

Resolving the conflict between traditional Islam and human rights: A comparative study of Mahmoud Mohammed Taha's and Mohsen Kadivar's views

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DOI: 10.1177/20503032211015293

journals.sagepub.com/home/crr**Masoumeh Rad Goudarzi** 

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Abstract

In the recent decades, many Muslim intellectuals have devoted their intellectual efforts to reconstructing the jurisprudence through a new interpretation of Islam in order to solve the problem of human rights. While they have mostly tried to find a solution based on Ijtihad in derivation of Shari'a, Mahmoud Mohammad Taha and Mohsen Kadivar have asked for structural Ijtihad, presenting reversed and rational abrogation theories. In the current article, the researcher aims to focus on three main questions: Why do they believe that traditional jurisprudence and Ijtihad in derivatives are not able to solve the conflict between Islam and human rights? What are the most important governing principles in the corrective theory of each thinker, and how can their proposed theories lead to the reconciliation of Islam and human rights? And finally, what are the most fundamental principles and common features that lie in the theory of the two thinkers?

Keywords

Mahmoud Mohammed Taha, Mohsen Kadivar, human rights in Islam, reversed abrogation, rational abrogation, abrogation theory

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Introduction

The idea of modern human rights is one of the most controversial issues in the reformation of religious thought and the reconstruction of jurisprudence. Since the idea of human rights entered Islamic societies, two tendencies have emerged among Islamic scholars: the first tendency is to defend the superiority of *Shari'a* over human rights while the other tries to open up a path for the acceptance of human rights through a new interpretation of Islam (Emon 2012, 52). These tendencies in the Islamic world have not been uniform. There is a significant difference in the degree of compliance to *Shari'a* and the commitment to human rights amongst various groups of scholars in both tendencies, a large part of which is due to different epistemological and ontological foundations regarding human rights (Sachedina 2009, 5).

In line with the efforts of the contemporary religious reformers who focused their endeavors on providing diverse and various guidelines for the reformation of traditional Islamic jurisprudence, in recent decades, certain Muslim intellectuals have concluded that reformation in the context of *Shari'a* cannot be beneficial concerning issues such as public laws. *Ijtihad*¹ is not permitted within the scope of *Shari'a* on issues whose verdicts are expressed by the explicit texts of the Qur'an and Sunna.² Therefore, through traditional *Ijtihad*, no fundamental or universal modification or change can be expected in the laws of traditional jurisprudence concerning women's rights or non-Muslims. Mahmoud Mohammed Taha (1909–1985), a Sudanese thinker and Mohsen Kadivar (b. 1959), an Iranian Mujtahid, thinker, and an advocate of human rights, are among the most prominent figures who have paid special attention to this issue. Taha is the first scholar to express his view on reversed abrogation and discuss both permanent and variable provisions³ in his book, *The Second Message of Islam*. In it, he demands *Ijtihad* in the principles of jurisprudence (*Usul al Fiqh*)⁴ and criticizes the traditional jurisprudential viewpoint on several issues, such as slavery, inequality of men and women, and polygamy.

Kadivar is the other thinker after Taha to use the theory of abrogation (*Naskh*)⁵ to solve the conflict between Islam and human rights. With the unfolding of the stalemate in Islamic thought against modernity and its rational concepts like human rights, the Shi'a Islamists sought juridical solutions to alleviate the existing conflict. Kadivar considered these efforts to be inadequate, demanded a kind of *Ijtihad* beyond the accepted framework in traditional jurisprudence, and presented the theory of rational abrogation. This theory, put forth in 2008, is the result of his efforts to surmount the stalemate in historical Islam and to bring a fundamental reconciliation between religion and human rights. Kadivar's theory of rational abrogation has received less attention from thinkers and researchers than Taha's theory of reversed abrogation.

What sets these two Muslim thinkers apart from other religious reformers is that they are amongst the few thinkers to posit their solutions beyond the accepted frameworks in Islamic jurisprudence, which is based on *Ijtihad* in the branches of jurisprudence (*Furu al Fiqh*).⁶ Through a theory based on structural *Ijtihad* or *Ijtihad* in the foundations and principles of jurisprudence, Taha (An-Na'im 1988, 1) and Kadivar (Kadivar 2015, XX–XXVII) have attempted to find a new solution to the existing problems between traditional jurisprudence and human rights. In this way, both thinkers have used the theory of abrogation and have presented an unprecedented type of abrogation in Islamic jurisprudence.

The first question raised in this article is why these intellectuals hold that traditional jurisprudence and *Ijtihad* in the branches of jurisprudence are not capable of resolving the

conflict between Islam and human rights. They consequently present a macro and integrated theological-non-juridical solution in the form of reverse abrogation and rational abrogation. Moreover, it is essential to describe and analyze the most important principles governing the theory of each scholar and, on that basis, determine how each theory can result in the reconciliation of Islam and human rights. Finally, it is necessary that we investigate the most fundamental principles and common features in the theories of these thinkers to understand the necessity of a reconstruction in religious thought regarding human rights.

