

HUMAN RIGHTS AND ISLAMIC LEGAL REFORM

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Is Islam compatible with human rights? This question has been in recent years the focus of attention of numerous human rights scholars, who have produced varying answers and advanced conflicting views. Any one who undertakes to study the literature generated in the process of answering the above question soon realizes that his or her task is exceedingly complex. For one finds that the foremost critics of traditional shari`a (Islamic law) are united with its ardent advocates in denying any relationship between Islam and human rights. One also finds that the proponents of a conception of human rights rooted in Islamic worldview stand condemned by both modernist and traditionalist scholars: by the former because of their association with Islam, and by the latter because of their advocacy of human rights. In the midst of the contradiction and confusion that riddle the discourse on Islam and human rights, clarity and understanding are sacrificed.

At the core of the confusion lies a static and a historical approach that fails to distinguish the universal from its historical manifestation in particular forms, and refuses to relate the applications of the Islamic principles to their historical contexts and premodern socio-political conditions. Therefore, modern human rights scholars are quick to point out that historically, Muslims and non-Muslims were not treated equally under shari`a law, in complete disregard to the gulf that separate the nationalist structure of modern political organization and the communalist structure of premodern political societies. Likewise, Muslim traditionalists, driven by a similar static outlook, and oblivious to the drastic social and political changes that separate historical and contemporary Muslim societies, insist on embracing the rules expounded by early jurists, even when the application of these historical rules would negate the universal principles of Islam which gave them force in the first place.

While agreeing with the modern critics of historical shari`a that its application in modern society would lead to serious violation of human rights, I reject the contention that Islamic law has been oblivious to the notion of human rights. I argue that the failure of modern critics to discern a human rights tradition in Islam results from a static and ahistoric outlook that divorce the shari`a rules developed by classical scholars from the socio-political structure of early Muslim society.

I further contend that for a modern human rights tradition to take hold in modern Muslim society, it should be rooted in the moral/religious commitments of Muslims. This can be achieved not through an imposition of a human rights tradition evolved in an alien culture, but by appealing to the conception of human dignity embedded in the Qur`anic texts, and by employing the concept of reciprocity which lies at the core of the Qur`anic notion of justice.

I therefore conclude by showing that the application of the Islamic sources through a paradigm that incorporates the principles of human dignity and moral reciprocity into a modern society — characterized by cultural plurality and globalizing technology — is bound to evolve a human rights tradition capable of ensuring equal protections of the moral autonomy of both individuals and groups.

HISTORICAL SHARI`A AND ITS MODERN CRITICS

Islamic law (shari`a) has been the subject of an elaborate and penetrating critique by human rights scholars. Modern scholars who have examined human rights schemes, advanced by contemporary Muslim authorities, have concluded that these schemes run far short of the protections provided by international human rights, enshrined in the Universal Declaration of Human Rights (UDHR). Thus Mayer contends that contemporary endorsement of international human rights by Muslims is more apparent than real, because all human rights pronouncements

by Muslim individuals and groups have been curtailed by qualifications rooted in shari`a.¹ The application of shari`a law would lead, she concludes, to serious breaches of international human rights. More specifically, the application of shari`a law would lead to the erosion of religious freedom and to discrimination against women and non-Muslims.²

Heiner Brelefeldt echoes the concerns of Mayer regarding historical shari`a's capacity to provide for human rights protections, particularly for women and non-Muslims. Examining areas of conflict between shari`a and human rights, he notes:

Due to the timing of its development, it is hardly surprising that the classical shari`a differs from the modern idea of universal human rights. Although the shari`a puts a great deal of emphasis on the equality of all the faithful before God, it traditionally assumes unequal rights between men and women and between Muslims and members of other religious communities.³

Similar arguments are made by Rhoda Howard, who points out that traditional shari`a fails to provide for equal protections of the law for women and non-Muslims. "According to traditional interpretations," she writes, "Islam excludes entire categories of people, most notably women, slaves [sic], and non-Muslims, from equality under the law, although it does set out careful rules for their unequal protection."⁴ Howard cautions, however, against any conclusion that would suggest that the classical legal system was unjust, and goes on to argue that "compared with Europe until barely a century and a half ago, Islamic societies might well be characterized as far more just in the modern sense of protecting human rights."⁵ Still, Howard is quick to deny the possibility of developing a modern human rights tradition, rooted in Islamic worldview, insisting that "Islamic conception of justice is not one of human rights."⁶

Perhaps the most penetrating and systematic critique of traditional shari`a is provided by Abdullahi An-Na`im. In his *Toward an Islamic Reformation*, An-Na`im discusses specific examples of violation of religious freedom by shari`a rules, and cites instances of discrimination against women and non-Muslims in the historical legal system.⁷ However, unlike the previous critics of shari`a, An-Na`im realizes that the possibility and importance of evolving a human rights tradition from within the Islamic normative system, and warns against any external imposition.⁸ To do this, he calls for an Islamic reformation aimed at overcoming contradictions between international human rights and shari`a rules, and proposes a methodological approach based on what he calls "the evolutionary principle" introduced in the seventies by his late mentor, Mahmoud Muhammad Taha. According to this principle, the Makkan Qur'an embodies the eternal principles of the Islamic revelation which emphasize human solidarity and establish the principle of justice for all, regardless of religion, gender, or race. The Medinan Qur'an, however, places, it is further argued, the solidarity of male Muslims above all others, thereby giving rise to discrimination against women and non-Muslims. For this reason, An-Na`im contends, one finds contradictions between the Makkan and Madinan Qur'an.⁹ While the Makkan Qur'an emphasizes freedom of religion and the peaceful coexistence among different religions, the Madinan Qur'an exerted Muslims to compel the unbelievers to accept Islam, and introduced measures that discriminate against women and against non-Muslims.¹⁰ Rightly recognizing that classical jurists introduced the principle of *naskh* (abrogation) to discard early Qur'anic statements that appeared to contradict later statements, An-Na`im calls for the application of reverse *naskh*, i.e. the abrogation of the Madinan Qur'an whenever contradicts the Makkan.¹¹ An-Na`im concludes by making a passionate plea that succinctly summarizes his approach:

Unless the basis of modern Islamic law is shifted away from those texts of the Qur'an and Sunna of the Medina stage, which constituted the foundations of the construction of Shari`a, there is no way of avoiding drastic and serious violation of universal standards of human rights. There is no way to abolish slavery as a legal institution and no way to

eliminate all forms and shades of discrimination against women and non-Muslims as long as we remain bound by the framework of Shari`a.¹²

An-Na`im's proposal seems on its face value to provide a quick fix to the contradictions between historical shari`a and international human rights. However, the "evolutionary principle", alluded to earlier, is not sustainable, I contend, as it can be easily faulted on both theoretical and practical grounds. First, since the Qur'an is considered by Muslims, as An-Na`im himself agrees, as a divine revelation, one has to accept the totality of the Qur'anic statements as a single discourse. Therefore, one is not justified in abrogating the Madinan verses altogether on the ground that they address a particular historical society. Rather one has to eliminate the possibility of generalizing particular rules by demonstrating their particularity. Such a procedure would permit one to arrive at the same result without reverting to a wholesale rejection of one-third of the Qur'an. Secondly, negating the Madinan Qur'an would not be acceptable by the bulk of Muslims, including those who agree with An-Na`im that there should be a fresh reading of the Islamic sources so as to effect a sweeping legal reform. For the Qur'anic statements revealed in Madina do not only comment on family matters and relationships with non-Muslims, but also on issues relating to fundamental Islamic practices, such as the performance of prayer, *zakat*, fasting, and *hajj*. Thirdly, negating one-third of a book which the majority of Muslims consider to be incontrovertible is counterproductive, particularly when it can be shown, as I intend to do shortly, that the contradictions between the Makkan and Madinan statements on women and non-Muslims are more apparent than real, resulting from faulty interpretations by classical scholars, as well as the application of an atomistic methodologies of derivation.

