The American University in Cairo

School of Humanities and Social Sciences

WOMEN'S RIGHTS IN ISLAM: TWO REFORMIST APPROACHES
ABDULLAHI AN-NA'IM AND KHALED ABOU EL FADL

A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law

By

Mohamed Sayed Sultan

May 2006
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To her
To the one who held my hands seconds before she passed away and said:
"If it were up to me, I'd have lived for you forever."
To her, and to no one else,
I dedicate this paper.
To my mother…. peace be upon her.
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ABSTRACT
American University in Cairo
Women's Rights in Islam: Two Reformist Approaches
Presented by Mohamed Sayed Sultan
Supervised by Assistant Professor Naz K. Modirzadeh

The paper examines two different reformist approaches to Islamic law in general and women’s rights in particular. Abdullahi Ahmed An-Na’im and Khaled Abou El Fadl are chosen as the focus of this study because of their respective innovative approaches to a historically controversial issue. The focus is on the Qur'anic verses and various definitive texts in Qur'an or al-nass qati al-delalalih. Discussed is the historical context of the scholars’ interpretation of the Qur'anic verses; the relationship is between the historical context of the Qur'anic verses and the occasions for which the Qur'anic verses were revealed to the Prophet; any differences between their methodologies on this issue; how the traditional Qur'anic texts are used in their interpretations; and finally, the problems which they try to incorporate. This is then applied to the question of women’s rights.

The methodologies of the reformist approaches make a case for a fuller understanding of the restrictions arising out of reform, definitive text, and the methodologies that seek consensus while avoiding conflict and integration of Sharia with human rights. The methodologies presented appeal to the elite, and those who are interested in the reform of Islamic law and the Islamic discourse. The average Muslim is not exposed to such theories; the discourse in the media tends to be outside much of the reformist debate.
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Opening

This is a definitive text. You do not have the right to interpret this verse differently than the old Islamic jurists scholars did. In addition, you are not entitled to interpret the verse, as you like. It is a clear, obvious text and it does not even need to be interpreted.

This was an extract from a rigid and challenging conversation that occurred in one of the classes, which I attended during my study at the American University in Cairo, in the summer of 2003. It was a comment on my understanding of one of the verses in the Qur'an discussing the position of women in Islam. I attempted to give a modern understanding of this verse relying on my comprehension of Islamic values and of Islam in general. From this moment, it was decided to focus on the controversial relationship between Islam and human rights, which I was already familiar with from my experience in the field of human rights. This is a complicated and controversial subject, and innovativion is required. The decision to write my final paper in this course about “Islam and Human Rights: Mechanisms for Reconciliation” was then taken.

The paper was a journey to discover other mechanisms which Muslims can depend on, whether they are Sunni or Shiite, to alleviate the tension between Islam and human rights. Perhaps these mechanisms would not solve the contradictions between Islam and human rights completely, but at least perhaps they would help explore ways to reconciliation. This paper discussed the wisdom of the gradualness of the Qur'anic revelation for a period of 23 years. Discussed also is the abrogation of some of the verses or (al-nasikh waal-m ansukh) and how it can be helpful to introduce new interpretations for the modern understanding of the Qur'an. Then the relationship between the occasions for which the Qur'anic verses were revealed to the Prophet (asbabal -nuzul) and the historical context
which most of the moderates call for now is examined. Discussion on how Omar Ibn El-Khatab, the second Rightly Guided successor of the Prophet interpreted and understood Islam, depending on the spirit of this religion and the values, which are embodied in its teachings, is introduced. Finally, after these theoretical aspects, practical implementations are discussed. What is the impact of all this debate on human rights activists? How can human rights activists use these mechanisms in developing their tools? Why should human rights activists inspire these mechanisms to solve their permanent problems in the Islamic texts? These questions are examined in this context.

Completion of this research paper reinforces the research's belief that endeavors of reconciliation can be achieved but it requires considerable and dedicated effort. Nevertheless, the more this issue is discussed and debated, the more the real danger and difficulty behind it is exposed. It is not that easy to accomplish such reconciliation, not because of the impossibility of it, but because of many political, legal, social, psychological, and religious reasons. However, there was a certain starting point in order to achieve harmony and agreement between Islam and human rights, a weapon to carry in order to fight against fanaticism and extremism.

**Definitive text**

The definition of the "definitive text" or *al-nass qati al-delalah* was the starting point. It is a central definition in the Qur'an's Sciences. All the debate around human rights and Islam relies mainly on this definition. The importance of this definition comes from the importance and the centrality of the Qur'an.
The Qur'an enjoys a central status in Muslims lives, from the emergence of Islam till the present. It is undeniable also that the Qur'an was the pillar, on which the Arab Islamic Civilization relied. Muslims have believed, since the emergence of Islam till the present time, that the Qur'an was God's revelation to His messenger. They believe that it is a Scripture which never changes but is ever changing. It includes "an exposition of all things"\(^1\) and "We have neglected nothing in the Book (of Our decrees)."\(^2\) It is a Scripture relevant, applicable, and valid for all times and places. Those who follow it are winners and the negligent are losers. Therefore, the Arab Islamic civilization has been described by some as being a "hadarat al-nas" or "Text Civilization"\(^3\) – due to the distinguished status of the Qur'an in this culture.\(^4\) Muslims should adhere to, take faith in all the prescriptions included therein, and submissively accept all the dos and don'ts stipulated by the Qur'an. There is no room for reluctance or rethinking "any provision, principle, value, or commandment of what is set forth in the Qur'an."\(^5\)

The focus on the Qur'an is the primary one because it is a Scripture whose validity is agreed upon by all Muslims; East and West, Sunni and Shiite.\(^6\) Such consensus is not available with any other sources of the Islamic Shari'a. There is an evident schism among Muslims as to the authenticity of the prophetic hadith, especially among the Sunni and Shiite. Each sect has its own authentic hadith references, not agreed to by both

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1 Surah 16, An-Nahl, verse 89, Translation of the Qur'an by: Muhammad Marmaduke Pickthall.
2 Surah 6, Al-An'am, verse 38, Translation of the Qur'an by: Muhammad Marmaduke Pickthall.
4 It was not strange to appear groups of researchers from all the Arab Islamic countries call for believe in Qur'an and leave the other religious and divine scriptures, which is the trend that we do not agree with. It reveals the strength and the centrality of the Qur'an in the Islamic religious thought. This status is incomparable with another religious text in Islam. AHMED SOBH MANSOUR, , AL-QURAN WA KAFAR
6 My stress on the Qur'an here is not for the same reasons, which Christopher Melchert mentioned in his article about the Islamic law. See Christopher Melchert, Islamic Law, 23 Okla. City U. L. Rev. 908 (1998).
groups. The focus is on the Qur'an, as it is the unique Arabic Book used by all Muslims worldwide. It is a book with which Muslims spent their most of their lives attempting to interpret its verses, meditate its connotations, and abide by its prescriptions. The Qur'an is a rich book teaming with references and allusions. It is truly as described by Imam Ali "of various meanings, hence emerged the numerous interpretations resulting in the intellectual and cultural richness of the Arab Islamic culture.