Why is new Ijtihad necessary? Taha⁷ and the need for change in Sunni historical jurisprudence

Taha's main concern, which motivated him to ponder the problems associated with the traditional understanding of religion, was that Shari'a does not recognize equal legal and fundamental rights for women and non-Muslim citizens. The current discrimination in historical Islam is due to the fact that people are classified based on their religious beliefs, according to which their personal and social rights are determined. The necessity for such discrimination has been accepted as a legitimate principle in historical Islam. Muslim jurists formulated Islamic law based on the socio-historical realities of their own times. As a result, the theological and epistemological foundations of traditional jurists developed, in which the inherent dignity of humans was not recognized as the main source for their fundamental rights; rather, gender and religion gave value or dignity to individuals.

Because the existence of discrimination against women and religious minorities in traditional jurisprudence was accepted as a fundamental principle, Taha was looking for a jurisprudential solution capable of eliminating all institutionalized discrimination in the traditional structure of jurisprudence. Ijtihad is one of the major problems that contemporary reformers, including Taha, encounter in addressing the conflict between Islam and human rights. When there are explicit narratives⁸ or verses about a particular subject in Shari'a, a jurist elucidates the relationship between that principle or rule and the Qur'an or Sunna with Ijtihad. Therefore, if there is a clear and definite text, there must be no need for a new Ijtihad. As a result, the new Ijtihad is not possible in cases where there is a clear text or even a consensus amongst the jurists, which is referred to in the Islamic jurisprudence as closing the gate of Ijtihad (Hallaq 1984, 3).

According to most Muslim scholars, the gate of Ijtihad has been closed since the tenth century, and the efforts of Sunni scholars to revise this method have not led to a tangible result. Accordingly, Taha believed that traditional jurisprudence is not fundamentally capable of creating such reformation since many of these discriminations are based on the Qur'an's explicit verses and the text of the prophetic narratives. Furthermore, there is no possibility of changing them on the basis of conventional Ijtihadi criteria. Taha found that the only way out of this stalemate was to create a fundamental reformation in Islamic laws. To formulate his conception of reformation, Taha insists on the fundamental point that the jurisprudence is a contractual system unlike what Muslim jurists have described; thus, it is not an unchangeable religious and holy truth. He believes that what Muslims know as Islamic jurisprudence is in fact a historical understanding of the text of the religion formed by Muslim jurists of the early Islamic centuries based on the Qur'an and Sunna and following sociocultural conditions and characteristics of their time. It is this interpretation and understanding that has been presented to Muslims as the most complete

deduction and interpretation of the religion. Therefore, with no violation of any religious sacraments of Muslims, parts of Islamic jurisprudence can be removed or altered (Taha 1987, 39).

However, most Muslims hold that attributing a defect to any part of the Shari'a is blasphemy because Shari'a was sent from God. Nevertheless, the public laws of Shari'a, with all of the detailed principles and rules, are not part of the revelation sent to the prophet of Islam by God; rather, the jurisprudential rules and laws have been gradually established by the previous jurists relying on the Qur'an, the basic sources of Sunna, and the understanding of the Qur'an and the prophetic tradition. The jurists trust the sources that preceded them, but there is a gap of at least a century and a half between these jurists and the era of the prophet. These jurists have developed Islamic jurisprudence by defining its sources, methods, and rules of using general principles. Therefore, jurisprudence is not divine, and it is the result of interpreting the text of the Qur'an, Sunna, and other resources as well as logical conclusions derived from these interpretations. In this regard, from the viewpoint of Taha, it is essential to cautiously approach the writings of previous scholars because although these publications have been provided by the Islamic scholars, it does not mean that what they have fathomed or interpreted is the only form that is in compliance with Shari'a or even in agreement with it (An-Na'im 1990, 11). Moreover, the rights enshrined in Islamic jurisprudence may have been considered justified in their historical context, but due to the political and social changes that have taken place in recent centuries, these rights are no longer justifiable (An-Na'im 1988, 4).

The reasons for duality in the message of Islam

From Taha's viewpoint, Islam is a religion with a universal message. This religion was first revealed in the city of Mecca with a message based on tolerance, justice, inherent dignity of the human, and equality, where the Prophet propagated individual responsibility and equality among all human beings regardless of race, gender, or social position. Because the people of Mecca did not accept the Prophet's invitation, Muslims migrated to Medina. For this reason, some aspects of the message have been altered in response to the socio-economic conditions and political realities of the time (Taha 1987, 37, 166).

General principles in the Qur'anic texts revealed in Mecca are as follows: an invitation to monotheism and faith in God and prophecy, following in the path of the divine prophets and the Prophet of Islam and their books, faith in resurrection and the Doomsday, description of hell and paradise, and faith in divine angels. The audience of these verses are humans in general, not necessarily believers or Muslims. However, the texts revealed in Medina after the creation of the Islamic community (*umma*) are mostly related to social organization, legal rules, religious provisions, laws about war and peace, and internal and external affairs. These texts are addressed to believers. "Migration to Medina was not merely a tactical step, but also signified a shift in the content of the message itself" (An-Na'im 1987, 21). The difference between the religious message in the texts of Mecca and Medina is evident both in the text of the Qur'an and in the words of the Prophet. Taha sees this difference both in the number of people who received this message and in the kind of issues that should be resolved based on the verses of the Qur'an in Medina. He believes that migration made a significant change in the subject matter and content of the Prophet's mission. Taha (1987, 40) deduced this based on the content of the Qur'anic verses and the narratives of the Prophet

Mohammad in his thirteen year period of living in Mecca, which established the basic principles and religious and ethical foundations of Islam.

