Human Rights and New Jurisprudence in Mohsen Kadivar’s Advocacy of “New-Thinker” Islam

Yasuyuki Matsunaga

Tokyo

Abstract
In 2001, Mohsen Kadivar (1959-), a Qom-trained Shi’ite mujtahid, began advocating what he has alternately termed “spiritual Islam”, “goal-oriented Islam”, and “new-thinker Islam”. No longer just a critic of the “rule of the jurisprudent” (wilāyat-i faqīh) doctrine, Kadivar started to set forth his version of postrevivalist Islam, a kind that characteristically highlights its spiritual aspects but is nonetheless self-consciously anchored within the framework of Islamic jurisprudence. In this article, I will first examine Kadivar’s arguments about the fundamental conflict between the traditional exegesis of Islam and modern human rights norms, the inadequacy of traditional Islamic jurisprudence as a means to tackle the conflict, and his proposed approach to solving the problem. I will then critically discuss certain controversial aspects of the new exegesis that Kadivar has proposed—particularly, the issues surrounding the abrogation of accepted precepts of sharīʿa and the newly introduced conception of the intrinsic rights of human beings—as well as its significance and cogency. These examinations will highlight the unique emphasis that Kadivar has put on jurisprudence as the means to come to terms with the challenges of modernity, in contrast with more explicitly hermeneutic approaches preferred by some of his peers within the emerging postrevivalist current in Iran.

Keywords
fiqh, ijtihād, sharīʿa, human rights, postrevivalist, Islām-i nau-andish

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1. Introduction

As a youngster growing up in the southern Iranian city of Shiraz in the late 1970s, Mohsen Kadivar (1959-) was an ardent reader of books authored by ‘Ali Shari’ati (1933-1977), Mahmud Taleqani (1910-1979) and, above all, Mehdi Bazargan (1907-1995). Responding to the calls by Ayatollah Ruhollah Khomeini (1902-1989) for an Islamic revolution and an Islamic republic, he was among the leading student activists at Shiraz University during and immediately after the 1979 Iranian Revolution. Then, opting for full-scale seminary education in Qom in 1981 amid the post-revolutionary university closure, Kadivar eagerly studied the works of Morteza Motahhari (1920-1979) and Mohammad Hossein Tabataba’i (1892-1981) before attending advanced jurisprudential classes of Ayatollah Hossein ‘Ali Montazeri (1922-2009). By the late 1980s, Muhammad Baqir al-Sadr (1935-1980) joined ‘Allamah Tabataba’i and Ayatollah Montazeri as the major influences on his thinking. His career as an Islamic scholar and prolific writer started amid his advanced studies in Qom in the early 1990s: one of his first publications which formed the basis of his first book, *The Theories of Government in Shi‘ite Jurisprudence* appeared in 1994. The culmination of his seminary education in obtaining an *ijtihād* degree from Grand Ayatollah Montazeri and his move to the capital Tehran in 1997 coincided with the politico-societal change symbolized by the election of reformist president Mohammad Khatami. The polarizing struggles among politico-ideological factions and certain societal forces for and against the multifaceted openings that surfaced during the early years of the Khatami presidency (1997-2005) landed Kadivar—by then one of the most articulate and well-known reformist figures outside the Khatami Government—in the Evin prison two years later.

A year after his July 2000 release from seventeen-month-long solitary confinement, Kadivar embarked on his new project: an advocacy of

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2) For his early biographical information, see Bahā-ye Āzādi: Dīfā‘iyat-i Muhāsin-i Kadiwar dar Dādgāh-i Wizhah-yi Rūḥāniyat, ed. Zahra Rudi (Kadivar) (Tehran, 1999), 17ff. See also Farhang Rajaee, *Islam and Modernism: The Changing Discourse in Iran* (Austin, TX, 2007), 214f. In addition to being a licensed mujtahid, Kadivar holds a Ph.D. degree in Islamic philosophy conferred in 1999 by Tarbiat Modarres University in Tehran.
what he alternately termed “spiritual Islam” (Islâm-i maʾnawī), “goal-oriented Islam” (Islâm-i ghâyat-madâr), and “new-thinker” Islam (Islâm-i nau-andish). No longer just a critic, albeit a serious one, of the theory and practice of the “rule of the jurisconsult” (wilâyat-i faqîh), Kadivar began to set forth his version of postrevivalist Islam, a kind that characteristically highlights its spiritual aspect but is nonetheless self-consciously anchored within the framework of Islamic jurisprudence. His critical appraisal of the viability of the “traditional” jurisprudential approach did not lead him to abandon it entirely, but to propose an alternative conceived within the broader tradition of Islamic sciences. As such, his principled efforts seemingly constitute sincere attempts by a trained mujtahid to come to terms with the perceived challenges of modernity, or in his words, “to defend religiosity in the age of modernity”.

The goal of this article is two-fold. First, I will examine the arguments Kadivar has presented since 2001 in several of his articles now collected in his most recent monograph, Ḥaqq al-Nâs (2008), about the fundamental conflict between the traditional exegesis of Islam and modern human rights norms, the inadequacy of traditional Islamic jurisprudence as a means to tackle the conflict, and his proposed approach to solving the problem. Second, I will offer some preliminary discussions of certain controversial aspects of the new exegesis that Kadivar has

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4) See his Ḥukûmat-i Wilâţî (Tehran, 1998), among others.

5) For the concept of postrevivalist Islam, see Abbas Kazemi, Jâmî’ah-shinâsî-yi Raushanfikri-yi Dini dar Iran (Tehran, 2004), 79ff., and Matsunaga, “Mohsen Kadivar, an Advocate of Postrevivalist Islam in Iran”, 320ff.

6) Kadivar, Ḥaqq al-Nâs, 33.
proposed as well as its significance and cogency in critical perspective. In particular, I will discuss the issues surrounding the abrogation of accepted precepts of shari‘a and the newly introduced conception of the intrinsic rights of human beings. These examinations will, in part, highlight the unique emphasis that Kadivar has put on jurisprudence as the means to come to terms with the challenges of modernity, in contrast with more explicitly hermeneutic approaches preferred by some of his peers within the emerging postrevivalist current in Iran.

