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Human rights and intellectual Islam

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The substance of this chapter originally appeared, in a different form, as a two-part article published in Iran in 2003.¹ In the first part of the article, there is a survey of six areas of conflict between historical Islam and human rights norms: 1) inequality between Muslims and non-Muslims, 2) inequality between men and women, 3) inequality between slaves and free human beings, 4) inequality between commoners and jurists in public affairs, 5) freedom of conscience and religion versus punishments for apostasy, and 6) extra-judicial punishments, violent punishments and torture. It demonstrates in detail how numerous precepts of Islamic jurisprudence (fiqh) conflict with international human rights norms, specifically in Twelver Shi'i fiqh and the contemporary law of Iran, but mutatis mutandis in the Sunni schools as well. The second part, which follows here in a slightly abridged form, discusses the scope and methodologies for resolving these conflicts.

That a few occasional and rare verdicts should conflict with human rights is not a problem, but that traditional Islam's well-known views or unanimous and consensual verdicts should conflict with human rights is seriously problematic.² The question of conflict between the notion of human rights and traditional Islam goes much deeper than the realm of opinions. The conflict is not confined to the

verdicts of theologians and experts on Islamic law; it is a question of conflict between Scripture, i.e. some verses, as well as many Narratives, and the notion of human rights.

Muslims who allow the notion of human rights into their consciousness should be aware of the epistemic mayhem and the deep conflicts that they will have to cope with when this new guest steps into the abode of their minds. "Human rights" is a notion that is based on particular epistemological and philosophical underpinnings and presuppositions, and particular views about human beings. Human rights cannot be accepted without accepting these underpinnings and premises. A law that attaches precedence to religion and beliefs over the humanness of human beings, or attaches precedence to people's maleness or femaleness over their humanness, or recognises the ownership of slaves, has, first, defined the cosmos and human beings in a particular way and, then, accepted propositions about distinctions in rights on the basis of this conception of human beings and the cosmos. Deducing such rulings would undoubtedly have been impossible without an epistemological cohesion of this kind. One of the epistemological principles that pertain when we deal with different laws or with different propositions is the principle of avoiding contradictions. The human mind is unable to accept two wholly contradictory or conflicting propositions at one and the same time. Hence, it goes without saying that the notion of human rights cannot be combined with laws that are based on underpinnings and premises (and, consequently, results and conclusions) that are in conflict with and contrary to human rights.

Traditional Islam, too, as an epistemic constellation, is a particular system of rights with its own underpinnings and premises. This constellation includes Scripture and the Tradition of the Prophet, the technical opinions of experts on Islam (such as the fatwas issued by *fuqahā'*, the verdicts of experts on Islamic ethics and theological propositions) and the practices of experts on the Shari'a, the faithful and Muslims over the course of history. Traditional Islam holds first, that conflict with the notion of human rights is certain in all three of these areas and secondly, that, precisely because of this, the notion of human rights is incorrect and unacceptable. It is possible to agree with and accept the first proposition with some amendments. That is to say, I believe that there is a great deal in the practices of Muslims and experts on the Shari'a over the course of history, and even today, that conflicts with human rights; that, secondly, the verdicts and fatwas of religious experts contain many propositions that conflict with human rights; that, thirdly, there are points in the Verses of the Holy Qur'an and the Traditions attributed to the Prophet and the Shi'i Imams that conflict with human rights – less in the Verses and more in the Narratives. Moreover, the conflict between traditional Islam and human rights is not minor and superficial; it is serious and deep-rooted. Accepting and preferring either one of the two sides of the conflict has important corollaries and consequences that ought not to be disregarded.

Theoretical underpinnings of the conflict between historical Islam and human rights

In historical Islam, human beings are not the focal point of the discussion; the focal point is God, and the Shari'a revolves around the axis of religion and divine duties. The preoccupation of traditional Islam is to identify and respect these duties, which are known as Shari'a precepts. In dealing with the corollaries and phenomena of the modern age, such as human rights, democracy, civil society, etc., historical Islam has offered a general, unchanging response: if these affairs really play a part in true human felicity and are intrinsically correct and valid, they have, without a doubt, been taken into account in advance and in full in Muslims' divine duties and Shari'a precepts; and if they do not play a part in true human felicity, they are condemned to invalidity. All that is necessary has been taken into account in God's eloquent wisdom, including people's true rights.

In view of the growing acceptance of the notion of human rights in Islamic societies, Islamic experts have opted for two courses: on the one hand, they try – as much as possible – to reduce the prominence of those religious precepts that conflict with human rights, and try to justify them in some way. On the other hand, they try to find and highlight the points in Islamic texts that corroborate human rights, and their overall aim is to remove Islam from the firing line of human rights-based criticism.

To be fair, we would have to say that such stipulated “true human rights” are different from the internationally accepted notion of “human rights”. Traditional Islam's conflict with the notion of human rights has been established on the basis of an *a posteriori* investigation; that is, the precepts of traditional Islam were compared to the articles of the Universal Declaration of Human Rights and other international conventions, and the result of the investigation was that there are at least six areas of conflict.³ I think it is unlikely that the adherents of historical Islam can deny this conflict. In order to extricate themselves from this conundrum, they suggest the idea of “true human rights” from an *a priori* perspective. I think that, if we explore and draw out the “theory of true human rights”, then the epistemic underpinnings and the theories about religion and human beings that underlie historical Islam will become clear: true human rights are a part of the intrinsic interests that have been fully taken into account by All-Knowing God in the formulation of Shari'a precepts. These rights are unchanging; they do not vary over time, in the different stages of the advancing life of humanity and in different locations. The creator of these rights is the Creator of human beings. Performing one's duties and Shari'a precepts is the surest way of abiding by human beings' true rights.

Now, the question arises: How do we identify human beings' true rights? The only valid way is to refer to God's revelation, i.e., to see what the Lawgiver has

presented in Scripture or in the Tradition of the Prophet (peace be upon him). So, the trustworthy method of learning about true human rights is text-based and narration-based. From the Shi'i perspective, consensus is not an independent source: it is a way of proving tradition. Reason, too, as a discoverer of Shari'a precepts can take us from one Shari'a precept to a second Shari'a precept that is a corollary of the first precept. This kind of proof is known as non-self-justifying reasoning, and it is incontestably accepted.

The fundamental problem lies in the possibility of discovering human beings' true rights using human reason, without the assistance of the Shari'a, revelation and narration. Can human beings recognise their own true rights? The acceptance of rational good and bad by the Mu'tazilites and the Shi'is could have paved the way to an affirmative answer. On this basis, reason is capable of independent understanding regarding the goodness of justice and the badness of injustice, and whatever reason rules, the Shari'a will also rule. Hence, whatever reason finds just should also be religiously obligatory, and whatever reason finds unjust should be religiously prohibited. This rational approach has not found much reflection in *fiqh*. As Sayyid Mohammad Baqir al-Sadr (1935–80) wrote at the beginning of *Al-Fatawa al-Waziha*, you can deduce a full course of demonstrative *fiqh* (Islamic jurisprudence), without needing to seek recourse in the rulings of reason a single time. Why? Because it is effectively impossible for human reason to achieve an all-embracing grasp of the hidden harms and benefits of minor matters. The rulings of reason are either certain and definite, or presumptive. A certain and definite understanding of the essential harms and benefits of matters, including true human rights, is impossible. A presumptive and non-definite understanding is futile and unreliable. Hence, it is not possible to discover true human rights with human reason; the only way to ascertain these rights is to refer to the Shari'a and to the narrations of Scripture – there is no other way.