Historical Islamic Shari'a law... was based on the texts of the second stage. In the Medina stage, God was responding... to the potential and actual needs of human society. To that end, some aspects of the earlier level of revelation and Sunna were subjected to repeal or abrogation from the legal point of view although they remained operative at a moral/persuasive level. (An-Na'im 1987, 21)

The shift from the Mecca to Medina text was not just a transformation from general issues into details or from religious and ethical issues into political and legal ones; rather, it was a kind of transformation in the concepts and meanings of the Qur'an and Sunna. The political and legal criteria specified by the Qur'an and Sunna in this period do not fully and accurately reflect the meanings and concepts associated with the mission of the Mecca stage. Therefore, at this stage, in order to regulate a given political community within a given historical and geographical range, it was necessary to adapt those principles and general issues to external conditions (Taha 1987, 126). An-Na'im (1991, 13) explains:

Owing to this duality of purpose, the sources of Islam inevitably contained a rather contradictory set of principles, one designed to be applied immediately in order to satisfy the real needs of early Muslim communities and the other intended for future implementation under the appropriate conditions. In effect, Islam consists of two messages, one transitional in nature and localized in application and the other eternal in nature and universal in application.

The problem that Taha seeks to solve is the contradiction between the verses revealed in Medina and those revealed in Mecca. For instance, while the verses revealed in Mecca ask the Prophet and his followers to invite people to their God's path through wisdom and good advice, and allow them to not accept Islam, the Qur'an and Sunna during the Medina period forces non-Muslims to convert to Islam. Moreover, the verses and narratives related to the era of Islam in Medina admit that there are differences between men and women, Muslims and non-Muslims. To coordinate and resolve the contradictions of the verses, the previous jurists believed that some verses and narratives had to be abrogated to present a coordinated and inclusive system of Shari'a. In this regard, to maintain a harmony, jurists recognized the verses that recommended violence or coercion. According to this view, Islamic jurisprudence is based on the Qur'anic verses revealed in Medina and the conflicting verses revealed in Mecca were abrogated (Burton 1990, 18–19).

One of the most critical points of Taha's theory (1987, 40) is that if Muslims could use the abrogation theory once for the adjustment of public laws in individual, social, or political subjects, why can contemporary Muslims not use this theory once again to solve the problems of their times, set new Islamic rules, and act based on the abrogated verses. From Taha's (1987, 41) viewpoint, Islamic jurisprudence is not required to stay forever committed to the deductions and the solutions offered by the early Muslims who lived in completely different historical conditions than the Muslims of the present age since we are discussing two completely different periods with different legal and socio-political needs.

Reversed abrogation, its Qur'anic grounds and viability

The foundation of Taha's theory (1987, 62–64) is the fact that the mission of Islam in Mecca, which insists on the genuine dignity of human beings, is its most important mission.

It demands equality between men and women and full liberty in choosing their religion and beliefs. In this period, the Qur'an always addresses human beings and uses words such as "O, children of Adam" or "O, mankind"—the terms by which human dignity and respect can be understood without religious, racial, and gender discrimination (Taha 1987, 62). As the idolaters of Mecca began violently rejecting this mission, it became clear that the community was not yet ready to accept it. As a result, the second stage of the Holy Prophet's mission, which was more compatible with social reality, commenced in Medina and its rules were implemented (125–126). Therefore, the aspects of the message of Islam in Mecca that could not be practiced in those historical circumstances were abrogated.

From Taha's viewpoint, the abolished aspects of the Prophet's mission in Mecca cannot be stopped forever, and their practice is deferred until appropriate conditions are provided in the future. Otherwise, we must admit that the superior and immortal aspects of the mission of Islam have been forever lost (41). Given that the abrogation of some Qur'anic verses have been accepted by most Muslim scholars, can Muslims revise the abrogation issue today? And can we use the previously abrogated verses as a new basis for Islamic law? Taha's method among Sunni religious reformers is a revolutionary one that can revolutionize public Islamic law:⁹ "What is revolutionary in his thinking is the notion that the abrogation process was in fact a postponement, and not a final and conclusive repeal. Once this basic premise is conceded, a whole new era of Islamic jurisprudence can begin, one that allows for the development of liberty and equality for all human beings" (An-Na'im 1987, 21–22).

This technique allows part of the verses and Sunna to be placed as the foundation of Islamic law and the contradictory verses to be ignored since these verses are more suitable to the current circumstances of the Islamic community and can provide a way to overcome the obstacles in understanding traditional jurisprudence. The central point in Taha's theory is justifying the need for a transition from the first stage to the second stage. In his view, this transition should take place to meet the conditions of the time. He argues that the Qur'an is the last revealed book by asking the basic question that if the mission of the first stage of Islam (embracing the major message of the religion) was not executable, why were these verses revealed? Therefore, the Qur'an must contain all that God wants for future generations. From Taha's standpoint, the difference between the Qur'an of Mecca and Medina is not merely related to the time and place of revelation, but only indicates the difference in the size of the audience.

