, mere dressing or moral behaviour is a good indication of this point. It is always easy to identify a Muslim or a Hindu from the mode of dressing.

3   This is the function of many agents of socialisation, including even the religious institutions and groups. *See* M. Mendoza & V. Napoli, *Systems of Society*, Heath, Lexington, MA, 1977, pp. 126-143; K. Jennings & R.G. Niemi, 'The Transition of Political Values From Parent to Child', *in* J. Dennis (Ed.), *Socialization to Politics*, John Wiley & Sons, New York, NY, 1973, p. 323.

purpose. Even taking Islam as a civilisation would suggest that, as the Western civilisation has grown through the ages,[4] its political value system, as distinguished from its spiritual milieu, would inevitably pass through stages of development. This presupposes that even assuming, without conceding, that Islam is incompatible with democracy, it would still reach a stage when Muslims may find accommodation for democracy as a political value within the confines of the religion or the Shariah.

In this article, Section B examines some arguments in favour of incompatibility and concludes that the grounds for incompatibility are too weak for any serious consideration, while Section C deals with the question of democracy and the Shariah and argues that Islam is democratic and that Shariah, which also recognises pluralism or multiculturalism, can flourish within secularism. Section D examines constitutionalism and Shariah, and draws attention to the fact that Shariah itself is a system of constitutionalism and that if there is any distinction it is more apparent in semantics. This becomes more glaring with the understanding that the two are embodiments of the same normative concepts. Section E is the concluding part, calling all to the duty of finding the true position so as to avoid being consumed by ignorance, arrogance and cultural intolerance.

B.   Objectionists' Views

The debate has been multidimensional. Muslims themselves are divided in the debate: the moderates, the liberals or the Islamists and the constitutionalists on the one side; the so-called fundamentalists or the traditionalists are on the other side; while at the same time the West is also divided on whether Islam or Shariah is compatible with democracy. Although the debate has been very robust, some of the antagonists have missed the point. For example, Bahlul, although optimistic about the compatibility of Islam and democracy, opines that Islamic regimes may not be democratic. This is because, according to him, democracy, constitutionalism and separation of powers arose "in the context of secularism."[5] His conclusion is that since Islam rejects secularism, and that since secularism is the basis of democracy, constitutionalism and separation of powers, there cannot be compatibility unless secularism is taken as "being only contingently related to democracy and constitutionalism". The fact is that, to start with, those who talk about separation of religion from the State only do that to suit their convenience. They do have, in reality, whether in the public or private sphere, some affinity with the Church. A secular State may not in actual fact exist anywhere, and thinking of a Godless society or State that has nothing to do with religion or that is not influenced by religious precepts in its political thoughts is merely a tall dream.

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4   This is including democracy that has grown in stages from the Athenian's to the present ideas of liberal or constitutional democracy, or democratic socialism. *See, generally,* T. Fotopoulos, *Towards an Inclusive Democracy: The Crisis of the Growth Economy and the Need for a New Liberatory Project,* Cassell, London, 1997, p. 171.

5   R. Bahlul, 'Islamic Perspectives on Constitutionalism', *Jura Gentium,* Vol. 1, 2005, pp. 1, 20.

Men, through the civilizations, have had belief in the unseen power, and they have expressed this belief in varieties of systems; they have been influenced in their dealings by the religions. So secularism is only a pretence to give to religion what is its and to give to partisan politics what is its, but certainly one is bound to influence the other. Further, it is spurious to say that democracy arose in the context of secularism or that democracy and constitutionalism presuppose secularism. To say this would mean that without secularism there is no democracy and constitutionalism. I propose to argue that secularism is on its own and that constitutionalism and democracy are complementary.

The emergence of 'Islamic democracy' has suggested that secularism and democracy are not mutually dependent.[6] I would also argue that Shariah is compatible with functional constitutionalism although Katz argues to the contrary, pointing out that the two have differing origins. To him the Shariah derives from the "Word of the Prophet and from the interpretative tradition of that law, and it is interpreted by clerics who devote their lives to the study of religious law".[7] The problem with his postulation is that he considers constitutionalism in the context of positive law: "[...] the larger question is how Shari'ah relates to western notion of constitutionalism, in which the basic rules are fixed upon the basis of popular consent and the rest of the legal system is left to democratic legislation and secular adjudication."[8] If the truth must be told, the 'larger question' must be reformulated thus: can there be universal constitutionalism?

Depending on what is taken to be constitutionalism or its forms, the universality of constitutionalism, particularly among nations, may not be visible now unless this develops from international or regional constitutional norms. This, outside violent democratisation, would be achieved through dialogue between the various levels of constitutionalism. The Universal Declaration of Human Rights, the European Convention on Human Rights and Fundamental Freedoms and the African Union Charter on Human and Political Rights have demonstrated this possibility. However, as there are variations in political and social cultures among the various nations of the world and even people of the same nation,[9] so also there must be differences in the understanding of concepts. This presupposes that some of the determinant factors of universality of constitutionalism are

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6   G.M. Tezcur, 'Constitutionalism, Judiciary, and Democracy in Islamic Societies', *Polity*, Vol. 39, No. 4, 2007, pp. 479-501, at 493.
7   S.N. Katz, *Gun Barrel Democracy? Democratic Constitutionalism Following Military Occupation: Reflection on the US Experience in Japan, Germany, Afghanistan and Iraq*, Paper presented at Budek Lecture, University of Pennsylvania, 14 May 2004.
8   *Id.*
9   This is typical of Nigeria, where the people are heterogeneous and thus have cultural and religious pluralism, which have to a large extent, inclusive of the colonial past, shaped their political ideologies. While in the northern part there is political conservatism, the southern people are progressive. This can be seen in the various election results in the country.

political and social culture.[10] This then suggests that there would be similarities and dissimilarities in the idea or notion of constitutionalism. This again is dependent on other factors such as political history and tradition, international and regional politics. Also, some aspects of constitutionalism, for example human rights, judicial review and other normative concepts, have their origin in the natural law. This explains the presence of similarities and not universality in the notion of constitutionalism. It must be recalled that the Common Law of England had its origin in Christendom.[11] Unless constitutionalism is understood from this perspective, there certainly will be conflict between cultures. So for Katz, the relationship between different constitutionalisms should remain that of understanding and tolerance, until there is harmonisation of concepts and approaches prompted at the regional and international levels to accelerate universalism in constitutionalism.

Secularism has little or nothing to do with democracy[12] and constitutionalism, much as the existence of the one does not depend on the existence of the other, although the two may be conceptually political. The United States of America is supposedly the father of modern democracy notwithstanding the fact that there is seeming diffusion between the State and the Church. Islam or the Shariah does not foreclose positive or democratic legislation in so far as doing that would not contradict the principles of the primary sources.[13] This is not

10   There is no universal constitutionalism; the fact is that there are certain norms that can be universal in nature, *e.g.* the idea of justice. But then the content would differ from place to place. Also, take, for example, judicial review as a norm of constitutionalism; some countries favour it, while others do not. There is even scepticism over it in all those countries exercising it; that has been controversial. *See* for scholarly discussions on this T.R.S. Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry', *Columbia Law Journal*, Vol. 61, Part 1, 2002, p. 87. On the one hand is the controversy over the real foundation of judicial review. On the other hand is the scope of review – whether it covers jurisdictional and non-jurisdictional errors. Also, it assumed another dimension in America – whether or not *Madibury v. Madison* is rightly the origin of judicial review. For scholarly discussions, *see, generally,* A. Halpin, 'The Theoretical Controversy Concerning Judicial Review', *Modern Law Review*, Vol. 64, No. 3, 2001, p. 500; B. Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues', *Federal Law Review*, Vol. 8, 2002, p. 1; N. Sidebothan, 'Judicial Review: Is There Still a Role for Unreasonableness?', *Murdoch University Electronic Journal of Law*, Vol. 8, No. 1, 2008, p. 1; *see also*, that import research paper 06/44 of the House of Commons: *'Judicial Review' – A Short Guide to Claims in the Administrative Court*, 28 September, 2006, pp. 1-54; G.L. McDowell, 'Coke, Corwin and the Constitution: The Higher Law Background Reconsidered', *The Review of Politics*, Vol. 55, No. 3, 1993, p. 393; J. Adler, *Constitutional and Administrative Law*, 2nd edn, Oxford University Press, Oxford, 1994, p. 60; M. Elliot, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law', *Columbia Law Journal*, Vol. 58, Part 1, 1999, p. 129.

11   *See Bowman v. Secular Society Limited*, 1917 Appeal Cases 406, where the Court, per Lord Summer, referring to English Law, pointed out that "Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English Law may well be called a Christian Law [...]".

