NOTES ON THE SHARI‘A:
HUMAN RIGHTS, DEMOCRACY, AND THE
EUROPEAN COURT OF HUMAN RIGHTS

Moussa Abou Ramadan*

The Turkish Constitutional Court in 1998 questioned whether values such as human rights and democracy are consistent with values raised and supported by the Shari‘a. The Court’s implicit assumption is that it is impossible to find a concept in Islamic law that respects human rights. With regard to the Shari‘a, there are different positions concerning democracy and human rights depending on the legal corpus included in the definition of the Shari‘a. The thesis of incompatibility is based on the classical definition of the Shari‘a as invariable and unchanging. But once other perceptions of the Shari‘a are incorporated, some of these conceptions are compatible with human rights and democracy.

I. Introduction

As a result of the 1995 general elections, Refah, the Welfare Party, became the largest political party in the Turkish parliament, coming into power in 1996 by forming a coalition government. On January 16, 1998, the Turkish Constitutional Court dissolved the Refah party, a party in existence since 1983.1 This paper will concentrate on the European Court of Human Right’s (hereinafter the Court) perception of the

* Lecturer, Law Faculty, Haifa University.
1 On the Refah Party see Haldun Gülup, Globalization and Political Islam: the Social Bases of Turkey’s Welfare Party, 33 Int’l J. Mid. East Stud. 433 (2001). (The author maintains that the rise of the Refah Party is due to great economic changes in Turkey, mainly the effects of globalization and the diminishing role of the state in economics. The author also argues that there is also a crisis in the state’s project to bring Turkey to modernity represented in the official ideology of Kemalism. The Refah party had the support of different classes in the society: the peripheral segment of the capitalist class, the professional middle class, and the working class). (See also Susanna Dokupil, The Separation of Mosque and State: Islam and Democracy in Modern Turkey, 105 W. V.A. L. Rev. 53 (2002) (Retracing the history of the main political Islamist parties in Turkey and more specifically the Refah Party see id., at 105-121).
Shari’a, particularly in light of their view in paragraph 72 of the decision. Like the Constitutional Court, the Court considers that the Shari’a, that faithfully reflects the dogmas and divine rules determined by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place within it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of the Shari’a, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on the Shari’a, that clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In addition, the statements concerning the desire to found a “just order” or the “order of justice” or “God’s order,” when read in their context, and even though they lend themselves to various interpretations, have as their common denominator

the fact that they refer to religious or divine rules in order to define the political regime advocated by the speakers. They reveal ambiguity about those speakers’ attachment to any order not based on religious rules. In the Court’s view, a political party whose actions seem to be aimed at introducing the Shari’a in a state party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.

This decision, including paragraph 72, was upheld by the Grand Chamber in quoting the mentioned paragraph again without change. This paragraph, of course, is a loaded statement. One is left wondering from where the Court came by its understanding of the Shari’a, since they refused guidance from the Muslims pleading before it. This paper will focus on one of the main problems raised by the Court: the problem of democracy and human rights in the Shari’a. It will not consider the immutability of Islamic law, nor will it consider the platform of the Refah party and its compatibility with the Convention.

As mentioned in paragraph 72 of the Refah decision, the Court insisted on the immutability of the Shari’a on one side, and on the incompatibility between the Shari’a, democracy, and human rights on the other. Is there any connection between the two statements? There is an implicit assumption in the Court’s view that it is impossible to find a concept in Islamic law that is immutable and respects human rights. But is there a concept of the Shari’a that is immutable and has a healthy respect for human rights? If this is true, than the focus should be on the Shari’a, democracy and human rights, thus making the need to question immutability irrelevant. The Court could have merely held that the Shari’a is incompatible with human rights and stopped there. Why go further and state that the Shari’a is static and immutable? There is logic to the Court’s linking immutability, democracy, and human rights; I will give four reasons for this connection:

1) The connection between the immutability of the Shari’a and the incompatibility of the Shari’a with human rights is vital because if the Shari’a was dynamic and evolving the Court would not be at liberty to say that the Shari’a is incompatible with human rights. Perhaps some interpretation of it are incompatible with human rights, but surely the Court would have to acknowledge that this is not a permanent

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3 Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98 the Refah Party, supra note 2, at para. 123.
4 On the political program of the Refah party see Dokupil, supra note 1, at 109-16.
condition and that careful and judicious interpretations could form the Shari'a into a code that is completely in accord with modern notions of human rights.

2) Another problem with the immutability of the Shari'a concerns its lack of conformity to democracy, even if it respects human rights. The lack of influence citizens have on the law creates a problem for those wishing to participate in a modern democracy. Can we accept a regime that applies all international human rights conventions but citizens cannot amend these conventions? Certainly not, because democracy requires the sovereignty of the people, it is “la volonté générale” that decides and not God or any other organ. In a democratic state, the people must be able to change their own law. The only law that they could not pass is one that abolishes the democratic regime. In a system that God is the sovereign and the interpretation of the will of God by a category of religious persons, even if it respects human rights, will still only be a theocracy and not a democracy. In the case of the 2001 Refah Party decision, the Court stated:

Democracy requires that the people should be given a role. Only institutions created by and for the people may be vested with the powers and authority of the state; statute law must be interpreted and applied by an independent judicial power. There can be no democracy where the people of a state, even by a majority decision, waive their legislative and judicial powers in favor of an entity which is not responsible to the people it governs, whether it is secular or religious. 6

3) If the Shari’a is a static system of law, it will not respect the obligation of the state as guarantor of human rights. In the 2003 Refah Party decision 7 the Court stated that it “sees no reason to depart from the Chamber’s conclusion that a plurality of legal systems, as proposed by Refah, cannot be considered as compatible with the Convention system.” In its judgment, the Chamber gave the following reasoning:

7 The Refah party, supra note 2.
It would do away with the state’s role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the state in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the state has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention (see, mutatis mutandis, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 14, § 25).  

This means that in a positivist system of law, like the Court’s conception of law, the source of law is the state, as is the obligation to protect human rights. There can be no rights without the state. The Court rejects a natural law theory of human rights, human rights based on divine origin or any origin other than the state.

4) Furthermore, a legal system that is immutable is in direct contradiction with the Court’s view of the Convention. The Court views the Convention as a living document. If the system of law is immutable, it cannot make the necessary adaptations to be in conformity with the rulings of the Court. In adhering to the Convention, a state also adheres to the subsequent developments in international law. If there is a new custom created between member states, the state that was in

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8 Id.
9 Case S.L. v. Austria (application no.45330/99), 9 January 2003 para. 39. Case of L. and V. v. Austria (Applications nos. 39392/98 and 39829/98) of 9 January 2003 para. 47. “The court has frequently held that the Convention is a living instrument, which has to be interpreted in the light of present-day conditions.” In Tyer v. the United Kingdom, (1979-1980) 2 E.H.R.R. 1. The Convention is “a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.” Id. at para. 31:

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.

conformity with the Convention will no longer be in conformity if it has adopted an immutable system of law. The Convention is static and immutable in only one respect, no state has the right to alter its democratic character. But one should be cognizant that the conception of democracy itself evolves and changes over time.

Others have studied the relationship between human rights, the *Shari’a* and democracy. Some have examined this question at the level of the political regime—does the Muslim regime fit the model of democracy and human rights? Here also, one can examine the conflict between Islamic culture on one side and democracy and human rights on the other. Daniel Price argues that there is no firm relationship between the extent of the Islamic influence on a society and its level of democracy and human rights. In comparing two states with high levels of Islamic influence in their political culture, Iran and Saudia Arabia, he arrived at the conclusion that the same intensity of Islam in a society can result in different amounts of democratic freedom and human rights. The same conclusion is reached on the relationship between democracy and Islam by Mark Tessler.

The legal practice of Muslim states and the relationship between the legal system and human rights has been studied and examined by many scholars. Some have examined the practice of Muslim states with regards to international human rights’ conventions and analyzed the extent to which they adhere to the standards set within

At para. 193, the Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see Selmouri v. France, 2000 29 E.H.R.R. 403, at para. 101.)

As the Court states: “[d]emocracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.” (United Communist Party of Turkey and Others v. Turkey, (1998) 26 E.H.R.R. 121, at para. 45). “The principles and the structure of the state can be changed but without harming democracy itself.” (Socialist Party case, supra note 2, at para. 47; the Freedom and Democracy Party case, supra note 2 at para. 41; and the Dicle case, supra note 2 at para. 44 & para. 46).


them, other scholars have focused on the international documents issued by all Muslim states, such as the Cairo Declaration on Human Rights in Islam adopted in 1990 by the Member States of the Organization of the Islamic Conference or those adopted among Arab states, such as the Arab Charter of Human Rights of 1994. Still other academics have examined what Muslim intellectuals themselves think about these issues. Finally there is a growing body of literature written by Muslim writers who are trying to develop a model of compatibility between the Shari’a, human rights, and democracy.

In many Muslim states, the Shari’a is the source of legislation; thus regardless of whether the legal document is a domestic text such as a constitution or an international one such as an international convention between Muslim states, it is still necessary to examine whether the Shari’a is compatible with human rights and democracy. The compatibility between the Shari’a, democracy, and human rights depends on what we mean by Islam or by the Shari’a. Is there one Islam or one Shari’a or do we have different interpretations of Islam, just as we have different interpretations of any religion? Some authors support the thesis of incompatibility while others support the thesis of compatibility.

In the following analysis I will limit myself to the discussion of democracy, human rights, and the Shari’a on the doctrinal level and not on the level of the political regime of Muslim countries. On this level, we can detect four categories of trends in contemporary legal thought in the Islamic world.