The basic question asked by Taha is that if the abrogation has always been practiced in the same manner and the Meccan verses conflicting with the Medinas verses remain invalid forever, why revelation then? He concludes that this view cannot be correct. According to Taha (1987, 40), "the evolution of Shari'a, is simply its evolution by moving from one text to the other, from a text that is suitable to govern in the seventh century . . . to a text which was, at the time, too advanced and therefore had to be abrogated." This indicates that Taha paid special attention to the conditions of the time and place as well as understanding the needs of society as the basic factors in the application of religious rules.

Why new Ijtihad is essential: Kadivar's¹⁰ view on the contradiction of historical Islam with human rights

Kadivar (2008, 137–138),¹¹ explaining why a new jurisprudence is necessary and that traditional jurisprudence is inefficient, presents a fourfold division of the teachings of

Islam: belief system, moral values, ritual or devotional matters, and non-devotional rules called *fiqh al-mu'amalat* or social transactions, including the provisions of civil rights, commercial law, criminal law, international law, and basic rights. He expresses that more than ninety-eight percent of the verses of Qur'an explain the first three sections, namely faith-related, ethical, and devotional affairs, and only about two percent of the verses are related to social transactions. Although the volume of non-devotional jurisprudential rules among the narratives is much higher than the verses, it does not comprise more than ten percent of the narratives. Kadivar believes one of the main problems in traditional jurisprudence is that in traditional Islam, the fourth part (social transactions) became extremely significant to the extent that it overshadowed faith-related, ethical, and devotional parts of the religion. Their jurisprudential form and format has also affected the other aspects of religion in worship. This prevents concentration and contemplation on the message and the true purpose of religion and has reduced Islam to a series of dictates.

One focal point in Kadivar's theory is the separation between jurisprudence and Shari'a. He considers the religious perceptions to be a human narrative of divine teachings, which can be criticized and assessed based on human virtues (Kadivar 2008, 9). These human perceptions of Shari'a have created a special sense of Islam in the minds of their audience, which he calls historical Islam which means the dominance of the culture of different eras and places, and the particular circumstances of the early stages of Islam as the sacred, unchangeable, ideal, and desirable form of Islamic thought. From Kadivar's perspective, the historical or traditional Islam, as a belief-related and epistemological collection, constitutes a special legal system with its own specific foundations and presuppositions. This system includes the text of Quran and Sunna, the opinions of the religious scholars such as jurists' fatwas, the opinions of the scholars of ethic and theology, and the actual practices of believers and Muslims throughout history. In historical Islam, human beings have no inherent rights for being human and beliefs precede humanity (Kadivar 2018, 25–26). As a result, the jurists speak of the rights of Muslims, not of human rights.

Describing and expressing the depth of the existing conflict between traditional Islam and the standards of international human rights, Kadivar is concerned with answering these fundamental questions: Can traditional Islam overcome this obstacle? With the existing rules in traditional jurisprudence, meaning *Ijtihad* in the branches of jurisprudence, is it possible to resolve such a conflict? If yes, to what extent can this conflict be reduced? He examines the conditions and criteria required in traditional Islam in the field of human rights and concludes that from the perspective of the traditional jurists, the denial of these standards and criteria means a departure from the framework of the "Ijtihad in the branches of jurisprudence" and doing "Ijtihad in principles," which is unacceptable by mainstream religious authorities. Consequently, given the obligation of applying these criteria and rules in traditional jurisprudence, there is no alternative but to accept the conflict.

However, why does Kadivar believe that traditional jurisprudence cannot provide a practical approach to resolving this conflict? From his perspective, examining the *dimensions* and *depth* of this conflict are the two main subjects in evaluating the contradiction between traditional Islam and the idea of human rights. In examining the dimensions of this contradiction, it is essential to have the opinions of the Muslim jurists to demonstrate whether the Islamic provisions in conflict with human rights are the rules set merely by the traditional jurists or whether they are the result of consensus and agreement in historical Islam? In this regard, Kadivar extensively investigated the opinions of the Shi'a jurists regarding Islamic provisions opposed to human rights and eventually concluded that these opinions

are famous jurisprudential ideas, the vast majority of which are based on perfect consensus among jurists.

Regarding the depth of the conflict of traditional Islam with human rights, Kadivar does not recognize the current conflict only as the result of epistemological foundations governing the mentality of jurists concerning human beings and its fundamental rights, but also he believes that part of the conflict is rooted in the text of the verses and narratives. Given that the main source of Islam is the Qur'an, which precedes the narratives, it is crucial to determine if there are verses that violate human rights. In Kadivar's view, the main problem with this challenge is rooted in the answer to this question. There are also verses that support the legal differences between Muslims, believers of the Books, and idolaters, or those between men and women in divorce, inheritance, testimony or in criminal law, or Islamic legal punishments. Traditional Islam considers such verses to be among the permanent, absolute, and unconditional to temporal and spatial provisions, hence unabrogable.

Regarding the position of the narratives in contradiction with human rights, Kadivar examined the sources of the Islamic rules contradicting human rights and concluded that most of them are based on the narratives of the Prophet or Imams. The great problem that traditional jurisprudence faces in this regard is the fact that many of these narratives, in compliance with the jurisprudential rules of traditional jurisprudence, are credible or authentic. Therefore, the jurists have considered this group of narratives as permanent and constant provisions (Kadivar 2008, 114–115).