A better and more effective approach to reforming historical shari`a is one that sets out from the very notion that constitutes the *raison d'etre* for the articulation of human rights in Western tradition, viz. human dignity. Since the Qur'anic texts embody clear and developed notion of human dignity, restructuring shari`a rules — particularly those which relate to the public sphere — on the basis of the Qur'anic notion of human dignity would lead, I contend, to a situation in which the civil and political liberties of all citizens — regardless of gender, ethnic, or religious distinctions — are protected. Further, setting out from the notion of human dignity to reform the shari`a has another advantage: It has the potential to nurture a liberal tradition without being limited to the tradition of individualistic liberalism, which many scholars consider to be Western specific. As will be shown in the next section, developing a human rights tradition on the basis of Islamic worldview and heritage extends the notion of moral autonomy, presupposed by human dignity, from the individual to the community.

DIGNITY, RECIPROCITY, AND UNIVERSAL CLAIMS

The critics of shari`a have used UDHR as the standard through which shari`a is evaluated and faulted. Because UDHR is rooted in the political culture of Western society, and is informed by the philosophical outlook of Western liberalism, its application in other societies requires that the universal validity of its principles is made evident to other peoples, particularly those whose worldviews and historical experiences are different from the West's. Realizing that the claim of universality cannot be established on theoretical grounds, most "international human rights" advocates advance practical and pragmatic reasons for establishing universality claims. Some emphasize the fact that peoples of different cultural and geographical backgrounds "share a common humanity, which means that they are equally deserving of rights and freedom."¹³ Others point out that the UDHR has been framed by representatives of the various nations that constitute the United Nations (UN), and hence conclude that UDHR receives the support of various cultures and religious communities. Still others argue that human rights were developed in modern times to protect individuals from the encroachment of the modern nation-state.

Because the nation-state is the basic political organization for all societies and cultures, the need for adopting international human right to protect individual liberties is universal.¹⁴

The pragmatic arguments for the universality of human rights are problematic, because they either completely overlook the significant impact cultural differentiation has on values and perceptions, or ignore the fact that agreements through UN reflect, more often than not, political compromises by political elites, rather than normative consensus. Further, many of the ruling elites who pretend to speak on the behalf of the peoples of the developing world lack political legitimacy and public support, and have embraced ideological outlooks at odd with the surrounding cultures. In the absence of genuine democracy in the countries of the South, no one can ascertain whether, or to what extent, official policies reflect popular views and preferences.

Given the Western roots of international human rights, and the absence of any theoretical foundation or practical ground for their universal claims, I propose that a more fundamental criteria should be used to develop a human rights tradition, rooted in Islamic values and ethos, and capable of protecting the rights, and promoting the interests of citizens, regardless of religious, gender, racial, or national distinctions. The fundamental criteria I am referring to are the concept of *dignity* and the principle of *reciprocity*.

Human *dignity* is the reason for which international human rights have been delineated. The preamble of the UDHR begins by emphasizing this very point. In Western tradition, the concept of dignity has been best elaborated by Kant, who points out that human beings are moral agents, and should hence always be treated as ends, and never as means. Conceiving every human being as an end means that he or she should always be treated as a subject, capable of identifying and pursuing his or her interests. This does not mean that one cannot use the services of others to achieve one's goals, but that the services they provide must be performed with their consent, and should be based on their full realization of the intents, significations, and consequences of their actions. Compelling people to act under the use or threat of force violates their dignity. Likewise, the Qur'an describes the human person as a unique being among the creatures of God, endowed with rational capacity to understand the natural order, and to distinguish right from wrong; and elevated over the entire creation by a moral capacity to commit oneself to a specific moral vision, and the ability to translate ideas and values to physical and social forms. Life is presented as a trial in which people have the opportunity to make choices, and are individually responsible for the choices they make. Therefore, central to the notion of dignity in both Western and Islamic traditions, is the notion of moral autonomy, i.e. the freedom to make rational choices, and to accept the outcome of the rational choices one makes.

At the heart of the notion of dignity, though, is not social license to do whatever one wishes, but a moral character that acts out of deep convictions, including the conviction that one ought to respect the moral choices of others, and the expectation that others should reciprocate and respect one's choices. That is, dignity lies in the profound sense of moral autonomy which enable the person to behave in accordance with his or her moral commitments and convictions, regardless of whether others agree with him or her, or approve of their choices. It is for this very reason that the behavior of those who are willing to give up their moral autonomy, in exchange for personal gratification, brings to mind the image of a shameless act deprived of dignity. While those who are ready to withstand adversities, even ridicule, rather than betray their moral commitments or submit to the arbitrary will of others make us appreciate human dignity.

Although the individual sense of dignity cannot be taken away, but can only be strengthened, by the use of arbitrary force to restrict moral autonomy, the belief in human equality, and the transcendental nature of moral responsibility require that the moral autonomy of the individual be protected by a system of rights from violation by others, particularly by a superior power, such as the state, or an organized social group. A person who refuses to compromise deeply held principles in exchange for a generous monetary reward, or in the face of a serious threat to one's safety, exemplifies human dignity at its best.

Yet moral autonomy associated with human dignity is not limited to the individual, but involves the moral autonomy of the group to which one belongs as well. Because the concretization of the moral choices one makes requires the cooperation of all individuals who share the same moral vision, the autonomy of individuals — and hence their dignity — hinges on the autonomy of the group to which they belong. It is here where the notion of individualism in the Western and Muslim historical experience diverge. In the tradition of Western individualism, the individual is seen as a member of a homogeneous community, and the freedom of the individual means that he or she has the right to enact their moral choices, as long as they do not violate the freedom of others.¹⁵ However, in the tradition of Islamic legal and political thought, society is not seen as homogenous, but consisting of a plurality of moral communities, each of which has the freedom to actualize its own moral vision.¹⁶

Emphasizing the moral autonomy of groups is exceedingly important in a postmodern society that combines global orientation with moral and cultural fragmentation. The homogenous culture in which Western individualism was developed has already become something of the past. Cultural fragmentation and the coexistence of a multitude of moral communities is today the reality of societies once enjoyed remarkable cultural homogeneity, such as the French and the German. Protecting human dignity in a heterogeneous society requires a markedly new approach whereby the moral autonomy of the individual is linked to that of the moral community to which he or she belong.

While the notion of human dignity emphasizes the moral autonomy of individuals and groups, the extent of this autonomy can be specified by employing another principle, viz. the principle of reciprocity. The principle, central to all religious and secular ethics, has been appropriated from Christian ethics by modern Western scholars, and has been given a secular expression in Kant's categorical imperative: "Act only on that maxim through which you can at the same time will that it become a universal law."¹⁷ Similarly, the principle of reciprocity lies at the core of the Islamic concept of justice. The Qur'an is pervaded with injunctions that encourage the Muslims to reciprocate good for good and evil for evil.¹⁸

But reciprocity, as the most fundamental principle of justice, is often employed to denote mutual recognition by individual members of the community, and rarely a relationship among moral groups and communities. This applies to both modern and pre-modern scholars. It is evident that while classical Muslim jurists recognized the moral autonomy of non-Muslim religious communities, they did not attribute to them equal moral freedom, and hence failed to develop rules that they would accept if they happened to come under the hegemony of others. The same can be said about those Western scholars who are driven by a single-minded desire to export those human rights schemes to the rest of the world, and who have shown little interest in engaging non-Western points of view in any meaningful cross-cultural dialogue.