2. New Jurisprudence: Why and What?

Although not part of the establishment in its political sense, Mohsen Kadivar, as a Qom-seminary-trained mujtahid, is part of the established scholarly tradition of the usūlī school of Twelver Shi‘ism. Kadivar attained the level of mujtahid after devoting sixteen years at the Qom seminary to mastering the sciences of Islamic law and other related subjects. Though exclusively trained inside Iran, Kadivar has clearly benefited from the scholarship of the Najaf seminary as well, given the almost uninterrupted movements of seminary teachers and students between the two distinct religious centers (Hauzah-hā-yi ‘ilmīyah). As has been pointed out elsewhere, Kadivar has deliberately worked to combine the schools of Ayatollahs Hossein Borujerdi (1875-1961), Ruhollah Musavi-Khomeini, Abu al-Qasim Khu‘i (1899-1992), and Muhammad Baqir al-Sadr, the first two representing the Qom and the last two the Najaf seminary scholarship. He has also edited a volume comprising the works and correspondence of Mulla Muhammad Kazem Khorasani (1839-1911), a prominent scholar-cum-teacher in the Najaf seminary at the turn of the 20th century. In other words, Kadivar comes from, and does seem to represent the cream of younger generations of, the established usūlī Shi‘ite scholarship. This begs the question as to why he would see the need to establish new Islamic jurisprudence (ta‘ṣīs-i fiqh-i jadīd).

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7) Rajaei, Islamism and Modernism, 215.
8) Mohsen Kadivar, Siyāsat-nāmeh-yi Khurāsānī (Tehran, 2006).
9) Kadivar, Haqq al-Nās, 137. The term fiqh may simply denote law as a collection of substantive juristic values, or more broadly the science of Islamic law, with certain
The Modernity-Religiosity Clash

In two separate interviews with Iranian periodicals, the monthly Āftāb and the daily Iʿtimād-i Millī in 2003 and 2007 respectively, Kadivar suggested that it was a series of events starting with the notorious serial murder of dissidents in late 1998 that led him to delve again into the classical Islamic sources, ranging from the Qurʾān and the hadiths of the Prophet and Imams to numerous scholarly works in substantive Islamic law. In Kadivar’s accounts, the rumored possibility of religiously-sanctioned dissident killings, his public argument against such killings that apparently contributed to his arrest and imprisonment, the March 2000 terror-attack on his reformist activist-intellectual colleague Saʿīd Hajjarian, and the apostasy charge once-leveled against his “new-thinker” colleague Hasan Yusefi-Eshkevari (1949-), all pushed him to carefully rethink about the relations between religion and violence, on the one hand, and Islam and human rights, on the other. In the 2007 interview, he recounted:

The discussion of human rights and Islam (baḥth-i huqūq-i bashar wa Islām) became a serious question for me when I heard, in the Evin prison, the news of the terror attack on my friend Saʿīd Hajjarian. In the name of religion, this terror attack took place. My imprisonment also followed my Qadr-night speech in 1377 [1999] in Esfahan entitled “The Prohibition against Terror in Islam”. It was a speech about the serial killings, the murder of [Mohammad] Mokhtari, [Mohammad Jaʿfar] Puyandeh, and Parvaneh and Dariush Foruhar. [Now] it had been said that these [rumored] verdicts or fatwās could not have been issued by religious scholars. I saw, however, that once again in the name of religion, violence and terror took place. Around the same time, I read in the prison a book by Mohammad Reza Nikfar. A sentence in it to the effect that “in encountering any religion or ideology, measure to see how much violent capacity it has” made me sink into contemplation. I began a full round of study and note-taking in substantive Islamic law (fiqh). The core part of that study has not been published. The attention to human rights resulted from that [research] opportunity.
This appears to have been how the quest indeed began. In the 2003 interview, he had added:

The [reported] issuance of an execution sentence for my new-thinker friend Hasan Yusefi-Eshkevari on the offence of apostasy (jurm-i irtidad) was the principal reason behind [my April 2001 article] “Freedom of Belief and Religion in Islam and the Human Rights Documents”. In that article, in addition to criticizing the penalty of execution for an apostate in traditional Islam, I defended [the position of] absolute denial of earthly penalties for changing religion and belief (taghyir-i din wa ‘aqidah) on the basis of a new exegesis of Islam (qaradati tāzih az Islām).

By the time Kadivar started publicly enunciating his new exegesis of Islam in the summer of 2001 with his treatise “From Historical Islam to Spiritual Islam”, however, the principal challenge was no longer identified as religiously sanctioned violence or capital punishment for the charge of apostasy. It was framed more broadly as the challenge that, with the coming of modernity, the Muslims in Iran and elsewhere had come to face as believers. Kadivar characterized the challenge as follows:

[The advent of] modernity marked a turning point […] With the world entering the modern era and Muslims gradually becoming familiar with the standards and debates of the new era, the relation between religiosity and modernity (nisbat-i din-dārī wa tajaddud) became one of the most important questions […] The problem started when some of the religious accounts (guzārih-hā-yi dinī) [found in the Qurān and the Sunna] became conflicting with the achievements of the new civilization […] The problems became more serious when [those] achievements and the products of modernity were quietly turned into the custom (‘urf) of the era, or more technically, the “manner of the reasonable people” (sirah-yi ‘uqalā’) of the time.

