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Islam and the Challenge of Democratic Commitment

Dr. Khaled Abou El-Fadl*

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Dr. Khaled Abou El-Fadl

Abstract

The author questions whether concurrent and simultaneous moral and normative commitments to Islam and to a democratic form of government are reconcilable or mutually exclusive. The author will argue in this Article that it is indeed possible to reconcile Islam with a commitment in favor of democracy. The author will then present a systematic exploration of Islamic theology and law as it relates to a democratic system of government, and in this context, address the various elements within Islamic belief and practice that promote, challenge, or hinder the emergence of an ideological commitment in favor of democracy. In many ways, the basic and fundamental objective of this Article is to investigate whether the Islamic faith is consistent or reconcilable with a democratic faith. As addressed below, both Islam and democracy represent a set of comprehensive and normative moral commitments and beliefs about, among other things, the worth and entitlements of human beings. The challenging issue is to understand the ways in which the Islamic and democratic systems of convictions and moral commitments could undermine, negate, or validate and support each other.

ISLAM AND THE CHALLENGE OF DEMOCRATIC COMMITMENT

*Dr. Khaled Abou El Fadl**

The question I deal with here is whether concurrent and simultaneous moral and normative commitments to Islam and to a democratic form of government are reconcilable or mutually exclusive. I will argue in this Article that it is indeed possible to reconcile Islam with a commitment in favor of democracy. I will present a systematic exploration of Islamic theology and law as it relates to a democratic system of government, and in this context, I will address the various elements within Islamic belief and practice that promote, challenge, or hinder the emergence of an ideological commitment in favor of democracy. In many ways, the basic and fundamental objective of this Article is to investigate whether the Islamic faith is consistent or reconcilable with a democratic faith. As addressed below, both Islam and democracy represent a set of comprehensive and normative moral commitments and beliefs about, among other things, the worth and entitlements of human beings. The challenging issue is to understand the ways in which the Islamic and democratic systems of convictions and moral commitments could undermine, negate, or validate and support each other. At the outset of this Article, I make no apologies for my conviction that separate and independent commitments in favor of Islam and in favor of democracy are morally desirable and normatively good. The problem is to facilitate the co-existence of both of these desirable moral commitments and, to the extent possible, to guard against a situation in which the one challenges and negates the other. As discussed below, in my view, reconciliation, and perhaps cooperation, between Islam and democracy is challenging but absolutely necessary.

* Dr. Khaled Abou El Fadl was recently appointed by President Bush as a Commissioner to the U.S. Commission on International Religious Freedom. Dr. El Fadl is a Visiting Professor of Law at Yale Law School and Professor of Law at the University of California, Los Angeles. He is one of the leading authorities on Islamic law in the United States and Europe. He holds a B.A. from Yale University, a J.D. from the University of Pennsylvania Law School, and an M.A./Ph.D. from Princeton University. Dr. El Fadl is grateful to his wife Grace, for her invaluable feedback and assistance, and would also like to thank Anver Emon, his research assistant, for his diligent work on this paper.

At the very outset of this Article, the first issue that ought to be addressed is the ideal form of government in Islam. A jurist writing a few centuries ago on the subject of Islam and systems of government would have commenced his treatise by separating all political systems into three broad types.¹ The first system is a natural system that approximates a primitive state of nature. This is an uncivilized system of lawlessness and anarchy, in which the most powerful in society dominate and tyrannize the rest.² In such a system, instead of law, there would be custom, and instead of government, there would be tribal elders who are respected and obeyed only as long as they remained the strongest and most physically able.³ The second system is dynastic. Such a system is based not on custom, but on laws issued by a king or prince.⁴ According to Muslim jurists, such a system would be illegitimate as well.⁵ Because the king or prince is the source of law, the system is considered baseless, whimsical, and capricious.⁶ In such a system, people obey laws out of necessity or compulsion, but the laws themselves are illegitimate and tyrannical.⁷ The third system, and the most superior, is the Caliphate, which is based on Shari'ah law.⁸ Shari'ah law, according to Muslim jurists, fulfills the criteria of justice and legitimacy, and it binds the governed and governor alike.⁹ Because the government is bound by a higher law that may not be altered or changed, and because the government may not act whimsically or outside the pale of law, the Caliphate system is superior to any other.¹⁰

Many Muslim scholars, like Ibn Khaldun, consistently made the same assumption: the Islamic political system was considered a challenge to the world.¹¹ While all other polities are doomed to despotic governance, and their laws are individualis-

1. See, e.g., MUHSIN MAHDI, *IBN KHALDUN'S PHILOSOPHY OF HISTORY* 193-201 (1964).

2. See *id.* at 261-63.

3. See *id.* at 196.

4. See *id.* at 206-09.

5. See *id.* at 251.

6. See *id.*

7. See *id.*

8. See *id.* at 237-48.

9. See *id.*

10. See *id.* at 284; NIZAM BARAKAT, *MUQADDIMA FI AL-FIKR AL-SIYASI AL-ISLAMI* 119 (Jami'at al-Malik Su'ud 1985).

11. See MAHDI, *supra* note 1, at 284.

tic and whimsical, the Caliphate system of governance is superior because it is based on the rule of law.¹² Whether as a matter of historical practice this assumption was justified or not, the material point was that classical Muslim jurists exhibited a distinct aversion to whimsical or unrestrained governance. A government bound by Shari'ah was considered meritorious in part because it is a government where human beings do not have unfettered authority over other human beings, and because there are limits on the reach of power. For instance, a Sunni jurist such as Abu al-Faraj Ibn al-Jawzi (d. 597/1200) asserted that a Caliph who tries to alter God's laws for politically expedient reasons is implicitly accusing the Shari'ah of imperfection.¹³ Ibn al-Jawzi elaborated upon this by contending that, without the rule of Shari'ah, a ruler may justify the murder of innocent Muslims under the guise of political expediency or interests. In reality, he argued, no political interest could ever justify the killing of a Muslim without legitimate legal cause, and it is this type of restraint that demonstrates the superiority of a Shari'ah system over the other two alternative systems of governance.¹⁴

This classical debate is rather fascinating for several reasons. It is fair to say that in the contemporary age, the challenge of good governance is posed most aptly by a democratic system of government, and not simply by limited or restrained government. In espousing the principle of limited government and the rule of law, classical Muslim scholars were, in fact, asserting prin-

12. See KHALED ABOU EL FADL, *REBELLION AND VIOLENCE IN ISLAMIC LAW* (2001) [hereinafter *EL FADL, REBELLION AND VIOLENCE*]; ABU YA'LÁ MUHAMMAD IBN AL-HUSAYN IBN AL-FARRA', *AL-AHKAM AL-SULTANIYAH* 28 (1983) [hereinafter *AL-FARRA'*]; 1 H.A.R. GIBB, *Constitutional Organization, in LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW* (Majid Khadduri & Herbert J. Liebesny eds., 1955); YUSUF IBISH, *NUSUS AL-FIKR AL-SIYASI AL ISLAMI: AL-IMAMAH 'INDA AL-SUNNAH* 55 (1966); ANN KATHERINE SWYNFORD LAMBTON, *STATE AND GOVERNMENT IN MEDIEVAL ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY: THE JURISTS* 19 (1981); 'ALI IBN MUHAMMAD MAWARDI, *AL-AHKAM AL SULTANIYAH WA-AL-WILAYAT AL-DINIYAH* 19-21 (Mustafa al-Halabi 1985) [hereinafter *MAWARDI, AL-AHKAM*]; HANNA MIKHAIL, *POLITICS AND REVELATION: MAWARDI AND AFTER* 20-21 (1995); MUHAMMAD JALAL ABU AL-FUTUH SHARAF & 'ALI 'ABD AL-MU'TI MUHAMMAD, *AL-FIKR AL-SIYASI FI AL-ISLAM: SHAKHSIYAT WAMADHAHIB* 399 (Dar al-Jam'at al-Misriyya 1978); W. MONTGOMERY WATT, *ISLAMIC POLITICAL THOUGHT: THE BASIC CONCEPTS* 102-03 (1968).

13. See ABU AL-FARAJ 'ABD AL-RAHMAN IBN 'ALI IBN AL-JAWZI, *AL-SHIFA' FI MAWA'IZ AL-MULUK WA-AL-KHULAFÁ* 55 (Fu'ad Ahmad ed., Dar al-Da'wa 1985) [hereinafter *AL SHIFA'*]; 1 AL-JAWZI, *AL-MISBAH AL-MUDI' FI AL-KHILAFAT AL-MUSTADI'* 298 (Ibrahim Najjiyya ed., Matba'at al-Awqaf 1979) [hereinafter *AL-MISBAH*].

14. See *AL-SHIFA'*, *supra* note 13, at 55, 57; *AL-MISBAH*, *supra* note 13, at 298.

ciples that are at the core of all democratic practices in the modern world. But it is important to recognize that the idea of limited government, alone, is no longer in this day and age, sufficient for proving the merit of a particular system of government.

Today, the system of government that has the strongest and most compelling claim to legitimacy, and moral virtue, is a democracy. The mere fact that, with very few exceptions, every despotic regime in the world today claims to be more democratic, and less authoritarian, is powerful evidence of the challenge democracies pose to the world. Most authoritarian governments claim to be popular with the people they rule over, and attempt to conceal the appearance of despotism and arbitrariness, but in doing so they also tacitly affirm the primacy and moral superiority of the democratic paradigm in the modern age. Although limited government and the rule of law are necessary for the establishment of a democratic order, these are not the elements that give a democracy its moral and persuasive power. The legitimacy of a democratic order is founded on the idea that the citizens of a Nation are the sovereign and that a democratic government gives effect to the will of that sovereign through representation. As such, the people are the source of the law, and the law is founded on the basis of fundamental rights that protect the basic well-being and interests of the individual members of the sovereign. Whether there is a written constitution or not, according to democratic theory, there must be a process through which the sovereign may guard and protect its rights and also shape the law.

As far as Islam is concerned, democratic theory poses a formidable challenge. Put simply, if Muslim jurists considered law derived from a sovereign monarch to be inherently illegitimate and whimsical, what is the legitimacy of a system in which the law is derived from a sovereign, but where the sovereign is made up of the citizens of a Nation? The brunt of the challenge to Islam is: If God is the only sovereign and source of law in Islam, is it meaningful to speak of a democracy within Islam, or even of Islam within a democracy, and can an Islamic system of government ever be reconciled with democratic governance?

Struggling to answer this question is an endeavor fraught with conceptual and political pitfalls. On the one hand, arguing that constitutionalism and Islamic political doctrines are compatible immediately raises the problem of historical and cultural

anachronism. How can a modern concept reflecting values that evolved over centuries within a particular cultural context be sought in a remarkably different context? In many ways, democracy cannot be theorized, but must be practiced through a culture that tolerates others, accepts disagreement, is amenable to change, and values the process, quite often regardless of the results it generates. On the other hand, denying that Islamic political doctrines could support a democratic order implies that Muslims are doomed to suffer despotism, unless they either abandon or materially alter their traditions. Furthermore, culture can be reconstructed and re-invented partly through the power of ideas, and if ideas are lacking, there is never really a possibility of a systematic or directed cultural change.

Therefore, any time one portends to discuss whether Islam and democracy are compatible, one is also taking an implicit normative stance. This is so because both Islam and democracy are conceptual frameworks anchored in systems of commitment and belief. Both require a conviction and a conscientious dedication without which they cannot really exist. In the same way that it is possible to perform Islamic rituals without ever being a believing Muslim, it is also possible to have all the trappings and processes of a democracy without ever creating a democracy. It is possible for a country to have a Constitution, parliament, judiciary, elections, and other institutions of democracy, without being democratic.¹⁵ Similarly, it is possible for a government to implement the rules and regulations of Islamic law without being, in any real sense, Islamic.¹⁶ What defines either a democracy or Islam are the moral values that one associates with either one of these systems of belief, and the attitudinal commitments of their adherents. I say this because, in my view, the broad tradition of Islamic political thought contains ideas and institutions that could potentially support or undermine a democratic order. There are trajectories or potentialities found in historical Islamic doctrines that could be utilized to promote or oppose a democratic system of government. However, saying this is akin to as-

15. Cases in point would be many developing countries that have all the formal trappings of democracies, but do not lead a democratic life.

16. A case in point would be Saudi Arabia, where many purported Islamic laws are in effect, but the government fails to embody most Islamic virtues or moralities. See Glenn E. Robinson, *Can Islamists Be Democrats? The Case of Jordan*, in 51 MIDDLE E.J. 373, 379 (1997).

serting that there are raw materials that could be utilized to manufacture finished products. Without will power, inspired vision, and moral commitment, these raw materials remain of little use. Similarly, regardless of the doctrinal potentialities found in the Islamic tradition, without the necessary moral commitment, and conscientious understanding, there can be no democracy in Islam. At least for Muslims for whom Islam is the authoritative frame of reference, they must develop a conviction that democracy is an ethical good and that the pursuit of this good does not constitute an abandonment of Islam.

I. ISLAM AND THE MORAL COMMITMENT TO DEMOCRACY

Should Muslims strive towards a democratic system of government, and if so, why? Any honest approach to the issue should start with these basic questions. Arguably, Muslims might legitimately prefer a system of government that submits to the Divine will, instead of abiding by the vagaries of human whimsies. Conceding sovereignty to God is more virtuous than accepting the sovereignty of human beings, and in fact, the very idea of human sovereignty smacks of self-idolatry. In addition, one might even contend that some Muslims seek to establish a democratic system of governance only because of their infatuation with everything Western, instead of choosing to hold steadfast to what is legitimately and authentically Islamic.

These are formidable questions, but I believe they are also the wrong ones. The Qur'an did not specify a particular form of government, but it did identify social and political values that are central to a Muslim polity, and it urged Muslims to pursue and fulfill these values. Among such values ordained by the Qur'an are: the promotion of social cooperation and mutual assistance in pursuit of justice,¹⁷ the establishment of a consultative and non-autocratic method of governance,¹⁸ and the institutionalization of mercy and compassion in social interactions.¹⁹ Therefore, it would stand to reason that Muslims ought to adopt the system of government that is the most effective in helping Muslims promote the pertinent moral values. In this regard, it could

17. QUR'AN 11:119; 49:13.

18. See *infra* note 68 and accompanying text (referring to the concept of government through *shura*).

19. QUR'AN 6:12, 54, 21, 107; 27:77; 29:51; 45:20.

be plausibly argued that democracy is the most effective system for doing so. If Muslims are convinced that democracy is the best available means for serving the moral purposes of their religion, it hardly seems relevant that democracy is a Western, or non-Western idea. What is relevant is the existence of a conviction and belief in the merits of a democratic system, as opposed to any other possible system, and a commitment to the fostering and promotion of such a system through the moral venues facilitated by Islamic law and ethics.

In my view, there are several reasons that commend democracy, and especially a constitutional democracy, as the system most capable of promoting the ethical and moral imperatives of Islam. These reasons are elaborated upon below, but in essence, I would argue that a democracy offers the greatest *potential* for promoting justice, and protecting human dignity, without making God responsible for human injustice or the infliction of degradation by human beings upon one another. As I have argued elsewhere, authoritarianism, if inflicted in the name of religion, is a transgression upon the bounds of God. Authoritarianism allows despots to usurp the Divine prerogative by empowering some human beings to play the role of God.²⁰ In order to avoid having a small group of people appointing themselves as the voice of God, and speaking in God's name, there are two main options: 1) Either we ought to deny everyone the authority to speak on God's behalf; or 2) we endow everyone with that authority. The former option is problematic because the Qur'an provides that God has vested all of humanity with divinity by making all human beings the viceroys of God on this earth; the latter is problematic because a person that does good cannot be morally equated with a person who does evil — for instance, a saint does not have the same moral worth as a serial killer.

A constitutional democracy avoids the problem by enshrining some basic moral standards in a constitutional document, and thus, guarantees some discernment and differentiation, but, at the same time, a democracy insures that no single person or group becomes the infallible representative of divinity. In addi-

20. See generally KHALED ABOU EL FADL, AND GOD KNOWS THE SOLDIERS: THE AUTHORITATIVE AND AUTHORITARIAN IN ISLAMIC DISCOURSES (2001) [hereinafter THE SOLDIERS]; KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN (2001) [hereinafter SPEAKING IN GOD'S NAME].

tion, a democratic system offers the greatest possibility for accountability and resistance to the tendency of the powerful to render themselves immune from judgment. This is consistent with the imperative of justice in Islam. If in a political system, there are no institutional mechanisms to prevent the unjust from rendering themselves above judgment, then the system is itself unjust, regardless of whether injustice is actually committed or not. For instance, if there is a system in which there is no punishment for rape, this system is unjust, quite apart from whether that crime is ever committed or not. A democracy — through the institutions of the vote, separation and division of power, and guarantee of pluralism — at least offers the possibility of redress, and that, in and of itself, is a moral good.

There are several other reasons for commending a constitutional democracy as the system most consistent with Islamic moral imperatives. I will explore these reasons below, but first it is important to acknowledge that regardless of the practical merits identified, there are serious conceptual challenges to a democratic commitment in Islam. The principle challenges are the religious law of Shari'ah, and the idea that the people, as the sovereign, can be free to flout or violate Shari'ah law. To understand these challenges, we must delve into the epistemology of Shari'ah, and the meaning of God's sovereignty. The problem, however, has been that in contemporary Islam there has not been a serious and systematic effort to evaluate either the concept of sovereignty or Shari'ah, as each may relate to modern political systems.

The dominant Muslim responses to the challenge of democracy tend to be either apologetic and defensive or nationalistic and rejectionist, but both responses remain largely reactive. Muslim apologists tend to claim that democracy already exists in Islam, primarily as a means of emphasizing the compatibility of Islam with modernity. Typically, they maintain that the Qur'an is the functional equivalent of a Constitution, and they also tend to recast the early history of Islam as if it were an ideal democratic experience. Apologists defend the public image of Islam by indulging in anachronisms, often pretending as if the Prophet was sent to humanity to teach it the art of democratic governance. Therefore, they would declare the fundamental compatibility between Islam and democracy as a conclusion to be accepted as a matter of faith and belief, rather than as a pro-

position to be argued and proven. Importantly, however, this assumption was not the product of a moral commitment to democracy, but rather was the result of a keen interest in power. A democratic Islam was simply the vehicle by which they sought to empower themselves against the onslaught of various competing political forces, and Islam was also the means by which they sought to bid for domination over others. This is why many of the apologists are affiliated with some religio-political movement in the Muslim world, for instance, like the Muslim Brotherhood movement in Egypt. This is also why we find that the political practices of the apologists do not reflect the type of ethical virtues associated with democratic thought, such as tolerance of dissent, or valuing intellectual and cultural diversity. For example, we find that many of the American-Muslim organizations which consistently affirm the compatibility of Islam with democracy are, in fact, quite despotic both in their internal dynamics, and in the type of theology to which they adhere. For these organizations, democracy is affirmed politically, but it is not believed or internalized ethically.²¹

The second main response in modern Islam insists that the Islamic political system is different and unique, and argues that such a system might overlap with a democracy in some regards and might depart on others. The main emphasis of this approach is on cultural or intellectual independence and autonomy, and therefore, any attempt to commit to a democratic system of government is seen as a sign of surrender to what is called the Western intellectual or cultural invasion of the Muslim world. For instance, the Pakistani propagandist Abu al-A 'la al-Mawdudi contended that the Islamic system of government is a theo-democracy, which, he insisted, is very different from either a theocracy or a democracy.²² In addition, adherents of this approach frequently proclaim that the political system of Islam is a *shura* government, which they claim has nothing to do with a

21. For instance, after writing a regular column for many years in an Islamic magazine, my column was suddenly terminated and my work banned because I disagreed with the leadership of the organization that publishes the magazine. Not surprisingly, this organization tirelessly proclaims the democratic nature of Islam, and even claims that the Prophet was a philosopher of democracy. But apologetic stances such as this often translate into a hypocritical despotism in actual practice.

22. See ABU AL-A 'LÁ AL-MAWDUDI, AL-KHILAFÁ WA-AL MULK 13-21 (Ahmad Idris trans., Dar al-Qalam 1978).

democratic system of government. Like the apologist approach, this trend is largely reactive in the sense that it defines itself solely by reference to the perceived "other." According to this orientation, an Islamic system cannot be democratic simply because the West is democratic. But, rather inconsistently, the partisans of this approach often spend a considerable amount of energy trying to prove that Western democracies are hypocritical, and that they are not democracies at all. It is as if they see the merits of a democracy, but, out of a blind sense of nationalistic tribalism, insist that the West does not really have democracy, and that Muslims ought not to pursue it. Importantly, however, what the adherents of this approach claim to be essential to an Islamic political system is as alien, or indigenous, to Islam as is a democratic system of government. In other words, the adherents of this approach construct a reactive symbolism of what an Islamic system ought to be, but such symbolism is not necessarily derived from any genuine and authentic Islamic historical experience. It is wholly and completely derived from what they believe the "other" is not, and, consequently, that derived construct is as much of a historical anachronism as is a democratic vision of the Prophet and his companions' polity. It is fair to say that the adherents of this orientation are far more anti-Western than they are pro-Islamic.

