

The Human Rights Commitment in Modern Islam*

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Of all the moral challenges confronting Islam in the modern age, the problem of human rights is the most formidable. This is not because Islam, as compared to other religious traditions, is more prone to causing or inducing behaviour that disregards or violates the rights of human beings. In fact, the Islamic tradition has generated concepts and institutions that could be utilised in a systematic effort to develop social and moral commitments to human rights. But the cause of the formidable challenge to the Islamic tradition pertains to the particular historical dynamics that Muslims have had to confront in the modern age. Political realities—such as colonialism, the persistence of highly invasive and domineering despotic governments, the widespread perception, and reality, of Western hypocrisy in the human rights field, and the emergence and spread of supremacist movements of moral exceptionalism in modern Islam—have contributed to modes of interpretation and practice that are not consistent with a commitment to human rights.¹

These political developments, among others, have led to an aggravated process of moral disengagement, and even callousness, toward human suffering, even when such suffering is inflicted in God's name. Put simply, in the contemporary era there has been a systematic undermining and devaluing of the humanistic tradition in Islam, and a process of what could be described as a vulgarisation of Islamic normative doctrines and systems of belief. Therefore, exploring the relationship of Islam to the concept of human rights implicates the crucial issue of

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Islam's self-definition: What will Islam stand for and represent in the contemporary age? What are the symbolic associations that Muslims and non-Muslims will draw when it comes to thinking about the Islamic tradition? A corollary issue will be the relationship between modern Islam and its own humanistic tradition: To what extent will modern Islam associate with and develop the historical experience of Islamic humanism?²

In recent times, and well before the tragedy of 9/11, Muslim societies have been plagued by many events that have struck the world as offensive and even shocking. Morally offensive events—such as the publication of *The Satanic Verses* and the consequent death sentence issued against Salman Rushdie; the stoning and imprisoning of rape victims in Pakistan and Nigeria; the public flogging, stoning, and decapitation of criminal offenders in Sudan, Iran, and Saudi Arabia; the degradation of women by the Taliban; the destruction of the Buddha statues in Afghanistan; the sexual violation of domestic workers in Saudi Arabia; the excommunication of writers in Egypt; the killing of civilians in suicide attacks; the shooting in 1987 of over four hundred pilgrims in Mecca by Saudi police; the taking of hostages in Iran and Lebanon; the burning to death in 2002 of at least fourteen schoolgirls in Mecca because they were not allowed to escape their burning school while not properly veiled; and the demeaning treatment that women receive in Saudi Arabia, including the ban against women driving cars, as well as many other events—seem to constitute a long Muslim saga of ugliness in the modern world.

My purpose in this chapter is not necessarily to explain the socio-political reasons for the pervasiveness of acts of ugliness in the modern Islamic context. In addition—although, admittedly, I discuss the Islamic tradition as an insider—I do not aim, so to speak, to vindicate or defend Islam by proving that Islamic beliefs and convictions are consistent with human rights. For reasons explained below, I think that adopting such an

approach would be intellectually dishonest and ultimately not convincing or effective. Rather, the purpose of this article is to discuss the major points of tension between the Islamic tradition and the human rights system of belief and to explore the possibilities for achieving a normative reconciliation between the two moral traditions.

I will identify some of the main obstacles that hamper a serious Islamic engagement with the field, and analyse potentialities within Islamic doctrine for realising a vision of human rights. In essence, this article will focus on potentialities—i.e. the doctrinal aspects in Muslim thought that could legitimise, promote, or subvert the emergence of a human rights practice in Muslim cultures. In principle, doctrinal potentialities exist in a dormant state until they are co-opted and directed by systematic thought, supported by cumulative social practices, toward constructing a culture that honours and promotes human rights. This article will focus on the doctrinal potentialities or concepts constructed by the interpretive activities of Muslim scholars (primarily jurists), but not on the actual socio-political practices in Islamic history.

One of the powerful attributes of doctrine—especially theological and religious doctrine—is that it does not necessarily have to remain locked within a particular socio-political-historical practice. Religious doctrine can be distilled from the aggregations and accumulations of past historical practices, and reconstructed and reinvented in order to achieve entirely new social and political ends. I do admit that I suffer from a certain amount of optimism about the possibilities of reinterpreting religious doctrine in order to invent new socio-political traditions, without necessarily having to sacrifice either the appearance or substance of authenticity. Put differently, I do believe that even if Islam has not known a human rights tradition similar to that developed in the West, it is possible, with the requisite amount of intellectual determination, analytical rigour, and social commitment, to demand and eventually construct such a tradition.³ This is to say that the past influences—but

does not completely determine—the future, and if one did not at all believe in the transferability of ideas, and in the possibility of cultural transplants, there would be little point to speaking about a possible relationship between Islam and human rights.

I. Colonialism, Apologetics, and the Muslim Human Rights Discourse

The construct of human rights has achieved notable symbolic significance in the modern world. Politically, whether in fact a nation regularly violates the rights of its citizens or not, most nations go through the pretence of claiming to honour some version of human rights. In the past half-century, human rights has become a significant part of international relations, as there has been a globalisation of human rights concerns and discourses. At least since the widespread adoption of what has been referred to as the International Bill of Rights, the idea of human rights has become established as a powerful symbolic construct often used to shame or embarrass governments into exhibiting a higher degree of restraint in dealing with their citizens.

Importantly, in the case of the Muslim world, the human rights movement has, so to speak, won indigenous converts, and as a result, it is not unusual to observe the language of human rights being used as a medium for expressing dissent, and making demands on local governments. This is the case particularly for women's rights activists in the Muslim world who frequently cite international standards and obligations as a means of exerting pressure upon their domestic governments.⁴ But aside from localised support and co-optation of the language and paradigms of international human rights by some activists in the process of articulating social and political demands, there has been quite a different dynamic taking place in Muslim countries.

Despite the active involvement of countries such as Egypt, Lebanon, and Tunisia in drafting the aspirational language of several international human rights documents, there remained a considerable tension between traditional Islamic law and the normative demands of human rights. This was particularly so in matters relating to personal status laws, equal rights for women, freedom of religion, and harsh Islamic criminal penalties for offences such as theft, adultery, and apostasy.⁵ However, the primary intellectual and theological response to the challenge of international human rights followed a pattern that had become well ingrained since the onslaught of colonialism and the taunting criticisms of Orientalists against the Islamic tradition and systems of belief.

Colonialism, and its accompanying institution of Orientalism, had not only played a pivotal role in undermining the traditional institutions of Muslim learning and jurisprudence, but it had also posed a serious challenge to traditional Muslim epistemologies of knowledge and the sense of moral values.⁶ Although international human rights law was enshrined in various treaties during a period in which most Muslim countries had gained political independence, the experiences of colonialism and post-colonialism influenced the Muslim intellectual response in several important respects. Muslims did not first encounter Western conceptions of human rights in the form of the Universal Declaration of Human Rights (UDHR) of 1948, or in the form of negotiated international conventions. Rather, they encountered such conceptions as part of the 'White Man's Burden' or the 'civilising mission' of the colonial era, and as a part of the European natural law tradition, which was frequently exploited to justify imperialistic policies in the Muslim world.⁷

This experience has had a significant impact on the understanding of human rights in the Muslim social imagination, and on the construction of Islamic discourses on the subject. The most important, among Muslim

intellectuals, was the perception that the human rights field is thoroughly political, and that it is plagued by widespread Western hypocrisy. The aggravated politicisation of the issue of human rights meant that, quite frequently, the field became a battleground for competing cultural orientations within Muslim societies. In the writings of some dogmatists such as Sayyid Qutb, Abu A'la al-Mawdudi, and Jalal Kishk, the human rights discourse was portrayed as a part of the Western cultural invasion of Muslim lands, and as a tool for instilling Muslims with a sense of cultural inferiority. Although in the late nineteenth and early twentieth centuries there were several systematic efforts to come to terms with the Western natural law tradition in general⁸ and human rights more specifically, increasingly the Muslim intellectual response could be summed up within two predominate orientations, the first apologetic and the second defiant or exceptionalist.

The apologetic orientation consisted of an effort by a large number of Islamists to defend and salvage the Islamic system of belief and tradition from the onslaught of Westernisation and modernity by simultaneously emphasising both the compatibility and the supremacy of Islam. Apologists responded to the intellectual challenges of modernity and to universalist Western paradigms by adopting pietistic fictions about the presumed perfection of Islam, and eschewed any critical evaluation of Islamic doctrines. A common heuristic device of apologetics was to argue that any meritorious or worthwhile modern institutions were first invented and realised by Muslims. Therefore, according to the apologists, Islam liberated women, created a democracy, endorsed pluralism, and protected human rights, long before these institutions ever existed in the West.⁹

Muslim apologists generated a large body of texts that claimed Islam's inherent compatibility with international human rights, or even claimed that Islam constituted a fuller and more coherent expression of human rights. These texts followed the same basic pattern and

methodology; they produced a list of rights purportedly guaranteed by Islam, and the rights listed coincided, or were correlated, most typically with the major human rights articulated in the UDHR. Most often, in order to demonstrate the point, these texts would selectively cite a Qur'anic verse, or some anecdotal report attributed to the Prophet, for each of the purported rights.

Nonetheless, these rights were not asserted out of critical engagement with Islamic texts, or the historical experience that generated these texts, or even out of a genuine ideological commitment or a rigorous understanding of the implications of the rights asserted. Rather, they were asserted primarily as a means of resisting the deconstructive effects of Westernisation, affirming self-worth, and attaining a measure of emotional empowerment. The apologetic orientation raised the issue of Islamic authenticity in relation to international human rights, but did not seriously engage it. By simply assuming that Islam presented a genuine and authentic expression of international human rights, the apologetic orientation made those international rights redundant.

