A Muslim jurist writing a few centuries ago on the subject of Islam and government would have commenced his treatise by distinguishing three types of political systems. The first he would have described as a natural system-like a primitive state of nature, an uncivilized, anarchic world where the most powerful tyrannize the rest. Instead of law there would be custom; instead of government there would be tribal elders who would be obeyed only as long as they remained the strongest.

The jurist would then describe a second system, ruled by a prince or king whose word is the law. Because the law is fixed by the arbitrary will of the ruler and the people obey out of necessity or compulsion, this system, too, is tyrannical and illegitimate.

The third and best system would have been the caliphate, based on Shari’ah law – the body of Muslim religious law founded on the Qur'an and the conduct and statements of the Prophet. Shari’ah law, according to Muslim jurists, fulfills the criteria of justice and legitimacy and binds governed and governor alike. Because it is based on the rule of law and thus deprives human beings of arbitrary authority over other human beings, the caliphate system was considered superior to any other.

In espousing the rule of law and limited government, classical Muslim scholars embraced core elements of modern democratic practice. Limited government and the rule of law, however, are only two elements of the system of government with the most compelling claim to legitimacy today. Democracy’s moral power lies in the idea that the citizens of a nation are the sovereign, and-in modern representative democracies-they express their sovereign will by electing representatives. In a democracy, the people are
the source of the law and the law in turn is to ensure fundamental rights that protect the well-being and interests of the individual members of the sovereign.

For Islam, democracy poses a formidable challenge. Muslim jurists argued that law made by a sovereign monarch is illegitimate because it substitutes human authority for God's sovereignty. But law made by sovereign citizens faces the same problem of legitimacy. In Islam, God is the only sovereign and ultimate source of legitimate law. How, then, can a democratic conception of the people's authority be reconciled with an Islamic understanding of God's authority?

Answering this question is extraordinarily important but also extraordinarily difficult, for both political and conceptual reasons. On the political side, it must be said at the outset that democracy faces a number of practical hurdles in Islamic countries-authoritarian political traditions, a history of colonial and imperial rule, and state domination of economy and society. But philosophical and doctrinal questions are important, and I propose to focus on them here as the beginning of a discussion of the possibilities for democracy in the Islamic world.

A central conceptual problem is that modern democracy evolved over centuries within the distinctive context of post-Reformation, market-oriented Christian Europe. Does it make sense to look for points of contact in a remarkably different context? My answer begins from the premise that democracy and Islam are defined in the first instance by their underlying moral values and the attitudinal commitments of their adherents—not by the ways that those values and commitments have been applied. If we focus on those fundamental moral values, I believe, we will see that the tradition of Islamic political thought contains both interpretive and practical possibilities that can be developed into a democratic system. To be sure, these doctrinal potentialities may remain unrealized: without will power, inspired vision, and moral commitment there can be no democracy in Islam. But Muslims, for whom Islam is the authoritative frame of reference, can come to the conviction that democracy is an ethical good, and that the pursuit of this good does not require abandoning Islam.
Democracy and Divine Sovereignty

Although Muslim jurists debated political systems, the Qur'an itself did not specify a particular form of government. But it did identify a set of social and political values that are central to a Muslim polity. Three values are of particular importance: pursuing justice through social cooperation and mutual assistance (Qur'an 49:13; 11:119); establishing a non-autocratic, consultative method of governance; and institutionalizing mercy and compassion in social interactions (6:12, 54; 21:107; 27:77; 29:51; 45:20). So, all else equal, Muslims today ought to endorse the form of government that is most effective in helping them promote these values.

The Case for Democracy

Several considerations suggest that democracy—and especially a constitutional democracy that protects basic individual rights—is that form. My central argument (others will emerge later) is that democracy—by assigning equal rights of speech, association, and suffrage to all—offers the greatest potential for promoting justice and protecting human dignity, without making God responsible for human injustice or the degradation of human beings by one another. A fundamental Qur'anic idea is that God vested all of humanity with a kind of divinity by making all human beings the viceroys of God on this earth: "Remember, when your Lord said to the angels: 'I have to place a vicegerent on earth,' they said: 'Will you place one there who will create disorder and shed blood, while we intone Your litanies and sanctify Your name?' And God said: 'I know what you do not know'" (2:30). In particular, human beings are responsible, as God's viceroys, for making the world more just. By assigning equal political rights to all adults, democracy expresses that special status of human beings in God's creation and enables them to discharge that responsibility.