The dominance of the apologetic or rejectionist orientations throughout the Colonial and post-Colonial eras in Islam have resulted in the stunting of the Islamic creative impulse towards the challenge of democracy. Is Islam compatible with democracy? The response can only be that it depends on whether there are a sufficient number of Muslims willing to commit to the democratic ideal and to undertake the type of critical reappraisal of Islamic theology and law in order to give full effect to this commitment. Thus far, most of the efforts at achieving this have been on largely functionalist and opportunistic grounds that, if anything, ultimately discredit the very idea of reform within Islam. Overwhelmingly, contemporary Muslim reformers have attempted to justify a democracy in Islam solely on the grounds of *maslaha* [public interest]. Typically, such reformers are satisfied with asserting that most of Islamic law may be changed to serve the public interests of Muslims, and they jump from that assertion to the conclusion that the adoption of democracy ought not pose any serious obstacles because of the pri-

macy of deference to public interest in Islamic jurisprudence. The fact is that such reformers tend to come from the ranks of people who have nothing more than the most superficial familiarity with the epistemology and methodology of Islamic jurisprudence. In addition, the logic of public interest is like a harlot: it offers its services, as effectively as possible, to democrats and despots alike. Amongst the often opportunistic logic of reformers, the obstinacy of rejectionists, and the insincerity of apologists, the possibilities for a democracy within Islam have not been seriously explored. The balance of this Article will focus on the possibilities offered by the intellectual heritage of Islam, and will also point out the issues that pose the greatest challenge to Muslims willing to make a commitment to democracy.

II. GOD AS THE SOVEREIGN

I will discuss the issue of political representation below, but at this point, it is important to start exploring the idea of God as the sovereign lawmaker in an Islamic State, and whether such a paradigm is consistent with a democratic system of government. Interestingly, early in Islamic history, the issue of God's dominion or sovereignty in the political sphere [*hakimiyyat Allah*] was raised by a group known as the Haruriyya (later known as the Khawarij) when they rebelled against the fourth Rightly-Guided Caliph 'Ali Ibn Abi Talib (d. 40/661). Initially, the Haruriyya were firm supporters of 'Ali, but they rebelled against him when he agreed to arbitrate his political dispute with a competing political faction led by a man named Mu'awiya. Ultimately, the effort at reaching a peaceful resolution to the political conflict was a failure, and, after 'Ali's death, Mu'awiya was able to seize power and establish himself as the first Caliph of the Umayyad Dynasty. At the time of the arbitration, however, the Khawarij, who were pious, puritan, and fanatic, believed that God's law clearly supported 'Ali and, therefore, an arbitration or any negotiated settlement was inherently unlawful. The Khawarij maintained that the Shari'ah clearly and unequivocally supported 'Ali's claim to power, and that any attempt at a negotiated settlement, in effect, challenged the rule of God and God's sovereignty or dominion, and therefore, by definition, was illegitimate.

Ironically, 'Ali himself had agreed to the arbitration on the condition that the arbitrators be bound by the Qur'an, and that

they would give full consideration to the supremacy of the Shari'ah. However, in 'Ali's mind, this did not necessarily preclude the possibility of a negotiated settlement, let alone the lawfulness of resorting to arbitration as a way of resolving the dispute. In the view of the Khawarij, by accepting the principle of arbitration and by accepting the notion that legality could be negotiated, 'Ali had lost his claim to legitimacy because he transferred God's dominion to human beings. 'Ali's behavior, according to the Khawarij, had shown that he was willing to compromise God's supremacy by transferring decision making to human actors instead of faithfully applying the law of God. Not surprisingly, the Khawarij declared 'Ali a traitor to God, rebelled against him, and eventually succeeded in assassinating him. Notably, the Khawarij's rallying cries of "dominion belongs to God" [*la hukma illa li'llah*] and "the Qur'an is the judge" [*al-hukmu li'l-Qur'an*] are nearly identical to the slogans invoked by contemporary fundamentalist groups.²³ But considering the historical context, the Khawarij's sloganeering was initially a call for the symbolism of legality and the supremacy of law.²⁴ This search for legality quickly descended into an unequivocal radicalized call for clear lines of demarcation between what is lawful and unlawful.

The anecdotal reports about the debates between 'Ali and the Khawarij regarding this matter reflect an unmistakable tension about the meaning of legality, and the implications of the rule of law. In one such report, members of the Khawarij accused 'Ali of accepting the judgment and dominion [*hakimiyya*] of human beings instead of abiding by the dominion of God's law. Upon hearing of this accusation, 'Ali called upon the people to gather around him, and he brought a large copy of the Qur'an. 'Ali touched the Qur'an while instructing it to inform the people about God's law. Surprised, the people gath-

23. Ironically, Shi'i and Sunni fundamentalist groups detest the Khawarij and consider them heretics, but this is not because these modern groups disagree with the Khawarij's political slogans, but because the Khawarij murdered 'Ali, the cousin of the Prophet.

24. This claim is quite controversial for Muslims and non-Muslims, alike. Nevertheless, I believe that this argument is supported by the fact that the rebellion of the Khawarij took place in the context of an overall search for legitimacy and legality after the death of the Prophet. The research of some scholars on the dogma and symbolism of the early rebellions lends support to this argument. See HICHEM DJAIT, *AL-FITNAH: JADALIYAT AL-DIN WA-AL-SIYASAH FI AL-ISLAM AL-MUBAKKIR* (2d ed., al-Tab'ah 1989).

ered around 'Ali exclaimed, "What are you doing?! The Qur'an cannot speak, for it is not a human being." Upon hearing this, 'Ali exclaimed that this is exactly the point he is trying to make. The Qur'an, 'Ali explained, is but ink and paper, and it does not speak for itself. Instead, it is human beings who give effect to it according to their limited personal judgments and opinions.²⁵

Anecdotal stories such as these not only relate to the role of human agency in interpreting the Divine word, but also symbolize a search for the fundamental moral values of society. In thinking about these moral values, it is important to differentiate between the issues that are subject to political negotiation and expedience, and issues that constitute unwavering matters of principle and that are strictly governed by law. Furthermore, one can discern in such reports a search for the proper legal limits that may be placed upon a ruler's range of discretion. But more importantly, they also point to the dogmatic superficiality of proclamations of God's dominion or sovereignty in order to legitimate and empower what are fundamentally human determinations.

For a believer, God is thought of as all-powerful and as the ultimate owner of the heavens and earth, but what are the implications of this claim for human agency in understanding and implementing the law in a political system? As I argue below, arguments claiming that God is the sole legislator and only source of law engage in a fatal fiction that is not defensible from the point of view of Islamic theology. Such arguments pretend that human agents could possibly have perfect and unfettered access to the will of God and also that human beings could possibly become the mere executors of the Divine will, without inserting their own human subjectivities in the process. Furthermore, and more importantly, claims about God's sovereignty assume that there is a Divine legislative will that seeks to regulate all human interactions. This is always stated as an assumption, instead of a proposition that needs to be argued and proven. As discussed later, it is possible that God does not seek to regulate all human affairs. It is also possible that God leaves it to human beings to regulate their own affairs as long as they observe cer-

25. See 14 AHMAD IBN 'ALI IBN HAJAR AL-'ASQALANI, *FATH AL-BARI BI-SHARH AL-BUKHARI* 303 (Dar al-Fikr 1993); 7 MUHAMMAD IBN 'ALI SHAWKANI, *NAYL AL-AWTAR: SHARH MUNTAQÁ AL-AKHBAR MIN AHADITH SAYYID AL-AKHYAR* 166 (Dar al-Hadith 1993).

tain minimal standards of moral conduct and that such standards include the preservation and promotion of human dignity and well-being.

According to the Qur'an, human beings are the vicegerents of God, the inheritors of the earth, and the most valued invention of God's creation. In the Qur'anic discourse, God commanded creation to honor human beings because of the miracle of the human intellect, which is the microcosm of the abilities of the Divine itself. Arguably, the fact that God honored the miracle of the human intellect and also honored the human being as a symbol of divinity, is sufficient in and of itself to justify a moral commitment to the values that are necessary for protecting and preserving the integrity and dignity of that symbol of divinity.²⁶ As I argue below, the fact that God is sovereign and creation is God's dominion cannot be used as an excuse to escape the burdens of human agency. Seen from a different perspective, the notion of God's sovereignty can easily be exploited to overcome and marginalize the agency of most human beings in conducting the affairs of their polity. This will invariably mean, however, that only an elite will rule in God's name while pretending to implement the Divine will. This is fundamentally at odds with the epistemology and methodologies of classical Islamic jurisprudence. As argued later, God's sovereignty is honored in the search for the ways that human beings may be able to approximate the beauty and justice of God. It is also honored in the attempt to preserve and safeguard the moral values that reflect the attributes of the sublimity of the Divine. However, if God's sovereignty is used to argue that the only legitimate source of law is the Divine text and that human experience and intellect are irrelevant and immaterial to the pursuit of the Divine will, then the idea of Divine sovereignty will always stand as an instrument of authoritarianism and an obstacle to democracy.²⁷ I will fur-

26. According to the Qur'an, as a symbol of honor due to human beings, God commanded the angels, who were incapable of sin, to prostrate before Adam. The angels protested honoring a being that is capable of committing evil and causing mischief. God conceded as much, but explained that the miracle of the intellect, in and of itself, deserved to be honored, and that God had made human beings the vicegerents of divinity. See FAZLUR RAHMAN, MAJOR THEMES OF THE QUR'AN 17-18 (1994).

27. One of the most important, but also one of the most neglected, treatises was written by a former chairman of the Muslim Brotherhood organization in Egypt, where he effectively refuted Mawdudi's arguments on *hakimiyya*. Rather tellingly, the author's arguments, despite their liberal implications, would have been far more persuasive to

ther develop this argument below, but in order to make this argument more accessible, I will first lay a broader foundation for Islamic legal and political doctrines.

III. THE POWERS OF THE RULER

If, as many Muslim fundamentalists and Western orientalist contend, God's dominion or sovereignty means that God is the sole legislator, then one would expect that a Caliph or Muslim ruler would be treated as God's agent or representative. If God is the only sovereign within a political system, then the ruler ought to be appointed by the Divine sovereign and serve at His pleasure. However, in the same way that the meaning and implications of God's sovereignty were the subject of an intense debate in pre-modern Islam, so was the topic of the powers and capacity of the ruler. It is well established, at least in Sunni Islam, that the Prophet died without naming a successor to lead the Muslim community. The Prophet intentionally left the choice of leadership to the Muslim Nation as a whole.²⁸ A statement attributed to the Rightly Guided Caliph Abu Bakr asserts, "God has left people to manage their own affairs so that they will choose a leader who will serve their interests."²⁹ The word *khalifa* [Caliph], the title given to the Muslim leader, literally means the successor or deputy. Early on, Muslims debated whether it was appropriate to name the leader the Caliph of God [*khalifat Allah*], but most scholars preferred the designation The Caliph of the Prophet of God [*khalifat rasul Allah*]. Hence, the well-known jurist al-Mawardi (d. 450/1058) stated:

And, he is called Caliph because he succeeded the Prophet [in leading] the Nation (*ummah*). So it is proper to call him the Caliph of the Prophet (successor of the Prophet). The scholars disagreed over whether it is proper to call him the Caliph of God. Some allowed it because he (the leader) ful-

medieval Muslim jurists than contemporary fundamentalist publicists. See HASAN HUDAYBI, *DU'AH — LA QUDAH: ABHATH FI AL-'AQIDAH AL-ISLAMIYAH WA-MANHAJ AL-DA'WAH ILÁ ALLAH* (Dar al-Tiba'ah wa-al-Nashr al-Islamiyah 1977).

28. See ABU YA'LÁ MUHAMMAD IBN AL-HUSAYN IBN AL-FARRA' & WADI' ZAYDAN HADDAD, *KITAB AL-MU'TAMAD FI USUL AL-DIN* (Dar al-mashriq 1974); GHAZZALI & 'ABD AL-RAHMAN BADAWI, *FADA'IH AL-BATINIYAH* 135-37 (al-Dar al-Qawmiyah lil-Tiba'ah wa-al-Nashr 1964) [hereinafter GHAZZALI, *FADA'IH*]; 'ALI IBN MUHAMMAD MAWARDI, *ADAB AL-DUNYA WA-AL-DIN* 5 (Mustafá Saqqa ed., 1950) [hereinafter MAWARDI, *ADAB*].

29. ABU MUHAMMAD IBN QUTAYBA, *AL IMAMA WA I SIYASA* 21 (Mu'assasat al-Halabi 1967). This book is traditionally known as *Ta'rikh al-Khulafa'*.

fills the rights of God in His people . . . but the majority of the jurists disallowed it . . . because succession can only be in the rights of one who is dead or absent, and God is never absent or dead.³⁰

Nevertheless, the Caliph's source of legitimacy and parameters of his powers remained ambiguous. Whether the Caliph was considered the Prophet's successor or God's deputy, from a theological point of view, the Caliph did not enjoy the authority of either the Prophet or God. Theologically speaking, God and His Prophet cannot be equated with any other, and their powers of legislation, revelation, absolution, and punishment cannot be delegated to any other. Yet, the exact nature and extent of the Caliph's powers remained contested. This is partly due to the fact that the Divine law provides a nexus to the powers and authority of both God and His Prophet. In principle, the application of God's law implies giving effect to the Divine will, which, in turn, implicates the authority of the Divine. Therefore, Ibn al-Jawzi, for example, states: "The Caliph is God's deputy over God's followers and lands, and [the Caliphate entails] applying His orders and laws. [This function] was performed by His Prophets and the Caliph performs that role after them (the Prophets)."³¹ Even if one assumes that the Caliph cannot be considered the moral equivalent of God or the Prophet, the question remains: how much of the Prophet's legislative and executive authority does the Caliph enjoy? According to the prominent jurist Ibn Taymiyah (d. 728/1328), the word Caliph simply means the physical or historical act of ruling after the Prophet, but it does not connote the transference of the Prophet's authority or power. The Caliph is the historical, not the moral, successor of the Prophet; thus, the moral and legal authority of the Prophet (or God) does not vest in a person carrying the title of Caliph.³² At one point, Ibn Taymiyah stated:

He (the Caliph) is not the people's Lord so that he could possibly do without [their assistance]; and he is not God's Prophet, acting as their agent to God. But he and the people are partners who [must] cooperate for the welfare [of the

30. 'ALI IBN MUHAMMAD MAWARDI, *AL-AHKAM AL-SULTANIYAH WA-AL-WILAYAT AL-DINIYAH* 15 (Mustafá al-Babi al-Halabi 1966).

31. I AL-MISBAH, *supra* note 13, at 93.

32. QAMAR-UD-DIN KHAN, *IBN TAYMIYAH WA-FIKRUHU AL-SIYASI* 102-22 (Maktabat al-Fallah 1973).

people] in this earthly life and the Hereafter. They (the people) must help him, and he must help them.³³

Ibn Taymiyah's conception of the relationship between the ruler and the ruled is egalitarian, but it does not help in understanding the source of the Caliph's powers or in delineating the nature of the relationship between the ruler and his people. Ideally, the ruler and the ruled should cooperate in order to maximize the best interests of the community, but the question remains: what is the exact nature of the Caliph's powers *vis-à-vis* his subjects?

The jurist al-Baqillani (d. 403/1013) is more explicit in differentiating between the authority of the Caliph, and God or the Prophet. He argues the following:

The *imam* (leader) is chosen to apply the laws expounded by the Prophet and recognized by the Nation, and he, in all that he does, is the Nation's trustee and representative; and it (the Nation) is behind him, correcting him and reminding him . . . and removing him and replacing him when he does what calls for his removal.³⁴

In al-Baqillani's conception of the Caliphate, the ruler is the people's duly delegated agent who is charged with the obligation of implementing God's law. This brings us closer to the idea of a representative government, and to a government of limited powers. Arguably, the limitations are imposed by the people who act as overseers, insuring compliance with God's law. The imperative of acting as overseers is performed pursuant to the religious obligation to enjoin the good and forbid the evil [*al-amr bi'l ma'ruf wa al-nahy 'an al-munkar*]. According to Islamic law, Muslims are commanded to enjoin the good and forbid the evil, which includes the obligation to prevent the government from violating the Shari'ah.³⁵ Significantly, according to the classical

33. *Id.* at 178.

34. MUHAMMAD IBN AL-TAYYIB BAQILLANI ET AL., *AL-TAMHID FI AL-RADD 'ALÁ AL-MULHIDAH AL-MU'ATTILAH WA-AL-RAFIDAH WA-AL-KHAWARIJ WA-AL-MU'TAZILAH* 56 (Dar al-Fikr al-'Arabi 1989) [hereinafter BAQILLANI]. See also YUSUF IBISH, *THE POLITICAL DOCTRINE OF AL-BAQILLANI* (1966) (discussing Baqillani's political thought).

35. See MICHAEL COOK, *COMMANDING THE RIGHT AND FORBIDDING THE WRONG IN ISLAMIC THOUGHT* (2000) (describing the duty of enjoining the good and forbidding the evil). See also EL FADL, *REBELLION AND VIOLENCE*, *supra* note 12, at 123, 180-82, 194-96, 273-74, 304-06 (discussing the assertion of this duty against the government). Typically, Sunni jurists differentiated between the duty of enjoining the good and forbidding the evil in matters involving the rights of God [*huquq Allah*] as opposed to matters

theory, the Caliph's charge is not necessarily to give effect to the will of the people, but to give effect to God's will, as exemplified by God's law.³⁶ However, this brings us full circle, once again, to the issue of the boundaries set by the Divine law and the extent that Shari'ah law provides limits on the discretion and power of the ruler. Aside from the issue of the exact limits placed upon the ruler's powers, it is imperative that it be recognized that wedding the notion of the Caliphate to the Divine law creates an intimate connection between the Caliph and the Divine will and that the Divine will is not as discernable as some would like to believe.

Whether the Caliph is considered God's deputy or the Prophet's deputy, the question is: to whom does the Caliph answer? If the Caliph's primary obligation is to implement the Divine law, then arguably, the Caliph answers only to God. Since God's law is not always discernable, as long as the Caliph's actions are plausible interpretations of the mandates of God's law, then such interpretations must be accepted. But the idea that the Caliph's primary charge is to give effect to God's law, and the associated idea that the Caliph answers only to God, creates a symbolic privity or, at least, the appearance of a special relationship between the Caliph and God. It is not so much that the Caliph becomes the representative of the Divine will, but that the Caliph comes to be perceived as having a symbolic association or connection with God, as the guardian and protector of God's will and law. Often, this is manifested simply in a presumption of deference to the Caliph. Al-Baqillani's discourse,

involving the rights of human beings [*huquq al-'ibad* or *huquq al-adamiyyin*]. Sunni jurists also distinguished a third category of rights, which they called the mixed rights of God and human beings [*al-huquq al-mukhtalatah*]. The rights of human beings were further divided into private and public rights [*al-huquq al-'ammah wa al-huquq al-khasah*]. Each category of rights necessitated different rules of jurisdiction and methods of enjoining the good and forbidding the evil. The emphasis was primarily juristic: the classical jurists discussed which categories required the intervention of the police [*al-shurtah*], the market inspector [*muhtasib*], or the judiciary. In this context, non-governmental interveners or private activists were called *al-mutatawwi'un* [volunteers]. Especially as to the rights of people and private rights, although Sunni jurists did envision a role to be played by private non-governmental individuals in enjoining the good and forbidding the evil, for the most part, they were opposed to forcible self-help. See MAWARDI, AL-AHKAM, *supra* note 12, at 303-22; AL-FARRA', *supra* note 12, at 284-308. Nevertheless, this is among the areas of Islamic thought that remains poorly studied in modern scholarship, and therefore it is difficult to understand the full implications of this juristic discourse.