The first is the traditional way of thinking which gives a priority to the fuqaha’ (Muslim Jurist). Islamic law was developed mainly by Muslim jurists and is defined by some scholars as Jurist law. Since the source of the Shari’a is God, the Muslim

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15 For the text, see ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 203-208 (1999).
jurists have an obligation to discover and reveal this divine will. Their legal opinions represent a very important source of Islamic law.19

In the first part of this Article, I will analyze the opinions of these scholars vis-à-vis human rights, democracy, and the Shari’a. I will not focus on a specific school of Islamic law, but instead I will show how the Shari’a could be viewed by some as incompatible with human rights by relying on different scholars from all of the four main schools of Sunni Islam.

I will conclude by showing how Islamic law could be viewed as compatible with human rights through the work of two contemporary scholars (Mahmoud Taha and Nasr Hamid Abu Zayd) who do not belong to the Muslim jurists. Their proposal to make the Shari’a compatible with human rights were seen as anti-Muslim by other Muslims and because of their beliefs they were ostracized and even suffered personal loss and even death. An example of this was seen with Mahmoud Taha, who was a Sudanese architect who belonged to the “Republican Brotherhood.” He was eventually killed in 1985 by the regime of Numeri (the President of Sudan). Additionally Abu Zayd,20 a professor in the Arabic department at Cairo University, experienced a similar fate. He was divorced by his wife using the legal argument that his writings proved he was not a believer and thus his marriage to his Muslim wife was null and void. ‘Ali ‘Abd al-Raziq, who wrote about the constitutional system of Islamic law,21 was excluded in 1925, from the status of the Ulama’,22 and he was forced to forfeit his membership in the Al-Azhar (the most prestigious Sunni religious institution) for writings that were thought to be un-Islamic.

The result of the exclusion of these three scholars from the orbit of Islam is similar to the European Court of Human Rights decision on the Refah party. Both Al-Azahar and the Court took it upon themselves, and only themselves, the right to declare what is and is not Islamic, leaving no room for others who may have a more liberal interpretation of the Shari’a.

19 In Sunni Islam, which represents approximately ninety percent of Muslims today, there are four schools of law.
21 ‘ALI ‘ABD AL-RAZIQ, AL-ISLAM WA-USUL AL-HUKM (1966).
Less extreme than Abu Zayd’s Mahmoud Taha’s, Ali ‘Abd al-Raziq and than these two trends—one that reconciles the Shari’a with human rights and the other that finds the Shari’a incompatible with human rights—are two additional trends—one can be called the reformist trend and the second can be called the fundamentalist trend. The common feature of these two trends is to devaluate the teachings of the scholars of the four schools and claim that these scholars distorted the true meaning of Islam. Their aim is a return to pure Islam.

To adapt Islamic law to the necessities of modern life, the Muslim scholar Muhammad Abduh began the reformist trend,\textsuperscript{23} at a time when the Muslim world was confronted with the European colonial powers and the question of compatibility between Islam and the modern world was raised.\textsuperscript{24} He maintained that rational thought and Islam are compatible, but rational thought does not necessarily lead to the same answers found in God’s revelations.\textsuperscript{25,26}

The fundamentalists interpret the holy texts exactly; the fundamentalism’s chief propagandist was Sayyid Qutb. After his death, some in the fundamentalist movement interpreted his writings in such a way as to allow a turn toward violence.\textsuperscript{27}

After explaining the difficulties that exist, it is important to remember that the main thesis of this note is to show that the European Court of Human Rights failed to see the plurality of interpretations of the Shari’a among Islamic thinkers. It dogmatically characterized the Shari’a by holding that it is static, monolithic, and lacking history, geography, and ethnicity. The Court chose a conservative approach of the Shari’a and intervened in defining Islam. An important note is that this article does not claim to determine which way the Shari’a should be interpreted, but rather it claims that the court over stepped its mandate. A secular court has no function in

\textsuperscript{23} MUHAMMAD ‘ABDUH, AL-ISLAM, DIN AL-‘ILM WA-AL-MADANIYYAH 10 (1998).
\textsuperscript{24} On this trend see M.A. ZAKI BADAWI, THE REFORMERS OF EGYPT (1978); TARIQ RAMADAN, AUX SOURCES DU RENOUVEAU MUSULMAN. D’AL-AFGHANI A HASSAN AL-BANA. UN SIÈCLE DE REFORMISME ISLAMIQUE (1998); WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997); Aharon Layish, The Contribution of the Modernists to the Secularization of Islamic Law, 14 MID. EASTERN STUD. 263 (1978).
\textsuperscript{25} CHARLES ADAMS, ISLAM AND MODERNISM IN EGYPT 127 (1933).
\textsuperscript{26} See, e.g., the famous commentary by MUHAMMAD ABDOU, RACHID RIDA, & J. JOMIER, LE COMMENTAIRE CORANIQUE DU MANAR. TENDANCES MODERNES DE L’EXÉGÈSE CORANIQUE EN ÉGYPTE 191-235 (1954).
\textsuperscript{27} RAMADAN, supra note 24, at 385-446. The fundamentalist are in fact different groups with different perspectives but none of them offer a theory that conforms to human rights and democracy. See also SALIEH & ALDEEB, supra note 17; LAMIA RUSTUM SHEHADEH, THE IDEA OF WOMEN IN FUNDAMENTALIST ISLAM (2003).
choosing between different trends within one religion—a secular court, especially a court of human rights, is not a court for examining the orthodoxy of religions. This Article does not make claims against the upholding of the decision in the Refah case by the Court but rather it is limited to the misperception of the Court regarding the relationship between democracy, human rights and the Shari‘a.

II. Thesis of Incompatibility between the Shari‘a and Human Rights: the Conservative Approach

The concept of incompatibility can be deduced from the works of Muslim scholars (fuqha) from the 19th century and its interpretation of the Qur’an. If Islam was just the interpretation of the fuqha’ and did not include the efforts of modern Muslims to improve the status of human rights, it is possible to determine that Islam is not compatible with human rights. However, this is not the case and will be proved below.

A. The Level of Abstraction

There is no doubt that the Muslim jurists believe human beings possess certain rights. In the Islamic law textbook (fiqh) we find references to the notion of human rights (Huquq al-‘ibad) and the rights of God (Huquq Allah). This distinction is usually found in criminal matters. Al-Marghinani (d.1197), a 12th century Islamic jurist, wrote about punishment (had) in the Shari‘a stating punishment is prescribed for a violation of God’s rights. Retaliation (Qisas), on the other hand, is not because it is refers to the violation of man’s rights. One of the important consequences of this distinction is that punishment could not be renounced because it concerns the rights of God. On the contrary, the qisas, which concern the rights of humans (ibad) can be renounced.28 This distinction between the rights of God and the rights of humans is sometimes also used in matters regarding marital relations. Ibn al-‘Arabi, (d.1148), stated that the Head of the State (Imam) should intervene in conflicts between spouses and not wait

for them to turn to him because marital relations are matters that concern the rights of God. This distinction is seen in various multiple distinctions and combinations by other scholars. However, to see this as a concept of human rights is exaggerated. It seems that it is the distinction between *jus cogens* and *jus dispositivium*. The first one represents the norms that cannot be derogated under any circumstances. This is not to say that from this notion one cannot develop a theory of human rights. However, I contend that the ancient Muslim jurists did not see this matter in this way, unlike Khaled Abu al-Fadl who recently made this distinction with a twist:

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, honoring 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, honoring the vicegerents of God, achieving mercy, and pursuing the ultimate goal of justice.

The classical interpretation did not view the claims or rights of Allah as vindicated in the hereafter but as categories of punishment to be applied in this world. Relegating the punishment to the hereafter and favoring the rights of the individual in this world is a new interpretation of this distinction.


30 Al-Mawardi presents a third category between these two rights as a mix between the rights of God and the right of man (Muhammad Al-Mawardi, *Al-Ahkam al-Sultaniyyah wa-al-Wilayat al-Diniyyah* 9 (1978)). Al-Sarkhasi identifies four categories: The first category is the rights of God, the second is the rights of the human being, the third is a mix in which the rights of God are dominant and the fourth is a mix in which the rights of the human being are dominant: (Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* 60-62 (1994)). For more on the distinction between the rights of God and rights of human beings, see Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* 200-16 (1999).

Another institution in classical Islamic law, the *Caliphate* (the political and religious head of a Muslim state), demonstrates that the Muslim jurists’ notion of human rights was concerned mainly with the idea of protecting the individual from dispossession and oppression. The ultimate purpose for establishing the *Caliphate* was not to protect human rights but to preserve Islam and apply the *Shari’a*. Nevertheless, as Al-Ghazali (d.1111) noticed in the 11th century, an individual would not have time to fulfill his religious obligations without satisfying his basic needs like food, shelter, and clothing. It was therefore, incumbent on the *Caliphate* to provide an orderly society that would allow a Muslim time and energy for prayer. Additionally, the institution of the Muslim judge (*Qadi*) is obligated to ensure that an individual receives the rights to which he is entitled. This idea of the protection of rights is found in the institution of *mazalim*. It is defined by Al-Mawardi (d.1058) as follows:

Judicial investigation of wrongs or abuses is concerned with leading those who have committed wrongs to just behavior by instilling fear in them, and with dissuading litigants from undue obstinacy in their disputes by instilling a feeling of respect. Thus among the qualities demanded of the judicial investigator is that he be of imposing stature, that he ensure that action follows his words, that he commands great respect, is manifestly correct in his keeping within moral bounds, restrained in his appetites, and possessed of great scrupulousness.

The *Mazalim* Institution attempted to “right many wrongs,” two such examples are restoring taxes collected unduly or restituting property seized unlawfully by governors or by powerful individuals.