Of course God's viceregent does not share God's perfection of judgment and will. A constitutional democracy, then, acknowledges the errors of judgment, temptations, and vices associated with human fallibility by enshrining some basic moral standards in a
constitutional document-moral standards that express the dignity of individuals. To be sure, democracy does not ensure justice. But it does establish a basis for pursuing justice and thus for fulfilling a fundamental responsibility assigned by God to each of us.

Of course, in a representative democracy some individuals have greater authority than others. But a democratic system makes those authorities accountable to all and thus resists the tendency of the powerful to render themselves immune from judgment. This requirement of accountability is consistent with the imperative of justice in Islam. If a political system has no institutional mechanisms to call the unjust to account, then the system is itself unjust, regardless of whether injustice is actually committed or not. If the criminal law does not assign punishment for rape, then it is unjust, quite apart from whether that crime is ever committed or not. It is a moral good in and of itself that a democracy, through the institutions of the vote, separation and division of power, and guarantee of pluralism at least offers the possibility of redress.

We have a provisional case for democracy, then, founded on a fundamental Islamic idea about the special status of human beings in God's creation. It is provisional because we have not yet considered the great challenge to that case: how can the higher law of Shari'ah, founded on God's sovereignty, be reconciled with the democratic idea that the people, as the sovereign, can be free to flout Shari'ah law?

**God as the Sovereign**

Early in Islamic history the issue of God's political dominion (*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. Initially supporters of 'Ali, the Haruriyya turned against him when he agreed to arbitrate his political dispute with a competing political faction led by a man named Mu'awiya.

'Ali himself had agreed to the arbitration on condition that the arbitrators be bound by the Qur'an and give full consideration to the supremacy of the Shari'ah. But the
Khawarij-pious, puritanical, and fanatical-believed that God's law clearly supported 'Ali. So they rejected arbitration as inherently unlawful and, in effect, a challenge to God's sovereignty. According to the Khawarij, 'Ali's behavior showed that he was willing to compromise God's supremacy by transferring decision making to human actors. They declared 'Ali a traitor to God, and after efforts to reach a peaceful resolution failed they assassinated him. After 'Ali's death, Mu'awiya seized power and established himself as the first caliph of the Umayyad Dynasty.

Anecdotal reports about the debates between 'Ali and the Khawarij 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 brought a large copy of the Qur'an. 'Ali touched the Qur'an while instructing it to speak to the people and inform them about God's law. Surprised, the people gathered 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 was exactly his point. 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.¹

Such stories are subject to multiple interpretations, but this one points most importantly to the dogmatic superficiality of proclamations of God's sovereignty that sanctify human determinations. Notably, the Khawarij’s rallying cry of "dominion belongs to God" or "the Qur'an is the judge" (la hukma illa li'llah or al-hukmu li'l-Qur'an) is nearly identical to the slogans invoked by contemporary fundamentalist groups.² But considering the historical context, the Khawarij's sloganeering was initially a call for the symbolism of legality and the supremacy of law that descended into an unequivocal radicalized demand for fixed lines of demarcation between what is lawful and unlawful.

¹ Source: The Iran Human Rights Library
www.tavaana.org
To a believer, God is all-powerful and the ultimate owner of the heavens and earth. But when it comes to the laws in a political system, arguments claiming that God is the sole legislator endorse a fatal fiction that is indefensible from the point of view of Islamic theology. Such arguments pretend that (some) human agents have perfect access to God's will, and that human beings could become the perfect executors of the divine will without inserting their own human judgments and inclinations in the process.

Moreover, claims about God's sovereignty assume that the divine legislative will seeks to regulate all human interactions, that Shari'ah is a complete moral code that prescribes for every eventuality. But perhaps God does not seek to regulate all human affairs, and instead leaves human beings considerable latitude in regulating their own affairs as long as they observe certain minimal standards of moral conduct, including the preservation and promotion of human dignity and well-being. In the Qur'anic discourse, God commanded creation to honor human beings because of the miracle of the human intellect—an expression of the abilities of the divine. Arguably, the fact that God honored the miracle of the human intellect and the human being as a symbol of divinity is sufficient to justify a moral commitment to protecting and preserving the integrity and dignity of that symbol of divinity. But—and this is 'Ali's central point—God's sovereignty provides no escape from the burdens of human agency.