Among all the Qur'anic verses the focus is on"definitive textual rulings in the Qur'an" – the texts that are evidently explicit and do not necessitate interpretation as per El Shafi’ renowned book Al Risalah (The Message). The significance of such texts is due to their evident explicitness– according to the fundamentalists – and their evident contradiction with the international human rights instruments.

Such a topic, completed to satisfaction, is beyond this paper. This paper will be a critical analysis of two of the more prominent scholars who have devoted their life and careers to human rights and Islam, Abdullahi Ahmed An-Na'im and Khalled Abou El Fadl.
Introduction:

The Legal Reform Process

An-Na'im and Abou El Fadl were chosen as the focus in this study. A criticism and analysis of their perspectives in two main areas will be undertaken. How do they interpret the Qur'anic verses, and what are the methodologies, which they follow in order to interpret the Qur'anic verse? What are their positions on women’s rights in Qur'an?

It is fundamental to examine their role in the Islamic legal reform process which has continued since it began a century and a half ago. The process started in 1850, when “the first example in history of a codification of principles derived from the Sha i’ a but enacted as law by legislature”. The trends in Islamic legal reform and the modernization of Islam have continued, but significantly the dilemmas, problems, and weaknesses, remain the same. Consequently, family laws, the status of women in Islam, inheritance, riba or usury continue as dilemmas, which our modern scholars grapple with. The conclusion, which the observer or the analyst of the Islamic studies can draw, is that the calls for reform and ijtihad, which commenced in the middle of the 19th century, have missed the point.

It is significant on reflection, that there was an absent question during this process of reform. The absent question simply is what we mean by reform. I think that before we start talking about the importance of the Islamic legal reform we should first know what

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8 Id. at 6-12.
9 See KHALED ABOU EL FADL, SPEAKING IN GOD’S NAME, 171 (2001), and WAEL HALLAQ, AUTHORITY, CONTINUITY AND CHANGE, 126 (2001)
we mean by the word "reform". The determination of the meaning of reform must be one of our priorities as academics, scholars, sheikhs, or even average Muslims. There is an observable lack in this regard. Significantly, there is no consensus among Muslim jurists and scholars regarding the concept of reform.\textsuperscript{10} Interestingly, the discourse of reform since the last century until now, has repeated the same problems and dilemmas without dealing with the fundamental questions which we need to ask before starting the discussion about reform.\textsuperscript{11}

It is significant that most of the official authorities in the Muslim countries, in addition to conservative religious scholars, talk about "renewal in Islamic thought" or "renewal of the Islamic discourse."\textsuperscript{12} It is incredible that those who talk or discuss the "renewal in the Islamic fiqh field" are writing what has already been written. They do not have innovative approaches to face the challenges, which really face the Muslim societies. Their ideas are repetitive, their \textit{ijithad} are restricted, and their visions are limited.\textsuperscript{13} Most of the scholars spend their working life discussing the importance of \textit{ijithad} or renewal of Islamic thought without identifying, firstly, the meaning of renewal or reform.\textsuperscript{14}

Interestingly, some who discuss the meaning of renewal " give the word a very repressive meaning. This restricts the meaning of religious renewal, regressing to the

\textsuperscript{10} In this regard, you can compare between the positions of the modern scholars \textit{See} the papers of the above-mentioned conference. ‘Renewal in Islamic Thought’, the Supreme Council for Islamic Affairs, 209-760.

\textsuperscript{11} In this regard, we can compare between the efforts of Mohamed Abdou with our contemporary scholars, see \textit{id.} 209-760

\textsuperscript{12} This is the title of thirteenth general conferences of the supreme council for Islamic affairs which held in Cairo from 31 May to 3 June 2001. ADNAN MOHAMED IMAMAH, AL-TAGDEED FI AL-FIKR AL-ISLAMI, Dar Ibn Al-Gawzy.

\textsuperscript{13} Renewal in Islamic Thought, \textit{supra} note 10, 209-760.

\textsuperscript{14} \textit{Id.} at 35-206
form settled during the Prophet’s period, and returns the application on the people to the situation of the Muslims of the first three centuries.\textsuperscript{15} This means interpretation of the word and context is restricted to the period of the Prophet and its application restricted to the circumstances of the first three centuries of the Muslim community. Even the academic approaches to their work continue to restrain the characteristics of the renewal of Islamic thought. One of the academics referrers to these characteristics as the characteristics of stability. The stable fields in Islam, this argument goes, are focused on beliefs (\textit{al-`aqid}), the faithful realities, foundations, principles, the goals of \textit{Shari`a} values and general morals, worships, statutory penalties (\textit{hudud}).\textsuperscript{16} You find at the end of the day that there is nothing to be renewed! They restrict the idea of renewal or reform to just one thing, which is religious discourse.

\section*{The Role of An-Na'im and Abou Al Fadl in the Process of the Islamic Legal Reform}

Remarkably, both An-Na'im and Abou Al Fadl approach and discuss courageously the meaning of reform, and the way in which contemporary Muslims need to approach it in order for renewal, not only the religious thought but the religious understanding, values, morals, as well. It is of interest to see the ability of both of them in interpreting the Qur'anic verses from different perspectives but reaching the same goals and results. They do not discuss the branches, \textit{furu}, but they directly discuss the contradictions between some of the Qur'anic verses, and the modern dilemma, which face contemporary

Muslims. Their interests are focused on the clash, or the confrontation, between Islam as a religion and modernity as the way of our current life.

**Why focus on those two scholars?**

There are many similarities between An-Na’im and Abou El Fadl.\(^7\) They are both academics, have a legal background, have Islamic legal reform motives, and they have worked and still work in human rights. Furthermore, they teach Islamic law and human rights in two well-known universities in the United States. They have also worked as Visiting Professors of Law at the University of California at Los Angeles, and Abou El Fadl still works there. An-Na’im works in Charles Howard Candler Professor of Law at Emory Law School.