12   K.A. Bokhari, 'Is Democracy Disbelief? Kamran Bokhari Challenges the Tiresome Militancy of Those Who Seek a Mythical Islamic State', 2003, <www.post-islamist.inf/docs/disbelief.html>, last accessed 1 July 2009; Tezcur, 2007, at 493.

13   Nigeria under the 1999 Constitution has witnessed democratic legislation of the Islamic Criminal Justice System. For scholarly discussion, see generally

strange; for example, the Nigerian Constitution, 1999 provides that any law that is in conflict with any provisions of the Constitution shall be rendered void and ineffective to the extent of its inconsistence.[14] This only shows the relationship between the constitution as the organic law of the land and other statutes.

The Qur'an, being the *font oriego*, is superior to man-made laws, and no law of inferior status could be allowed to run counter to the superior divine law. This may be in sharp contrast to the positivists' idea of law as distinct from the natural law that Shariah is.[15] Today, there are Muslim nations with institutionalised legislature: the Islamic Republic of Iran,[16] Afghanistan,[17] Nigeria,[18] Algeria,[19] Pakistan and Malaysia, etc. have their legislative arm of government in one form or the other. Katz further missed the ground with the example he gave of Israel's "integration of traditional religious law with modern constitutionalism".[20] There is nothing fundamentally wrong with such integration.[21] That has been the experience in most African countries. For example, Nigeria's constitution recognises the various religious laws of the people to the extent that the country's federalism and pretentious secularism can accommodate.[22]

Legal pluralism as a policy of State does not pose any danger to democracy if only it is understood that pluralism itself in any form, cultural or religious, is inevitable, particularly in a democratic federalism. A conscious recognition of the inevitability of pluralism is an essential ingredient for the survival of democracy in any heterogeneous society.[23] Also, if democracy is about rights, then pluralism of political opinions and ideas, religion, culture, social and even economic system must be accommodated as they constitute rights-related norms. Article 9 of the European Convention on Human Rights gives a broad understanding of this:

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14 Nigerian Constitution, 1999, Section 1.
15 *See* A.T. Shehu, 'Islamic Jurisprudence in Perspective', *Ilorin Bar Journal*, Vol. 1, No. 1, 2002, p. 90.
16 Tezcur, 2007, at 480, 483-487.
17 *See, generally*, M.H. Kamali, 'Judicial Reforms in Afghanistan', *Ahmadu Bello University Law Journal*, Vol. 10, 1981, pp. 16-36; Katz, 2004.
18 Nigeria cannot be said to be predominantly Muslim, but the northern part is. For example, the Zamfara State of the Federation in 2000 adopted the Shariah Criminal Code, exempting the crime of apostasy in spite of the practice of constitutional democracy at the federal level. Later, other States in the northern part of the country followed the Zamfara initiative and established Shariah Courts to try offences under the Shariah Criminal Code. *See, generally*, I.A. Aliyu, 'Shariah Implementation in Nigeria 1999-2005: A Review of Its Legal, Institutional and Social Environment', *Ahmadu Bello University Law Journal*, Vol. IV-V, 2007, pp. 142, 148-161.
19 *See* Chapter II of The Constitution of the People's Democratic Republic of Algeria, 1996.
20 Katz, 2004.
21 The Nigerian experience has shown that there is nothing wrong with such integration, at least in a democracy.
22 Because of the federal nature, the constitution in Section 262 established for the Federal Capital Territory a Sharia Court of Appeal, and empowers, in Section 265, any State that requires it to establish it. So also is the case of Customary Court of Appeal in Sections 275 and 285.
23 The Nigerian Constitution, 1999 recognises this inevitability and thus gives to each section what they require.

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

This shows the new world's positive response to the question of religious pluralism. The provisions may have their problem of enforcement like any other law, as recently analysed by Hopkins and Yeginsu.[24] Even Katz's worry over the success of working out a balance between formal constitutionalism, secular law and Shariah in democratic Muslim nations, particularly Iran, is unimpressive. There is no cause for striking a balance between these norms; the worry is a matter of, or problem of, semantics. Already Iran operates a constitution that has put in place some democratic structures within the confines of the Iranian approach to democratisation, setting forth certain rights and judicial review.[25] To think therefore of any balance would mean gauging Iranian democratisation against a standard that is externally motivated on the basis of a different notion of democracy.[26]

The cases of Iraq and Afghanistan may be different from that of Iran, because democracy in those countries is externally imposed, albeit with imputes from the local clerical politicians and other elites.[27] Taheri[28] was, however, too simplistic in his approach. One of his reasons for the incompatibility between Islam and democracy is that the word democracy was not known in Muslim languages until the 1890s. One may agree with him that to understand a civilisation there is a need to first understand, among others, the language of that civilisation. However, understanding the language may not render the necessary assistance in comparing civilisations, language being a medium of communication by which thoughts, ideas and opinions are communicated by and from individuals to individuals, groups and societies. The fact that a particular word is found in the vocabulary of a civilisation but is not exactly the same in the vocabularies of other civilisations does not warrant the conclusion that that word is not known to those other civilisations. There are words in different civilisations having the same meaning. An example is the word God. Without going into the ontology of the word, it generally means the unseen, most powerful being to whom all beings

24 R. Hopkins & C.Y. Yeginsu, 'Religious Liberty in British Courts: A Critical and Some Guidance', *Harvard ILJ Online*, Vol. 49, 2008, pp. 28-39. *See also*, C. Evans & B. Gaze, 'Between Religious Freedom and Equality: Complexity and Context', *Harvard ILJ Online*, Vol. 49, 2008, pp. 40-49.
25 *See* A. Abootalebi, 'The Struggle for Democracy in the Islamic Republic of Iran', *Middle East Review of International Affairs*, Vol. 4, No. 3, 2000, pp. 43-56.
26 One of the grave political mistakes of our time is to expect uniformity in democratic constitutionalism; this would spell doom for the international democratisation process. Each sovereign nation has the inherent or natural right to determine her approach to democracy. There is nothing in form, but in substance. A close study of the Iranian constitution would show that there is power of judicial review in Iran, but not in the sense of the United States of America or Nigeria. *See* Abootalebi, 2000; A.T. Shehu, 'Judicial Review: Still in Search of the True Foundation', <www.ssrn.com>.
27 Katz, 2004.
28 A. Taheri, *Islam and Democracy: The Impossible Union*, 2004, <www.hvk.org/articles/0504/113.html>, last accessed 29 June 2009.

have recourse; even the atheists and pagans have a way of expressing belief in an unseen most powerful being to whom they have recourse. This word, God,[29] in Western civilisation, is the same as Allah in Arabic,[30] Olorun or Olu-Orun in Yoruba,[31] So-ko in Nupe,[32] but they all have the same impression, talking about one and the same being in different languages. Differences in languages therefore do not actually mean differences in notions. So the fact that 'democracy' is not found in the vocabulary of Arabian or Islamic civilisation would not, without more, convincingly indicate the absence of the notion in Islamic or Arabian civilisation. The word, though Greek in nature, may not have the same or equivalent of it in other languages of the world, but this does not suggest that other civilisations did not or could not embrace the notion of democracy. Taheri's literal understanding of the word is thus not helpful to the ongoing debate. There are many civilisations that were never in contact with Greek political philosophy, and they practised a system of government that was democratic in character even though the word democracy is never found in their vocabularies. Most precolonial African societies practised monarchial-constitutional democracy without having been in contact with the Greeks, not to speak of the word democracy.[33] They had their systems of installing the Kings or Obi, and they had their system

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29   *See* J. Sinclair *et al.* (Eds.), *BBC English Dictionary*, HarperCollins, London, 1992, p. 495.

30   Allah or Allahu in Arabic means the Supreme Being or power in whose hand is the overall control of the entire universe; He is the creator of all men, jinns and all living and non-living things, and to whom all shall return.

31   The Yorubas are one of the major ethnic groups in Nigeria, particularly in the South-Western region. They have different names for God – Oluaiye, Obatala, Olorun, all meaning the same with Allah or God irrespective of differences in language.