36. IBISH, *supra* note 34, at 99.

itself, reflects this symbolic connection when he discusses whether a ruler may name a successor to the Caliphate. Al-Baqillani argues that, in fact, it is permissible for the Caliph to do so, and that the people should accept his nomination. His justification is the most interesting part of his discussion; he argues that the people should accept the Caliph's decision because there is a legal presumption that the Caliph always acts in the best interest of his people. According to al-Baqillani, for people to believe otherwise is a sin that calls for repentance.³⁷ This type of presumption is coherent only if the ruler both represents the Divine will and answers to God. If the ruler discharges the duties of piety by giving effect to God's law, however God's law is defined, he has fulfilled his duties towards the people, and the quality or genuineness of his intentions are assessed only by God. As a result of this type of paradigm, most Sunni jurists argued that a ruler is not removable from power unless he commits a clear, visible, and major infraction against God (i.e., a major sin).³⁸

Muslim jurists, however, did not completely sever the connection between the ruler and the people. In Sunni theory, the Caliphate must be based on a contract [*'aqd*] between the Caliph and *ahl al-hall wa al-'aqd* [the people who have the power of contract, also known as *ahl al-ikhtiyar* or the people who choose] who give their *bay'a* [allegiance or consent to the Caliph]. In the classical theory, a person who fulfills certain conditions [*mustawfi al-shurut*] must come to power through a contract entered into with *ahl al-'aqd* pursuant to which the Caliph is to receive the *bay'a* in return for his promise to discharge the terms of the contract. The terms of the contract were not extensively discussed in Islamic sources. Typically, jurists would write a list of terms that included the obligation to apply God's law, the obligation to protect Muslims and the territory of Islam, and in return, the ruler was promised the people's support and obedience. There is no precedent in Islamic discourses for a negotiated contract of the Caliphate. The jurists seemed to treat the contract as a contract of implied terms, but there is no explicit rejection of the notion of a contract of negotiated terms. The extent to which the contract of the Caliphate is subject to the principle of freedom of contract and permissibility of negotiation remains unex-

37. BAQILLANI, *supra* note 34, at 76.

38. See WATT, *supra* note 12, at 58. See also LAMBTON, *supra* note 12, at 19, 37.

plored in Islamic thinking. Thus far, it has been assumed that Shari'ah law defines the terms of the contract.

Who are the people that have the power to choose and remove the ruler? According to some, like the Mu'tazili³⁹ scholar Abu Bakr al-Asam (d. 200/816), it is the public at large that constitutes this group. Therefore, according to this view, there must be a general consensus over the ruler, and each person must individually give his vote of allegiance to the ruler.⁴⁰ The vast majority of Muslim jurists disagreed with this position and adopted a more pragmatic approach to power: they argued that *ahl al-'aqd* are those who possess the necessary *shawka* [power or strength] to insure the obedience, or, in the alternative, the consent of the public. Although it does make a material difference whether the people who possess this *shawka* represent the consent of the governed, or whether they represent the ability to yield a sufficient amount of power to insure the obedience of the public, this issue remained unclear. Ahmad Ibn Hanbal, the eponym of the conservative juristic school of thought, seems to primarily speak of obedience: the people of *shawka* must be able to deliver the obedience of the people to the ruler.⁴¹ On the other hand, the jurist al-Ghazzali seems to focus on consent as the material issue. He argues that *shawka* means the ability to deliver the consent of the people; in other words, the consent of the *ahl al-'aqd* must represent the consent of the governed.⁴² The idea of the consent of the governed ought not to be equated, however, with conceptions of delegated powers or government by

39. The Mu'tazilah was a theological school of thought whose adherents called themselves *ahl al-'adl wa al-tawhid* [the people of justice and unity]. The school traces its origins to the thought of Wasil b. 'Ata' (d. 131/748) in Basra. The Mu'tazilah are often described as rationalists for their emphasis on rational theology. They also considered justice and enjoining the good and forbidding the evil to be among the five basic principles of faith. The Mu'tazilah's five principles of faith were: (1) *tawhid* [believing in the unity and singularity of God]; (2) *'adl* [justice]; (3) *al-wa'd wa al-wa'id* [the promise of reward and threat of punishment]; (4) *al-manzilah bayna al-manzilatayn* [those who commit a major sin are neither believers nor non-believers]; (5) *al-amr bi al-maruf wa al-nahy 'an al-munkar* [commanding the good and prohibiting the evil].

40. Citing the precedent of the Prophet in Medina, al-Asam maintained that this included free Muslim women, but not non-Muslims or slaves. Reportedly, upon migrating to Medina, the Prophet took the *bay'a* from a number of native women as well as men. See MUHAMMAD 'IMARAH, *AL-ISLAM WA FALSAFAT AL-HUKM* 431-32 (n.p. 1979).

41. FATHI 'UTHMAN, *MIN USUL AL-FIKR AL-SIYASI AL-ISLAMI: DIRASAH LI-HUQUQ AL-INSAN WA-LI-WAD' RI'ASAT AL-DAWLAH (AL-IMAMAH) FI DAW' SHARI'AT AL-ISLAM WA-TURATHIHI AL-TARIKHI WA-AL-FIQHI* 402 (Mu'assasat al-Risala 1979).

42. GHAZZALI, *FADA'IH*, *supra* note 28, at 177.

the people. The consent of which al-Ghazzali and others speak does not seem to mean the existence of a representative government that seeks to give effect to the will of the people. Rather, consent in pre-modern Muslim discourses appears to be the equivalent of acquiescence. Typically, Muslim jurists assert that *ahl al-'aqd* must be people who fulfill certain conditions such as decency, probity, knowledge, and wisdom.⁴³ Beyond these qualifications, the jurists assert that the group with the power to choose must consist of a certain number of the notables of society [*shurafa' al-umma*] or the prominent jurists.⁴⁴ There is considerable disagreement about how many individuals would be sufficient to form such a group. Some, such as the jurist al-Juwayni, argued that the exact number is immaterial; the group that chooses the Caliph could be a single person or a hundred as long as the consent of this group represents the consent of the majority of the people.⁴⁵

It is important to note that pre-modern Muslim scholars exhibited a certain amount of distrust towards the laity [*al-'amma*]. For example, the Mu'tazili scholar al-Jahiz (d. 255/868-869), describing the laity, wrote: "[t]hey (the laity) tend to float with every ebb and flow, and maybe [the laity] will be more content with choosing [to the Caliphate] the wrong-doers instead of the righteous [rulers]"⁴⁶ This type of attitude was widespread among Muslim jurists, and considering the historical period in which they wrote, it is not surprising. But this also meant that although many of the concepts employed in political discourses came close to affirming the idea of government through representation, they never in fact did so. It is as if Muslim jurists generated legal concepts that were derived from the historical practices of the early Muslims, but never developed these concepts,

43. MAWARDI, ADAB, *supra* note 28, at 6; 'ABD AL-MALIK IBN 'ABD ALLAH IMAM AL-HARAMAYN AL-JUWAYNI ET AL., GHIYATH AL-UMAM FI ILTIYATH AL-ZULAM 50-51 (Dar al-Da'wah 1979) [hereinafter AL-JUWAYNI].

44. See AL-JUWAYNI, *supra* note 43, at 49, 50-51; see also MAWARDI, ADAB, *supra* note 28, at 6-7; BAQILLANI *supra* note 34, at 49; 'UTHMAN, *supra* note 41, at 407-09; GHAZZALI, *supra* note 28, at 177; KHAN, *supra* note 32, at 178; IBN AL-FARRA', *supra* note 12, at 19. Some jurists added that under all circumstances, the Caliph cannot be the one to appoint *ahl al-'aqd*. See ABU YA'LA MUHAMMAD IBN AL-HUSAYN IBN AL-FARRA', KITAB AL-MU'TAMAD FI USUL AL-DIN 245 (al-Hoda Publishers 1845).

45. See AL-JUWAYNI, *supra* note 43, at 55-57. See also BAQILLANI *supra* note 34, at 48-49; 'IMARAH, *supra* note 40, at 439; 'ABD AL-QAHIR IBN TAHIR AL-BAGHDADI, KITAB USUL AL-DIN 132-33 (n.d.).

46. 'IMARAH, *supra* note 40, at 435.

and utilized them towards a theory of representation. For example, Muslim jurists struggled with the conceptual nature of the contract of the Caliphate. Various Muslim jurists maintained that this political contract is akin to an employment contract, sale contract, or marriage contract in trying to figure out the jurisprudence that should apply to this unique form of contractual relationship.⁴⁷ The political contract had rather clear historical origins — it was initiated and practiced by the Companions after the death of the Prophet. The Prophet, himself, was keen on taking the *bay'a* of his followers on several occasions. Even more, when the Prophet became the ruler of Medina, he drafted what is now known as the Constitution of Medina [*wathiqat al-Madina*].⁴⁸

The Constitution of Medina does not read like a modern constitutional document — rather, it reads more like a contract or a corporate organizational document. These historical precedents must have persisted into the practices of the early Muslim community. Thus, although the historical origin was clear, the theoretical justifications for the doctrines of a political contract, consent, and the pledge of allegiance remained ambiguous. Significantly, as the jurists formed a socially and professionally recognizable class of experts, they reasoned that the purpose of the contract is to uphold God's law. The notion of political representation, however, remained undeveloped, at best. The overwhelming majority of Muslim jurists do not contend that the purpose of the Caliphate's contract is to represent the will of the governed. Instead, these jurists thought of the contract as essentially a promise to uphold God's law. The consent of the people is needed because the contract is premised on a cooperative rela-

47. See e.g., AL-BAGHDADI, *supra* note 45, at 132-33; LAMBTON, *supra* note 12, at 18.

48. For a discussion on the Constitution of Medina, see Anver M. Emon, *Reflections on the 'Constitution of Medina': An Essay on Methodology and Ideology in Islamic Legal History*, 1 UCLA J. ISLAMIC AND NEAR E.L. 103, 103-33 (2001); Frederick Denny, *Ummah in the Constitution of Medina*, 36 J. NEAR E. STUD. 39-47 (1977); Moshe Gil, *The Constitution of Medina: A Reconsideration*, 4 ISR. ORIENTAL STUD. 44, 44-65 (1974); Akira Goto, *The Constitution of Medina*, 18 ORIENT. REP. SOC'Y FOR NEAR E. STUD. JAPAN 1, 1-17 (1982); HUSAYN MU'NIS, *DUSTUR UMMAT AL-ISLAM: DIRASAH FI USUL AL-HUKM WA TABI'ATIHI WAGHAYATIHI 'INDA AL-MUSLIMIN* (Dar al-Rashad 1993); Uri Rubin, *The 'Constitution of Medina': Some Notes*, 62 STUDIA ISLAMICA 5, 5-23 (1986); R.B. Serjeant, *The 'Constitution of Medina'*, 8 THE ISLAMIC Q. 3, 3-16 (1964); *The "Sunnah Jami'ah,"* *Pacts with the Yathrib Jews, and the "Tahrim" of Yathrib: Analysis and Translation of the Documents Comprised in the So-Called 'Constitution of Medina'*, 41 BULL. SCH. ORIENTAL AND AFR. STUD. 1, 1-42 (1978); WATT, *supra* note 12, at 130-34.

tionship between the governor and governed, with the purpose of guarding and protecting the righteous religion and Shari'ah. Even though, as we will see below, there are glimpses of the notion of representation on behalf of the people, the dominant paradigm is one in which both the ruler and ruled act as God's duly delegated agents [*khulafa' Allah*] in implementing the Divine law.

Particularly after the age of *mihna* (inquisition — 218-234/833-848) the *'ulama* [religious scholars or jurists] were able to establish themselves as the exclusive interpreters and articulators of the Divine law. Towards the end of the reign of the 'Abbasid Caliph al-Ma'mun (r. 198-218/813-833), the Caliph adopted the Mu'tazili doctrine of the createdness of the Qur'an, and instituted an inquisition against those jurists who refused to adhere to this doctrine. Although ostensibly about a theological dispute concerning whether the Qur'an was created or eternal (uncreated), in reality, the inquisition was a concerted effort by the State to control the juristic class and the method by which Shari'ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the jurists retained a near exclusive monopoly over the right to interpret the Divine law.⁴⁹ Thus, in order for a Caliph and community to attain and continue enjoying Islamic legitimacy, they would have to dedicate themselves to upholding the will of God as articulated by the jurists. In a sense, we end up with a tri-polar dynamic with the ruler and governors at one pole, the jurists at another, and the lay public at the third. But one would have to consider the possibility that between the interpretive and legislative tasks of the jurists and the executory duties of the ruler, the common people do not play a major role in the negotiative process between the three social poles. This possibility is quite clear in the statement made by the jurist Ibn al-Qayyim:

Properly speaking, the rulers (*al-umara'*) are obeyed [only to the extent] that their commands are consistent with the [determinations] of the religious sciences (*al-'ilm*). Hence, the duty to obey them (the rulers) derives from the duty to obey the jurists (*fa ta'atuhum tab'an li ta'at al-'ulama*). [This is because] obedience is due only in what is good (*ma'ruf*), and

49. REBELLION AND VIOLENCE, *supra* note 12, at 90-96; A.J. Wensinck, *Mihna*, in SHORTER ENCYCLOPEDIA OF ISLAM 377-78 (H.A.R. Gibb & J.H. Kramers eds., 1961).

what is required by the religious sciences (*wa ma awjabahu al-'ilm*). Since the duty to obey the jurists is derived from the duty to obey the Prophet, then the duty to obey the rulers is derived from the duty to obey the jurists [who are the experts on the religious sciences]. Furthermore, since Islam is protected and upheld by the rulers and the jurists alike, this means that the laity must follow [and obey] these two [i.e., the rulers and jurists].⁵⁰

This type of statement generates the impression that the Islamic system of government is a theocracy or, at least, a legalistic technocracy, and in fact, inspired by passages such as this, modern fundamentalist groups do treat it as such. But understood within their proper historical contexts, statements such as the one quoted above would be read more as an aspirational moral exhortation than a constitutional delineation of the authority of the jurists. The absence of a singular authority conclusively and authoritatively defining the Divine law and the remarkable diversity of opinions and approaches within Islamic legal practices have formed a barrier against the formation of a central church that could rule in God's name. In addition, no church could provide a jurist with the insignia of investiture and render him authoritative regardless of his relationship to the laity. There were seminaries that trained Muslim jurists, but the amount of influence and authoritativeness that a jurist would enjoy depended on his ability to convince various strata within society of his sincerity, knowledge, and integrity. In the pre-modern age, the epistemology of Islamic jurisprudence and the processes that formed the juristic class contained popularistic elements. In fact, the idea of government bound by law was the symbolic field where Muslim jurists, armed with the Divine sanctity of Shari'ah law, were able to play the role of the representatives and the mediators on behalf of the government and the governed. In order to better understand this process, it is necessary to disentangle several layers of meaning in the debates surrounding the concept of a government bound by Shari'ah.

50. I MUHAMMAD IBN ABI BAKR IBN QAYYIM AL-JAWZIYAH, I'LAM AL-MUWAQQI'IN 'AN RABB AL-'ALAMIN 10 (Dar al-Hadith 1997).

IV. A GOVERNMENT BOUND BY LAW OR A GOVERNMENT OF LAWS

As noted above, pre-modern and modern scholars often repeat that the quintessential characteristic of a legitimate Islamic government is that it is a government subject to and limited by Shari'ah law. Although this concept does tend to offer support for the principles of limited government and the rule of law, we must distinguish between the idea of the supremacy of law, and the supremacy of legal rules. The two are quite distinct, and each concept has the potential of producing very different orientations towards the relationship between law and power. In asserting the supremacy of Shari'ah, Muslim scholars were not arguing that there ought to be a process that guards core legal values and that this process is binding upon the government. Rather, they were arguing that the positive commandments of Shari'ah, such as the punishment for adultery or the drinking of alcohol, ought to be honored and implemented by the government. The problem, however, is that it is possible for a government to declare its intention to abide by all the positive commandments of Shari'ah, but otherwise manipulate the interpretation and application of the rules in order to obtain desired results. As is the practice of several contemporary Islamist States, nothing prevents the government from implementing a process that rubberstamps whatever the government deems desirable. Unless there are institutional mechanisms and procedural guarantees safeguarding the implementation of law, the fact that a government is committed to implementing a particular set of rulings does not amount to the supremacy of law, or the establishment of the rule of law.

The problem in this regard is that the juristic conception of a government limited by Shari'ah amounted to a notion that the government is acting lawfully if it is implementing the legal rulings of Shari'ah. Nevertheless, a government could implement Shari'ah criminal penalties, prohibit usury, dictate rules of modesty, and so on, and yet remain a government of unlimited powers not subject to the rule of law. This is because Shari'ah is a general term for a multitude of legal methodologies and a remarkably diverse set of interpretive determinations.⁵¹ Unless the

51. Structurally, Shari'ah is comprised of the Qur'an, Sunnah, and *fiqh* [juristic interpretive efforts]. Substantively, the Shari'ah refers to three different matters: (1)

conception of government is founded around core moral values about the normative purpose of Shari'ah, and unless there is a process that limits the ability of the government to violate those core moral values, the idea of a government bound by Shari'ah remains hopelessly vague. It is quite possible for a government to faithfully implement the main technical rules of Shari'ah, but otherwise flout the rule of law. In fact, using the implementation of the technicalities of Shari'ah as an excuse could allow the government unrestrained powers. For instance, under the pretense of guarding public modesty, the government could pass arbitrary laws forbidding many forms of public assembly; under the guise of protection of orthodoxy, the government could pass arbitrary laws punishing creative expression; under the guise of protecting individuals from slander, the government could punish many forms of political and social criticism; and a government could imprison or execute political dissenters, while claiming that the dissenters are sowing *fitnah* [discord and social turmoil].

Arguably, all these governmental actions are Shari'ah-compliant unless there is a clear sense about the limits imposed upon the ability of the government to service and promote even the Shari'ah. Put differently, the rules of law cannot be used as an excuse to flout the rule of law, and the State cannot be allowed to usurp the process by which Shari'ah law is identified or determined. The rule of law does not simply mean the existence of a government bound by law as much as it means a government that is bound by the process that produces the law. More importantly, it means that the processes of law, themselves, are bound by fundamental and unwavering moral commitments that insure that the law is not used as an instrument of tyranny and oppression.

In pre-modern juristic literature, the issue of limits to be placed on the law-making power of the State was discussed, in part, under the rubric of public interest [*al-masalih al-mursalah*] and blocking the means to illegality [*sadd al-dhari'ah*]. Both ju-

general principles of law and morality; (2) methodologies for extracting and formulating the law; and (3) the *ahkam*, which are the specific positive rules of law. In the contemporary Muslim world, there is a tendency to focus on the *ahkam* at the expense of the general principles and methodology. It is entirely possible to be Shari'ah-compliant, in the sense of respecting the *ahkam*, but ignore or violate the principles and methodologies of Shari'ah.

risprudential concepts, although technically different, enabled the State to extend its law-making powers in order to fulfill a good or avoid an evil. For instance, pursuant to the principle of blocking the means, the lawmaker could claim that behavior that is lawful ought to be considered unlawful because it leads to the commission of illegal acts. In essence, both public interests and blocking the means were enabling devices that provided the law with considerable flexibility and adaptive ability. However, they were also double-edged concepts. They could be employed to respond to social demands, but they could also be used to expand the law and augment its intrusiveness at the expense of individual autonomy. Muslim jurists disagreed sharply on the permissibility and scope of these legal methodologies because a considerable number of jurists worried that these concepts were limitless and that they could be utilized to create a wide range of temporal non-Shari'ah based law.⁵² The concept of blocking the means to evil, in particular, is founded on the idea of preventive or precautionary measures [*al-ihhtiyat*], and it is this aggressive reactionary nature that could be exploited to expand the power of the State under the guise of protecting the Shari'ah. For instance, the claim of precautionary measures has been used in Saudi Arabia to justify a wide range of restrictive laws against women, including the prohibition against driving cars.⁵³ In many instances, this amounted to the use of Shari'ah to undermine Shari'ah. This type of dynamic can be avoided not only through the adoption of procedural guarantees, but more importantly, through basic commitments to the dignity and freedoms of human beings, which the Shari'ah can be utilized to justify, but cannot be allowed to undermine.