In traditional Islam "true human rights" are reduced to Shari'a precepts or human beings' religious duties. What these true rights might be is an intrinsic matter inscribed on an immutable scroll beyond the reach of human reason and understanding. But divine duties and Shari'a precepts are within reach through the narrated accounts. "True human rights" do not lend themselves to discussion, but Shari'a precepts can be discussed, at least among experts on religion. On this basis, let us abandon the idea of speaking about true human rights, and concentrate on the question of Shari'a precepts. It is clear that Shari'a duties and religious precepts differ depending on one's religion, creed, gender, freedom or slavery, and even on whether one is a *faqih* or not. Of course, from the traditional perspective, these differences do not by any means amount to discrimination; quite the reverse, they are the very essence of justice. That is to say, every precept relates to the essential merit of its beneficiary. Since God is just and wise, every single Shari'a precept is unquestionably just and wise.

For our purposes, traditional Islam's most important underlying principle, in terms of epistemology and theories about religion and human beings, is the limited scope of human reason or the human mind. The human mind is incapable of understanding human beings' true rights. The innate incapacity and congenital fallibility of the human mind in assessing what is more and what is less important to human life is the foundation and source of the other principles of this historical thought system. Among these other principles, which are based on the fallibility of reason, is the idea that the human mind is seriously limited in its capacity to have an all-embracing grasp of what does or does not constitute justice. The logical implication of this principle is that justice and injustice can only be identified in practice through the sacred words of the Lawgiver. When the human mind is incapable of recognising whether a ruling is just or not, justice is perforce that which the Lawgiver identifies as just, and injustice is, likewise, that which the Lawgiver identifies as unjust. In other words, traditional Islam has, in practice, accepted the approach of the Ash'arites. The second principle that follows from the mind's fallibility is the inability to legislate for this-worldly life. The faulty human mind is not qualified to make laws. In view of human beings' inability to have an all-embracing grasp of true human needs and true human felicity, and because human beings are swayed by their appetites and carnal desires, human laws lead to social feuds and conflict. In order to establish peace and calm, the only place to turn is to the laws of God, i.e. the Shari'a, and the divine Lawgiver, i.e. God. The importance attached to this principle is evident from the fact that an argument for the necessity of prophethood has been based on it, and the argument has been cited by many Islamic theologians and even by some Muslim philosophers. Thirdly, in view of the fact that Shari'a precepts have been formulated by All-Knowing God and human laws are products of fallible and limited human minds, it is self-evident that divine duties and Shari'a precepts are superior to human laws (including the conventions on human rights). This superiority is on such a scale that there is never any need to put it to the test, because the human mind's innate fallibility disqualifies it as an arbiter in this field, and the superiority is a necessary consequence of the acceptance of God's eloquent wisdom.

One of historical Islam's other underlying principles in terms of its theories of knowledge and religion is that it is possible to formulate unchanging laws, laws that do not need to vary, regardless of the many changes in human life, from the simple conditions of life many centuries ago to the complicated conditions of life today. This is because laws that are based on hidden, intrinsic harms and interests exist and apply regardless of time and place. Likewise, most of the Shari'a precepts that exist in the Tradition of the Prophet and the Infallible Imams, as reflected in the respected field of *fiqh*, are considered to be unchanging, eternal precepts. This belief has two logical consequences: first, the field of *fiqh* is of the first order of importance among the Islamic fields of learning, to the point where the works

produced by Muslim scholars in the field of *fiqh* outnumber the works that they have produced in other Islamic fields, such as ethics, theology, annotation, history, philosophy and mysticism, and *fuqahā'* have been accorded more esteem and importance. Secondly, more importance has been attached to the narration- and Shari'a-based fields than to the rational and empirical fields.

In traditional Islam, human beings have no intrinsic nobility and dignity, although they are of potentially noble fabric. The closer human beings move to the axis of dignity and nobility, the greater is their status: the further away they move from this divine axis, the lower their ranking. Hence human beings can range from being God's friends and the closest to God of God's creatures, to being even more lowly than four-legged animals and the most abject of creatures. Human beings' status depends on their closeness or otherwise to divine virtues and perfection. On this basis, human beings' true rights depend on their standing in terms of faith and religion. Hence, speaking of human rights and equal rights for all, man or woman, Muslim or non-Muslim, free or slave, is meaningless and unjust.

In this constellation, the world has to be understood in the light of the hereafter. Good decisions in this world have to be based on consideration for the afterlife, and human beings must not devote and confine themselves to this-worldly considerations. The important thing is to ensure felicity in the hereafter, and this-worldly life matters to the extent that it serves the afterlife. So, it is not surprising that this-worldly affairs are of secondary importance.

The above discussion was a brief analysis of historical Islam's underpinnings in terms of its theories of knowledge, religion, human nature and the cosmos. Now, let us compare these underpinnings to the principles that underpin the notion of human rights. This notion is based on a belief in the relative competence of the human mind or human reason to understand needs, interests and harms. Self-justifying critical reason is the foundation of modernity, and the notion of human rights is one of its products. From this perspective, human minds are capable of identifying and formulating human rights. Collective human reason undertakes this identification and formulation, and it does not consider its achievement to be definitive and immutable. It is, in fact, prepared to complete and amend its precepts as humanity gains new experiences. Human rights conventions are a product of the latest experiences of the collective reason of contemporary human beings. Such reason holds that if these principles of human rights are respected, all human beings will enjoy greater peace and justice. This thought system maintains that human reason is capable of discovering what does, and what does not, constitute justice and that collective human reason can assess the justice or injustice of human relations and laws. On this basis, human beings are capable of formulating just laws for governing their societies and their environments. Human rights conventions are examples of international laws created by the collective reason of contemporary human beings.

In view of the variety of religions and creeds in human societies and in view of the fact that they all have allocated particular rights to their followers, the notion of human rights – while respecting all religions and creeds and recognising their place in people's private lives – is neutral on religion and creed in the public sphere; in other words, human rights have been formulated for human beings *qua* human beings, before they believe in any particular religion and creed. Thus, individuals' religions or creeds do not alter their rights in any way and the principles of human rights are not based on any particular religion or rite.

It is important to note that the notion of human rights has been formulated on the basis of an *a posteriori* approach. In other words, it is based on human experiences and a practical comparison of various approaches to ensure that this approach is the best one. The notion of human rights is not based on any hidden mysteries that are beyond human comprehension. Hence, it can easily prove its superiority over rival approaches and demonstrate its success in practice. When human rights are respected, individuals have the opportunity to pursue their lives as they see fit, freely and autonomously. Whether they live as believers or atheists is for them, not others, to decide; but the notion of human rights is neither atheistic nor monotheistic.

A comparison of the underpinnings of historical Islam and those of human rights conventions reveals that the difference between these two systems is deep and fundamental. Accepting either one entails a rejection of the other, unless one chooses to believe in both in a superficial way by shutting one's eyes to their conflicting roots and implications.

Notion of human rights preferable to historical Islam's position

What are we to do in the face of the deep and fundamental disparity between historical Islam and the notion of human rights? Which one of the two should we accept? What should we do with the other one? This is a normative problem. There is no easy answer. Before attempting an answer, let me make some preliminary points.

First, one side of the conflict is historical Islam or traditional Islam, not Islam in the absolute sense. Historical Islam is a particular conception of the religion of God. Criticising it or, possibly, rejecting it, does not entail criticism or rejection of Islam. One can be a Muslim and believe in the singleness of God, the truth of Judgement Day and the Mission of Muhammad Ibn 'Abd Allah (peace be upon him), but have a different reading of Islam from the historical and traditional reading. Hence, we must approach the normative decision freely, fair-mindedly and as unbiased investigators, not as dogmatists nor in a partisan and unthinking way.

The second preliminary point is that, in view of the discussion in the previous section, the conflict can be viewed as a conflict of narrated words versus reason

(*naql wa 'aql*). Historical or traditional Islam relies on narrated accounts, and the human rights system relies on reason. Viewing the conflict as one of narrated accounts versus reason is much more realistic than viewing it as revelation versus reason, or religion versus reason.