15) Kadivar, Haqq al-Nās, 16f. Sirah-yi ‘uqalā’ (in Arabic, sirat al-‘uqalā’) is a technical term in Islamic legal theory (uṣūl al-fiqh) denoting the understanding or the conduct prevalent among the most knowledgeable (of all humankind) of the time. Although time-bound, it does not refer to place-specific or local understanding or conduct as ‘urf (custom) does.
What Kadivar began to problematize here was not modernity, but what he called the conventional or “traditional exegesis of Islam” (qarāʿat-i sunnatī az Islām) that has treated those religious accounts that came to be seen as conflicting with certain modern norms as “fixed and eternal precepts” of shariʿa. By the “conventional [traditional and official] exegesis” (qarāʿat-i rāyij [sunnatī wa rasmī]) of Islam, he meant:

that prevailing interpretation of the Qurʿān and the Sunna that are characteristically found in the opinions (ārāʾ) of the theologians and jurists and spread generally in the form of customary knowledge of the learned (ʿurf-i ahl-i ʿilm) in the Islamic world and with which the historical conduct of Muslims mostly conformed.16

In his 2001 lecture, Kadivar went on to pose the following question after describing two types of conventional reactions to the issue of incompatibility between certain modern norms and religious accounts—the wholesale rejection of modernity by the traditionalists and the privatization of religion by the “surrendered” modernists—as “extremist”:

The discerning religionists (din-dārān-i baṣīr) realized that they could not be cut off from modernity; nor could they abandon [their] tradition and religion. [Then the question became:] how could they live in the modern world in the age of modernity while preserving the Muslim tradition?17

Among those modern norms that have become the “manner of the reasonable people” (sirah-yi ʿuqalāʾ), human rights norms are, in Kadivar’s view, one of the most important achievements of humanity as a whole. Although many religious scholars have dealt with the issue of Islam and human rights for close to half a century in the Shiʿite Iranian context, Kadivar suggested that none of them squarely faced up to the challenge. They simply dismissed it by claiming (1) that the contents

16) “Āzādī-yi ʿAqīdah wa Madhhab dar Islām wa Asnād-i Ḥuqūq-i Bashar”, in Kadivar, Ḥaqq al-Nās, 181-215 at 184. This perspective has also a tendency to treat the custom and exigencies at the time of revelation as the sacred, unchangeable, ideal and desired relations and models (Kadivar, Ḥaqq al-Nās, 15).
of human rights have all along been abundantly found in the religious texts (the Qurʾān and the Sunna), and (2) that the notion of human rights in Islam is richer than the modern-day norms of human rights and that the Sacred Lawgiver has comprehensively enacted the “real rights of humans” (ḥuqūq-i wāqi‘i-yi insān-ha) within the shari‘a precepts.\(^\text{18}\)

By contrast, Kadivar chose to make the following two-step argument. First, he asserted that while there were some noticeable exceptions, the conflict (ta‘rüd) between the traditional exegesis of Islam—or the historical manifestation of Islam, especially that in shari‘a and fiqh—and modern human rights norms is fundamental and cannot be overlooked. Second, Islam cannot be reduced to historical Islam or the traditional exegesis of Islam, and 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.\(^\text{19}\) Thus positioned, Kadivar tasked himself with undertaking the following: to demonstrate why traditional Islamic jurisprudence is incapable of solving the conflict, and to delineate the nature and the content of his proposed approach that promises to solve the conflict.

**The Incapacity of Traditional Islamic Jurisprudence**

It is customary for a contemporary Shi‘ite jurist to claim that because the gate of ijtihād has remained open and because the rules governing ijtihād and taqlid require living mujtahids to engage in fresh ijtihād on all issues before them, Islamic jurisprudence (fiqh-i Islāmī) does not suffer from stagnation or inertia and is capable of dealing with all issues of life and meeting the needs of changing times and new phenomena.\(^\text{20}\) Kadivar noted that he himself studied and pursued his research for close to two decades with the same outlook. A series of his critical analyses on the theory of the “absolute rule of the appointed jurisconsult” (wilāyat-i intīṣābī-yi muṭlaqah-yi faqih) were all done within the

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\(^{18}\) Kadivar, Ḥaqq al-Nās, 8, 118f.

\(^{19}\) Kadivar, Ḥaqq al-Nās, 8.

\(^{20}\) See, for example, Muhammad Ibrahim Jannati, Adwār-i Ijtihād az Didgāh-i Madhāhib-i Islāmī (Tehran, 1993), 33f.
framework of traditional Islamic jurisprudence (fiqh-i sunnatī). In dealing with human rights issues as well, Kadivar initially sought to exhaust all the potentials of traditional jurisprudence. Then came his re-reading in the prison of the textual sources and fatwās issued by jurists from Shaykh Mufid (d. 1022) to contemporary marājiʿ al-taqlīd on the issue of various sorts of sharʿī punishment. After his release, he traveled to Qom to discuss his questions with some of the marājiʿ, including his teacher Ayatollah Montazeri. On what followed, Kadivar recounted:

In the year 1380 [2001], I plainly outlined the conflict that traditional jurisprudence had with The Universal Declaration of Human Rights in two pages and sent my questions to one of the most important teachers [in Qom]. I waited for several months, followed the matter up, and it became definite that traditional Islamic jurisprudence could not be expected to solve this difficulty and that accountability (pāsekhgūʾī) rested on establishing new jurisprudence. [My] teacher graciously encouraged [me] to pursue accountability, but with a recommendation for caution.

For Kadivar, by mid-2001, the problem was clear. The fundamental conflict with modern human rights norms is found not only among the technical opinions (namely fatwās) issued by a majority of the jurists in the traditional legal schools, but also within the religious text (matn-i dīn) itself. That is, some of the verses of the Qurʾān and many credible narratives of the Prophet and the Imams conflict fundamentally with the philosophy (andīshīb) of modern-day human rights. From the standpoint of traditional jurisprudence, therefore, the modern human rights regime that believes in equal individual rights for all humans—and thus negates the legal distinction (tabīd-i ḥuqūqi) that Islamic jurisprudence notably prescribes between Muslim and non-Muslim, man and woman, and free person and slave—is “an anti-Islamic regime and in contravention of the noble Qurʾān”.

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22) Kadivar, Haqq al-Nās, 137.
23) Kadivar, Haqq al-Nās, 115f. These are the first three of the six critical areas that Kadivar identified in his 2003 interview as those areas in which the views of traditional Islam and
an issue, in Kadivar’s account, when a Muslim allows the philosophy of human rights into her or his consciousness and realizes “what deep conflicts answers must be given to”.24

Kadivar then likened what he termed historical Islam to a paradigm. The modern human rights regime can be considered likewise. Each of these paradigms possesses certain bases and premises, as well as a core concern, or “anxiety” (daghdaghih) in the contemporary Iranian parlance.