An important dimension to the challenge of establishing the rule of law is the complex, and often ambiguous, relationship between Shari'ah law and what may be called the administrative practices of the State, or expediency laws [*al-ahkam al-siyasiyyah*]. As noted earlier, by the 4th/10th century, Muslim jurists had established themselves as the legitimate and exclusive authority empowered to expound the law of God. Only the jurists were deemed to possess the requisite level of technical com-

52. See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 267-81, 310-20 (rev. ed., Islamic Text Soc'y 1991).

53. See SPEAKING IN GOD'S NAME, *supra* note 20, at 22-23, 235, 278-80 (discussing the prohibition against women driving automobiles).

petence and learning that would qualify them to investigate and interpret the Divine will. While in the first two centuries of Islam, it was possible to find jurists citing the practices of the State as a normative precedent, this became increasingly rare.⁵⁴ This did not mean that the practice of the State was considered illegitimate or without justification. Rather, it meant only that the determinations of the jurists were considered to be of prescriptive value. Additionally, it meant that the State was expected to play the role of enforcer, not the maker, of Divine laws. Only the juristic law could enjoy the seal of divinity. State laws, on the other hand, were considered temporal, and therefore, primarily the product of functional necessities rather than an interpretation of the Divine will. However, pursuant to the powers derived from its role as the enforcer of Divine laws, the State was granted a broad range of discretion over what were considered matters of public interest [known as the field of *al-siyasah al-Shar'iyyah*]. The State's rule-making activity in the exercise of this discretion was considered to be akin to regulatory administrative rules that have temporal weight, but that are not a part of binding precedents of Shari'ah law. State regulations were lawful and enforceable as long as they did not contravene the Divine law, as expounded by the jurists, and as long as they did not constitute an abusive use of discretion [*al-ta'assuf fi masa'il al-khiyar*]. This is the reason that jurisprudential works meticulously documented the determinations of jurists, but did not document State regulations. State regulations were documented in texts written by state functionaries composing works on the administrative practices of the State.

The differentiation between temporal, or perhaps secular, State regulations and juristic Shari'ah law in Islamic history is subtle and often quite complex. It also raises serious questions about the Muslim conceptions of State power and ideas of sovereignty. But it has not been sufficiently explored in modern scholarship, and therefore, it is difficult to draw any firm conclusions from the little that we do know about these classical discourses.⁵⁵ Nevertheless, it is rather clear that the classical jurists did not consider Shari'ah as existing in conflict or even in ten-

54. See REBELLION AND VIOLENCE, *supra* note 12, at 90-99.

55. Examining this issue, some scholars reached the premature conclusion that Shari'ah law was primarily theoretical and unenforceable throughout Islamic history. They argued that the State relied on administrative regulations and, for the most part,

sion with administrative law. What was described as *al-ahkam al-Sultaniyyah* or *al-siyasah al-shar'iyah* was expected to guard and help fulfill the aims of Shari'ah. The administrative regulations of the State were considered a function of public policy or politics, but in the dictum of Muslim jurists, Shari'ah is considered the foundation of law, and politics is its protector.⁵⁶ Shari'ah was expected to play the dual role of enabling and limiting the regulatory powers of the State. In theory, the Shari'ah lends legitimacy to the regulatory powers of the State, but, in turn, such regulations are not supposed to contravene the Shari'ah. This paradigm, however, ended full circle with the core problem of clearly delineating the limits to the government's assertion of State power. To what extent can the government extend the reach of its laws under the guise of guarding or properly fulfilling the purposes of Shari'ah?

Concerns about the reach of the government's power under Shari'ah have antecedents in Islamic history, and so, by the standards of the modern age, this is not an entirely novel issue. The Maliki jurist al-Qarafi (d. 684/1285) attempted to articulate a theory defining the legal jurisdiction of Caliphs, judges, and juris-consuls.⁵⁷ There is also historic anecdotal evidence expressing concern about the ability of contending parties to manipulate the interpretation of the Shari'ah to achieve certain aims. For instance, a report was attributed to the Prophet in which he reportedly says, "If you lay siege to a fortress, do not accept the surrender of the fortress on the condition that you will apply God's law, for you do not know [what] God's law requires. Rather, have them surrender on the condition that you will ap-

ignored Shari'ah law. See, e.g., NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 120-34 (1964); JOSEPH SCHAFT, AN INTRODUCTION TO ISLAMIC LAW 49-56 (1964).

56. See, e.g., MAWARDI, AL-AHKAM, *supra* note 12, at 18; TAQI AL-DIN IBN TAYMIYAH, AL-SIYASAH AL-SHAR'IYAH 142 (Dar al-Afaq al-Jadidah 1983). Similarly, Muslim jurists often would assert that religion is the foundation and the political authorities are its protector.

57. See SHERMAN JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI (1996); *From Prophetic Action to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence*, 25 INT'L J. MIDDLE E. STUD. 71, 71-90 (1993). In addition, there is considerable juristic discourse on the proper jurisdiction of the police and market inspectors as opposed to judges. In summary, the police and market inspectors have no jurisdiction over any issue that involves competing factual or legal contentions. These issues must be referred to the judge. See 'ABD AL-RAHMÁN B. NASR AL-SHAYZARI, THE BOOK OF THE ISLAMIC MARKET INSPECTOR 28 n.1 (R.P. Buckley trans., 1999); MAWARDI, AL-AHKAM, *supra* note 12, at 100.

ply your own judgment.”⁵⁸ Reports such as this, reflect a nascent concern with the nature of the constraints that the broad concept of Shari‘ah may have on the actual process of adjudication or resolution of disputes. However, the invocation of Shari‘ah or the Qur‘an and Sunnah in confrontation with authority was often used as a symbolic point referring to legitimacy or legality in the management of the social order. For example, in another anecdotal report that reflects this dynamic, the first Umayyad Caliph Mu‘awiya (r. 40-60/661-680) asked Hujr b. ‘Adi al-Kindi (d. 51/671) for his allegiance [*bay‘a*]. Al-Kindi reportedly agreed to give his allegiance but only on the condition that Mu‘awiya abide by the Qur‘an and Sunnah. Mu‘awiya refused, arguing that a conditional allegiance is ineffective and, hence, al-Kindi refused to give his oath of allegiance.⁵⁹

The difficulty, however, is that these types of concerns that led to the differentiation between the Divine law of the jurists and the temporal laws of the State are nearly entirely absent from the framework of contemporary Islamists. To date, Islamist models, whether in Iran, Saudi Arabia, or Pakistan, have endowed the State with legislative power over the Divine law. This is a relatively novel invention in Islamic State practices. Traditionally, Muslim jurists insisted that the rulers ought to consult with the jurists on all matters related to law, but the jurists, themselves, never demanded the right to rule the Islamic State directly. In fact, until recently, neither Sunni nor Shi‘i jurists ever assumed direct rule in the political sphere.⁶⁰ Throughout Islamic history, the jurists [*‘ulama*] performed a wide range of economic, political, and administrative functions, but most importantly, they acted as negotiative mediators between the ruling classes and the laity. As Afaf Marsot states: “[The *‘ulama*] were

58. MUHAMMAD IBN AHMAD DHAHABI, *SIYAR A‘LAM AL-NUBALA’* 19, 190 (4th ed., Mu‘assasat al-Risalah 1986).

59. See ‘ALI IBN AHMAD IBN HAZM, *JAMHARAT ANSAB AL-‘ARAB* 401 (Evariste Levi-Provencal ed., *Dari al-Ma‘arif* 1948); see also 5 ABU JA‘FAR MUHAMMAD IBN JARIR AL-TABARI, *TARIKH AL-TABARI: (TARIKH AL-UMAM WA-AL-MULUK)* 141-42 (Mu‘assasat ‘Izz al-Din 1987); 3 ‘IZZ AL-DIN IBN AL-ATHIR, *AL-KAMIL FI AL-TARIKH* 336 (Abu al-Fida’ ‘Abd Allah al-Qadi ed., *Dar al-Kutub al-‘Ilmiyah* 1986).

60. After the evacuation of the French in Egypt in 1801, ‘Umar Makram, with the assistance of the jurists, overthrew the French agent left behind. Instead of assuming power directly, the jurists offered the government to the Egyptianized Albanian Muhammad ‘Ali. See Afaf Lutfi al-Sayyid Marsot, *The Ulama of Cairo in the Eighteenth and Nineteenth Centuries*, in *SCHOLARS, SAINTS, AND SUFIS* 149-65, 162-63 (Nikki Keddi ed., 1972).

the purveyors of Islam, the guardians of its tradition, the depository of ancestral wisdom, and the moral tutors of the population."⁶¹ While they legitimated and often explained the rulers to the ruled, the jurists also used their moral weight to thwart tyrannous measures, and, at times, led or legitimated rebellions against the ruling classes.⁶² As Marsot points out, "[t]o both rulers and ruled they were an objective haven which contending factions could turn to in times of stress."⁶³ Modernity, however, through a complex dynamic, turned the *'ulama* from "vociferous spokesmen of the masses" into salaried State functionaries that play a primarily conservative and legitimist role for the ruling regimes in the Islamic world.⁶⁴ The disintegration of the role of the *'ulama* and their co-optation by the modern praetorian State, with its hybrid practices of secularism, has opened the door for the State to become the maker and enforcer of the Divine law. In doing so, the State has acquired a formidable power that only serves to further engrain the practice of authoritarianism in various Islamic States.⁶⁵

V. THE IDEAL OF A CONSULTATIVE GOVERNMENT

The Qur'an instructs the Prophet to consult regularly with Muslims on all significant matters, and it also indicates that a society that conducts its affairs through some form of deliberative process is considered praiseworthy in the eyes of God.⁶⁶

61. *Id.* at 149.

62. *Id.* at 150. For an exhausted study on the role of the *'ulama* in the legitimating rulers and rebellions through the use of their moral weight, see REBELLION AND VIOLENCE, *supra* note 12. On the social and political roles played by the *'ulama*, see EDWARD MORTIMER, FAITH AND POWER: THE POLITICS OF ISLAM 299-307 (1982); MALCOLM H. KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD 'ABDUH AND RASHID RIDA 196 (1966); Louis J. Cantori, *Religion and Politics in Egypt*, in RELIGION AND POLITICS IN THE MIDDLE EAST 77-90 (Michael Curtis ed., 1981).

63. Marsot, *supra* note 60, at 159.

64. Daniel Crecelius, *Nonideological Responses of the Egyptian Ulama to Modernization*, in SCHOLARS, SAINTS, AND SUFIS, *supra* note 60, at 167-209, 168. Crecelius makes this point about the *'ulama* of Egypt in the modern age. *But see* Fouad Ajami, *In the Pharaoh's Shadow: Religion and Authority in Egypt*, in ISLAM IN THE POLITICAL PROCESS 18 (James Piscatory ed., 1983); MORTIMER, *supra* note 62, at 91, 95. MALISE RUTHVEN, ISLAM IN THE WORLD 179 (1984). Of course, there are notable exceptions in the contemporary Islamic practice. Many clerics become prominent opponents of the present Muslim regimes, and suffer enormously for their troubles.

65. For a discussion of the idea of the praetorian state, see AMOS PERLMUTTER, EGYPT: THE PRAETORIAN STATE (1974).

66. *See* QUR'AN 3:159; 42:38.

There are many historical reports indicating that the Prophet regularly consulted with his Companions regarding the affairs of the State.⁶⁷ In addition, shortly after the death of the Prophet, the concept of *shura* [consultative deliberations] had become a symbol signifying participatory politics and legitimacy. There are a variety of early Islamic historical narratives that indicate that the Qur'anic discourse on a consultative and deliberative socio-political order had captured the imagination of early Muslims. The failure to enforce or adhere to *shura* became a common theme invoked in narratives of oppression and rebellion. For example, it is reported that the Prophet's cousin 'Ali reproached Umar b. al-Khattab, the second Caliph, and Abu Bakr, the first Caliph, for not respecting the *shura* by nominating Abu Bakr to the Caliphate in the absence of the Prophet's family.⁶⁸ The opposition to 'Uthman b. 'Affan (r. 23-35/644-656), the third Rightly Guided Caliph, accused him of destroying the rule of *shura* because of his alleged nepotistic and autocratic policies. The pretender to the Caliphate, Ibn al-Zubayr (r. 60-73/680-692), justified his rebellion by accusing the Umayyads of destroying the *shura*, and undermining the rights of the people [*huquq al-nas*]. Al-Hasan, 'Ali's son and the Prophet's grandson, lamented that the Caliphate was passed on from Mu'awiya, the first Umayyad Caliph, r. 40-60/661-680, to his son Yazid by saying: "If it had not been for that fact, the Caliphate would have been continued by *shura* until the Final Day."⁶⁹

A prominent medieval scholar like al-Jahiz contended that Mu'awiya was able to achieve power only by destroying the *shura* and ruling by force and oppression.⁷⁰ Although the precise meaning of *shura* in these historical narratives is unclear, most certainly the concept did not refer to the mere act of a ruler soliciting the opinions of some notables in society. The term seemed to signify the opposite of autocracy, government by force, or oppression. This is consistent with the juristic attitude

67. 'ABD AL-WAHHAB KHALLAF, 'ILM USUL AL-FIQH 59 (Dar al-Qalam 1981).

68. LI-JALAL AL-DIN 'ABD AL-RAHMAN AL-SUYUTI, TARIKH AL-KHULAFAH 109 (Muhammad Abu Ibrahim al-Fadl ed., Dar Nahdat Misr. 1976).

69. *Id.* at 325.

70. 'IMARAH, *supra* note 40, at 651; ABU 'UTHMAN IBN BAHR AL-JAHIZ, RASA'IL AL-JAHIZ AL-RASA'IL AL-SIYASIAH 396-97 (Dar wa-maktabat al-Hilal 1987). See DJAIT, *supra* note 24, at 114, 210-13 (discussing the role of the concept of *shura* in early Islamic politics).

towards despotism [*al-istibdad*] and whimsical and autocratic governance [*al-hukm bi'l hawa wa al-tasallut*], realities which they considered repulsive and evil. Even when Muslim jurists prohibited rebellions against despotic rulers, they tolerated despotism not as a desirable good, but as a necessary evil.

Post 3rd/9th century, the concept of *shura* took an institutional shape in the discourses of Muslim jurists. *Shura* became the formal act of consulting *ahl al-shura* [the people of consultation], who, according to the juristic sources, are the same group of people who constitute *ahl al-'aqd* [the people who choose the ruler]. Sunni jurists debated whether the results of the consultative process are binding [*shura mulzima*] or non-binding [*ghayr mulzima*]. If the *shura* is binding, then the ruler must abide by the determinations made by *ahl al-shura*. The majority of the jurists, however, concluded that the determinations of *ahl al-shura* are advisory, not compulsory. But, rather inconsistently, many jurists asserted that, after consultation, the ruler must follow the opinion that is most consistent with the Qur'an, Sunnah, and the consensus of jurists. In effect, while these jurists were not willing to argue that the ruler ought to be free to ignore the opinions that are the most consistent with the Qur'an, Sunnah, and consensus of the jurists, they did not go as far as advocating a mandatory duty upon the ruler to follow such opinions. Interestingly, some jurists, such as Ibn Taymiyah, maintained that the ruler should attempt to ascertain the general consensus of Muslims, and not simply the consensus of jurists, and follow it.⁷¹ Most jurists, however, left the matter open-ended by limiting themselves to the argument that even if the Caliph is knowledgeable in law, he should not rule on any problem that involves Shari'ah without first consulting the jurists.⁷² As al-Ghazzali asserted in this context: "Despotic, non-consultative, decision-making, even if from a wise and learned person is objectionable and unacceptable."⁷³

Modern reformists have seized upon the ideal of a consulta-

71. IBN TAYMIYAH, *supra* note 56, at 136.

72. GHAZZALI, *supra* note 28, at 191, 193; SHARAF & MUHAMMAD, *supra* note 12, at 399-403. See also AL-SHIFA', *supra* note 13, at 55 (discussing the consulting of jurists); AL-FARRA', *supra* note 28, at 221; SHARAF & MUHAMMAD, *supra* note 12, at 351 (discussing the thought of the Seljuq wazir, Nizam al-Mulk (d. 485/1092)).

73. GHAZZALI, FADA'IH, *supra* note 28, at 186, 191; SHARAF & MUHAMMAD, *supra* note 12, at 399-403.

tive government as a way of arguing for the basic compatibility between Islam and democracy. There is no doubt that the imperative of *shura* is an important participatory ethic in the Islamic intellectual heritage. This is so, irrespective of how this ethic was used or misused in Islamic history because as a normative ideal, it could be co-opted and utilized in the furtherance of a democratic commitment. But even if the ethic of *shura* is expanded into a broader concept of a participatory government, no less important than the process are the moral commitments that inform the process. If the purpose of consultation is to find a correct answer that is derived from the Divine will, one might end up with the awkward situation where divinity is not represented by a single ruler, but by a consultative or legislative body. Instead of a ruling autocrat being capable of speaking on God's behalf, the authority is transferred to a council-like body that is empowered with the voice of God. This is problematic because such a body can be used to inflict a tyranny of the majority against a discrete minority, suppress dissent, and limit diversity. This is why even if *shura* is transformed into an instrumentality of participatory representation this instrumentality must itself be limited by a scheme of private and individual rights that serve an overriding moral goal such as justice. In other words, *shura* must be valued not because of the results it produces, but because it represents a moral value in itself. As a result, regardless of the utility or disutility caused by the existence of dissenting views, dissent would be tolerated because doing so is seen as a basic part of the mandate of justice.

VI. JUSTICE AND THE ISLAMIC POLITY

Muslim political thought dealt extensively with the purpose of government. The statement of *Imam al-Haramayn* al-Juwayni (d. 478/1085) is fairly representative of the argument of Muslim jurists. Al-Juwayni states:

The *imama* (government) is a total governorship and general leadership that relates to the special and common in the affairs of religion and this earthly life. It includes guarding the land and protecting the subjects, and the spread of the message [of Islam] by the word and sword. It includes the correcting of deviation and the redressing of injustice, the aiding of the wronged against the wrongdoer, and taking the right from the obstinate and giving it to those who are entitled to

it.⁷⁴

The essential idea conveyed here is that government is a functional necessity in order to resolve conflict, protect the religion, and uphold justice. In some formulations, justice is the core value that justifies the existence of government. Ibn al-Qayyim (d. 751/1350), for example, makes this point explicit when he asserts the following:

God sent His message and His Books to lead people with justice Therefore, if a just leadership is established, through any means, then therein is the Way of God In fact, the purpose of God's Way is the establishment of righteousness and justice . . . so any road that establishes what is right and just is the road [Muslims] should follow.⁷⁵

This argument is rooted in a methodical debate among pre-modern scholars about the nature of people if left without a government. This debate is remarkably similar to the seventeenth century Western discourse on the state of nature or the original condition of human beings. The Islamic debate focused on the original, so to speak uncorrupted, nature of human beings and how that nature affects the role and purpose of government. Some scholars such as Ibn Khaldun (d. 784/1382) and al-Ghazzali (d. 505/1111) argued that human beings are by nature fractious, contentious, and not inclined towards cooperation. Al-Ghazzali, in particular, added that human beings are prone to misunderstandings and conflicts. If one observes the affairs of people, one will notice that married couples and even parents and children fight and refuse to cooperate in mutually beneficial endeavors. Therefore, these authorities typically argued, government is necessary to force people to cooperate with each other. Government, in a paternalistic fashion, must force people to act contrary to their fractious and contentious natures, and in everyone's general best interest.⁷⁶

Another school of thought exemplified by al-Mawardi (d. 450/1058) and Ibn Abi al-Rabi' (d. 656/1258) argued that people, by their nature, have a tendency to cooperate for physical

74. AL-JUWAYNI, *supra* note 43, at 15.

75. 4 IBN QAYYIM AL-JAWZIYAH & MUHAMMAD IBN ABI BAKR, I'LAM AL-MUWAQQI'IN 'AN RABB AL-'ALAMIN 452 ('Abd al-Rahman al-Wakil ed., Dar al'kutub al-haditha 1969).