Another concept that influences modernist and reformist Muslims is *maqasid* (purpose of the Legislator). According to Al-Shatibi (d.1388) the *Shari’a* was created with the concerns and interests of people in mind (*masalih al ‘ibad*). Instead of

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36 *Id.* at 121.
37 *Id.* at 123-4.
citing and analyzing specific verses, Al-Shatibi analyzed the general purposes of the Shari’a as a whole. He stated that the Shari’a has three purposes: going down in order darruriyat (necessities), hajuyat (needs), and tahsiniyat (supplementary benefits). The necessities constitute protecting religion in life and in the afterlife and this can be achieved through either action or deterrence. The religion is protected through the relationship between man and God (‘ibadat) and can be represented by prayer, fasting, and haj. Customs (‘adat) protect life and are composed of the intellect, eating, drinking, clothing, and housing. The mu’amalat (the part of the Shari’a that concerns the relationship between people) protects the progenitor (nasl) and his economic well-being. The theory for human rights in Islam as the right to life, property, and the protection of religion, can be developed from this concept of purpose (masalih al ‘ibad).

The distinction between claims or rights of Allah (Huquq Allah) and private claims (Huquq al ‘ibad) the institutions of the Caliphate, mazalim, and the Muslim judge as well as the theory of purpose show that there are certain areas in Islam where an individuals’ rights are protected. Other views maintain that the purpose of the government in Islam is to apply Islamic law, encompassing all aspects of life and therefore leaving no place for the individual. For example, the European Court of Human Rights states that the Shari’a “intervenes in all spheres of private and public life in accordance with religious precepts.” Professor Ann Lambton stated that:

39 Haj is the Pilgrimage to Mecca in Islam.
40 Huquq Allah:

Rights of God refer to such matters as relate to relations between man and God. Islamic law also includes matters relating to collective and public interests as rights of God. Seen in this perspective, Huquq al-Ibad are individual rights and Huquq Allah are collective rights. Thus Islamic law entrusts Muslim community as the custodian of Huquq Allah.

41 Huquq al ‘ibad:

The rights between humans. Most of fiqh doctrines deal with Huquq al-‘ibad concerning marriage, divorce, property, contracts, services etc. The basic principle in these matters is social justice (la tazlimun wala tuzlamun: “you do not do injustice and you will not be treated unjustly,” and la darar wa la darar, no harm to yourself or to others).

Id.
42 The Refah party decision, 2001, supra note 6.
the state is “given,” and it is not limited by the existence of any
association claiming to be equal or superior, to which it can leave
the preaching of morality and the finding of sanctions for its truth.
It has itself to repress evil and show the way to righteousness; there
is no clear-cut boundary between morality and legality.  

It appears that what is good for the state is apparently good for the individual. She
concludes that the “antithesis between the individual and the state or the government is
not recognized . . .” and “criticism of, and opposition to, the state involves apostasy
and heresy.”

Sherman Jackson criticized this position. He maintains that Islamic law, or more
precisely a jurist from the maliki school, Shihab al-Din al-Qarafi, maintains a clear
distinction between religious affairs and civil and criminal affairs and only certain
categories of the first and the second were a matter of government jurisdiction.

A more satisfying distinction would be the distinction between an obligation that is
required religiously (dyanatan) and an obligation that is required judicially (qadan).
Even if there were some notion of how one should conduct oneself religiously,
 it is unlikely than one would be sued in court for a failure to perform a religious
obligation.

43 ANN K. S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM, AN INTRODUCTION TO THE STUDY OF
44 Id. at 20.
45 Id. at XIV.
46 Id. at 307.
47 SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE, THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB
AL-DIN AL-QARAFI (1996); “According to Al-Qarafi, the hukm (a legal rule based on interpretations
from jurists) is restricted in two ways. First, the subject matter over which it may claim jurisdiction
is roughly limited (id. at 197) to civil and criminal matters, i.e., the mu’amalat.”
Religious observances” (’ibadat) and the like lie outside government’s jurisdiction.
Second, within the area of the so-called mu’amalat, only rules from the obligatory (wajib),
neutral (mubah) and forbidden (haram) categories may be imposed through threat of force.
Government may not impose rules from the recommended (mandub) or discouraged
(makruh) categories.
48 AHMAD AL-HARAWI, AL-DUR AL-NADIID MIN MAJMU’AT AL-HAFID 175 (1904). ‘OTHMAN AL-NAJDI,
49 Ch. Chehata, La Religion et les fondements du droit en Islam, 18 ARCHIVES DE PHILOSOPHIE DU DROIT:
DIMENSIONS RELIGIEUSES DU DROIT 17-25 (1973). See, e.g., the Maliki jurist Ibn Rushd:
It is necessary to know that the ahkam [the plural of hukum] of the Shari’a are divisible
into two kinds. One of these kinds is adjudicated by the judges, and the majority of
There are two distinctions in Islamic legal obligation, the first between the part of the Shari'a that discusses the relationship between people and God and the second between judicial obligations and religious obligations. Neither distinction could resolve the problem of apostasy. Apostasy is considered a legal matter and according to medieval classical scholars is within the jurisdiction of the Muslim state. This remains the question, should human rights in Islam be examined generally or specifically? If understood in an abstract manner, the distinction between rights of God and rights of humans or the theory of purposes could provide us with a strong basis for arguing for the presence of human rights in Islam. One can even find verses in the Qur'an which support equality: “O mankind, surely we have created you from a male and a female, and made you tribes and nations that you may know each other. Surely the noblest of you in the eyes of God is the most pious among you.” Another verse points to the unity of origin and the fraternity of human beings: “O mankind, keep your duty to your Lord who created you from a single soul and created its mate of the same (kind) and created from them multitudes of men and women. And keep your duty to your Lord by whom you demand your rights from one another, and (observe) the ties of kinship.”

the ahkam we have mentioned fall under this category. The second kind is those not adjudicated by the judges, and most of these are in the recommended (mandub) category. This category of the ahkam are like responding to the Muslim greeting (salam), blessing one who sneezes, and like, which are mentioned by the jurists at the end of their books that are called “Jawami.”

2 IBN RUSHD, BIDAYAT AL-MUJTAHED 349 (1960), quoted in NYAZEE, supra note 30, at 238-239. An example of this distinction can be clarified by the following example: A father is obliged to pay maintenance to his poor son. But if the son is not poor, but is in fact wealthy, the father has no obligation to pay. On the contrary, if the father maintained the son while the son was in no need of maintenance, the father may get his money back from his son if the father can produce a witness to show that he spent the money on his son. The father can also get a court order from an Islamic judge before any money is spent on his son that certifies that his son is not in need of maintenance. If he does neither of these things, the court cannot force the return of the money. However, the father can claim that in the eyes of God he has a right to the money. Here we see the distinction between diyanatan (rights that will be vindicated by God) and qada’an (rights that must be satisfied by a court now). See 4 AL-KASANI, BADA’I’ AL-SANA’I’ FI TARTIB AL-SHARA’I’ 33-34 (1970). Another example of this distinction occurs when there is no divorce between a husband and wife. The mother is not obliged to raise the children because her only marital duty is to give herself to her husband. While she may be obligated religiously to do so, she is not obligated judicially to maintain the house, wash clothes, cook, or prepare bread, and this rule applies to child rearing as well. AL-SARKHASI, AL-MABSUT V 209 (2001).

50 Qur’an verse (49:13).
51 Qur’an verse (4:1). For more on the position of equality in Islamic law, see MUHAMMAD HASHIM KAMALI, FREEDOM, EQUALITY AND JUSTICE IN ISLAM 47-61 (2002).
B. Concrete Examples of Human Rights Infringements

However, when we examine classical Islamic law in detail, we find a number of human rights issues including: questions of inequality among gender, slavery, Muslims and non-Muslims and issues in Islamic criminal law. In the following section, I will provide a few examples that illustrate the idea of discrimination against women and the areas presenting problems in Islamic criminal law. I will focus on family law because the majority of Muslim countries today still apply the classical Shari‘a. Although, there are differences in the application of the Shari‘a on these matters, all of them violate the right of equality between the sexes.

The rights of women were not a major concern of the Muslim jurist in the medieval period, who was interested only in interpreting the Qur’an and explaining this text in the light of the Prophet’s practices. Discrimination between men and women is

52 For examples to illustrate this distinction on these two levels, see, e.g., SUBHI ‘ABDUH SA’ID, AL-ISLAM WA-HUQUQ AL-INSAN 55-56 (1994). The author deals with the right to equality in general, quoting many verses from the Qur’an and traditions from the Prophet that seem to support the idea of full equality for all human beings. However, when he moves away from the general to the specific, for instance in dealing with relations between spouses, classic discrimination against women reappears. He claims that it is the duty of a woman to obey her husband and the right of a husband to beat his wife (Id. at 291-296). For other examples of the distinction between the two levels see KAMAL HAMID MUGHITH, HUQUQ AL-INSAN FI AL FIKR AL-ISLAMI MUNAKASHA AWALIYA, 1 RAWAQ ARABI 35-47 (1996).

53 For an overview of the legal status of women in family law in Muslim countries see JOHN L. ESPOSITO & NATANA DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW (2nd ed. 2001); ABDULLAHI A. AN-NA‘IM, ISLAMIC FAMILY LAW IN A CHANGING WORLD—A GLOBAL RESOURCE BOOK (2002).