This led to an artificial sense of confidence, and an intellectual lethargy that neither took the Islamic tradition nor the human rights tradition very seriously. One of the serious consequences of this orientation was that, to date, a serious analytical Islamic discourse on human rights has not emerged. By pietistically affirming the place of human rights in Islam instead of investigating it, the apologetic movement simply avoided confronting the points of tension between the two convictional systems.¹⁰

One notices a near-complete absence of any systematic philosophical and theological treatment of the issue of human rights in Islam. As discussed later, in contrast to speculative theological works of classical Islam, and the often complex rights conceptions of premodern Islam, contemporary Islamist approaches remained superficial. For instance, during the heyday of socialist ideologies in the Third World,

a large number of Islamists insisted that the essential character of the Islamic approach to rights is collectivism and not individualistic. But in the 1980s, with the increasing influence of the United States on the world scene, a large number of Islamists claimed that Islam emphasised individualistic conceptions of rights and guaranteed the right to private property.

II. Puritanism, Anti-Westernism, and Exceptionalism in Muslim Discourses

In the 1970s, much of the Muslim world witnessed an Islamic resurgence, which took the form of a powerful puritan movement demanding a return to an authentic Islamic identity through the reimplementation of *Shari'ah* law. The return to an authentic Islamic identity as well as the call for the reassertion of *Shari'ah* law were recurrent themes during the colonial era. Both the Wahhabi¹¹ and the Salafi¹² theological movements—the main proponents of puritan Islam—had emerged during the colonial era and remained active throughout the twentieth century. But for a variety of reasons, including aggressive proselytising and the generous financial support of Saudi Arabia, these two movements became practically indistinguishable from each other, and they also became a dominant theological force in contemporary Islam.

Puritanism resisted the indeterminacy of the modern age by escaping to a strict literalism in which the text became the sole source of legitimacy. It sought to return to the presumed golden age of Islam, when the Prophet created a perfect, just polity in Medina. According to the puritans, it was imperative to return to a presumed pristine, simple, and straightforward Islam, which was believed to be entirely reclaimable by a literal implementation of the commands and precedents of the Prophet and by a strict adherence to correct ritual practice. The puritan

orientation also considered any form of moral thought that was not entirely dependent on the text to be a form of self-idolatry, and treated humanistic fields of knowledge, especially philosophy, as 'the sciences of the devil'. It also rejected any attempt to interpret the divine law from a historical or contextual perspective and, in fact, treated the vast majority of Islamic history as a corruption or aberration of the true and authentic Islam. The dialectical and indeterminate hermeneutics of the classical jurisprudential tradition were considered corruptions of the purity of the faith and law, and the puritan movement became very intolerant of the long-established Islamic practice of considering a variety of schools of thought to be equally orthodox. It attempted to narrow considerably the range of issues upon which Muslims may legitimately disagree.

In many respects, the puritan movement reproduced the mental sets adopted by the apologetic movement. It eschewed any analytical or historical approaches to the understanding of the Islamic message and claimed that all the challenges posed by modernity are eminently resolvable by a return to the original sources of the Qur'an and the *Sunnah*. Unlike the apologetic orientation, however, the puritans insisted on an Islamic particularity and uniqueness and rejected all universalisms, except the universals of Islam. The puritans reacted to the eagerness of the apologists to articulate Islam in a way that caters to the latest ideological fashion by opting out of the process. In the puritan paradigm, Islam is perfect, but such perfection meant that ultimately Islam does not need to reconcile itself or prove itself compatible with any other system of thought. According to this paradigm, Islam is a self-contained and self-sufficient system of beliefs and laws that ought to shape the world in its image, rather than accommodate human experience in any way.

This attitude, in good part, emerged from what is known as the *hakimiyya* debates in Islamic history (dominion or sovereignty). According to the puritans, in Islam dominion properly belongs to God alone, who is the sole legislator and lawmaker. Therefore, any normative

position that is derived from human reason or sociohistorical experience is fundamentally illegitimate. The only permissible normative positions are those derived from the comprehension of the divine commands, as found in divinely inspired texts. Not surprisingly, the puritan orientation considered all moral approaches that defer to intuition, reason, contractual obligations, or social and political consensus to be inherently whimsical and illegitimate. All moral norms and laws ought to be derived from a sole source: the intent or will of the Divine.

As to the issue of universal human rights, it is not entirely accurate to describe the puritan orientation as exceptionalist because the puritans did not seek a relativist or cultural exception to the universalism of human rights. Rather, the puritan claim was that whatever rights human beings are entitled to enjoy, they are entirely within the purview of *Shari'ah* law. It is important to realise that the puritans did not deny, in principle, that human beings have rights; they contended that rights could not exist unless granted by God. Therefore, one finds that in puritan literature there is no effort to justify international rights on Islamic terms but simply an effort to set out the divine law, on the assumption that such a law, by definition, provides human beings with a just and moral order.

Nevertheless, despite the practice of waving the banner of Islamic authenticity and legitimacy, the puritan orientation was far more anti-Western than it was pro-Islamic. The puritans' primary concern was not to explore or investigate the parameters of Islamic values or the historical experience of the Islamic civilisation but to oppose the West. As such, Islam was simply the symbolic universe in which they functioned and not the normative imperative that created their value system. Although the puritans pretended that the *Shari'ah* comprised a set of objectively determinable divine commands, the fact is that the divine law was the by-product of a thoroughly human and fallible interpretive process. Whatever qualified as a part of the *Shari'ah* law, even if inspired by exhortations found in religious texts, was the product of human efforts and

determinations that reflected subjective sociohistorical circumstances. As such, the determinations of the puritans were as subjective and contextual as any of the earlier juristic interpretations in Islam.

However, the most noticeable aspect regarding the puritan determinations was their reactive nature. The puritan orientation was as alienated and superficially anchored in the Islamic tradition as the apologetic orientation. Puritanism understood and constructed Islam only through the prism of seeking to be culturally independent from the West. As such, its primary operative mode was to react to Western supremacy in the modern world by, effectively, constructing Islam into the antithesis of the West, or at least the antithesis of an essentialised view of the West. This reactive stance was significant because it shaped much of the puritan discourse on the idea of universal human rights. Since international human rights was seen as distinctly Western in origin, they were opposed on these grounds alone and, in fact, Islamic scholars who espoused some form of doctrinal reconciliation were thought of as suffering from Westoxification and, consequently, treated as betrayers of the Islamic tradition.

III. The Human Rights Commitment and Ambiguity in Islam

Between the two dominant responses of apologetics and puritanism, Islamic discourse on the subject of human rights has remained vastly underdeveloped.¹³ Consequently, there has been much ambiguity surrounding what may be called the human rights commitment in modern Islam. In essence, a human rights commitment emerges from a convictional paradigm: human rights is a moral and normative belief about the basic worth and standard of existence that ought to be guaranteed for any human being.¹⁴ Whether this belief is founded on

a vision of human dignity, rational capacity, or freedom from harm and suffering, in its essence it expresses a commitment to the well-being of the human being. Even collectivist or communitarian visions of rights are often forced to justify their commitments by claiming to provide for the well-being of most of the members of the imagined community or collectivity.

Importantly, visions of human rights do not necessarily seek to exclude subjective or contextual perceptions of rights or entitlements. Such visions are not necessarily premised on the idea that there is a fixed set of human rights that is immutable and unevolving from the dawn of history until today. However, human rights visions do tend to objectify and generalise the subjective experiences of human beings. By evaluating the sociohistorical experience of human beings—the demands made for protection and the resistance offered to these demands—and by evaluating the impact of practices that cause suffering, degradation, or deny people the ability to develop, it becomes possible to articulate objectified visions of a universal set of rights that ought to be enjoyed by all human beings.¹⁵

At the legalistic level, arguably the so-called Bill of International Human Rights has already recognised what ought to be objective standards for human conduct, and such standards are binding on all nations of the world, even as to states that have not become signatories to the two human rights covenants. But whether the legal argument is valid or not, the universal human rights schemes have the unmistakable characteristic of an ideology that, very much like a religious faith, believes that human beings ought to be treated in a certain way because, quite simply, as a matter of conviction it is what is right and good. Once a claim of right is objectified, unless it goes through a process of deconstruction and de-objectification, as a matter of commitment and belief, it becomes binding to all. It also becomes a measure by which to judge the behaviour of violators.¹⁶

One of the major aspects that human rights schemes share with religious systems is the objectification of subjective experience. The tension between religion and human rights, as systems of convictional reference, is not in the subjective experience. Genuine regard for human rights may be subjectively experienced in a fashion that is entirely consistent with one's religious convictions.¹⁷ Put differently, a religious person's unique set of experiences may resolve all possible tensions between his/her own personal religious convictions and human rights. At the subjective level, individuals may feel that they have not experienced any irreconcilable conflicts between their commitment to human rights and their religious convictions.

Rather, the tension between the convictional systems of religion and human rights exist in the objectified standards and realities that each system claims.¹⁸ Put rather bluntly, which of the two generalised and objectified systems warrants deference and which constitutes the ultimate frame of reference? Unless one argues, as was claimed in the classical natural law tradition, that God willed that human beings have a particular set of rights, the tension between the two systems becomes inevitable.¹⁹ If the generalised and objectified set of human rights asserted by people just happens to be exactly the same as the divinely ordained set of rights, then, in effect, the tension is resolved, or such a tension never really existed in the first place. The tension is most pronounced, however, when the objectified religious experience is inconsistent with the objectified claims to human rights. This is especially the case when, as is the situation today, such claims arise from a fundamentally secular paradigm.²⁰

The ambiguity one finds in modern Muslim discourses regarding a commitment to human rights is due to the failure to confront the two objectified experiences of Islam and human rights. The apologetic discourse avoided the issue by assuming that the two experiences must be one and the same, and that God has granted human beings the

same set of rights found in the international human rights discourse. But such a claim was not made out of a process of reobjectifying or reconstructing Islam so as to engineer such a consistency. In light of the colonial experience and the perception of the vast hypocrisy in human rights practices, many Muslims did not take the human rights discourses seriously enough to effectuate such an engineering of the objectified experience of Islam.