Thirdly, it seems that in judging between the two sides of this conflict, an *a priori* investigation is inappropriate since the conflict has arisen precisely because of the utilisation of an *a posteriori* approach. That is to say, numerous religious precepts and duties have been declared to be in breach of human rights norms and, so, resorting to an *a priori* method would not be convincing. In other words, in making the judgement, it is not appropriate to rely on the speaker's standing and to say that, since the words were spoken by God or the Prophet, there is no need to prove the validity of the words. The *a posteriori* approach demands that we compare two claims on their own merits in order to establish which is correct and which is not. In the contemporary world, Shari'a precepts have to be defended on the grounds that they are rational and more just and better than comparable solutions.

The fourth point is that the human rights system belongs to the modern age and did not exist in pre-modern times. Historical Islam, too, is being discussed in the modern age; in pre-modern times, the traditional reading of Islam did not face a problem known as conflict with the notion of human rights. In other words, this is a new problem that belongs to the modern age, and it cannot be extended to pre-modern times. Historical Islam dealt successfully and honourably with the problems that arose in pre-modern times.

And the last point is that this conflict is one of the subdivisions of the debate between tradition and modernity. Here, historical Islam represents tradition, and the notion of human rights represents modernity.

Now, let us attempt to judge between historical Islam and the notion of human rights. In order to proceed as carefully as possible, let us judge each of the six areas of conflict in turn. Regarding the first area, i.e. inequality of rights between Muslims and non-Muslims, traditional Islam's position is not defensible in the contemporary world. Religion and creed must not lead to legal discrimination. Believing in a true religion and doing good deeds will be rewarded in the hereafter based on the judgement of All-Knowing God. But in this world, equal rights for all and non-discrimination on the basis of religion and creed is closer to justice. In a world populated by the followers of different religions and creeds, each of which considers itself in the right and all others in the wrong and accords special rights to its own followers, the fairest way is to reject all these special rights and not to involve religious beliefs in human rights. If God has put the blessings of nature at everyone's disposal without any distinction or discrimination, why should we not proceed on the same basis? What rational argument could possibly justify discrimination on the basis of religion and faith? In conditions of

equality, people can turn to and accept a religion with greater sincerity, without their decision being tainted by fleeting, this-worldly motivations. If we decide to judge rationally historical Islam's religious arguments in favour of different rights for Muslims and non-Muslims, and for orthodox believers and followers of other Islamic sects – rather than to accept them unquestioningly because we are devout and because we feel we must judge words on the basis of who has spoken them – then, we cannot doubt that equal rights for all is closer to truth and justice than discrimination on religious grounds.

Regarding the second area, i.e. inequality of rights between men and women, there is no reason to attach precedence to gender over humanness. Why should physiological and biological differences give rise to differences in rights? If racial differences cannot give rise to differences in rights, why should gender differences do so? That women should always be treated as underlings and men always treated as superiors lacks any rational justification. The criterion of superiority in the hereafter is piety, not gender and, in this world, opportunities and resources should be made available for healthy competition. Women are not inferior to men in terms of rationality, the ability to learn and occupational skills, nor are they inferior to men in the political, economic and cultural fields. In sum, equal rights for all, regardless of gender, is in keeping with common sense, whereas giving women fewer rights than men goes against fairness, justice and reason.

Regarding the third area, i.e. different rights for free people and slaves, far from there being reasons for this kind of discrimination, there are reasons against it. While it is impossible to do away with multiple religions and more than one gender among human beings, slavery is something that can be eliminated, and it no longer exists in its traditional form today. Common sense, justice and fairness cannot abide the existence of slavery and, *a fortiori*, cannot tolerate discrimination between slaves and non-slaves. There can be no doubt about the correctness of the human rights position of doing away with slavery and ruling out discriminatory rights in this respect.

Regarding the fourth area, i.e. inequality between *fuqahā'* (Islamic jurists) and commoners in the sphere of public affairs, contrary to the previous three areas, there are differences of opinion on this issue within traditional Islam, and this form of discrimination is not accepted as a self-evident necessity among religious experts. The critics believe that there is no valid religious evidence in support of it, that it cannot be supported by any rational argument and, most importantly, that there are arguments against it. Why should the public sphere and the political arena be entrusted to *fuqahā'*, and their views be given precedence over those of the public? Why should *fuqahā'* and clerics have special rights to key posts and in drawing up society's overall policies? What argument is there in support of *fiqh*-based politics as against science- or reason-based politics? It is patently clear that democracy is preferable to absolute rule or rule by a *faqīh* or a cleric.

Regarding the fifth area, i.e. freedom of opinion and religion and the punishment of apostasy, freedom of opinion and religion is a prerequisite of equal rights for all and the rejection of discrimination on the basis of religion. Freedom of opinion and religion, freedom to express one's beliefs, freedom to perform religious acts and ceremonies, freedom not to perform religious acts, freedom to change one's religion and opinion, and freedom to propagate one's religion and opinion all fall within this framework. Reason supports freedom of religion and does not abide this-worldly punishments for changing one's religion. Rejecting or restricting freedom of religion and laying down punishments for apostasy, including execution or jail with hard labour, makes traditional Islam appear irrational and weak. The way to safeguard believers' faith is to strengthen their religious knowledge, not to deprive them of freedom of religion and opinion. There can be no doubt that the human rights position in support of freedom of opinion and religion is rationally preferable. I have proved this in a separate article.⁴

As to the sixth area, i.e. extra-judicial punishments, violent punishments and torture, today, human reason does not accept that people can be punished and even executed without a trial in a competent court and without the right of defence for the accused. In punishing offenders, the main aim – more than the actual physical punishment or execution or the general form of the punishments – is to uproot offences and to warn the public not to commit offences. Violent punishments have in many instances lost their effectiveness in this respect. Today's world prohibits the use of torture for extracting information or breaking a prisoner's resistance. If penal precepts in traditional Islam are not considered to be essential to devoutness, the notion of human rights must be given precedence in the three above-mentioned areas of penal law.

Hence, in all six areas, i.e. equal rights for all and the rejection of discrimination on the basis of religion, gender, slavery and religious expertise, as well as on freedom of religion and thought and the rejection of extra-judicial and violent punishments and torture, the position of human rights conventions is more defensible, more rational, more just and preferable, and the precepts of historical Islam on these issues are not acceptable in our time.

Historical Islam's solutions for resolving the conflict

Is traditional Islam capable of extricating itself from this quandary? Is it possible to resolve this conflict on the basis of the criteria of traditional *fiqh* and the methods used for formulating opinions (*ijtihād*), i.e. the formulation of opinions on secondary principles? The answer is negative. Traditional Islam has compulsory criteria and standards that cannot be cast aside without departing from the whole framework. Adhering to the criteria and standards leaves the conflict unresolved.

First, the religious evidence cited in support of some of these problematic precepts consists of Verses from the holy Qur'an. Traditional Islam maintains that these Verses yield unchanging and absolute precepts (not conditional on time and place), which are never abrogated. Taking these Verses at face value, we would, in all fairness, have no choice but to accept unequal rights for Muslims and non-Muslims, and for men and women, in many instances, unequal rights for free people and slaves; and the administration of violent punishments. A traditionalist *faqīh* has no choice but to submit to Shari'a precepts that conflict with human rights.

Secondly, the religious evidence cited in support of nearly all the Shari'a that conflict with human rights consists of the Narratives recounting the words and deeds of the Prophet and the Shi'i Imams. Many of these Narratives are well-documented, reliable and perfectly valid on the basis of the accepted criteria of *fiqh*. The clear sense and purport of the relevant Narratives lead to the precepts that are considered to be in violation of human rights today. Traditional Islam believes that these valid Narratives convey to us unchanging and permanent precepts, and that "whatever was considered permissible by Muhammad will be permissible until Judgement Day and whatever was considered prohibited by Muhammad will be prohibited until Judgement Day". In some minor instances, there are also well-known opposing opinions, which are also based on some Narratives; e.g. concerning the age when girls become adults. However, opposing opinions on many of the relevant precepts lack any kind of corroboration in the Narratives. Even if generalities are cited in support, the problem remains that there is contrary evidence in the form of some Verses and reliable Narratives. With these sources and within this framework, a traditionalist *faqīh* cannot stray very far from the existing opinions and fatwas.