When human beings search for ways to approximate God's beauty and justice, then, they do not deny God's sovereignty; they honor it. It is honored as well in the attempt to safeguard the moral values that reflect the attributes of the divine. If we say that the only legitimate source of law is the divine text and that human experience and intellect are irrelevant to the pursuit of the divine will, then divine sovereignty will always stand as an instrument of authoritarianism and an obstacle to democracy. But that authoritarian view denigrates God's sovereignty.

I will further develop this argument below, but to make the case more compelling and accessible, I need first to lay a broader foundation for Islamic political and legal doctrines.
Government and Law

If, as many Muslim fundamentalists and Western orientalists 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, serve at His pleasure, and implement His will. But just as the meaning and implications of God’s sovereignty were the subject of an intense debate in pre-modern Islam, so were the powers of the ruler and the place of law in circumscribing those powers. And some lines of argument in the debate resonate with modern democratic ideas.

Ruler and Ruled

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. 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."2

The word *khalifa* (caliph), the title given to the Muslim leader, literally means 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 Caliph of the Prophet of God (*khalifat rasul Allah*). But the Caliph—whether the Prophet’s successor or God’s deputy—did not enjoy the authority of either the Prophet or God whose powers of legislation, revelation, absolution, and punishment cannot be delegated to any other. But how much of the Prophet’s authority does the Caliph enjoy? And to whom does the Caliph answer?

If the Caliph’s primary obligation is to implement divine law, then arguably the Caliph answers only to God. So long as the Caliph’s actions are plausible interpretations of
God's mandates, then such interpretations must be accepted and the Caliph has fulfilled his duties to the people. Only God can assess the Caliph's intentions, and—most Sunni jurists argued—a ruler is not removable from power unless he commits a clear, visible, and major infraction against God (i.e., a major sin).

Muslim jurists did not, however, completely sever the connection between ruler and 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) who give their bay'a (allegiance or consent to the Caliph): 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 include the obligation to apply God's law and to protect Muslims and the territory of Islam; in return the ruler was promised the people's support and obedience. The assumption has been that Shari'ah law defines the terms of the contract.

Who are the people that have the power to choose and remove the ruler? The Mu'tazili scholar Abu Bakr al-Asam (d. 200/816) argued that the public at large must have this power: there must be a general consensus over the ruler and each person must individually give his consent. The vast majority of Muslim jurists argued more pragmatically that ahl al-hall wa 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.

The idea of the consent of the governed, despite its democratic resonance, ought not to be equated with conceptions of delegated powers or government by the people. Consent in pre-modern Muslim discourses appears to be the equivalent of acquiescence. Underlying these discussions is a certain amount of distrust towards the laity (al-'amma): "They [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] . . ." This type of attitude was widespread among Muslim jurists, and considering the historical period in which they wrote—well before any experience with mass democracy or broad literacy—it is not surprising. As a result many of the concepts
employed in political discourses suggest an idea of representative government but never fully endorse it. In the dominant paradigm both ruler and ruled are God’s agents (khulafa’ Allah) in implementing the divine law.

The Rule of Law

As noted above, an essential characteristic of a legitimate Islamic government is that it is subject to and limited by Shari’ah law. Although this concept does offer support for the rule of law, we must distinguish between the supremacy of law and the supremacy of a set of legal rules. The two are quite distinct, and both are suggested in the Islamic legal tradition. Once again, Islamic political thought contains a range of interpretive possibilities. And once again, some of those possibilities resonate more strongly with democratic principles.

In asserting the supremacy of Shari’ah, Muslim scholars typically were arguing that its positive commandments, such as punishment for adultery or the drinking of alcohol, ought to be honored by the government. But a government that declares its intention to abide by all the positive commandments of Shari’ah may nevertheless manipulate the rules in order to obtain desired results. 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 it could pass arbitrary laws to punish creative expression; under the guise of protecting individuals from slander, it could suppress many forms of political and social criticism; and a government could imprison or execute political dissenters, claiming that they are sowing fitnah (discord and social turmoil). Arguably, all these governmental actions are Shari’ah-compliant unless there is a clear sense of the limits imposed upon the ability of the government to service and promote even the Shari’ah.

But the rule of law need not be taken to mean that government is bound by a codebook of specific regulations. Instead, it might be interpreted as requiring a government bound by processes of making and interpreting laws, and even more importantly as requiring
that those processes themselves be bound by fundamental moral commitments—in particular to human dignity and freedom.

