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Islam and the Challenge of Democracy†

Excerpt from:

Dr. Khaled Abou El Fadl*

Like the well-known Muslim historian and sociologist Ibn Khaldun (d. 784/1382), 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. The first, such a jurist would have described as a natural system—a system that approximates a primitive state of nature. This is an uncivilized system of lawlessness and anarchy in which the most powerful in society dominates and tyrannizes the rest. In such a system, instead of law, there would be custom, and instead of government, there would be tribal elders that are respected and obeyed only as long as they remained the strongest and the most physically able. The second system would be described as dynastic, which according to Muslim jurists, are tyrannical as well. Such systems are based not on custom, but on laws issued by a king or prince. However, according to Muslim jurists, such a system would be illegitimate as well. Because the king or prince is the source of the law, the system is considered baseless, whimsical, and capricious. In such a system, people obey laws out of necessity or compulsion, but the laws themselves are illegitimate and tyrannical. The third system, and the most superior, is the Caliphate, which is based on Shari'ah law. Shari'ah law, according to Muslim jurists, fulfills the criteria of justice and legitimacy, and binds the governed and governor alike. 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.[1]

Many Muslim scholars, like Ibn Khaldun, consistently made the same assumption: the Islamic political system was considered as if a challenge to the world. While all other polities are doomed to despotic governance, and their laws are individualistic and whimsical, the Caliphate system of governance is superior because it is based on the rule of law.[2] 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 government. 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 there are limits on the reach of power. So, 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.[3] Ibn al-Jawzi elaborated upon this by contending that, without the rule of Shari'ah, under the guise of political expediency or interests, a ruler may justify the murder of innocent Muslims. 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.[4]

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 principles 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 is no longer in this day and age, by itself, sufficient for proving the merit of a particular system of governance. 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 the sovereign are 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 is tolerant of the other, open to disagreement,

amenable to change, and that 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 really never 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.[5] Similarly, it is possible for a government to implement the rules and regulations of Islamic law without being, in any real sense, Islamic.[6] What define 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 governance. However, saying this is akin to asserting that there are raw materials that could be utilized to manufacture finished products. But without the 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.

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. Arguably, 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 the only reason that some Muslims seek to establish a democratic system of governance is 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 Qur'anically ordained values are: the promotion of social cooperation and mutual assistance in pursuit of justice,[7] the establishment of a consultative and non-autocratic method of governance,[8] and the institutionalization of mercy and compassion in social interactions.[9] 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, and, in this regard, it could 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.[10] 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. Either we ought to deny everyone the authority to speak on God's behalf, or we endow everyone with that authority—either we allow no human being to be vested with the divine power, or we vest everyone with such a power. 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 later 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 representatives of divinity. In addition, a democratic system offers the greatest possibility for accountability, and for 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, irregardless

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.

…It is important to acknowledge that regardless of the practical merits identified, there are serious conceptual challenges that stand as if an obstacle to a democratic commitment in Islam namely, 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. This requires that we 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 have tended to be either apologetic and defensive, or nationalistic and rejectionist, but both responses remained largely reactive. Muslim apologists, primarily as a means of emphasizing the compatibility of Islam with modernity, tended to claim that democracy already exists in Islam. Typically, they maintained that the Qur'an is the functional equivalent of a constitution, and also tended to recast the early history of Islam as if it were an ideal democratic experience. Apologists defended the public image of Islam by indulging in anachronisms, often pretending as if the Prophet was sent to humanity in order 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 proposition 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 we find that many of the apologists, for instance, were affiliated with the Muslim Brotherhood movement in Egypt, or with some other religio-political movement in the Muslim world. 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 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. This is because, for these organizations, democracy is affirmed politically, but not believed or internalized ethically.[11]

The second main response in modern Islam has been to insist that the Islamic political system is different and unique, and to argue 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 governance 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.[12] 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 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. 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, they insist that the West does not really have it, and Muslims ought not pursue it. Importantly, however, what the adherents of this approach claim to be of essence 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 a 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 willing to undertake the type of critical re-appraisal 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 jump from that assertion to the conclusion that the adoption of democracy ought not pose any serious obstacles because of the primacy of deference to public interest in Islamic jurisprudence. The fact is that such reformers have also tended 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 offered its services, as effectively, to democrats and despots alike. Between 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…