32   The Nupes are a minority ethnic group north of Nigeria along the Niger River.

33   *See, generally,* in the north of Niger was the Islamic system, and in the south was the traditional system, though there was no uniformity in the systems. *See, generally,* P.A. Talbot, *Tribes of the Niger Delta,* Frank Cass, London, 1976, pp. 288-299; H.L. Roth, *Great Benin: Its Customs, Act and Horrors,* Metro Books, Halifax, 1972, pp. 91-96; C.K. Meek, *The Northern Tribe of Nigeria,* Frank Cass, London, 1971, pp. 244-259; L. Brenners, *The Shehu of Kukawa: A History of the Al-Kanemi Dynasty of Bornu,* Oxford University Press, London, 1973, pp. 104-116; K.K. Nair, *Politics and Society in South Eastern Nigeria,* Frank Cass, London, 1972, pp. 1-15; R.N. Henderson, *The King in Every Man: Evolutionary Tends in Onitsha Ibo Society and Culture,* Yale University Press, New Haven, 1972, pp. 267-335; R.E. Bradbury, *Benin Studies,* Oxford University Press, London, 1973, pp. 44-90.

of removing him in case of abuse of power.[34] They also had their judicial system[35] that was well functioning, though there may not have been judicial review as it is known today. The African societies may not have had a Western style parliament; they had their systems of evolving laws that governed them as peoples in the pre-colonial era. Colonial influence led to cultural and legal pluralism and eventually to democracy, which evolved in the present model. True to his literalist approach, Taheri fails to appreciate the fundamental normative characteristics of the words equality and politics; he claims that the words politics and equality are unknown to Islam, failing to realise that the Qur'an and the Sunnah emphasise equality of men. I argue that there is equality of men in Islam. The Qur'an[36] is very emphatic on this:

> O mankind! Verily, We have created you all out of one male and a female, and have made you into nations and tribes that you may know one another. Certainly the noblest among you in the face of Allah is the one who is most conscious of his duty to Allah.

The Sunnah also follows this (there cannot be disagreement between Qur'an and Sunnah). Prophet Mohammed and his Orthodox Imams, from Abubakar, Umar, Uthman to Ali followed in the same direction.

It is therefore a heresy to claim that 'equality is unacceptable to Islam' or Shariah. It is also inappropriate to claim that politics is unknown to Islam simply because the word or its equivalent is not found in the Qur'an or simply because the same is not in the 'Muslim languages'.

The idea of Muslim languages itself is inappropriate, at least in the modern time; there are Muslims all over the world, among different people speaking different languages, the differences being recognised by the Qur'an.[37] The word politics simply means civil administration on the one hand and competition for the control of civil administration on the other. It therefore becomes difficult to see any logic in the argument that politics is unknown to Islam. Islam is a belief system and a way of life; though with no prescription on a particular system of gov-

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34 Before colonialism, the various ethnic and tribal groups were separately governed either as organised (as in the northern and south-western part) or acephalous (as in the south-eastern part). Earlier, the various divides were governed by the colonial masters as protectorates, but later they were all fused into one nation now called Nigeria. The amalgamation by Sir Lord Lugard in 1914 could not have actually been for the benefit of the people, but rather for administrative convenience of the colonial masters. *See, generally,* T.N. Tamuno, 'Nigeria, Federalism in Historical Perspective', *in* K. Amuwo *et al.* (Eds.), *Federalism and Political Restructuring in Nigeria,* Sectrum Books, Ibadan, 1998, pp. 13-17. The author has argued that the amalgamation was informed by "pragmatic economy-based consideration." To O.B. Osadolor the idea "did not result from the pressure of Local Political groups; it derived from considerations of administrative convenience as interpreted by a colonial power". T.N. Tamuno, 'The Development of Federal Idea and the Federal Framework, 1914-1960', *in* Amuwo, 1998, pp. 34-39. *See also* M. Crowder, *The Story of Nigeria,* Faber and Faber, London, pp. 188-2000.
35 *Id.*
36 Qur'an 49 verse 13.
37 Qur'an 49 verse 13.

ernment, it recognises the exercise of political leadership. The mode of evolving this leadership and its structural apparatus is fundamentally politics and political. Similarly, it is incongruous to say that the words 'government' and 'State' are not mentioned in the Holy Qur'an and thereby conclude that democracy is incompatible with Islam. This is a misrepresentation of Islam and the Shariah; there are many verses of the Qur'an and Sunnah of Prophet Mohammed (SAW) pointing to the recognition of system of government without particularity. In the Qur'an, Allah enjoined mankind to obey his commandments, the Prophet Mohammed (SAW) and those placed in positions of authority, and also that He has created us into nations and tribes.[38] When the Prophet arrived in Medina,[39] he met different ethnic groups[40] there without any form of government in the modern sense. The first thing Mohammed (SAW) did was to create a constitution,[41] which established the city of Medina into a nation-state with the different ethnic groups having some autonomy. With that constitution emerged a system of government with the Prophet as Head of State and Commander-in-Chief of the Armed Forces of the State of Medina. The system was purely the first Islamic system of government and the first of its kind in the history of mankind and Islam. Interestingly, the constitution recognised legal, cultural and religious pluralism of the people of Medina, and the people were accordingly guaranteed their freedom.[42] Also worthy of comment is Taheri's assertion:

> In Islam, however, power belongs to only to God; al-hukm l'lillah. The man who exercises that power on earth is known as Khalifat al-Allah, the regent of God. Even then the khalifah, or Caliph, can not act as legislator. The law has already been spelt out and fixed forever by God. The only task that remains is its discovery, interpretation and application. That, of course, allows for a substantial space in which different types of rule could develop. But the bottom line is that no Islamic government can be democratic in the sense of allowing the common people equal shares in legislation.[43]

It is true that God has fixed the laws in the Qur'an and granted the Prophet the power of legislation at the same time.[44] It is, however, unacceptable that the Caliph or the people cannot legislate. It is interesting that Taheri himself accepts that the people have the task of discovery, interpretation and application of the laws, a task that, by implication, necessitates the development of different *styles of rule*. Unless otherwise shown, rule making, whether directly by the legislature

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38 *Id.*, 4 verse 59.
39 *See* M.O.A. Abdul, *The Historical Origin of Islam*, Islamic Publication Bureau, Lagos, 1982, pp. 31-32.
40 *Id.*, pp. 33-37.
41 *Id.*
42 See the full text of the Medina Constitution in Ibn Hisham, Sira Al-Nabiy, Dar Rayhani, Beruit, for English text, *see* K. Majid, *War and Peace in the Law of Islam*, AMS Press, New York, NY, 1979, pp. 205-210.
43 Taheri, 2004.
44 Qur'an 4 verse 59.

or in the form of delegated legislation, is itself an act of legislation. Besides, it is wrong and inconceivable that the Caliph or the people acting through the *Shura* would not, in this complex modern day with advance technology, legislate to cope with the current situations that are daily begging for policy direction in the form of legislation. There is no doubt that the Qur'an and Sunnah of the Prophet have made extensive and expansive legal provisions, and at the same time allow *Ijtihad*[45] to make provisions for the continuous legislative needs of the societies; as advancement evolves, so does the need for expansion and development in the law. Discovery and interpretation of the broad legal injunctions in the Qur'an would essentially require documentation of the discovery and the interpretation so that the laws become certain and uniform in their application. This exercise cannot be left to God and the Prophet to be done again; human beings must provide a means of carrying out the task. This task can be performed in the modern time only by people or an assemblage of them charged with that responsibility. Besides, the recognition given to the secondary sources of Shariah is an indication that there is need for human legislation. It may be argued, however, that those who would perform the task should be adequately knowledgeable in the principles of Shariah. This is important so that those who would constitute the human aspect of lawmaking exercise their power within the limits of the primary sources. It must also be appreciated that the body of Shariah as it is today is partly the primary sources and partly the secondary sources, which have elements of human legislation. The various Islamic Schools of Law such as Maliki, Hanafi, Shafii, Hambali,[46] and even the Shia School, developed the law through Ijtihad, and it is their understanding of the primary sources that is now being applied in the Muslim world as the entire body of the Shariah. This shows that unless it can be convincingly argued that the road of Ijtihad has been forever closed there would be nothing wrong for mankind to legislate on the basis of the broad principles enunciated by the primary sources. The clamour for Islamic finance and economic law today is a clear vindication of this argument. The primary sources have indeed provided for the broad legal direction without particularities that are necessary for effective and efficient performance, say, of Islamic financial intermediation in the world, the global economic system. Therefore, it becomes the responsibility of those in the position of leadership to work out the regulatory guidelines in the form of legislation to fill the gap. There must be laws to regulate the establishment of financial houses and their modes of operation, all of which must be promulgated in the form of substantive and procedural laws by the people called by whatever name: Parliament, National Assembly, Majlis, Shura, etc. This is certainly one of the exegeses of our time that Taheri seems to have forgotten when he sounds the following warning:

45 This means, in legal terminology, discovering the legal rule. When the legal rule is not expressed in the primary sources, it becomes the responsibility of the learned men (in this sense those who are put in authority; *see id.*) to discover the applicable law from the direct and express rules.