Traditional Islam […] has a specific rights regime with its special bases and premises […] [That] rights regime in which religion, sect, and belief take precedence over humanness of humans or gender takes precedence over humanness […] had begun with sketching the world and human being in a specific way and then, on the basis of those views of the world and human being, accepted [those] accounts that are connotative of legal discrimination […] It is clear, therefore, that the philosophy of human rights cannot be mixed together with a rights regime that, in terms of its bases and premises, conflict with itself […] Traditional Islam, first, believes that in each of its three collections [the text of the Book of God, the Sunna of the auliya’ of the religion, and the technical opinions of religious scholars] the conflict with the philosophy of human rights is final, and second, for this reason, considers [that] philosophy invalid and rejected. The conflict is not partial, superficial or preliminary; it is serious and deeply-rooted […]25 Accepting one regime requires negating the other.26

As for the “anxiety” of traditional Islam, Kadivar noted that since it is not human but God that is the focal point of its discussion about religion, this anxiety has been to come to know and observe the divine obligation (shinākhb wa ri’āyat-i taklīf-i ilāhī) that God created.27 Yet the traditional exegesis of Islam comes with its fundamental epistemological, religiological and anthropological premise that human reason the human rights norms are incompatible. The other three are (4) inequality between commoners and jurists in the public sphere, (5) freedom of religion and belief, and (6) the punishment for apostasy, and extrajudicial and violent punishments and torture. See Kadivar, Haqq al-Nās, 85-114.

26) Kadivar, Haqq al-Nās, 123.
27) Kadivar, Haqq al-Nās, 118.
human reason is incapable of comprehending the all-embracing criteria of justice. Here, even though Imami Shi’ite scholars theologically have acknowledged, as did the Mu’tazilites, their belief in the justice of God. Kadivar argued, Shi’ite jurists have practically followed “the Ash’arites’ manner” (shiwihi Ashā’irah) in limiting the means with which humans acquire knowledge of justice and injustice to the expositions of the Lawgiver (bayānār-i shārī’i muqaddas). This makes it impossible for human reason to independently discover what the traditional jurists call the “real rights of humans” that God has taken into account while issuing the “real” shari’a precepts. Another limitation on the capacity of human reason was postulated in the area of legislation regarding earthly life. In the traditional exegesis, this premise was even used as a basis for demonstrating the necessity of the Prophetic mission. The same premise also made it evident, in the paradigm of historical Islam, that the divine obligation and shari’a precepts are superior to laws enacted by humans, including modern human rights norms.

The second fundamental premise of traditional Islam is that the entire shari’a precepts that the jurists have deduced from the text of the religion are “fixed” (thābit) and “eternal” (hamishigi or dā’imi) in nature. This premise has a two-part corollary. On the one hand, it has generated the importance attached to the science of Islamic law as compared to other Islamic sciences including ethics, theology, Qur’ānic exegesis, history and philosophy. On the other hand, it has led to the emphasis on the transmitted and revelational sciences (‘ulum-i naqli wa shari‘i) at the expense of the rational and mystical (‘aqli wa shubūdī) ones. Traditional Islam also postulates that the human being, in his essence (fi ḥadd-i dhāti-hi), lacks nobility or dignity, even if he is potentially of noble material. To the extent that he moves closer to the axis of dignity and nobility, he becomes the holder of status; to the degree that he moves further from this divine axis, he will fall in status. In this setup, therefore, speaking of equal (or identical) essential rights for all humans is considered futility and even injustice (ẓulm).

28 Kadivar, Ḥaqq al-Nās, 120f.
29 Kadivar, Ḥaqq al-Nās, 121. Shubūd denotes a mystical or spiritual experience.
30 Kadivar, Ḥaqq al-Nās, 121f.
therefore, are among the self-evident (badīḥiyāt) and immediate necessary knowledge (darārīyāt-i sharʿ) in traditional Islamic jurisprudence and one of the prerequisites of the traditional exegesis of Islam.31 Evidently the bases and premises of modern human rights norms are quite antithetical. If we consider the norms of innate equality and other basic human rights the end result derived by what can be called the “collective human reason” from historical experiences of all human beings, the above mentioned incompatibility between the two paradigms may be duly concluded.32

The incompatibility as legal regimes on the foundational level does not necessarily mean that nothing can be done under the framework of traditional Islamic jurisprudence to redress certain human rights problems, especially on the practical level. As mentioned, usūli scholars attribute the presumably unique capacity of Shiʿite jurisprudence to deal with emerging issues to the continued practice of ijtihād, as established by ʿAllamah Hilli (d. 1325) and reaffirmed by Wahid Bihbahani (d. 1790 or 1792). Ijtihād in its conventional Imami Shiʿite jurisprudential sense denotes “expenditure of efforts by a faqih in order to acquire an opinion (ẓann) on a sharʿi value (ḥukm)”, or “efforts at deducing a sharʿi precept from the valid indicators of sharʿa” (kushish dar istinbāṭ-i ḥukm-i sharʿi az rāy-i adillah-yi muʿtabarah-yi sharʿiyah).33 It is a reasoned effort by a knowledgeable specialist to state the substantive law called aḥkām-i farʿiyah-yi sharʿiyah (literally, derivative precepts of sharʿa), which as practical divine obligations are believed to affect the believers’ fate in the afterlife. The Shiʿite discipline of usul al-fiqh (legal theory; literally, the principles of jurisprudence), as a collection of general principles and regulations governing how the legal precepts are deduced from the valid sources, has been further developed during the last two centuries after Shaykh Murtada Ansari (d. 1864) introduced newly formulated distinctions and principles. One of these new ele-

32) Ibid., 119, 121f.
ments was what is known as the secondary precepts (ḥākām ʿthināwiya), which stipulate obligations in case of unusual and exceptional developments. Kadivar did acknowledge that certain principles of secondary precepts, such as “difficulty and hardship” (ʿusr wa ḥaraj), “emergency” (idṭirār) and “[not] weakening Islam” (waḥn-i Islām), may be resorted to, for example, in a wife’s effort to obtain a divorce ruling from the court or the judicial authorities’ decision in halting the execution of certain problematic punishments.