Thirdly, many of the Shari'a precepts that contravene human rights are consensual. Opposing opinions are rare on many of these precepts and there is unanimity over them. The majority of the opinions in favour of the precepts are well known. Most importantly, some of the precepts that conflict with human rights are considered to be essential elements of *fiqh* or essential elements of religion. In traditional *fiqh*, precepts of this kind are unchangeable. How can it be possible to resolve the conflict with human rights while abiding by these criteria?

Fourthly, if the precepts relating to social transactions, like the worship-related precepts, are based on hidden interests or benefits, independent reason will be incapable of comprehending these interests. Hence, a traditionalist *faqīh* cannot not use the ruling of reason in favour of human rights in this arena, because, as far as he is concerned, independent reason cannot rule on these instances. What greater prohibition can there be against the rational approach than the words and deeds of the Lawgiver, which are exemplified in the Verses and the reliable Narratives that underpin the precepts? It is also impossible to ascertain for certain what justice would demand in such cases, just as reason is unable to comprehend

the criteria underlying the precepts, unless they have been clearly stated by the Lawgiver.

Certainly, minor, superficial amendments are possible. For example, some precepts that are closer to human rights on women's affairs can be included in the marriage contract – as long as they do not invalidate the contract altogether. For example, the wife may be allowed to act in the husband's stead with the delegated right of initiating a divorce. A second possible way of bringing about amendments is by resorting to the principle of "distress and hardship". By proving distress and hardship, the wife can obtain a divorce without the husband's consent. Using the notion of "not bringing Islam into disrepute" is a third way of instigating amendments. For example, a sentence of stoning is occasionally not carried out, on the grounds that it would bring Islam into disrepute. On occasion, some religious punishments, especially flogging, are not carried out in public, on the same grounds. The fourth way, at least concerning the fifth and sixth areas of conflict (among the Shi'a), would be to halt the implementation of religious punishments during the absence of the twelfth Infallible Imam. With the halting of these punishments, these areas of conflict would be resolved. However, it is obvious that these kinds of solutions cannot take us very far. The majority of the Shari'a precepts that conflict with human rights do not lend themselves to amendment through the inclusion of conditions in a marriage contract or by appealing to the principle of "distress and hardship". Using the notion of "not bringing Islam into disrepute" is also very difficult. Claiming to understand hidden interests and harms would entail abandoning the criteria of traditional Islam. If reliance on these kinds of secondary axioms and notions turns into a routine procedure, and if they are applied more frequently than the original precepts, it will imply that there is something wrong with the formulation of the original precepts, otherwise there would be no need for so many opt-out clauses.

Although traditional *fiqh* holds that precepts can be divided into unchanging precepts and changing precepts, it also maintains that the precepts that are discussed in the field of *fiqh* are all unchanging precepts. In fact, the problem that traditional *fiqh* is facing today, i.e. disparity with the notion of human rights, falls squarely in the realm of the precepts that traditional Islam considers unchanging. Hence, the division of precepts into the two categories of unchanging and changing does not solve the problem.

One of the people who correctly recognised the inability of traditional *fiqh* and traditional methods to solve contemporary problems, and strove to use the element of interests or expediency – and the demands of time and place – to amend the situation, was the late Ayatollah Khomeini. He was of the view that the level of debate in seminaries and the framework of theory in which they work could not solve the problem. When there was protest over his new fatwa that made it permissible to play chess, he retorted: "Based on your reading of the Traditions and Narratives,

modern civilisation has to be razed to the ground and people have to live in huts or remain in the desert for ever.” Ayatollah Khomeini found the solution he was looking for in the absolute authority or guardianship of the state over *fiqh*. Based on his view, an Islamic state can prevent anything – whether worship-related or otherwise – that contravenes the interests of Islam, for as long as it does so. He explicitly said that the Islamic state was authorised to eliminate some precepts, such as precepts on the share crop system and sleeping partner investors. Ayatollah Khomeini believed that Shari‘a precepts were mediate and accidental goals (rather than final and essential ones), instruments and tools for running the state and spreading justice. On this basis, the ruling *faqīh* (Islamic jurist) can annul all the Shari‘a precepts that are not suited to the time and place or do not fulfil the interests of the state for as long as this is the case, and can also formulate new precepts that fulfil the interests of the state or are demanded by the time and place.

Now, let us imagine that a state is established in line with Ayatollah Khomeini’s theory, and that it considers it to be in the interests of the state that human rights should be respected, or holds that respect for human rights is demanded by the current time and place. Would such a state be able to prevent the implementation of precepts that are contrary to human rights? Without a doubt, it would.

Expediency-based *fiqh* and allowing state-decreed precepts is more effective than the previous four solutions we looked at, because it can block all Shari‘a precepts, worship-related or otherwise, as long as they are contrary to the interests of the state. Moreover, the state can formulate new precepts whenever it considers this to be in the interests of the state. So, if the ruling *faqīh* or his appointees consider it to be in the interest of the state to respect human rights, they can annul any Shari‘a precept, i.e. precepts that traditional Islam views as “unchanging precepts”, and even precepts that are considered to be essential elements of religion or essential elements of *fiqh*, if they conflict with human rights. Without a doubt, this innovation would resolve the conflict between traditional Islam and human rights.

However, this venerated solution has several problems. The most important problem is that it departs from the framework of traditional Islam and the accepted methods of formulating opinions. Many traditionalist *fuqahā’* believe that there is no valid evidence in the Shari‘a in support of the theory of the guardianship of the *faqīh*. The absolute authority/guardianship of the state over *fiqh* only has the endorsement of its progenitor and some of his students; it is not accepted among traditionalist *fuqahā’*. Traditional *fiqh* is very cautious and – unlike Ayatollah Khomeini – is neither of the view that interests or expediency can be clearly ascertained, nor that precepts based on interests or expediency can take precedence over all Shari‘a precepts, especially the worship-related ones. This point is not a problem in and of itself. If the expediency-based solution or the idea of state *fiqh* is right, it should be accepted, whether within the framework of traditional *fiqh* or outside of it, but the solution offered by expediency-based *fiqh* cannot be viewed

as traditional Islam's answer to the problem. Resorting to the state's interests means abandoning the criteria of traditional Islam in order to resolve its conflict with human rights.

Be that as it may, expediency-based *fiqh* will not solve the problem either. First, obtaining state precepts or expediency-based precepts is only an intermittent and temporary solution, since the unchanging Shari'a precepts will continue to be religiously valid; an unchanging precept will only be annulled (at the level of practice, not at the level of religious validity) by the ruling *faqīh* or his appointees if they ascertain that it is in the state's interests to do so – and only for as long as this is the case – and believers will have a duty to act on the state precept instead while it is valid. As soon as the state no longer considers the expedient precept valid, it will be annulled, and believers will revert to compliance with the former, unchanging precept. State precepts are not a permanent solution to the conflict with human rights. They are more like a painkiller that temporarily alleviates the conflict without curing it.

Secondly, expediency-based *fiqh* will put *fiqh* under the control of the state and political power. The absolute power of the guardian state over *fiqh* will make Shari'a precepts subject to state expediency and political power, and condemn them to endless changes in line with the vagaries of state interests. Moreover, a state that believes that it is in its interest to abide by human rights would have rejected in advance any special rights for *fuqahā'* and clerics in the public sphere and in politics. In other words, ascertaining such interests would lead to the disqualification of the guardian state itself. Can we imagine a state that would be prepared to inform the people in all sincerity that it should not have the rights that it has? The notion of human rights is fundamentally incompatible with the theory of expediency-based *fiqh* and an absolute, appointed, guardian state run by *fuqahā'*.