54 Discrimination against women is not limited to medieval scholars. It is also evident in current Islamic fundamentalism: LAMIA RUSTUM SHEHADEH, THE IDEA OF WOMEN IN FUNDAMENTALIST ISLAM (2003). Examining the discourse of Muslim fundamentalist scholars, radical as well as moderate, Sunni as well as Shi‘i, the author arrives at the conclusion that all of the fundamentalist streams discriminate against Muslim women:

All of the ideologies studied here agree on the central role the patriarchal family plays in creating the ideal integrated Islamic ummah. They also consider unsatisfied male sexuality to be a social danger and female seductive powers as conducive to fitnah or social anarchy and chaos. Due to physical and psychological gender differences, they all envision a sexually segregated society, as ordained by the Qur’an and the Shari‘a, as enhancing productivity. Men are viewed as having an insatiable sexual desire aroused by the sight, smell, or voice of a woman, thereby distracting and diverting their energy from productive endeavors to wasteful sexual activity. This is best curtailed through gender segregation. Women, on the other hand, are seen as sexual beings with no social role outside the confines of the marital home, unless, of course, it meets with the interest and approval of the husband. While fundamentalists differ on methodology, they all agree on the pivotal role the traditional Muslim family plays in bringing the ideal Islamic state to fruition.
evident in a number of areas: In the area of testimonies, there are instances that the testimony of two women is equal to the testimony of one man. Additionally in some criminal matters a female witness is not an acceptable witness, a woman inherits half of that of the man, and a husband has the right to beat his wife. However, below I will focus on three other examples of discrimination: polygyny, marriage with a non-Muslim, and unilateral divorce.

1. How Many Women May a Muslim Man Marry?

Concerning polygyny, there are two essential questions which interested the Muslim jurist. The first question concerns the number of women a man may marry. Concerning free women, the majority of the Muslim jurist supported the view that a man could marry up to four wives because the Qu’ran says that a man may marry “two, three, four wives.” Women are discriminated against as they are allowed to marry only one man and not four men.

However, the number has also grown to nine or eighteen wives depending on the interpretation used in understanding these numbers. Some determine nine wives by adding the numbers two, three and four. Others determine eighteen wives because the Qur’an does not actually say “two” but rather “mithna” which can mean two or the double of two, that is four and thulath which can mean three or the double of three (six) and ruba’ which can mean eight; the addition of these numbers: four, six, and eight produces eighteen.

Al-Kasani (d.1191), however, stated that the number of wives is limited to four. As proof, he cited the practice of the Prophet in regard to Muslims who convert to Islam

55 4 ‘ABD ALGHANI AL-MIDANI, AL-LUBAB FI SHARH AL-KITAB 56 (1980).
56 Id. at 55.
58 Qur’an verse (4:34); MUHAMMAD BIN ‘ALI BIN MUHSEN, FATH AL-MANNAN SHARH ZUBAD IBN RASLAN 358 (1988).
60 AL-QUR’AN, supra note 29, at 312; 4 MUHAMMAD AL-SHARBINI, MUGHNI AL-MUHTAJ ILA MA’RIFAT MA’ANI ALFAZ AL-MANAHJ 37 (1994).
while having more than four women: The Prophet told a man who had nine wives and had converted to Islam, to keep four wives and to separate them from the rest.

Ibn Qudama (d.1223)\(^{61}\) gives a linguistic argument for the idea that a husband may have only up to four wives; he uses what we could call today *le principe de l’effet utile*, “every word has its purpose and meaning.” If God wanted man to marry up to nine wives, he would have said it clearly instead of saying two, three, or four. The number four is limited to the free women that a man could marry, but the Muslim jurist supported the view that a man had a right to marry an unlimited number of slaves.\(^{62}\)

2. *Marriage of a non-Muslim with a Muslim*

A Muslim man, according to the medieval Muslim jurist\(^{63}\) cannot marry an infidel (*mushrika*) because of animosity between the two religions that prevents salubrity and love, the purposes of marriage. Even though the Christian or Jew (*kitabiyyah*), but not pagan (*dhimiyya*) is a person of the Book, she is obliged to study Islam, so that she will ultimately convert. The reason for using the female gender is that a Muslim woman can only marry a Muslim man; whereas a Muslim man can marry either a Muslim woman or a Christian, or a Jew.\(^{64}\) Kasani distinguishes between an infidel and a Jew or Christian:

And do not marry the idolatresses until they believe, and certainly a believing maid is better than an idolatress woman, even though she should please you; and do not give (believing women) in marriage to idolaters until they believe, and certainly a believing servant is better than an idolater, even though he should please you; these invite to the fire, and Allah invites to the garden and to forgiveness by His will, and makes clear His communications to men, that they may be mindful.\(^{65}\)

\(^{61}\) 3 *MUWAFAK AL-DIN QUDAMA, ALKAFI FI FIQH AL-IMAM AHMAD BIN HANBAL* 45 (1988).

\(^{62}\) *Id.*

\(^{63}\) 3 *AHMAD BIN AL-BANNA, ALMUQNI’ FI SHARH MUKHTASAR AL-KHARQI* 915 (1994).


\(^{65}\) He cites Surah II, verse 221, *THE QUR’AN* (translated M.H. Shakir, 12th ed. 2001) to prove that a Muslim can marry only a Jew or Christian and not an infidel.
Other verses imply that a Muslim man can marry a Christian or a Jewish woman:

This day (all) the good things are allowed to you; and the food of those who have been given the Book is lawful for you and your food is lawful for them; and the chaste from among the believing women and the chaste from among those who have been given the Book before you (are lawful for you).  

The Muslim jurist feared that women would be influenced by their husbands. To protect Islam, the Muslim jurist prohibited the marriage of Muslim women to non-Muslim men, even if they were Jewish or Christian. However, to expand Islam, the Muslim jurists allowed Muslim men to marry Jewish or Christian women, hoping that the women would be easily converted to Islam due to their familiarity with sacred texts. Regardless of the justifications for such rulings, this distinction between the marriage of Muslim women and Muslim men contradicts the principle of equality between the sexes.

3. Unilateral Divorce

In Islamic law there are different ways to dissolve a marriage. One of these categories allows the husband to divorce his wife at any time without her consent. Muslim Sunni jurists see this as a private act. It does not need witnesses or even the registration of a written statement. The husband can, at any given moment, divorce his wife without giving any sort of reason. It is important to note that there are several Muslim jurists who do not recommend this practice. According to Ibn Al Hamam (d.1457), one should forbid such a divorce unless it is absolutely necessary. However, the same right does not exist for the wife. The wife can dissolve the marriage only when the

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66 The Food, Surah V, verse 5.
69 There is also discrimination against non-Muslims.
71 Al-Sharbini, supra note 60, at 456.
husband gives his consent, or under certain circumstances she can ask the Muslim judge to dissolve the marriage for irreconcilable differences, lack of payment of maintenance, certain sicknesses, or his disappearance. The reasons allowing and possibilities of getting a divorce differ among the four schools of Islamic law. Islamic law also permits two people to divorce by mutual agreement or khul. However, even after allowing for this option, women face a great deal of discrimination when seeking a divorce.

The majority of these categories of discrimination are found in countries that apply Islamic Law in family matters. There is diversity in the application of Islamic law. Sometimes the discrimination is wider; at other times the legislation is more liberal, but some degree of discrimination is always present. The tacit recognition that such discrimination exists is evident in the reservations that many Muslim states had about the Convention on the Elimination on All Forms of Discrimination against Women.

On the different categories of dissolution of marriage from the viewpoint of Sunni jurists, see Y. Linant de Bellefonds, Traité de Droit Musulman Comparé. Le Mariage, La Dissolution du Mariage 304-480 (1965).

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband.”

Available at http://www.unhchr.ch/html.menu3//b/treaty9.asp.htm (last visited at April 20, 2006). Instead of the equality between men and women mentioned in the Convention, the Egyptian reservation speaks about equivalency, complementarity, “just balance,” “true equality.” It seems that according to Egypt, there are two kinds of equality, “the false one,” which is the formal
4. Islamic Criminal Law

Another area where there are violations against human rights by the classical Shari’a, is its stance against specific crimes. Some Muslim countries such as Saudi Arabia and the Sudan have adopted portions of classical Islamic criminal law for use in their societies. Classical Shari’a may contain punishments that are “inhuman or degrading,” contravening Article 3 of the European Convention on Human Rights (the Convention). An examination of classical Islamic criminal law reveals a violation of human rights in at least three fields: adultery, alcohol consumption, and theft.

a. Adultery

The Qur’an states: “the adulterer and the adulteress, scourge each of them with a hundred stripes. And let no pity for the twain withhold you from obedience to Allah, if ye believe in Allah and the Last Day. And let a party of believers witness their punishment.” The unmarried adulterer and adulteress receive a punishment of one hundred lashes. For the married adulterer the punishment is death by stoning (rajm).

The false imputation of adultery (qadhf) has two punishments: flogging and the disqualification of the guilty person from bearing witness. This rule is derived from equality, and the true equality that takes into account the different roles of spouses. The Shari’a, according to Egypt, cannot be called into question and cannot be changed. The Egyptian view, as I understand it, is that this fact of its immutability does not harm women because Shari’a is applying a notion of equality, different from the Western idea of equality, but nevertheless equality.

81 The European Court in paragraph 72 mentioned above in the Refah Party case 2001, supra note 6 stated the “regime is based on Shari’a, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure.”
82 Qur’an verse (24:2)
84 AL-DIMYATI, supra note 83, at 238; AL-DIALHAWI, supra note 83, at 278; AL-HASKAFI, AL-DUR AL-MUKHTAR, supra note 83, at 307; AL-TAFRI’, supra note 83, at 221.
the Qur’an: “and those who accuse honorable women and bring not four witnesses, scourge them with eighty stripes and never afterward accept their testimony.”

b. Prohibition against Alcohol

The probation against alcohol is found in the Qur’an and a saying of the Prophet Mohammed provides a punishment for drinking wine: “The person who drinks wine, scourge him with lashes and if he drinks again, lash him again.” Three Sunni schools say that the number of lashes is eighty, while the fourth, Al-Shafi’i, puts it at forty.

c. Theft

The Qur’an prescribes a punishment of cutting off the hand of a thief: “As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah.” If the thief steals again his foot will be cut off. The punishment for a robber is the cutting off of his right hand and left foot. This rule was based on the Qur’an:

The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and their feet on alternate sides cut off or will be expelled out of the land. Such will be their degradation in the world and in the Hereafter theirs will be an awful doom.