We find some evidence for this alternative conception of the rule of law in the pre-modern juristic literature. Jurists discussed the limits to be placed on the lawmaking power of the state, in part under the rubric of public interest (al-masalih al-mursalah) and blocking the means to illegality (sadd al-dhari’ah). Both jurisprudential concepts 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 interest and blocking the means made law more flexible and adaptive. Of course, they could be employed to expand the law not only in the service of the public good but at the expense of individual autonomy as well. In particular, blocking the means to evil, founded on the idea of preventive or precautionary measures (al-ihtiyat), could be exploited to expand the power of the state under the guise of protecting the Shari’ah. This type of dynamic can be avoided in part by adopting procedural guarantees, but more importantly by understanding that the rule of law is as ensuring the dignity and freedoms of human beings, which the Shari’ah can be utilized to justify but not to undermine.

An important dimension to the challenge of establishing the rule of law is the complex relationship between Shari’ah law, as articulated by jurists, and the administrative practices of the state or expediency laws (al-ahkam al-siyasiyyah). 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. By the fourth/tenth century Muslim jurists had established themselves as the only legitimate authority empowered to expound the law of God. The practice of the state was not considered illegitimate, but only the Muslim jurists could settle the law. The state was expected to enforce divine laws, not to determine their content.

Still, as the enforcer of divine laws the state was granted broad discretion over matters of public interest (known as the field of al-siyasah al-Shari’iyah). State regulations
were lawful and enforceable as long as they did not contravene the divine law, as expounded by the jurists, or constitute an abusive use of discretion (al-ta'assuf fi masa'il al-khiyar). For this reason jurisprudential works meticulously documented the determinations of jurists but did not document state regulations, which were documented by state functionaries in works on the administrative practices of the state. In the dictum of Muslim jurists, Shari'ah is considered the foundation of law and politics is its protector. (Similarly, Muslim jurists often would assert that religion is the foundation and the political authorities are its protector.) This paradigm, however, leaves unresolved the core problem of how to clearly delineate the limits of government power. To what extent can the government extend the reach of its laws under the guise of guarding or properly fulfilling 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. But such concerns are nearly 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. For instance, the claim of precautionary measures (blocking the means) is used today in Saudi Arabia to justify a wide range of restrictive laws against women, including the prohibition against driving cars. This is a relatively novel invention in Islamic state practices and in many instances amounts to the use of Shari'ah to undermine Shari'ah.

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. Throughout Islamic history the jurists ('ulama) performed a wide range of economic, political, and administrative functions but most importantly acted as negotiative mediators between the ruling classes and the laity. As Afaf Marsot states: "[The 'ulama] were the purveyors of Islam, the guardians of its tradition, the depository of ancestral wisdom, and the moral tutors of the population." 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. Modernity, however, has turned the 'ulama from "vociferous spokesmen of the masses" into salaried state functionaries who play a primarily conservative, legitimist role for the ruling regimes in the Islamic world. The disintegration of the role of the 'ulama and their co-optation by the modern praetorian state, with its hybrid practices of secularism, have opened the door for the state to become the maker and enforcer of the divine law; in so doing the state has acquired formidable power that has further ingrained the practice of authoritarianism in various Islamic states.

**Consultative Government**

The Qur'an instructs the Prophet to consult regularly with Muslims on all significant matters and indicates that a society that conducts its affairs through some form of deliberative process is considered praiseworthy in the eyes of God (3:159; 42:38). There are many historical reports suggesting that the Prophet consulted regularly with his Companions regarding the affairs of the state. In addition, shortly after the death of the Prophet the concept of shura (consultative deliberations) had become a symbol signifying participatory politics and legitimacy. 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. And 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.

Although the precise meaning of shura in these historical narratives is unclear, the concept most certainly did not refer merely to a ruler’s solicitation of opinions from notables in society; it signified, more broadly, resistance to autocracy, government by force, or oppression. This is consistent with the juristic hostility towards despotism (al-istibdad) and whimsical and autocratic governance (al-hukm bi'l hawa wa al-tasallut).
Even when Muslim jurists prohibited rebellions against despotic rulers, they tolerated despotism as a necessary evil, not as a desirable good.