An-Na’im was a law student at the University of Khartoum, Sudan. His enthusiasm toward the Islamic reform forced him to join the Islamic reform movement of *Ustadh* Mahmoud Mohamed Taha in 1968. He continued to be involved in this movement until An-numari’s government suppressed it in December 1984 by.

Islamic fundamentalism taking a stronger hold of Sudanese society and politics, An-Na’im left the country in April 1985. Hoping to be able to return to Sudan, he held a series of short-term positions until the early 1990s, when it became clear that the Islamic fundamentalist regime that came to power through a military coup in 1989 was consolidating its position in the country. As a result, An-Na’im accepted the position of Executive Director of Africa Watch, now the African Division of Human Rights Watch, based in Washington DC, from June 1993 until April 1995. He joined the Faculty of Emory Law School in June 1995, was granted tenure in 1997, and became Charles Howard Candler Professor of Law in 1999.\(^8\)


\(^8\) See his biography, [http://people.law.emory.edu/~abduh46](http://people.law.emory.edu/~abduh46).
Abou El Fadl was born in Kuwait 1963 and raised in Egypt. He received his B.A in 1986; his J. D in 1989, and his PhD in Islamic Studies, in 1999:

Khaled Abou El Fadl is one of the leading authorities in Islamic law in the United States and Europe. He was named as a 2005 Carnegie Scholar in Islamic studies. His personal library contains over 6500 Islamic books and manuscripts, some dating from the thirteenth century. He teaches Islamic law, Middle Eastern Investment Law, Immigration Law, and courses related to human rights and terrorism. He works with various human rights organizations, such as Human Rights Watch and the Lawyer's Committee for Human Rights.  

Abou El Fadl is now presented in the West as one of the world’s preeminent, important, and influential Islamic thinkers in the modern age a critical and powerful voice against the puritanical and the Wahhabi, an accomplished Islamic jurist and scholar.  

Finally, they both have their political focus relying on their Islamic knowledge. They fight ignorance, fanaticism, and extremism. Their writings have become a war against the traditional understanding of Islam, which has often placed Islam in a regressive context.

The Motivation

The motivation which had driven the Muslim scholars in the nineteenth century and the beginning of the twentieth century, changed by the late twentieth century and the beginning of the twenty first century. The evolution of needs, style of life, and the currentchallenges in our contemporary world are some of the reasons behind these different motives. The changes of the purpose have also affected thetype and direction of reform, which Muslim scholars sought to achieve. While there were some ideas about reform, the need for a new legal methodology was not achievable. The growing reality

20 See the cover of his book The Great Theft.
faced by Muslim scholars in contemporary Muslim countries, forced them to seek new methodologies. While the needs of reform were met by some changes and amendments in the field of family law, the calls for reform in the late twentieth century have expanded the requirements for reform of Islamic public law in an accelerated manner. Moreover, these reform initiatives have emphasized the need for a modern humanistic interpretation of the Qur'an to meet the current changes and circumstances, which currently occupy Muslims. The requirement of a new methodology in Islamic law has emerged, and is vital for both Muslim societies and the average Muslim.\(^{21}\)

This move for reform requires examination of the motives of An-Na'im and Abou El Fadl in their work. The scope of An-Na'im's thesis is the reform of Islamic public law. An-Na'im believes that the application of the public law\(^ {22}\) of Shari'a would create severe problems and hardship. Simply, he submits Shari'a violates the rights of non-Muslims and deals with them as second-class citizens, and the status of women in a secular public law is different from, and superior to, their status in the Muslim societies.\(^ {23}\) Moreover, Muslim men would lose some of their rights if the Muslim country restored Shari'a as the public law, for example the freedom of belief, expression, and assembly. At the international level, Shari'a can negatively violate some of the international human rights standards, which are universally recognized, accepted, and respected in many countries,

\(^{21}\) For more details about the endeavors, which had been undertaken in the Islamic law reform approach, see WAEEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES, P. 207-254 (1997).

\(^{22}\) An-Na'im uses the term public law as “a generic term for those aspects of Shari’a which applied, or were supposed to apply, in the public life of Muslim communities until they were replaced by secular public law during the nineteenth and early twentieth centuries”. See, ABDULLAHI AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION, 6 (1990).

although violations still occur. Moreover, these violations could come from the application of what An-Na'im calls the historical Shari'a in the public domain, by which he means "the constitutional order, criminal justice, international relations, and human rights, that is, matters governed by what may be called public law."  

An-Na'im asserts, "as long as Muslims continue to adhere to the framework of historical Shari'a, they will never achieve the necessary degree of reform which would make Islamic law workable today." Consequently, "Islamic law has to adapt and adjust to the circumstances and needs of contemporary life within the context of Islam as a whole, even if this should involve discarding or modifying certain aspects of historical Shari'a." Thus, we can claim that the starting point of An-Na'im's notion is the reformation of public law in Islam. As a result, he tries to "evolve an alternative and modern conception of Islamic law that can resolve those problems and hardships."  

An assessment or conclusion of just one motive driving Abou El Fadl in his writings is not as evident. There are many motives, but by carefully reading his writings, the reader can note that he is a) defending Islam, b) presenting a "humanistic interpretation" of the Islamic texts, and c) criticizing authoritarianism. Abou El Fadl could be classified as an apologist although he does not place himself in this category. He tries to present humanistic aspects and features of the Islamic texts, traditions, and beliefs, which will relieve westerners, his audiences, and foreigners in the Islamic world. However, it is

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24 For more details see AN-NA'I'M, supra note 22, at 8, 9.
25 Id. supra note 22, 1
26 Id. at 34
27 Id. at 7
28 Id. at 2
obvious for the readers of Abou El Fadl that he has just one concern prevailing in all his writings; that is criticizing authori tarianism, and believing that wresting Islam from extremists, puritans,\textsuperscript{29} and authoritarians is one of the priorities to which Muslim scholars should constantly try to achieve.

Thus, the first and second motives are implied in the third one. Briefly, wresting Islam from extremism and authoritarianism is a form of defending Islam, and at the same time presenting a humanistic interpretation of the Islamic texts, contradictory to the puritan understanding of the same texts. He defends Islam by criticizing Muslim extremists, and presents a humanistic interpretation by deconstructing their understanding of the Islamic texts. This is the thesis of Abou El Fadl.