Yet, even when they occur, these only represent exceptions and minor discretional adjustments, leaving intact the fundamental difficulty that Kadivar has identified. The problem is that the conflict with the modern norms of human rights are found among what traditional Islamic jurisprudence has considered the “fixed” and “eternal” precepts of shariʿa. Hence Kadivar’s assertion in his 2003 interview that traditional jurisprudence would not escape from this stalemate unless it fundamentally reconsiders its criteria and foundations. He then declared that “practicing ijtihād [only] for obtaining derivative obligations of shariʿa (ijtihād dar furūʿ) seems to have reached the end of its historical life”.

The Proposed Approach

Kadivar’s proposal to establish new Islamic jurisprudence, as examined above, followed his determination that efforts need to be made to fundamentally rethink the foundations and premises of the conventional exegesis of Islam and to devise the framework of an alternative exegesis. The new jurisprudence, therefore, is to constitute only a component—albeit of central importance—of a larger proposal for shifting the focus of human exegesis of Islam away from those teachings of Islam and texts of the religion that the jurisprudence of interpersonal relations and transactions (fiqh-i muʿāmalāt) has traditionally dealt with to those teachings that concern matters of faith, ethics and devotions (umūr-i

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35) Kadivar, Ḥaqq al-Nās, 128.
37) As such, it goes much beyond what is known as dynamic fiqh (fiqh-i pūyā) in postrevolutionary Iran.
imānī, akhlāqī wa 'ibādī). The proposed shift, which is to involve re-reading the accounts of the religion contained in the Makkan verses of the Qur’ān and the narratives of the Prophet in the Makkan period and of Imam ‘Ali more centrally than those contained in the Madinan verses and some of the narratives of the Prophet in the Madinan period and of the other Imams, will culminate in stressing the “meaning and the spirit of the religion” (ma’nā wa rūh-i dīn), the “purpose of the Prophetic mission” (hadaf-i ba’that-i piyāmbar), the “exalted objectives of sharī‘a” and, above all, the “exalted goals of the religion” (ghāyāt-i muta‘āli-yi dīn). Kadivar named his exegesis “spiritual and goal-oriented Islam” and characterized it as a “new-thinker” (or an intellectual) narrative of Islam. The proposed new approach contains, among others, the following three distinguishing features.

First, the new approach offers to fundamentally revise the epistemological, religiological and anthropological bases and premises of the traditional exegesis of Islam. If the focal point of the traditional exegesis was God and its “anxiety” was centered around discovering and observing the obligations enacted by Him, the new approach may be characterized as human-centered in comparison. It seeks to trust human beings more and accord to them the right to free choice. Its notion of human capacity is modeled after the modern conception of a human equipped with “critical reason” (‘aql-i naqqād), with the scope of relevant discussion of reason not limited to that of the traditional Mu’tazilite and Imami conceptions of independent rational principles (mustaqillāt-i ‘aqliyah) and the intelligibility of good and evil (ḥūsn wa qubh-i ‘aqlī). As for its understanding of religion, the new approach seeks to treat the “religion [of Islam] as religion” with a central focus on its spiritual side. It scales down both the realm of religion and the high expectation of religion. Kadivar contends that religion answers “specific needs of human[s], not all human needs” and that the proper expectation of religion ought to be “faith, righteous conduct and human

38) Kadivar, Haqq al-Nās, 138f.
41) Kadivar, Haqq al-Nās, 8, 31ff., 139, 151f., 289.
43) Kadivar, Haqq al-Nās, 144f.
development” (imān wa ‘amal-i šāliḥ wa insān-sāzī), not solutions to all problems of human societies. Although smaller outwardly, argued Kadivar, the new realm is to become “closer to the real realm of religion” and significantly deepened.  

These conceptual shifts are to lead to a new way of thinking about rights of humans: the conceptions of the intrinsic rights of human beings (ḥuqūq-i dhātī-yi insān)—or rights of human beings as human beings—and the rights of human beings as “subjects belonging to the reasonable people and prior to religion” (umūr-i ‘uqlā’î wa ma qabla dīnī).46

Second, the new approach offers to identify the source of, and the method to overcome, the principal challenge that contemporary Muslim religionists face. The proposed approach begins with the premise that in historical Islam, the sacred and timeless message of the divine revelation has been mixed with the “custom at the time of its arrival” (ʿurf-i ‘aṣr-i nuzūl) and that all the problems that have entered into the traditional exegesis of Islam in the modern age relate to this “customary part” (bakhsh-i ‘urfī) of traditional Islam. The problem is compounded because, as discussed above, the traditional exegesis of Islam has treated the entire derivative precepts of shari‘a, which the jurists have deduced from the text of the religion through ījtihād, “fixed” and “eternal” in nature. As examined above, after 2001 Kadivar came to fundamentally question the efficacy of the conventional ījtihād (ījtihād-i muṣṭalih), or ījtihād dar furū‘, as well as some of the bases of Islamic legal theory (uṣūl al-fiqh). As the central feature of the proposed new jurisprudence, the alternative named “ījtihād in bases and principles” (ījtihād dar mabānī wa uṣūl) aims at “extracting once again the sacred message and push aside the sediment of [the revelation-era] customs”.48

45) Kadivar, Ḥaqq al-Nās, 93, 100, 144.
46) Kadivar, Ḥaqq al-Nās, 10.
47) Kadivar, Ḥaqq al-Nās, 138. The process of this mixture is explained with the distinction between two types of shari‘a precepts: abkām-i ta‘lisī (those that Islam newly introduced) and abkām-i imdā’ī (those customs of the time that Islam signed on with or without reform). Both types of precepts have been considered obligatory for they have been enacted and “accepted” (or not rejected) by the Lawgiver, respectively. Kadivar, Ḥaqq al-Nās, 150.
48) Kadivar, Ḥaqq al-Nās, 134f., 137f.; also 146.
Thequestionishowonedistinguishbetweenthese two. Relying on commonly accepted but underutilized juridical distinctions available in usūlī Shiʿite jurisprudence and legal theory, Kadivar proposed the following. First, starting from the premise that all precepts of shariʿa have been enacted by the Lawgiver in accordance with the interests of the servants of God (maṣāliḥ-i ‘ibād)—namely the benefit and harm to humankind (maṣlahat wa maʃṣadah-yi nauʿiyah)—Kadivar argued that shariʿa precepts divide into two kinds, (1) those precepts whose benefits or harms are permanent such as the obligation of fairness and the prohibition on injustice and treachery and (2) the precepts concerning actions whose goodness (ḥusn) may change into mischief (qubh) or vice versa. Put differently, a precept of the second type may be good and have benefit (maṣlaḥat) in one condition, but may be mischievous (qabīḥ) and lacks benefit in another. Kadivar then goes on to argue that a majority of the shariʿa precepts regarding interpersonal transactions (ahkām-i sharʿi-yi muʿāmalāt) are of the second type—that is, “possessing benefit under certain conditions of time and place and legally valid (sharʿan muʿtabar) as long as that benefit is being received (dar ṣarfi kih in maṣlaḥat istīfā mī-shavād)”—and that the conflict between shariʿa precepts and the philosophy of human rights occurs only with regard to the second type of precepts.49