After the third/ninth century the concept of *shura* took more concrete 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 jurists, however, concluded that the determinations of *ahl al-shura* are advisory and 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. Al-Ghazali expressed the general consensus when he said that "[d]espotic, non-consultative, decision-making, even if from a wise and learned person is objectionable and unacceptable."11

Modern reformists have seized upon the ideal of a consultative government as a way of arguing for the basic compatibility between Islam and democracy. But even if the ethic of *shura* is expanded into a broader concept of a participatory government, concerns about majority tyranny underscore that the moral commitments informing the lawmaking process are as important as the process itself. So even if *shura* is transformed into an instrument of participatory representation, it 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 value of specific dissenting views, dissent would be tolerated because doing so is seen as a basic part of the mandate of justice.

The Islamic tradition of legal-political thought, then, suggests ideas of representation, consultation, and legal process. But the precise content of those ideas remains contested and provides no direct link between Islam and democracy. To understand the
democratic possibilities of Islam we must look more deeply into the role of human beings in God's creation and the central importance of justice in human life assigned by the Qur'an.

**Justice and Mercy**

Justice plays a central role in the Qur'anic discourse: it is an obligation we owe to God, and also 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, it emphasizes the ability to achieve justice as a unique human charge and necessity—an obligation that falls on all of us in our capacity as vicegerents. In essence the Qur'an requires a commitment to a moral imperative that is vague but recognizable through intuition, reason, and human experience.

The Islamic debate about how government might serve justice is remarkably similar to seventeenth-century Western discourse on the state of nature or the original condition of human beings. One view—advanced by Ibn Khaldun and al-Ghazali—argued that human beings are by nature fractious, contentious, and not inclined towards cooperation. So, government is necessary to force people to cooperate with each other, contrary to their natures, and to promote justice and the general interest.

Another school of thought, exemplified by al-Mawardi and Ibn Abi al-Rabi', argued that God created human beings weak and in need so that they would cooperate by necessity; cooperation would limit injustice by restraining the strong and safeguarding the rights of the weak. Furthermore, God created human beings different from one another so that they would need each other to achieve their aims. In this school of thought, human beings by nature desire justice and will tend to cooperate in order to achieve it. Even 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. And the ruler 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.

In reflecting on the demands of justice the juristic argument about human diversity and cooperation is especially important. The Qur'an says that God created people different and grouped them into nations and tribes so that they would 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 (49:13). The Qur'an also notes that people will remain different from one another until the end of human existence. It also states that the reality of human diversity is part of the divine wisdom and an intentional purpose of creation: "If thy Lord had so willed, He could have made mankind one people, but they will not cease to dispute ..." (11:118).

The Qur'anic celebration and sanctification of human diversity incorporates that diversity into the purposeful pursuit of justice and creates various possibilities for pluralistic commitment in modern Islam. That commitment could 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 nonreligious convictions. At the political level it 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, it could be developed into a notion of delegated powers, where the ruler is entrusted to serve the core value of justice by ensuring rights of assembly, cooperation, and dissent. 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 government fails to discharge the obligations of its covenant, then it loses its legitimate claim to power.

Unfortunately, however, several factors militate against the fulfillment of these possibilities in modern Islam. At the theological and philosophical level the constituents of justice have not been subject to close examination in Islamic doctrine. And part of the explanation for that limitation lies in a basic tension in understanding the nature of justice. 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.

If we can know what justice requires by first determining what the divine law is, then there is no point in investigating the demands of justice-whether justice means equality of opportunities or results, or fostering personal autonomy, or maximizing collective utility, or guarding basic human dignity. If the divine law is prior to justice, then the just society is no longer about rights of speech and assembly, or the right to explore the means to justice, but simply about the implementation of the divine law.

Suppose instead that we accept the primacy of justice in the Qur'anic discourse, the notion of human vicegerency, and the idea that the duty to foster justice has been assigned to humanity at large. A reasonable conclusion would be that the value of justice ought to control and guide all efforts at interpreting and understanding divine law. This requires a serious paradigm shift in Islamic thinking. In my view, justice is a divine imperative, and represents the 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 (6:12, 54). Furthermore, the very purpose of entrusting the divine message to the Prophet Muhammad was as a gift of mercy to human beings.12