The puritan orientation, on the other hand, opted out of the process altogether and, asserting the supremacy of Islam as a convictional system, rejected as a matter of principle the process of re-engineering or reobjectifying Islam in order to resolve such a tension. This is what accounts for the puritan orientation's defiant stance toward contemporary international human rights claims and its assumption that Islamic imperatives must necessarily be very different from the imperatives set by human rights commitments. The irony, however, is that by taking such a stance, the puritan orientation ended up negating the integrity of the Islamic experience and, in the name of being different, voided what could be genuinely Islamic and, at the same time, consistent with the international human rights tradition.

Acknowledging the primacy of the apologetic and the puritan approaches in modern Islam does not mean that the problematic relationship between the two convictional systems of Islam and human rights is fundamentally irresolvable. In fact, such an acknowledgement is a necessary precondition for developing a critical mass of analytically rigorous Islamic treatments of the issue. There have been some serious efforts, especially in Iran, to deal with the tension between the two systems, but to date such efforts have not reached a critical mass where they may constitute a serious intellectual movement.²¹

Methodologically, many of these efforts have tried to locate a primary Islamic value, such as tolerance, dignity, or self-determination, and utilise this value as a proverbial door by which the human rights

tradition may be integrated into Islam. Other efforts, however, have relied on a sort of original-intent argument, namely, that God's original intent was consistent with a scheme of greater rights for human beings but that the sociohistorical experience was unable to achieve a fulfilment of such an intent.²² My point here is not to critique these methodological approaches, and I do not necessarily even disagree with them. I do think, however, that Islamic discourses need to go further than either identifying core values or constructing arguments about a historically frustrated divine will.

It is not an exaggeration to say that what is needed is a serious rethinking of the inherited categories of Islamic theology. Nonetheless, in my view, what is needed is not a human-centred theology, but a rethinking of the meaning and implications of divinity, and a reimagining of the nature of the relationship between God and creation. It is certainly true that in Qur'anic discourses God is beyond benefit or harm, and therefore all divine commands are designed to benefit human beings alone and not God. One of the basic precepts of *Shari'ah* is that all laws are supposed to accrue to the benefit of human beings, who are ultimately charged with fulfilling the divine covenant.²³ But in and of itself, this avowed goal of Islamic law is not sufficient to justify a commitment to human rights. Rather, the challenge is to reimagine the nature of the divine covenant, which defines the obligations and entitlements of human beings, in order to centralise the imperative of human rights, and to do so from an internally coherent perspective in Islam.

From an internal perspective, the question is: Is the subjective belief of human beings about their entitlements and rights relevant to identifying or defining those entitlements and rights? May human beings make demands upon each other, and God, for rights and, upon making such demands, become entitled to such rights? As Islamic theology stands right now, the answer would clearly be that, in the eyes of God, the demands of human beings are irrelevant to their entitlements. God is not

influenced one way or the other by human demands, and it is heretical to think otherwise. This response given by traditional Islamic theology does not necessarily preclude a recognition of human rights, but I do believe that such a response creates the potential for foreclosing the possibility of giving due regard to the evolving field of universal human rights.

As I noted earlier, I am dealing with potentialities and not absolute determinations. Therefore, as argued below, giving a different response to these questions could contribute to, or could create, a potential for resolving what I described as the problematic tension between human rights schemes and Islam. I will argue that in order to create an adequate potential for the realisation of a human rights commitment in Islam, it is important to visualise God as beauty and goodness, and that engaging in a collective enterprise of beauty and goodness, with humanity at large, is part of realising the divine in human life.

IV. God's Sovereignty and the Sovereignty of Human Well-Being

The well-known Muslim historian and sociologist Ibn Khaldun (d. 784/1382) separated all political systems into three broad types. The first he described as a natural system, which approximates a primitive state of nature. This is a lawless system in which the most powerful dominates and tyrannises the rest. The second system, which Ibn Khaldun described as dynastic, is tyrannical as well but is based on laws issued by a king or prince. However, due to their origin, these laws are baseless and capricious, and so people obey them 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 fulfils the criteria of justice and legitimacy, and binds the governed and governor alike. Because the government

is bound by a higher law that it may not alter or change, and because the government may not act whimsically or outside the pale of law, the caliphate system is, according to Ibn Khaldun, superior to any other.

Ibn Khaldun's categorisation is not unusual in premodern Islamic literature. The notion that the quintessential characteristic of a legitimate Islamic government is that it is a government subject to and limited by *Shari'ah* law is repeated often by premodern jurists. Muslim jurists insisted that a just caliph must apply and himself be bound by *Shari'ah* law. In fact, some such as the jurist Abu al-Faraj al-Baghdadi 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.

In the imaginary constructs of Muslim jurists, *Shari'ah* was seen as the bulwark against whimsical government, and as the precondition for a just society. Although this point is often ignored in modern discourses, *Shari'ah* was, at least at the symbolic level, presented as a constraint on the power of the government. The very notion that informed the concept of *Shari'ah* law was that *Shari'ah* is not the law of the state but the law that limits the state. The premodern jurists insisted that the state or the ruler cannot make or formulate *Shari'ah* law. Particularly after the third/ninth century, it had become fairly well established that it was the jurists (*ulama*) who were the legitimate spokespersons for the divine law—an idea that was expressed in the oft-repeated phrase that the *ulama* are the inheritors of the *Shari'ah*.

The state could pass and adopt rules and regulations, as might be necessary in order to serve the public interest, but only as long as such rules and regulations did not violate *Shari'ah* law. Any rules or regulations enacted by the state did not constitute a part of *Shari'ah* law, but were treated as merely administrative in nature. Administrative laws, or what might be called executive laws, were, unlike *Shari'ah* law, considered temporal and mundane; they were a legitimate means for achieving

specific contextual ends, but such laws had no claim to divinity and had no precedential value beyond their specific context and time.

The notion of a government constrained by laws, and the denial to the executive power of unfettered discretion in dealing with the ruled, does tend to support conditions that are conducive for the protection of human rights. Arguably, *Shari'ah* law, as articulated by jurists, could support a conception of rights that, in most situations, are immune from government interference or manipulation. The fact that the interpretations of jurists are endowed with a certain measure of sanctity—as long as such interpretations tend to respect the honour and dignity of human beings—could empower these juristic interpretations against the vagaries and indiscretions of political powers and contribute to the protection of human dignities.

In fact, in Islamic historical practice, Muslim jurists did form a class that exercised considerable moral power against the government and helped to play a mediating role between the rulers and the ruled. Historically, Muslim jurists often represented the ruler to the ruled, and the ruled to the ruler, and acted to stem and balance against political absolutism. They did so by negotiating power, and yielding their moral authority in favour of the ruler or the ruled, depending on the sociohistorical context and the competing normative demands confronting them. Throughout Islamic history, the *ulama* performed a wide range of economic, political, and administrative functions, but most importantly, they acted as negotiative mediators between the ruling class 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.'²⁴ Importantly, until the modern age Muslim jurists, as a class of legal technocrats, never assumed power directly and did not demand that they be allowed to assume direct political power.²⁵ Therefore, theocratic rule, until the contemporary age, was virtually unknown in Islam.²⁶

The problem, however, is that *Shari'ah* is a general term for a multitude of legal methodologies and a remarkably diverse set of interpretive determinations.²⁷ In fact, the negotiative role played by Muslim jurists points to the subjective element in *Shari'ah* interpretations. Despite the dogmatic assumptions of many Muslim activists, *Shari'ah* law constitutes the sum total of the subjective engagements of legal specialists with texts that purport to represent the divine will. The extent to which *Shari'ah* law will provide for certain rights—to be retained by individuals or even communities, which are held as immunities against possible transgressions by others—largely depends on the subjective determinations of Muslim jurists.

I am not arguing that Islamic texts do not provide for objectivities whatsoever, or that they do not constrain, and even limit, the interpretive activities of jurists. My argument is that the idea of limited government in Islam is as effective as the constraints and limitations that the subjective interpreter is willing to place upon such a government. In other words, the reliance on *Shari'ah*, or on Islamic texts, is not in and of itself a sufficient guarantee of human rights. What is needed is a normative commitment by the subjective interpreters of the law in favour of such rights.

It is quite possible for a government to implement faithfully the technical rules of *Shari'ah*, but otherwise violate the rights of human beings. A government could implement *Shari'ah's* criminal penalties, prohibit usury, dictate rules of modesty, and so on, and yet remain a government of unrestrained powers against its citizens. This is because unless the conception of government is founded around core moral values about the normative purpose of *Shari'ah* and unless there is a process that limits the ability of the government to violate those core moral values, the idea of a government bound by *Shari'ah* remains vague.

Much of the debate on the subjective moral commitments that underlie the implementation of *Shari'ah* harks back, however, to the issue of God's legislative sovereignty. This is known in Islamic

discourses as the *hakimiyya* debate. Arguably, it is meaningless to speak of normative moral commitments to human rights in the context of Islamic law. Put simply, since only God is sovereign and since God is the sole legislator, God is also the giver and taker of rights. Therefore, it is often argued, human beings only have such rights as God has chosen to give to them, and they are also denied the rights that God has denied them, and one may not add or subtract anything to this basic and fundamental principle. As a result, it is often maintained that the sole focus ought to be on compliance with the technical rules of Islamic law, without paying particular attention to whether the implementation of such laws grant or deny rights to human beings. Interestingly, a very similar issue was debated in the context of a famous political controversy in early Islam. It will be helpful to review briefly this historical debate.