Kadivar then makes the following two-fold argument. On the one hand, even though the traditional jurisprudents have considered them “fixed” and “eternal” and therefore permanently obligatory, it is clear from the fact that their benefits fluctuate and sometimes expire that the Lawgiver has enacted the second type of shariʿa precepts in ways “temporary and limited to the continuance of certain conditions” (muwaqqat wa muqayyad biḥ baqā-yi sharʿīf).50 On the other hand, whether or not the benefit of each shariʿa precept of the second type has expired (muntafī shudīh) can be discovered by seeing whether the said obligation (namely precept) meets the following three criteria: being reasonable (ʿuqalāʾi būdan), being just (ʿādilānīh būdan), and being better than

49 Kadivar, Ḥaqq al-Nās, 140.
50 Kadivar, Ḥaqq al-Nās, 140.
the alternative solutions offered by other religions (bārtar az rāḥ-ḥall-hā-yi dīgār-i adyān wa makātib būdan). Kadivar argued:

The three conditions, being reasonable, being just and being better than the alternative solutions offered by other religions, are not [exclusive to] the conditions of the arrival [of the divine revelation]. Rather, in any age, non-devotional precepts of shari`a must conform to the custom of the reasonable people (`urf-i `uqalā`) of that age according to the three criteria above. The definite conflict (mukhālafat-i yaqīnī) of a precept with the manner of the reasonable people (sirāb-yi `uqalā`) of our age, the incompatibility with the yardsticks of justice in our age, or being surpassed by the solutions of the modern age is an indicator (kāshif) of the temporary and non-eternal and, in a sense, abrogated nature (mansūkh shudan) of that precept.

It is critical to note that, although their identification may be the product of “ijtihād in principles”, all three of these criteria are to be considered independently of the transmitted knowledge of the religion. For, in Kadivar’s argument, “justice” (`adālat; in Arabic `adāla) constitutes one of the most important determinants (shākhiṣ-hā) of a precept’s benefit to humankind, or the basis of its postulation (that is, its enactment). In the `adliya school (namely the Mu`tazilites and the Imami Shi’ites), he contended, justice is definable and knowable independently of religion (mā qabla din). Then whether or not the benefit of a shari`a precept has expired may properly be determined, independently of the text of the religion, on the basis of the “manner of the reasonable people” of the age. The latter, to Kadivar, represents “collective reason of humanity” (`qāl-i jām`-yi ādamiyān). Kadivar, therefore, suggested that the task of determination as to whether a shari`a precept meets the three criteria ought to be assigned not exclusively to mujtahids, but to the “customary knowledge” (`urf) of `ulamā` and qualified specialists in various disciplines of “human” sciences.

51) Kadivar, Haqq al-Nās, 31, 145, 290f. The determination of these three criteria may be said to be an outcome of ijtihād in principles.
52) Kadivar, Haqq al-Nās, 145.
53) Kadivar, Haqq al-Nās, 140.
54) Kadivar, Haqq al-Nās, 31f., 288f.
55) Kadivar, Haqq al-Nās, 9, 122, 139.
56) Kadivar, Haqq al-Nās, 32; also 147.
Third, the new approach offers to place an utmost emphasis on the spiritual side as well as the goals (ghāyāt) of the religion and shari‘a. The proposed approach offers to treat the matters relating to faith, ethics and devotions as the “principal frame of the divine religion” (paykarih-yi ašli-yi dīn-i ilāhī). It relates the purpose of the Prophetic mission and the spirit of Islam to the purification and calming of the soul with noble ethical values and to God-fearing piety (taqwā).

In accordance with this reemphasis, the new approach offers to redefine religiosity (dīn-dārī) as “knowing and realizing the spirit of the religion and objectives and goals of Islam”. The redirected focus on spiritual matters is, in part, the direct result of downscaled expectation and the resizing of the proper realm of region, which in turn resulted from the fundamental review of religiological premises. No less important, it is the antithesis of what Kadivar called “historical Islam” in which an “indescribable importance” was given to non-devotional matters—namely interpersonal transactions—and, even in matters relating to faith and devotions, the juridical mold and form (qālib wa ṣūrat-ī fiqh) overshadowed other dimensions of this “indivisible part” of the religion.

Kadivar charged that those who have regarded the derivative precepts and practical molds of shari‘a as higher than the purposes and goals of the religion and interpreted the custom of the past—albeit that of the arrival [of the divine revelation]—as something sacred have become distanced themselves from the rightful ijtihād exactly because they kept the sacred goals of the religion and the exalted purposes of shari‘a stalled.

Precepts were meant to be only the “path” (tariq) to reach the goals, contended Kadivar, but the traditional jurists made them into the subjects in and of themselves (maudū‘iyat). Kadivar summarized his point succinctly: “Shari‘a precepts are desirable [only] incidentally, whereas

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57) Kadivar, Ḥaqq al-Nās, 139.
59) Kadivar, Ḥaqq al-Nās, 16.
60) Kadivar, Ḥaqq al-Nās, 139.
61) Kadivar, Ḥaqq al-Nās, 146.
the exalted goals of the religion are intended in themselves” (ahkām-i sharʿi maṭlūb bi-l-araḏ wa ghāyāt-i mutaʿālī-yi din maqṣūd bi-l-dhāt).