Having identified the criteria for evaluating historical shari'a, we can turn now to examine its pronouncements concerning the civil and political rights of individuals.

CLASSICAL LEGAL THEORY: THREE FAULT LINES

We started our discussion by asking whether a political order based on Islamic ethos is capable of promoting human rights. We argued that critics of Islamic law have advanced the proposition that women and non-Muslims did not enjoy equal rights with Muslim men. However, the evidence presented by the critics of shari'a is inconclusive as to whether the fault lines that separate Muslims and non-Muslims, as well as men and women, stem from intrinsic features of the Islamic sources themselves, or whether they result from the failure to develop shari'a to cater to modern settings. This ambivalence may be attributed — at least partially — to the fact that Islamic sources and legal rules appear to combine statements that emphasize equality with other statements justifying religious and gender differentiation. It is therefore incumbent upon us, before we go on to study the possibilities of reform, to understand the reasons behind the

contradictions cited by the critics, and to examine the nature of the methods and arguments used to justify and reconcile contradictions.

Human rights scholars have identified various shari`a rules which are in direct contradiction with international human rights. The shari`a rules incongruent with international human rights can be subsumed under three major headings: restrictions on freedom of religion, discrimination against women, and discrimination against non-Muslims. However, a close examination of the corpus of shari`a rules developed by early jurists reveals three important facts that eluded modern critics of shari`a. First, that shari`a rules concerning particular issues have changed over time, pursuant to changes in the social and political structures of Muslim society. Secondly, jurists have adopted varying positions regarding women's and non-Muslim rights. These positions were influenced by the cultural milieu of the jurist, and the jurisprudential school to which he belonged. Thirdly, while the systems of rights developed by classical Muslim jurists were far from being perfect, it is evident that classical jurists recognized the intrinsic dignity of non-Muslims and women, even when they failed to provide a complete and comprehensive list of rights for its protection.

Early jurists recognized that non-Muslims who have entered into a peace covenant with Muslims are entitled to full religious freedom, and equal protection of the law as far as their rights to personal safety and property are concerned. Thus Muhammad bin al-Hasan al-Shaybani states in unequivocal terms that when non-Muslims enter into a peace covenant with Muslims, "Muslims should not appropriate any of their [the non-Muslims] houses and land, nor should they intrude into any of their dwellings. Because they have become party to a covenant of peace, and because on the day of the [peace of] Khaybar, the prophet's spokesman announced that none of the property of the covenanter is permitted to them [the Muslim]. Also because they [the non-Muslims] have accepted the peace covenant so as they may enjoy their properties and rights on par with Muslims."¹⁹ Similarly, early Muslim jurists recognized the right of non-Muslims to self-determination, and awarded them full moral and legal autonomy in the villages and towns under their control. Therefore, al-Shaybani, the author of the most authoritative work on non-Muslim rights, insists that the Christians who have entered into a peace covenant (*dhimma*) – hence became *dhimmis* – have all the freedom to trade in wine and pork in their towns freely, even though such practice is considered immoral and illegal among Muslims.²⁰ However, *dhimmis* were prohibited to do the same in towns and villages controlled by Muslims.

Likewise, early Muslim jurists recognized the right of *dhimmis* to hold public office, including the office of a judge and minister. However, because judges had to refer to laws sanctioned by the religious traditions of the various religious communities, non-Muslim judges could not administer law in Muslim communities, nor were Muslim judges permitted to enforce *shari`a* laws on the *dhimmis*. There was no disagreement among the various schools of jurisprudence on the right of non-Muslims to be ruled according to their laws; they only differed in whether the positions held by non-Muslim magistrates were judicial in nature, and hence the magistrates could be called judges, or whether they were purely political, and therefore the magistrates were indeed political leaders.²¹ Al-Mawardi, hence distinguished between two types of ministerial positions: *plenipotentiary* minister (*wazir tafwid*) and *executive* minister (*wazir tanfiz*). The two positions differ in that the former acts independently from the caliph, while the latter has to act on the instructions of the caliph, and within the limitations set by him.²² Therefore, early jurists permitted *dhimmis* to hold the office of the executive, but not the *plenipotentiary*, minister.²³

Given the communal nature of the social and political organizations of premodern Muslim society – indeed most premodern societies for that matter – it would be erroneous to argue that *dhimmis* were considered a second class citizens, or that they were not treated with equal "concern and respect". Such a conclusion results from an ahistorical perception of society, whereby a premodern, communally-based society is evaluated using concepts – such as *citizen* or

equal protection of the law – developed under conditions quite unlike those existed in the historical Muslim society.

But while early shari`a law recognized the civil and political rights and liberties of non-Muslim *dhimmi*s, shari`a rules underwent drastic revision, beginning with the eighth century of Islam. This was a time of great political turmoil throughout the Muslim world. It was during that time that the Mongols invaded Central and West Asia inflicting tremendous losses on various dynasties and kingdoms, and destroying the seat of the caliphate in Baghdad. This coincided with the crusaders' control of Palestine and the coast of Syria. In the West, the Muslim power in Spain was being gradually eroded. It was under such conditions of mistrust and suspicion that a set of provisions attributed to an agreement between the Caliph Omar and the Syrian Christians were publicized in a treatise written by Ibn al-Qayyim.²⁴ The origin of these provisions is dubious, but their intent is clear: to humiliate Christian *dhimmi*s and to set them apart in dress code and appearance. Their impact, however, was limited, as the Ottomans, who replaced the Abbasid as the hegemonic power in the Muslim world, continued the early practice of granting legal and administrative autonomy to non-Muslim subjects.

When we turn to examine the attitude toward women in historical shari`a we find that the situation here is more perplexing. For, on the one hand, one can see clearly that shari`a considers women as autonomous persons with full legal capacity: they enjoy full control over their property; their consent is required for marriage and they have the right to initiate the process of divorce; they can initiate legal proceedings and can grant or receive the power of attorney; they can even assume public office and serve in the capacity of judges. But, on the other hand, one can also see that the historical prejudice against women in general has worked against them in the historical Muslim society, and that Muslim jurists managed to undermine their independent legal personality by a host of legal devices. However, it can be easily demonstrated that the desire to place limitations on the civil and political rights of Muslim women was not of the same intensity across legal schools. The most conservative stance came from the Hanbali, and, to a lesser degree, the Shafi'i schools. The Hanafi school displayed, on the other hand, a more liberal attitude toward women, allowing them more leverage in pursuing their civil rights.

While Shafi'i and Malik permit, for instance, the father to compel his daughter in matters of marriage, Abu Hanifa, al-Thawri, al-Awza'i, and the majority of early jurists insist that a girl has the final say in marriage matters.²⁵ Similarly, *Shafi'i* requires the consent of the guardian of a woman for the validation of marriage, whereas Abu Hanifa, al-Shu'bi, and al-Zuhri permit a woman to marry herself despite her family disapproval.²⁶ However, all legal schools recognize the women's right to terminate the marriage but only under conditions that vary from one school to another.²⁷ Likewise, there is disagreement among jurists as to whether women can assume public office; while Ibn Jarir al-Tabari places no limitations on women's right to assume the post of judge in all legal matters, al-Mawardi contends that women cannot be allowed to serve as judges under any circumstances. In between stands Abu Hanifa who allows women to serve as judges but only in cases involving commercial deals.²⁸

We may conclude that while historical shari`a recognized the capacity of non-Muslims and women to enjoy certain civil and political liberties, it managed, nonetheless, to curtail these liberties on social and rational grounds. The degree of limitation on the exercise of civil and political rights also varied across historical periods and legal schools. And hence while our observations give us reasons for optimism about the capacity of Islamic values and ideals to promote human rights, they point to the inability of classical legal system to promote human rights in modern times, and to the urgent need for undertaking legal reform of traditional Islamic law.