The issue of God's dominion or sovereignty (*hakimiyyat Allah*) was raised by a group known as the Haruriyya (later known as the Khawarij) when they rebelled against the fourth Rightly Guided Caliph, 'Ali ibn Abi Talib (d. 40/661). Initially, the Haruriyya were firm supporters of 'Ali, but they rebelled against him when he agreed to arbitration in his political dispute with a competing political faction led by a man named Mu'awiya. Being a puritan and pietistic group of zealots, the Khawarij believed that God's law clearly supported 'Ali and, therefore, an arbitration or any negotiated settlement was inherently unlawful. It in effect challenged the rule of God and thus God's sovereignty or dominion, and therefore, by definition, was illegitimate.

In the view of the Khawarij, by accepting the principle of arbitration and by accepting the notion that legality could be negotiated, 'Ali himself had lost his claim to legitimacy because he had transferred God's dominion to human beings. Not surprisingly, the Khawarij declared 'Ali a traitor to God, rebelled against him, and eventually succeeded in assassinating him.

Typically, the story of the Khawarij is recounted as an example of early religious fanaticism in Islamic history, and I have no doubt that this view is substantially correct. However, one ought not to overlook the fact that the Khawarij's rallying cry of 'dominion belongs to God' or 'the Qur'an is the judge' (*al-hukm li-Allah* or *al-hukm li al-Qur'an*) was a call for the symbolism of legality and the supremacy of law.²⁸ This search for legality quickly descended into an unequivocal radicalised call for clear lines of demarcation between what is lawful and unlawful. The anecdotal reports about the debates between 'Ali and the Khawarij regarding this matter reflect an unmistakable tension about the meaning of legality and the implications of the rule of law.

In one such report, members of the Khawarij accused 'Ali of accepting the judgement 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 and brought a large copy of the Qur'an. 'Ali touched the Qur'an, commanding it to speak to the people and to inform them about God's law. The people gathered around 'Ali and one of them exclaimed, 'What are you doing! The Qur'an cannot speak, for it is not a human being.' Upon hearing this, 'Ali exclaimed that this is exactly the point he was trying to make! The Qur'an, 'Ali stated, is but ink and paper, and it is human beings who give effect to it according to their limited personal judgements.²⁹

Arguably, anecdotal stories such as this do not relate only to the role of human agency in interpreting the divine word, but they also symbolise a search for the fundamental moral values in society. For a believer, God is thought of as all-powerful and as the ultimate owner of heaven and earth, but what are the implications of this claim for human agency in understanding and implementing the law? As I argue below, arguments claiming that God is the sole legislator and the only source of law engage in a fatal fiction that is not defensible from the point of view of Islamic theology. Such arguments pretend that human agents

could possibly have perfect and unfettered access to the mind of God and could possibly become the mere executors of the divine will, without inserting their own human subjectivities in the process. Furthermore, and more importantly, claims about God's sovereignty assume that there is a divine legislative will that seeks to regulate all human interactions. This is always stated as an assumption, instead of a proposition that needs to be argued and proven.

It is possible that God does not seek to regulate all human affairs, a point to which I will return. It is also possible that God leaves it to human beings to regulate their own affairs as long as they observe certain minimal standards of moral conduct, and that such standards include the preservation and promotion of human dignity and honour because, after all, according to the Qur'an, humans are the vicegerents of God and the inheritors of the earth and are the most valued invention among God's creation. In the Qur'anic discourse, God commanded creation to honour human beings because of the miracle of the human intellect, which is the microcosm of the abilities of the divine itself. Arguably, the fact that God honoured the miracle of the human intellect and also honoured the human being as a symbol of divinity is sufficient, in and of itself, to justify a moral commitment to whatever might be needed to protect and preserve the integrity and dignity of that symbol of divinity.

At this point, it will be useful to deal more systematically with the very concept and epistemology of *Shari'ah*, and the possibility of moral commitments within such an epistemology. This is important because of the centrality of *Shari'ah* to the whole conception of government in Islam, and because the epistemological basis of *Shari'ah* itself is poorly understood by contemporary Muslims, let alone by non-Muslims. As noted earlier, the primacy of the apologetic and puritan trends in contemporary Islam has made *Shari'ah* discourses more like an arena for political slogans than a serious intellectual discipline. But the issue of God's sovereignty and

the possibility of moral commitments within a *Shari'ah* paradigm needs to be analysed through a more informed understanding of the epistemology of *Shari'ah*. Only then can one hope to get beyond the prevalent contemporary dogma in the process of justifying a human rights commitment in Islamic jurisprudence.

As discussed earlier, the difficulty with the concept of *Shari'ah* is that it is potentially a construct of limitless reach and power, and any institution that can attach itself to that construct becomes similarly empowered. *Shari'ah* is God's Way, and it is represented by a set of normative principles, methodologies for the production of legal injunctions, and a set of positive legal rules. *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, is considered the Way of God. It is true that the *Shari'ah* is capable of imposing limits on government and of generating individual rights, both of which would be considered limits and rights dictated by the divine will. Yet, whatever limits are imposed or whatever rights are granted may be withdrawn in the same way they are created—through the agency of human interpretation.

In other words, the *Shari'ah*, for the most part, is not explicitly dictated by God. Rather, it relies on the interpretive act of the human agent for its production and execution. This creates a double-edged conceptual framework: on the one hand, *Shari'ah* could be the source of unwavering and stolid limitations on government and an uncompromising grant of rights; but on the other hand, whatever is granted by God can also be taken away by God. In both cases, one cannot escape the fact that it is human agents who determine the existence, or non-existence, of the limits on government and the grant of individual rights. This is a formidable power that could be yielded, in one way or another, by the human agent who attaches himself or herself to the *Shari'ah*. The discourse of *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.

However, I wish to focus on one aspect of Islamic theology that might contribute to the development of a meaningful discourse on human rights in the Islamic context. As noted above, Muslims developed several legal schools of thought, all of which are equally orthodox. But paradoxically, *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 realisation 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.

As part of the doctrinal foundations for this discourse, Muslim 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'.³⁰ This implied that there could be more than a single correct answer to the same question. For Muslim 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 or demand, 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 Muslim jurists agreed that good faith diligence in searching for the divine will is sufficient to protect a researcher from liability before God. As long as the researcher exercises due diligence in the search, he or she 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 seeker might reach the truth while the others might be mistaken. On the Final Day, God will inform all seekers 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 Imam al-Haramayn al-Juwayni (d. 478/1085), 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. 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 of 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 investigate a problem diligently 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.³¹

God's command to human beings is to search diligently, 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, for that person 'that' is in fact God's law. The position of the *musawwibah*, in particular, raises difficult questions about the application of the *Shari'ah* in society.³² 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 *mukhatti'ah* teach that whatever law is applied is potentially God's law, but not necessarily so. In my view, this raises the question: Is it possible for any state-enforced law to be God's law? Under the first (*mukhatti'ah*) 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 (*musawwibah*) school of thought, any law applied by the state is not the law of God unless the

person to whom 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 that *Shari'ah* ought to stand in an Islamic polity as a symbolic construct for the divine perfection that is unreachable by human effort. 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 channelled 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 it is imperfect and contingent. Jurists ought to continue exploring the ideal of *Shari'ah* and expounding their imperfect attempts at understanding God's perfection. As long as the argument constructed is normative, it is an unfulfilled potential for reaching the divine will. Significantly, any law applied is necessarily a potential unrealised. *Shari'ah* is not simply a bunch of *ahkam* (a set of positive rules) but also a set of principles, methodology, and a discursive process that searches for the divine ideals. As such, it 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 on 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.³³

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. 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 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 also means that any codification of *Shari'ah* law produces a set of rules that are human, and not divine. 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. As to the fundamental rights that often act as the foundation of a just society, a Muslim society would have to explore the basic values that are at the very core of the divine ideal.

It is important to note that the paradigm proposed above does not exclude the possibility of objectified and even universalistic moral standards. It simply shifts the responsibility for moral commitments, and the outcome of such commitments, to human beings. Morality could originate with God or could be learned by reflecting upon the state of

nature that God has created, but the attempts to fulfil such a morality and give it actual effect are human. In fact, the paradigm proposed here would require certain moral commitments from human beings that ought to be adopted as part of their discharge of their agency on God's behalf.

Neither the first nor the second view of *Shari'ah* epistemology is possible unless people are guaranteed the right to rational development. Furthermore, the right to rational development means that people ought to be entitled to minimum standards of well-being, in both the physical and intellectual senses. It is impossible to pursue rational development if one is not fed, housed, educated, and, above all, safe from physical harm or persecution. In addition, people cannot pursue a reflective life unless they are guaranteed freedom of conscience, expression, and assembly with like-minded people. Premodern Muslim jurists approached the same type of concerns expressed here by arguing that human needs should be divided into necessities, needs, and luxuries, and that the necessities should be conceptualised in terms of the five core values of protecting religion, life, intellect, honour, and property. I have more to say about the juristic divisions and five core values, but my point is that even these juristic divisions, for example, are fundamentally human, and thus fallible attempts at fulfilling a divine ideal or moral commitment. As such, they can be rethought, deconstructed, and redeveloped if need be. I think that once Muslims are able to assert that morality is divine, but law and legal divisions and rules are mundane, this will represent a major advancement in the attempt to justify a paradigm of human rights in Islam.

More concretely, reflecting upon divinity, I, as a Muslim, might be able to assert that justice and mercy are objective and universal moral values. I might even try to convince others that justice and mercy are part of the divine charge to humanity—God wants humans to be merciful and just. This represents a moral commitment that I am inviting other human beings to adopt as well. But, under the paradigm proposed here, while

I can claim that moral rules emanate or originate from God—a claim which people are free to accept or dispute—I cannot claim that any set of laws that attempt to implement or give effect to this moral commitment is divine as well. Under the first and second views discussed above, this would simply be a conceptual impossibility. Giving effect to this paradigm, I will argue below that justice is a core divine and moral value and further attempt to justify a human rights commitment in Islam.