3. Critical Discussion

The points of contention. As examined above, Kadivar defined the principal challenge for the modern Islamic religionist as the need to reconcile the conflict between some of the accepted religious accounts and modern human rights norms. The solution he has offered critically hinges on the possibility of abrogating certain sharʿa precepts deduced by the traditionalist mujtahids from the credible indicants of sharʿa, declared as eternally obligatory, and widely accepted as such by the followers of traditional Islam. The mere possibility of such abrogation (naskh) appears highly controversial. After citing from the Buyid-period Imami jurist Shaykh al-Taʾifa Hasan al-Tusi (d. 1067) to the effect that the injunctive precepts (awāmīr wa nawāḥi) of sharʿa are obligatory only as long as their benefit (mašlaḥa) lasts, Kadivar in 2003 asserted the following:

The majority of injunctive precepts and declaratory precepts (ahkām-i waḍʿī) found in the Qurʿān and the Sunna are of the second kind, that is, although [their] indicant language (lisān-i dalīl) is absolute and not limited, in the real world of existence (dar ʿālam-i thubūt wa wāqiʿ), they are conditional and limited to the continuance of the benefit and time-bound by the duration of the existence of that benefit.

Kadivar seems to suggest that quite a few sharʿa precepts may have to be abrogated in the modern age, a development with quite an impact if it is materialized. The issue is not his contention that not all Qurʿānic precepts are fixed and eternally valid. It is an accepted principle, or a necessity, in the traditional discipline of Qurʿānic exegesis (tafsīr) that some verses may be abrogated by some other verses of the Qurʿān,

\[\text{\textit{Kadivar, Haqq al-Nās}, 31, 146.}\]

\[\text{\textit{Not an obligation in itself, hukm-i waḍʿī is a juridical value that specifies a situation (maudāʾ) or an institutional ground (zamīnih) from which a variety of obligations subsequently flow.}}\]

\[\text{\textit{Kadivar, Haqq al-Nās}, 141.}\]
namely some of those verses revealed later during the lifetime of the Prophet. The controversial aspect lies in Kadivar’s assertion—in its more technical formulation—that a rationally derived precept with a definite indicant (*ḥukm-i ʿaqli-yi yaqini*) is capable of abrogating a time-bound precept of *shariʿa* even when the latter has a valid transmitted indicant (*dalil-i muṭabar-i naqli*) in the text of the religion. Kadivar’s reasoning is, again, that if the precept in question contradicts a rationally derived precept with a definite indicant, it means that its *maṣlaḥat* “has ceased to exist” (*muntafi shudih ast*) and “its obligatory status is no longer active”. 65 Within the framework of conventional or traditional Shiʿite jurisprudence, however, this argument is likely to encounter serious difficulties and unlikely to be accepted. Even though the dispute may be a matter of degree, not of principle—as Kadivar suggested—since all *usuli* Shiʿite jurists recognize the authority (*ḥujjat*) of human reason, the gulf seems quite wide. 66 As a way to possibly allay the fear of the traditionalists and help persuade hesitant mujtahids, Kadivar suggested the idea of a temporary abrogation in lieu of a permanent one, arguing that the issue of temporary abrogation is not unheard of in the Qurʾānic sciences. 67

Although discovering those *shariʿa* precepts whose benefits are found to have been time-bound and separating them from the truly eternal precepts seems its immediate (and possibly principal) objective, 68 the “*ijtihād* in bases and principles” that Kadivar has proposed appears somewhat more broadly conceived. One of the purported reasons for


66) Ibid. For example, Ayatollah Montazeri, in 1999, argued as follows: “the basis (*ma bn ā*) of the precepts of Islam is not only reason […] the profound basis of the precepts of Islamic jurisprudence, including those relating to interpersonal transactions […] is the Qurʾān and the Sunna, even though we ultimately attain the authoritative quality (*ḥujjīyat*) of the Qurʾān and the Sunna rationally (*az rāh-i ʿaql*). Then we have no right to unilaterally push aside […] the outward text (*zawāhir*) of the Qurʾān and the Sunna and precepts with definite [transmitted] indicants that have been interpreted by […] the infallible Imams and reached us hand in hand […]”. See Hossein ‘Ali Montazeri, “Bāb-i Mafṭūḥ-i Ijtihād”, in *Didgāh-hā*, vol. 1 (Qom, 2004), 111-122 at 120. This article was originally published in monthly *Kiyān* in its issue no. 47 as a response to a letter from ‘Abdolkarim Sorush.


proposing new jurisprudence was, as discussed above, to practice *ijtihād* beyond its conventional confines of derivative and practical precepts (*furūʿ-i ʿamali*). In an earlier effort, Kadivar suggested a multi-step process of *ijtihād* involving criticizing the conventional indicants of *sharīʿa*, re-deriving what he called the “foundational norms” (*dawābit-i bunyādī*) of the Qurʾān and the Sunna, and conducting renewed *ijtihād* based on those authentic norms (*dawābit-i aṣīl*). In this way, although its outcomes are still in the form of “juridical or *sharīʿa* precept” (*ḥukm-i fiqhī yā sharīʿ*), the domain of *ijtihād* will encompass the “entire Islamic teachings and sciences”. While the extent to which rational indicants are utilized is expected to widen, the Qurʾān, the Sunna and *ʿaql* (reason) will remain as the principal sources (*manābiʿ*) of *ijtihād*, a standard unchanged from what is common in conventional *uṣūl* Shiʿite legal theory. Similarly, the proposed *ijtihād* is not expected to change the core principles of faith (*uṣūl al-dīn*), namely *taḥīd* (God’s unity), *nubuwwat* (prophethood) and *maʿād* (return).