86 Qur’an verse (24:4).
87 Qur’an verse (5:90).
89 3 AL-MIDANI, AL-LUBAB FI SHARH AL-KITAB, supra note 55, at 195; AL-DALHAWI, supra note 83, at 299; AL TALEB, supra note 48, at 532.
91 Qur’an verse (5:38)
92 ZAKARIYYA AL-ANSARI, AL-GURAR AL-BAHIYYAH FI SHARH MANZOMAT AL-BAHIA AL-WARDIYYAH 266 (1997).
93 Qur’an verse (5:33).
Another example of actions against human rights is seen by the Qur’an acceptance of and allowing of violent retaliation (qisas) for an affront:

And we prescribed for them therein: The life for the life, and the eye for the eye and the nose for the tooth and for wounds retaliation. But whosoever forgoeth it (in the way of charity) it shall be expiation for him. Whosoever judgeth not by that which Allah hath revealed, such are wrong-doers.\(^4\)

This is problematic in terms of the Convention, in particular Article 3. There is the possibility that the retaliation could lead to “inhuman or degrading” punishments.

Criminal Islamic law contains three categories of crimes. The first category is a crime with a fixed punishment, such as theft, fornication, and the consumption of alcohol; these crimes are called *hudud*.\(^5\) The second category contains crimes related to the harming of human beings. Offenses in this category are called *jinayat*.\(^6\) The third category is acts for which there is no clearly defined punishment. These are the crimes of discretionary punishment, *ta’zir*.\(^7\) Discretionary punishment or *ta’zir*, by a judge, contravenes the principle of legality inscribed in Article 7 of the Convention.

Classical *Shari’a* includes punishment for apostasy, which contravenes freedom of religion as it is in Article 9 of the Convention. It is applied only against a Muslim who wants to change his religion.\(^8\) The Prophet is reported to have said: “Whoever changes his religion, kill him.”\(^9\)

As seen by the examples above, the thesis of incompatibility between the *Shari’a* and human rights is correct if a classical definition of the *Shari’a* is adopted.

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4. Qur’an verse (5:45).
7. AL-HASKAFI, supra note 84, at 316; AL-BAHOUTI, supra note 95, at 121; 3 AL-MIDANI, supra note 55, at 198.
8. AL-NAJDI, supra note 48, 538; AL-BAHOUTI, supra note 95, at 168; IBN AL-JALLAB, supra note 83, at 231.
However, if we include modern liberal trends in the Shari‘a as well, we arrive at another conclusion.

III: Thesis of Compatibility between the Shari‘a and Human Rights

From Abduh (d. 1905) we can trace two main trends; one is more rationalist and looks for complete compatibility between Islam and modernity and human rights as a cultural product of modernity, while the other trend, the reformist, tries to alleviate discrimination against women. The main distinction between these two trends is that the rationalist tries to create complete compatibility between Islam and human rights, while the reformist tries to ameliorate inequities in human rights. The reformist approach is more limited, seeking only partial reconciliation between Islam and human rights, while the rationalist approach seeks complete compatibility. The reformist approach is a step forward in achieving human rights in Islam. There is no reliance on the textual meaning of the revealed text as transmitted by medieval scholars. There are different and original methods to resolve the problem of incompatibility.

A. The Reformist Approach

The reformist approach does not believe that Muslims should blindly follow the classical Muslim jurist. Muslims have a right to reinterpret classical Islamic law, *ijtihad*. The reformists are against the imitating the classical Muslim jurist. One of the main features of the reformist approach is to emphasize Islam as a whole, rather than to discuss the various schools of thought that developed in the classical period and rather than focusing on the four schools of law and their various terminology, methodology, and writings that developed in the Sunni practice. The reformist approach goes directly to the Qur‘an as the primary source of the Shari‘a and reinterprets it.

Abduh had a great influence on Muslim intellectuals. However, the reformist approach of Abduh is limited; he did not argue for the abolishment of the prohibition against the marriage of a Muslim woman with a non-Muslim, nor did he fight against the abolishment of the right of the husband to divorce unilaterally. He only argued that unilateral divorce should be discouraged. Nor did he argue for the abolishment of classical Islamic punishment.
To illustrate the reformist approach, I will focus on the problem of women’s rights. There have been many attempts by Muslim scholars to tease out a human rights doctrine within Islam. There are some who argue that there is equality in Islamic law between men and women but that it has been stripped away by centuries of interpretation. One could look at the evolutionary method of revelation and argue that the Muslim jurist betrayed the original message of the Qu’ran by putting in their gender construction. This is the approach commonly adopted by Muslim feminists. The Qur’an itself was a reformist movement. The Muslim jurist deviated from the principles of justice enshrined in the Qur’an and constructed their own patriarchal social vision as the Shari’a. 100

Another attempt was made by Zainab Chador, who said that Islam should give women rights by recognizing their legal personality, property rights, consent in marriage, and above all the right of life. With regard to inheritance, Islamic law maintains that on some occasions a woman can receive only half of the inheritance that her brother receives. According to the cause (illa) and the purposes (maqasid), this is not discrimination against women. In an Islamic family there is a division of labor and a sharing of the responsibility. While Zainab Chaudhry101 tried to demonstrate that discrimination is not gender based, she was unable demonstrate that there is no discrimination, at least in the sense of the European Convention of Human Rights. She appealed for reform but it is not very clear where this reform could lead.

Another interesting method is that of Ali Engineer. He makes the distinction between contextual verses and normative verses. In the Qur’an there are two categories of verses. The first category consists of statements reflecting facts that existed in the period of revelation of the Qur’anic message by God. The second category consists of normative verses that regulate social relations. The first category of facts describes

100 See, e.g., Ziba Mir-Hosseini, The Construction of Gender in Islamic Legal Thought and Strategies for Reform, 1(1) HAWWA 1-28 (2003):

I am not suggesting that there was a conspiracy among classical jurists to undermine women, or that they deliberately sought to ignore the voice of revelation (wahy). Rather I argue that, in their understanding of sacred texts, these jurists were guided by their outlook, and in discerning the terms of the Shari’a, they were constrained by a set of legal and gender assumptions and theories that reflected the state of knowledge and normative values of their time. These theories, which are the product of either juristic speculations or social norms, continued to be treated by subsequent generation of jurists as though they were immutable and part of the Shari’a.

the attitudes of that period and the relationship between gender and social relations. This description has no prescriptive value in the sense that it establishes a rule for the future. On the other hand, in the Qur’an there are prescriptive verses that have a normative function and are immutable. The commandment of God in these cases must be executed. Engineer stated that there are verses that recognized the equality between women and men. He also recognized that there are discriminatory verses towards women.

What is equitable is the normative aspect and what is discriminatory is the contextual aspect. The situation during the life of the Prophet was different from today and there was discrimination against women. This is a contextual aspect. It is not sufficient to apply a theological approach; rather one should apply a socio-theological approach.

The Qur’an reflects the social situation. It simply says that men are qawwam (maintainers or managers of family affairs) and does not say they should be qawwam. It can be seen that ‘are qawwam’ is a contextual statement, not a normative one. Had the Qur’an said men should be ‘qawwam’ it would have been a normative statement and would have been binding on women for all ages and in all circumstances to come. But Allah did not will it in that way.102

When we more closely examine the application of these methods to different aspects of the legal status of women, we realize that the application is not always equal. To demonstrate this fact, I will use the example of inheritance and the example of unilateral divorce.

Engineer did not question the decree from the Qur’an that the daughter receives only half the inheritance of what brother receives. Instead, he justified the rule by mentioning that a woman receives a dowry (mahr) once she is married, a sum that is also kept by her husband. If a woman does not marry, the trustee of the estate may give her some rights, but Engineer does not question whether or not the trustee necessarily assesses the woman’s marital status. Additionally, there is a possibility that the testator gives her some rights. However, here as well he does not question if the testator takes into the account the woman’s marital status.

On man’s ability to divorce his wife unilaterally, Engineer is not clear enough. He does not use the distinction between normative and contextual verses. Also, he described the right of women to ask for divorce on different grounds than those accepted by classical Islamic law. It seems that his intention was that in any divorce proceeding the Qur’an requires the intervention of an Islamic judge.

As we saw the holy Qur’an requires arbitration before a divorce can take place and Hazrat ‘Ali ruled that the decision of arbiters should be binding. That means the qadi or the court should have the final say in the matter. However, the prevalent practice is very different and divorce has become the exclusive preserve of the husband who, at any time, in any state of mind, can just pronounce the words talaq, talaq, talaq thus sealing the wife’s fate forever.\(^{103}\)

This reformist trend did not provide an answer to the problematic verses of the Qur’an, some of which we noted in the previous part. Instead, they assume the principle of equality and respect for human rights without proposing a theory to support it. Ziba Mir-Hosseini assumed the justice of the revelation and its equality without showing how and why it is equal. Ali Engineer in his distinction between normative and contextual verses took a big step toward equality, but he did not resolve the discrimination arising from the right of a man to divorce his wife unilaterally.

Rather than the reformist approach, which fails to answer many problematic issues, we need a comprehensive theory that will cover all areas of human rights, democracy and the Shari‘a. The modernist approach seems to be a more successful method in this regard.