Thirdly, even if we disregard the above-mentioned problems, if the number of state precepts keeps growing in such a way that society's interests seem to lie in the temporary annulment of the majority of Shari'a precepts, and if these interests persist over a number of years and decades, would these two facts not suggest that we had made some fundamental errors in deducing the unchanging Shari'a precepts in the first place? Otherwise, why would we need constant opt-out clauses and endless patchwork?

Although Ayatollah Khomeini's idea is open to serious criticism, his courage in criticising traditional *fiqh*, whilst remaining appreciative of it, is laudable, as is his acknowledgement of the fact that the accepted methods of formulating opinions in *fiqh* were ineffective when it came to dealing with the problems of the modern world.

Historical Islam – and traditional *fiqh* in particular – cannot extricate itself from this impasse without reassessing its methods and underpinnings. It seems that formulating opinions (*ijtihād*) on secondary religious principles (*furū'*) has reached the end of its historical life. The ineffectiveness, in our times, of traditional

fiqh and its methods (i.e. formulating opinions on secondary principles) must not prevent us from being grateful to it for the services it has rendered in the past. New methods all owe a debt of gratitude to their predecessors. Moreover, the traditional method of deducing precepts is still valid for worship-related issues such as the ritual prayers, fasting and *hajj*, because reason cannot enter the realm of worship, and there is no conflict with human rights in this realm.

International and national efforts to combine traditional Islam and human rights

At the international level, over the past quarter of a century, six declarations and draft declarations on Islam and human rights have been issued by the Islamic Council for Europe (1980, 1981), the Kuwait Conference (of the International Commission of Jurists and the Union of Arab Lawyers, 1980) and the Organisation of the Islamic Conference (Mecca, 1979; Ta'if, 1981). The most recent and most official Islamic declaration of human rights was issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo in 1990 – based on a draft prepared in Tehran – under the title “The Cairo Declaration on Human Rights in Islam”. Apart from these declarations, which are at most a delineation of the common view of human rights among Muslims, Islamic countries have not managed to approve any binding convention, treaty or covenant in this respect. Be that as it may, these mere declarations are still cause for hope. We must see them as an indication that Islamic communities recognise the need to consider human rights. These declarations have endeavoured to highlight those points in international human rights conventions that are in keeping with traditional Islam, to extract corroboration from scattered bits of Islamic teachings and to prove that Islam was the forerunner of respect for human rights. The novel points in the Cairo Declaration, in comparison with international human rights conventions, include the recognition of the right to struggle against colonialism as “one of the most evil forms of enslavement” (Article 11) and the recognition of everyone’s “right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development; and it is incumbent upon the state and society in general to afford that right” (Article 17). The Cairo Declaration represents a big stride in terms of prohibiting discrimination between slaves and free people, and prohibiting slavery itself. Article 11 states: “Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.”

The Cairo Declaration and the other declarations were completely unsuccessful in dealing with the other five areas of conflict between traditional Islam and the

notion of human rights, and confined themselves to general phrases, ambiguity, brevity or silence, effectively confirming the conflict. For example, Article 10 of the Cairo Declaration states: "Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism." What about exercising compulsion to make someone remain a Muslim? Is that allowed? At any rate, this declaration, in the mould of traditional Islam, has not recognised freedom of religion, and has formally recognised the right to discrimination on the basis of religion. That is to say, unlike international human rights conventions, which are neutral on religion, the Cairo Declaration is bound by and committed to Islam. On the question of gender discrimination, the Cairo Declaration has been unable to go further than saying that "woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage" (Article 6). Article 24 states: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'a."

The Cairo Declaration is the height of traditional Islam's efforts in the realm of human rights, and it has failed to resolve these five areas of conflict. The declaration is discriminatory in terms of, first, religious rights and religious intolerance, secondly, gender discrimination, thirdly, discriminatory rights in the public sphere (of course the declaration is silent on the question of special rights for *fuqahā'*, and has confined itself to speaking about everyone's "right to assume public office in accordance with the provisions of the Shari'a"), fourthly, failure to recognise the right to freedom of opinion and religion and fifthly, implicit recognition of degrading, violent and extra-judicial punishments.

The Constitution of the Islamic Republic of Iran is the height of traditional Shi'i Islam's efforts in the realm of human rights. The Constitution has officially recognised discrimination between Muslims and non-Muslims, and Shi'is and Sunnis, in Articles 12, 13 and 14. Discrimination between men and women has been subtly included in the form of Articles 20 and 21. The question of slavery has been passed over in silence, although Article 4 lays the groundwork for recourse to all the Shari'a of traditional Islam. The Islamic Republic's Constitution has explicitly recognised discrimination between *fuqahā'* and commoners in the public sphere in Articles 5, 57, 109 and 110, and it is a standard-bearer in this respect. Although Articles 23 and 24 give recognition to freedom of opinion, freedom of religion – including the right to change religion, publicise one's own religion and so on – is out of the question, in view of the fact that it has been said in Article 4 that the Shari'a absolutely governs all the articles of the Constitution and all other laws and regulations. Article 38 has explicitly banned all forms of torture and Article 36 has ruled out extra-judicial punishments and stated that "only competent courts are entitled to pass a sentence and execute it." Hence, the situation is better in the sixth area of conflict, i.e. punishments, than in the other areas. Torture and extra-

judicial punishments have been prohibited, while violent and degrading punishments have been passed over in silence, although Article 4 effectively leaves the door open to the application of such punishments. Among the laws of the Islamic Republic of Iran, the Islamic Penal Law is considered to be the most problematic in terms of violating the norms of human rights.

The conduct of the Guardian Council (which vets legislation for compliance with the Constitution and the Shari'a) shows that the council's approach is further away from respect for human rights than that of the constituent assembly that drew up the Constitution in 1979.

On the basis of traditional Islam, it is impossible to advance any further in terms of human rights than the Cairo Declaration and the Constitution of the Islamic Republic of Iran. Examining these two documents testifies to the disparity between traditional Islam and human rights norms. Unless *fuqahā'* are allowed to formulate opinions (*ijtihād*) on primary religious principles (*uṣūl*) and unless there is a fundamental transformation in their way of thinking, the conflict between Islamic countries' laws and the notion of human rights is irresolvable in these areas.

Abuse of human rights and its causes

The opponents of the notion of human rights usually raise a number of objections. One is that human rights are said to be a political tool that is used by the US or the European Union to exert pressure on developing countries, especially Islamic ones, whereas human rights violations by their allies, especially Israel, are overlooked. Another objection is that human rights are said to be in keeping with Western societies and their way of life. It is said that accepting them would mean surrendering to the West: we Muslims do not need the paraphernalia of the infidels' world. Is there anything wrong with our religion, that we have to try to make up for it by using the handiwork of infidels and the enemies of Islam?

There are a number of answers to these objections. On the whole, it is regrettable that these kinds of superficial objections are raised in the name of religion, making it seem as if faith and religion are in conflict with the notion of human rights. In response to the first objection, it has to be said that human rights norms are violated more frequently in developing countries than in developed countries, although developed countries are not very sensitive to human rights violations in other countries. If their interests conflict with respect for human rights in developing countries, they never hesitate to act on the basis of their interests. The notion of human rights is a necessary condition of a healthy world; it is not a sufficient condition. Respect for human rights requires binding mechanisms. We never said that one swallow would make a spring, and that believing in human rights would

solve all the problems of contemporary humanity. We made a much more modest claim: respect for human rights norms will solve some of the problems of contemporary human beings.

Moreover, nothing is immune to abuse. Has religion not been abused in numerous ways over the course of history? Have tyrannical states not used religion, which is a source of compassion, as a tool for cruelty and for consolidating and justifying their power? The notion of human rights, too, can be abused, but such abuses by no means detract from the desirability of religion and human rights.