46 For the historical development of these Schools, *see* Salma Taman, above p. 243, as well as Mohammed Jawad Maghniyyah, *Islamic Law According to Five Schools of Jurisprudence*, Amazon Digital 2010.

Muslims should not be duped into believing that they can have their cake and eat it. Muslims can build successful societies provided they treat Islam as a matter of personal, private belief and not as a political ideology that seeks to monopolise the public space shared by the whole of humanity and dictate every aspect of individual and community life.[47]

Truly, Muslims can build successful societies if only the Shariah is followed and observed to the letter. However, to say that Islam should be regarded as a matter of personal and private life is rather diminishing. Islam is a complete way of life touching on every aspect: political, private or personal. There are found in the Qur'an and the Sunnah of the Prophet (SAW) legal injunctions on constitutional and international matters.[48] These legal injunctions are usually in broad terms and require human interpretation for effective and efficient application in the conduct of public affairs. There are other Muslims with that literalist approach to the interpretation of the Qur'an. Sayyid Qutb was one of them. He held the belief that the Islamic legal system is complete with the Qur'an and Sunnah and as such does not require further legislation.[49]

C.   Democracy and Shariah

As already mentioned, the debate on the compatibility of the two concepts has been very keen, though rather enduring. As there have been objectionists, so there are Muslim Democrats, who believe that Islam and democracy are compatible, as argued by this article. To understand the compatibility question would require an understanding of the two concepts and see where they meet or disagree.

Democracy as a concept, linguistically, started with the Greeks[50]; no one ever before talked about it in its linguistic understanding. This is apparently because of the linguistic origin of the word itself, which had no equivalence in the other languages known to humanity. This is, however, not to suggest that no other human community ever had similar or equivalent political ideology; names may be different, but objects may remain the same. Nwala puts it correctly when he points out that non-representative democracy has been recorded in the studies of

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47   Taheri, 2004.
48   For a discussion on the legal classification of the Qur'an, *see* S. Ramadan, *Islamic Law: Its Scope and Equity*, Islamic Centre, Geneva, 1970, pp. 122-123.
49   Quoted by A.R. Abootalebi, 'Islam, Islamists and Democracy', *Middle East Review of International Affairs*, Vol. 3, No. 1, 1999, p. 2, <www .routledgemiddleeaststudies .com/ .../ Political -Islam - isbn9780415404532>, last accessed 3 August 2009.
50   A. Sen, 'Democracy as a Universal Value', < http:// caliope .jhu .edu/ journals/ journal_ of_ democracy/v010/10.3sen.html>, last accessed 17 August 2009.

other peoples who had no link with the Greeks.[51] This presupposes the existence of systems that had elements of democracy even though they were not called democracy. In comparing Shariah and democracy, we must bear in mind the need for conceptual clarification between theory and definition to avoid or to reduce ambiguity so that from the outset we are in the right direction. As Salami puts it, a definition of a concept is about clarification of meaning and usages,[52] and to designate and distinguish one from the other. On the other hand, theory is all encompassing, showing the true nature of that concept, and that would also involve the study of the functions of the concept and its entire constitutive elements.

Democracy, it has been argued, has no universal definition or concept that is acceptable to all[53]; this does not, however, rule out a working definition that may serve as an analytical tool in a comparative study. So with this preliminary clarification, I would say that we cannot, at this point of political development, be talking of the Athenian democracy, which was far away from the modern conception of democracy, let alone comparable to any system of governance in accordance with the Shariah. To the Greeks, democracy meant nothing more than minority rule over the majority, apparently because, according to Jega, only "freeborn male citizens in the City-State collectively participated in the management of their common affairs".[54] In other words, the Athenian democracy discriminated against other members of the City-State, and hence there was no equality among members. What the Athenians called democracy was a system of government by a few over the large majority, a system that excluded the majority of the people from holding public office.

Certainly, the idea of democracy in its classical formulation was antithetical to the teaching of Islam, which does not discriminate among people on the basis of condition of birth, wealth or position. This precludes any comparison between Shariah and the Athenian conception of democracy; moreover, any attempt at such a comparison is wasteful now that the ancient democracy has undergone various reforms to attain its present liberal conception. Modern democracy, or the notion of liberal democracy,[55] though lacking a universal or consensual definition, at least has a value system or descriptive values that may be said to be con-

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51 T.U. Nwala, 'A Critical Assessment of the Parliamentary Model of Democracy', in A.M. Jega & H. Wakili (Eds.), The Question of Democracy: Direct or Representative, Center for Democratic Research and Training, Kano, 2005, pp. 76-91, at 77. The writer also argues correctly that the concept may have Greek origin, but the practice prevailed in many pre-colonial feudal communities in Nigeria. It is not only in Nigeria.

52 A.T. Salami, 'Theorizing Democracy: A Focus on Richard Joseph's Prebendal "Theory"', in O. Omoruyi et al. (Eds.), Democratization in Africa: Nigerian Perspectives, Vol. 1, Hima & Hima, Nigeria, 1994, pp. 11-21, at 14.

53 Id., at 15.

54 A.M. Jega, 'The Evolution of the Concept and Institutions of Democracy: A Preliminary Survey', in Jega & Wakili, 2005, pp. 1-22, at 5. See also C.M.C. Onu, 'Democracy and Trust: The Case of Nigeria', in Omoruyi et al., Nigerian Perspectives, 1994, pp. 35-44, at 35.

55 For a scholarly discussion of the origin, see, generally, id., at 14-17; M.O. Nwokeji, 'A Historical and Theoretical Diagnosis of African Democratic Delusions', in O. Omoruyi et al. (Eds.), Democratization in Africa: African Perspectives, Vol. 2, Hima & Hima, Nigeria, 1994, pp. 24-45, at 37-42.

ceptually universal, which would enable a comparative study or an assessment of its functionality. These values, according to Osaghae, include:

> Competitive election, civil liberties – such as freedom of speech, religion, education, health, freedom to form and associate with people of similar ideologies and values, economic freedom, the freedom to reside in one's place of choice, accountability of leaders through representative institutions and the rule of law.[56]

Other normative values of democracy include popular sovereignty, equality before the law and secularism. These have consistently been the most contested aspect of the compatibility question. A careful look at the tenets of liberal democracy shows a clear similarity or identical values with the conceptual values of the Shariah. As rightly put by Wright,[57] Islam preaches equality, justice and human dignity just as any form of modern system of constitutional government. Qur'an, the scriptural basis of Islam and the Shariah, is very emphatic on these; it is expressly stated therein that man has been created from one single pair (Adam and Eve) and made into nations and tribes essentially to know one another and to live together in peace and harmony and not to despise one another.[58] This is the constitutional[59] basis of the law of equality before the law in the Shariah.

Prophet Mohammed (SAW) gave practical application to the law in his dealings as political and spiritual leader, and the four rightly guided Caliphs who succeeded him also applied the law. When the Prophet arrived in Medina in AD 622, the first challenges he faced were how to unify the different tribal and religious groups of the city, including those who migrated with him to the city, and how to bring them all under the same and single State administration. In spite of the cultural and religious pluralism, the Prophet established Medina into a City-State,

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56 M.O. Osaghae, 'Sustainable Democracy', *in* Omoruyi *et al.*, *Nigerian Perspectives*, 1994, pp. 45-68, at 45. Al-Qaradawi has, however, pointed out that democracy really means that the people must choose their leaders by themselves, that the people must have the right to bring him to account if he commits mistakes, and they must have the right to depose him and choose another. *See* Y. Al-Qaradawi (Trans.), *State in Islam*, El-Falah, Egypt, 1998, p. 197.

57 R. Wright, *Islam and Liberal Democracy: Two Visions of Reformation*, <http://calliope.jhu.edu/journals/journal-of-democracy/v007/7.2wright01.html>, last accessed 30 June 2009.

58 *See* Qur'an Chapter 49 verse 13.