THE IMPERATIVE OF RATIONAL MEDIATION OF ISLAMIC SOURCES

Shari`a law was historically developed by Muslim jurists by applying human reasoning to revealed texts with the aim to develop a normative system capable of regulating individual actions and social interactions. Early jurists relied primarily on the Qur'an and the practices of the Prophet to elaborate the rules of shari`a, and referred to the process through which shari`a rules were elaborated by the term *ijtihad* (intellectual exercise). Recognizing the imperative of rational mediation for understanding the rules of shari`a, early jurists exerted a great deal of time and energy to define the grammar of interpreting the divine texts and the logic of reasoning about their implications. The differences in methodological approaches led to the differentiation of the various schools of jurisprudence. Because the Qur'anic texts were given in a concrete form, whereby the Qur'an commented on the actions and interactions of the early Muslim community, and directed early Muslims in concrete situations, the jurists applied legal analogy (*qiyas*) to expand the application of the Qur'anic precepts to new cases. The *qiyas* technique, widely accepted by the schools of jurisprudence, requires the jurists to identify the efficient reason ('*illah*) of a specific Qur'anic statement, and to use this reason as the basis for extending the application of the Qur'anic precept to new cases. For example, early jurists extended the prohibition of wine to all intoxicating substance on the ground that intoxication was the reason for the Qur'anic prohibition of wine. Early jurists also utilized the statements and actions of the Prophet and his companions as a means to arrive at better understanding of the revealed texts. The practices of the Prophet and his companions became known as the *Sunna* and were captured in the *hadith* narrations. Early jurists did not feel that the *Sunna* has an authority independent from the Qur'an, and hence did not hesitate to reject a *hadith* narration whenever it was in a clear contradiction with a Qur'anic statement.²⁹

Ijtihad took a decisive turn when Muhammad bin Idris al-Shafi'i produced, in the middle of the second century of Islam, the first work in Islamic Principles of Jurisprudence (*usul al-fiqh*) under the title *al-Risala* (the Message). In his *Message*, Shafi'i declared that the *Sunna* was an inviolable source of law on par with the Qur'an, and insisted that it enjoyed an independent authority.³⁰ Furthermore, Shafi'i confined *ijtihad* to legal analogy (*qiyas*), declaring all other legal reasoning to be arbitrary.³¹ The restrictions on *ijtihad* were further extended by Ahmad bin Hanbal, who insisted that legal analogy has to be used only as a last resort. He therefore required that even a weak *hadith* has to be given priority over legal analogy.³² The other two major schools of jurisprudence of the Sunni branch of Islam,³³ the Hanafi and Maliki, were able to escape the severe restrictions on *ijtihad* imposed by Shafi'i and Hanbali schools by employing the techniques of *istihsan* and *istislah* respectively. *Istihsan* meant that the jurist was not bound by the apparent reason of a particular rule, but could utilize other reasons of shari`a whenever deemed more relevant. *Istislah*, on the other hand, allowed the jurist to base the rules of shari`a on public interests and utility, rather than confining them to '*illah* (efficient reason).

The desire of Hanafi and Maliki jurists to overcome the literalist approach that equates *ijtihad* with *qiyas* (à la shafi'i), or with linguistic explication of the Qur'an by reference to *hadith* (à la Hanbali), has inspired them to develop methods aimed at prioritizing shari`a rules and principles. Methods such as *al-qawa'id al-fiqhiyyah* (juristic rules) or *al-maqasid al-Shari'iyyah* (shari`a purposes) aim at the systematization of the shari`a rules by eliminating internal contradiction, and constitute what is referred to today as *maqasid* approach.

By its emphasis on meaning, reasoning, and purposes the *maqasid* approach provide a powerful tool for reforming historical shari`a, because it rejects the literal reading of statements apart from their rationale, and insist that those rationale cannot contradict basic Islamic values. The definitive exposition of this approach can be found in the work of the Andalusian jurist Ibrahim bin Ishaq al-Shatibi, *Al-Muwafaqat*. The *maqasid* approach expounded by Shatibi can be summarized in the following points: (1) Shari`a rules purport to promote human interests; (2)

Shari`a consists of a hierarchy of rules, whereby the particular rules (*ahkam juz'iyah*) are subsumed under universal laws (*qwanin kulliyah*); (3) General rules must be modified to accommodate – whenever possible – particular rules; (4) Particular rules that contradict general rules should be rejected or ignored; (5) The various rules and laws of shari`a aim at advancing five general purposes: the protection of Religion, life, reason, property, and progeny.

I wish, in the remainder of this paper, to undertake a fresh interpretation of the Islamic sources on the moral positions women and non-Muslims enjoy, and the rights and obligations assigned to them. I propose to employ a methodology rooted in the *maqasid* approach, and based on the following five principles:

Principle 1: Rights and obligations cannot be established on the basis of individual statements of the Qur'an and Sunnah, but have to accord with the totality of relevant statements. Therefore, a jurist is required, according to this principle, to consult all relevant texts *before rendering a specific ruling*.

Principle 2: The multiplicity of Qur'anic rules must be reduced into a coherent set of universal principles. The universal principles should be used to ensure the systematic application of shari`a in modern context. Such systematization should prevent an application of a specific (*khas*) rule in violation of a general (*'am*), or a particular (*juz'i*) in violation of a universal (*kulli*).

Principle 3: Because the generalization of a rule presupposes that the reason for its enactment is clear, no rule should be generalized unless its reason has been explicated. This principle requires that Qur'anic rules relating to social actions and interactions should be understood fully, and systematized with other rules. If this requirement is met, the literalist application of shari`a would be eliminated.

Principle 4: Because the universalization of a principle requires that the conditions of its application be identical, regardless of time and space, no principle can be declared universal if the particularity of the context for which it was intended is evident. This principle complement Principle 3 by requiring the jurist to examine the extent to which a specific statement or rule is directly connected with the socio-political context in which it was revealed.

Principle 5: Qur'anic statements take priority over Prophetic ones. Hence, in the case of conflict and real contradiction, Qur'anic precepts override Prophetic ones.³⁴

Utilizing the methodological framework outlined above, I turn now to examine the extent to which religious restrictions on religious freedom and the rights of women and non-Muslims are rooted in the attitudes and practices of historical Muslim communities, and how far these restrictions can be attributed to revealed texts.