Democracy and the Islamic State

In the modern age, a large number of commentators have grown comfortable with the habit of producing a laundry list of concepts such as *shura* [consultative deliberations], the contract of the Caliphate, the idea of *bay'a* [allegiance or consent to the Caliph] 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 with Westernized intellectuals who were themselves not religious, and who sought to minimize the role of Islam in public life. As such, secularism, known as *'ilmaniyya*, 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.[13]

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 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.[14] 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?[15] But 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 effectively empowers human agency with the voice of God. This is a formidable power that is easily abused, and therefore, it is argued, 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 historical fact 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, and even after the Ottomans adopted Hanafism as the official school of the state, the Ottomans never managed to enforce this school to the exclusion of the others. The very idea of a centralized and codified Shari'ah law was instigated by jurists, educated in the Civil law system, who sought to reform and modernize Islamic law by making it more adaptable to the needs of the modern nation-state. But 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 is 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, it is necessary that we develop a more sophisticated understanding of Shari'ah itself…As part of this foundation, it is important to appreciate the centrality of Shari'ah to 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."[16]

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.[17] Nevertheless, Shari'ah as a whole, with all its schools and variant 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.[18]

As part of the doctrinal foundations for this discourse, 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."[19] 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 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.[20] 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.[21] 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 Divine 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. Legal truth, or correctness, in most circumstances, 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."[22] According to al-Juwayni, what God wants or intends is for human beings to search—to live a life fully and thoroughly engaged with the Divine. Al-Juwayni explains: 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."[23] 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.[24]

The position of the second school (*musawwibah*), in particular, raises difficult questions about the application of the Shari'ah in society.[25] 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 (*mukhatti'ah*) indicates that whatever law is applied is potentially God's law, but not necessarily so.[26] In my view, 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, that law is only potentially the law of God, but 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 done living, and the second school hinges knowledge on the validity of the process and ultimate sincerity of belief.

Building upon this intellectual heritage, I would 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 ought to continue exploring the ideal of Shari'ah, and ought to continue 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 set of principles, methodology, and a discoursive process that searches for the Divine ideals. As such, Shari'ah is a work in progress that is never complete. To put it more concretely, 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. But what has been applied and enforced is not God's law—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.[27]

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 Sunna, 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."[28] Although the legal import of the verse seems to be clear, at a minimum, it requires

that human agents struggle with meaning of "thief," "cut off," "hands," and "recompense."[29] Dealing with the fact of human agency, the question is: Whatever the meaning generated from the text, can the human agent claim that with absolute certainty that the determination reached is identical to God's? A further point is that, 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, but 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.[30] But 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). But, it bears emphasis; 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. This means that 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 ideal, but 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 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 the majority is not persuaded and insists on 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, those individuals who constituted the majority will have to answer, in the Hereafter, only to God. ❖

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1. Nizam Barakat, *Muqaddima fi al-Fikr al-Siyasi al-Islami* (Riyadh: Jami'at al-Malik Su'ud, 1985), 119.

2. See Abu al-Hasan 'Ali b. Muhammad b. Habib al-Mawardi, *al-Ahkam al-Sultaniyya* (Beirut: Dar al-Kutub al-'Ilmiyya, 1985), 19-21; al-Qadi Abu Ya'la Muhammad b. al-Husayn al-Farra', *al-Ahkam al-Sultaniyya* (Beirut: Dar al-Kutub al-'Ilmiyya, 1983), 28; Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), 19; W. Montgomery Watt, *Islamic Political Thought:? The Basic Concepts* (Edinburgh: Edinburgh University Press, 1968), 102-103; Hanna Mikhail, *Politics and Revelation: Mawardi and After* (Edinburgh: Edinburgh University Press, 1995), 20-21; H.A.R. Gibb, "*Constitutional Organization*," in Law in the Middle East, vol. 1, *Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: Middle East Institute, 1955): 3-27, 9, 12; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001); Muhammad Jalal Sharaf and 'Ali 'Abd al-Mu'ti Muhammad, *al-Fikr al-Siyasi fi al-Islam: Shakhsiyyat wa Madhahib* (Alexandria: Dar al-Jami'at al-Misriyya, 1978), 399; Yusuf Ibish, *Nusus al-Fikr al-Siyasi al-Islami: al-Imama 'ind al-Sunna* (Beirut: Dar al-Tali'ah, 1966), 55.