B. The Modernist Approach

1. The Theory of Regressive Abrogation

Abdullahi Ahmed An-Na‘im proposed an original and comprehensive theory to

\(^{103}\) Id. at 126-7.
resolve the problem of human rights in Islam.\textsuperscript{104} He maintains that the continuation of a medieval perception of the \textit{Shari’a}, that discriminates against non-Muslims and women, cannot be moral. According to An-Na’im, Muslims need to respect international human rights and develop a new paradigm. The reformist paradigm failed in providing compatibility between human rights and the \textit{Shari’a} because although it improved human rights, it was unable to interpret the Qur’an in such a way that it could unequivocally be seen to be in accordance with modern notions of human rights. An-Na’im proposed an approach based on the ideas of the Sudanese thinker, Mahmood Taha. He contested that Muslims should change their classical theory of abrogation. Muslim scholars realized that there were contradictions among verses of the Qur’an—that was revealed in different periods over a period of 23 years—and different contradictory verses could not be maintained at the same time if one wanted to have a coherent legal system. The proof from the quran that it is possible to abrogate (\textit{naskh}) versus is taken from Verse 106 of the Qur’an, Surah II (Cow), “Whatever communications we abrogate or cause to be forgotten, we bring one better than it or like it.”). According to the theory of abrogation, if there is a contradiction between verses that are from different periods, the later verses abrogate the earlier ones. This is similar to the notion of \textit{lex posteriori derogate lex priori} in public international law. There are different kinds of abrogation. Sometimes the verse itself disappears, but here I will deal with the abrogation of the rule deduced from the verse, and not the verse itself. In other words, the verse continues to be part of the Qur’an but its legal effects are abrogated.\textsuperscript{105}

In Islamic law there are two distinct periods—the period before AD 622 when Mohammed was in Mecca and that after AD 622 when Mohammed fled Medina. Why is this distinction important? The Mecca revelations are more universal and speak to all of humanity, while the Medina revelations are more restricted and speak mainly to Muslims. Additionally, legal matters were mainly revealed in Medina. For example, the \textit{Surah} (chapter of the Qu’ran) concerning women comes from the Medina revelations and contains many discriminatory verses against women. Relying on the Mecca revelations makes it easier to reconcile Islam with international standards of human rights. Mahmood Taha claims that today Muslims should abrogate the Medina rules and replace them with the Mecca rules.

\textsuperscript{104} \textsc{Abdullah Ahmed An-Na’im, Toward an Islamic Reformation—Civil Liberties, Human Rights, and International Law} (1990).
\textsuperscript{105} On the theories of abrogation see \textsc{John Burton, The Sources of Islamic Law—Islamic Theories of Abrogation} (1990).
According to this claim, the Qur’an as applied to Muslims took into account the prevailing circumstances at the time and did not want to revolutionize the customs of that period, so it applied the norms that prevailed during this period. Once the circumstances change, one cannot continue to apply these norms, and one should come to the eternal and real message of the Qur’an, which is the message that Mohammed received earlier at Mecca.

2. The Theory of Transmission of the Qur’an by Signs

The main objective of the writings of Nasr Hamid Abu Zayd,106 is to attempt to achieve respect for democracy and human rights within Islam. He deconstructs Islamic thought in order to construct a new meaning that respects human rights and has a clear agenda and purpose. What is interesting in Abu Zayd’s project is his method of achieving this objective. The main technique he uses is to limit the religious discourse as it is established, mainly by the traditionalist and Islamist movement, and to replace it by freedom and reason. He tries to demonstrate that the current perception of Islamic law is just one of a variety of concepts that for political or ideological reasons won out over other interpretations that were hidden or forgotten. The current perception of the Shari’a results from the struggle between different trends. Islamic law is the result of the political imposition of a theological, philosophical, and legal theory. It is the combination of Al-Shafi’i’s (d.820) legal theory, Ashari’s (d. 945) theological teachings, and Al-Ghazali’s fight against philosophy. The Shari’a as it is understood today is the result of historical, political, and economic conditions. Abu Zayd tries to minimize the sanctity of the writings of the classical scholars and points out their ideological foundations.

a. Al-Shafi’i and Abu Zayd’s Opposing Ideas

Al-Shafi’i considered the founder of Islamic legal theory established the sources of Islamic law.107 Abu Zayd analytically examined Al-Shafi’i’s contribution to legal

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106 An Egyptian professor of Arabic currently working at the Islamic Institute in Leiden, the Netherlands.
theory. Al-Shafi’i stated the four main sources of Islamic law are—the Qur’an, the Sunna, the qiyas (analogy), and the Ijma’ (consensus). According to Abu Zayd, non-texts have migrated to the status of a text. While the Qur’an is indisputably a holy text and therefore unquestionable, Abu Zayd believes that Al-Shafi’i argued that the Sunna were based on the Qur’an so they too also must be considered a holy text and since the Ijma’ was based on the Sunna which is now a holy text, it too should also be considered holy text.

As for the Qur’an, in his book Al-Risala (The Letter), Al-Shafi’i refutes the claim of some that the Qur’an contains words that were influenced by Persian, Hebrew, or other languages prevalent at that time. He maintains that it contains only Arabic in its purest form. He goes on to say that the Arabic language is so rich and inclusive that no man but the Prophet could know it in its entirety and therefore that no man could understand all the complexities of the Koran save Mohammed. Abu Zayd adds that the Qur’an was read in seven different styles and that Caliphate Othman (d.656) established a standard reading and text based on that of the Quraysh (the tribe of the Prophet). Abu Zayd mentions that Al-Shafi’i did not defend the reading of the Quraysh tribe because at the time of Al-Shafi’i, the discussion on this issue was over.

Al-Shafi’i did not establish the hegemony of the Arabic language but the hegemony of the Quraysh dialect over that of the other Arab tribes. The preference for Quraysh is manifested in Al-Shafi’i’s writing. He prefers Quraysh to other tribes and states that the caliphate must be from Quraysh. More evidence that he preferred the Quraysh was that he was the only faqih who cooperated with the Ummayad Caliphtates, members of the Quraysh tribe, while the other Muslim jurist, such as Abu Hanifa (d.767) and Anas B.Malik (d.795), refused such cooperation on the grounds that the Ummayads (661-750) were un-Islamic.

When Ma’mun (r.813-833) was in power, Al-Shafi’i’s moved to Egypt. Abu Zayd connects Al-Shafi’i’s hatred for Ma’mun to Ma’mun’s support of the mu’tazila (a movement of rational freethinkers) whom Al-Shafi’i hated. Abu Zayd said that he was asabiyah (agnatic) and therefore biased, preferring only his own tribe and was not open on this point to other points of view. In contrast to Abu Hanifa, Al-Shafi’i objected

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110 Id. at 15.
to the use of non-Arabic languages for prayer. Al-Shafi‘i maintained that the Qur’an can resolve all problems because it was revealed in the Arabic language, which is all encompassing. In fact, Abu Zayd said that Al-Shafi‘i abolished reason by reason.

After politicizing the reading of the Qur’an as a source of law as set out by Al-Shafi‘i, Abu Zayd takes a further step. He maintains that the Qur’an was revealed by God through the Angel Gabriel to the Prophet Muhammad. When the Angel Gabriel transmitted the message of God to Muhammad, Muhammad interpreted the meaning of the revelation in his own words. Here Abu Zayd goes against the classical theory of Islamic law, which believed that the Qur’an is a literal transmission of the word of God in the Arabic language. Abu Zayd argues that since Mohammed already interpreted the revelations and the Koran is not a literal transmission, then the Koran can evolve with changing circumstances. The Qur’an is merely a cultural product, though its inspiration comes from God.

There is another idea in Islamic thought that the Qur’an has always existed from time immemorial. If the Qur’an has always existed and it was not created then the Qur’an has no history. This a historicity of the Qur’an, according to Abu Zayd, means that one does not have to take into account historical circumstances at all since the Koran is eternal not just in its future, but also in its past.

For Al-Shafi‘i there are three categories of Sunna. The first category encompasses those areas where the Sunna repeats what the Qur’an says. In the second category, the Sunna explains and clarifies the Qur’an by specifying the general or detailing the global. The third category is that of the Sunna as an autonomous source. This third source is also a revelation from God, but it is a revelation different from the Qur’anic revelations. Abu Zayd maintains that to view the Sunna as an autonomous source of law was controversial during the lifetime of Al-Shafi‘i. After Al-Shafi‘i, later Muslims have accepted the idea of the Sunna as autonomous and have forgotten how controversial an idea it was to begin with. In fact, today the vast majority of Muslim scholars maintain that the Sunna is indeed autonomous and that is the only correct way to approach it. In addition to the perception of the Sunna as an autonomous source, another method of enlarging the Sunna and therefore the scope of the religion (while reducing the role for man’s reason) is to accept hadith al-ahad (the category of Hadith that did not have a high degree of authenticity) as a source of law, unlike ahl-alra’y (the group of Muslims that gave more importance to personal legal reasoning

111 Id. at 39.
when there is no authentic Hadith or Qur’an). They use their personal legal reasoning when there was an *ahad hadith*,\(^{112}\) (the group of persons that relied only on the Hadith and not on reason). Abu Zayd believes that most Muslims have ignored the insistence of the Prophet in distinguishing what Mohammed did as a man and what he did as a prophet. Only what he did as a prophet should be considered legally normative.\(^{113}\)

This distinction between *Sunna* that explains the revelation of the Qur’an and *Sunna* that are both related to social practice and to the historical person (the Prophet Muhammad) was accepted according to Abu Zayd. The *ahl-alra’y* made such a distinction, whereas the second group (*ahl-alhadith*) did not make such a distinction. The second group, as represented by Al-Shafi‘i, is still dominant today.\(^{114}\)

As for *Ijma‘*, Abu Zayd points out that the consensus of the first generation of the companions of the Prophet was introduced in the notion of *Sunna* and therefore greatly enlarged the category of *nas*, the religious texts.\(^{115}\)

b. Against Asharite Theology

One of the crucial problems that occupied Muslim theology in the 8\(^{th}\) century was the debate over the question of whether humans have free will or whether their acts are guided by God.