In the Qur'anic discourse mercy is not simply forgiveness, nor the willingness to ignore the faults and sins of people,13 but a state in which the individual is able to be just with him- or herself and others, by giving each individual person his or her due. Fundamentally, mercy is tied to a state of genuine perception of others-that is why in the Qur'an mercy is coupled with the need for human beings to be patient and tolerant with each other.14 Most significantly, diversity and differences among human beings are claimed in the Qur'anic discourse as merciful divine gifts to humankind (11:119).15 Genuine perception that enables persons to understand, appreciate, and become enriched by the diversity of humanity is one of the constituent elements for founding a just society and achieving 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 to utilize this genuine knowledge in an effort to pursue justice.
On this view, then, the divine mandate for a Muslim polity is to pursue justice by adhering to the need for mercy. Although coexistence is a basic necessity for mercy, in order to pursue genuine knowledge of the other and aspire to a state of justice, human beings need to cooperate in seeking the good and beautiful, and do so by engaging in a purposeful moral discourse. Implementing legalistic rules, even if such rules are the product of the interpretation of divine texts, is not sufficient for mercy-genuine perception of the other—or, ultimately, for justice.

So principles of mercy and justice are the primary divine charge, and God's sovereignty lies in the fact that God is the authority that delegated to human beings the charge to achieve justice on earth by fulfilling the virtues that approximate divinity. This conception of divine sovereignty does not negate human agency by requiring a mechanical enforcement of rules; instead, it accommodates our agency and even promotes it insofar as it contributes 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. The challenge for human vicegerents is to recognize that a right exists, to understand who is the possessor of such a right, and ultimately to ensure that the possessor enjoys the right. A society that fails in this task—no matter how many rules it applies—is neither merciful nor just. This puts us in a position to explore the possibility of individual rights in Islam.

**Individual Rights**

All constitutional democracies afford strong protections to certain individual interests through rights of free speech and assembly, equality before the law, rights to property, and guarantees of due process. But which rights ought to be protected, and to what extent, is subject to a large measure of variation in theory and practice. Here I will suppose that whatever the precise nature of rights, some individual interests ought to be treated as unassailable. These unassailable interests are those whose violation communicates to the individual in question a sense of worthlessness and tends to destroy the faculty of a human being to comprehend the necessary elements for a
dignified existence. So, use of torture and denial of food, shelter, or means of sustenance, such as employment, are always unacceptable.

To understand the traditional place of protected interests in Islamic law it is important to note that the purpose of Shari’ah in jurisprudential theory is to assure the welfare of the people (tahqiq masalih al-‘ibad). Typically, Muslim jurists divided the welfare of the people into three categories: necessities (daruriyyat), needs (hajiyyat), and luxuries (kamaliyyat or tahsiniyyat). According to Muslim jurists the law and policies of the government must fulfill these interests, in descending order of importance-first necessities, then needs, then luxuries. The necessities are further divided into five basic values-al-daruriyyat al-khamsah: religion, life, intellect, lineage or honor, and property. But Muslim jurists did not develop the five basic values as broad categories and then explore the theoretical implications of each value. Rather, in a positivistic spirit, they examined existing legal injunctions that could be said to serve each value and concluded that by their codification of these specific injunctions, the five values would be sufficiently served. So, for example, Muslim jurists contended that the prohibition of murder in Islamic law served the basic value of life, the law of apostasy protected religion, the prohibition of intoxicants protected the intellect, the prohibition of fornication and adultery protected lineage, and the right of compensation protected the right to property. But limiting the protection of the intellect to a prohibition of alcohol or the protection of life to the prohibition of murder is hardly thorough. Unfortunately, it appears that the juristic tradition reduced these five values to technical objectives. Still, the broad values asserted could serve as a foundation for a systematic theory of individual rights in the modern age.12

To be sure, the juristic tradition articulated a wealth of positions that exhibit an orientation toward protections for individuals. For instance, Muslim jurists developed the idea of presumption of innocence in criminal and civil proceedings and argued that the accuser always carries the burden of proof (al-bayyina ‘ala man idda’a). In matters 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. In criminal cases the jurists argued that it is always better to release a guilty person than to run the risk of
punishing an innocent one. 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 argued that such groups may not be harassed or molested until they carry arms and form a clear intent to rebel against the government. Muslim jurists also condemned the use of torture, arguing that the Prophet forbade the use of *muthla* (the use of mutilations) in all situations, and opposed the use of coerced confessions in all legal and political matters. In fact, a large number of jurists articulated a doctrine similar to the American exculpatory doctrine—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 are to 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 the caliph and his representatives generally, because the government is deemed vicariously liable for the unlawful behavior of its judges.