Another problem that Kadivar identifies in relation to historical Islam is the status of reason. Historical Islam believes in a kind of religious rationality that cannot be necessarily understood by the human intellect. Thus, the role of reason is not so prominent due to the limitations of human intellect in deducing divine rules; consequently, religious understanding is text-oriented, and understanding the literal meaning of the text is synonymous with understanding the religion. As a result, although Ijtihad is accepted, it is permitted only in the branches of jurisprudence. In historical Islam, any kind of Ijtihad in the Usul al fiqh that deals with hermeneutical principles and philosophy of law is forbidden (Kadivar 2008, 37).¹² These problems have led Kadivar to a definitive conclusion: "*Usul al-fiqh* needs reconstruction, not a mild reformation. There are many valuable points within it, but it needs enrichment and continuity of Ijtihad throughout itself" (Kadivar 2015, XXIV).

The reasons and foundations of abrogation theory: Transition from historical Islam to spiritual Islam

Identifying the shortcomings of traditional jurisprudence, Kadivar focuses on the main purpose of religion and its message (calling it spiritual Islam) in order to begin his modifications. "What Kadivar termed spiritual Islam or goal-oriented Islam, that is, a 'new-thinker' or intellectual account of Islam, is compatible with modern human rights norms" (Matsunaga 2011, 365). Spiritual or purposive Islam believes that all religious rituals and rules serve a transcendental goal or purpose called human dignity. Each commandment, prohibition, ritual, and Islamic rule has a purpose, and all of them are in line with an ultimate transcendental purpose. Religion in its totality is a direction towards a transcendental matter for the salvation and perfection of mankind. The value of deeds and religious rituals is realized once this orientation is provided (Kadivar 2008, 39).

From Kadivar's perspective, purposive Islam sees religiosity as the knowledge and fulfillment of the spirit and goals of the religion. In this attitude, "theoretical and practical

alignment with the aim and the purpose of the revelation and the spirit of Islam (piety) is the criterion for being religious, and not the mere observance of the particular temporal and spatial superficialities and forms related to the Revelation Age of the Qur'an" (Kadivar 2011, 460). The main feature in the new interpretation of Islam is the special attention paid to faith-related, ethical, and devotional affairs as the main body of the divine religion. This means that in spiritual Islam, these three areas reclaim their Qur'anic position and flourish and develop the main features of religiosity. The main difference between the traditional reading and the reformist readings of Kadivar (2008, 41-42) lies in the non-devotional aspect. In intellectual Islam, non-devotional affairs are not a mere imitation, and rational perception is totally valid. Kadivar believes that while spreading to new lands, Islam was affected by different customs and cultures. In the meantime, the customs and the rules governing Hejaz in early Islam have the most impact. The joint work of jurists and Islamic scholars revolves around refining the religious rules belonging to different temporal and spatial relations, and moving on from issues limited to specific times and places towards the permanent and timeless text of religion (16).

It is of the utmost importance to specify the criteria for differentiating the fixed provisions of religion from the temporary ones so as to provide what is necessary for the implementation of religious reforms intended by the reformers. According to Kadivar, even the Qur'an contains both forms of Islamic provisions. In other words, although the constant, universal, and timeless provisions in the Qur'an are not scarce, it is not so that all the Qur'an's statements and provisions are of this kind. In fact, in the Holy Book, there are issues concerning the specific circumstances pertaining to the time of revelation with temporary and variable conditions. The Qur'an and the Prophet could not be indifferent to the issues and problems of early Islam. However, such provisions are temporary and variable (39-40). Kadivar holds that Muslim jurists have presumed that many temporary and variable provisions in verses and narratives are permanent resulting in the prevailing problems of the contemporary Muslims.

The fundamental features of spiritual Islam

Kadivar identifies four essential features for the values, norms, and provisions of religion: wisdom (*Hakimaneh*), justness, rationality, and superiority in comparison to the rules of other religions. Religious affairs, ethical values, and provisions of devotional jurisprudence and some rules in social transactions are the building blocks of religion, all of which are permanent and not geographically or temporally limited. Nevertheless, concerning public laws, the requirements of time and place play a serious role. The provisions regarding social transactions cannot be fully considered as devotional in a way that the human intellect does not understand any immoral purpose in them. Islam did not change certain customs and practices existing at the time of revelation and endorsed and signed on to the preceding customary rules. According to Kadivar, every single non-devotional Islamic provision in early Islam had four characteristics: they were considered wise, rational, just, and superior in comparison to the rules of other religions. All of these provisions, having the four characteristics, were advanced at the time of revelation. These provisions were also successful in the pursuit of religious discipline (Kadivar 2008, 138).

Discussing the separation of endorsed and established provisions opens the way for the fundamental conclusion of Kadivar and his introduction of the essential factors for the separation of the fixed and variable rules. He concluded that the human problems have

evolved, particularly regarding the social aspects. Many issues that were previously regarded as fair and reasonable in the past centuries are now outrageous, unjust, and against logic (30-31). Justice is the most important inherent feature of religion and being reasonable is the main factor for evaluating the accuracy of rulings (*Ahkam*) in social matters. Therefore, it can be concluded that the jurisprudential provisions are valid as long as they meet the requirements of time and place and so long as they are in compliance with reason (*Sireh-e 'Uqala*). If a rule is contradictory to common logic and justice, it is temporary and can be abrogated. The rules that do not comply with these two conditions are considered as contingent, hence abrogable (31-32). Thus, as it is possible to abrogate an Islamic rule based on the book and the Sunna; it is also possible to do so based on ratiocination (40). Focusing on the philosophy of rules, Kadivar expresses that Islamic provisions are paths to extending justice, realizing rational standards, and following public interests. Therefore, every Islamic provision will continue to exist as long as it is a means to achieving religious ends.