FREEDOM OF CONVICTION

There is ample evidence in the Qur'an, both the Makkan and Madinan, that individuals should be able to accept or reject a particular faith on the basis of personal conviction, and that no amount of external pressure or compulsion should be permitted: "No compulsion in religion: truth stands out clear from error."(2 : 256) "If it had been the Lord's will, they would have believed – All who are on earth! Will you then compel mankind, against their will, to believe!" (10 : 99) By emphasizing people's right to freely follow their conviction, the Qur'an reiterates a long standing position, which it traces back to one of the earliest known Prophets, Noah³⁵:

Not only does the Qur'an recognize the individual's right to freedom of conviction, but it also recognizes his/her moral freedom to act on the basis of their conviction.³⁶ The principle that the larger community has no right to interfere in one's choices of faith and conviction can be seen, further, in the fact that the Qur'an emphasizes that the individual is accountable for the moral choices he or she makes in this life to their Creator alone.³⁷

Yet despite of the Qur'anic emphasis on the freedom of conviction and moral autonomy, most classical jurists contend that a person who renounces Islam or converts to another religion

commits a crime of *ridda* (apostasy) punishable by death. However, because the Qur'an is unequivocal in supporting religious freedom,³⁸ classical jurists relied, in advocating death penalty for *ridda* (renouncing Islam), on two *hadith* texts, and the precedent of the Muslims fighting against Arab apostates under the leadership of Abu Bakr, the first Caliph. This evidence is, though, shaky and does not stand under close scrutiny. The two *hadith* texts reported in Sahih Bukhari state. "Kill whoever changes his religion", and "Three acts permit the taking of a person's life: a soul for a soul, the adultery of a married man, and renouncing religion while severing ties with the community".

Now both *hadith* statements cannot stand as a credible evidence because they contravene numerous Qur'anic evidence. According to the *Maqasid* approach, a *hadith* can limit the application of a general Qur'anic statement, but can never negate it.³⁹ Besides, the *hadith* even contradicts the practices of the Prophet who reportedly pardoned Muslims who committed *ridda*. One well-known example is that of Abdullah bin Sa'd who was pardoned after Osman bin Affan pleaded on his behalf. Ibn Hisham narrated in his *Sirah* that the Prophet pardoned the people of Quraysh after Muslims entered Makkah victorious in the eighth year of the Islamic calendar. The Prophet excluded few individuals from this general pardon, whom he ordered to be killed if captured, including Abdullah bin Sa'd. Abdullah was one of the few persons appointed by the Prophet to write the revealed texts. After spending a while with the Muslims in Madina, he renounced Islam and returned to the religion of Quraysh. He was brought to the court of the Prophet by Osman, who appealed for his pardon. He was pardoned even though he was still, as the narration indicates, in a state of *ridda* and was yet to reembrace Islam.⁴⁰ If *ridda* was indeed a *hadd* (sing. of *hudud*), neither Osman would be able to plea for him, nor the Prophet would pardon him in violation of the shari'a law. Therefore, I am inclined to the increasingly popular view among contemporary scholars, that *ridda* does not involve a moral act of conversion, but a military act of rebellion, whose calming justifies the use of force and the return of fire.⁴¹

To make things worse, classical jurists extended death penalty to cases of misinterpretation of divine texts, or negligence of religious practices. Thus classical jurists insisted that a Muslim who negates or neglects prayer can be executed if he does not repent within three days. The vast majority of classical jurists maintained that it was not necessary for a Muslim to openly renounce Islam to be subject to death penalty. Rather, it was sufficient for him to say or do something contrary to Islam to be executed. Although jurists called neglecting religious duties or contravening orthodox interpretations *zandaqa* (heresy) rather than *ridda*, they treated both as equal in their severity.⁴² Interestingly, heresy punishment is not based on any Qur'anic or Prophetic texts, but on a faulty theory of right.

The widely accepted theory of right among jurists divided rights into three types:⁴³ (1) Rights of God (*Huquq Allah*) — These consist of all obligations that one has to discharge simply because they are divine commands, even when the human interests or utilities in undertaking them are not apparent, such as prayers, fasting, *hajj*, etc.; (2) Rights shared by God and his servants (*Huquq Allah wa al-'Ibad*) — These include acts that are obligatory because they are demanded by God, but they are also intended to protect the public, such as *hudud* law, *jihad*, *zakat*, etc., and (3) Rights of God's servants (*Huquq al-'Ibad*) — These are rights intended to protect individual interests, such as fulfilling promises, paying back debts, honoring contracts. Still people are accountable for their fulfillment to God.

As it can be seen, the theory of right devised by late classical jurists – around the eighth century of Islam – emphasizes that people are ultimately answerable to God in all their dealings. However, by using the term rights of God to underscore the moral duty of the individual, and his/her accountability before God, classical jurists obscured the fact that rights are invoked to support legal claims and to enforce the interests of the right-holder. Because the Qur'an makes it abundantly clear that obeying the divine revelation does not advance the interests of God, but only those of the human being, the phrase "rights of God" signifies only the moral obligations of

the believers towards God, and by no means should they be taken as a justification of legal claims.⁴⁴ It follows that the rights of God which are exclusively personal should be considered as moral obligations for which people are only answerable to God in the life to come. As such accepting or rejecting a specific interpretation or a particular religious doctrine, and observing or neglecting fundamental religious practices, including prayer or *hajj*, should have no legal implications what ever. A legal theory in congruence with the Qur'anic framework should distinguish between moral and legal obligations, and should confine the latter to public law that promote public interests (constitutional, criminal, etc.) and private law that advances private interests (trade, family, personal, etc.).

Unless the above legal reform is undertaken, there is no way to ensure that *takfir* (charging one with disbelief) and *zandaqa* (charging one with heresy) claims would not become a political weapon in the hands of political groups to be used as a means to eliminate rivals and opponents. Indeed there is ample evidence to show that *zandaqa* and *takfir* have been used by the political authorities during the Umayyad and Abbasid dynasties to persecute political dissidents.⁴⁵

RELIGIOUS EQUALITY AND MORAL AUTONOMY

We have already seen that the record of historical shari`a concerning the human rights of non-Muslims is mixed. On the one hand, the shari`a recognized the rights of non-Muslims to enjoy equal protection of the law as far as their life, property, and personal security are concerned. Non-Muslims also enjoyed the rights to freedom of conviction, and the right for self-determination as far as their legal and administrative conditions were involved. On the other hand, classical jurists imposed a number of restrictions on non-Muslims in the area of dress code, display of religious symbols, the construction of churches in predominantly Muslim districts, the use of mounts and carrying of weapons, etc.⁴⁶ I have already suggested that the restrictions imposed on non-Muslims do not stem from Qur'anic standards, but rather security concerns during the political turmoil associated with the Mongol and crusade invasions. Therefore, the apparent indifference on the part of shari`a towards the civil and political rights of non-Muslims stems not from any insensitivities attributable to classical jurists, but rather to the literalist approach of contemporary traditionalist jurists. Indeed, the literalist and imitative approach of Islamic traditionalism has been the main obstacle in the way toward evolving a human rights tradition rooted in Islamic sources.

The first thing that strikes us when we study the Qur'anic texts is that the Qur'an neither confines faith and salvation to those who accept the Islamic revelation, nor deny faith and salvation to other religions.⁴⁷ Indeed the Qur'an does not limit the attribution of faith and salvation to the People of the Book (Jews and Christians) but extend it to believers of other faiths.⁴⁸

Nor does the Qur'an consider all those who accepted Islam as true believers. For some have accepted the new religion as a general mode of life but failed to internalize its worldview and ethical mission:

The desert Arabs say, "We believe." Say, "Ye have no faith; but you (only) say, 'we have submitted our wills to God,' for not yet has faith entered your hearts. But if you obey God and His messenger, he will not belittle aught of your deeds: for God is oft-forgiving, most merciful.(49 : 14)

Others conformed to Islamic teachings only in appearance, but continued to harbor suspicion and doubts, even ill-will toward Islam and its adherents and advocates.⁴⁹ It follows that believers and disbelievers can belong to all religions.