76. BARAKAT, *supra* note 10, at 116; SHARAF & MUHAMMAD, *supra* note 12, at 377, 380-81, 514-15; GHAZZALI, AL-IQTISAD FI AL-I'TIQAD 106 (1971).

and spiritual reasons. In fact, God created human beings weak and in need of cooperation with others in order to limit the ability of human beings to commit injustice. Although this school of thought did not elaborate upon the meaning of justice, its adherents asserted that without cooperation, human beings will not be able to overcome injustice [*zulm*], or establish justice [*'adl*]. Without social cooperation, the strong are bound to violate the rights [*huquq*] of the weak, and injustice will become widespread. By cooperating with each other, human beings will be able to restrain the strong, and safeguard the rights of the weak. Furthermore, God created human beings diverse and different from each other so that they will need each other. This need will invite human beings to further augment their natural tendency to assemble and cooperate in order to establish justice. The relative weakness of human beings and their remarkably diverse abilities and habits will further induce people to draw closer and cooperate with each other. Importantly, human beings, by nature, desire justice, and will tend to cooperate in order to fulfill it. If human beings exploit the Divine gift of intellect and the guidance of the law of God through cooperation, they are bound to reach a greater level of justice and moral fulfillment. The ruler, this school of thought argued, ascends to power through a contract with the people pursuant to which he undertakes to further the cooperation of the people, with the ultimate goal of achieving a just society or, at least, maximizing the potential for justice.⁷⁷

This juristic discourse offers formidable normative possibilities for democratic thought in modern Islam. In the Qur'anic discourse, justice is asserted as an obligation owed to God, and also owed by human beings to one another. In addition, the imperative of justice is tied to the obligations of enjoining the good and forbidding the evil, and the necessity of bearing witness on God's behalf. Although the Qur'an does not define the constituent elements of justice, and in fact seems to treat it as intuitively recognizable, the Qur'an emphasizes the ability to achieve justice as a unique human charge and necessity.⁷⁸ In

77. SHARAF & MUHAMMAD, *supra* note 12, at 209, 212; BARAKAT, *supra* note 10, at 107; RIDWAN AL-SAYYID, AL-UMMA WA AL-JAMA'A WA AL-SULTAH 207-08 (1984); MAWARDI, *supra* note 28, at 116-27.

78. See RAHMAN, *supra* note 26, at 42-43 (discussing the obligation of justice in the Qur'an); TOSHIHIKO IZUTSU, THE STRUCTURE OF ETHICAL TERMS IN THE QURAN 205-61

essence, the Qur'an requires a commitment to a moral imperative that is vague, but that is recognizable through intuition, reason, or human experience. It is important here to consider more carefully the juristic argument on the importance of human diversity for the cooperative efforts at seeking justice. This juristic discourse is partly based on the Qur'anic statement that God created people different from one another and made them into Nations and tribes so that they will come to know one another. Muslim jurists reasoned that the expression "come to know one another" indicates the need for social cooperation and mutual assistance in order to achieve justice.⁷⁹

Although the pre-modern jurists did not emphasize this point, the Qur'an also notes that God made people different, and that they will remain different until the end of human existence. Further, the Qur'an states that the reality of human diversity is part of the Divine wisdom, and an intentional purpose of creation.⁸⁰ The Qur'anic celebration and sanctification of human diversity, in addition to the juristic incorporation of the notion of human diversity into a purposeful pursuit of justice, creates various possibilities for a pluralistic commitment in Islam. This could also be developed into an ethic that respects dissent and honors the right of human beings to be different, including the right to adhere to different religious or non-religious convictions. Furthermore, the debate regarding the original condition and the proclivity of human beings towards justice could be appropriated into a normative stance that considers justice and diversity to be core values that a democratic constitutional order is bound to protect. Furthermore, this discourse could be appropriated into a notion of delegated powers in which the ruler is entrusted to serve the core value of justice in light of systematic principles that promote the right of assembly and cooperation and the right to dissent in order to enhance the fulfillment of this core value. Even more, a notion of limits could be developed that would restrain the government from derailing the quest for justice or from hampering the right of the people to cooperate, or dissent, in this quest. Importantly, if the

(2000); MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* (1984) (discussing the various Muslim theories of justice).

79. QUR'AN 49:13.

80. *Id.* 11:119.

government fails to discharge the obligations of its covenant, then it loses its legitimate claim to power.

This, however, is wishful thinking because there are several factors that militate against the fulfillment of these possibilities in modern Islam. First, modern Muslims; themselves, are hardly aware of the Islamic interpretive tradition on justice. Both the apologetic and puritan orientations, which are the two predominant trends in modern Islam, have largely ignored the paradigm of human diversity and difference as a necessary means to the fulfillment of the imperative of justice. Second, as discussed above, the conception and role of the government or Caliphate remained rather vague in Islamic practice. The third factor, and the more important one, is that even if modern Muslims reclaim the interpretive traditions of the past on justice, the fact is that, at the conceptual level, the constituent elements of justice were not explored in Islamic doctrine. Justice, as a moral value, has an intuitive appeal, but it is also a vague concept. The question in this regard is: if one demands justice, what specific conditions is one demanding? The possibilities are many: they could include a restoration of rights pursuant to a particular vision of rights; equality of entitlements; equality of opportunities; a proportional balance between duties and rights; and so on.

In order for the demand for justice to have any specific meaning, it is necessary to investigate the particular factors that are material to a state of justice. But there is a tension between the obligation of implementing the Divine law and the demands for justice, and that is the tension produced by the process of definition. To put it bluntly, does the Divine law define justice or does justice define the Divine law? If it is the former, then whatever one concludes is the Divine law therein is justice. If it is the latter, then whatever justice demands is, in fact, the demand of the Divine. Put differently, if the organizing principle of society is the Divine law, the risk is that the subjectively determined Divine law becomes the embodiment of justice. Under this paradigm, there is no point in investigating the constituent elements of justice: there is no point in investigating whether justice means equality of opportunities or results, or whether it means maximizing the potential for personal autonomy, or perhaps the maximization of individual and collective utility, or the guarding of basic human dignity, or even the simple resolution of conflict and the maintenance of stability, or any other concep-

tion that might provide substance to a general conception of justice. There is no point in engaging in this investigation because the Divine law preempts any such inquiry. The Divine law provides particularized positive enactments that exemplify, but do not analytically explore, the notion of justice. Conceptually, the organized society is no longer about the right to assembly, the right of cooperation, or the right to explore the means to justice, but simply about the implementation of the Divine law. This brings us full circle to the problem identified above, which is that the implementation of the Divine law does not necessarily amount to the existence of limited government, rule of law, or even the protection of basic individual rights.

It is important to note, however, that considering the primacy of justice in the Qur'anic discourse, the notions of human vicegerency in the Qur'anic discourse, and the Divine charge of justice delegated to humanity at large, it is plausible to maintain that justice is what ought to control and guide all human interpretive efforts at understanding the law. This requires a serious paradigm shift in Islamic thinking. In my view, justice, and whatever is necessary to achieve justice, is a Divine imperative and is what represents the supremacy and sovereignty of the Divine. God describes God's self as inherently just, and the Qur'an asserts that God has decreed mercy upon God's-self.⁸¹ Furthermore, the very purpose of entrusting the Divine message to the Prophet Muhammad was to give a gift of mercy to human beings.⁸² In the Qur'anic discourse, mercy is not simply forgiveness, or the willingness to ignore the faults and sins of people.⁸³ Mercy is a state in which the individual is able to be just with himself or herself, and with others, by giving each their due. Fundamentally, mercy is tied to a state of true and genuine perception — that is why, in the Qur'an, mercy is coupled with the

81. *Id.* 6:12; 54.

82. *See id.* 21:107 (addressing the Prophet: "We have not sent you except as a mercy to human beings"). *See generally* QUR'AN 16:89. In fact, the Qur'an describes the whole of the Islamic message as based on mercy and compassion. Islam was sent to teach and establish these virtues among human beings. I believe that as to Muslims, as opposed to Islam, this creates a normative imperative of teaching mercy. *See generally* QUR'AN 27:77; 29:51; 45:20. But to teach mercy is impossible unless one learns it, and such knowledge cannot be limited to text. It is *ta'aruf* [the knowledge of the other], which is premised on an ethic of care that opens the door to learning mercy, and in turn teaching it.

83. In Qur'anic terms, *rahma* [mercy] is not limited to *maghfira* [forgiveness].

need for human beings to be patient and tolerant with each other.⁸⁴ Most significantly, diversity and differences among human beings are claimed in the Qur'anic discourse as a merciful Divine gift to humankind.⁸⁵ Genuine perception that enables persons to understand and appreciate, and become enriched by the difference and diversity of humanity is one of the constituent elements for the founding of a just society, and for the achievement of justice.

The Divine charge to human beings at large, and Muslims in particular, is, as the Qur'an puts it, "to know one another" and utilize this genuine knowledge in an effort to pursue justice. This, in my view, means that the Divine mandate for a Muslim polity is to pursue the fulfillment of justice through the adherence to the need for mercy.⁸⁶ Although co-existence is a basic necessity for mercy, in order to pursue a state of real knowledge of the other and aspire for a state of justice, it is imperative that human beings cooperate in seeking the good and beautiful and that they do so by engaging in a purposeful moral discourse.⁸⁷

84. See QUR'AN 90:17; 43:32. The Qur'an explicitly commands human beings to deal with one another with patience and mercy and not to transgress their bounds by presuming to know who deserves God's mercy and who does not. See generally JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 101-55 (1994). An Islamic moral theory focused on mercy as a virtue will overlap with the ethic of care developed in Western moral theory.

85. See QUR'AN 11:118-19. See also I ISMA'IL IBN MUHAMMAD JARRAHI, *KASHF AL-KHAFAT WA-MUZIL AL-ILBAS 'AMMA ISHTAHARA MIN AL-AHADITH 'ALÁ ALSINAT AL-NAS* 66-68 (Mu'assasat al-Risalah 1983). This idea is also exemplified in a tradition attributed to the Prophet asserting that the disagreement and diversity of opinion of the *umma* (Muslim Nation) is a source of divine mercy for Muslims. Whether the Prophet actually made this statement or this statement is part of the received wisdom that guided the diverse and often competing interpretive traditions within Islam is beside the point. The point is that this tradition, Prophetic or not, was used to justify an enormous amount of diversity within the Islamic juristic tradition, and it played an important role in preventing the emergence of a single voice of authority within the Islamic tradition. See generally THE SOLDIERS, *supra* note 20, at 23-36.

86. See generally GLEN NEWBY, *VIRTUE, REASON AND TOLERATION* 85-114 (1999) (discussing tolerance as a moral virtue and its limits); JAY NEWMAN, *FOUNDATIONS OF RELIGIOUS TOLERANCE* (1982); HANS OBERDIEK, *TOLERANCE: BETWEEN FORBEARANCE AND ACCEPTANCE* (2001). See also George Fletcher, *The Instability of Tolerance*, in *TOLERATION: AN ELUSIVE VIRTUE* 158-72 (David Heyd ed., 1996) [hereinafter *TOLERATION*]; Gordon Graham, *Tolerance, Pluralism, and Relativism*, in *TOLERATION*, *supra*, at 44-59; John Horton, *Toleration as a Virtue*, in *TOLERATION*, *supra*, at 28-43; ROBERT MCKIM, *RELIGIOUS AMBIGUITY AND RELIGIOUS DIVERSITY* (2001); T.M. Scanlon, *The Difficulty of Tolerance*, in *TOLERATION*, *supra*, at 226-39; Bernard Williams, *Toleration: An Impossible Virtue?*, in *TOLERATION*, *supra*, at 18-27.

87. See DANIEL VOKEY, *MORAL DISCOURSE IN A PLURALISTIC WORLD* (2001). See also

The more the good and beautiful is approached, the closer a polity comes to a state of divinity. Significantly, however, implementing legalistic rules, even if such rules are the product of the interpretation of Divine texts, is not sufficient for the achievement of genuine perception of the other, mercy, or, ultimately, justice. The paradigm shift of which I speak requires that the principles of mercy and justice become the primary Divine charge. In this paradigm, God's sovereignty lies in the fact that God is the source and authority that delegated to human beings the charge to achieve justice on earth by fulfilling the virtues that are approximations of divinity.⁸⁸ Far from negating human subjectivities through the mechanical enforcement of rules, such subjectivities are accommodated and even promoted to the extent that they contribute to the fulfillment of justice. Significantly, according to the juristic discourses, it is not possible to achieve justice unless every possessor of a right [*haqq*] is granted his or her right. As discussed below, God has certain rights, humans have rights, and both God and humans share some rights. The challenge of vicegerency is first to recognize that a right exists, then to understand who is the possessor of such a right, and, ultimately, to allow the possessor of a right to enjoy the prescribed right. A society that fails to do so, regardless of the deluge of rules it may apply, is not a merciful or just society.⁸⁹ This puts us in a position to explore the possibility of individual rights in Islam.

Alan Gewirth, *Is Cultural Pluralism Relevant to Moral Knowledge?*, in *CULTURAL PLURALISM AND MORAL KNOWLEDGE* 22-43 (Ellen Frankel Paul et al. eds., 1994) (arguing that cultural pluralism is not necessarily inconsistent with rational moral knowledge); MICHELLE MOODY-ADAMS, *FIELDWORK IN FAMILIAR PLACES: MORALITY, CULTURE, AND PHILOSOPHY* (1997) (using a similar approach to Daniel Vokey).

88. Of course, approximating the Divine does not mean aspiring to become Divine. Approximating the Divine means visualizing the beauty and virtue of the Divine, and striving to internalize as much as possible of this beauty and virtue. I start with the theological assumption that God cannot be comprehended or understood by the human mind. God, however, teaches moral virtues that emanate from the Divine nature, and that are also reflected in creation. By imagining the possible magnitudes of beauty and its nature, human beings can better relate to the Divine. The more humans are able to relate to the ultimate sense of goodness, justice, mercy, and balance, which embody Divinity, the more they are able to visualize or imagine the nature of Divinity, and the more they are able to model their own sense of beauty and virtue as approximations of Divinity.

89. See DAVID S. ODERBERG, *MORAL THEORY* 53-63 (2000) (discussing the relationship between justice and human rights); HILLEL STEINER, *AN ESSAY ON RIGHTS* 224-48 (1994) (explaining the relationship between justice and human rights).

VII. *THE RIGHTS OF THE PEOPLE IN ISLAM*

All constitutional democracies afford protections to a particular set of individual interests, such as freedom of speech and assembly, equality before the law, right to property, and due process of law, but which exact rights ought to be protected, and to what extent, is subject to a large measure of variation in theory and in practice. There is also a considerable amount of debate in democratic societies as to the sources and nature of individual rights, as well as to whether there are inherent and absolute individual rights, or presumptive individual entitlements that could be outweighed by countervailing considerations.⁹⁰ As far as this Article is concerned, for the most part, by individual rights I do not mean entitlements, but qualified immunities: the idea that particular interests related to the well-being of an individual ought to be protected from infringements whether perpetrated by the State or other members of the social order, and such interests should not be sacrificed unless for an overwhelming necessity. However, I doubt very much that there is an objective means of quantifying an overwhelming necessity. Thus, I believe that some individual interests ought to be unassailable under any circumstances. These unassailable interests are the ones that, if violated, are bound to communicate to the individual in question a sense of worthlessness, and that, if violated, tend to destroy the faculty of a human being to comprehend the necessary elements for a dignified existence. Therefore, for instance, under my conception of rights, the use of torture, or the denial of food, shelter, or the means for sustenance, such as employment, would be a violation of an individual's rights under any circumstances.

It is fair to say, however, that the pre-modern juristic tradition did not articulate a notion of individual rights as privileges, entitlements, or immunities. Nonetheless, the juristic tradition did articulate a conception of protected interests that accrue to

90. See S.I. BENN & R.S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT: SOCIAL FOUNDATIONS OF THE DEMOCRATIC STATE* 101-20 (1966); LOUIS HENKIN, *THE AGE OF RIGHTS* (1990); LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES (Austin Sarat & Thomas R. Kearns eds., 1997); CARL WELLMAN, *A THEORY OF RIGHTS: PERSONS UNDER THE LAWS, INSTITUTIONS, AND MORALS* (1985). Debates on individual rights raise questions about the nature, foundations, and universality of such rights. The historical discontinuities of individual rights suggest that, despite the absolutist-moral overtones of some rights-talk, individual rights are the product of complex historical processes.

the benefit of the individual. In order to better understand the idea of protected interests in Islamic law, it is important to note that the purpose of Shari'ah in jurisprudential theory is to fulfill the welfare of the people [*tahqiq masalih al-'ibad*]. Typically, Muslim jurists divided the interests or the welfare of the people into three categories: the necessities [*daruriyyat*], the needs [*hajjiyyat*], and the luxuries [*kamaliyyat* or *tahsiniyyat*]. According to Muslim jurists, the law and political policies of the government must fulfill these interests, in descending order of importance: first, the necessities, then the needs, and then the luxuries. The necessities are further divided into five basic values: *al-daruriyyat al-khamsah*: religion, life, intellect, lineage or honor, and property.⁹¹ But Muslim jurists did not develop the five basic values as conceptual categories and then explore the theoretical implications of each value; rather, they pursued what can be described as an extreme positivistic approach to these rights. Muslim jurists examined the existing positive legal injunctions that arguably can be said to serve each of these values, and concluded that by giving effect to these specific legal injunctions, the five values have been sufficiently served. So, for example, Muslim jurists contended that the prohibition of murder in Islamic law served the basic value of life, that the law of apostasy protected religion, that the prohibition of intoxicants protected the intellect, that the prohibition of fornication and adultery protected lineage, and that the right of compensation protected the right to property.⁹² It is important for modern Muslims to concede that limiting the protection of the intellect to the prohibition

91. See MUHAMMAD ABU ZAHRAH, *USUL AL-FIQH* 291-93 (Dar al-Fikr al-'Arabi 1957); I ABU HAMID AL-GHAZZALI, *AL-MUSTASFÁ MIN 'ILM AL-USUL* 286-87 (Mu'assasat al-Risalah 1997); KAMALI, *supra* note 52, at 271-73; AHMAD IBN IDRIS QARAFI, *SHARH TANQIH AL-FUSUL FI IKHTISAR AL-MAHSUL FI AL-USUL* 391 (Maktabat al-Kulliyat al-Azhariyyah 1973) [hereinafter QARAFI, *SHARH*]; 5 FAKHR AL-DIN MUHAMMAD IBN 'UMAR RAZI, *AL-MAHSUL FI 'ILM USUL AL-FIQH* 159-60 (n.p. 1997); ZAKI AL-DIN SHA'BAN, *USUL AL-FIQH AL-ISLAMI* 382 (Dar al-Nahdah al-'Arabiyyah 1967); 2 IBRAHIM IBN MUSÁ SHATIBI, *AL-MUWAFÁQAT FI USUL AL-SHARI'AH* 7-8 ('Abd Allah Daraz & Muhammad 'Abd Allah Daraz eds., Dar al-Kutub al-'Ilmiyya n.d.); WAHBAH ZUHAYLI, *AL-WASIT FI USUL AL-FIQH AL-ISLAMI* 500-01 (Dar al-Fikr 1969).

92. ABU ZAHRAH, *supra* note 91, at 291-93; MUHAMMAD 'UBAYD ALLAH AS'ADI, *AL-MUJAZ FI USUL AL-FIQH* 247 (Dar al-Salam 1990); BADRAN ABU AL-'AYNAYN BADRAN, *USUL AL-FIQH* 430-31 (Dar al-Ma'arif 1965); ZAKARIYA BARRI, *USUL AL-FIQH AL-ISLAMI* 144-45 (Dar al-Nahdah al-'Arabiyyah 1974); 'ALI HASAB ALLAH, *USUL AL-TASHRI' AL-ISLAMI* 260 (Dar al-Ma'arif 1971); KAMALI, *supra* note 52, at 271-72; SHA'BAN, *supra* note 91, at 382-84; ZUHAYLI, *supra* note 91, at 498-99.

against the consumption of alcohol or the protection of life to the prohibition of murder is hardly a very thorough protection of either intellect or life. At most, these laws are partial protections to a limited conception of values, and at any case, cannot be asserted as the equivalent of individual rights because they are not asserted as immunities to be retained by the individual against the world. Unfortunately, the way the juristic tradition treated these five values amounted to denying them any theoretical social and political content and reduced them to technical legalistic objectives. This, of course, does not preclude the possibility that the basic five values could act as a foundation for a systematic theory of individual rights in the modern age.⁹³

To argue that the juristic tradition did not develop the idea of fundamental or basic individual rights does not mean that that tradition was oblivious to the notion. In fact, the juristic tradition tended to sympathize with individuals who were unjustly executed for their beliefs or those who died fighting against injustice. Jurists typically described such acts as a death of *musabara*, a term that carried positive or commendable connotations. In addition, Muslim jurists produced an impressive discourse condemning the imposition of unjust taxes and the usurpation of private property by the government.⁹⁴ In fact, the majority of Muslim jurists refused to condemn or criminalize the behavior of rebels who revolted against the imposition of oppressive taxes or a tyrannical government.⁹⁵ In addition, the juristic tradition articulated a wealth of positions that exhibit humanitarian or compassionate orientations. For instance, Muslim jurists developed the idea of presumption of innocence in all criminal and civil proceedings, and they argued that the accuser always carries the burden of proof [*al-bayyina 'ala man idda'a*].⁹⁶ In mat-

93. I would argue that the protection of religion should be developed to mean protecting the freedom of religious belief; the protection of life should mean that the taking of life must be for a just cause and the result of a just process; the protection of the intellect should mean the right to free thinking, expression and belief; the protection of honor should mean the protecting of the dignity of a human being; and the protection of property should mean the right to compensation for the taking of property.