59 The word 'constitutional' is used here not in the sense of positive law or positive morality, but in the sense of natural law. The Qur'an is the Organic law, the basis of all aspects of the Shariah; its provisions serve the same purpose as the secular constitutions, though with different characteristics. As no Act of, say, the Congress of the United States of America or the Nigerian National Assembly (and of most jurisdictions in the world) can conflict with the constitution, so also no other legislation can conflict with the provisions of the Qur'an.

with a constitution[60] that took cognizance of the City-State's multiculturalism. All members of the State were guaranteed freedom of religion and equality before the law.[61]

Certainly Islam was the State religion, yet the Jews were allowed freedom to practise their religion. Taheri's[62] contention that a non-believer can have no equality with a believer is not only unfounded, but grossly misplaced and against the injunction of Allah in Surah Al-Maidah:

> O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice [...][63]

In a clear and strict compliance with the injunction of Allah, Prophet Mohammed accommodated the Jews of Medina and was also reported to have decreed thus:

> Beware! Whosoever is cruel and hard on a contractee, or curtail his rights, or burden him with more than he can endure, or takes anything of his property against his free will, I shall myself be a plaintiff against him on the Day of Judgment.[64]

One other argument that has been held against equality in Islam is that women are not allowed to lead, based on a prophetic tradition to the effect that no people led by a woman would prosper.[65] This argument is rather mischievous: no other worldly religion or culture accords women befitting status or equal rights with men than Islam. There is clear evidence in the Bible (1 Corinthians 11:6-10) that women are not equals of men. It is true that the Prophet was reported to have observed, "Never would a people who choose a woman to lead their affairs prosper." The questions are, in what context was the observation made if at all the Prophet said so? Is there any provision in the Qur'an to the same effect? This second question is fundamental in view of the fact that never had the Prophet given any verdict that is patently contradictory to the words of Allah.

Certainly nowhere in the Qur'an does Allah enjoin diminishing the status of women. Rather, He commands respect and dignity for them, and makes them

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60 For the detailed contents of the Al-Madina Constitution, *see* Abdul, 1982, at pp. 33-36; H.Y. Al-Mallah, *The Governmental System of the Prophet Mohammed: A Comparative Study in Constitutional Law*, Dar Al-Kotob Al-ilmiyah, Lebanon, 2008, pp. 45-60; M. Salami, *Mohammed: The Messenger of Allah*, Dar Al-Kotob Al-ilmiyah, Lebanon, pp. 170-174. *See also* for a comparison of the constitution with the American constitution, Imad-ad-adeen Ahmad, 'On the US Constitution From the Perspective of the Qur'an and the Medina Covenant', *American Journal of Islamic Social Sciences*, Vol. 20, No. 3-4, 2003, pp. 105-124.

61 *Id.*

62 Taheri, 2004.

63 M. Taqi-ud-Din Al-Hilali (Trans.), *The Holy Qur'an*, Chapter 5 verse 8, Raj P. Nig., Lagos.

64 *See* Ramadan, 1970, at 122-123.

65 Bahlul, 2005.

equals of men.[66] The Prophetic ruling was a response when he heard that the Persians had chosen the daughter of their Emperor to be their Queen.[67] A literal understanding of this would certainly not suggest that there is no equality between men and women when it comes to public leadership. Besides, a clear and objective understanding of the position of women in the teaching of Prophet Mohammed (SAW) indicates that the Prophet never could have intended to make women inferior to men, not even in the public sphere. Once, a man approached the Prophet and asked him, four times, concerning whom he should honour of all people, and Prophet Mohammed (SAW) answered him 'your mother' three times and said 'your father' the fourth time.[68] Besides, there are women who played advisory and supportive roles in the holy mission of Prophet Mohammed (SAW) and took part in some of the wars fought by him, for example Umm Salamah.[69]

There is ample authority in the Qur'an suggesting equality between them except in marital affairs and other matters that are collateral to marriage.[70] Although the Qur'an has no specific prescription on the system of government besides the mere mention of the Shura as the basis of decision making, it has also not specifically prohibited women from holding any position of responsibility in the public sphere even though their roles in the family are particularly amplified. The story of the Queen of Sheba is narrated in the Qur'an as a leader of her people and how she came in contact with Prophet Sulaiman (King Solomon) and accepted Islam.[71] No trace of condemnation of her leadership over her people is manifest in the Qur'an. This suggests that it is not wrong for a woman to lead a community of people, provided that public responsibility would not in any way jeopardise her divine domestic responsibilities. Secondly, the Prophet earlier served as a trading assistant under Khadijat, who later became his wife and a business partner. Thus, the prophetic tradition relied upon by the opponents of women's leadership should be taken with caution; its application should be restricted and not made a subject of general application.

Today, there are women who are established and successful in their various careers and who, by virtue of their training, are better qualified than their male counterparts and as such are most suitable to lead their concerns. Denying such women the right to lead in such circumstances would mean not only that they are being denied the opportunity to serve humanity, but also that humanity has been denied the benefit of the service that the women are capable of rendering. In the

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66 T. Luqman, 'Women in the Holy Qur'an', *The Review of Religion*, Vol. 98, No. 2, 2003, p. 47. *See* Qur'an Chapter 4 verse 124: "And whosoever does any righteous good deeds, male or female, and is a (true) believer, such will enter Paradise and not the least injustice, even to the size of a speck on the back of a date-stone, will be done to them."

67 Al-Qaradawi, 1998, at 268.

68 Luqman, 2003, at 49.

69 *See, generally,* A.A.-J. Abu Hassan, *Noble Women Around the Messenger*, A. Abdul Fadi Faraq (Trans.), Om Elqura Mansoura, Eygpt, pp. 74-135 (1408 AH).

70 *See, generally,* Qur'an Chapter 3 verse 35; 47 verse 13; 4 verse 34; 2 verse 228; 43 verses 17-18.

71 *Id.,* Chapter 27 verse 22-44.

face of modern societies, the *Doctrine of Maslahah*[72] may also apply here so that women who have the resources and ability to govern are not denied the societies. The guiding principle should simply be that since there is no express provision in the Qur'an to the contrary and that in so far as women played significant roles in the life of Prophet Mohammed both as a private person and in his spiritual and political leadership, and that in so far as the people recognise the capability and ability of the woman to govern, they (the people) should have the benefit. A distinction must also be drawn between the different strata of human affairs: legal, political, social, professional and spiritual matters. The situation in the world today is a clear witness to this division, even in the predominantly Muslim societies where the position of Amir (head of State) has been separated from that of Imam (spiritual leader), the position of the head of State being political, that of the Imam being spiritual. A liberal or purposive construction of the much revered prophetic tradition would therefore suggest that although a woman, no matter how vast her knowledge, should not be the overall spiritual leader over men (she could in her feminine community), she could be a political leader, particularly in a situation where she has distinguished herself over and above men in that category, in the political context.

I.   Election of Leaders
Fundamental to democracy is popular and periodic election. Islam or the Shariah does not prescribe a specific formula for the emergence of political leadership, though it recognises public authority[73] and leadership[74] and prescribes consultation (Shura)[75] as the basis of decision making in the affairs of society. As Orire[76] correctly points out, the Shariah is concerned about achieving democratic goals, but it has certainly left the process of or method of evolving the leader to individual nations; it does not matter what method is adopted.[77] All that is important is that anyone who aspires to reach the leadership position must be God-fearing,

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72   This doctrine is all about public interest; it is like the common law purposive interpretation. Maslahah, though a source of Islamic Law, may at the same time be seen as a canon of interpretation whereof it is applied in constructing an Islamic ruling in a way that it would serve the best need of society, provided the resulting construction would not lead to making legal what the main body of Shariah has made illegal or vice versa. See for a scholarly discussion of the doctrine.

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74   In Qur'an Chapter 17 verse 71, Allah warns: "And remember the day when we shall call together all human beings with their Leaders." The fact that Allah appointed a Prophet for each generation from Abraham to Jesus and to Prophet Mohammed points to the fact that leadership is ordained in one form or another. Also, in the Holy Qur'an, Chapter 4 verse 59, Allah decrees: "O you who believe! Obey Allah and obey the Messenger and those in authority."

75   See Qur'an Chapter 42 verse 38.

76   A former Grand Qadi of The Shariah Court of Appeal of Kwara State, Nigeria.

77   A.K. Orire, 'The Role of Shari'ah in Democratic Rule', *in Perspectives in Islamic Law and Jurisprudence*, National Association of Muslim Law Students, Ibadan, 2001, pp. 44-62, at 53-54.

just and with sound knowledge of the law and ability to perform.[78] An indication to this was when the Prophet died, there was serious contention as to who among his four immediate lieutenants should assume the spiritual and political leadership (not the prophethood) of the Muslim world. Eventually, the first of the Caliphs, Abu-Bakr, was elected as the successor to the spiritual and political leadership of the City-State.[79] This historical evidence proved that leadership in Islam is not hereditary or monarchial and that it could be by election or even by appointment. As a true leader of his people, chosen by the people to direct their affairs, Abu-Bakr in his post-election speech said:

> O people you choose me to rule you and you know that I am not the best among you. So as long as you believe that I am right, you must help me but as soon as you believe that I am wrong, you must correct me [...] Obey me as long as you believe that I obey Allah in ruling and conducting your affairs but as soon as you believe that I disobey him, you must cease obeying me.[80]

Although it could not be said that the Caliph had in mind the contents of modern democracy, his post-election speech was nothing short of the type any democratically elected president would make, indicating that the leader is just the custodian of the peoples' political power and thus a servant of his people. Apparently, there is nothing vehemently against election of the leaders in the Shariah. The Law provides for leadership and prescribes the process of decision making (Al-Shura), leaving the methodology of evolving leaders to the people through *Ijtihad*.