But perhaps the most intriguing discourse on the subject in the juristic tradition concerns the rights of God and the rights of people. The rights of God (*huquq Allah*) are rights retained by God in the sense that only God can say how the violation of these rights may be punished and only God has the right to forgive such violations. But all rights not explicitly retained by God are retained by people. And 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. Thus, a right to compensation is retained individually by a human being and may only be forgiven by the aggrieved individual. Neither the government nor even God have the right to forgive or compromise such a right of compensation if it is designated as part of the rights of human beings.

Muslim jurists did not imagine a set of unwavering and generalizable 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 obtains a claim for retribution or compensation as a result. To shift paradigms would require transformation of traditional conceptions of rights, so that rights become the property of individual
holders, regardless of whether there is a legal cause of action. The set of rights recognized as immutable 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 the five values mentioned above, but this issue needs to be reanalyzed in light of the current diversity of human existence. In this context, the commitment to human rights does not signify a lack of commitment to God but is instead a necessary part of celebrating human diversity, honoring God's vicegerents, 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 individual rights in Islam. Rather, the most serious obstacle comes from modern Muslims themselves. Especially in the second half of the last century, a considerable number of Muslims have made the unfounded assumption that Islamic law is concerned primarily with duties, not rights, and that the Islamic conception of rights is collectivist, not individualistic. Both assumptions, however, are based only on cultural assumptions about the non-Western "other." It is as if these interpreters fixed on a Judeo-Christian or perhaps Western conception of rights and assumed that Islam must be different.

In reality, claims about both individual and collectivist rights are largely anachronistic. Pre-modern Muslim jurists did not assert a collectivist vision of rights or an individualistic vision. They did speak of al-haqq al-'amm (public rights), and often asserted that public rights ought to be given preference over private entitlements. But this amounted to no more than an assertion that the many should not be made to suffer for the entitlements of the few. For example, 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. But as noted above, Muslim jurists did not, for instance, justify the killing or the torture of individuals in order to promote the welfare of the state or the public interest.
Perhaps the widespread assertion of a primacy of collectivist and duty-based perspectives in Islam points to the reactive nature of much contemporary discourse on Islamic law. But the notion of individual rights is actually 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 individuals is to take God's creation seriously. Each individual embodies a virtual universe of divine miracles. Why should a Muslim commit him- or herself to the rights and well-being of a fellow human being? The answer is that God already made such a commitment when God invested so much of the God-self in each and every person. This is why the Qur'an asserts that whomever kills a fellow human being unjustly has in effect murdered all of humanity; it is as if the killer has murdered the divine sanctity and defiled the very meaning of divinity (5:32).

Moreover, the Qur'an does not differentiate between the sanctity of a Muslim or non-Muslim. As the Qur'an repeatedly asserts, no human being can limit the divine mercy in any way, or even regulate who is entitled to it (2:105; 3:74; 35:2, 38:9, 39:38; 40:7, 43:32). I take this to mean that non-Muslims as well as Muslims could be recipients and givers of divine mercy. The measure of moral virtue on this earth is a person's proximity to divinity through justice, not a religious label. The measure in the Hereafter is a different matter, but that matter is God's exclusive jurisdiction. God will most certainly vindicate God's rights in the Hereafter in the fashion that God deems most fitting. But our primary moral responsibility on earth is the vindication of the rights of human beings. A commitment in favor of human rights is a commitment in favor of God's creation and ultimately a commitment in favor of God.

Shari’ah and the Democratic State

A case for democracy presented from within Islam must accept the idea of God's sovereignty: it cannot substitute popular sovereignty for divine sovereignty, but must instead show how popular sovereignty—with its idea that citizens have rights and a correlative responsibility to pursue justice with mercy—expresses God's authority,
properly understood. Similarly, it cannot reject the idea that God’s law is given prior to human action, but must show how democratic lawmaking respects that priority. I have reserved the issue of Shari’ah and the State for the end because it was necessary to first lay the foundation for addressing it. As part of this foundation, it is important to appreciate the centrality of Shari’ah to Muslim life. 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. 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 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 midair, unaffected and uncorrupted by life’s vagaries. The fiqh is the human attempt to understand and apply the ideal. Therefore, Shari’ah is immutable, immaculate, and flawless-fiqh is not.