Because believers and disbelievers cannot be distinguished on religious lines, as they run across all religions, the Qur'an urges Muslims to seek a political order based on peaceful

cooperation and mutual respect, and warns them against placing religious solidarity over covenanted rights and the principles of justice.⁵⁰

Equipped with the above set of principles, the Prophet managed to establish in Madina a multi-religious political community, based on a set of universal principles that constituted the Pact of Madina (*Sahifatul Madina*).⁵¹ The various rules enunciated in the Pact were aimed at maintaining peace and cooperation, protecting the life and property of the inhabitants of Madina, fighting aggression and injustice regardless of tribal or religious affiliations, and ensuring freedom of religion and movement. It is remarkable that the Madina Pact placed the rules of justice over and above religious solidarity, and affirmed the right of the victim of aggression and injustice to rectitude regardless of their tribal or religious affiliation, or that of the culprit.

However, it is not sufficient today for Muslim jurists to recognize the moral autonomy of non-Muslim communities, as the classical jurists did. The Qur'anic concept of justice requires that they employ the principle of reciprocity in delineating the overall legal structure to govern the religiously and morally pluralistic societies of today. That is, contemporary Muslim should avoid invading the moral space of other communities in as much as they would dread the imposition of alien moral or legal rules in their moral space.

WOMEN'S RIGHTS: PUBLIC EQUALITY AND FAMILY PRIVACY

When approaching Islamic sources to shed light on the issue of women's rights, a clear distinction emerges between the rights of women in the public sphere, and their rights in the area of family law. For while Islamic sources differentiate men's and women's responsibilities within the family, all limitations on women's rights imposed by classical scholars in the public sphere were based on either faulty interpretations of Islamic texts, or practical limitations associated with the social and political structures of historical society.

The Qur'an is unequivocal in assigning equal responsibilities for men and women for maintaining public order: "The believers, men and women, are protectors one of another; they enjoin the right (*ma'ruf*) and forbid the intolerable (*munkar*); they observe regular prayers, practice regular charity, and obey God and His Messenger." (9:71). Since men and women are entrusted with the same public responsibility to enjoin the right and forbid the intolerable, one should expect that both would enjoy equal political rights. Yet it is obvious that classical jurists deny women political equality with men. The question therefore arises as to what is the basis of the classical position? Jurists who deny women the right to public office base their arguments on one Qur'anic and one prophetic statements. The Qur'anic statement reads: "Men are the protectors (*qawwamun*) of women, because God has given the one more (strength) than the other, and because men support women from their means." (4 : 34) The word *qawwamun* which connotes "support" and "protection" has come to signify authority as well. The fact that *qawwamun* also signifies authority is not difficult to see as the remainder of the above Qur'anic statement empowers men with the right to discipline women guilty of mischief. But can the above verse be used to deny women access to public office? The answer is an emphatic no. For the authority implied by *qawwamun* and the obedience it entails is relevant – even under classical interpretation – within the confines of the family. It is clear that the Qur'an does not intend to give authority to every single man over every single woman. Nor do those who extend the implication of this verse to the public sphere expect that any single woman in society should obey any single man, known to her or not. If this is the case, no one can invoke the notion of *qawwamun* to deny women access to public office.

The other textual evidence used by classical jurists, and continues to be held by contemporary traditionalist jurists, is in the form of a *hadith* text that states: "They shall never succeed those who entrust their affairs to a woman."⁵² Reportedly the statement is a comment made by the Prophet upon hearing the news of the accession of Buran, the daughter of King

Anusherawan, to the Persian throne after the passing away of her father. I wish to argue here that there are sufficient reasons to show that the above *hadith* does not stand in the face of a close scrutiny, and cannot, hence, be allowed to undermine the principle of moral and political equality between the sexes, which is firmly established in the Qur'anic texts. (1) The *hadith* statement is not given in the form of a directive, but an opinion that has to be understood in its historical and cultural context. That is, the *hadith* has to be interpreted in the context of a historical society where women were not active participants in political life, and in the context of a political culture that places the hereditary rule over the principle of merit in deciding political succession. (2) The *hadith* is a single statement that has no support in the most authoritative Islamic source – i.e. the Qur'an. (3) The *hadith* stands in a direct contradiction with the principle of moral and political equality of the sexes, a principle established by numerous Qur'anic verses. (4) Finally, the *hadith*, being a singular narration (*khobar ahad*), is of a lesser degree of certainty than the Qur'anic narration (*khobar mutawatar*), and hence cannot overrule principles established in the Qur'an.

We have to conclude therefore that the Islamic sources support the right of women to have full access to public office, and to enjoy complete equality with men in public life. Our discussion of the notion of *qawwamun*, which provides men with a degree of authority over women, must be confined to the realm of family life. It is in the family, and in the family alone, that all of the practices cited by the critics of *shari`a* as instances of gender inequality can be found, namely polygamy, unequal inheritance, and inter-religious marriages.⁵³ Defenders of these inequalities among contemporary Muslim intellectuals have cited various biological, psychological, and functional bases to justify inequalities within a framework of complementary family roles. Western critics, on the other hand, dismiss gender role arguments as outdated and irrelevant, and insist that for women to live a life of dignity, society must declare the two sexes absolutely equal, and reject any legal rule that sanctions differentiation among the sexes.

While I do recognize the complexity of the issues involved in the debate on gender equality and gender roles, and the need for undertaking further research to examine the socio-historical meaning of biological differences between the sexes, and the socio-political significance of psychological differences – if any – between genders, I think that the debate is neither relevant nor helpful for the purpose of elaborating human rights. It is obvious that the findings of all empirical studies on the issue of sexual differences have been disputed on ideological grounds and have been interpreted in support of competing normative positions. There is nothing to suggest that human beings would ever subordinate their moral beliefs to empirical knowledge – at least not in a historically relevant timeframe. I propose, instead, that for the purpose of advancing equitable rights for all, we should focus our attention on how to ensure that marriage constitutes a consensual relationship that contribute equally to advancing the interests of the various parties involved. This, I suggest, can be achieved – as far as the legal system is concerned – by: (1) providing men and women with equal rights to enter into the relationship on their own terms, and to leave whenever they decide that the relationship has become exploitative or dissatisfying, and (2) to empower women so as to ensure that they can negotiate the conditions of the marriage from a point of strength, and to ensure that they do receive the legal support they need to make it possible for them to exit the relationship whenever it becomes undignifying.

The point being stressed here is that marriage should be viewed as a voluntary and contractual relationship, entered into with the aim to founding a family. In keeping within the framework of human rights, our efforts should focus on liberating the individual, morally and legally, from the impositions of arbitrary wills, rather than imposing a specific moral vision or legal code on him or her. Mature men and women should be able to negotiate the terms of their relationship freely without imposition from outside. Because, more often than not, families are organized in keeping with specific religious traditions of recognized moral autonomy, it is

wrong for a person who belongs to one moral community to impose his or her moral vision on others.

The above point can be illustrated by looking into few concrete examples. Forcing a woman to stay in a marriage against her will violates her right to moral autonomy and hence contravene her civil liberties, to which she is entitled under international human rights, even if this was done in keeping with a specific religious tradition, such as the Catholic. By the same token, no one should be justified to force a woman who, in keeping with Catholic morality and religion, decides to keep her marriage, even if it can be shown that her relationship with her husband brings her no satisfaction or happiness. Similarly, a woman who elects to maintain her marriage even after she became aware of her husband's intention to take a second wife, permitted under shari`a, must be allowed to do so. The law should provide her with the option to opt for a dignified exit under reasonable conditions. But it would be sheer arrogance for a person belonging to another moral or religious view to insist that their moral values or religious practices should prevail over her voluntarily made choice.