In response to the second objection, it has to be said that human rights, in and of itself, is either right or wrong. Geography does not play a part in its rightness or wrongness. The fact that an idea originates in the East does not make it more right, nor does the fact that an idea originates in the West make it wrong. None of the articles of the Universal Declaration of Human Rights or the two international covenants on civil, political, economic, social and cultural rights were designed solely with Western societies in mind. Human rights should be defended not because they originate in the West but because they are right, rational and in keeping with justice and fairness.

Over the course of history, similar objections have been raised against logic and philosophy. It was once said that anyone who applied logic was a heretic. Centuries had to pass before it became clear that there was no connection between formal logic and polytheism or monotheism. For centuries, philosophy was rejected as “infidels’ spittle” because it originated in Greece, but it is clear today that no system of thought, even religious learning, can answer its critics without being explained rationally. Accepting the notion of human rights is not surrendering to the West; it is surrendering to reason and justice. Religion is the answer to particular human needs, not the answer to everything that human beings need. There were times when religion was expected to solve medical problems too. But today no one expects medical prescriptions from religion. If we do not expect religion to have the answers to questions about physics or chemistry, why should we expect it to have the answers to questions relating to economics, politics or law? We should expect religion to answer our religious needs. A detailed treatment of this subject must be left for some other occasion. At any rate, resisting the notion of human rights in the name of religion inflicts one of the biggest blows on religiosity and religious faith, and it provides an excellent pretext to people who are opposed to religion.

Intellectual Islam's solution to the conflict between traditional Islam and human rights

Now, after all the descriptions, analyses and judgements, it is time to offer a solution. What is the solution to the conflict between historical Islam and the notion of human rights? In accepting the notion of human rights, what "Islam" do religious intellectuals offer as a replacement for traditional Islam? What does "intellectual Islam" consist of? What are its characteristics?

Since the time when Muslims had to take a stance on modernity and its trappings, including human rights and democracy – and once it had become clear that traditional Islam's answers were not appropriate – they have witnessed the birth and development of a new movement, which is not unique to either Sunnis or Shi'is, nor to either Iran or the Arab countries, nor to either the Middle East or the Far East. There have been different – but in a sense common – efforts among all Muslim elites to present a new image of Islam and to offer a new reading of Scripture and the Tradition of Muhammad. This movement is known as intellectual Islam or Islamic modernism. Whilst remaining committed to the eternal message of God's revelation, it believes that, in historical Islam, the sacred message has been mixed with the customs and conventions of the age when revelation was made, that all of traditional Islam's problems in the modern age emanate from the customary part of traditional Islam, and that the sacred message can still be defended with great pride. The main duty of insightful religious experts and '*ulamā*' is to extract the sacred message again and to push aside the sediment of time-bound customs. Hence, this solution is not confined to resolving the conflict between traditional Islam and human rights; it will also resolve other conflicts, such as those of reason, science and democracy, with traditional Islam.

Islam's teachings can be divided into four parts: first, matters of faith and belief, i.e. faith in Almighty God, faith in the hereafter, Judgement Day and the afterlife, and faith in the Seal of the Prophets Muhammad Ibn 'Abd Allah (peace be upon him) and his mission. Secondly, matters of morality: i.e. purifying the self and equipping oneself with moral values and virtues in line with the most important aim of the Prophet's mission. Thirdly, matters relating to worship: i.e. prayer, fasting, *hajj* and alms, as the most important manifestations of servitude and submission to God. Fourthly, non-worship-related Shari'a precepts, which are known as the *fiqh* of social transactions and include precepts relating to civil law, commercial law, penal law, public and private international law, fundamental rights, and precepts relating to victuals and drinks.

More than 98 per cent of the Verses of the holy Qur'an concern the first three parts: i.e. matters of faith, morality and worship, and only about 2 per cent have been devoted to the *fiqh* of social transactions. Although the proportion of non-

worship-related precepts is much higher among the Narratives than among the Verses, they form only about 10 per cent of the Narratives. But, in traditional Islam, the fourth part, i.e. the *fiqh* of social transactions, has gained indescribable importance, to the point where it has overshadowed the parts of religion that relate to faith, morality and worship. In the worship-related precepts, too, their *fiqh*-based form and shape has cast a shadow over the other dimensions of this quintessential component of religion. By contrast, the main defining characteristic of the modern reading of Islam is that the focus of attention is on matters of faith, morality and worship as the main body of God's religion, in the sense that these three matters are given greater depth, regain the significance attached to them in the Qur'an and flourish as the main mark of religiosity. The main difference between the modern reading and the traditional reading is over the fourth part; i.e. the *fiqh* of social transactions. Modernist Islam does not deny the need for Islamic law and jurisprudence (Shari'a and *fiqh*), but it is a critic of historical Islamic law and traditional jurisprudence, and it disagrees with the stances adopted by *fuqahā'* the past on numerous precepts. Hence, it presents a new *fiqh*. Although this new *fiqh* has a common stance with traditional *fiqh* on some precepts, it has serious differences with it on some other precepts, including the Shari'a precepts that conflict with human rights. In terms of overall volume, the new *fiqh* is smaller than traditional *fiqh*, and on the criteria underpinning its methods for formulating opinions, it differs from the principles of traditional *fiqh*.

Each and every (non-worship-related) Shari'a precept had three particular characteristics in the age of revelation: 1) It was deemed to be rational by the conventions of the time. 2) It was deemed to be just by the conventions of the time. 3) In comparison with the precepts stipulated by other religions and rites, it was deemed to be a better solution. In the light of these three characteristics, all these precepts were progressive solutions in the age of revelation, and laid the groundwork for a successful religious system. Collective human reason did not have better solutions at the time, and rational conduct endorsed these precepts and did not consider any of them to be unjust, violent, degrading or irrational.

In other words, all Shari'a precepts were formulated by the wise Lawgiver in accordance with the best interests of the worshippers. The interest of the human species (*maṣāliḥ al-naw'iyya*) formed the basis of the formulation of Shari'a commands and harms to the species formed the basis of Shari'a prohibitions. It is impossible to find a precept that was formulated without the consideration of species interests or harms. One of the most important marks of species interests is justice. Hence, Shari'a precepts have been formulated in accordance with justice and fairness, and the conventions of the age of revelation totally sensed this justice and fairness.

A Shari'a precept will only remain valid as long as it fulfils these species interests. On this basis, there are two types of precepts: the first type are precepts that are

permanently linked to species interests or harms; in other words, they will always retain the same quality, and this quality will not vary in different times and places. Precepts such as the obligation of being fair, the obligation of thanking the Benefactor, the prohibition on injustice and betrayal, the obligation of respecting a trust and honouring a pledge, the prohibition on lying, and so on, will always remain unchanged. The second type of precepts are those whose quality of goodness or badness may change. Most of the Shari'a precepts relating to social transactions are of this second type. In other words, in some times and places, they are in keeping with people's best interests and, while this is the case, they are valid. There is no doubt about the existence of these two types of Shari'a precepts; this is a division that has been recognised in many books on theology and the principles of *fiqh*. The conflict between Shari'a precepts and the notion of human rights which we have been discussing never occurs among the first type of precepts; in other words, none of the Shari'a precepts that are permanently linked to interests or harms, conflict with human rights. The conflict relates to the second type of Shari'a precepts.

At the level of the "in itself", the first type of Shari'a precepts is created for all eternity, but the wise Lawgiver – knowing better than anyone the potential of actions and circumstances and the way they vary over time and place – makes the second type of precept conditional on the continuation of the circumstances, and temporary in this sense. In other words, the precepts concerning actions that may be beneficial in some circumstances and harmful in others have not been formulated by God as permanent and unchanging precepts; from the start, they were made conditional on the continuation of the relevant circumstances.