How abrogation occurs in temporary provisions of religion

Based on their message and aim, Kadivar categorizes religious provisions into two groups: first, those that meet the best interests of human beings or prevent a corruption regardless of time and place and second, those that are sometimes accepted and welcomed in different temporal and spatial conditions and are sometimes not considered as provisions that are in compliance with justice or rationality. The existing conflict between Islamic provisions and the concept of human rights has never been seen in the first group, but it has in the second one. The provisions of the first category are permanent and eternal, but those of the second group will be abrogated when they lose their benefit or expediency. Abrogation is not allowed in the first group of Islamic provisions, but it is in the second group, and in Islamic jurisprudence, there is a precedent for abrogation (Kadivar 2008, 141).

In justifying his view, Kadivar states that jurists who consider reason as one of the four valid sources of jurisprudence for the inference of provisions, cast their vote on the possibility of abrogating the text-based (*Naqli*) Islamic rules by virtue of rational Islamic order. Accordingly, if thinkers can reasonably conclude that the expediency of an Islamic order has been abolished, they can abrogate it. If reason can confirm an Islamic provision, it can undoubtedly recognize that it does not befit the present time and place. Kadivar (142) emphasizes the necessity of time and place as a rule in contemporary Shi'a jurisprudence. He goes on to conclude that when the inevitable role of time and place as a jurisprudential rule is accepted, an Islamic provision can be confirmed as temporary because these requirements are not constant but variable. As a result, the four conditions of being wise, rational, just, and superior in comparison to the rules of other religions are not the mere conditions of early Islam; rather in every time period, non-devotional Islamic provisions must meet these conditions in compliance with the customs of the scholars of that age.

Fundamental principles governing the underlying structure of Taha's and Kadivar's abrogation theory

To get an in-depth insight into Taha and Kadivar theories, in this part of the article, I focus on identifying the main principles governing the thinkers' theories and presenting them as a unit or system. In other words, my attempt here is to uncover the underlying structure of the theorists' thoughts in revising the traditional understanding of Shari'a. To do so, it is

necessary to find out what neglected or less considered principles Taha and Kadivar have focused on in Islamic jurisprudence and how it has allowed them to create a reconciliation between Islam and human rights standards. In addition, how can each of these principles alone and as a whole challenge the foundations of traditional jurisprudence? The most important of these principles and features are:

Paying attention to the dominant general spirit of the Qur'anic teachings

A general look at the Qur'an reflects the diversity and plurality of subjects and concepts presented in it: the purpose behind the creation of the world and man; the inherent talents and abilities of human beings; the general principles of setting individual, social, and ethical relationships between individuals and communities, human values, mutual rights of individuals, and moral virtues. The attention to the general spirit of the Qur'an sheds light on principles, such as the inherent dignity of humans, the central role of justice in creation, ethics as an element of social development, and the approval of customs accepted by the scholars of the society. Delving deeper into the spirit of Qur'anic teachings exposes the fundamental weakness of traditional Ijtihad, in which the emphasis has been on verses and words to the point where the main spirit and purpose of the text has been ignored and even contradicted in some cases. This attention to the general principles and values of the Qur'an and the need to coordinate any inference from them indicates the fact that Qur'an is not a book of provisions, but a set of beliefs, teachings, and ethics. Taha and Kadivar have underscored the Qur'an in its totality, paying attention to its fundamental objectives and messages, so that any jurisprudential Ijtihad focuses on the fundamental rights of human beings as well as the inherent dignity rather than the responsibilities. This opens up a path to creating a human-centered understanding of Shari'a.

The primacy of ethics over jurisprudence

In the traditional attitude towards jurisprudence as Ash'rites believe, the jurist does not have to consider ethics in issuing jurisprudential fatwas when he is issuing them as this group believes that Islamic provisions are ethical in their essence. In other words, jurisprudential deduction is independent of morality because whatever God has decreed is ethical. One of the most important principles that Taha and Kadivar, as neo-Mu'tazilites, have focused on in their reformative thought is based not only on the independence of ethics from jurisprudence, but also on the priority of morality in jurisprudence. The overall spirit associated with the reformative thought of the two scholars implies that God is a moral being, and being moral means that God, both as the creator of the world and human beings and as the Islamic legislator, does not violate ethical norms. If we accept that human rights are in fact ethical considerations, then we should logically accept that God, in the position of decreeing Islamic provisions, cannot violate human rights and nor does he allow anyone to violate them. In this regard, jurists should consider the ethical necessity of rules as a basic presupposition in every jurisprudential deduction. Islamic laws cannot and should not negate and ignore the moral principles emphasized in the Qur'an. Accepting the impossibility of the inconsistency of religious provisions with the teachings and moral values mentioned in the Qur'an allows for amendments and changes in some of the laws emphasized by traditional jurists that are contrary to the accepted moral principles in the Qur'an. Accepting the

fundamental role of morality in any kind of Ijtihad means reviving the Mu'tazilite theories in this regard.