Islamic theological history offers three differing doctrines. The *mu’tazila* (scholars who used rational thought in Islamic theology) supports the view that man has free will and God, who is just, rewards or punishes him. The other doctrine involves the *jabarite* who maintained that because God has unlimited power, a human being can do nothing without the will of God. The Asharite maintained a median position.\(^{116}\) Their position states that God is the source of all human acts, but at the same time, by virtue of the theory of acquisition, a human being credits the acts created by God

\(^{112}\) *Id.* at 60-1.

\(^{113}\) *Id.* at 40.

\(^{114}\) *NASIR HAMID ABU ZAYD, AL-NASS, AL-SULTA, AL-HAQQA: AL-FIKR AL-DINI BAYNA IRADAT AL-MA’RIFA WA-IRADAT AL-HAIMANA* 16-17 (1995).

\(^{115}\) *ABU ZAYD, supra* note 109, at 85-90.

to his account \((kasb)\). By this theory of \(kasb\), the Asharite take a middle position between the two extremes described before.\(^{117}\) Abu Zayd supports the view that this is not a median position that was propagated by the Asharites. The \(kasb\) theory is closer to the \(jabarite\) doctrine and reduces human responsibility and free will in the face of the unlimited power of God.\(^{118}\) Abu Zayd claims that this Asharite theology was developed by Al-Ghazali in the 11\(^{th}\) century to allow tyrants to maintain their dictatorships through the use of the political power in Islam.\(^{119}\) This Asharite theology justifies the use of force in the struggle to become caliph because the winner is decided by the will of God.\(^{120}\)

c. Against the Philosophical Position of Al-Ghazali

The famous debate between Al-Ghazali (d.1111) and Ibn Rushd (d.1198) is based on the relevance of philosophy with particular emphasis on the principle of causality. Ibn Rushd supported the principle of causality whereas Al-Ghazali said that there is no principle of causality as God is the cause of all things.\(^{121}\) After the 13\(^{th}\) century, the study and teaching of philosophy was forbidden. In Islamic thought Al-Ghazali


\(^{118}\) Abu Zayd, supra note 109, at 4-5; Abu Zayd, supra note 111, at 31-2.

\(^{119}\) Id. at 28-29. Here I would like to point out two things to the reader: First, there is no doubt that Al-Ghazali was helping to justify the current Muslim political regime, but did he have any choice in the matter? There was no democracy then (or now for that matter). (Noah Feldman, After Jihad, America and the Struggle for Islamic Democracy (2003)). Al-Ghazali sometimes expressed his mistrust of political power in general without specifying any particular individual or institution. Second, some scholars doubt whether Al-Ghazali should be classified as an Asharite and maintained that he was even anti-Asharite: George Makdisi, The Non-Ash’arite Sha’tism of Abu Hamid al-Ghazali, 54 Revue des Études Islamiques 239 (1986).

\(^{120}\) Abu Zayd, supra note 117, at 38-9. On the relationship between human freedom and political power, see Boumrane, supra note 117, at 8-9, 15-6, 21-2, & 25.

\(^{121}\) Abu Zayd, Al-Nass, Al-Sulta, Al-Haqqa: Al-Fikr al-Dini, supra note 114, at 19; Abu Zayd, supra note 116, at 32. The principle of causality in Al-Ghazali’s writings is not as clear as Abu Zayd described. Al-Ghazali was not as consistent as Abu Zayd believed, there was in fact an evolution in Al-Ghazali’s conception on the principle of causality. See Binyamin Abrahamov, Al-Ghazali’s Theory of Causality, 67 Studia Islamica 75 (1988). He writes: “But whereas noone doubts that Ibn Rushd propounds the philosophical theory of causalities, the scholar’s views concerning al-Ghazali differ. Some of them agree that al-Ghazali rejects causality, while others hold that al-Ghazali abandoned the Ash’arite theory of the denial of causality.” id. at 77.
became central and Ibn Rushd was marginalized. To revive Islamic thought Abu Zayd maintained that we need to revive the approach of Ibn Rushd.

One can say that Abu Zayd adopted a framework of legal theory with no constraint on legal change, even when there are no core legal rules. The only rules are freedom, equality, and dignity. His methodology brings back the reason that was eliminated by the position against philosophy, by the adoption of Asharite theology and by the emphasis on texts. To this argument one can reply that the framework above goes beyond what is Islam. In saying this, one must have a precise notion of Islam that would not contradict medieval Sunni legal theory. It is evident that these two theories of regressive abrogation and criticism of religious discourse are incompatible with medieval legal thinking. However, all of these various categories still lie within the framework of Islam. To say that this is not Islam would be like acting as President Numerie did in executing Mahmoud Taha or the Egyptian courts in declaring that Abu Zayd and his writings were un-Islamic.

IV: The Shari‘a and Democracy

The idea that democracy is incompatible with the Shari‘a is true only if we adopt a medieval approach to the political regime. This essay will discuss the concept of democracy as it is applied by the European Court of Human Rights. The concept of democracy is mentioned in different articles in the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (Articles 8 to 11). The preamble of the Convention seems to distinguish between human rights and democracy. Both human rights and democracy are perceived as means to protect “fundamental freedoms.”

In Articles 8-11 the “democratic society” is perceived as a model in which a society can adopt certain limitations, from these articles, one can infer what democracy does

122 ABU ZAYD, supra note 117, at 19-66.
123 Id. at 26-27.
not allow, but not what democracy is about. Member states are obligated to provide at least the level of human rights to their populations as ascribed in these Articles. When this standard is breached, the Court will refer the specific violation to its chambers and examine whether the violation is acceptable in a democratic society. Under these circumstances, “necessary in democratic society” is a control mechanism rather than a substantive issue.

In a number of cases, the Court has identified several elements of democracy, including pluralism, tolerance, and broadmindedness and has stated without these elements there is no “democratic society.”125 More recently the Court added that the use of violence negates a society from qualifying as a democracy. “One of the principal characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome.”126

In this same decision, the Court said “there can be no democracy without pluralism,”127 and added that the State is “the ultimate guarantor of the principle of pluralism.”128 The Court added:

[i]n the political sphere that responsibility means that the State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No.1, free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.129

One can say that the definition of democracy by the Court is a combination of both substantive and formal democracy.130 It is the protection of human rights, but it is also a specific modality of government in which the person who holds the power should

125 Handyside v. United Kingdom, (1979-1980) 1 E.H.R.R. 737. With regard to pluralism, see also, the Socialist Party case, supra note 2, at para. 41; the Freedom and Democracy Party case, supra note 2, at para. 37; and the Dicle case, supra note 2, at para. 43.
126 The United Communist Party of Turkey case, supra note 2, at para. 57, the Socialist Party case, supra note 2, at para. 45; and the Freedom and Democracy Party case, supra note 2, at para. 44.
127 The Freedom and Democracy Party case, id. at para. 43.
128 Id. at para. 44.
129 Id.
came to power and be removed from power through elections. A state that does not respect the list of human rights of the Convention would, of course, be in violation of the Convention. However, an unlimited dictatorship is a regime unacceptable to the Convention, even if such a regime respects all of the rights delineated by the Convention, because it has not come to power through periodic elections.

If we define democracy in a minimal sense as that those who hold power should be elected by the people and not as a process to establish a social contract, is classical Islamic law compatible with democracy?

I will try to answer this question from a classical Islamic law point of view. The concept of democracy as we know it now is relatively new, and has existed only in the western world since the end of the Second World War. One should not expect to find authors from the Middle Ages interested in democracy. In Sunni legal theory, the jurists were more interested in private Islamic law or at least in their treaties of Islamic law. ‘Ali ‘Abd al-Raziq points out the scarcity of political writing in the Muslim world, despite the fact that Muslims wrote about all fields of knowledge available at that time. Khomeiny says that Islamic law deals with “menstruation and childbirth,” and is not involved in political matters. There are only a few classical treatises dealing with constitutional and administrative matters. The most famous piece of writing in the classical period on political subjects is Al-Mawardi’s The Laws of Islamic Governance. We also find important sections concerning constitutional issues in Kitab tamhid al-awa’il wa-talkhis al-dala’il and al-Iqtisad fi al-i’tiqad, both treatises dealing more with theology than with political governance.

Al-mawardi, a Sunni, provides a political legal theory focusing mostly on the Caliphate, the political regime established after the death of the Prophet. For instance,
Al-mawardi discusses the problem of the succession of the Prophet Muhammad in 632. Was the succession of the Prophet designated by the Hadith (the sayings of the Prophet Muhammad) or not? This question distinguishes the two major divisions of Sunni and Shi’i Islam. The Shi’i position states that the Prophet designated Ali as his successor; the Sunnis however, disagree. The most clear and detailed response to the Shi’a was given by Al-Baqilani (d.1013) who attacked this claim on a variety of grounds. He believed that it was inconceivable that such an important decision of succession would be made in secret while less important leadership decisions were made in public.

He also questioned the authenticity of the Hadith that the Shi’i claim supported Ali as the successor of the Prophet Muhammad. Furthermore, Al-Baqilani discussed the content of Hadith saying, “Whoever recognizes me as his mawla will know ‘Ali as his mawla.”137 According to Al-Baqilani, mawla does not mean Caliph but it rather “defender,” “ally,” or “assistant.”

The Sunni alternative to designating a successor was to hold elections. After supporting the view that the Caliph is the successor of the Prophet, and hence should be elected, the next question that comes logically is how and by whom should such elections be held? The election should be conducted by the ahl alhal wa al’aqd, literally the people who loose and tie. However, figuratively it means the Mujtahid, persons who can create rules from the sources of law.138 There is no specific number of how many people are needed. Their numbers are not fixed, and there is a discussion among Muslim Muslim jurist as to the number of representatives (the members of ahl alhal wa al’aqd). Some say there should be five, others say there should be just one.139 In practice, the election of the first four caliphs consisted of their being elected by a small number of people. During the Umayah Caliphate (661-750)140 and Abassid Caliphate (750-1258),141 the successors were designated by the ruler in place or they came to power by the use of force.