V. Justice as a Core Value and Human Rights

One of the basic issues commonly dealt with in Islamic political thought was the purpose of government (or the caliphate). The statement of al-Juwayni is fairly representative of the argument of premodern jurists. He states:

The *imama* (government) is a total governorship and general leadership that relates to the special and common in the affairs of religion and this earthly life. It includes guarding the land and protecting the subjects, and the spread of the message [of Islam] by the word and sword. It includes correcting deviation, redressing injustice, aiding the wronged against the wrongdoer, and taking the right from the obstinate and giving it to those who are entitled to it.³⁴

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

God sent His message and His Books to lead people with justice.... Therefore, if a just leadership is established, through any means, then therein is the Way of God.... In fact, the purpose of God's Way is the establishment of righteousness and justice ... so any road that establishes what is right and just is the road [Muslims] should follow.³⁵

In the Qur'anic discourse, justice is asserted as an obligation owed to God and also owed by human beings to one another. In addition, the imperative of justice is tied to the obligations of enjoining the good and forbidding the evil and the necessity of bearing witness on God's behalf.

Although the Qur'an does not define the constituent elements of justice and in fact seems to treat it as intuitively recognisable, it emphasises the ability to achieve justice as a unique human charge and necessity.³⁶ In essence, the Qur'an requires a commitment to a moral imperative that is vague, but recognisable through intuition, reason, or human experience.³⁷ Importantly, a large number of Muslim jurists argued that God created human beings weak and in need of cooperating with others in order to limit their ability to commit injustice. Furthermore, God created human beings diverse and different from each other so that they will need each other, and this need will cause them further to augment their natural tendency to assemble and cooperate in order to establish justice.

The relative weakness of human beings and their remarkably diverse abilities and habits will further induce people to draw closer and cooperate with each other. 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 strength and justice. The ruler, the jurists argued, ascends to power through a contract with the people pursuant to which he undertakes to further the cooperation of the people,

with the ultimate goal of achieving a just society or at least maximising the potential for justice.

This juristic discourse is partly based on the Qur'anic statement that God created people different, and made them into nations and tribes so that they will come to know one another. Muslim jurists reasoned that the expression 'come to know one another' (*Al-Hujurat* 49:13) indicates the need for social cooperation and mutual assistance in order to achieve justice. Although the premodern jurists did not emphasise this point, the Qur'an also notes that God made people different, and that they will remain different until the end of human existence. Further, the Qur'an states that the reality of human diversity is part of the divine wisdom, and an intentional purpose of creation (*Hud* 11:118). The Qur'anic celebration and sanctification of human diversity, in addition to the juristic incorporation of the notion of human diversity into a purposeful pursuit of justice, creates various possibilities for a human rights commitment in Islam. This discourse could be appropriated into a normative stance that considers justice to be a core value that a constitutional order is bound to protect.

Furthermore, this discourse could be appropriated into a notion of delegated powers in which the ruler is entrusted to serve the core value of justice in light of systematic principles that promote the right of assembly and cooperation in order to enhance the fulfilment of this core value. In addition, 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 in this quest. Importantly, if the government fails to discharge the obligations of its covenant, then it loses its legitimate claim to power.

However, there are two considerations that militate against the fulfilment of these possibilities in modern Islam. First, modern Muslims themselves are hardly aware of the Islamic interpretive tradition on justice. Both the apologetic and the puritan orientations, which are

the two predominant trends in modern Islam, have largely ignored the paradigm of human diversity and difference as a necessary means to the fulfilment of the imperative of justice. The second consideration, and the more important one, is that even if modern Muslims reclaim the interpretive traditions of the past on justice, the fact is that, at the conceptual level, the constituent elements of justice were not explored in Islamic doctrine.

There is a tension between the general obligation of implementing the divine law and the demand for justice. Put simply, does the divine law define justice, or does justice define the divine law? If it is the former, then whatever one concludes to be the divine law, therein is justice. If it is the latter, then whatever justice demands is, in fact, the demand of the Divine. For instance, many premodern and modern jurists asserted that the primary purpose of a Muslim polity is to guard and apply the divine law, and the primary charge of a Muslim ruler is to ensure that the people cooperate in giving effect to God's law. In effect, this paradigm makes the organising principle of society the divine law, and the divine law becomes the embodiment of justice.

Under this paradigm, there is no point in investigating the constituent elements of justice. There is no point in investigating whether justice means equality of opportunities or results, or whether it means maximising the potential for personal autonomy, or whether it means, perhaps, the maximisation of individual and collective utility, or the guarding of basic human dignity, or even the simple resolution of conflict and the maintenance of stability, or any other conception that might provide substance to a general conception of justice. There is no point in engaging in this investigation because the divine law pre-empts any such inquiry. The divine law provides particularised positive enactments that exemplify but do not analytically explore the notion of justice. Conceptually, according to this paradigm, organised society is no longer about the right to assembly, about cooperation, or about the right

to explore the means to justice, but simply about the implementation of the divine law. This brings us full circle to the problem noted above, which is that the implementation of the divine law does not necessarily amount to the existence of limited government, or the protection of basic human rights.

It is important to note, however, that considering the primacy of justice in the Qur'anic discourse, coupled with the notions of human vicegerency, and the notion that the divine charge of justice has been delegated to humanity at large, it is plausible to maintain that justice is what ought to control and guide all human interpretive efforts at understanding the law. This requires a serious paradigm shift in Islamic thinking. In my view, justice and whatever is necessary to achieve justice is the divine law and is what represents the supremacy and sovereignty of the Divine.

God describes God's-self as inherently just, and the Qur'an asserts that God has decreed mercy upon Godself (*Al-An'am* 6:12, 54). Furthermore, the very purpose of entrusting the divine message to the Prophet Muhammad is as a gift of mercy to human beings.³⁸ In the Qur'anic discourse, mercy is not simply forgiveness or the willingness to ignore the faults and sins of people. Mercy is a state in which the individual is able to be just with himself or herself and with others by giving each their due. Fundamentally, mercy is tied to a state of true and genuine perception; that is why, in the Qur'an, mercy is coupled with the need for human beings to be patient and tolerant with each other.³⁹ Most significantly, diversity and differences among human beings are claimed in the Qur'anic discourse as a merciful divine gift to humankind.

Genuine perception that enables persons to understand and appreciate—and become enriched by—the difference and diversity of humanity is one of the constituent elements for the founding of a just society, and for the achievement of justice. The divine charge to human

beings at large, and Muslims in particular, is, as the Qur'an puts it, 'to know one another', and utilise this genuine knowledge in an effort to pursue justice. Beyond mere tolerance, this requires that Muslims, and human beings in general, engage in a collective enterprise of goodness, in which they pursue the fulfilment of justice through mercy. The challenge is not simply for people to coexist, but to take part in an enterprise of goodness by engaging in a purposeful moral discourse. Although coexistence is a basic necessity for mercy, in order to pursue a state of real knowledge of the other and aspire for a state of justice, it is imperative that human beings cooperate in seeking the good and beautiful. The more the good and beautiful is approached, the closer humanity comes to a state of divinity.

However, implementing legalistic rules, even if such rules are the product of the interpretation of divine texts, is not sufficient for the achievement of genuine perception of the other, of mercy, or ultimately of justice. The paradigm shift of which I speak requires that the principles of mercy and justice become the primary divine charge. In this paradigm, God's sovereignty lies in the fact that God is the source and authority that delegated to human beings the charge to achieve justice on earth by fulfilling the virtues that are approximations of divinity. Far from negating human subjectivities through the mechanical enforcement of rules, such subjectivities are accommodated and even promoted to the extent that they contribute to the fulfilment of justice.

Significantly, according to the juristic discourses, it is not possible to achieve justice unless every possessor of right (*haqq*) is granted his or her right. As discussed below, God has certain rights, humans have rights, and both God and humans share some rights. The challenge of vicegerency is to first recognise that a right exists, then to understand who is the possessor of such a right, and ultimately to allow the possessor of a given right the enjoyment of the warranted right. A society that fails to do so, regardless of the deluge of rules it might apply, is not a merciful

or just society. This puts us in a position to explore the possibility of individual rights in Islam.

VI. The Rights of God and the Rights of People

This is the most challenging topic, and I cannot possibly do it justice in the space of this article. The very notion of individual rights is elusive, in terms of both the sources and the nature of those rights. Furthermore, whether there are inherent and absolute individual rights or simply presumptive individual entitlements that could be outweighed by countervailing considerations is debatable. In addition, while all constitutional democracies afford protections to a particular set of individual interests, such as freedom of speech and assembly, equality before the law, right to property, and due process of law, exactly which rights ought to be protected, and to what extent, is subject to a large measure of variation in theory and practice. In this context, I am using a minimalist and, hopefully, non-controversial notion of individual rights.

By individual rights, I do not mean entitlements but qualified immunities—the idea that particular interests related to the well-being of an individual ought to be protected from infringements, whether perpetuated by the state or other members of the social order, and that such interests should not be sacrificed unless for an overwhelming necessity. This, as noted, is a minimalist description of rights and, in my view, a largely inadequate one. I doubt very much that there is an objective means of quantifying an overwhelming necessity, and thus, some individual interests ought to be unassailable under any circumstances. These unassailable interests are the ones that, if violated, are bound to communicate to the individual in question a sense of worthlessness, and that, if violated, tend to destroy the faculty of a human being to comprehend the necessary elements for a dignified existence. Therefore,

for instance, under this conception, the use of torture, the denial of food or shelter, or the means for sustenance, such as employment would, under any circumstances, be a violation of an individual's rights. For the purposes of this article, however, I will assume the minimalist description of rights.