The emphasis on the inherent dignity of mankind as the fundamental source of personal and social rights

The most important feature of Taha and Kadivar's jurisprudential reformative theory is the principle of human dignity in restoring religious thoughts and reconciling religion with human rights. In traditional jurisprudence, the jurists consider the moral values, beliefs, and religion of the individual as sources of human rights by denying the role of inherent dignity as the main source of individual rights. This view is one of the basic foundations of the systematic discrimination applied to women and religious minorities in traditional jurisprudence. Taha and Kadivar reject historical Islam mainly to endorse the inherent dignity of mankind that allows human beings to have value and dignity. Therefore, any reflection on the Qur'an and Sunna, with the purpose of interpreting the text, Ijtihad, and legislation, should be done regarding the inherent dignity of human. As a result, religious and gender-related legal distinctions as presuppositions, which is the consensus among jurists, requires a critical revision. Also, the verses and narrations cited by them must be reviewed in light of new social, political, and cultural realities. In fact, any attempt to reformulate Islamic jurisprudence must comprise the unconditional acceptance of the inherent dignity of mankind as the source of their individual and social rights. This shifts the discourse of jurists away from paying special attention to Muslim rights to human rights and paves the way for fundamental changes in jurisprudence, theology, and epistemology.

Taha and Kadivar's emphasis on human dignity lays the foundation for a human-oriented or humanist jurisprudence against text-based jurisprudence and Ijtihad as well as a rights-centered jurisprudence against duty-based jurisprudence. Accepting the inherent dignity of human beings, regardless of their religion or beliefs, means the recognition of human individuality in Islamic jurisprudence, which is rarely respected by the jurists.

Considering the impact of the historical era on the provisions

One of the governing principles of the reformative thought of Taha and Kadivar is their thorough attention to the impact of the historical era and its political, social, and cultural impact on the provisions. Heeding the distinction between the true message of religion and its historical requirements means to separate the historical and customary part of Islam from its holy message. This culminates in the refinement of Shari'a, allowing for an Ijtihad based on the needs and interests of Muslims in the new era. Through considering the impact of the historical era on the provisions, Taha and Kadivar look for fundamental values neglected in traditional jurisprudential texts. This requires reviewing the Qur'an and Sunna in light of basic concepts, such as equality, justice, and ethics and from a transgender perspective. This includes challenging the sanctity of the laws deemed by jurists as sacred and permanent. Considering the requirements of each historical era means the possibility of the historical reading of the text in order to achieve a new meaning and concept in accordance with the needs of the modern age. Just as Muslims and jurists of early Islamic centuries were able to read and fathom the Qur'an in terms of the realities of their society, Muslims and jurists today must be able to read and understand the text according to the time in which they live. Taha and Kadivar do not merely concentrate on modifying

traditional jurisprudence; they simultaneously and critically analyze the epistemological, ontological, and theological foundations of jurisprudence as the dominant mental presuppositions affecting jurists' thoughts in selecting and interpreting the text and Ijtihad and Islamic provisions.

To understand the importance of the constructive elements of Taha and Kadivar's theory, their potential effects, both separately and as a whole, must be considered in creating a change in Islamic jurisprudence in favor of the values accepted in the modern era. While the fundamental principles of traditional Ijtihad have been developed based on the text, the fundamental principles of Taha and Kadivar's theory seriously question the centrality of the text and put forth important assumptions as fundamental principles in any kind of Ijtihad, principles that have never been or are rarely considered in traditional Ijtihad. These fundamental principles show that the new tools for responding to the specific needs of contemporary times must be considered in jurisprudence and revised along with the rereading of the Qur'an and Sunna, and the epistemological, theological, and historical foundations developed within their framework in traditional jurisprudence.

Conclusion

Studying Taha and Kadivar's views regarding the necessity of a reformation in the Islamic jurisprudence, the identification and analysis of the most important obstacles found in the reconciliation of jurisprudence and human rights and their solution confirms the variety of approaches that Muslim reformers have employed in modifying religious thought. As previously mentioned, the answer provided by Taha and Kadivar is an integrated theological solution that seeks to solve all the contradictions between Islam and human rights in the form of a prescription. The importance of their theories is quite clear in two regards: finding the fundamental problems in how traditional jurisprudence views religion, its messages, and goals, as well as the fundamental principles that they have considered in their theory, which demonstrates the major shortcomings of both Sunni and Shi'a's traditional jurisprudence.