Another point of contention seems to lie in his conception of the “intrinsic rights of human being[s]” (*ḥuqūq-i dhātī-yi īnsān*). If the meaningful discussion of human rights becomes possible only with the introduction of the concept of intrinsic rights, or natural right (*ḥaqq-i ṭabīʿi*), of human beings as Kadivar himself seemed to suggest, the whole human rights business may well be considered something alien, or even heretical, in the traditional framework of Islamic law. For, as Kadivar argued, all that is meant by right (*ḥaqq*) in Islamic law and some other religious sources is “divine obligation and ethical duty of human being[s]” (*taklīf-i dīnī wa waẓīfah-yi akhlāqi-yi īnsān*), and “fundamentally differs from its conventional usage in the human

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69) Kadivar, _Ḥaqq al-Nās_, 182f.
70) Kadivar, “Pursīsh wa Pāsūkh darbārhī-yi ʿIṣřīḥād dar Uṣūl”, personal communication with this author (7 August 2010).
71) Kadivar, _Ḥaqq al-Nās_, 147. *Ijmāʿ* (consensus) as reflecting the opinions of the Imams is not independent of the narratives of the Prophet, although often counted as one of the four sources of *sharīʿa* precepts in Shiʿite legal theory. Therefore, in *uṣūl* Shiʿite jurisprudence and legal theory, the Qurʾān, the Sunna, and *ʿaql* are considered of critical importance.
sciences and human rights [discourse]. If so, is it not the case that any new exegesis of Islam that is compatible with the modern norms of human rights is also an unwanted innovation (bid'a)?

Kadivar’s argument has been that it is not so for the following two reasons. On the one hand, the proposed exegesis remains squarely in line with the original “meaning and goals” of the religion, “purpose of the Prophetic mission”, and “goals” of shari’a. While his is an exegesis of postrevivalist, and thus slimmed-down, Islam, Kadivar has argued that its principal part, or its “religious side” (dīn-būdan-i dīn), is kept intact. He has contended that even though his new exegesis will make the realm of religion smaller on the surface, it will become significantly deepened by getting closer to the real realm of religion (qalamrū-yi waqi’i-yi dīn). He has also suggested that those things that have become incompatible with the new standards of the age are intentionally taken out of the realm of religion so as to keep the religion intact.

On the other hand, Kadivar made the case that modern human rights norms are of supra-religious quality, being the end product of critical collective reason of humanity in the modern era. As such, Kadivar contended, they remain:

unconditioned by any religion in the public sphere. Those rights have been laid down for humans as humans before they find [any] belief in this religion or that sectarian belief […] The philosophy of human rights is neither atheistic nor monotheistic.

However, by taking the issue of human rights out of the realm of religion or bestowing a “prior to religion” quality on it, Kadivar seems left with few connections between his conception of the rights of human beings and the Lawgiver, except the existence of benefit (maṣlaḥat). What Kadivar has proposed, then, is not an Islamic conception of human rights. It is, rather, an Islamic conception of compatibility between religious faith and the philosophy of modern-day human

73 Kadivar, Haqq al-Nās, 88.
74 Kadivar, Haqq al-Nās, 30.
75 Kadivar, Haqq al-Nās, 16.
76 Kadivar, Haqq al-Nās, 30.
77 Kadivar, Haqq al-Nās, 122f.
rights, a significant departure from the standard Muslim approaches to the subject.

Another question is: if the conflict between the traditional exegesis of Islam and the manner of the reasonable people in the modern era is indeed fundamental as it so appears, then is it not the case that there is a fundamental conflict between the traditional exegesis of Islam and Kadivar’s new exegesis, which is compatible with the custom, manner of the reasonable people, and “new proprieties” (munāṣibāt-i jadid)\(^78\) of the modern era? This seems to indicate what an uphill struggle Kadivar may be engaged in. To be sure, Kadivar’s approach to removing the perceived difficulties between religiosity and modernity has been quite logical. Whether this may gain ground, however, seems to depend ultimately on how convincing this is to his main audience, namely contemporary Muslim religionists (dīn-dārān-i muʿāṣir). The answer remains to be seen at the time of this writing.

4. Conclusion

Thus examined, Kadivar’s proposed solution to the perceived modernity-related problem for Muslim religionists was to place those religious accounts—together with some of the bases and premises that underlie them—that are seen as conflicting with the accepted norms of the day out of the realm of religion “properly” conceived. This is to be accompanied by the resizing of the expectation of the religion as well as the deepening of its principal realm. The proposed shift will also emphasize the meaning and spirit of Islam, the purpose of the Prophetic mission, and above all, the goals of the religion. The principal means by which to remove the perceived conflict between the religious precepts and the supra-religious norms was termed “ijtihād in bases and principles”. As the new exegesis has, in part, resulted from some fundamental rethinking about the bases and premises of traditional Islamic jurisprudence, the arrival of the new ijtihād was accompanied by the call to establish new jurisprudence.

\(^{78}\) Kadivar, Ḥaqq al-Nās, 122f.
So far, Kadivar has applied this new approach principally to make a case that faith in God, belief in the hereafter, and adhering to the teaching of the Prophet of Islam have, in themselves, no contradiction with the human rights approach. His message is: the philosophy of basic human rights can be whole-heartedly and foundationally defended by a believing Muslim.\(^79\) Given the deep-rooted conceptions of legal inequalities built within the framework of traditional Islamic jurisprudence, it is not a small achievement. The unique contribution that Kadivar has made in this direction seems to lie in his effort to propose an approach rigorous in its theological and theoretical foundations and usable with the three express criteria. His recourse to the underutilized \(\text{ʿadliya}\) theory of \(\text{maṣlaḥa}\) in the postulation of \(\text{shariʿa}\) precepts in conjunction with the supra-religiously conceived concepts of justice and reasonable convention appears to merit appreciation in particular.

It may be argued that the new exegesis that Kadivar has proposed is likely to have little appeal for those who see no difficulty becoming secular (in one sense or another) or remaining religious in its traditional sense. In the context of postrevolutionary Iran, however, his perspective seems to offer an extra benefit. As Kadivar suggested in the summer of 2001, for a reform movement—be it primarily social, cultural, or political—to gain momentum in that country, reform-seeking norms need to penetrate the dominant culture and be transformed into a cultural custom.\(^80\) Given the dominant role that the religion has played—and is made to play today—in shaping the public culture, reforming religious thinking does seem to constitute one of the pillars for the reformist movement in contemporary Iran.

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\(^79\) Kadivar, \(\text{Ḥaqq al-｝\text{Nās}\), 8.

\(^80\) Kadivar, \(\text{Ḥaqq al-｝\text{Nās}\), 15.