94. See Khaled Abou El Fadl, *Tax Farming in Islamic Law (Qibalah and Daman of Kharaj): A Search for a Concept*, 31 ISLAMIC STUD. 5, 5-32 (1992).

95. See REBELLION AND VIOLENCE, *supra* note 12, at 234-94.

96. See JALAL AL-DIN 'ABD AL-RAHMAN AL-SUYUTI, AL-ASHBAH WA-AL-NAZA'IR FI QAWA'ID WA FURU' FIQH AL-SHAFI'YAH 53 (Dar al-Kutub al-'Ilmiyah 1983); SUBHI RAJAB MAHMASANI, FALSAFAT AL-TASHRI' FI AL-ISLAM [THE PHILOSOPHY OF JURISPRUDENCE IN IS-

ters related to heresy, Muslim jurists repeatedly argued that it is better to let a thousand heretics go free than to wrongfully punish a single sincere Muslim. The same principle was applied to criminal cases: the jurists argued that it is always better to release a guilty person than to run the risk of punishing an innocent person.⁹⁷ Moreover, many jurists condemned the practice of detaining or incarcerating heterodox groups even when such groups openly advocated and proselytized their heterodoxy (such as the Khawarij), and they argued that such groups may not be harassed or molested until they carry arms and form a clear intent to rebel against the government.⁹⁸ Muslim jurists also condemned the use of torture, arguing that the Prophet forbade the use of *muthla* [mutilations] in all situations,⁹⁹ and they opposed the use of coerced confessions in all legal and political matters as well.¹⁰⁰ In fact, a large number of jurists articulated a

LAM] 294 (Dar al-'Ilm lil-Malayin 1961); 'ALI AHMAD NADWI, AL-QAWA'ID AL-FIQHIYAH 400-01 (Dar al-Qalam 1994); AHMAD ZARQA' ET AL., SHARH AL-QAWA'ID AL-FIQHIYAH 369-89 (Dar al-Qalam 1996).

97. See IBN HAJAR AL-'ASQALANI, *supra* note 25, at 308; SHAWKANI, *supra* note 25, at 168.

98. See IBRAHIM IBN MUFLIH ET AL., AL-MUBDI' FI SHARH AL-MUQNI' 168 (al-Maktab al-Islami 1980); El Fadl, *Law of Duress in Islamic Law*, 30 ISLAMIC STUD. 305, 305-50 (1991) [hereinafter *Law of Duress*].

99. Muslim jurists, however, did not consider the severing of hands or feet as punishment for theft and banditry to be mutilation. See 2 JALAL AL-DIN AL-SUYUTI, AL-DURR AL-MANTHUR FI AL-TAFSIR BI AL-MA'THUR 305-06 (Matba'at al-Anwar al-Muhammadiyya n.d.); 2 ISMA'IL IBN 'UMAR IBN KATHIR, TAFSIR AL-QUR'AN AL-'AZIM 56-57 (Dar al-Khayr 1990); 2 ABU BAKR MUHAMMAD IBN ZAKARIYA RAZI, KITAB AHKAM AL-QUR'AN 407-08 (Dar al-Kitab al-'Arabi 1986); 1 AHMAD IBN MUHAMMAD SAWI, HASHIYAT AL-'ALLAMAH AL-SAWI 'ALÁ TAFSIR AL-JALALAIN 280 (Dar Ihya' al-Turath al-'Arabi n.d.); MAHMUD IBN 'ABD ALLAH ALUSI, RUH AL-MA'ANI FI TAFSIR AL-QUR'AN AL-'AZIM WA-AL-SAB' AL-MATHANI 121-22 (Dar Ihya' Turath al-'Arabi 1985); 5 ABU JA'FAR MUHAMMAD IBN JARIR AL-TABARI, JAMI' AL-BAYAN FI TAFSIR AL-QUR'AN 134-35 (Dar al-Ma'rifah 1989); 3 'ALI IBN MUHAMMAD KIYA AL-HARASI, AHKAM AL-QUR'AN 65 (Dar al-Kutub al-'Ilmiyya 1985); 2 ABU BAKR MUHAMMAD IBN AL-'ARABI, AHKAM AL-QUR'AN 594 ('Ali Muhammad al-Bajawi ed., Dar al-Jil 1987); 6 ABU 'ABD ALLAH MUHAMMAD B. AHMAD AL-ANSARI AL-QURTUBI, AL-JAMI' LI AHKAM AL-QUR'AN 149-50 (n.p. 1952); 1 'ABD AL-RAHMAN IBN MUHAMMAD AL-THA'ALIBI, AL-JAWAHIR AL-HISAN FI TAFSIR AL-QUR'AN 459 (Mu'assasat al-'Alami li al-Matbu'at n.d.); 1 QUTB AL-DIN SA'ID IBN HIBAT ALLAH AL-RAWANDI, FIQH AL-QUR'AN 366 (al-Sayyid Ahmad al-Husayni ed., Matba'at al-Wilayah 1405 AH); 12 ABU MUHAMMAD 'ALI IBN AHMAD IBN SA'ID IBN HAZM, AL-MUHALLÁ BI-AL-ATHAR 285-88 ('Abd al-Ghaffar Sulayman al-Bandari ed., Dar al-Kutub al-'Ilmiyya n.d.); REBELLION AND VIOLENCE, *supra* note 12, at 32, 50-57, 73-77, 340-41.

100. A considerable number of jurists in Islamic history were persecuted and murdered for holding that a political endorsement (*bay'a*) obtained under duress is invalid. Muslim jurists described the death of these scholars under such circumstances as a death of *musabara*. This had become an important discourse because Caliphs were in

doctrine similar to the American exculpatory doctrine, which provides that confessions or evidence obtained under coercion are inadmissible at trial. Interestingly, some jurists even asserted that judges who rely on a coerced confession in a criminal conviction may be held liable for the wrongful conviction. Most argued that the defendant, or his family, may bring an action for compensation against the judge, individually, and against the Caliph and his representatives, generally, because the government is deemed to be vicariously liable for the unlawful behavior of its judges.¹⁰¹

Perhaps the most intriguing discourse on the subject in the juristic tradition is that which relates to the rights of God and the rights of people. The rights of God [*huquq Allah*] are rights retained by God, as His own, through an explicit designation to that effect.¹⁰² These rights belong to God in the sense that only God can say how the violation of these rights may be punished

the habit of either bribing or threatening notables and jurists to obtain their *bay'a*. See 1 IBN KHALDUN, *AL-MUQADDIMA* 165 (Sinbad 1978); *REBELLION AND VIOLENCE*, *supra* note 12, at 86-87. On the Islamic law of duress and on coerced confessions and political commitments, see *Law of Duress*, *supra* note 98, at 305-50.

101. See AHMAD IBN 'UMAR KHASSAF, *KITAB ADAB AL-QADI* 364-65 (Farhat Ziyadah ed., American University of Cairo Press 1978); 1 'ALI IBN MUHAMMAD MAWARDI, *ADAB AL-QADI* 233 (Muhyi Hilal al-Sarhan ed., Matba'at al-Irshad 1971); MAWARDI, *AL-AHKAM supra* note 30, at 58; 1 'ALI IBN MUHAMMAD SIMANANI, *RAWDAT AL-QUDAH WA TARIQ AL-NAJAH* 157-58 (Mu'assasat al-Risala 1984); 6 NIZAM ET AL., *AL-FATAWA' AL-HINDIYAH FI MADHHAB AL-IMAM ABI HANIFAH AL-NU'MAN* 430 (Dar Ihya' al-Turath al-'Arabi 1986); 3 FAKHR AL-DIN 'UTHMAN IBN 'ALI AL-ZAYLA'I, *TABYIN AL-HAQA'IQ: SHARH KANZ AL-DAQA'IQ* 240 (Dar al-Kitab al-Islamiyah n.d.).

102. Classical jurists would normally list most acts of worship, and Qur'anically prescribed criminal punishments as part of the rights of God. Accordingly, fasting during the month of Ramadan, praying five times a day, or the punishment for adultery, for example, are parts of the rights of God. The punishment for theft was often designated as a mixed right. Another important distinction in the classical sources was the differentiation between acts of *'ibadat* [worship] and *mu'amalat* [conduct involving social interaction]. *Ibadat*, in most occasions, were designated as implicating the rights of God, while most *mu'amalat* were designated as implicating the rights of people. While *'ibadat* were considered unchangeable and personal between the individual and God, *mu'amalat* were considered changeable, negotiable, and within the realm of human discretion. Significantly, modern day puritans have tried to blur the distinction between the two categories, claiming that all conduct, including social interactions, fall within the realm of *'ibadat*, and then claiming that the State is responsible for enforcing the rights of God on this earth, and that the rights of God take priority over the rights of people. This is quite a shift from the traditional categories of Islamic law because it effectively injects the State in the relationship between individuals and God. In my opinion, it even amounts to the dethroning of God, as the State comes to sit in God's place.

and only God has the right to forgive such violations.¹⁰³ These rights are, so to speak, subject to the exclusive jurisdiction and dominion of God, and human beings have no choice but to follow the explicit and detailed rules that God set out for the handling of acts that fall in God's jurisdiction. In addition, in the juristic theory, all rights not explicitly retained by God, accrue to the benefit of human beings. In other words, any right [*haqq*] that is not specifically and clearly retained by God becomes a right retained by people. These are called *huquq al-'ibad*, or *huquq al-nas*, or *huquq al-adamiyyin*.¹⁰⁴ Importantly, while violations of God's rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by the people. For instance, according to the juristic tradition, a right to compensation is retained individually by a human being and may only be forgiven by the aggrieved individual. The government, or even God, does not have the right to forgive or compromise such a right of compensation if it is designated as part of the rights of human beings. Therefore, the Maliki jurist Ibn al-'Arabi (d. 543/1148) states:

The rights of human beings are not forgiven by God unless the human being concerned forgives them first, and the claims for such rights are not dismissed [by God] unless they are dismissed by the person concerned The rights of a Muslim cannot be abandoned except by the possessor of the right. Even the *imam* (ruler) does not have the right to demand [or abandon] such rights. This is because the *imam* is not empowered to act as the agent for a specific set of individuals over their specific rights. Rather, the *imam* only represents people, generally, over their general and unspecified rights.¹⁰⁵

103. Some modern Muslim commentators tried to equate the rights of God with the idea of public rights. Muhammad Abu-Hassan, *Islamic Criminal Law*, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW 79-89 (Gerald E. Lampe ed., 1997); SHAIKH SHAUKAT HUSSAIN, HUMAN RIGHTS IN ISLAM 38-39 (1990); MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 10 (rev. ed., Islamic Texts Soc'y 1997). This argument is untenable and it is based on a misunderstanding of the theory behind the concept of God's rights. See Fazlur Rahman, *The concept of haad in Islamic Law*, 4 ISLAMIC STUD. 237, 237-51 (1965) (providing a Muslim critique of God's rights as the equivalent of public rights).

104. See ABU ZAHRAH, *supra* note 91, at 256-58; BERNARD WEISS, THE SPIRIT OF ISLAMIC LAW 181-84 (1998); KAMALI, *supra* note 52, at 348-50.

105. See 2 ABU BAKR MUHAMMAD B. 'ABD ALLAH B. AL-'ARABI, AHKAM AL-QUR'AN 603 ('Ali Muhammad al-Bajawi ed., Dar al-Ma'rifah n.d.); KHALED ABOU EL FADL, CONFER-

In a similar context, the Hanafi jurist al-'Ayni (d. 855/1451) argues that the usurper of property, even if a government official [*al-zalim*], will not be forgiven for his sin, even if he repents a thousand times, unless he returns the stolen property.¹⁰⁶ Most of these discourses occur in the context of addressing personal monetary and property rights, but they have not been extended to other civil rights, such as the right to due process or the right to listen, to reflect, and to study, which may not be violated by the government under any circumstances. This is not because the range of the rights of people was narrow; quite to the contrary, it is because the range of these rights was too broad.

It should be recalled that people retain any rights not explicitly reserved by God. Effectively, since the rights retained by God are quite narrow, the rights accruing to the benefit of the people are numerous. The juristic practice has tended to focus on narrow legal claims that may be addressed through the processes of law rather than on broad theoretical categories that were perceived as non-justiciable before a court. As such, the jurists tended to focus on tangible property rights or rights for compensation instead of focusing on moral claims. So, for instance, if someone burns another person's books, that person may seek compensation for destruction of property, but he could not bring an action for injunctive relief preventing the burning of the books in the first place. Despite this limitation, the juristic tradition did, in fact, develop a notion of individual claims that are immune from governmental or social limitation or alienation.

There is one other important aspect that needs to be explored in this context. Muslim jurists asserted the rather surprising position that if the rights of God and rights of people (mixed rights) overlap, in most cases, the rights of people should prevail. The justification for this was that humans need their rights, and need to vindicate those rights on earth. God, on the other

ENCE OF THE BOOKS 105-08 (2001); *see also*, 6 ABU 'ABD ALLAH MUHAMMAD B. AHMAD AL-ANSARI AL-QURTUBI, AL-JAMI' LI AHKAM AL-QUR'AN 103 (Dar al-Kutub al-'Ilmiyya 1993); HASAB ALLAH, *supra* note 92, at 293-7; AHMAD FARRAJ HUSAYN, USUL AL-FIQH AL-ISLAMI 405-15 (al-Dar al-Jam'iyya 1986); AHMAD IBN 'ABD AL-HALIM IBN TAYMIYAH, AL-SIYASAH AL-SHAR'IYAH FI ISLAH AL-RA'I WA-AL-RA'IYYA 65-144 (Dar al-Kutub al-'Ilmiyah 1988); LAMBTON, *supra* note 12, at 19-20.

106. *See* 6 BADR AL-DIN MAHMUD IBN AHMAD 'AYNI, AL-BINAYAH FI SHARH AL-HIDAYAH 482 (Dar al-Fikr 1990).

hand, asserts God's rights only for the benefit of human beings, and, in all cases, God can vindicate God's rights in the Hereafter if need be. As to the rights of people, Muslim jurists did not imagine a set of unwavering and general rights that are to be held by each individual at all times. Rather, they thought of individual rights as arising from a legal cause brought about by the suffering of a legal wrong. A person does not possess a right until he or she has been wronged and, as a result, obtains a claim for retribution or compensation.

Shifting paradigms, it is necessary to transform the traditional conceptions of rights to a notion of immunities and entitlements. As such, these rights become the property of individual holders, before there arises a specific grievance and regardless of whether there is a legal cause of action. The set of rights that are recognized as immutable and invariable are those that are necessary to achieve a just society while promoting the element of mercy. In my view, these must be the rights that guarantee the physical safety, and moral dignity of a human being. It is quite possible that the relevant individual rights are those five values mentioned above, but this issue needs to be re-thought and re-analyzed in light of the current diversity and particularity of human existence. The fact that the rights of people take priority over the rights of God, on this earth, necessarily means that a claimed right of God may not be used to violate the rights of human beings. God is capable of vindicating whichever rights God wishes to vindicate in the Hereafter. On this earth, we concern ourselves only with discovering and establishing the rights that are needed to enable human beings to achieve a just life, while, to the extent possible, honoring the asserted rights of God.¹⁰⁷ In this context, the commitment to human rights does not signify a lack of commitment to God, or a lack of willingness to obey God. Rather, human rights become a necessary part of celebrating human diversity, honoring the vicegerents of God, achieving mercy, and pursuing the ultimate goal of justice.

Interestingly enough, it is not the pre-modern juristic tradition that poses the greatest barrier to the development of indi-

107. This idea is reflected in the well-known tradition attributed to the Prophet that whenever God commands humans to do something, then they should do of it as much as they can. This tradition represents further recognition of the contingent and aspirational nature of human ability, and that while humans may strive for perfection, God is perfection itself.

vidual rights in Islam. Rather, the most serious obstacle comes from modern Muslims themselves. Especially in the last half of the past century, a considerable number of Muslims have made the unfounded assumption that Islamic law is concerned primarily with duties, and not rights, and that the Islamic conception of rights is collectivist, not individualistic.¹⁰⁸ Both assumptions, however, are not based on anything other than cultural assumptions about the non-Western "other." It is as if the various interpreters decided on what they believe is the Judeo-Christian, or perhaps Western, conception of rights, and then assumed that Islam must necessarily be different.¹⁰⁹ In the 1950s and 1960s, most Muslim countries, as underdeveloped nations, were heavily influenced by Socialist and national development ideologies, which tended to emphasize collectivist and duty-oriented conceptions of rights. Therefore, many Muslim commentators claimed that the Islamic tradition necessarily supports the aspirations and hopes of what is called the Third World. But such claims are as negotiative, re-constructive, and inventive of the Islamic tradition as any particular contemporaneous vision of rights. The reality is that both claims of individual rights or collectivist rights are largely anachronistic.

Pre-modern Muslim jurists did not assert a collectivist vision of rights, in the same way that they did not assert an individualistic vision of rights. They did speak of *al-haqq al-'amm* [public rights], and they often asserted that public rights ought to be given preference over private entitlements. But as a matter of juristic determination, this amounted to no more than an assertion that the many should not be made to suffer for the entitlements of the few. For instance, as a legal maxim, this was utilized to justify the notion of public takings or the right to public easements over private property. This principle was also utilized in prohibiting unqualified doctors from practicing medicine.¹¹⁰ But as noted above, Muslim jurists did not, for instance, justify

108. For this often-repeated claim, see LAWRENCE ROSEN, *THE JUSTICE OF ISLAM* 7, 79-80, 156-57 (2000); WEISS, *supra* note 104, at 145-85; RHODA HOWARD, *HUMAN RIGHTS AND THE SEARCH FOR COMMUNITY* 92-104 (1995).

109. For the claim that the human rights tradition is Judeo-Christian in origin, see CLAUDIO F. BENEDI, *HUMAN RIGHTS: THE THEME OF OUR TIMES* 27-32 (1997).

110. SALIM RUSTUM BAZ, *SHARH AL-MAJALLAH* 31 (Dar Ihya' al-Turath al-'Arabi 1986). Muslim jurists also asserted that specific rights and duties should be given priority over general rights and duties. But, again, this was a legal principle that applied to laws of agency and trust. *Id.* at 43-44. Although the principle could be expanded and

the killing or the torture of individuals in order to promote the welfare of the State or the public interest. Even with regard to public takings or easements, the vast majority of Muslim jurists maintained that the individuals affected are entitled by the State to compensation equal to the fair market value of the property taken.

In addition, pursuant to a justice perspective, one can argue that a commitment to individual rights, taken as a whole, will accrue to the benefit of the many (the private citizens) over the few (the members of ruling government). I do believe that the common good is greatly enhanced, and not hampered, by the assertion of individual rights, but a separate study is needed to develop this point in a more systematic way.¹¹¹ My point here, however, is that the juristic notion of public rights does not necessarily support what is often described as a collectivist view of rights.¹¹² Likewise, the idea of duties [*wajibat*] is as well established in the Islamic tradition as the notion of rights [*huquq*]. Indeed, the Islamic juristic tradition does not show a proclivity toward the one more than the other. In fact, some pre-modern jurists have asserted that to every duty there is a reciprocal right,

developed to support individual rights in the modern age, historically, it was given a far more technical and legalistic connotation.

111. See YVES RENÉ MARIE SIMON & VUKAN KUIC, *THE TRADITION OF NATURAL LAW: A PHILOSOPHER'S REFLECTIONS* 86-109 (1965); see also ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* 218-33 (1982); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 205-18 (1980).