However, at the level of the "for us", virtually all Shari'a precepts (i.e. precepts of the second type) are presented in an absolute and permanent form and without any conditions attached. There was a specific advantage to not stipulating a time frame for Shari'a precepts that were, in fact, temporary and conditional on the circumstances: it was unnecessary to stipulate that a precept was temporary long before the relevant circumstances had expired, since it is easier for people to act on a permanent precept than on a temporary, conditional one. Since the circumstances in the original time period and the circumstances in the subsequent era differ, if the Lawgiver had formulated precepts on the basis of the subsequent time frame, they would not have been in keeping with best interests in the original time. But if the Lawgiver were to formulate precepts for the original period and not allow them to be abrogated in the subsequent time – when they would no longer be in keeping with people's best interests – it would mean that the Lawgiver would be demanding something from people that was against their best interests, something that is unthinkable. Hence, concerning these kinds of actions which may be appropriate or inappropriate in different circumstances, there is no option but to formulate temporary precepts. Actions of this kind do not lend themselves to being governed by permanent precepts. If the goodness or badness of an action

depends on impermanent circumstances, the only solution is to formulate temporary precepts, which in themselves are only valid as long as they continue to be in line with people's best interests. Since at the level of the "for us", it is always better to present precepts in an absolute and unconditional form, nearly all precepts have been issued in this way, without the stipulation of expiry conditions in terms of time and place. But as Shaykh al-Ta'ifa Tusi (d. 1068), the great rationalist *faqīh*, said: faced with Shari'a precepts, the pious have to be confident that these commands and prohibitions pertain for only as long as they "continue to be in their best interests". In other words, all Shari'a precepts (of the second type) are in fact conditional and temporary: they pertain only as long as the circumstances that make them in keeping with people's best interests persist.

Most of the commands and prohibitions and the precepts that we find in the holy Qur'an and in the Traditions are of the second type. That is to say, although the language of the evidence is absolute and non-conditional, in reality and in themselves, they are conditional on, and bound by, the continuation of the underlying best interest and are set to expire when that interest expires. The fact that a Shari'a precept is based on the Qur'an does not mean that it is a permanent precept which rests on permanent interests. Many of the Shari'a precepts that rest on variable interests are also based on the Qur'an. In fact, the idea of one precept being abrogated or superseded by another is one of the most important topics of discussion in Qur'anic studies, theology and the principles of *fiqh*. Abrogation means discarding a Shari'a precept by virtue of the fact that its term has expired.

The main prerequisite for abrogation is that the abrogated precept must be of the second type; i.e. precepts that are not associated with permanent interests or permanent harms, but with interests or harms that may change with variations in time and place. Hence, abrogation does not apply to the first type of precept, but it does apply to the second type and has in fact occurred in the past. It goes without saying that the abrogation of a precept that is based on the Qur'an means the abrogation of the precept without the abrogation of the recitation. In other words, whilst accepting that the abrogated Verse has been revealed to the Prophet by God, and will forever be a part of the Qur'an and included in recitations and in the discussion of the miraculousness and eloquence of the Qur'an, the relevant precept is abrogated and superseded by another Verse. In other words, the first Verse presented a temporary and conditional precept and, although phrased in an absolute language, we realise, with the revelation of the second Verse, that the precept has reached the end of its term and is no longer in our best interests, and that our duty in practice is to abide by the second Verse (i.e. the abrogating Verse). In the words of Imam 'Ali (peace be upon him) anyone who cannot distinguish between an abrogated precept and an abrogating precept is condemned to perdition and will lead others to perdition.

At any rate, the realm of abrogation is one of the essential elements of the field of exegesis. Among the most important instances of abrogation in the Qur'an are the abrogation of the Najawi Verse (58:12) by 58:13; the abrogation of the number of warriors (8:65) by 8:66; the precept on widows (2:240) by 2:234; the precept on the punishment for lewd acts in 4:15–16, the precept on inheriting on the basis of faith in 8:72 by 33:6; and the changing of the *qibla* from Jerusalem to the Holy Mosque (2:142–50). Referring to the existing books on Qur'anic studies and studying the abrogated and abrogating Verses will leave no doubt that even Shari'a precepts that are based on the Qur'an and multiple Traditions can still be abrogated, and that this has indeed occurred in specific instances. A Shari'a precept that has been based on a single Tradition may also be subject to abrogation.

The essence of the discussion lies in the answer to the following question. The fact that the abrogation of Verses, multiple Traditions and single Traditions is a possibility and has actually occurred is not disputed. The dispute is over what can serve as an abrogator. The proof and argument of the abrogator cannot be weaker than that of the abrogated. The abrogator of a Verse has to be another Verse or a multiple Tradition (a multiply attested account of the Prophet's words and deeds). The abrogator of a multiple Tradition can be a Verse or another multiple Tradition. A presumed single Tradition is not qualified to abrogate a Verse or a multiple Tradition. Now it must be asked, is the proof and argument of definite reason qualified to abrogate a Shari'a precept?

The question can be rephrased as follows: What is to be done when there is conflict between a narrated proof and a rational proof? If the rational proof is definite, it can serve as a yardstick for reassessing the manifest meaning of the narrated proof. In other words, the narrated proof is interpreted in the light of the rational proof or, to put it more precisely, the rational proof is favoured over the narrated proof. This is the unanimous view of those Islamic experts who believe God must act justly (*'ulamā' adliyya*), whether Mu'tazilites or Shi'ites. The corollary of this dignified position is that narration-based Shari'a precepts can be abrogated by the rulings of definite reason. The position of Islamic experts who view reason as one of the four legitimate proofs in connection with the Shari'a effectively means that a narration-based Shari'a precept can be abrogated by a reason-based Shari'a precept. If all the Shari'a precepts of the second type (precepts that are based on interests that can vary over time and place) are in fact conditional on the continuation of the relevant interests and, therefore, temporary, and, if reason can somehow rule definitively that the relevant interests have expired, the relevant Shari'a precept is clearly abrogated by the ruling of reason. Once reason has so ruled, the former Shari'a precept no longer constitutes an actual duty. If reason is qualified to discover Shari'a precepts, it is undoubtedly also qualified to discover when a Shari'a precept has reached the end of its term. The idea that the ruling of reason can serve as an abrogator simply means that reason is capable of imposing time limits on Shari'a precepts.

It would seem that traditional thinking on theology, the principles of *fiqh* and Qur'anic exegesis does not have any problems with the various stages of this argument, apart from holding to the following point: if reason ever comes to such an understanding, its conclusion is binding, but definite reason has not come to such an understanding that we might base ourselves on it. In fact, the dispute with these traditionalist scholars will be over the minor premises, not the major premises. In other words, the disagreement with them is not over principles but over actual, concrete instances (when reason may be said to be certain about something). Whatever stance we take in this dispute, the result will have deep consequences. If we investigate the root causes of this problem, we find that until about two centuries ago, no conflict was observed between narration-based arguments and reason-based arguments. Moreover, *fuqahā'* used to find the answers they were seeking to the problems of their time in their understanding of Scripture and Tradition, so they had no need to refer to reason-based arguments. Even the understanding of the rationalists, who believed that reason also had binding force, did not differ substantially from that of the traditionalists. For example, a glance at the views of al-Ghazali (d. 1111), an Ash'arite, Ibn Abi al-Hadid (d. 1258), a Mu'tazilite, Shaykh Yusuf al-Bahrani (d. 1772), a traditionalist, and Sahib Jawahir (Shaykh Muhammad Hasan al-Najafi, d. 1850), a rationalist, would reveal how small a part was played by reason in the derivation of Shari'a precepts.