Even when one truly believes that the moral system to which he or she belongs is superior to others, and that others, by following different moralities, are not being treated to the full respect they deserve, one is not justified to require that his or her moral system should be imposed through legal means on others. For human dignity, which human rights intend to protect, requires that the person be first persuaded to the superiority of this or that moral system, so as to allow him/her to be the agent through which the legal system is reformed. The most the advocate of human rights should do is to ensure the free flow of information, and a political environment conducive to freedom of speech and action.

Because of the importance of the family to human society, all religions stress certain attitudes and values to keep it intact, and to extend its protection to the fragile souls who were brought to life within its confines. Human rights scholars should not direct their efforts to undermine religious attitudes and values, but should focus on the conditions that allow free and equal entrance and exist to the two genders. This would mean that while Muslim women may keep in line with their religious conviction and refuse to marry non-Muslim men, those who elect to violate the religious code should have the legal freedom to do so. As we saw earlier, in violating the moral requirements of shari`a, they will be answerable to their creator, not to society.

CONCLUSION

Our examination of the Qur'anic discourse reveals to us the significance it places on the moral autonomy of human beings. While the Qur'an urges people to adopt high moral standards, it makes it quite clear that people are ultimately accountable to their creator for their moral failings. The Qur'an further stresses that while it is not always possible for people to stay on a high moral plane, they should strive to the best of their ability to do so. Those who have been more fortunate to lead a moral life should strive, with tolerance and sympathy, to persuade others to adopt their vision of a good life, but they should never go to the extent of imposing their morality on others. It was such an attitude which allowed early Muslims to embrace diverse cultural groups, and to cooperate and peacefully coexist with a plurality of religious communities.

The tolerant attitude and pluralistic outlook was later diluted, giving rise to a more intrusive approach in which the lines separating the moral from the legal became blurred. The traditionalist stance was further compounded by undermining the principle of moral equality between men and women advanced in the Qur'anic texts. This was done by giving more weight to particular pronouncements, while ignoring universal principles and general purposes. Gradually, therefore, the moral autonomy of individuals and groups was severely compromised. Interestingly, though, in their zeal to assert Islamic morality through legal enforcement, the traditional jurists unwittingly undermined the moral fabric of society. This is because moral

character does not develop under conditions of rigid restrictions on free speech and action. By definition, a moral choice presupposes that the individual has also the choice of acting immorally, or in accordance with standards that does not rise to the level of moral action. Take this choice away, morality cannot be distinguished from hypocrisy and duplicity.

There is a dire need today for Muslims to undertake a legal reform so as to restore the principle of moral autonomy to both individuals and cultural groups. By so doing, Muslims would have a greater opportunity to rid their communities from oppression, corruption, and hypocrisy. They would have also the chance to join hands with an increasing number of individuals and groups belonging to the various religious communities of the world to fight global injustice and oppression. The UDHR, should be viewed as a common thread that can bind the efforts of people belonging to diverse moral communities the world over. As I tried to show in this paper, supporting international human rights does not mean that one has to accept the various interpretations assigned to them. While the dominant interpretations of the various articles of UDHR reflect the moral inclination of Western individualism, the universal principles themselves are compatible with Islamic values and ethos. Indeed, the rejection of UDHR on the ground that it does not fit neatly into a specific moral code derived from Islamic sources is not only a theoretical mistake, but a strategic blunder as well. Whereas the rejection of UDHR is likely to deprive the Muslims from achieving greater political liberation, a strong commitment to its principles would undoubtedly allow them to enter the global debate, and give them the opportunity to bring their values and ethos to bear positively on the future development of human rights discourse.

NOTES

- ¹ The word “shari’a” in this work refers to the various rules and doctrines derived from Islamic sources by jurists, and not the sources themselves. Historical shari’a thus signifies rules derived by classical Muslim jurists.
- ² Ann Elizabeth Mayer, *Islam and Human Right: Tradition and Practice*, 2nd ed. (boulder, co.: Westview Press, 1995), pp. 64-5.
- ³ Ibid. p. 89.
- ⁴ Heiner Biefeldt, “Muslim Voices in the Human Rights Debate,” *Human Rights Quarterly*, 17.4 (1995), p. 596.
- ⁵ Rhoda Howard, *Human Rights and the Search for Community* (Boulder, Co. : Westview Press, 1995), p. 93.
- ⁶ Ibid., p. 94.
- ⁷ Ibid.
- ⁸ Abdullahi Ahmad An-Na’im, *Toward an Islamic Reformation* (Syracuse University Press, 1990), p.52-6.
- ⁹ “Makkan Qur’an” refers to the Qur’an which was revealed in the city of Makkah (or Mecca), prior to the Prophet’s migration to the city of Madina where the Madinan Qur’an was revealed.
- ¹⁰ Ibid., p. 176.
- ¹¹ Ibid. p. 49.
- ¹² Ibid. p. 180.
- ¹³ Mayer, *Islam and Human Rights*, p. 7.
- ¹⁴ See for example Reza Afshari, “An essay on Islamic cultural Relativism in the Discourse of Human Rights”, *Human Rights Quarterly*, 16 (1994), pp. 235-76.
- ¹⁵ Natural rights thinkers, such as Hobbes, Locke, or Rousseau, perceived society to be composed of free and equal individuals. The cultural homogeneity of members of society is taken for granted, and assumed in the notion of the state of nature.
- ¹⁶ The attitude of early Muslim jurists toward the moral autonomy of non-Muslims is illustrated in the next section.
- ¹⁷ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (London: Routledge, 1993), p. 84.
- ¹⁸ See for example (2:194) and (55:60).
- ¹⁹ Muhammad bin Ahmad al-Sarakhsi, *Sharh Kitab al-Siyar al-Kabir* (Pakistan: Nasrullah Mansur, 1405 A.H.), Vol. 4, p. 1530.
- ²⁰ Ibid.
- ²¹ Ali bin Muhammad al-Mawardi, *al-Abkam al-Sultaniyyah* (Cairo: Dar al-Fikr, 1983/1401), p.59.
- ²² Ibid. pp. 20-23.
- ²³ Ibid. p.24.
- ²⁴ See Ibn al-Qayim, *Sharh al-Shurut al-Umariyyah* (Beirut: Dar al-‘Ilm lilmalayin, 1961/1381).
- ²⁵ Muhammad bin Ahmad bin Rushd (d.595), *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (Beirut: Dar al-Ma’rifah, 1986/1406) vol. 2, p. 5.
- ²⁶ Ibid. p.8.
- ²⁷ Ibid. p. 66-68.
- ²⁸ Ibid. p. 40; see also al-Mawardi, p.59.
- ²⁹ For further elaboration on this point, see Louay M. Safi “Islamic Law and Society”, *American Journal of Islamic Social Sciences*.
- ³⁰ Muhammad bin Idris al-Shafi’i, *Al-Risala* (Beirut, Lebanon: Dar al-Kutub al-‘Ilmiyyah, n.d), pp. 401-76.
- ³¹ Ibid. p.
- ³² For elaboration of Hanbali Principles of Jurisprudence see Ibn al-Qayim, *A’lam al-Muaqi’in* (Beirut, Lebanon: Dar al-Kutub al-‘Ilmiyyah, 1991 A.C. 1411 A.H.), Vol. 1, pp. 24-6.
- ³³ Shi’a jurists imposed, by far, fewer restrictions on *ijtihad*.
- ³⁴ I have elsewhere expounded this approach under the title “The Methodology of Comparative Rules,” See also Louay *‘Imal al-‘Aql* (Damascus, Syria: Dar al-Fikr, 1998), Chapter 4.
- ³⁵ “He [Noah] said: O my people! See if I have a clear sign from my Lord, and that he has sent mercy unto me, but that the mercy has been obscured from your sight? Shall we compel you to accept it when you are averse to it!” (11 : 28). “The message of freedom of belief and conviction, and the call to religious tolerance is reiterated time and again through various Prophets: And if there is a party among you that believes in the message with which I have been sent, and a party which does not believe, hold yourselves in patience until Allah does decide between us: for He is the best to decide. The leaders, the arrogant party among his people, said: O Shu’ayb! We shall certainly drive you out of our city, and those who believe with you, or else you shall have to return to our ways and religion. He said: “What! Even though we do not wish to do so.” (7 : 86-7).
- ³⁶ “Say: O my people! Do whatever you may: I will do (my part). But soon will you know on whom an anguish of ignoring shall be visited, and on whom descends an anguish that abide”. (39 : 39-40). “Say: Everyone acts according to his own disposition: But your Lord knows best who it is that is best guided on the way.” (17 : 84).
- ³⁷ “O you who believe! Guard your own souls: If you follow (right) guidance, no hurt can come to you from those who stray. The goal of you all is God: It is He that will show you the truth of all that you do.” (5 : 105). “So if they dispute with you, say: I have submitted my whole self to God and so have those who follow me. And say to the People of the Book and to those who are unlearned: Do you (also) submit yourselves? If they do, they are in right guidance. But if they turn back, your duty is to convey the Message; And in God’s sight are (all) His servants.” (3 : 20)
- ³⁸ In fact, one cannot find in the Qur’an any support for the *ridda* penalty. The Qur’an makes two references to *ridda*: “Nor will they cease fighting you until they turn you back from you faith if they can. And if any of you turn back (commit *ridda*) from their faith and die in unbelief, their works will bear no fruit in this life; and in the hereafter they will be companions of the fire and will abide therein.” (2:217) “O you who believe! If any from among you turn back (commits *ridda*) from his faith, soon will God produce a people whom He will love as they will love Him — humble with the believers mighty against the disbelievers, thriving in the way of god, and never afraid of the reproaches of detractors. That is the grace of God, he bestows on whom He please; and God encompasses all and he knows all things.” (5:54). In both cases the Qur’an does not specify any physical punishment here and now, let alone a death penalty. The Qur’an rather warns those who renounce their faith of disgrace and ill-fate. To the