112. It might be that someone would want to argue that collectivist rights schemes are superior to individual rights schemes. However, a collectivist rights scheme, as much as an individualist rights scheme, would need to be justified on Islamic grounds. Both types of rights schemes are equally alien, or unfamiliar, to the Islamic tradition. In addition, I do not dispute the morality of some collectivist rights, such as the rights of indigenous people, the right to culture, or the right to development, nor do I dispute that these rights could be justified on Islamic grounds. But from an Islamic perspective, it is much harder to justify sacrificing the safety or well-being of individuals in pursuit of a collective right. It seems to me that the collectivist rights mentioned above are justifiable largely when a collectivity is trying to protect its individuals and collective interests from aggression arising from outside the collectivity. In other words, it is justifiable when a community of people, sharing common interests, is trying to protect itself from external dangers. However, it seems far less justifiable when the community is turning inwards, and trying to target individuals within its own membership, under the auspices of protecting the character of the collectivity against the dangers of dissent. See *THE RIGHTS OF PEOPLES* (James Crawford ed., 1992); Alexandra Xanthaki, *Collective Rights: The Case of Indigenous Peoples*, in *HUMAN RIGHTS IN PHILOSOPHY AND PRACTICE* 303-13 (Burton Leiser & Tom Campbell eds., 2001); Emily R. Gill, *Autonomy, Diversity and the Right to Culture*, in *HUMAN RIGHTS IN PHILOSOPHY AND PRACTICE*, *supra*, at 285-300.

and vice versa.¹¹³ It is true that many jurists claimed that the ruler is owed a duty of obedience, but ideally, they also expected the ruler to safeguard the well-being and interests of the ruled. The fact that the jurists did not hinge the duty to obey on the obligation to respect the individual rights of citizens does not mean that the jurists were, as a matter of principle, opposed to affording the ruled certain immunities against the State. In some situations, Muslim jurists even asserted that if the State failed to protect the well-being of the ruled and acted unjustly toward them, the ruled no longer owed the State either obedience or support.¹¹⁴

Perhaps the widespread rhetoric regarding the primacy of collectivist and duty-based perspectives in Islam points to the reactive nature of much of the discourse on Islamic law in the contemporary age. From a theological perspective, the notion of individual rights is easier to justify in Islam than a collectivist orientation. God created human beings as individuals, and their liability in the Hereafter is individually determined as well. To commit oneself to safeguarding and protecting the well-being of the individual is to take God's creation seriously. Each individual embodies a virtual universe of Divine miracles in body, soul, and mind.

Why should a Muslim commit himself or herself to the rights and well-being of a fellow human being? The answer is that God has already made such a commitment by investing so much of the God-self in each and every person. This is why the Qur'an asserts that when a human kills a fellow human being unjustly, it is as if he or she has murdered all of humanity: it is as if the killer has murdered the Divine sanctity and defiled the very meaning of divinity.¹¹⁵ Moreover, the Qur'an does not differentiate between the sanctity of a Muslim and that of a non-Muslim.¹¹⁶ As the Qur'an repeatedly asserts, no human being can limit the Divine mercy in any way, nor even regulate who is

113. On the relationship between duty and right in Roman law, and the subsequent Western legal tradition, see FINNIS, *supra* note 111, at 205-10. The dynamic that Finnis describes is very similar to that which took place in classical Islamic law. See also Lloyd L. Weinreb, *Natural Law and Rights*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 278-305 (Robert P. George ed., 1992) (discussing rights and responsibilities).

114. See *REBELLION AND VIOLENCE*, *supra* note 12, at 280-87.

115. QUR'AN 5:32.

116. Some pre-modern jurists did differentiate between Muslim and non-Muslim, especially in matters pertaining to criminal liability and compensation for torts.

entitled to it.¹¹⁷ I take this to mean that non-Muslims, as well as Muslims, could be the recipients and the givers of Divine mercy. The measure of moral virtue on this earth is proximity to divinity through justice, and not the correct religious or irreligious label. The measure in the Hereafter is a different matter, but it is a matter that is in the purview of God's exclusive jurisdiction. God will most certainly vindicate God's rights in the Hereafter in the fashion that God deems most fitting, but on this earth, our primary moral responsibility is the vindication of the rights of human beings. Put this way, perhaps it becomes all too obvious that a commitment in favor of human rights is a commitment in favor of God's creation and, ultimately, a commitment in favor of God.

VIII. *THE PROMISE OF INDIVIDUAL RIGHTS*

What are the possible sources of individual rights in Islam? In natural law theory, certain rights, derived through reason or intuition, are considered innate and fundamental. These rights are not subject to violation by majoritarian determinations, and they are retained against society and State. Importantly, the natural law tradition emerged from a thoroughly religious, especially Christian, paradigm, and in fact, the retreat of natural law before positivist theories of law occurred only after natural law became secularized and alienated from its religious foundations. However, this issue has become extremely complicated after the so-called secularized natural law has experienced, thanks to the efforts of people like John Finnis, a powerful resurgence in the past thirty years or so, and the very meaning and connotations of secularism have become highly contested in Western democracies. But at a minimum, contrary to the assumptions of some secularists, a belief in fundamental individual rights does not necessarily need to be based on the exclusion of God from public life.

Even more, a commitment to a paradigm of individual rights need not detract from God's supremacy or dominion on this earth. The integrity, honor, and dominion of the Divine need not be compromised or equivocated in any fashion in order for human beings' accountability for their agency to be given full recognition. The right entitlements of human beings

117. QUR'AN 2:105; 3:74; 35:2; 38:9-10; 39:38; 40:7; 43:32.

are simply a basic component of recognizing the direct accountability of individual agents to God, and not to other human beings. If the individual agent does not have rights that safeguard his *ability* to discharge his obligations towards God, then the integrity of the agency itself is compromised, and the whole logic of individual accountability cannot be sustained in any serious fashion. The integrity of the agency and the individual accountability of the agent mandate that the agent be free to deny his agency and even deny God. It also mandates that the agent be able to declare his willingness to take full responsibility for this individual decision before God in the Hereafter. Forcing individuals to discharge the obligations of their agency toward God renders the agency itself meaningless, because it presumes that one agent can take responsibility for the agency of another, which is something that the Qur'an quite clearly and explicitly rejects.¹¹⁸

In the Islamic context, the most challenging issue pertaining to individual rights is not the conceptual origins of rights, but the role of the text in relation to any claim of rights. In Islam, the real question remains: is it possible to develop a conception of rights that are fundamental, inalienable, and not subject to waiver or compromise through legal interpretation, even if it is the interpretation of Divine text? This question recalls the classical debate on the nature of *husn* [what is good or beautiful] and *qubh* [what is bad or ugly]. Like the debates on the nature of justice, the issue here was whether good and bad have an inherent essence that exists separate from the Divine will, or whether they are entirely determined by God. For instance, is a particular value good or bad because the Divine text says it is, or is it so because good and bad have an inherent or natural essence to them?¹¹⁹ If moral values such as goodness, justice, and mercy are created and determined by the Divine will, then arguably, these values are contingent and unnatural, because they do not have an objective essence. In the classical period, the

118. The Qur'an seems to treat religious compulsion as an act that compromises the integrity and self-evident autonomy of the truth of God. See *id.* 2:256; 10:99-100. The Qur'an also repeatedly affirms the principle that no human can bear responsibility for the accountability of another. See, e.g., *id.* 6:164; 17:15; 35:18; 39:7; 53:38.

119. See SPEAKING IN GOD'S NAME, *supra* note 20, at 160-61, 168. The Mu'tazila argued that good and bad are inherent and recognized, but not created by the Divine text. Good and bad are realizable by reason as well as revelation.

main argument against the idea of natural essence or inherent values was that it conflicts with the immutability of God. If moral values have not been generated by an act of Divine creation, then this would mean that there is creation outside of God. Furthermore, if God is bound or obliged to respect certain inherent moral values, this would seem to challenge the absoluteness of God's will and power. Although the idea that an immutable God cannot be bound or limited by moral values seems plausible, it does raise considerable difficulties.

The text of the Qur'an itself uses words such as justice, mercy, and goodness as if they have an objectively discernable quality. The Qur'an does not attempt to define any of these moral values, but it does refer to them as if they are inherently recognizable by human beings. It consistently calls upon people endowed with a healthy intuition [*yatadhakarun*] or balanced rationality [*ya'qilun*] to recognize the existence of such moral values, and to strive to implement them.¹²⁰ But is God bound by the values that God advocates? For instance, the Qur'an states, "God has prescribed mercy upon Himself."¹²¹ Does this mean that mercy, as a concept, existed separate and apart from God, and God then chose to bind Himself by it? Or does it mean that God created a moral value, such as mercy, as binding upon His creatures, but then decided to abide by it Himself? The verse implies that God had the choice either to be merciful or not, and that God chose to be merciful. However, this verse could have various possible connotations, none of which are necessarily conclusive as to the issue of natural rights. For instance, it could be argued that God decreed mercy upon Himself because God recognized that to do otherwise would be immoral.

The classical debate on this issue focused on whether it is possible for God to commit ugliness, the implication being that if God is bound by moral values, then so are human beings.¹²² The issue, for the most part, is resolved by the fact that the

120. See IZUTSU, *supra* note 78; ETHICO-RELIGIOUS CONCEPTS IN THE QUR'AN (1966).

121. QUR'AN 6:12, 54.

122. The Mu'tazila, in particular, contended that God could not commit evil or ugliness. The good is recognizable through reason and revelation, and the two sources of knowledge are always reconcilable. However, good has an objective reality that exists in a state of nature. For two Mu'tazilite classical scholars who make systematic arguments on this issue, see AL-MUHASSIN IBN MUHAMMAD IBN KARRAMAH AL-JUSHUMI AL-BAYHAQI, *RISALAT IBLIS ILA IKHWANIHI AL-MANAHIS* (Hossein Modarressi ed., Dar al-Muntakhab al-'Arabi 1995); MAHMUD IBN MUHAMMAD AL-MALAHIMI AL-KHUWARIZMI,

Qur'an consistently describes God as endowed with moral values, such as beauty, justice, compassion, and mercy. The issue, in my view, is not whether God is bound by moral values, for God is the embodiment of moral values.¹²³ If God embodies moral values, then exploring and seeking to understand the objective reality of morality is part of understanding the objective reality of God. This is an issue of crucial importance, and so it deserves to be restated and emphasized. God, in my view, is not bound by moral virtue: God is the embodiment of moral virtue and beauty, while moral virtues are inherent to the very concept of divinity. If God describes God's self as just or merciful, then God is so. In my view, God's moralities and virtues are inseparable from God, and they are unalterable because God is unalterable. As such, God's morality is binding on all in the same way that God is present for all. Divinity is approached, in my view, through studying the Divine moral imperatives and not the rules of law, because morality is prior to law in the same way that God is prior to anything, including the text or the law.¹²⁴ Therefore, I would argue that inalienable human rights exist not in a state of nature, but by the fact or reality of divinity of creation. In other words, such rights are derived not from the law of nature, but the law of creation, which is the product of the Divine design. By asserting, for instance, that God is merciful and compassionate, the text can and does help human beings understand the law of creation.

However, there is no reason to assume that the text is the only means for attaining such a comprehension. In fact, the Qur'anic text, by urging people to reflect upon creation and by inviting them to utilize their rational faculties, clearly recognizes

KITAB AL-MU'TAMAD FI USUL AL-DIN (Martin McDermott & Wilfred Madelung eds., Al-Hoda 1991).

123. I would argue that moral values, whether one considers them as characteristics or as part of the essence of God, are inseparable from the manifestation of Godliness. In order to understand God, one must understand the moral values that are either at the essence of God or characterize God. Put differently, to know morality is to know God. The law as found in the Divine text is one possible manifestation of God, but it is not all-inclusive of the reality of God. Therefore, an inquiry into moral values – an inquiry into the reality of God – cannot be limited to the Divine text, which is a partial, albeit important, manifestation of God.

124. In my view, the primary commitment of a Muslim should be to God and God's moral essence, and not to the specific rules of law. Therefore, if there is a conflict between the morality of a legal rule and our moral conception of God, the latter must take priority.

that the text is not the only means for understanding creation or divinity. It is important to understand that the text is a part, and not the whole, of creation, and that the part cannot be treated as if it could abrogate the whole or render it irrelevant.¹²⁵ Instincts, intuitions, and reasoning processes of human beings, as well as the objectively observable laws of nature, are all a part of the Divine creation as well, and there is no reason to grant the text a decisive and exclusive veto power over all other means to comprehending creation. Doing so assumes that the text, which is realizable only through subjective interpretation, is necessarily a more reliable means to realizing the Divine or to understanding creation. As far as the text is concerned, it is of crucial significance to differentiate between texts that explain creation and texts that attempt to organize creation. The former inform the seeker about the nature of divinity and educate on the laws of creation, while the latter administrate an aspect of creation within time and space limitations.

For instance, foundational texts that educate human beings on dignity, mercy, diversity, and justice as Divine natures and moral imperatives are quite different from organizational texts that specify what ought to be done in a case of divorce or in a situation involving commercial contracts. The first set of texts elucidates the laws of creation, while the second set of texts explains the laws of society within a particular time and space dimension. In addition, the first set of texts is subject to a process of moral interpretation, while the second set of texts is subject to legal interpretations.

It is reasonable to argue that legal interpretations must fulfill and not negate moral interpretation. In this sense, interpretations of the law of creation, in which the rights of individuals are found, are first in the order of interpretations of the laws of organization, and they ought to be the standard by which legal interpretations are evaluated, rejected, or adopted. According to this conceptual framework, the inherent and fundamental rights of human beings that cannot be waived or denied through legal interpretation, even if based on text, are those immunities and entitlements that, after reflecting upon divinity, creation,

125. I am assuming that textual law is always a product of interpretation. In other words, I am assuming that the text, Divine or not, never speaks for itself — the text always manifests meaning through the negotiative agency of the reader of the text.

and foundational texts, human rational faculties are able to conclude are mandated by the very act of creation, the need to investigate creation, and the necessity of bearing full responsibility for one's agency before God. Pursuant to this paradigm, I do not think it would be difficult to defend the right to think and study, the right to believe and to speak, the right to be free from molestation or assault, and the right to shelter and food as basic and fundamental Islamic, human, and individual rights.

IX. DEMOCRACY AND THE ISLAMIC STATE

In the modern age, a large number of commentators have grown comfortable with the habit of enumerating a list of Islamic concepts, such as *shura*, the contract of the Caliphate, *bay'a*, and the supremacy of Shari'ah, and then concluding that Islam is compatible with democracy. In my view, these types of vacuous approaches are the product of intellectual torpor induced by the rather abysmal fortunes of the Islamic heritage in the modern age. Islamists who have pursued this superficial and apologetic method of dealing with the challenge of democracy in the modern age have done so largely in reaction to internal calls for the full-fledged adoption of secularism in Muslim societies. For these Islamists, secularism has come to symbolize a misguided belief in the supremacy of rationalism over faith and a sense of hostility to religion as a source of guidance in the public sphere. In fact, secularism is seen as originating from Westernized intellectuals who were themselves not religious and who sought to minimize the role of Islam in public life. As such, secularism, known as *'ilmaniyah*, is often treated as a part of the Western intellectual invasion of the Muslim world, both in the period of Colonialism and post-Colonialism — an invasion that is more insidious and dangerous than the Christian Crusades.¹²⁶

While I do disagree with these reactive accusations against the secularist paradigm, I do agree that secularism has become an unworkable and unhelpful symbolic construct. To the extent that the secular paradigm relies on a belief in the guidance-value

126. See generally TARIQ BISHRI, *AL-HIWAR AL-ISLAMI AL-'ALMANI* (Dar al-Shuruq 1996); MUHAMMAD GHAZALI, *AL-GHAZW AL-THAQAFI YAMTADDU FI FARAGHINA* (Dar al-Shuruq 1998); MUHAMMAD JALAL KISHK, *AL-GHAZW AL-FIKRI* (al-Mukhtar al-Islami 1975); YUSUF QARADAWI, *AL-ISLAM WA-AL-'ALMANIYAH WAJHAN LI-WAJH* (Mu'assasat al-Risalah 1997); SALAH SAWI, *MUWAJAHAH BAYNA AL-ISLAM WA-AL-'ALAMANIYAH* (al-Afaq al-Dawliyah lil-I'lam 1993); TAHAFUT AL-'ALMANIYAH (al-Afaq al-Dawliyah lil-I'lam 1992).

of reason as a means for achieving utilitarian fulfillment or justice, it is founded on a conviction that is not empirically or morally verifiable. One could plausibly believe that religion is an equally valid means of knowing or discovering the means to happiness or justice.¹²⁷ In addition, given the rhetorical choice between allegiance to the Shari'ah and allegiance to a secular democratic State, quite understandably most devout Muslims will make the equally rhetorical decision to ally themselves with Shari'ah. But beyond the issue of symbolism, as noted earlier, there is a considerable variation in the practice of secularism. It is entirely unclear to what extent the practice of secularism requires a separation of church and State, especially in light of the fact that there is no institutional church in Islam. Put differently, to what extent does the practice of secularism mandate the exclusion of religion from the public domain, including the exclusion of religion as a source of law?¹²⁸

The fact that secularism is a word laden with unhelpful connotations in the Islamic context should not blind us to the seriousness of the concerns that secularists have about a political order in which Shari'ah is given deference or made supreme. Shari'ah enables human beings to speak in God's name, and it effectively empowers human agency with the voice of God. This is a formidable power that is easily abused, and therefore, it is argued, that secularism is necessary to avoid the hegemony and abuse of those who pretend to speak for God. The challenge this poses for a democratic order is considerable because Shari'ah is a construct of limitless reach and power, and any institution that can attach itself to that construct becomes similarly empowered. Yet, Islamists and secularists often ignore the his-

127. See generally MILNER S. BALL, *THE WORLD AND THE LAW* (1993); HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); *SECULARIZATION AND SPIRITUALITY* (Christian Duquoc ed., 1969); FINNIS, *supra* note 111; TIMOTHY L. FORT, *LAW AND RELIGION* (1987); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); SEYED HOSSEIN NASR, *ISLAM AND THE PLIGHT OF MODERN MAN* (1975).

128. The literature on the history, theory, and practices of secularism is vast. Most theoretical treatments understandably have remained wedded to the Western historical experience. See, e.g., HARVEY COX, *THE SECULAR CITY: SECULARIZATION AND URBANIZATION IN THEOLOGICAL PERSPECTIVE* (1965); HORACE M. KALLEN, *SECULARISM IS THE WILL OF GOD: AN ESSAY IN THE SOCIAL PHILOSOPHY OF DEMOCRACY AND RELIGION* (1954); BLANDINE KRIEDEL, *THE STATE AND THE RULE OF LAW* 123-34 (1995); DANIEL CALLAHAN, *THE SECULAR CITY DEBATE* (1966).

torical facts that the *'ulama*, until the modern age, never assumed power directly and that Islamic law was centralized and codified only when it came under the influence of the French Civil Law system. Until the Ottoman Empire, no State succeeded in adopting a particular school of law as the law of the State. Even after the Ottomans adopted Hanafism as the official school of the State, they never managed to enforce Hanafism to the exclusion of the others. The very idea of a centralized and codified Shari'ah law was instigated by jurists who, educated in the Civil law system, sought to reform and modernize Islamic law by making it more adaptable to the needs of the modern Nation-State. Nevertheless, it is important to realize that Shari'ah law, as a codified State-sponsored set of positive commands, is a serious break with tradition and a radical departure from the classical epistemology of Islamic law.

In order to engage in a more nuanced discourse on the dynamics between the Shari'ah and the State, we must develop a more sophisticated understanding of Shari'ah itself. I have reserved this issue until the end because it was necessary to establish a sufficient foundation before engaging this topic. As part of this foundation, it is important to appreciate the centrality of Shari'ah in Muslim life. The pre-modern jurist Ibn Qayyim appropriately captures this sentiment in the following statement describing Shari'ah:

The Shari'ah is God's justice among His servants and His mercy among His creatures. It is God's shadow on this earth. It is His wisdom which leads to Him in the most exact way and the most exact affirmation of the truthfulness of His Prophet. It is His light which enlightens the seekers and His guidance for the rightly guided. It is the absolute cure for all ills and the straight path which if followed will lead to righteousness It is life and nutrition, the medicine, the light, the cure and the safeguard. Every good in this life is derived from it and achieved through it, and every deficiency in existence results from its dissipation. If it had not been for the fact that some of its prescriptions remain [in this world], this world would become corrupted and the universe would be dissipated If God would wish to destroy the world and dissolve existence, He would void whatever remains of its injunctions. For the Shari'ah which was sent to His Prophet . . . is the pillar of existence and the key to success in this world and

the Hereafter.¹²⁹

Shari'ah is God's Way; it is represented by a set of normative principles, methodologies for the production of legal injunctions, and a set of positive legal rules. As is well known, Shari'ah encompasses a variety of schools of thought and approaches, all of which are equally valid and equally orthodox.¹³⁰ Nevertheless, Shari'ah as a whole, with all its schools and various points of view, remains the way and law of God. The Shari'ah, for the most part, is not explicitly dictated by God. Rather, Shari'ah relies on the interpretive act of the human agent for its production and execution. Paradoxically, however, Shari'ah is the core value that society must serve. The paradox here is exemplified in the fact that there is a pronounced tension between the obligation to live by God's law and the fact that this law is manifested only through subjective interpretive determinations. Even if there is a unified realization that a particular positive command does express the Divine law, there is still a vast array of possible subjective executions and applications. This dilemma was resolved, somewhat, in Islamic discourses by distinguishing between Shari'ah and *fiqh*. Shari'ah, it was argued, is the Divine ideal, standing as if suspended in mid-air, unaffected and uncorrupted by the vagaries of life. The *fiqh* is the human attempt to understand and apply the ideal. Therefore, Shari'ah is immutable, immaculate, and flawless — *fiqh* is not.¹³¹

As part of the doctrinal foundations for this discourse,

129. 3 IBN QAYYIM AL-JAWZIYAH, *supra* note 50, at 3. On the Shari'ah and competing comprehensive views of a moral life, see El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525, 1525-42 (1996).

