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Confronting Misconceptions and Acknowledging Imperfections: A Response to Khaled Abou El Fadl's "Islam and Democracy"

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Abstract

Professor Abou El Fadl's Article, *Islam and the Challenge of Democracy*, demonstrates the need to move forward with knowledge of the nuance and depth of the historic, philosophic, legal, and theological foundations of both political stasis and political change in Muslim countries. The author comments on three aspects of Khaled Abou El Fadl's paper. First, the author will juxtapose the discourse that Professor Abou El Fadl is stimulating with other perspectives in order to delineate the sets of actors in this debate among Muslims. The author will also argue that "Islamic exceptionalism," so prominent in post-modern critiques, is unhelpful. Second, the author will comment on the centrality of Shari'ah to the internal debate, and discuss widespread misconceptions about Shari'ah among non-Muslims. Third, the author will comment on the problem of human agency and imperfect institutions. This imperfection becomes a critical issue when sacred texts are codified into secular law.

CONFRONTING MISCONCEPTIONS AND ACKNOWLEDGING IMPERFECTIONS: A RESPONSE TO KHALED ABU EL FADL'S "ISLAM AND DEMOCRACY"

*Erik G. Jensen**

One of the great ironies of our time is that a profoundly pluralistic religion that values equality, respects privacy, and throughout most of its history, has fastidiously refused to be co-opted by the State (despite numerous efforts by States over the centuries), is now being used by three groups for purposes that seem to belie the features of its tradition. Power-holders in certain Muslim countries use Islam to perpetuate authoritarianism and autocracy. Islamists promote Islam as the basis of political administration. And certain elements in the West conjure up a threat-based agenda in response to what they contend are inherent, immutable, and inimical dimensions of Islam.

Perhaps if administrative governance (particularly, the delivery of social services) within a secular political framework had not failed so woefully across the Arab world and South Asia,¹ if Wahabbism and like ideologies had not been exported so vigorously and effectively, if more wisdom and courage had been brought to bear on the issue of a Palestinian homeland, if Christian and Jewish fundamentalism² had not gained such political

* Co-Director, Rule of Law Program, Stanford Law School and Senior Law Advisor, The Asia Foundation. I would like to thank Shirin Sinnar, my teaching assistant (and now a clerk for Judge Warren J. Ferguson of the United States Court of Appeals for the Ninth Circuit), for a course on *Islam and the Rule of Law* that we taught at Stanford during the winter quarter of 2003, as well as Jonathan Greenberg, Bill Cole, and Mathew Nelson for their helpful comments. The views expressed in this Article are mine and do not necessarily represent those of the institutions with which I am affiliated.

1. One of the most deleterious effects of administrative governance failure is persistent mass unemployment – “probably the greatest challenge to contemporary citizenship.” *THEORIZING CITIZENSHIP* 3 (Ronald Beiner ed., 1995). See THOMAS W. SIMMONS, JR., *ISLAM IN A GLOBALIZING WORLD* 38-40 (2003) (analyzing the problem of large numbers of unemployed males in Muslim countries).

2. Here I want to be clear about my usage of “fundamentalism” and distinguish it from what it means to be “devout” in Islam, Judaism, and Christianity. “Fundamentalism” is defined as “a usually religious movement or point of view characterized by a return to fundamental principles, by rigid adherence to those principles, and often by intolerance of other views” *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH*

traction, and if the Arab world had not been cursed with enormous oil reserves and all the distortions of political and economic life that such riches entail,³ Khaled Abou El Fadl's detailed and layered discourse on Islam and democracy would not be so necessary. Certainly it would not be so consequential; but it is.

Wishful thinking to revise a series of events of the last sixty years is everywhere. But the clock cannot be turned back. So debates related to authority and interpretation in Islam have reached incredible intensity. Professor Abou El Fadl's Article, *Islam and the Challenge of Democracy*, demonstrates the need to move forward with knowledge of the nuance and depth of the historic, philosophic, legal, and theological foundations of both political stasis and political change in Muslim countries.

I will comment on three aspects of Khaled Abou El Fadl's paper. First, I will juxtapose the discourse that Professor Abou El Fadl is stimulating with other perspectives in order to delineate the sets of actors in this debate among Muslims. I will also argue that "Islamic exceptionalism," so prominent in post-modern critiques, is unhelpful. Second, I will comment on the centrality of Shari'ah to the internal debate, and discuss widespread misconceptions about Shari'ah among non-Muslims. Third, I will comment on the problem of human agency and imperfect institutions. This imperfection becomes a critical issue when sacred texts are codified into secular law.

FIVE STYLIZED VIEWS OF ISLAM AND DEMOCRACY: A VIEW OF ISLAMIC EXCEPTIONALISM

There are at least five distinct views of the relationship between Islam and democracy and an infinite number of sub-

LANGUAGE (4th ed. 2000). On the other hand, to be "devout" is variously defined as: "devoted to religion or to the fulfillment of religious obligations," "displaying reverence or piety," "sincere," or "earnest." *Id.* In modern usage, then, "fundamentalism" often implies intolerance in stark contrast to being "devout." Fundamentalism in this usage is inimical to cross-faith understanding. Being "devout" does not imply rigidity or intolerance.