It might be argued that defending Islam could be achieved by criticizing the flood of materials which are published in the West about Muslims and their religion. Such materials can disrupt Islamic religion and force Muslims to doubt their beliefs and religious foundations. However, it is submitted that Abou El Fadl's motive in this context is to criticize those who claim that they represent the authentic and true Islam. This is in order to eliminate some of the reasons behind the criticism, which Islam currently faces in the Western media and the Western political and academic institutions. Furthermore, the gate to criticism of Islam will be closed if he presents the real message and a humanistic interpretation of Islam. Therefore, Abou El Fadl devotes three of his books to assessing

\textsuperscript{29} Abou El Fadl uses this term in a very specific way, "I prefer the label puritans because the distinguishing characteristic of this group is the absolutists and compromising nature of its beliefs." See KHALED ABOU EL FADL, THE GREAT THEFT, 18 (2005).
and criticizing the Wahhabs, whom he describes in his books as puritans\textsuperscript{30} or authoritarians,\textsuperscript{31} believing that their methodologies are bound to wear down the effectiveness and vitality of Islamic law. The dilemma in his opinion is that they believe that they hear God clearly and loudly. He believes that their interpretive methodology does not "struggle with much ambiguity, and if it engages in the dialectical process at all, it will cut this process short."\textsuperscript{32}

**The Structure of This Paper**

In the first chapter of this paper, the researcher will discuss the methodologies, which An-Na'im and Abou El Fadl use in their work in Islamic law and Islamic discourse. I will review critically the basic arguments on which they rely in their methodologies and their reform approach. The focus of this paper will be on the Qur'anic verses and some of the definitive texts in Qur'an or *al-nass qati al-delalah*. It will discuss how they use the historical context in their interpretation of the Qur'anic verses; what the relationship is between the historical context of the Qur'anic verses and the occasions for which the Qur'anic verses were revealed to the Prophet; whether there any differences between their methodologies on this issue; how the traditional Qur'anic texts are used in their

\textsuperscript{30} Abou El Fadl prefers this label although this group have been described by many writers as extremists, radicals, fundamentalists, jihadists, militants, and even simply Islamists, because "the distinguishing characteristic of this group is the absolutist and uncompromising nature of its beliefs". He believes that "[I]n many way, this orientation tends to be purist, in the sense that it is intolerant of competing points of view and considers pluralists realities to be a form of contamination of the unadulterated truth". See id, 18.

\textsuperscript{31} Abou El Fadl uses the word "authoritarian" in a very particular sense. He argues that authoritarianism: [r]efers to a hermeneutic methodology that usurps and subjugates the mechanisms of producing meaning from a text to a highly subjective and selective reading." He argues, "the selective subjectivity of the authoritarian hermeneutic involves equating between the authorial intent and the reader's intent, and renders the textual intent and autonomy, at best, marginal. Furthermore, in order to make the textual intent irrelevant and to abrogate the autonomy of the text," he argues," that the selectivity subjective reader will inevitably commit an act of misrepresenting or fraud as well as violate other conditions.

\textit{See ABOU EL FADL, supra note 9, at 5, (2001).}

\textsuperscript{32} Id. at 7
interpretations; and finally, what the problems are which they try to incorporate. It is very important here to examine their perspectives of the relationship between Islam and human rights.

In the second chapter, the practical implementations of the theoretical perspectives in which both of them believe, and try to apply to the Qur'anic verses, will be examined. This chapter will be divided into three sections. The first section, I will present, in the first part, the official and fundamental perspective of the women's rights in Islam. I will mainly focus on three aspects or elements of the status of women in Islam, which are: equality, inheritance, and *qawwama*. I chose these aspects as indicators of the rest of the rights, which Muslim women should enjoy. In the second part of the section, I will review the international standards on women's rights relying on the international conventions and mainly on The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). I will divide the second section into two parts. The first section will examine how Abou El Fadl applies his methodology and the second one will examine how An-Na'im applies his methodology. The conclusion will focus on the application of these theories and difficulties that face such theories and methodologies.

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33 Adopted by the United Nations General Assembly in 1979, and interred into force in 1981
Chapter One: Two Reformist Approaches: A Critical Analysis of Abdullahi An-Na'im and Khaled Abou El Fadl

The aim of this chapter is to review critically the methodologies which Abou El Fadl and An-Na'im use in their work in the Islamic field. In the first part, the researcher will present and analyze the methodology of An-Na'im focusing on his basic arguments on which he relies in his analysis of Islamic issues. In the second part, I will present and analyze the foundations and arguments, which Abou El Fadl develops in his work in the Islamic law and Islamic discourse. This chapter is a critique of the methodologies, which they use.

I. Abdullahi An-Na'im's Methodology

A. Introduction

The aim of this first part, which I divide into three sections, is to present a critical analysis of Abdullahi An-Na'im's main thesis and methodology. The second section, which is the core of this part, will present the three basic arguments on which An Na'im relies in his legal reform construction. The researcher examines the implications of these basic arguments in An-Na'im's methodology for later analysis and conclusions of the impact in relation to women’s rights discussed in chapter two. The third part is the conclusion.
An-Na'im constructs his whole notion on the reform of Islamic law, relying on certain basic arguments, which are: 1) reopening the gate of *ijtihad*, 2) the open text and the historical context, and 3) the methodology of *Ustadh* Mahmoud Mohamed Taha.\(^{34}\)

Initially, he states that "*Shari'a* is not the whole of Islam but, is, instead, an interpretation of its fundamental sources as understood in a particular historical context."\(^{35}\) This is based on the belief that founding Muslim jurists achieved the reconstruction of this *Shari'a* in such a manner. An-Na'im urges Muslim scholars to reconstruct certain aspects of *Shari'a* based on the same fundamental sources of Islam and is fully consistent with its essential moral and religious precepts.\(^{36}\)

He claims that the reform of Islamic law must be based on the primary and fundamental sources of Islam, which are the Qur'an and *Sunna*.\(^{37}\) It is a fact that human interpretation plays a crucial role in understanding and applying these fundamental sources. An-Naim emphasizes that because Muslim founding jurists throughout history have interpreted these sources, it is reasonable that modern Muslims jurists can advance alternative interpretations of these sources.\(^{38}\)

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34 Hereinafter, *Ustadh* Mahmoud.
35 AN-NA’IM, supra note 22, at, xiv.
36 Id. at xiv.
38 Id. at 46.
B. The Basic Arguments of An-Na'im's Approach