It is fair to say, however, that the premodern juristic tradition did not articulate a notion of individual rights as privileges, entitlements, or immunities. Nonetheless, the juristic tradition did articulate a conception of protected interests that accrue to the benefit of the individual. However, as demonstrated below, this subject remains replete with considerable ambiguity in Islamic thought. As noted earlier, the purpose of *Shari'ah* in jurisprudential theory is to fulfil the welfare of the people. The interests or the welfare of the people is divided into three categories: the necessities (*daruriyyat*), the needs (*hajiyyat*), and the luxuries (*kamaliyyat* or *tahsiniyyat*). The law and political policies of the government must fulfil these interests in descending order of importance—first, the necessities, then the needs, and then the luxuries. The necessities are further divided into five basic values (*al-daruriyyat al-khamsah*): religion, life, intellect, lineage or honour, and property. But Muslim jurists did not develop the five basic values as conceptual categories and then explore the theoretical implications of each value. Rather, they pursued what can be described as an extreme positivistic approach to these rights.

Muslim jurists examined the existing positive legal injunctions that arguably can be said to serve these values, and concluded that by giving effect to these specific legal injunctions, the five values have been sufficiently fulfilled. So, for example, Muslim jurists contended that the prohibition of murder 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. Limiting the protection of the intellect to the prohibition against the consumption

of alcohol or the protection of life to the prohibition of murder is hardly a very thorough protection of either intellect or life. At most, these laws are partial protections to a limited conception of values and, in any case, cannot be asserted as the equivalent of individual rights because they are not asserted as immunities to be retained by the individual against the world. It is reasonable to conclude that these five values were emptied of any theoretical social and political content and were reduced to technical legalistic objectives. This, of course, does not preclude the possibility that the basic five values could act as a foundation for a systematic theory of individual rights.⁴⁰

To argue that the juristic tradition did not develop the idea of fundamental or basic individual rights does not mean that that tradition was oblivious to the notion. In fact, the juristic tradition tended to sympathise with individuals who were unjustly executed for their beliefs or those who died fighting against injustice. Jurists typically described such acts as a death of *musabara*, a description that carried positive or commendable connotations. Muslim jurists produced a formidable discourse condemning the imposition of unjust taxes and the usurpation of private property by the government. Furthermore, the majority of Muslim jurists refused to condemn or criminalise the behaviour of rebels who revolted because of the imposition of oppressive taxes or who resisted a tyrannical government.⁴¹ In addition, the juristic tradition articulated a wealth of positions that exhibit a humanitarian or compassionate orientation. I will mention only some of these positions, leaving the rest to a more extensive study. Muslim jurists developed the idea of presumption of innocence in all criminal and civil proceedings and argued that the accuser always carries the burden of proof (*al-bayyina 'ala man idda'a*).⁴² In matters related to heresy, Muslim jurists repeatedly argued that it is better to let a thousand heretics go free than to punish a single sincere Muslim wrongfully. The same principle was applied to criminal cases; the jurists argued that it is always better to release a guilty person than

to run the risk of punishing an innocent person.⁴³ Moreover, many jurists condemned the practice of detaining or incarcerating heterodox groups that advocate 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 situations⁴⁴ and opposed the use of coerced confessions in all legal and political matters.⁴⁵ 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 asserted that a judge who relies on a coerced confession in a criminal conviction is, in turn, 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 against the caliph and his representatives, generally, because the government is deemed to be vicariously liable for the unlawful behaviour of its judges.

But perhaps the most intriguing discourse in the juristic tradition is that which relates to the rights of God and the rights of people. The rights of God (*huquq Allah*) are rights retained by God, as God's own through an explicit designation to that effect. These rights belong to 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. These rights are, so to speak, subject to the exclusive jurisdiction and dominion of God, and human beings have no choice but to follow the explicit and detailed rules that God set out for the handling of acts that fell in God's jurisdiction. In addition, in the juristic theory, all rights not explicitly retained by God accrue to the benefit of human beings.

In other words, any right (*haqq*) that is not specifically and clearly retained by God becomes a right retained by people. These are called *huquq al-'ibad*, *huquq al-nas*, or *huquq al-adamiyyin*. Importantly, while

violations of God's rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by the people. The Hanafi jurist al-'Ayini (d. 855/1451) argues that the usurper of property, even if a government official (*al-zalim*), will not be forgiven for his sin, even if he repents a thousand times, unless he returns the stolen property.⁴⁶

Most of such discourse occur in the context of addressing personal monetary and property rights, but they have not been extended to other civil rights, such as the right to due process or the right to listen, to reflect, and to study, which may not be abandoned or violated by the government under any circumstances. This is not because the range of the rights of people was narrow; quite to the contrary, it is because the range of these rights was too broad. It should be recalled that people retain any rights not explicitly reserved by God. Effectively, since the rights retained by God are quite narrow, the rights accruing to the benefit of the people are numerous. Juristic practice has tended to focus on narrow legal claims that may be addressed through the processes of law rather than on broad theoretical categories that were perceived as non-justiciable.

As such, the jurists tended to focus on tangible property rights or rights for compensation instead of on moral claims. So, for instance, if someone burns another person's books, that person may seek compensation for destruction of property, but he could not bring an action for injunctive relief preventing the burning of the books in the first place. Despite this limitation, the juristic tradition did, in fact, develop a notion of individual claims that are immune from governmental or social limitation or alienation.

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

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

Shifting paradigms, it is necessary to transform the traditional conceptions of rights to a notion of immunities and entitlements. As such, these rights become the property of individual holders, before a specific grievance arises and regardless of whether there is a legal cause of action. The set of rights that are recognised as immutable and invariable are those that are necessary to achieve a just society while promoting the element of mercy. It is quite possible that the relevant individual rights are those five values mentioned above, but this issue needs to be rethought and reanalysed in light of the current diversity and particularity of human existence.

The fact that the rights of people take priority over the rights of God, on this earth, necessarily means that a claimed right of God may not be used to violate the rights of human beings. God is capable of vindicating whichever rights God wishes to vindicate in the Hereafter. On this earth, we concern ourselves only with discovering and establishing the rights that are needed to enable human beings to achieve a just life, while—to the extent possible—honouring the asserted rights of God. In this context, the commitment to human rights does not signify a lack of commitment to God, or a lack of willingness to obey God. Rather, human rights become a necessary part of celebrating human diversity, honouring the vicegerents of God, achieving mercy, and pursuing the ultimate goal of justice.

VII. Islam and the Promise of Human Rights

I have argued that God's sovereignty is honoured in the pursuit of a just society and that a just society must, in pursuit of mercy, respect human diversity and richness and must recognise the immunities that are due to human beings. I have justified this position on Islamic grounds, and, while acknowledging that this approach is informed by the interpretive traditions of the past, it is not the dominant approach to the subject or even a well-established approach among Muslims in the modern era. Unfortunately, the only well-established approaches to the subject today are the apologetic and puritan approaches. As far as contemporary discourses are concerned, they are replete with unjustified assumptions and intellectual shortcuts that have seriously undermined the ability of Muslims to confront such an important topic as human rights.

In addition, partly affected by Muslim apologists, many Western scholars repeat generalisations about Islamic law that, to say the least, are not based on historical texts generated by Muslim jurists. Among those unfounded generalisations are the claims that Islamic law is concerned primarily with duties, and not rights, and that the Islamic conception of rights is collectivist, and not individualistic.⁴⁷ Both claims, although they are often repeated, are somewhat inconsistent, but more importantly, they are not based on anything other than cultural assumptions about the non-Western 'other'. It is as if the various interpreters, having decided on what they believe is the Judeo-Christian or perhaps Western conception of rights, assume that Islam must necessarily be different. The reality, however, is that both claims are largely anachronistic.

Premodern Muslim jurists did not assert a collectivist vision of rights, just as they did not assert an individualistic vision of rights. 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 as a matter of juristic determination, this amounted to no more than an

assertion that the many should not be made to suffer for the entitlements of the few. For instance, as a legal maxim, this was utilised to justify the notion of public takings or the right to public easements over private property. This principle was also utilised in prohibiting unqualified doctors from practising 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. Even with regard to public takings or easements, the vast majority of Muslim jurists maintained that the individuals affected are entitled by the state to compensation equal to the fair market value of the property taken.

Pursuant to a justice perspective, one can argue that a commitment to individual rights, taken as a whole, will accrue to the benefit of the many (the private citizens) over the few (the members of ruling government). I do believe that the common good is greatly enhanced, and not hampered, by the assertion of individual rights, but this point needs to be developed in a more systematic way in a separate study. My point here, however, is that the juristic notion of public rights does not necessarily support what is often described as a collectivist view of rights.

Likewise, the idea of duties (*wajibat*) is as well established in the Islamic tradition as the notion of rights (*huquq*); the Islamic juristic tradition does not show a preference for one over the other. In fact, some premodern jurists have asserted that to every duty there is a reciprocal right, and vice versa.⁴⁸ It is true that many jurists claimed that the ruler is owed a duty of obedience, but they also, ideally, expected the ruler to safeguard the well-being and interests of the ruled. The fact that the jurists did not hinge the duty to obey on the obligation to respect the individual rights of citizens does not mean that they were, as a matter of principle, opposed to affording the ruled certain immunities against the state. In some situations, Muslim jurists even asserted that if the state fails to protect the well-being of the ruled, and is unjust toward them, the ruled no longer owe the state either obedience or support.⁴⁹

The widespread rhetoric regarding the primacy of collectivist and duty-based perspectives in Islam points to the reactive nature of much of the discourse on Islamic law in the contemporary age. In the 1950s and 1960s, most Muslim countries, as underdeveloped nations, were heavily influenced by socialist and national development ideologies which tended to emphasise collectivist and duty-oriented conceptions of rights. Therefore, many Muslim commentators claimed that the Islamic tradition necessarily supports the aspirations and hopes of what is called the Third World. But such claims are as negotiative, reconstructive, and inventive of the Islamic tradition as is any particular contemporaneous vision of rights. In my view, however, from a theological perspective, the notion of individual rights is easier to justify in Islam than a collectivist orientation.