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." This implied that there could be more than a single correct answer to the same question. For Sunni jurists this raised the issue of the purpose or 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? 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 goodfaith diligence in searching for the Divine Will is sufficient to protect a researcher from liability before God. Beyond this, the jurists were divided into two main camps. The first school, known as the mukhatti’ah, argued that every legal problem ultimately has a correct answer; however, only God knows the correct response, 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 rest might mistake it. God, on the Final Day, will inform all readers of 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, argued that there is no specific and correct answer (hukm mu‘ayyan) that God wants human beings to discover: after all, 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 discover 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. According to al-Juwayni, for example, 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."  

Source: The Iran Human Rights Library
www.tavaana.org
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 it is in fact God's law.

The position of the second school in particular raises difficult questions about the application of the Shari'ah in society. 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. Under the first school of thought, whatever law the state applies, that law is only potentially the law of God, and 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 it 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 to explore the ideal of Shari'ah and to expound their imperfect attempts at understanding God's perfection. As long as the argument constructed is normative it is unfulfilled potential to reach 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, a methodology, and a discursive 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: 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, of God Himself. In Islamic theology, this possibility cannot be entertained.  

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. But—to return one last time to a point I have emphasized throughout—regardless of how clear and precise the statements 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" (5:38). Although the legal import of the verse seems to be clear, it requires at minimum that human agents struggle with the meaning of "thief," "cut off," "hands," and "recompense." 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. Whatever the meaning derived from the text, can the human interpreter claim with certainty that the determination reached is identical to God's? And even when 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, the jurists, can and do act as 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. But the law of the state, regardless of its origins or basis, belongs to the state. Under this conception, no religious laws can or may be enforced by the state. All laws articulated and applied in a state are thoroughly human and should be treated as such. 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. Put differently, creation, with all its textual and nontextual richness, can and should produce foundational rights and organizational laws that honor and promote those 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 both expresses the special worth of human beings—the status of vicegerency—and at the same time deprives the state of any pretense of divinity by locating ultimate authority in the hands of the people rather than the 'ulama. 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—no matter how well educated morally—can embody the full majesty of God. And in the worst case—if the majority is not persuaded by the 'ulama, if the majority insists on turning away from God but still respects 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 still have to answer, in the Hereafter, to God.

Khaled Abou El Fadl is the Omar and Azmeralda Alfi Distinguished Fellow in Islamic Law at UCLA and author most recently of The Place of Tolerance in Islam.

Notes

2. 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.


4. 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-ma'ruf wa al-nahy 'an al-munkar* (commanding the good and prohibiting the evil).

5. Citing the precedent of the Prophet in Medina, al-Asam maintained that this included free Muslim women, but not non-Muslims nor slaves. Reportedly, upon migrating to Medina, the Prophet took the *bay'a* from a number of native women as well as men. Muhammad 'Imara, *al-Islam wa Falsafat al-Hukm* (Beirut: n.p., 1979), 431-432.


7. 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.


12. Qur'an 21:107, which addressing the Prophet states: "We have not sent you except as a mercy to human beings." Also, see 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 (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.

13. In Qur'anic terms, rahma (mercy) is not limited to maghfira (forgiveness).

14. The Qur'an explicitly commands human beings to deal with one another with patience and mercy (90:17) and not to transgress their bounds by presuming to know who deserves God's mercy and who does not (43:32). An Islamic moral theory focused on mercy as a virtue will overlap with the ethic of care developed in Western moral theory.
15. 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.

16. 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.

17. 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.

18. Muslim jurists, however, did not consider the severing of hands or feet as punishment for theft and banditry to be mutilation.

19. 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 the habit of either bribing or threatening notables and jurists to obtain their bay’a.
20. 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. Although the principle could be expanded and developed to support individual rights in the modern age, historically, it was given a far more technical and legalistic connotation.

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

22. The four surviving Sunni schools of law and legal thought are the Hanafi, Maliki, Shafi'I, and Hanbali schools.

23. 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.


25. 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.

26. Ahmed Ali argues in *Al-ur'an: A Contemporary Translation* (Princeton University Press, 2001) 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 . . ." (113). Classical jurists placed conditions that were practically impossible to fulfill before a limb could be amputated.

27. In order for the 'ulama to play a meaningful role in civil society they must first regain their institutional and moral independence.
Originally published in the April/May 2003 issue of Boston Review