Any form of government has its own system of evolving the leader, and as rightly observed by Ramadan,[81] Islam has not categorically specified a particular form of government, but sets out the principles, "leaving the details to be evolved in accordance with the requirements of time and with the progress of human knowledge and administration".[82] This means that the people of different ages are free to determine the process of evolving their political leadership. Any process adopted by the people is a consequence of rigorous thinking and deliberations that are necessarily influenced by many factors, including culture, social and economic environment and political and historical experience. I argue that historical study of democracy as we have it today followed this theory, from the Athenian to modern democracy.

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78   For a detailed discussion of requirements of leadership under the Shariah, *see* A.F. Raji, *The Crisis of Leadership in the Muslim Ummah: A Call to the Prophetic Model*, Al-Mustaghfirun Research Institute, Lagos, 2008, pp. 17-33; I.N. Sada, 'Qualification, Duties and Mode of Appointing Head of State in Islamic Constitutional Law: The Vews of the Founders of Sokoto Caliphate', *Ahmadu Bello University Law Journal*, Vol. 24-25, 2006, pp. 114, 115-124.
79   A.G.O. Oloruntele, *Introduction to Islamic Theology: The Historical Origin and Doctrines of the Early Muslim Sects*, Taofiqullahi Publishing House, Ilorin, 2001, pp. 15-32, at 23-25. *see also* Orire, 2001, at 54; *id.*, at 52-53.
80   *See* Al-Qaradawi, 1998, at 206.
81   Ramadan, 1970, at 143, 144-145.
82   *Id.* However, for a discussion on leadership succession in Islam, *see* Sada, 2006, at 114-128.

Muslims of any age are not precluded from this political evolutionary trend applying their sense of analogical deductions; after all, the Holy Qur'an mostly speaks in parables such that only the conscious, intelligent and articulate would understand the full meaning and apply it to their affairs. It is therefore ironical to say that Islam or the Shariah prescribes a particular form of government (Caliphate system) other than that any form adopted by the people must be in accordance with the Shariah.[83] Caliphate, understood in its natural or literal linguistic content, indicates succession, which can be in any form. Thus understood in constitutional law, it could mean a system of leadership succession, the modality of which is left to the people to determine. The historical evidence of this is that the death of Prophet Mohammed (SAW) threw up the succession question since he never appointed any political successor in his lifetime. There was a leadership vacuum that was eventually filled by his people using their sense of judgment (Ijtihad) to arrive at a consensus leadership, which democratically elected leadership is about.

II.   Sovereignty of God v. Popular Sovereignty

Closely related to the preceding discussion is the matter of sovereignty. To Western democracy, government derives its legitimacy from popular sovereignty, meaning that the people are sovereign. That is to say, the supreme power in the State lies with the people; they have the inalienable right to choose their leaders and also to remove them. On the other hand, the Muslim opponents of Western democracy argued that sovereignty belongs to God, hence the incompatibility. However, before going into the reality of sovereignty, it is important to point out that most democratic countries of the world only have the provision relating to popular sovereignty in their constitutions and other statutes; the reality is far from the contents, people have often been denied the exercise of the sovereign power through electoral frauds. Elections are often being manipulated to suit the personal aggrandisement of the ruling party.[84] In most African countries today, the majority of the people do not have the minimum political education that is fundamental to the free and effective exercise of their sovereignty. Also, poverty in its most devastating and debilitating effect has not only turned the masses into mere political slaves who would always do all the dirty jobs of the political manipulators and brigands, but has also deadened their sense of reasoning that would have enabled them to see the evils that are perpetuated against them by the politicians.[85] So in reality popular sovereignty has become merely cosmetic: the politicians, instead of the people, are the reservoir of political power. The same may be less true but is by no means absent in other parts of the world.

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83   *See* Bokhari, 2003.
84   The recent general election in Nigeria was a pointer to this; the election was characterised by massive irregularities that are up till now being contested at the various State Election Petition Tribunals across the country.
85   For a scholarly discussion, see A. Ajibewa, 'Democracy and Corruption *in* Nigeria', in O.O. Emmanuel (Ed.), *Challenges of Sustainable Democracy in Nigeria*, John Archers, Ibadan, 2006, pp. 261-272.

Be that as it may, there is a need to distinguish sovereignty; there is spiritual-legal and political or popular sovereignty. It is the inability to distinguish between the forms of it that is responsible for the controversy over it; there ought not to be any conflict. God, in the Qur'an, has been very emphatic about this. It is abundantly stated thus: "And to God belongs the dominion of the heavens and the earth, and Allah has power over all things,"[86] He is the best in giving judgment,[87] and He commands that justice must be in accordance with the Divine Law:

Surely, We have sent down to you (O Muhammad, SAW) the Qur'an in truth that you might judge between men by that which Allah has revealed onto you [...][88] And so judge among them by what Allah has revealed and follow not their vain desires [...][89]

It is crystal clear that the sovereignty of God is distinct from that of the people: that of God relates to creation of all things and the power over them all. It also, in the legal regime, relates to the supremacy of the law of God over all other laws.

Al-Mallah correctly points out that the sovereignty of Allah is universal, absolute, permanent, indivisible and inalienable, but at the same recognises the nation's sovereignty and argues that Muslim sovereign nations must still submit to the sovereignty of God.[90] I argue that whether in the predominantly Muslim nations or in the plural religions there is hierarchy of sovereignty, and in most democracies there is the sovereignty of God, which I have termed 'spiritual-legal', and the popular sovereignty, which I have called 'political'. The relationship between the two is that while the first is independent of the second, the second is dependent on the first. This presupposes that the law emanating from the first must, as a matter of superior hierarchy, regulate the laws: constitutional and international, in particular, emanating from the second. This is an inevitable consequence of the superiority of the first over the second. In essence, it is the supposition that in any democracy the government derives its authority from the people exercising their divinely legitimate right to choose the leaders, who must exercise their leadership trust in accordance with the divine laws. This informs, it is supposed, Ladan's categorisation of LAW into three: "Law as the command of the Supreme Sovereign (Allah), Law as the command of the God-appointed sovereign, Law as the command of the people-appointed sovereign."[91] The third, being the least in the hierarchy, has the responsibility to ensure conformity with the two Sovereign Legislatures in the exercise of its limited legislative authority.

Most democracies, the world over, recognise the superiority of the sovereignty of God either directly or indirectly. This is evidenced by the fact that the peoples of these democracies have mosques and churches where they worship

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86   Qur'an Chapter 3 verse 189. *See also* 43:84; 48:7; 4:126; 2:29; 67:1.
87   Qur'an Chapter 6 verse 57; 13:418.
88   Qur'an Chapter 4 verse 105.
89   *Id.*, verse 106.
90   Al-Mallah, *Governmental System of the Prophet Mohammed*, pp. 71-93, at 77-81.
91   M.T. Ladan, Introduction to Jurisprudence: Classical and Islamic, Malthouse Press, Lagos, 2006, pp. 165-178, at 165-170.

God, signifying their submission to His sovereign power. But Boyd and Worcester have argued that religious influence on the life and value system cannot be measured "solely by the vast number of churches and the percentage of the population attending them regularly".[92] The religious attachment of the people is easily verifiable potently from that, and although it may not show how sincere they are about the codes or laws of the religions that they profess, at least it shows that they recognise the sovereignty of God. Not only this, most of them declare public holidays to mark religious festivals, and in their constitutions they make direct or indirect allusion of their submissiveness to the sovereignty of God.[93]

The law of God is the foundation of all laws. It is in exercise of His sovereignty or supreme power over all things that He ordains laws that must regulate and guide the conduct of affairs of all, and any man-made laws that are not in conformity with the divine law are not laws, properly speaking.[94] Indeed, there is nothing in democracy as a political ideology, as I have clearly shown earlier, challenging or denying the sovereignty of God, bearing in mind that all the much venerated rights of men are rooted in the laws of God. Nor is there anything in Islam or the Shariah that prevents the people from exercising political sovereignty over their leaders by way of periodic election to ensure a system of government and facilitate political accountability.