The most important theoretical achievement of Taha and Kadivar is their insistence on the fact that if the attention has been to the spirit of the religion and the real objectives of the Prophet's mission, it is clearly understandable that the existing conflict between Islam and human rights standards are the result of the incomplete deduction of religious teachings and their emphasis on a limited part of the texts and ignoring the rest. The limitation that Muslims from early Islam until the present time have accepted is the result of the imposition of historical eras, customs, and the culture of the geographical areas forming the Islamic world over the message and purpose of the religion. The problems identified in traditional Sunni and Shia jurisprudence and the similarity of the fundamental principles that both scholars have adopted in solving the conflict between Islam and human rights indicate the importance of these principles in any reconstruction of religious thought. Taha and Kadivar's efforts to identify and correct the presupposition of jurists and to show its deep impact on how they approach Qur'an and Sunna have strengthened the desacralizing process of Islamic jurisprudence. This is evident amongst Shi'a scholars who historically have had more freedom to perform new Ijtihad compared to their Sunni counterparts. The creation of the trend known as dynamic or searching Fiqh (*Fiqh-e-Pouya*)¹³ in Iran's seminaries and the entrance of several higher ranked jurists such as Grand Ayatollah Montazeri, Yusuf Saanei, and Mohammad Ebrahim Jannaati to discuss the necessity of the

compatibility of human rights and religious deduction and the incorporation of some of the proposed principles of Taha and Kadivar in reformation in Islamic thought are clear signs of the effectiveness of their thoughts in this direction. So far, the promoters of the dynamic or searching Fiqh in Iran have succeeded in issuing two hundred fatwas through reviewing some of the theological, epistemological, and anthropological presuppositions of jurisprudence, criticizing parts of the governing principles of traditional jurisprudence, and proposing alternative or supplementary principles, all of which have been issued in the framework of Ijtihad in branches of jurisprudence. These fatwas have not only greatly reduced the level of conflict between Islamic provisions and fundamental principles of human rights, but they have also revealed a very clear and tangible vision of the formation of a human-centered, ethical, and justice-based jurisprudence.

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Notes

1. Legal methods of interpretation and reasoning by which a Mujtahid derives or rationalizes law on the basis of the Qur'an, the Sunna, and/or consensus; also, a judge's evaluation of customary practices as they bear on a case brought before him (Hallaq 2009, 173).
2. "Sunna is the second, but most substantial source of Islamic law. For Sunni Muslims, it means the exemplary biography of the Prophet" (Hallaq 2009, 177) but "for Shi'a Muslims it includes what the prophet and their twelve infallible Imams had said, done or tacitly approved with regard to a particular matter. The Sunna departs from the Qur'an in the sense that it provides legislation on matters on which the Qur'an is silent" (Hallaq 1999, 25).
3. "The Islamic ordinances divide into the fixed and the variable. The former denoted the permanent and unannulable precepts that made up the text of sharia, while the latter represented time-bound precepts that addressed certain interests and that, although 'obligatory to implement,' may come to lapse" (Matsunaga 2007, 325).
4. "Discipline or a field of study specializing in methods of interpretation and reasoning (ijtihad), with the aim of arriving at new legal norms for unprecedented cases or rationalizing existing ones" (Hallaq 2009: 177–178).
5. Abrogation means "making a revealed text supersede another. The grounds on which abrogation can be made are many, one of which is the chronologically later provenance of the repealing text (reflecting a change of mind or position adopted in the earlier text); another reason for abrogation is when one text itself commands the abandonment of a matter specified in another text" (Hallaq 2009, 171). For the study of abrogation in Sunni and Shi'a jurisprudence see Hallaq 1999, 1–35 and al-Khoei 2007.
6. "Juristic literature has generated two major literary genres. One, known as *usul al-fiqh* (roots of jurisprudence), deals with hermeneutical principles that can be used for deriving rules from revelation; it represents, in part, something like a philosophy of law. The other, dominant genre, *furu' al-fiqh* (branches of jurisprudence), is an elaboration of rules which govern ritual and social activities. An overall philosophy of law in Islam, not fully articulated in the pre-modern tradition, can only be discovered through consideration of both genres" (Calder 1998).
7. For a brief biographical note on Taha, and his social and political reform movement in Sudan, see An-Na'im 1987 and Thomas 2010.
8. "Narrative means Hadith literature and the hadiths are the literary expressions and context-specific accounts of the Sunna" (Hallaq 2009: 177).

9. "Public law is that area of constitutional, administrative, criminal, and International Law that focuses on the organization of the government, the relations between the state and its citizens, the responsibilities of government officials, and the relations between sister states. It is concerned with political matters, including the powers, rights, capacities, and duties of various levels of government and government officials."
 "Public law refers to an act that applies to the public at large, as opposed to a private law that concerns private individual rights, duties, and liabilities" (West's 2021).
10. For a brief biographical note on Kadivar, see his website: <https://english.kadivar.com/biography-mohsen-kadivar> and Yasuyuki 2007.
11. To investigate Kadivar's thought in this article, I have relied upon *Haqq al-Nas: Islam wa Huquq-i Bashari* (the Rights of People: Islam and Human Rights). This book contains his articles on various issues related to human rights in Islam. In the second part of the book, Kadivar presents the basics of his theory of rational abrogation.
12. There are two kinds of Ijtihad in Islamic jurisprudence: Ijtihad in Usul al fiqh (roots and principles of jurisprudence) and Ijtihad in Furu al fiqh which means Ijtihad in the rulings. According to the traditionalist jurists, Ijtihad is only permitted in the rulings not the hermeneutic and philosophy of law; however, the main sources of the problem in the conflict between Islam and human rights, has roots in the hermeneutical understanding of the Shari'a. See footnote 6.
13. For more information about dynamic or searching Fiqh as well as the thought of Iranian reformers Jurists about the subject of human rights in Islam see Rad Goudarzi, and Najafinejad, 2018 and Rad Goudarzi and Najafinejad, 2019.

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