God created human beings as individuals, and their liability in the Hereafter is individually determined as well. To commit oneself to safeguarding and protecting the well-being of the individual is to take God's creation seriously. Each individual embodies a virtual universe of divine miracles—in body, soul, and mind. Why should a Muslim commit himself/herself to the rights and well-being of a fellow human being? The answer is because God has 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 whoever kills a fellow human being unjustly, it is as if he/she has murdered all of humanity; it is as if the killer has murdered the divine sanctity and defiled the very meaning of divinity (*Al-Ma'idah* 5:32).

The Qur'an does not differentiate between the sanctity of a Muslim and that of a non-Muslim. It repeatedly asserts that no human being can limit the divine mercy in any way or even regulate who is entitled to it (*Al-Baqarah* 2:105, *Al-Imran* 3:74, *Al-Fatir* 35:2, *Sad* 38:9, *Az-Zumar* 39:38, *Ghafir* 40:7, *Zukhruf* 43:32).

I take this to mean that non-Muslims, as well as Muslims, could be the recipients and the givers of divine mercy. The measure of moral virtue on this earth is who is able to come closer to divinity through justice, and not who carries the correct religious or irreligious label. The measure in the Hereafter is a different matter, but it is a matter that is in the purview of God's exclusive jurisdiction.

Does it matter what the general world community has come to believe are the minimal standards of conduct that ought to be observed when dealing with human beings? Concretely, does it matter if the world community has come to see the cutting of the hands of the thief, the stoning of an adulterer or adulteress, or the male privilege enjoyed in matters of divorce or inheritance to be violative of the basic standards that should be observed in dealing with human beings? It is relevant if the concept of mercy and human diversity is going to be taken seriously. The real issue is that as Muslims we have been charged with safeguarding the well-being and dignity of human beings, and we have also been charged with achieving justice.

If my argument is sound, dignity and justice need compassion and mercy. Muslims are charged with the obligation to teach mercy; but in the same way that one cannot learn to speak before learning to listen, one cannot teach unless one is also willing to learn. To take the ethic of mercy seriously, we must first learn to care, and this is why it does matter what humanity at large thinks of our interpretations and applications of the divine mandate. If other humans cannot understand our version of mercy, then claiming cultural exceptionalism or relativism, from a theological point of view, avails us nothing. This is especially so if we, as Muslims, are engaging the rest of humanity in a collective enterprise to establish goodness and well-being on this earth. Considering the enormous diversity of human beings, we have no choice but to take each contribution to a vision of goodness

seriously, and to ask which of the proffered visions comes closer to attempting to fulfil the divine charge.

Yet we cannot lose sight of the fact that, as human beings, the charge, and ultimate responsibility, is ours. This means that, acting upon the duties of vicegerency on this earth, we must take the imperative of engaging in a collective enterprise of goodness seriously, and in doing so we must be willing to persuade and be persuaded as to what is necessary for a moral and virtuous existence on this earth. God will most certainly vindicate God's rights in the Hereafter in the fashion that God deems most fitting, but, on this earth, our primary moral responsibility is the vindication of the rights of human beings. Put this way, perhaps it becomes all too obvious that a commitment in favour of human rights is a commitment in favour of God's creation, and ultimately, it is a commitment in favour of God.

Notes

- 1 See Mayer, 'Rhetorical Strategies and Official Policies on Women's Rights', pp. 104-32.
- 2 On the humanistic tradition in Islam, see Boisard, *Humanism in Islam*; Goodman, *Islamic Humanism*; Kraemer, *Humanism in the Renaissance of Islam*; Makdisi, *The Rise of Humanism in Classical Islam and the Christian West*.
- 3 For the argument that some of what are believed to be ancient traditions are in reality recently crafted constructs, see the introduction and concluding chapter written by Hobsbawm in Hobsbawm and Ranger, *The Invention of Tradition*, pp. 1-14, 263-307.
- 4 For instance, see Black, *Islam and Justice*; Cotran and Yamani, *The Rule of Law in the Middle East and the Islamic World*; Dwyer, *Arab Voices*; Waltz, *Human Rights and Reform*, pp. 14-34, 216-30. On the impact of the international human rights discourse on Egypt, see Boyle, 'Human Rights in Egypt', pp. 87-114. For a more general assessment, but which also focuses on Algeria, see Monshipouri, *Democratization, Liberalization, and Human Rights in the Third World*. A particularly insightful analysis is offered by Dalacoura, *Islam, Liberalism and Human Rights*.
- 5 On the issue of the general tension between Islamic law and human rights law, see Tibi, 'Islamic Law/Shari'ah and Human Rights', pp. 75-96. On the response of several Muslim countries to international human rights obligations, see Mayer, *Islam and Human Rights*. Mayer critiques the practice of several Muslim countries of entering reservations to human rights treaties providing that they are bound by human rights law only to the extent that such international obligations are consistent with *Shari'ah* law. See also Mayer, 'Cultural Particularism as a Bar to Women's Rights', pp. 176-88. On the

treatment of religious minorities in traditional Islamic law, and the tension with international human rights law, see Mohammad Tal'at Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, pp. 212-16. See also Kelsay, 'Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights', pp. 33-52. For two very critical perspectives on the status of women under traditional *Shari'ah* law, see Abdel Halim, 'Reconciling the Opposites', pp. 203-13, and Afkhami, 'Gender Apartheid and the Discourse of Relativity of Rights in Muslim Societies', pp. 67-77. See also Cooke and Lawrence, 'Muslim Women Between Human Rights and Islamic Norms', pp. 313-28. On Islamic criminal punishments and human rights, see An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights', pp. 19-43. See also Mayer, 'A Critique of An-Na'im's Assessment of Islamic Criminal Justice', pp. 37-60. On freedom of religion in Islam, see Lerner, *Religion, Beliefs, and International Human Rights*, pp. 47-8.

- 6 See Anderson, *Islamic Law in the Modern World*; Anderson, *Law Reform in the Muslim World*; Hallaq, *A History of Islamic Legal Theories*, pp. 207-11. On the adoption of secularised law, and the emergence of Western legal professionals in Egypt, see Ziadeh, *Lawyers, the Rule of Law, and Liberalism in Modern Egypt*, pp. 3-61.
- 7 The classic studies on Orientalism and its effects remain those of Said, *Orientalism* and *Culture and Imperialism*. For a probing survey of Orientalism and its practices, see Turner, *Orientalism, Postmodernism and Globalism*, pp. 3-114. See also Hussain, Olson and Qureshi, *Orientalism, Islam, and Islamists*. For an informative survey of Orientalism and its practices, see Macfie, *Orientalism*. Euben in *Enemy in the Mirror* argues somewhat persuasively that Islamic fundamentalism is a form of critique or protest against rationalist modernism. On the emergence of the feminist discourse and the 'White Woman's Burden', see A. Ali, *The Emergence of Feminism*

Among Indian Muslim Women 1920-1947; Ahmed, *Women and Gender in Islam*; Charrad, *States and Women's Rights*; Chaudhuri and Strobel, *Western Women and Imperialism*; Jayawardena, *The White Woman's Other Burden*; S. Ali, *Gender and Human Rights in Islam and International Law*.

- 8 This period has been described by some scholars as the liberal age of modern Islam. See Binder, *Islamic Liberalism*; Brown, *Rethinking Tradition in Modern Islamic Thought*; Hourani, *Arabic Thought in the Liberal Age*; Lee, *Overcoming Tradition and Modernity*. Lee focuses on the reformative thought of four modern influential Islamic thinkers. For excerpts from the works of Muslim liberals, see Kurzman, *Liberal Islam*. See also Isik, *The Religion Reformers in Islam*.
- 9 For a critical, and similarly grim, assessment by a Muslim intellectual of the impact of apologetics upon Muslim culture, see Ramadan, *Islam, the West and the Challenges of Modernity*, pp. 286-90. For an insightful analysis of the role of apologetics in modern Islam, see Smith, *Islam in Modern History*.
- 10 On this subject, see the collection of articles in An-Na'im et al., *Human Rights and Religious Values*.
- 11 The foundations of Wahhabi theology were set into place by the eighteenth-century evangelist Muhammad b. 'Abd al-Wahhab (d. 1206/1792). With a puritanical zeal, 'Abd al-Wahhab sought to rid Islam of all the corruptions that he believed had crept into the religion—corruptions such as mysticism, including the doctrine of intercession and rationalism. The simplicity, decisiveness, and incorruptibility of the religious thought of 'Abd al-Wahhab made it attractive to the desert tribes, especially in the area of Najd. 'Abd al-Wahhab's ideas would not have spread even in Arabia had it not been for the fact that in the late eighteenth century the Al Saud family united itself with the Wahhabi movement and rebelled against Ottoman rule in Arabia. The Wahhabi rebellion was considerable, at one point reaching as far

as Damascus in the north and Oman in the south. Egyptian forces under the leadership of Muhammad Ali in 1818, however, quashed the rebellion after several failed expeditions and Wahhabism seemed to be on its way to extinction. Nevertheless, Wahhabi ideology was resuscitated once again in the early twentieth century under the leadership of Abd al-Aziz b. Al Sa'ud (r. 1319-1373/1902-1953), who adopted the puritanical theology of the Wahhabis and allied himself with the tribes of Najd, thereby establishing the nascent beginnings of what became Saudi Arabia.