1. Reopening the Gate of Ijtihad

The first basic argument in An-Na'im's approach is reopening the gate of ijtihad. An-Na'im calls contemporary Muslim scholars to reopen the gate of ijtihad because they essentially have "the competence to reformulate usul al-fiqh and exercise ijtihad even in matters governed by clear and definite texts of the Qur'an and Sunna as long as the outcome of such ijtihad is consistent with the essential message of Islam."\(^{39}\) However, he inconsistently states, "according to its textual and logical rational under historical Shari'a, ijtihad was by definition restricted to matters not governed by clear and definite texts of Qur'an or Sunna."\(^{40}\) He argues, "Ijtihad within the framework of Shari'a is inadequate because most of the problematic principles and rules of Shari'a in the fields of constitutional law, criminal justice, international law, and human rights are based on clear definite texts of the Qur'an and Sunna."\(^{41}\)

An-Na'im advocates the practice of ijtihad, which is one of the principles of Shari'a, and at the same time he states that ijtihad within the framework of Shari'a is inadequate. What does An-Na'im mean by the term ijtihad? This is not clear in any of his works. Simply, he presents his own purportedly Islamic understanding of ijtihad. The question arises; can we describe this version of ijtihad as an Islamic one? Is the reliance on the fundamental sources of Islam enough to have an adequate version of ijtihad? Such an approach is problematic. The position of An-Na'im in this issue becomes confusing in respect to the role of the historical and traditional interpretations in the ijtihad process.

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39 AN-NA’IM, supra note 22, at, 2.
40 Id. at 28.
41 Id. at 49.
Throughout this enthusiasm for reopening the gate of *ijtihad*, he believes that "the possibility of an alternative interpretation, however, should not be confused with the current authoritative view of *Shari'a* as accepted by the vast majority of Muslims."\(^{42}\)

These two positions appear contradictory to each other.

It is possible to argue that these two positions are not contradictory. They reflect the environment in which the various scholars study and write.\(^{43}\) Because of his roots in a Muslim county, the Muslim scholar believes in his religious foundations and basics, and at the same time, the scholar looks forward to accomplishing the required reform according to the international community's achievements in human rights. An-Na'im, in this situation, stands on the other side of the 'ulama' that Fazulr Rahman describes as those who "are incapable of contributing to the process of modernization because their education and orientation not only restricted them to the traditional confines but prevented them from even perceiving the problem."\(^{44}\) The education, which An-Na'im received and the academic freedom in the later years, grants him a different capability of participation in the process of modernization of Islamic law reform. However, the question of influence in addition to the critique, which he presents to one of the "founders" of Islamic modernism,\(^{45}\) is also applicable to An-Na'im's methodology in reform.\(^{46}\)


\(^{43}\) See Abudhalla hi An-Na'im's CV at [http://people.law.emory.edu/~abduh46/](http://people.law.emory.edu/~abduh46/)

\(^{44}\) AN-N'A'M, *supra* note 22, at 61.

\(^{45}\) *Id.* at 61 He indicates here to Muhammed Abdoh and Jamal al-Din al-Afghani.

\(^{46}\) I think it is important here to quote An-Na'im's critique of Mohammed Abdoh because it is applicable as a critique to An-Na'im's perspective. An-Na'im states:

Abdoh seems to have had more lasting influence, but the ambivalence of his position provided common ground for opposing points of view. On one hand, his position could
2. The Open Text and the Historical Context

To be effective, An-Na'im urges human rights advocates to pursue their efforts to accomplish the required reform within the framework of Shari'a and Islam. An-Na'im affirms that Muslims are obliged to conduct their public and private affairs "in accordance with the dictates of Islam, but there is room for legitimate disagreement over the precise nature of these dictates in the modern context."47 The legitimate disagreement, which An-Na'im points out here, concerns the role of the human agent in interpreting religious texts. An-Na'im believes that "Religious texts, like all other texts, are open to a variety of interpretations. Human rights advocates in the Muslim world should struggle to have their interpretations of the relevant texts adopted as the new Islamic scriptural imperatives for the contemporary world."48 However, the limits of the role of the human agent in this reinterpretation process are not obvious in An-Na'im's thesis. Is it restricted to the authoritative view of Shari'a and the authoritative view of the scholars who wrote the Qur'anic sciences books? This is not clear in An-Na'im's perspective of reform.

Reinterpreting religious texts should consider another important aspect from An-Na'im's perspective, which is the historical context of these texts. He argues that the main challenge, which faces the Muslim scholars and human rights advocates, is the historical contexts of the fundamental sources of Islam, which are the Qur'an and the Sunna, and the impact of this historical context upon the understanding, the interpreting, and the applying

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47 An-Na'im, supra note 22, at 61.
48 Id. at 15.
of these fundamental sources. Thus, reinterpreting the religious texts should rely on the circumstances of the revelation in addition to the objectives of Islam as a whole.

It is important here to distinguish between the circumstances of the revelation and the reasons for the revelation or 'asbab an-nuzul' in the Qur'anic sciences books.

An-Na'im links the circumstances of the revelation and the objectives of Islam to point out the importance of understanding the motives behind the revelation, the problems that the revelation tried to solve, and the needs that the revelation tried to meet. This is a significant difference between asbab an-uzul, as identified in the Qur'anic sciences books, and An-Na'im's perspective. While the founding jurists relied on asbab an-nuzul to understand the meaning of the verses, An-Na'im relies on the historical context to realize the wisdom and the objective of the verse in general, in specific circumstances, or for a specific reason. The interest of An-Na'im, in this proposition, is the value behind the revelation, not the reason for the revelation.

Another important point is that the historical context is not the reason for the revelation, but is the social, political, cultural atmosphere where the revelation appeared and was declared. The dilemma which faces some of the traditional Muslim scholars in interpreting the Qur'an is that nine to ten of the Qur'anic verses do not have reasons for the revelation. An-Na'im's perspective here is different because he does not rely on the

49 Id. at 13-14 footnote 1.
50 See GALAL AL-DIN ABDULLAHMAN AL-SIUTI, AL-ITQAN FI 'ULUM AL-QUR'AN, 82-98 Vol. 1, and BADRULLDIN MOHAMMED IBN ABDULLAHI AL-ZARAKASHI, AL-BURHAN FI 'ULUM AL-QUR'AN, 22-52 Vol. 1.
51 See AL-SIUTI, supra note 50, at 28-38, and AL-ZARAKASHI, supra note 50, at 52-53.
52 BASSAM AL-GAMAL, ASBAB AN-NUZUL, 443 (2005) I should mention here that this study is an academic, deep, and informative one in asbab an-nuzul. It is a PhD dissertation presented to the Faculty of Literatures in Banoba, Tunisia in 2003.
reasons for the revelation of each verse independently; rather he relies on the historical circumstances that surround the revelation as a whole.