- contrary, the Qur'an provides a direct evidence, albeit open to interpretation, that *rida* is not punishable by death: "Those who believe then disbelieve, then believe again, then disbelieve and then increase in their disbelief – God will never forgive them nor guide them to the path." (4 : 137).
- 39 See al-Shatibi, *al-Muafaqat* (Beirut, Lebanon: Dar al-Ma'rifah, n.d.), vol. 3, pp. 15-26.
- 40 Ibn Hisham, *al-Sirah al-Nabawiyah* (Cairo : Mustafa Halabi Press, 1955/1375), Vol. 2, P. 409.
- 41 For an elaborate discussion of this point see Mohamad Hashim Kamali, *Freedom of Expression In Islam*, (Kuala Lumpur : Ilmiah Publishers, 1998), pp. 87-106.
- 42 See for example, Abu Hamid al-Ghazzali, *Fada'ih al-Batiniyyah* (Amman, Jordan: dar al-Bashir, 1993/1413), p. 95-97.
- 43 See for instance Al-Iz bin Abdul Salam (d. 660AH), *Qawa'id al-Abkam* (The Basis of Rules), Vol. 1, pp. 113-21; al-Shatibi, *Ibid.*, Vol. 2, pp. 318-20.
- 44 The Qur'an repeatedly points out that people's neglect of its commandments has no consequences onto the Divine whatsoever — be it good on evil — but only onto themselves: See for example, verses: (2 Baqarah 57), (7 al-A'raf 160), (3 Al-Imran 176-77), and (47 Muhammad 32).
- 45 The execution of Ghaylan al-Dimanshqi by the order of Caliph Abdul Malik bin Marwan, and Ahmed bin Nasir by the order of Caliph al-Wathiq after being accused of heresy are cases in point.
- 46 See Ibn al-qayim, *al-shurut al-Ummariyyah*; also Ibrahim bin Nujaym (d.970 ah), *Al-Ashbah was al-Naza'ir* (Damascus; Dar al-Fikr, 1988/1403), pp. 386-8. Ibn Nujaym belongs to the more tolerant school of Hanafi.
- 47 "Not all of them are alike! Of the People of the Book are a portion that stand (for the right); they rehearse the signs of God around the night, and they prostrate themselves in adoration. "They believe in God and the last day; they enjoin the right and forbid the intolerable (*munkar*); and they hasten in (all) good works: they are in the rank of the righteous. Of the good that they do, nothing will be rejected of them; for God knows well those that do right." (3 : 113-5) "And there are certainly among the People of the Book those who believe in God, in the revelation to you, and in the revelation to them, bowing in humility to God. They will not sell the signs of God for a miserable gain! For them is a reward with their Lord, and God is swift in account." (3 : 199)
- 48 "Those who believe (in the Qur'an), those who follow the Jewish (scriptures), and the Sabians and the Christians – any who believe in God and the Last Day, and work righteousness – on them shall be no fear, nor shall they grieve." (Al-Ma'idah 69) "The Qur'an goes even further to make it abundantly clear that no religious community has the right to claim monopoly on righteousness or salvation: 'The Jews say: 'The Christians have naught (to stand) upon; and the Christians say: 'The Jews have naught (to stand) upon. Yet they (Profess to) study the (same) book. Like unto their work is what those say who know not; but Allah will judge between them in their quarrel on the Day of Judgement.'" (2 : 113) "Indeed the Qur'an rebuke those of the People of the Book who justify the violation of their moral code when dealing with people who belong to another faith: Among the people of the book are some who, if entrusted with a hoard of gold, will (readily) pay it back; others, who, if entrusted with a single silver coin, will not repay it unless you constantly stood demanding, because they say: there is no call on us (to keep faith) with these ignorant (pagans). But they tell a lie against god, and (well) they know it." (3 : 75)
- 49 See for example (2:8-20) and (4:142-3).
- 50 "Those who believed, and migrated, and fought for the faith, with their property and their persons, in the cause of God, as well as those who gave (them) asylum and aid — these are (all) friends and protectors, one of another. As to those who believed but chose not to migrate, you owe no duty of protection to them until they migrate; but if they seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance. And (remember) God sees all that you do. The unbelievers are protectors, one of another: unless you do this (protect each other), there would be oppression and commotion on earth, and great mischief." (8 : 72)
- 51 See Ibn Hisham, *al-Sirah al-Nabawiyah*, vol. 1, p
- 52 Reported by Bukhari, al-Tirmidhi, and al-Tabarani.
- 53 Empowering women through public work, education, and legal reform addresses cases of injustice steaming from polygamy, while separating moral from legal obligations addresses interreligious marriage. Unequal inheritance, on the other hand, is connected with exempting women from any obligation to spend on the household, even when they enjoy high income, and hence must be dealt with in any legal reform by considering both rights and obligations within the family.