D.   Constitutionalism and Shariah

Democracy as a political system or ideology aims at good governance, for which it is the darling of most countries in the modern world. But certainly, for democracy to achieve its political mandate, constitutionalism must present itself as a ready and willing companion. This means that democracy and constitutionalism are inseparable; any conflict therefore between democracy and the Shariah would consequently mean conflict between the Shariah and constitutionalism. Some Muslim and Western, secularist scholars, as earlier stated, have argued that the

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92   M. Boyd & D. Worcester, American Civilization, Allyn and Bacon, Boston, 1964, p. 384.
93   See, e.g., the Preamble ("[...] To Live in unity and harmony as one indivisible and indissoluble Sovereign Nation under God [...]") to the Constitution of the Federal Republic of Nigeria, 1999. It has also been pointed out that "American political ideals have always had religious overtones, and our political democracy is directly descended from the democratic values of early Christianity [...]." See Boyd & Worcester, 1964, at 386. Besides, one popular slogan in America is: "God bless America." This is very important in considering the relationship between the sovereignty of God and popular sovereignty. That slogan signifies the importance the Americans attached to God, and it also points out that the Americans acknowledge the supremacy of God in their lives. See also the Preamble ("[...] May God protect our people [...]") to the Constitution of the Republic of South Africa, 1996. This again is an indication of recognition accorded to the sovereignty of God. The Constitution of Japan, 1946, in its Preface, provides that "[...] Government is a sacred trust of the people [...]." The use of the word 'sacred' there points to spirituality, which has something to do with supernatural influence on the constitution. It is expressly provided in Part 1, Schedule B to Canadian Constitution Act, 1982 thus: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."
94   See, generally, A.T. Shehu, 'Islamic Jurisprudence in Perspective', Ilorin Bar Journal, Vol. 1, No. 1, 2002, p. 95; J. Omoregbe, An Introduction to Philosophical Jurisprudence, 1994, pp. 90,94.

two are incompatible.[95] I intend to argue that the two are compatible and that those on the opposite side have failed to realise that the word constitutionalism is only modern in its linguistic terminology, having been with men since time immemorial in its natural essence and by whatever name it was called.

A careful study of human nature suggests that constitutionalism is part of human existence from conception to death following an arranged or a predetermined procedure. It is also important that constitutionalism may not mean the same thing to different people,[96] though democracy may commend itself to universal practice because it has a unique target. This informs differences in the procedures of democracy; Britain has parliamentary democracy, while constitutional democracy prevails in countries such as America, India, Germany, Canada, Australia, Nigeria, Ghana and even Iran and Afghanistan. This suggests different notions of constitutionalism: to some, constitutionalism is all about having a written constitution even without the basics, and to others it goes beyond that. Rubenfeld is therefore correct when he points out that there are two different conceptions of constitutionalism and its relationship with democracy, and that there are multiple, distinct, competing strands of it within Europe as well as many perspectives on it in America.[97] It is not only in Europe and America that constitutionalism has this problematic character.[98]

Constitutionalism is all about limiting powers; ensuring that those who are constitutionally responsible for the execution of the powers of government are constantly within the limits allowed to them by the constitution. Maruste aptly puts the idea when he says that it is not the constitution that matters, "but the constitutionalism arising from it – the sets of principles, methods, institutions, practices and norms that function to limit power".[99] In other words, constitutionalism may be looked upon as the functionality of the constitutional democracy or as the totality of all the mechanisms put in place by the constitution to ensure its effective implementation by those in charge of executing it. These mechanisms include, generally, human rights, separation of powers, rule of law, independent

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95 The debate has been largely semantics or a linguistic problem accentuated by cultural hatred and intolerance and, more importantly, it sometimes assumes the dimension of conflict between influence and resistance.

96 *See* Katz, 2004. The author painstakingly points out the futility of imposing the idea of constitutionalism on one country by another country, that each society must develop its own culture of constitutionalism, and, quite correctly, pessimistic about America's imposition of democratic constitutionalism in Iraq and Afghanistan. His concern and apprehension is based on his conviction that "successful constitutionalism represents the conclusion of long domestic struggle for democracy and the rule of law". This argument represents the true position of most post-colonial and post-military dictatorship democratic constitutionalism such as the United States of America and Nigeria.

97 J. Rubenfeld, 'Unilateralism and Constitutionalism', *New York University Law Review*, Vol. 79, No. 6, 2004, pp. 1972, 1991.

98 For a scholarly discussion on this problem, *see* Katz, 2004.

99 R. Maruste, *The Role of Constitutional Court in Democratic Society*, <http://D:/Juridica.htm>, last accessed 11 July 2008.

judiciary and judicial review.[100] The test of compatibility of Shariah with constitutionalism should therefore focus on these norms of constitutionalism. However, I shall limit myself to human rights and judicial review as being pivotal and fundamental to this discussion.

I.   Shariah, Human Rights and Judicial Review

Shariah, as any secular constitution should, has as its primary target the welfare of the people. This welfare relates to both the person, his faith, intellect and material wealth. Besides, one visible commonality between Shariah and secular human rights is that they both have the same origin, and this presents the similarities in the contents of both. It must be noted, however, that the struggle for secular human rights from the Magna Carta (1215), the French Declaration of Rights of Man (1789), the American Bills of Rights (1791) to the United Nations Universal Declaration (1948) and all the others, including the Convention for the Elimination of All Forms of Discrimination Against Women[101] and the Convention on the Rights of Child,[102] began long after Islam had prescribed the standard of rights of people, men, women and the child,[103] that was far more inclusive than all the secular conceptions of rights, which in their original forms had their origin in the natural law. It must also be stated that what some nations have in their constitutions as 'Fundamental Rights' are grossly inadequate compared with what the Shariah had prescribed without exceptions. For example, economic and education rights are prescribed by the Shariah, but the same are not found in the so-called fundamental rights enshrined in most constitutions. Also, the fundamental objectives and the directive principles of State in Shariah are to protect life, property, honour, intellect and dignity, and are enforceable against the State.[104]

A holistic approach to the contentions would, however, suggest that the contenders against the Shariah or Islam argued on the basis of their narrow, or what I may call exclusive, interpretation of the provisions of the Shariah relating to the rights of the people or to certain areas of the legal system. A good example of this exclusivity is reflected in interpreting the laws on the rights of non-Muslims in

100 S.N. Hosen, 'Constitutionalism and Syar'i'ah', *Murduch University Electronic Journal of Law*, Vol. 11, No. 1, 2004, <www.file://F:/ E LAW Constitutionalism and Syar'i'ah,_files/ hosen111_text.htm>, last accessed 29 November 2008.

101 Adopted 18 December 1979, entered into force on 3 September 1981, GA Res. 34/180, 34 UN Doc. A/36/46, at p.193.

102 Adopted 20 November 1989, entered into force on 2 September 1990, GA Res. 44/45, UN Doc. A/44/49, at p. 166.

103 For scholarly discussions on the rights of women and children in Islam, *see, generally*, I.N. Sada, *Rights of Women and the Children: A Comparative Analysis Between the Free Western Societies and Islamic Law*, Conference Proceedings, National Conference on the Rights of Women and Children under the Sharia, Ahmadu Bello University, Zaria, 2008, pp. 217-231; M. Bin Uthman, *The Rights of Women and Children: Issues and Challenges From Human Rights and Islamic Perspective*, Conference Proceedings, National Conference on the Rights of Women and Children under the Sharia, Ahmadu Bello University, Zaria, 2008, pp. 1-22.

104 For scholarly discussion on this, *see* Orire, 2001, at 45, 46-53; *see also* B. Babajo, 'Constitutionalism, Democratic Governance and Sharia in Nigeria', *Ahmadu Bello University Journal of Islamic Law*, Vol. 4-5, 2007, p. 109.