3. Economic and political distortions in oil-rich countries are exacerbated, of course, by the special treatment these countries receive in international diplomacy, business and intrigue, and "blowback," or negative consequences that flow from this special treatment. See CHALMERS JOHNSON, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (1997). See also TERRY LYNN KARL, *THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES* (1997).

groups and hybrids. The first of these five groups, the “secularists,” do not even wish to discuss the relationship between Islam and secular political administration. The second group consists of those whom Khaled Abou El Fadl and others would call “apologists” — those who “claim that democracy already exists in Islam.”⁴ This group looks superficially at selected passages from the Qur’an, the Constitution of Medina, as well as concepts and practices such as *shura*, *ijma* and *maslaha*, and pours Islam into liberal democratic vessels.

The third group, known as “Islamists,” actively pursues a radical political agenda and its “vision of that which is truly Islamic.”⁵ This group interacts eclectically with the texts and the juristic tradition for explicit political purposes. In significant ways, Islamists invite participation that is denied to many by autocratic governments. The fourth group is comprised of “reformers” who are intensely and intimately engaged with the texts and juristic tradition. The internal discourse among the faithful in this group⁶ understand the parameters of continuity and change, parse out the authoritative from the authoritarian, and reorient scholarly discourse to illuminate a way forward that considers the foundational issue of the relationship between Islam and the State. Khaled Abou El Fadl, the author of the lead piece in this volume, is a leading scholar in this devout, rigorous, and thoughtful group.⁷

A fifth group — the “rejectionists” as Abou El Fadl calls them — pursues an opposite course from the “reformers.” Rejectionists embrace Islamic exceptionalism and argue that Islam is incompatible with democratic values because these values

4. Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 UCLA J. ISLAMIC & NEAR E. L. 33, 62 (2002).

5. See generally Sherman Jackson, Interpretation and Authority in Islamic Law, Public Lecture at Stanford (Jan. 27, 2003) (transcript currently available at <http://iis.stanford.edu/newsarticles/jacksontranscript.pdf>) (discussing the interpretative dynamics surrounding approaches that draw their legitimacy from a “vision of that which is truly Islamic”).

6. Mohammad Iqbal in colonial India and Muhammad Abduh in Egypt are different in many ways (e.g., their ideas about secularism), but both could be regarded as significant historical figures belonging to this group. Also, a group of “outsiders” looking in, who are committed to interfaith dialogue and understanding, have made significant contributions as well — John Esposito is a notable member of this group.

7. I resist listing examples of those who belong to this group because omissions are inevitable and would be glaring. The views of this group are far from monolithic. But they share the qualities ascribed to them above: devout, rigorous, and thoughtful.

allegedly emanate from the West. Some in this group seem stimulated by vestiges of dependency theory and an enthusiasm for deconstructive post-modernism. This group seems to deny any possible good resulting from the universal dynamic through which ideas are transfused and transplanted. As Khaled Abou El Fadl notes in his essay, this has “resulted in the stunting of the Islamic creative impulse towards the challenge of democracy.”

To divide the world into Muslim and non-Muslim, and accept as a basis for political and social change only ideas that clearly find their etymology in one world or the other, is mind-numbing Puritanism wherever it is found. Both rejectionists and secularists are vulnerable to this impulse. Moreover, this perspective can be challenged on the basis of praxis: the idea that democratic values are so incompatible with Islamic principles may be news to the vast majority of the world’s Muslims who live in electoral democracies.⁸ This strand of rejectionist thinking also ignores the burgeoning self-critical literature in the West about democracy and the crass efforts by Western States to export it to other lands.⁹ Although many people are troubled by the illiberal trajectory of liberal democracy in America, two wrongs do not make a right. Countries in transition, both Muslim and non-Muslim, are moving away from dictatorships, but not necessarily towards democracy,¹⁰ and certainly not in the inexorable and monolithic way that modernization theory projected four decades ago. In this difficult process of change, are Muslim countries inherently exceptional, and if so in what ways?

The discussion of exceptionalism deserves to be elevated to a philosophic level on which few would disagree. All who have worked extensively on-the-ground in developing countries (Muslim or non-Muslim) face a philosophical dilemma in distinguishing universal features from specific features of government, given both similarities and differences across countries. The universal school sees the virtue in, if not the inevitability of, wholesale convergence toward what are perceived to be international

8. Only fifteen percent of the world’s 1.2 billion Muslims live in Arab countries. By my rough calculation, at least sixty to seventy percent live in Asia. One-third of all Muslims live on the Indian subcontinent.

9. See, e.g., FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003).

10. See Thomas Carothers, *The End of the Transition Paradigm*, 13 J. OF DEMOCRACY 5, 5-17 (2002).

standards of behavior. At the very least, it sees virtue in focusing on certain variables of analysis that may well have more traction in the West than in the rest of the world. This strand of thinking moves inexorably to the establishment of certain societal structures and goals. Yet those who would hyper-contextualize the unique nature of polities are equally misguided, as they make the people, systems, and processes that they study falsely incomprehensible outside a narrowly drawn local framework.¹¹ How can Professor Abou El Fadl be wrong when he observes that “powerful humanitarian ideas enjoy a mixed lineage, and [that] this lineage has much Muslim blood”? His philosophical point of departure is simply unassailable.