3. Ustadh Mahmoud Mohamed Taha’s Methodology

The methodology of Ustadh Mahmoud is one of the crucial and basic foundations in An-Na'im's perspective in researching Islamic law. An-Na'im cites his master’s methodology in almost all of his writings and publications. Moreover, he translated the cornerstone work of Ustadh Mahmoud, *The Second Message of Islam* into English.

There are two levels or stages of the Islamic message, according to the revelation of the Qur'an and the Sunna: the Mecca stage and the subsequent Medina. The original, fundamental, eternal message of Islam is embodied in the Mecca stage, where a respect for the dignity of all human beings regardless of their religion, sex, or color. Equality between men and women was the distinct characteristic of this message. In addition to that, there was a "complete freedom of choice in matters of religion and faith. Both the substance of the message of Islam and the manner of its propagation during the Mecca period were predicated on ismah, freedom of choice without any form or shade of compulsion or coercion."

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54 AN-NA’IM, *supra* note 22, at 52.
Historically, the society in Mecca was not ready to implement the Meccan superior level of this message and aggressively and irrationally rejected it. Moreover, the aspects of this message of the Mecca period were inappropriate for practical implementation within this historical context. Thus, the more practical and realistic message of Medina was revealed and implemented in the Medina stage. As a source of law, the main aspects of the message were not lost as Ustadh Mahmoud argues, "Rather, they were postponed for implementation under appropriate circumstances in the future. Otherwise, he argued the superior and eternal aspects of Islam would have been irredeemably lost."  

This methodology on which An-Na'im relies on in his work, informs his approach to international human rights law. Before I present my critique here, I can briefly state that all the effort, which he and Ustadh Mahmoud propose in this methodology, is to reverse the process of abrogation (naskh) in order to inspire the values of the Meccan period, which are universal and humanitarian, in order to place Islamic law on a different level. 

First, it is not clear why An-Na'im insists that what he presents of his Ustadh Mahmoud methodology is "Islamic." What is Islamic here is just the term al-naskh ‘abrogation’. After that, there is no one idea in this methodology that belongs to the Islamic jurists, whether they are modern or traditional.

55 *Id.* at 53.
56 For extensive background about this methodology *see* the references which I mentioned in footnote 53
All the Qur'anic Sciences books devote a complete chapter to the “Abrogating and Abrogated “an-nasekh wa al-mansukhl I will rely heavily here on the two formost and fundamental books in the Qur'anic Sciences, which are “al-burhan fi ’ulum al-Qur'an by al-zarakashi and “al-itqan fi ’ulum al-Qur'an by al-siuoti. The idea of abrogation relies on the verse (1:106) “Such of Our revelations as We abrogate or cause to be forgotten, we bring (in place) one better or the like thereof. Knowest thou not that Allah is able to do all things? 57 I will include here the translation, which An-Na'im proposes in his fundamental work ‘Toward an Islamic Reformation’. He translates this verse as: “Whenever We abrogate any verse (ayah) or postpone it (nunsi‘ha), we bring a better verse, or similar one. Do you know that God is capable of everything? 58

The meanings of the abrogation, which are mentioned in the two fundamental texts, cited above, do not include the meaning that Ustadh Mahmoud used in his work. The meaning of abrogation in this work is restricted to abolishment: “But Allah abolisheth that which Satan proposeth (22:52), changing: “And when We put a revelation in place of (another) revelation, (16:102). Not one of the meanings, which are mentioned in the Qur'anic Sciences books, indicate the version Ustadh Mahmoud suggests in his work. Contradictorily, the meaning that he suggests is not logical or rational under scrutiny. The meanings of the verses indicate that the later verse can abrogate, abolish, or change the earlier one. However, what he suggests is contradictory to these meanings. Put simply, the idea, which he mentions in his work, is that the verses, which were revealed in Mecca, can abrogate, abolish, or change the verses, which were revealed in Medina. It is

57 Translation of the Qur'an by: Muhammad Marmaduke Pickthall.
58 Id. at 59.
submitted that this is the core of his thesis. Set aside the discourse of Islamic values, freedom, and dignity. Before discussing these issues, I am going to examine the foundations, on which An-Na'im relies.

What An-Na'im proposes is appealing and attractive, but it is not the solution, which we can employ in order to solve the dilemma of human rights and their relationship to Islam. The acceptance of such a methodology faces obstacles because of the lack of authoritative sources characterizing Ustadh Mahmoud's approach. He simply reverses what the founding jurists applied in their interpretation of the Qur'anic verses.

In order to attract both the average Muslim and scholars, An Na'im could list the Meccan verses and the values, to which we can inspire as Muslims and human rights advocates, in order to support his methodology. The dilemma, which faces him in this case, is that there are several Meccan verses, which do not support the universal values of forgiveness, freedom of religion, and tolerance. It is unacceptable here to state, as An-Na'im does, that:

[A] comprehensive listing and elaboration of all relevant verses of the Qur'an was neither possible in a limited work of that nature, nor appropriate for me to attempt. It is up to various Islamic communities to develop and implement a more detailed and specific application of the suggested principle of interpretation, each in its own context and in light of its own circumstances."

Simply, if you are aware of the importance of your revolutionary work, and the misunderstanding, ignorance, and hostility, which will ensue because of this work, the most important factor here is being able to support and prove the validity of your work.

Paradoxically, when An-Na'im presents a critique of the prominent Sudanese scholar, Hassan Al-Turabi, he states that the assertions of Al-Turabi “suffer from two very serious weaknesses. First, he does not cite a single authority in the Qur'an or Sunna, or even from the established Islamic jurists, to support any of his bold assertions. Since most of these assertions are simply untrue, or at least disputed by serious scholars of Islam, the lack of reference to evidence in their support repudiates the credibility of his entire thesis.”

This is precisely what we seek in An-Na'im’s work. What are the authorities on which he relies in his interpretation of the verse of abrogation? How many established Islamic jurists suggest this interpretation? Does he think that his thesis, which rests on his Master’s methodology, will be disputed by the vast majority of Muslim scholars and the average Muslims nowadays? It is very ironic to realize that An-Na'im, himself, confesses that the methodology on which he relies is never elaborated on or articulated by Muslim jurists, scholars, or others. Nevertheless, he does not accept others theses because they do not cite a single authority from established Islamic scholars.