3. Abu al-Faraj al-Baghdadi Ibn al-Jawzi, *al-Shifa' fi Mawa'iz al-Muluk wa al-Khulafa'*, ed. Fu'ad Ahmad (Alexandria: Dar al-Da'wa, 1985), 55; *id*., *al-Misbah al-Mudi' fi al-Khilaf al-Mustadi'*, ed. Ibrahim Najiyya (Baghdad: Matba'at al-Awqaf, 1979), 1:298.

4. Ibn al-Jawzi, *al-Shifa'*, 55, 57; *id*.., *al-Misbah*, 1:298.

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

6. In my view, 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.

7. Qur'an, 49:13; 11:119.

8. I am here referring to the concept of government through *shura*, which is discussed later.

9. Qur'an, 6:12, 54; 21;107; 27:77; 29:51; 45:20.

10. On this, see Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses* (Lanham, Md.: University Press of America, 2001); Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001).

11. For instance, after writing for many years a regular column in an Islamic magazine, my column was suddenly terminated and my work banned because I disagreed with the leadership of the organization that publishes this 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.

12. See his main work on the subject, Abu al-A'la al-Mawdudi, *al-Khilafa wa al-Mulk*, Ahmad Idris, trans. (Kuwait: Dar al-Qalam, 1978), 13-21.

13. For instance, see, Muhammad al-Ghazali, *al-Ghazw al-Fikri wamtadd fi Faraghina* (Cairo: Dar al-Shuruq, 1998); Muhammad Jalal Kishk, *al-Ghazw al-Fikri* (Cairo: al-Mukhtar al-Islami, 1975); Yusuf al-Qaradawi, *al-Islam wa al-'Ilmaniyya* (Beirut: Mu'assasat al-Risalah, 1997); Tariq al-Bishri, *al-Hiwar al-Islami al-'Ilmani* (Cairo: Dar al-Shuruq, 1996); Salah al-Sawi, ed., *Tahafut al-'Ilmaniyya* (Cairo: al-Afaq al-Dawliyya li al-I'lam, 1992); Salah al-Sawi, ed., *al-Muwajaha bayna al-Islam wa al-'Ilmaniyya* (Cairo: al-Afaq al-Dawliyya li al-I'lam, 1992).

14. Christian Duquoc, ed., *Secularization and Spirituality* (New York: Paulist Press, 1969); Sayyed Hossein Nasr, *Islam and the Plight of Modern Man* (London: Longman, 1975); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993); Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta, Georgia: Scholar's Press, 1993); Timothy L. Fort, *Law and Religion* (Jefferson, North Carolina: McFarland & Co., 1987); Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford: Oxford University Press, 1995); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Milner S. Ball, *The World and the Law* (Chicago: University of Chicago Press, 1993).

15. 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, Kriegel, *The State*, 123-134; Horace M. Kallen, *Secularism Is the Will of God: An Essay in the Social Philosophy of Democracy and Religion* (New York: Twayne Publishers, Inc., 1954); Harvey Cox, *The Secular City: Secularization and*

Urbanization in Theological Perspective (New York: Macmillan Co., 1965); Daniel Callahan, ed., *The Secular City Debate* (New York: Macmillan Co., 1966).

16. Ibn Qayyim, *I'lam al-Muwaqqi'in*, vol. 3, 3. On the Shari'ah and competing comprehensive views of a moral life, see Abou El Fadl, "*Muslim Minorities and Self-Restraint in Liberal Democracies*," Loyola of Los Angeles Law Review 29:1525-42 (1996).