There are several conditions that must be met in order to be elected. The Caliph must be a man and a Muslim. Some add that the Caliph must be from the tribe of

137 IBISH, supra note 132, at 88.
139 AL-MAWARDI, supra note 30, at 6.
140 MUHAMMAD SHABAN, ISLAMIC HISTORY: A NEW INTERPRETATION A.D. 600-750 (1971).
141 MUHAMMAD SHABAN, HISTORY: A NEW INTERPRETATION (1976).
the Prophet. Even in the event of the Caliph being elected, the majority of the population did not participate in the election process—they could not elect or be elected—women and non-Muslims were specifically excluded.

The classical author Al-mawardi accepted that the Caliph in power may designate his successor. In this event there are two evident issues: first, by the Caliph designating his successor, the people are not choosing their leader. Second, the individual was elected for life and not for a limited period. Theoretically the ‘Ulama’ (Muslim scholars specialized in Islamic law) did not ignore the possibility of deposing the caliph; however such an event rarely happened. In some cases, injustices performed by the caliph were reason enough to depose him, while for others it was not. In any case, if the person gained power by force and had enough power he was obeyed and could not be deposed.

Given the limitations on elections, we can say that medieval Sunni legal theory was not democratic by our definition. However, could there be a reinterpretation of certain classical concepts that would fit democracy? There are two approaches here that are worthy of consideration. The first maintains that the classical approach applies only to Muslim religious institutions. With regard to forms of government that are not part of religious institutions, Muslims should be free to adopt the type of administration that they think is best for them. Here, Islamic law becomes irrelevant to the structure of power. In 1925, this trend was first represented in ‘Abd al-Raziq in his book The Foundation of Government in Islam and accentuated by Abu Zayd. However, ‘Ali ‘Abd al-Raziq was condemned and excluded by al-Azhar, the most important religious institution in the Sunni world, and deemed to be outside the acceptable framework of Islam. To remain a legitimate figure within Islam and to argue in support of democracy another strategy was adopted: to rework Muslim concepts and to reconstruct them to support democracy. One method for performing this task is termed shura where Muslim political leaders consult with Islamic scholars. Here Muslim political history could be revised by giving it a softer image. The Muslim political chief derives his sources of power and legitimacy from the Muslim community itself.

142 AL-MAWARDI, supra note 30, at 6.
143 Id. at 14.
144 IBISH, supra note 132.
145 ABU ZAYD, supra note 114, at 22, 61.
146 Literally it means consultation, MAWSILLI, supra note 17.
147 Id. at 29.
Administration in Islam should be based on a correct system of *shura* or, in modern terminology, a democratic (consultative) government of the people. This form of government, based on *shura*, mainly postulates people’s equality and individual rights and limits the state’s function to serving people’s interests and development. It also postulates the ruler’s responsibility before God, the people, and the rule of law. Its main political principles are, therefore, freedom of, equality among, and justice for the people.\(^{148}\)

The period following the assassination of Ali introduced a new dynasty and is regarded by Moussalli, a contemporary Muslim scholar, as the point at which the notion of elections was forsaking.\(^{149}\) “Evidence was ample that the caliphate had degenerated into a naked exercise of power.” Moussalli maintains that Muslims elect their ruler for life, with no recourse.\(^{150}\) The model of the Prophet and the guided caliphate is idealized and sacred. From this model, it should be the way Muslims act and govern today take as an example normative rules should be deduced. However, during the successive periods of the Ummaya and Abassid caliphates, these norms played a diminished role in political life.

Another strategy to make democracy and the *Shari’a* compatible was proposed by ‘Ali ‘Abd al-Raziq. The main idea of his book titled *usul al-hukm* written in 1925\(^{151}\) was to make religion irrelevant to matters of politics. He tried to claim that in Islam the question of the caliphate was based on power and also in many instances on oppression. Moreover, according to this claim, the caliphate has no religious Islamic origin nor is the Prophet a political leader but rather a religious leader chosen by God to propagate the Islamic religion. ‘Ali ‘Abd al-Raziq tried to demonstrate the separation of church and state within Islam itself. It is not a secular view of the religion, but merely a religious point of view that could lead to secularism.

\(^{148}\) *Id.* at 45.
\(^{149}\) *Id.* at 44.
\(^{150}\) *Id.* at 45.
He explained that he wrote his book to find an explanation for the source of his function as a Muslim judge in the Shari’a court, as it was claimed that all such functions have their origin in the institution of the caliphate. He demonstrated that the extensive powers of the caliphate were given to him by classical Muslim authors, who concentrated religious and political powers in his hands. The caliph was at the top of the hierarchy and all powers emanated from him to ministers, governors, judges and other designated functionaries.

Concerning the origin of the sources of the caliphate, ‘Ali ‘Abd al-Raziq claims that there are two theories. One approach declares that the origin of the power of the caliphate is God himself,152 while the other approach maintains that the source is the umma,153 the community of Muslims. He adds that this dichotomy exists in European political thought, with Hobbes representing the first approach and Locke the second.154 He then examined the sources of Islamic law and their relationship with the caliphate. As for the sayings of Mohammad (hadith), he maintains that even the authentic hadith did not require the institution of a caliphate, despite the fact that it mentions concepts such as allegiance, power, and government. However, mentioning a concept is one thing and to make it a religious obligation is another.155 At the very beginning of the caliphate there was opposition by certain Muslims. Some showed their opposition openly, while others took an esoteric position. The history of the caliphate is rife with brutality.156

Ali ‘Abd al-Raziq’ second claim relates to the concept that the caliphate is necessary for religious obligations; however, Muslims do not need a caliphate to conduct their religious and temporal life. The caliphate itself did not have real power. His power was very limited even in Baghdad. In addition, we cannot say that those Muslims who lived outside of Baghdad performed their religious obligations with less religiosity. Ali ‘Abd al-Raziq’ then examined the judicature function of some of the Prophet’s companions and found that the stories were controversial and the functions not clearly defined. He interpreted the wars conducted by Abu Bakr (d. 634), the first caliph who succeeded the Prophet and determined that these wars on apostates were wars revolving more around the contesting of power than around the teachings of the

152 AL-RAZIQ, supra note 21, at 7.
153 Id. at 10.
154 Id. at 11.
155 Id. at 17.
156 Id. at 23.
Prophet. He did not negate that there were false prophets and persons who denied Islam, but he said that the distinction between apostates and political opponents was not always clear. ‘Abd al-Raziq concluded that the practice of the Prophet could not be described as governance. He was the messenger of God. Not head of the state; thus Islamic governments are not relevant, any government is good not ilamis

Arriving at the conclusion that the form of the political regime is not a religious matter but a political matter, Muslims could construct a new political regime in accordance with human reason.

Abu Zayd recently supported this project by examining the subsequent history of the caliphate. Abu Zayd drew the same conclusion by examining the political history of caliphate and not the legal texts as did ‘Ali ‘Abd al-Raziq. He maintained that from the 9th century the caliphate held an honorific function without any real power. It was used and abused by military leaders to legitimize their power.157

Two powers struggled for control of the Muslim and the Arab mind—the authority represented by religious texts and the authority of political power. Even the so-called secularists were torn between these two poles. The political authority tried to control the religious authority and thus have a monopoly on knowledge and truth. This political situation influenced the Muslim and Arab mind from the beginning of Islam until today. Every new political authority de-legitimizes its predecessor and tries to eliminate its traces in the memory of every Muslim. One of the methods of accomplishing this goal is to establish its new legitimacy through the control of religious texts. Even Arab nationalism is related to religion.

The history of the caliphate is the history of a political regime that had no relationship with religion.158 Muslims cannot move forward unless they acknowledge this fact and recognize democracy and pluralism.159

It is necessary to break the monopoly of power, and the monopoly of the production of the conscience and the memory on the level of

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157ABU ZAYD, supra note 114, at 139-151. This view is similar to Henri Laoust’s, who wrote a half century ago and maintained that the reason that the great jurist Al-Mawardi wrote his book AL-AHKAM AL-SULTANIYA was to enhance the position of the Caliph vis-à-vis the military leaders.

158Id. at 165.

159Id. at 138.
peoples from Arab nations and on the level of all the *Umma*, and there is no way to this end unless there is struggle for the recognition of pluralism on the level of thought and the level of society and on the level of politics. This is a total democracy, democracy of reason, democracy of the living represented in the equal rights of human beings, in the participation of the fruits of the national production, and the political democracy in the right of alternance of the authority and the right of participation through the social, cultural, and political institutions.\textsuperscript{160}

Abu Zayd promotes democracy for all and not the type of democracy that excludes some.\textsuperscript{161} So even in Algeria, Abu Zayd supports the case of the Islamists taking power without hindrance from the military. The people must decide their future and then suffer or profit from their choice.\textsuperscript{162}

V. Conclusion

These thesis—compatibility and incompatibility—come from an assumption of the understanding of Islam and the understanding of human rights. In comparing these two understandings we arrive at different conclusions. If we mean that the basic components of democracy as periodic democratic election and human rights as those rights enshrined in the *European Convention on Human Rights*, however in regard to the *Shari‘a*, there are different positions concerning democracy and human rights depending on the legal corpus that was included in the definition of the *Shari‘a*. The thesis of incompatibility is based on the classical definition of the *Shari‘a* as invariable and unchanging. But once we incorporate other perceptions of the *Shari‘a*, we see that some of these conceptions are compatible with human rights and democracy. The exclusion of these concepts from the political discourse has nothing to do with whether or not they are acceptable to Islam, but rather just as Ali ‘Abd al-Raziq, who was excluded from Al Azhar under one political regime, was allowed back under the following regime, so too, changes in the political climate, not religion, ultimately dictate the rise and fall of democracy and human rights in Muslim countries.

\textsuperscript{160} Id. at 64.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 65.