The difficulties behind the acceptance of this methodology are many. In fact, the division between the two stages, the Mecca and Medina, is not easy. In the Qur'anic Sciences books, there are twenty-five aspects the interpreter should be aware of and distinguish between in order to be able to interpret or to talk on the Qur'an. There are many verses revealed in Mecca but their rule ‘hukmaha’ is Medinan and vise versa. Although there are specific characteristics for the Meccan and Medinan verses, the distinction between them are not simple. There is an unambiguous disagreement between

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60 AN-NA'IM, supra note 22, at 39.
61 An-Na’im, supra note 24, at 99.
62 See AL-SIOUTI, supra note 50, at, 1-22.
the scholars regarding the division between the Meccan and Medinan verses which gives An-Na'im the flexibility each time he faces problematic verses in the Meccan stage, to claim that these verses are practically Medinan ones.\textsuperscript{63} However, the clear-cut division between the two stages will not be achieved by An Na'im or the other scholars. Many verses were not revealed in either Mecca or Medina.\textsuperscript{64} It is obvious in the Qur'anic Sciences books that the scholars have their own terminologies and definitions for the differences between the Meccan and the Medinan stages, but these terminologies have many exceptions and do not meet what An-Na'im proposes.\textsuperscript{65}

It is perplexing for the average Muslim, that God revealed the superior message first and then found it inappropriate or impractical for implementation in the context of the seventh century.\textsuperscript{66} This proposition leads the average Muslim directly to doubt. Furthermore, the reasons that Ustadh Mahmoud presented in his argument\textsuperscript{67} are completely irrelevant to what he discussed. Anyone reading the reasons which he presents, would not understand or realize the wisdom behind the revelation of the superior

\textsuperscript{63} See An-Na'im supra note 59, at 105.
\textsuperscript{64} AL-SIOUTI, supra note 50, at 23 and AL-ZARKASHI, supra note 50 at 197, 203-205.
\textsuperscript{65} AL-SIOUTI, supra note 50, at 1-23-25
\textsuperscript{66} AN-NA'IM, supra note 22, at 52-53.
\textsuperscript{67} Ustadh Mahmoud states:
First, and in accordance with Muslim belief, the Qur'an is the final revelation and the Prophet Muhammad is the final prophet. Consequently, the Qur'an had to contain, and the Prophet had to propagate, all that God wanted to immediate application as well as that which was be applied under appropriate future circumstances. The second reason has to do with the dignity and freedom which God bestowed on all human beings. In accordance with that dignity and freedom, God wished human beings to learn through their own practical experience with the inapplicability of the earlier message of Mecca, which was then suspended and replaced by the more practical message of Medina. In that way, people would have stronger and more genuine conviction of the practicability of the message that was propagated and eventually implemented during Medina stage.

AN-NA'IM, supra note 22, at 53.
message first as he asserts. The wisdom of the abrogation is known and identified by
God and the interpretations of the Islamic jurists.

C. Conclusion

It can be argued that Muslim scholars can rely heavily on abrogation (an-naskh) in the
Qur'an in order to develop independently the Islamic law and the Islamic discourse
generally. The importance of abrogation comes from the development and evolution
process, which the Islamic law experienced throughout in order to obtain the final rule. It
is significant that Muslim scholars ensured the importance of an-naskh because of the
changes in the life of Muslims and the historical development in the Muslim society in
Medina.

The modern Muslim scholars and human rights activists can rely on this fact to present
their own questions regarding this development. They can argue that the contemporary
era is completely different from the era when the Qur'an was revealed. Accordingly, the
process of legislation can be changed, and the process of development can continue.
Abrogation is an indicator of development and renewal. If God legislated for Muslim
believers gradually in order for them to adapt to the changes that were occurring in their
life and society, it can be argued that Muslims today need such a process. It is significant
that although the period of revelation was just 23 years, it contained various changes in
legislation for Muslims and it contained development within the Qur'anic discourse itself.
That can lead contemporary scholars to raise the question of renewal, not reform,
according to the changes within our contemporary life.
In summary, reopening the gate of *ijtihad* in addition to the historical context are two main factors on which most of the Muslim reformists rely on in their methodology. It is obvious that the first two elements in Ḍh Na’im's methodology and the critique which we present of these elements, remain the most tangible and acceptable elements in this methodology. On the contrary, the difficulties, which will face the methodology of *Ustadh* Mahmoud, are various as argued in this critique.
II. Khaled Abou El Fadl's Methodology

A. Introduction

The purpose of this section is to present the methodology of Khaled Abou El Fadl. This section is divided three parts, part A, discussed the starting points in Abou El Fadl's methodology. In part B, the two main arguments in Abou El Fadl's methodology, which he relies on in his analysis of the Qur'anic verses and hadith and generally on his critique of the puritans, are examined. Part C is the conclusion.

The starting point in this critique comes from Abou Fadl’s belief that it is imperative for Muslims:

[...to take a self-critical and introspective look at their own tradition and system beliefs. The reason for such and introspective and self-critical look is to ask: Does the tradition of Islam, with its inherited system of beliefs and convictions, contribute to the commission of these acts of ugliness? Are Muslims who commit acts of terrorism or who persecute women and religious minorities inspired by the doctrines and dogma of the Islamic religion?[^68]]

It is understandable that he deals with the prevailing trends in the West that criticizes Islam, and categorize Islam as a terrorist religion. He tries to show that there are different understandings of Islam inside the Muslim world in respect to Islamic convictions and morals. In order to support this thesis, he presents a comparison in his book *The Great Theft*, between Muslim puritans and Muslim moderates. He heavily supports the latter group, arguing that they represent the humanistic and moral perception of Islam.

Significantly, the reader will not see any of Abou El Fadl's books or articles without a reference to or critique of Wahhabis. He believes that a battle should be launched against

[^68]: ABOU EL FADL, supra note 29, at 4.
those who try to wrest Islam from its normative values, morals, and ethics. He challenges "those who invoke the moral weight of Islamic law to their side as a way of foreclosing and ending the debate." Abou El Fadl attempts to "resist the spread of what it perceives to be a puritan and despotic trend that is devastating the legacy of a very rich tradition."

Contrary to An-Na'im, Abou El Fadl does not give much attention to Islamic legal reform. He believes that it is imperative to examine first the current Muslim condition and to try to understand the map of ideas, which chart the boundaries within the Islamic world and the Muslim mind. He strongly believes in the richness of Shari'a. However, he understands the formidable questions, which presently face Muslims, especially those that relate to the role of Shari'a and the relationship between Islam and democracy.

It is interesting that this awareness of the richness of Shari'a inspired Abou El Fadl to propose a methodology based on usul al-fiqh. In the next part, I will discuss the basic and foundational arguments in Abou El Fadl's methodology presenting a critique and analysis of these arguments.