17. The four surviving Sunni schools of law and legal thought are the Hanafi, Maliki, Shafi'I, and Hanbali schools. On the history of these schools, as well a those which 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.* (Leiden: Brill, 1997). On the organization, structure, and curriculum of learning, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

18. 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, *Fasafat al-Tashri'*, 21-24, 199-200; Weiss, *Spirit*, 119-121; Abu Zahra, *Usul al-Fiqh*, 291; Mustafa Zayd, *al-Maslaha fi Tashri' al-Islam wa Najm al-Din al-Tufi*, 2nd ed. (Cairo: Dar al-Fikr al-'Arabi, 1964), 22; Yusuf Hamid al-'Alim, *al-Maqasid al-'Ammah li al-Shari'ah al-Islamiyya* (Herndon, Va.: International Institute of Islamic Thought, 1991), 80; ?Muhammad b. 'Ali b. Muhammad al-Shawkani, *Talab al-'Ilm wa Tabaqat al-Muta'allimin: Adab al-Talab wa Muntaha al-'Arab* (n.p.: Dar al-Arqam, 1981), 145-151.

19. The Arabic is "*kull mujtahid musib*" and "*li kull mujtahid nasib*". See, Abu al-Husayn Muhammad b. 'Ali b. al-Tayyib al-Basri, *al-Mu'tamad fi Usul al-Fiqh* (Beirut: Dar al-Kutub al-'Ilmiyya, 1983), 2:370-372; 'Ala' al-Dini 'Abd al-'Aziz b. Ahmadi al-Bukhari, *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi*, ed. Muhammad al-Mu'tasim bi Allah al-Baghdadi, 3rd ed. (Beirut: Dar al-Kitab al-'Arabi, 1997), 4:30-55; Abu Hamid al-Ghazali, *al-Mustasfa*, 2:363-367; Abu al-Ma'ali 'Abd al-Malik b. 'Abd Allah b. Yusuf al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis* (Damascus: Dar al-Qalam, 1987), 26-32; Abu Muhammad 'Ali b. Ahmad b. Sa'id b. Hazm al-Zahiri, *al-Ihkam fi Usul al-Ahkam* (Cairo: Dar al-Hadith, 1984), 5:68-81, 8:589-592; Muhammad b. Ahmad b. 'Abd al-'Aziz b.'Ali al-Fatuhi Ibn al-Najjar, *Sharh al-Kawkab al-Munir al-Musamma Mukhtasar al-Tahrir aw al-Mukhtabar al-Mubtakar Sharh al-Mukhtaasar fi Usul al-Fiqh*, eds. Muhammad al-Zuhayli and Nazir Hammad (Riyadh: Maktabat al-'Ubaykan, 1993), 4:488-492; Abu Bakr Ahmad b. 'Ali b. Thabit al-Khatib al-Baghdadi, *Kitab al-Faqih wa al-Mutafaqqih wa Usul al-Fiqh* (Cairo: Zakariyya 'Ali Yusuf, 1977), 245-250; Abu al-Thana' Mahmud b. Zayd al-Lamishi, *Kitab fi Usul al-Fiqh*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1995), 201-202; al-Qarafi, *Sharh*, 438-441; Fakhr al-Din al-Razi, al-Mahsul (1997), 6:29-36; Muhammad b. 'Ali b. Muhammad al-Shawkani, *Irshad al-Fuhul ila Tahqiq al-Haqq min 'Ilm al-Usul* (Beirut: Dar al-Kutub al-'Ilmiyya,n.d.), 383-389; Abu Ishaq Ibrahim b. 'Ali b. Yusuf al-Fayruzabadi al-Shirazi, *Sharh al-Lum'ah*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1988), 2:1043-1071; *id.*, *al-Tabsirah fi Usul al-Fiqh*, ed. Muhammad Hasan Haytu (Damascus: Dar al-Fikr, 1980), 496-508. In this context, Sunni jurists also debated a report attributed 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 b. Abi Bakr al-Suyuti, *Ikthilaf al-Madhahib*, ed. 'Abd al-Qayyum Muhammad Shafi' al-Bastawi (Cairo: Dar al-I'tisam, 1404 AH), 38; Ibn Hazm, *al-Ihkam*, 5:73-74, 8:591; *id.*, *al-Nubadh fi Usul al-Fiqh al-Zahiri*, ed. Muhammad Subhi Hasan Hallaq (Beirut: Dar Ibn Hazm, 1993), 119-120; Abu al-Hasan 'Ali b. 'Umar Ibn al-Qassar, *al-Muqaddimah fi al-Usul*, ed. Muhammad b. al-Husayn al-Sulaymi (Beirut: Dar al-Gharb al-Islami, 1996), 114-115; Mahfuz b. Ahmad b. al-Hasan Abu al-Khattab al-Kaluzani, *al-Tamhid fi Usul al-Fiqh*, ed. Muhammad b. 'Ali b.Ibrahim (Mecca: Markaz al-Bahth al-'Ilmi wa Ihya' al-Turath al-Islami, 1985), 4:317-318; al-Qarafi, *Sharh*, 440; Abu 'Abd Allah Muhammad b. Idris al-Shafi'I, *al-Risalah*, ed. Ahmad Muhammad Shakir (n.p.: Dar al-Fikr, n.d.), 494; al-Shirazi, *al-Tabsira*, 499; Muhammad b. 'Abd al-Hamid al-Asmandi, *Badhl al-Nazar fi al-Usul*, ed. Muhammad Zaki'Abd al-Barr (Cairo: Maktabat Dar al-Turath, 1992), 702-703.