130. The four surviving Sunni schools of law and legal thought are the Hanafi, Maliki, Shafi'I, and Hanbali schools. For a discussion of the history of these schools, as well as those that are not extinct, such as the Tabari and Zahiri schools, see CHRISTOPHER MELCHERT, *THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9TH-10TH CENTURIES C.E.* (1997). For a discussion of the organization, structure, and curriculum of learning, see GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* (1981).

131. I am simplifying this sophisticated doctrine in order to make a point. Muslim jurists engaged in lengthy attempts to differentiate between the two concepts of Shari'ah and *fiqh*. See MAHMASANI, *supra* note 96, at 21-24, 199-200; WEISS, *supra* note 104, at 119-21; ABU ZAHRA, *supra* note 91, at 291; MUSTAFĀ ZAYD, *AL-MASLAHAH FI AL-TASHRI' AL-ISLAMI WA-NAJM AL-DIN AL-TUFI* (2d ed., Dar al-Fikr al-'Arabi 1964); YUSUF HAMID 'ALIM, *AL-MAQASID AL-'AMMAH LIL-SHARI'AH AL-ISLAMIYAH* (Int'l Inst. Islamic Thought 1991); MUHAMMAD IBN 'ALI SHAWKANI, *TALAB AL-'ILM WA TABAQAT AL-MUTA'ALLIMIN: ADAB AL-TALAB WA MUNTAHI AL-'ARAB* 145-51 (Dar al-Arqam 1981).

Sunni jurists focused on the tradition attributed to the Prophet stating: "Every *mujtahid* (jurist who strives to find the correct answer) is correct," or "Every *mujtahid* will be [justly] rewarded."¹³² This implied that there could be more than a single correct answer to the same exact question. For Sunni jurists, this raised the issue of the purpose or the motivation behind the search for the Divine will. What is the Divine purpose behind setting out indicators to the Divine law and then requiring that human beings engage in a search? If the Divine wants human beings to reach *the* correct understanding, then how could every interpreter or jurist be correct? The juristic discourse focused on whether or not the Shari'ah had a determinable result or demand in all cases and, if there is such a determinable result, are Muslims obligated to find it? Put differently, is there a correct

132. The Arabic is "*kull mujtahid musib*" and "*li kull mujtahid nasib*." See 2 MUHAMMAD IBN 'ALI BASRI, *AL-MU'TAMAD FI USUL AL-FIQH* 370-72 (Dar al-Kutub al-'Ilmiyah 1983); 4 'ABD AL-'AZIZ IBN AHMAD BUKHARI ET AL., *KASHF AL-ASRAR 'AN USUL FAKHR AL-ISLAM AL-BAZDAWI* 30-55 (3d ed., Dar al-Kitab al-'Arabi 1997); 2 GHAZZALI, *AL-MUSTASFA*, *supra* note 91, at 363-67; 'ABD AL-MALIK IBN 'ABD ALLAH IMAM AL-HARAMAYN AL-JUWAYNI, *KITAB AL-IJTIHAD MIN KITAB AL-TALKHIS* 26-32 (Dar al-Qalam 1987); 5 'ALI IBN AHMAD IBN HAZM, *AL-IHKAM FI USUL AL-AHKAM* 68-81 (Dar al-Hadith 1984) [hereinafter IBN HAZM, *AL-IHKAM*]; 8 IBN HAZM, *AL-IHKAM*, *supra*, at 589-92; 4 TAQI AL-DIN MUHAMMAD IBN AHMAD IBN AL-NAJJAR, *SHARH AL-KAWKAB AL-MUNIR AL-MUSAMMA BI-MUKHTASAR AL-TAHRIR, AW, AL-MUKHTABAR AL-MUBTAKAR SHARH AL-MUKHTASAR FI USUL AL-FIQH* 488-92 (Maktabat al-'Ubaykan 1993); ABU BAKR AHMAD IBN 'ALI KHATIB AL-BAGHDADI, *KITAB AL-FAQIH WA-AL-MUTAFAQQIH WA-USUL AL-FIQH* 245-50 (Zakariya 'Ali Yusuf 1977); MAHMUD IBN ZAYD LAMISHI & 'ABD AL-MAJID TURKI, *KITAB FI USUL AL-FIQH* 201-02 (Dar al-Gharb al-Islami 1995); IQRAH, *SHARH, supra* note 91, at 438-41; 6 RAZI, *AL-MAHSUL*, *supra* note 91, at 29-36; MUHAMMAD IBN 'ALI SHAWKANI, *IRSHAD AL-FUHUL ILA TAHQIQ AL-HAQQ MIN 'ILM AL-USUL* 383-89 (Dar al-Kutub al-'Ilmiyah n.d.); 2 ABU ISHAQ IBRAHIM IBN 'ALI IBN YUSUF FIRUZABADI AL-SHIRAZI, *SHARH AL-LUMA* 1043-71 ('Abd al-Majid Turki ed., Dar al-Gharb al-Islami 1988); ABU ISHAQ IBRAHIM IBN 'ALI IBN YUSUF FIRUZABADI AL-SHIRAZI & MUHAMMAD HASAN HAYTU, *AL-TABSIRAH FI USUL AL-FIQH* 496-508 (Dar al-Fikr 1980) [hereinafter SHIRAZI, *AL-TABSIRAH*]. In this context, Sunni jurists also debated a report attribute to the Prophet in which he says "whoever performs *ijtihad* and is correct will be rewarded twice and whoever is wrong will be rewarded once." See JALAL AL-DIN 'ABD AL-RAHMAN AL-SUYUTI, *IKHTILAF AL-MADHAHIB* 38 ('Abd al-Qayyum Muhammad Shafi' al-Bastawi ed., Dar al-I'tisam n.d.); 5 IBN HAZM, *AL-IHKAM*, *supra*, at 73-74; 8 IBN HAZM, *AL-IHKAM*, *supra*, at 591; AL-NUBADH *FI USUL AL-FIQH AL-ZAHIRI* 119-20 (Muhammad Subhi Hasan Hallaq ed., Dar Ibn Hazim 1993); IBN AL-QASSAR & MUHAMMAD IBN AL-HUSAYN SULAYMANI, *AL-MUQADDIMAH FI AL-USUL* 114-15 (Dar al-Gharb al-Islami 1996); 4 MAHFUZ IBN AHMAD KALWADHANI, *AL-TAMHID FI USUL AL-FIQH* 317-18 (Muhammad b. 'Ali b.Ibrahim ed., Markaz al-Bahth al-'Ilmi wa-Ihya' al-Turath al-Islami 1985); QARAFI, *SHARH, supra* note 91, at 440; MUHAMMAD IBN IDRIS SHAFI', *AL-RISALAH* 494 (Ahmad Muhammad Shakir ed., n.d.); SHIRAZI, *AL-TABSIRAH*, *supra*, at 499; MUHAMMAD IBN 'ABD AL-HAMID USMANDI, *BADHL AL-NAZAR FI AL-USUL* 702-03 (Muhammad Zaki'Abd al-Barr ed., Maktabat Dar al-Turath 1992).

legal response to all legal problems, and are Muslims charged with the legal obligation of finding that response? The overwhelming majority of Sunni jurists agreed that good faith diligence in searching for the Divine Will is sufficient to protect a researcher from liability before God.¹³³ As long as the reader exercises due diligence in the search, the researcher will not be held liable nor incur a sin regardless of the result.

Beyond this, the jurists were divided into two main camps. The first school, known as the *mukhatti'ah*, argued that ultimately there is a correct answer to every legal problem. However, only God knows what the correct response is, and the truth will not be revealed until the Final Day. Human beings, for the most part, cannot conclusively know whether they have found that correct response. In this sense, every *mujtahid* is correct in trying to find the answer. However, one reader might reach the truth while the others might mistake it. God, on the Final Day, will inform all readers who was right and who was wrong. Correctness here means that the *mujtahid* is to be commended for putting in the effort, but it does not mean that all responses are equally valid.

The second school, known as the *musawwibah*, included prominent jurists such as al-Juwayni, Jalal al-Din al-Suyuti (d. 911/1505), al-Ghazali (d. 505/1111) and Fakhr al-Din al-Razi (d. 606/1210), and it is reported that the Mu'tazilah were followers of this school as well.¹³⁴ The *musawwibah* argued that there is no specific and correct answer [*hukm mu'ayyan*] that God wants human beings to discover, in part, because if there were a correct answer, God would have made the evidence indicating a Di-

133. This juristic position is to be distinguished from the early theological school of the Murji'a (Murji'ites) of suspension of judgment. The Murji'a developed in reaction to the fanaticism of the Khawarij, who believed that the commission of a major sin renders a Muslim a non-believer. The Murji'a believed that major sins are offset by faith, and argued that punishment in the Hereafter is not everlasting. They also refused to take a position on political disputes, arguing that judgment over any political dispute ought to be suspended until the Final Day. See, A.J. Wensinck, *Al-Murjii'a*, in *SHORTER ENCYCLOPEDIA OF ISLAM* 412 (H.A.R. Gibb & J.H. Kramers eds., 1961). Most of the jurists I am describing did not adhere to Murji'ite theology.

134. For discussions of the two schools, see 4 BUKHARI, KASHF, *supra* note 132, at 18; ABU HAMID MUHAMMAD IBN MUHAMMAD AL-GHAZZALI, *AL-MANKHUL MIN TA'LIQAT AL-USUL* 455 (Dar al-Fikr 1980); 2 AL-MUSTASFA 550-51; 2 FAKHR AL-DIN MUHAMMAD IBN 'UMAR RAZI, *AL-MAHSUL FI 'ILM USUL AL-FIQH* 500-08 (Dar al-Kutub al-'Ilmiyah 1988); QARAFI, SHARH, *supra* note 91, at 438; ZUHAYLI, *supra* note 91, at 638-55; HASAB ALLAH, *supra* note 92, at 82-83; BADRAN, *supra* note 92, at 474.

vine rule conclusive and clear. God cannot charge human beings with the duty to find the correct answer when there is no objective means to discovering the correctness of a textual or legal problem. If there were an objective truth to everything, God would have made such a truth ascertainable in this life. In most circumstances, legal truth or correctness depends on belief and evidence, and the validity of a legal rule or act is often contingent on the rules of recognition that provide for its existence. Human beings are not charged with the obligation of finding some abstract or inaccessible legally correct result. Rather, they are charged with the duty to diligently investigate a problem and then follow the results of their own *ijtihad*. Al-Juwayni explains this point by asserting: "The most a *mujtahid* would claim is a preponderance of belief (*ghalabat al-zann*) and the balancing of the evidence. However, certainty was never claimed by any of them (the early jurists) If we were charged with finding [the truth] we would not have been forgiven for failing to find it."¹³⁵

According to al-Juwayni, what God wants or intends is for human beings to search and to live a life fully and thoroughly engaged with the Divine. Al-Juwayni explains that it is as if God has said to human beings: "My command to My servants is in accordance with the preponderance of their beliefs. So whoever preponderantly believes that they are obligated to do something, acting upon it becomes My command."¹³⁶ God's command to human beings is to diligently search, and God's law is suspended until a human being forms a preponderance of belief about the law. At the point that a preponderance of belief is formed, God's law becomes, in accordance with the preponderance of belief, formed by that particular individual. In summary, if a person honestly and sincerely believes that such and such is the law of God, then, as to that person that is in fact God's law.¹³⁷

The position of the *musawwibah*, the second school raises

135. AL-JUWAYNI, *supra* note 132, at 50-51.

136. *Id.* at 61.

137. See 4 SAYF AL-DIN ABU AL-HASAN ET AL, AL-IHKAM FI USUL AL-AHKAM 183 (Abd al-Razzaq 'Afifi ed., 2d ed., al-Maktab al-Islami 1402 AH); JAMAL AL-DIN ABI MUHAMMAD 'ABD AL-RAHIM B. AL-HASAN AL-ASNAWI, AL-TAMHID FI TAKHRIJ AL-FURU' 'ALA AL-USUL 531-34 (3d ed., n.p. 1984); 3 MUHAMMAD B. AL-HASAN AL-BADAKHSHI, SHARH AL-BADAKHSHI MANAHIJ AL-'UQUL MA'A SHARH AL-ASNAWI NIHAYAT AL-SUL 275-81 (1984); 2 ABU HAMID AL-GHAZZALI, *supra* note 91, at 375-78; AL-JUWAYNI, *supra* note 132, at 41; MAHMUD B. ZAYD AL-LAMISHI, *supra* note 132, at 202-03; QARA'FI, SHARH, *supra* note 91, at 440; 6

difficult questions about the application of the Shari'ah in society.¹³⁸ This position implies that God's law is to search for God's law; otherwise, the legal charge [*taklif*] is entirely dependent on the subjectivity and sincerity of belief. The first school (i.e., the *mukhatti'ah*) indicates that whatever law is applied is potentially God's law, but not necessarily so.¹³⁹ This raises the question: is it possible for any State-enforced law to be God's law? Under the first school of thought, whatever law the State applies is only potentially the law of God. We will not find out until the Final Day. Under the second school of thought, any law applied by the State is *not* the law of God unless the person, to which the law applies, believes the law to be God's will and command. The first school suspends knowledge until we are finished living, and the second school hinges knowledge on the validity of the process and ultimate sincerity of belief.

Building upon this intellectual heritage, I suggest Shari'ah ought to stand in an Islamic polity as a symbolic construct for the Divine perfection that is unreachable by human effort. As Ibn Qayyim stated, it is the epitome of justice, goodness, and beauty as conceived and retained by God. Its perfection is preserved, so to speak, in the Mind of God, but anything that is channeled through human agency is necessarily marred by human imperfection. Put differently, Shari'ah as conceived by God is flawless, but as understood by human beings, Shari'ah is imperfect and contingent. Jurists should continue exploring the ideal of Shari'ah and expounding their imperfect attempts at understanding God's perfection. As long as the argument constructed is normative, it is an unfulfilled potential for reaching the Divine Will. Significantly, any law applied is necessarily a potential unrealized. Shari'ah is not simply a collection of *ahkam* [a set of positive rules], but also a combination of principles, methodology, and a discursive process that searches for the Divine ideals. As such, Shari'ah is a work in progress that is never complete.

FAKHR AL-DIIN AL-RAZI, *supra* note 91, at 34-35, 43-50; SHA'BAN, *supra* note 91, at 418-19; BADRAN, *supra* note 92, at 474; ZUHAYLI, *supra* note 91, at 643.

138. See SPEAKING IN GOD'S NAME, *supra* note 20 (discussing the two schools of thought more extensively).

139. I am ignoring in this context the role of *ijma'* [consensus] because of the complexity of the subject. Some modern Muslims have argued that the doctrine of consensus is the normative equivalent of majority rule. I think this is a gross over simplification, and, in any case, majority rule is not the same as a constitutional democracy that defers to majority determinations unless they violate fundamental rights.

More specifically, a juristic argument about what God commands is only potentially God's law, either because in the Final Day we will discover its correctness (the first school), or because its correctness is contingent on the sincerity of belief of the person who decides to follow it (the second school).

If a legal opinion is adopted and enforced by the State, it cannot be said to be God's law. By passing through the determinative and enforcement processes of the State, the legal opinion is no longer simply a potential: it has become an actual law, applied and enforced. However, the law applied and enforced is not God's law; instead, it is the State's law. Effectively, a religious State law is a contradiction in terms. Either the law belongs to the State or it belongs to God, and as long as the law relies on the subjective agency of the State for its articulation and enforcement, any law enforced by the State is necessarily not God's law. Otherwise, we must be willing to admit that the failure of the law of the State is, in fact, the failure of God's law and, ultimately, God Himself. In Islamic theology, this possibility cannot be entertained.¹⁴⁰

Of course, the most formidable challenge to this position is the argument that God and His Prophet have set out clear legal injunctions that cannot be ignored. Arguably, God provided unambiguous laws precisely because God wished to limit the role of human agency and foreclose the possibility of innovations. However, there is a two-part response to this argument. Regardless of how clear and precise the statement of the Qur'an and Sunnah, the meaning derived from these sources is negotiated through human agency. For example, the Qur'an states, "As to the thief, male or female, cut off (*faqta'u*) their hands as a recompense for that which they committed, a punishment from God, and God is all-powerful and all-wise."¹⁴¹ Although the legal import of the verse seems to be clear, at a minimum, it requires that human agents struggle with the meaning of "thief," "cut off," "hands,"

140. Contemporary Islamic discourses suffer from a certain amount of hypocrisy in this regard. Often, Muslims confront an existential crisis if the enforced, so-called, Islamic laws result in social suffering and misery. In order to solve this crisis, Muslims will often claim that there has been a failure in the circumstances of implementation. This indulgence in embarrassing apologetics could be avoided if Muslims would abandon the incoherent idea of Shari'ah State law.

141. QUR'AN 5:38.

and “recompense.”¹⁴² Dealing with the fact of human agency, the question is: whatever the meaning generated from the text, can the human agent claim with absolute certainty that the determination reached is identical to God’s? Furthermore, even assuming that the issue of meaning is resolved, can the law be enforced in such a fashion that one can claim that the result belongs to God? God’s knowledge and justice are perfect, but it is impossible for human beings to determine or enforce the law in such a fashion that the possibility of a wrongful result is entirely excluded. This does not mean that the exploration of God’s law is pointless. It only means that the interpretations of jurists are potential fulfillments of the Divine will, and the laws as codified and implemented by the State cannot be considered as the actual fulfillment of these potentialities.

Institutionally, it is consistent with the Islamic experience that the *‘ulama* can and do play the role of the interpreters of the Divine word, the custodians of the moral conscience of the community, and the curators reminding and pointing the nation towards the Ideal that is God.¹⁴³ However, the law of the State, regardless of its origins or basis, belongs to the State. It bears emphasis that under this conception, there are no religious laws that can or may be enforced by the State. The State may enforce the prevailing subjective commitments of the community (the second school), or it may enforce what the majority believes to be closer to the Divine Ideal (the first school). In either case, what is being enforced is not God’s law. This means that all laws articulated and applied in a State are thoroughly human, and should be treated as such. Hence, any codification of Shari‘ah law produces a set of laws that are thoroughly human. These laws are a part of Shari‘ah law only to the extent that any set of human legal opinions can be said to be a part of Shari‘ah. A code, even if inspired by Shari‘ah, is not Shari‘ah: a code is simply a set of positive commandments that were informed by an

142. The Qur’an uses the expression *iqta’u*, from the root word *qata’a*, which could mean to sever or cut off, but it could also mean to deal firmly, to bring to an end, to restrain, or to distance oneself from. See 11 ‘ALLAMAH IBN MANZUR, *LISAN AL-‘ARAB* 220-28 (Dar al-Thabat 1997). Ahmed Ali argues that the word used in the Qur’an does not mean to amputate a limb, but means to “stop their hands from stealing by adopting deterrent means” AHMAD ALI, *AL-QUR’AN* 113 n.2 (1993). Classical jurists placed conditions that were practically impossible to fulfill before a limb could be amputated.

143. This proposal is nonsense unless the *‘ulama* regain their institutional and moral independence.

ideal, but the positive commandments do not represent the ideal. Put differently, creation, with all its textual and non-textual richness can and should produce foundational rights and organizational laws that honor and promote the foundational rights, but the rights and laws produced do not mirror the perfection of Divine creation.

According to this paradigm, democracy is an appropriate system for Islam because it denies the State the pretense of divinity. Moral educators have a serious role to play because they must be vigilant in urging society to approximate God, but not even the will of the majority can come to embody the full majesty of God. Under the worst circumstances, if those individuals in the majority are not persuaded and insist upon turning away from God, as long as they respect the fundamental rights of individuals, including the right to ponder creation and call to the way of God, they will have to answer only to God in the Hereafter.