The distinguishing feature of the modern age is the blossoming of reason. Critical reason does not recognise any red lines and has begun questioning everything, even things that were unquestionable in the past. Contemporary human beings have grasped many things that were shrouded in mystery in the past. This does not mean that modern human beings know everything and that nothing remains unknown to them; on the contrary, as the scope of their knowledge has increased, so has their recognition of the extent and depth of their ignorance. They ask courageous questions and offer modest answers. No religious scholars can consider themselves independent of new rational studies, such as the methods of analysing meaning, methods of interpreting texts (hermeneutics), the philosophy of religion, modern theology, the sociology of religion, the psychology of religion, the methodology of history, philosophy, law, ethics, etc. Objections and criticism cannot be foreclosed by simply saying that all the social transactions precepts are in the service of God and closed for discussion, or by appealing to hidden interests and harms. Contemporary human beings are certain that owning slaves is unjust, irrational and reprehensible. They do not consider just and rational discrimination on the basis of religion or gender. They consider it unfair and irrational that *fuqahā'* and clerics should have special rights in the public sphere. They declare any limitation on freedom of religion to be a constriction of innate human rights. They find violent punishments intolerable. When reason comprehends and recognises a ruling, it is binding, essentially binding. Contemporary human beings do

not doubt their powers of comprehension in these matters. If there are people who have not yet attained this level of comprehension, they have no right to dismiss the comprehension of others and the rational conventions of our day.

The rationality of contemporary Muslims is not in line with – and actually conflicts with – the narration-based proof of some of traditional Islam's Shari'a precepts. Reason is strong enough today to serve as a yardstick for reassessing narration-based proofs and discovering their impermanence. Today, discussions about reason have become far broader and far more profound than the limited discussions of the past about whether reason was capable of independent judgement on good and bad or not.

At any rate, contemporary Muslims see two lines of thinking in Scripture and Tradition: first, a line of thinking that is compatible with human rights and consists of two types of propositions; i.e. propositions that do not conflict with the notion of human rights and propositions that explicitly affirm that human beings have rights simply by virtue of being human. These kinds of propositions are to be found in the generalities contained in the Mecca Verses and in the Prophet's conduct in Mecca, as well as in the conduct of Imam 'Ali during his time as leader. Secondly, a line of thinking that is incompatible with human rights, including propositions that are explicitly in conflict with human rights, and textual support for distinctions in human beings' rights depending on their religion, gender, whether they are slaves or not, and whether they are *fuqahā'* or not; support for violent and degrading punishment; and the rejection of freedom of religion. These kinds of propositions are to be found in the form of explicit proofs in some of the Medina Verses, parts of the Prophet's conduct in Medina, and some of the Narratives about the Shi'i Imams.

Faced with these two lines of thinking, traditional Islam has found the evidence for the second stronger, because the proofs for the first are either general, indefinite or brief, whereas the proofs for the second are specific, delineated and detailed. In sum, traditional Islam attaches precedence to proofs that are specific, delineated and detailed. On this basis, all Shari'a precepts – whether of the first set or the second – are deemed to be unchanging and permanent. This method of adding up the evidence comes into conflict with the notion of human rights in our day. In the solution that we offer, the narration-based proofs of the first set are fortified with reason-based proofs, and reason-based proofs are used as a yardstick for assessing the time frame of the precepts of the second set. Reason discovers that these were bound by interests that no longer apply and have now expired. More precisely, the argument of reason, corroborated by the narration-based proofs of the first set, abrogates the narration-based proofs of the second set, which conflict with human rights, and reports that their terms have expired. With the expiry and abrogation of the conflicting proofs, the conflict itself is fundamentally resolved.

The three preconditions of being rational, just and better than the solutions offered by other religions, did not only pertain in the age of revelation. In any age, the non-worship-related Shari'a precepts must meet these three preconditions on the basis of the conventions of the wise people of the day. Definite disagreement between a precept and the dictates of reason in our day, a conflict with the norms of justice of our day or the existence of preferable solutions in the modern age reveal that the relevant precept was not permanent and has been abrogated. In other words, these precepts were in keeping with best interests in the age of revelation; they did not rank among the Lawgiver's permanent, unchanging laws. When people start speaking about the implications of time and place, it means that they have accepted the idea that a Shari'a precept can be temporary. The implications of time and place are not necessarily unchanging; they differ and change. The philosophy behind the presence of these precepts in unchanging Scripture and Tradition was the need to solve the problems of the age of revelation and similar situations. If the Lawgiver had not taken into account the implications of time and place of the Prophet's day and the customs of the time, and had abandoned people to their own devices – at a time when there was great need for such precepts, in view of the limitations of collective rationality in the age of revelation – it would have been out of keeping with God's eloquent wisdom. Despite his perfections, the Prophet would have been unable – without the direct assistance of God – to solve the countless problems related to organising religion and running society. Many was the occasion when he hoped and waited for the blessing of revelation from God. Hence, there was no alternative but to formulate – alongside the unchanging and permanent Shari'a precepts – temporary precepts that were contingent on the continuation of the underlying best interests, and to include them in Scripture and Tradition. The language of the proof, even if it explicitly conveys everlastingness, does not prevent abrogation if the evidence and proof for one precept is superseded by a subsequent proof. Our distinguished predecessors have unanimously accepted this.

Formulating opinions (*ijtihad*) means distinguishing precepts that were laid down in accordance with the demands of time and place and the conditions of the age of revelation, from the unchanging and permanent precepts of the Shari'a. Confusing these two types of precepts, and considering all the precepts of Scripture and Tradition to be unchanging and applicable in all times and places, is to fail to understand correctly the meaning of religion, the aim of the Prophetic mission and the objectives of the Shari'a. People who have elevated secondary precepts and practical forms above the aims and objectives of religion, and who have lent sanctity to the customs of the age of revelation while disregarding the sacred aims of religion and the exalted objectives of the Shari'a, are at some distance from the correct way of formulating opinions. Constantly rehearsing fatwas that have been issued in the past and glorifying constantly-recurring opinions as the best

amounts to nothing more than the imitation of our predecessors in formulating opinions. Shari'a precepts are accidentally desirable, whereas the exalted aims of religion are essentially so. In other words, Shari'a precepts are secondary ways or means of attaining religion's main, sacred aims. Any way is only valid as long as it leads us to the destination. The way is not the object, it is the means. If we become certain (not presuming or guessing or assuming) that a precept is no longer the right way and that the best interests on which it was based have expired, it goes without saying that it is no longer valid. If insightful religious authorities (*mujtahids*), informed *fuqahā'* and Islamologists who are acquainted with the times fail to rise to this challenge, let them know for certain that serious religious and cultural problems and crises will eclipse religion and the Shari'a. It goes without saying that deciding which precepts are conditional on mutable best interests, and which are unchanging and permanent, is a specialist task that requires deep knowledge of Scripture and Tradition, on the one hand, and familiarity with the modern achievements of reason (or with the capabilities and limitations of reason in the modern age), on the other. If, per chance, there are people who fear permanent abrogation (despite all the supporting evidence and despite taking every precaution), they can use temporary abrogation, in the sense that they do not rule out that the circumstances may change again and that the abrogated precept may come into force again in a different time and place. The idea of temporary abrogation is not unheard of in Qur'anic studies.

Moreover, the real interests and harms that underpin precepts – which are, on occasion, described as hidden interests and harms and, on other occasions, as intrinsic interests and harms – are completely different from the interests of the state as set out in Ayatollah Khomeini's idea of interest-based *fiqh* or state *fiqh*. In the former case, it is a question of species interests, whereas, in the latter case, it is a question of the interests of a political regime or what the ruler deems to be in the interests of the people. The discernment of species interests is the responsibility of religious experts and conventional wisdom, while the discernment of the state's interests is the responsibility of statesmen and rulers. The former are qualified to formulate Shari'a precepts, while the latter are in a position to issue state precepts or state decrees.

I hope that readers who have criticisms or suggestions regarding the foregoing material – especially those who are followers of traditional Islam – will be kind enough to inform me of any shortcomings and flaws. The argument will undoubtedly become more cogent in the light of criticism and the clash of ideas.

Peace be upon you.

Translated from the Persian by Nilou Mobasser