THE CENTRALITY OF SHARI‘AH

Professor Abou El Fadl’s careful analysis of Shari‘ah is foundational. It is also the key to an understanding that is simultaneously open to universal values and thoroughly embedded within the traditions of Islam. The last pages of his paper should be required reading for anyone grappling with the meaning of Shari‘ah, problems of human agency in relation to Shari‘ah, the difference between Shari‘ah and *fiqh*, and the implications of these issues for the role of Islam in the State.

It is clear that Islam and liberal democracy share many basic principles. The knottier and more volatile issues concern multiple definitions of Shari‘ah and their implications. The status of Shari‘ah in Islam has attributes perhaps more widely and closely held than the legal content one finds in other religious traditions.¹² To Muslims, the Qur’an, including the Shari‘ah, is perfection as in the mind of God. Shari‘ah is aspirational — “the way toward goodness.” Muslims who are unfamiliar with the journalistic usage of the term will (or should) answer “yes” when asked whether they support Shari‘ah. The religious imperative is absolutely clear.

But calls for the implementation of Shari‘ah are often journalistically translated in the West as shorthand for intolerance —

11. Erik Jensen, *Pakistan — The Road Ahead*, 21 ASIA BUS. L. REV. 41, 41-46 (1998).

12. Ironically, however, the Qur’an is much smaller than the Bible or the Torah, and legal issues constitute only about eleven percent of this relatively slender text. See Ahmad Dallal, *The Historical Development of Islamic Law*, Public Lecture at Stanford University (Jan. 13, 2003) (transcript currently available at <http://iis.stanford.edu/new-sarticles/dallaltranscript.pdf>).

that is, harsh punishments, discriminatory gender laws, and the rejection of democracy. In fact, the injunctions of the Qur'an, as the Qur'an itself states, are ambiguous.¹³ They do not dictate or imply a certain set of legal institutions.

*THE PROBLEM OF HUMAN AGENCY AND
IMPERFECT INSTITUTIONS*

Institutional analysis in the context of the fallibility of human agency can and should be explored more fully, not only in the context of Islamic institutions, but in the context of institutions more generally. Few would disagree that human rationality is imperfect, no matter which tradition a particular expression of rationality calls home. But even beyond this general issue, is it possible, through human agency, to institutionalize the extraordinary moral commitment that Islam demands at the level of a modern "State"? If human agency could be something other than imperfect, one would expect to see substantially better performance, for example, in Islamic legal institutions than in secular legal institutions. Yet the imperfections of human agency vex performance in both secular and Islamic courts. Human agency, as manifested through the performance of institutions, shows that all institutions are second-best.¹⁴

Unfortunately, rule of law promoters have paid inadequate attention to the interaction of various reforms — for example, strengthening the courts and codifying the laws — with Islamic laws and legal institutions. This neglect must be corrected. The empirical literature on the comparative legitimacy of secular and Islamic legal institutions is underdeveloped. The data that does exist, however, are mixed.¹⁵ But even as the body of research

13. See Dallah, *supra* note 12.

14. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1412 (1996) ("[T]here are no purely rational decisions, ideal institutions, or optimal solutions, but only second bests."). See also NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994).

15. For example, through empirical research carried out by The Asia Foundation with its Asian partners over the last several years, sometimes we have seen that local Islamic institutions enjoy greater legitimacy in resolving disputes. This was the case in Indonesia. See THE ASIA FOUNDATION & AC NIELSON, *SURVEY REPORT ON CITIZENS' PERCEPTIONS OF THE INDONESIAN JUSTICE SECTOR*, available at <http://www.asiafoundation.org/pdf/IndoLaw.pdf>. In other instances, we have seen a preference for the secular courts, as was the case in Punjab and Sindh in Pakistan. See Mathew J. Nelson & Erik G. Jensen, *Supporting Access to Justice Under the Local Government Plan: Small Scale*

and experience grows, it will show deficits in human agency expressed through suboptimal institutional performance; the only question is the degree of this deficit, not whether such a deficit exists.

In conclusion, I am reminded of the admonition of the Indian philosopher, Ashis Nandy, who once said that “‘the inability to imagine alternatives’ is the surest defence of oppression.”¹⁶ I can only hope that a remarkable group of penetrating, diverse, devout, and thoughtful contemporary scholars — Khaled Abou El Fadl being a leading figure among this group — will continue to imagine.

Technical Assistance (Dec. 2001) (unpublished report, on file with the Asian Development Bank).

16. Tariq Banuri & Edward Amadeo, *Worlds within the Third World: Labor Market Institutions in Asia and Latin America*, in *ECONOMIC LIBERALIZATION: NO PANACEA: THE EXPERIENCES OF LATIN AMERICA AND ASIA* 206 (Tariq Banuri ed., 1991) (quoting Ashis Nandy).