20. This juristic position is to be distinguished from the early theological school of the Murji'a (Murji'ites) of suspension of judgement. 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-Murdji'a," in S*horter Encyclopedia of Islam*, 412. Most of the jurists I am describing above did not adhere to Murji'ite theology.

21. For discussions of the two schools, see al-Bukhari, *Kashf*, 4:18; Abu Hamid Muhammad b. Muhammad al-Ghazali, *al-Mankhul min Ta'liqat al-Usul* (Damascus: Dar al-Fikr, 1980), 455; idem, *al-Mustasfa*, 2:550-551; Fakhr al-Din Muhammad b. 'Umar b. al-Husayn al-Razi, *al-Mahsul fi 'Ilm al-usul al-Fiqh*

(Beirut: Dar al-Kutub al-'Ilmiyya, 1988), 2:500-508; al-Qarafi, *Sharh*, 438; al-Zuhayli, *al-Wasit*, 638-655; Hasab Allah, *Usul al-Tashri'*, 82-83; Badran, *Usul al-Fiqh*, 474.

22. Al-Juwayni, *Kitab al-Ijtihad*, 50-51.

23. Al-Juwayni, *Kitab al-Ijtihad*, 61.

24. Sayf al-Din Abu al-Hasan 'Ali b. Abi 'Ali b.Muhammad al-Amidi, *al-Ihkam fi Usul al-Ahkam*, ed. 'Abd al-Razzaq 'Afifi, 2nd ed. (Beirut: al-Maktab al-Islami, 1402 AH), 4:183; Jamal al-Din Abi Muhammad 'Abd al-Rahim b. Al-Hasan al-Asnawi, *al-Tamhid fi Takhrij al-Furu' 'ala al-Usul*, 3rd ed. (Beirut: Mu'assasat al-Risalah, 1984), 531-534; Muhammad b. Al-Hasan al-Badakhshi, *Sharh al-Badakhshi Manahij al-'Uqul ma'a Sharh al-Asnawi Nihayat al-Sul* (Beirut: Dar al-Kutub al-'Ilmiyya, 1984), 3:275-281; Abu H amid al-Ghazali, *al-Mustasfa*, 2:375-378; al-Juwayni, *Kitabl al-Ijtihad*, 41; Abu al-Thana' Mahmud b. Zayd al-Lamishi, *Kitab fi Usul al-Fiqh*, ed. 'Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1995), 202-203; al-Qarafi, *Sharh*, 440; Fakhr al-Diin al-Razi, *al-Mahsul* (1997), 6:34-35, 6:43-50; Sha'ban, *Usul al-Fiqh*, 418-419; Badran, *Usul al-Fiqh*, 474; al-Zuhayli, *al-Wasit*, 643.

25. I deal with these two schools of thought more extensively elsewhere, see Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001).

26. 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 at any case, majority rule is not the same as a constitutional democracy that defers to majority determinations unless they violate fundamental rights.

27. 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.

28. Qur'an, 5:38.

29. 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, 'Allamah Ibn Manzur, *Lisan al-'Arab* (Riyadh: Dar al-Thabat, 1997), 11:220-228. 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* (Princeton: Princeton University Press), 113. Classical jurists placed conditions that were practically impossible to fulfill before a limb could be amputated.

30. This proposal is nonsense unless the *'ulama'* regain their institutional and moral independence.