Islamic societies: that they do not have the same rights as the Muslims, and that they were "obliged to pay special taxes and to accept various terms of social subordination to Muslims".[105]

Let me first say that we cannot be talking of Dhimmis or non-Muslims living in Muslim societies today; we now live in the era of multiculturalism and critical interdependency in terms of economy and technology such that even the predominantly Muslim societies may not advance beyond their traditional economies and technologies without the fullest participation of the so-called non-Muslims. This would apparently negate any discrimination on the basis of religion, except in purely spiritual matters, in which case everyone must go his own religious ways. It must be understood that the era of such classification is gone, the era that was characterized by war and peace between Muslims and non-Muslims and thus by extension of religious identity. Even then, non-Muslims were treated with respect as human beings and were even granted political asylum within Islamic territory,[106] and although they (men) paid Jizyah (a form of tax paid by non-Muslims), Muslims also pay Zakat, which is a religious obligation and a source of revenue to the State. Since non-Muslims should not pay Zakat, they paid Jizyah, which was not meant to discriminate against them, but rather to ensure that they also contribute to the revenue of the State, and it served to exempt them from military service. Besides, Jizyah was paid by only those male adults who were capable of paying as agreed by the Islamic Authority and the non-Muslims. Those who were incapable of paying were paid some stipend from the Bayt-l-Mal (Public Treasury).[107]

As demonstrated by Emon,[108] lack of uniformity in the interpretation of some basic Shariah rules by the forerunners of Islamic jurisprudence is partly responsible for some of the negative impressions people have about Shariah or Islam. This problem is itself historical and linguistic[109] in nature when put in the proper perspective. However, this should not lead one to conclude that Shariah or Islam is not compatible with human rights or constitutionalism, but should instead call for a rigorous and systemic intellectual analysis of both systems on the basis of objective criteria, to facilitate understanding and tolerance of one culture by another. An-Na'im has also fallen into the traps set by exclusive or narrow interpretation of basic Shariah rules to agree that:

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105 *See* A. Dacey & C. Koproske, *Islam & Human Rights*, Center for Inquiry, New York, 2008, pp. 10, 17.

106 The practice of Prophet Mohammad in Medina (The Medina Constitution) is a classical example of this position.

107 *See, generally,* U. Salihu, 'The Rights and Obligations of the Non-Muslims Under Sharia', *Critical Inquiry in Language Studies Journal*, Vol. 25, 2005, pp. 186-195; K. Ahmad (Trans.), *The Islamic Law and Constitution*, Islamic Publication, Lahore, 1980, pp. 274, 282-299; A.F. Ibn Raji, *Islam & Human Rights in Broader Perspectives*, Jam'iyyat Junud Dinil-Islamiyyah, Lagos, 2001, pp. 137-140; M. Khadduri, *War and Peace in the Law of Islam*, AMS Press, New York, 1955, pp. 175, 187; *See also* Ramadan, 1970, at 128, 132-145.

108 Emon, 'Limits of Constitutionalism in the Muslim World'.

109 *See* M.P. Mejia, 'Gender Jihad: Muslim Women, Islamic Jurisprudence, and Women's Rights', 2007, <www.kritike.org/journal/issue_1/mejia_june2007.pdf>, last accessed 17 February 2009.

[...] since the rights of women and non-Muslims under sharia are not equal to those of men and Muslims, respectively, the level of protection of rights under Sharia is not sufficient when judged by the standards sets by the UDHR, which require equal rights for all human beings, without distinction on such grounds as sex, religion or belief.[110]

It is indeed unnecessary to judge one culture by any standard attained by another, particularly when the cultures address issues from different perspectives, as in the case of secular and Shariah human rights. The standard set by the UDHR and the Shariah with different perspectives, though having originated from the same or identical origin, should rather be judged on their individual bases, bearing in mind the needs of people. Therefore, it is necessary to align with him to the extent that human rights must also be legitimated in the context of different religious traditions.[111] This is the only way by which there would be harmony, understanding and tolerance, not criticism of one culture by another or show of superiority/inferiority among the different cultures.

Human rights, whether Islamic or contemporary, and democracy need to be safeguarded by being legitimated in the constitution or any statute if they must be properly implemented to achieve the desired goals. To ensure this, therefore, most constitutions directly or indirectly enshrined and vested in the judiciary the power to screen any act of the Executive or the Legislature and to declare any act that is in violation of the right of a citizen or that is in breach of the constitution or any other statute null and void. Although judicial review has remained controversial, it is to facilitate balancing in governance. Even where the courts cannot trace their power of review to the constitution, they should be able to trace it to the formal constitution. This formal constitution, as I have argued elsewhere, is the supreme law of God to which all other laws are inferior; though it may not be written in any form as in the form of the Shariah or as in the sense of positive law, it is written in the heart of all.

In the Shariah, also, although there may not be any express provision bearing on the question of review, there are patent provisions from which to infer the review of act of the government by the judiciary. Therefore, if the courts could not base the power on any express provision, they should be content with the inference from both the Qur'an and the prophetic traditions. Allah says, "Surely, We have sent down to you the Book in truth that you might judge among men by what Allah has revealed unto you."[112] This is the law: that the executive, the legislature and even the judiciary have the sacred duty of ensuring that all acts are in strict compliance with the law of God. It does presuppose the rule of law, judicial review and independence of the judiciary. With this, all the court does is to see to it that any act of the executive or the legislature violates neither the right of the citizen nor the clear provisions of the basic law. As the watchdog, the court would

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110 I.A. An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate', *American Society of International Law Proceedings*, Vol. 94, 2000, p. 98.
111 *Id.*, p. 100.
112 *See* Quran, Chapter 4 verse 105.

declare any law or administrative act to that effect null and void, as not being in accordance with the law of God.

Certainly, the duty of ensuring compliance with the fundamental law might not be the duty of every citizen in society; there must be an institutional, judicial arrangement for effecting that injunction. It is therefore wrong to opine that Islam is incompatible with democracy because it does not align with constitutionalism or vice versa. As already argued in this article, reliance on historical analysis of events or certain traditions in the predominantly Muslim countries or relying on Western terminologies or ideologies, to judge Islam and the Shariah to draw conclusions would not only create intellectual gaps and deficiencies, but also certainly lead to wide misunderstandings between cultures. As Hamdi has rightly observed, unless all cultures and civilisations see each other as constitutive elements, albeit as partners, in the process of evolving "political and moral standards for the entire world,"[113] there is not likely to be a constructive dialogue among them. This must certainly be avoided so that the entire human race is not consumed by torrential fire fuelled by ignorance, arrogance and cultural intolerance.

E. Conclusion

This article has tried to critically examine the controversy on the question of compatibility of Shariah, democracy and constitutionalism. It looks at some of the arguments on both sides and concludes that both are compatible, pointing out that the controversies have sometimes arisen out of a lack of uniformity among Muslim scholars on the interpretations of provisions of the basic Shariah law. At other times it is the problem of cultural hatred and intolerance; any concept presented in Western terminology is a taboo to some Muslims just as any terminology in Islamic coinage is to some Western, secularist intellectuals without looking for the substance for critical appraisal that would enable objective comparison. Besides, the likes of Pepes[114] have erroneously relied on historical events, and non-Islamic cultures in predominantly Muslim countries are taken as traditional Islamic cultures as the basis for their arguments. This is quite inappropriate; the

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113 *See* M.E. Hamdi, *Islam and Liberal Democracy: The Limits of the Western Model,* <http://calliope.jhl .edu/journals/journal_of_democracy/v007/7.2hamdi.html>, last accessed 2 August 2009.

114 D. Pepes, 'Give Muslims Time to Find Democratic Feet', 2008, <www.smh.com.au/egi-bin/ popupPrint/Article.pl?path=/article/2008/04/...>, last accessed 17 April 2008. The writer erroneously asserts that Islam encourages Muslims to wage violent jihad to impose Muslim rule, suicide terrorism, endorsement of second-class citizenship for non-Muslims, death sentences for blasphemy or apostasy, and essentially that the religion is anti-democratic, presuming autocratic rulership. As pointed out earlier, his has been a mere display of ignorance of what Islam is all about, relying on narrow and wrong interpretation of the religion and the Shariah. This is evident in his reliance on P.C. Salzman's *Culture and Conflict in the Middle East,* Humanity Books, New York, 2007, as if that represents the positions of Islam on all the issues raised in it. Pepes fails to appreciate that Islam is a universal religion cutting across borders and that what happens in the Middle East, though predominantly Muslim, does not represent all the clear teachings (peace and harmony among the various people irrespective of race or religion) of Islam.

basis of argument should be the express provisions of the primary sources of the Shariah and the consensual juridical expositions of them since, although not on all issues is there consensus among the Islamic Schools of Jurisprudence in their various interpretations of the basics, they form the basis of core jurisprudential thoughts in the Shariah. These differences in interpretation would further enhance objective appraisal since they would allow for synthesis of a wide range of interpretations from which conclusions could be eventually drawn rather than relying on a single or narrow interpretation as a basis for argument. Also, happenings in a particular Muslim country or among a group, including even behavioural patterns, may not necessarily represent the actual and authentic position of Islam. This suggests that more needs to be done in seeking the true position. Also important is that no culture may be effectively judged by the standards set by another culture because of differences in value systems, though there may be harmonisation and cross-influence, not imposition of ideas and policies.