12 Salafism is a creed founded in the late nineteenth century by Muslim reformers such as Muhammad 'Abduh (d. 1323/1905), Jamal al-Din al-Afghani (d. 1314/1897), Muhammad Rashid Rida (d. 1354/1935), Muhammad al-Shawkani (d. 1250/1834), and al-Jalal at-San'ani (d. 1225/1810). Salafism appealed to a very basic and fundamental concept in Islam, that Muslims ought to follow the precedent of the Prophet and his rightly guided Companions (*al-salaf al-salih*). The founders of Salafism maintained that on all issues Muslims ought to return to the original textual sources of the Qur'an and the *Sunnah* (precedent) of the Prophet. In doing so, Muslims ought to reinterpret the original sources in light of modern needs and demands without being slavishly bound to the interpretive precedents of earlier Muslim generations. Methodologically, Salafism is nearly identical to Wahhabism except that Wahhabism is far less tolerant of diversity and differences of opinion. By the 1980s, however, Wahhabism co-opted the language, symbolisms, and even the very name of Salafism and, therefore, was able to spread in the Muslim world under the Salafi label.

13 For an overview of the Islamic response to international human rights, see Brems, *Human Rights*, pp. 183-293; Mayer, 'The Dilemmas of Islamic Identity', pp. 94-110.

- 14 See the discussion on this point by Ignatieff, *Human Rights*, pp. 53-94.
- 15 For instance, one can speak of a right to education because of the fact that such a right has been demanded and often denied. On the other hand, one normally does not speak of a right to go to the toilet because that function is normally not demanded and then denied. However, one might start articulating such a right if, for instance, state or non-state actors are torturing a prisoner by denying him or her access to such facilities. I am not necessarily articulating a sociological understanding of human rights. A right could exist as a perennial right or eternity, but it is not recognised or claimed until human experience demonstrates the need to recognise or claim it. On the social recognition and promotion of rights, see Martin, *A System of Rights*, pp. 24-97.
- 16 This is well exemplified by the unfortunate practice of retaliatory 'political' rapes that exist in some countries. Once a woman's right to be free of sexual molestation is recognised, political rapes become indefensible regardless of the applicability of the legal argument. Whether rape is mentioned in an international declaration or treaty, and whether a particular country is a signatory to a particular covenant or not, is treated as irrelevant to assessing the moral wrong of retaliatory rapes. On retaliatory rapes, see Haeri, 'The Politics of Dishonor', pp. 161-74.
- 17 By an exercise of personal volition, an individual may resolve most, if not all, conflicts between religious conviction and human rights claims. For instance, although the divine law may decree that the hands of a thief be severed, I may refuse to sever anyone's hands, or even refuse to prosecute anyone if the punishment is so harsh. Likewise, I may abstain from stoning an adulterer or adulteress to death, or refuse to take part in a proceeding that would result in a

stoning. Of course, the more a system is compulsory and the more it denies individual volition, the more exasperated the tension becomes between the subjective experience and human rights standards.

18 On the dynamics between religion and human rights, see Marty, 'Religious Dimensions of Human Rights', pp. 1-16.

19 See Mitchell, *Law, Morality and Religion in a Secular Society*, pp. 103-18; Tuck, *Natural Rights Theories*, pp. 5-31. On religion and the natural rights tradition, see Gordis, 'Natural Law and Religion', pp. 240-76; Sigmund, *Natural Law in Political Thought*, pp. 36-89; Strauss, *Natural Right and History*, pp. 81-164.

20 See Monshipouri, *Islamism, Secularism, and Human Rights in the Middle East*, pp. 207-35.

21 For the Iranian context, see Mir-Hosseini, *Islam and Gender*; Soroush, *Reason, Freedom and Democracy in Islam*, pp. 61-4, 122-30, 132-3

22 For instance, see An-Na'im, *Toward an Islamic Reformation and 'Islamic Foundations of Religious Human Rights'*, pp. 337-59; Esack, *Qur'an, Liberation, and Pluralism*; Kamali, *The Dignity of Man*; Moussalli, *The Islamic Quest for Democracy, Pluralism, and Human Rights*; Sachedina, *The Islamic Roots of Democratic Pluralism*.

23 For elaboration on this, see Abou El Fadl, *Speaking in God's Name*, pp. 32-3.

24 Marsot, 'The Ulama of Cairo in the Eighteenth and Nineteenth Century', p. 149.

25 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 Egyptianised Albanian Muhammad 'Ali. See Marsot, 'The Ulama of Cairo', pp. 149-65.

26 Modernity, however, through a complex dynamic, turned the '*ulama*' from 'vociferous spokesmen of the masses' into salaried state

functionaries that play a primarily conservative, legitimist role for the ruling regimes in the Islamic world. See Crecelius, 'Egyptian Ulama and Modernization', pp. 167-209. Crecelius makes this point about the '*ulama*' of Egypt in the modern age. However, see Ajami, 'In the Pharaoh's Shadow', p. 18; Mortimer, *Faith and Power*, pp. 91, 95; Ruthven, *Islam in the World*, p. 179. Of course, there are notable exceptions in contemporary Islamic practice. Many clerics became prominent opponents of the present Muslim regimes, and suffered enormously for their troubles. To my mind, the disintegration of the role of the '*ulama*' and their co-optation by the modern praetorian state, with its hybrid practices of secularism, has made Islamic normative determinations all the less rich. On the idea of the praetorian state, see Perlmutter, *Egypt*.

27 Structurally, *Shari'ah* is comprised of the Qur'an, *Sunnah*, and *fiqh* (juristic interpretive efforts). Substantively, the *Shari'ah* refers to three different matters: (1) general principles of law and morality; (2) methodologies for extracting and formulating the law; and (3) the *ahkam*, which are the specific positive rules of law. In the contemporary Muslim world, there is a tendency to focus on the *ahkam* at the expense of the general principles and methodology. It is entirely possible to be *Shari'ah*-compliant, in the sense of respecting the *ahkam*, but to ignore or violate the principles and methodologies of *Shari'ah*.

28 Of course, I realise that this claim is quite controversial for Muslims and non-Muslims alike. Nevertheless, I believe that this argument is supported by the fact that the rebellion of the Khawarij took place in the context of an overall search for legitimacy and legality after the death of the Prophet. Furthermore, the research of some scholars on the dogma and symbolism of the early rebellions lends support to this argument. See Hisham, *al-Fitnah*.

29 Al-Shawkani, *Nayl al-Awtar Sharh Muntaqa al-Akhbar*, 7:166;

- Ibn Hajar al-'Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari*, 14:303.
- 30 The Arabic is '*kull mujtahid musib*' and '*li kulli mujtahid nasib*'. See Abu al-Husayn, *Al-Mu'tamad fi Usul al-Fiqh*, 2:370-2; 'Ala' al-Din, *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi*, 4:30-55; Al-Ghazali, *al-Mustasfa min 'Ilm al-Usul*, 2:363-7.
- 31 Al-Juwayni, *Kitab al-Ijtihad min Kitab al-Talkhis*, pp. 50-5.
- 32 I deal with these two schools of thought more extensively elsewhere. See Abou El Fadl, *God's Name*, pp. 145-65.
- 33 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.
- 34 Al-Juwayni, *Ghiyath al-Umam fi Iltiyath al-Zulam*, p. 15.
- 35 Shams, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*, 4:452.
- 36 On the obligation of justice in the Qur'an, see Izutsu, *The Structure of Ethical Terms in the Qur'an*, pp. 205-61; Rahman, *Major Themes of the Qur'an*, pp. 42-3. On the various Muslim theories of justice, see Khadduri, *The Islamic Conception of Justice*.
- 37 The Qur'an also demands adherence to a large number of moral virtues such as mercy, compassion, truthfulness, equity, generosity, modesty, and humility.
- 38 Qur'an 21:107, which, addressing the Prophet, states: 'We have not sent you except as a mercy to human beings'; see also 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 to Muslims, as opposed to Islam, this creates a normative imperative of teaching mercy (Qur'an

27:77; 29:51; 45:20). But to teach mercy is impossible unless one learns it, and such knowledge cannot be limited to text. It is *ta'aruf* (the knowledge of the other), which is premised on an ethic of care, that opens the door to learning mercy, and in turn, teaching it.

39 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. See Tronto, *Moral Boundaries*, pp. 101-55.

40 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 honour 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.

41 See Abou El Fadl, *Rebellion and Violence in Islamic Law*, pp. 234-94.

42 Ahmad, *Sharh al-Qawa'id al-Fiqhiyya*, pp. 369-89; 'Ali Ahmad, *al-Qawa'id al-Fiqhiyya*, pp. 400-1; Jalal al-Din, *al-Ashbah wa al-Naza'ir fi Qawa'id wa Furu' Fiqh al-Shafi'iyya*, p. 53; Mahmasani, *al-Ashbah wa al-Naza'ir fi Qawa'id wa Furu' Fiqh al-Shafi'iyya*, p. 294.

43 Al-Shawkani, *Nayl al-Awtar*, 7:168; Ibn Hajar al-'Asqalani, *Fath al-Bari*, 14:308.

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

45 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 in order to obtain their *bay'a*. See Abou El Fadl, *Islamic Law*, pp. 86-7; Ibn Khaldun, *The Muqaddimah*, p. 165. On the Islamic law of duress and on coerced confessions and political commitments, see Abou El Fadl, 'Law of Duress in Islamic Law and Common Law', pp. 305-50.
- 46 Abu Muhammad, *al-Binaya fi Sharh al-Hidaya*, p. 482.
- 47 For this often-repeated claim, see Howard, *Human Rights and the Search for Community*, pp. 92-104; Rosen, *The Justice of Islam*, pp. 7, 79-80, 156-7; Weiss, *The Spirit of Islamic Law*, pp. 145-85.
- 48 On the relationship between duty and right in Roman law, and the subsequent Western legal tradition, see Finnis, *Natural Law and Natural Rights*, pp. 205-10. The dynamic that Finnis describes is very similar to that which took place in classical Islamic law. On rights and responsibilities, also see Weinreb, 'Natural Law and Rights', pp. 278-305.
- 49 On this subject, see Abou El Fadl, *Islamic Law*, pp. 280-7.

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