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69 KHALED ABOU EL FADL, AND GOD KNOWS THE SOLDIERS 20, (2001)
70 Id, at 20
B. The Basic Arguments of Khaled Abou El Fadl's Approach

It is not easy to summarize Abou El Fadl's methodology because of the complexity and the richness of his knowledge of Islamic law, Islamic history, and Qur'anic Sciences. However, an attempt to map some of his opinions and perspectives on which he relies in order to develop his methodology will be undertaken focusing mainly on his methodology applied to Qur'anic texts. The reader can find the methodology of Abou El Fadl in two main references of his writings: *Speaking in God's Name, And God Knows the Soldiers, The Great Theft, and Conference of the Books*. Because in *Speaking in God's Name*, Abou El Fadl presents his methodology extensively supporting his arguments with various examples and applications. Therefore, the researcher will focus mainly on *Speaking in God's Name* and will use the other sources as supportive resources in the critique of his methodology.

There are many appealing factors and elements in Abou El Fadl's methodology. It strictly relies on a solid Islamic foundation that reflects the richness of Abou El Fadl's knowledge and understanding of Islamic texts and the juristic tradition. It is not easily contested or challenged because of these Islamic elements, which are spread throughout this methodology. Furthermore, the methodology comes from a Muslim scholar who repeatedly declares his belief in Islam and the authenticity and divinity of its origins. Abou El Fadl also relies heavily on authentic sources for *usul al fiqh* and Qur'anic sciences books.
In this section, it is proposed to present the two main elements in Abou El Fadl's methodology, which are the "open text" and the "four main types of assumptions". The purpose of this section is not to describe the methodology of Abou El Fadl but to criticize this methodology directly. The reason behind this direct critique is that the reader can find the detail of the methodology of Abou El Fadl in the references, which are mentioned in the introduction to this section.

1. The Open Text

Abou El Fadl argues that because God speaks for all ages we cannot restrict the understanding and the meaning of Qur'anic text to a specific historical context. We should put the relationship between the text and the meaning in the past under examination, and then examine this relationship to the present. Furthermore, he bravely states that there is no text that can present perfectly and completely the intent of God, which means that the text does not embody the Divine Will. With this argument, there is no one that can claim that he/she is capable of presenting the Divine Will. "Any interpreter of the Divine Word will be informed by a set of relationships with the author, with other texts and other authors, and a range of experience that will form an inseparable part of the psychology of the interpreter."

The idea of open text in Abou El Fadl's methodology is founded on the work of Umberto Eco's writings *The Open Work* and *The Limits of Interpretation*. The core of

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71 ABOU EL FADL, supra note 9, at 154-161.
72 Id. at 130 and see Abou El Fadl, supra note 29 at 276.
73 Id. at 130.
74 Id. at 146.
this idea relies on the expression of Eco, which is "works in movement." Abou El Fadl argues here that the Qur'an and Sunna are works in movement, thus lending themselves to different interpretive strategies. The text according to Abou El Fadl's analysis speaks out and opens up to all generations of readers to actively evolve the meaning. This opening characteristic gives the text the ability to "continue [to] have a voice."\textsuperscript{75}

The purpose of this critique is to examine whether Abou El Fadl follows the instructions, which he mentions regarding over-interpretation. It appears that Abou El Fadl uses Umberto Eco's term to warn readers and scholars to avoid and recognize over-interpretation,\textsuperscript{76} but it is easy for an average Muslim to accuse Abou El Fadl of practicing this type of interpretation throughout his work. This over-interpretation, which Abou El Fadl practices, is not restricted to the heritage of the juristic tradition but extends to the Qur'anic translations as well. He does not rely on the published translations of the Qur'anic verses, whether official Islamic institution or individual publishing. Nevertheless, he always presents his understanding of the "original" meaning.\textsuperscript{77} This indicates that he has his own understanding of the text.

Although he puts limits on the role of the reader inside the text, Abou El Fadl does not put any kind of restrictions upon his practice of interpretation of the Qur'anic verses.\textsuperscript{78} In the conclusion, it appears that Abou El Fadl believes that Muslim values are not different

\textsuperscript{75} \textit{Id.} at 146.
\textsuperscript{76} \textit{Id.} at 55.
\textsuperscript{77} See \textit{id.} at 7, footnote 1.
\textsuperscript{78} See his interpretation to the verse 4:34 from the Qur'an in his book \textit{CONFERENCE OF THE BOOKS}. He interprets this verse according to his humanistic interpretation approach in interpreting the Qur'anic verses. See also his interpretation to the verse 2:256 and what the reader, according to his arguments, can understand from this verse.
from Western values. This I submit is the aim of Abou El Fadl’s methodology. A careful reading leads the reader to the conclusion that Abou El Fadl’s main goal is to prove the existence of a humanistic discourse to a Western audience in order to convince them that the problem lies with the authoritarians, not in Islam. The problem is in the understanding of the text, not in the text itself.

Another problem which should be mentioned here, is the ‘textuality’ of the Qur'an. Several studies have emerged recently tackling “al-nas,” "the text" i.e. the Qur'anic "text," particularly the studies analyzing one of the Qur'anic issues or principles. Throughout the Arab world, further studies and books have been handling "the concept of text," "the text, authority and the truth," "the institutional text," and "the fixed text and the changing reality." Other readings emerged approaching "the authority of the text," "reading a religious text." In addition, there are many other studies using the term "text" or nas to refer to the Qur'an. The Qur'an is described in such studies as “religious text," "foundational text" or "the fundamental religious text: the Qur'an, the illustrative Book”79 In other instances, there is reference to "the law of the text,”80 "the text boundaries”81 and "the text components.”82

None of these scholars ask the seminal question which is whether the Qur'an is a text? They concentrate their efforts on dealing with the Qur'an as a text and to importing western theories to apply to the Qur'an in order to generate modern interpretations.

79 MOHAMED A’BED AL-JABRI, BENIYAT AL-’AQI AL-’ARABI, 2/14 (7th ed. 2004).
80 ABD AL-GAWAD YASSEN, AL-SULTA FI AL-ISLAM, (2nd ed. 2000).
82 SA’AD KAMONI, AL-’AQI AL-’ARABI FI AL-QUR’AN (2005).
Nevertheless, no one has asked first, whether the Arabic founding jurists ever described the whole of the Qur'an as a text. What is the danger behind this approach? Nasr Hamed Abou Zied\textsuperscript{83} is one of the propagators of the textuality of the Qur'an in the Arab world, and he apparently changed his position from that of a great propagator of the textuality of the Qur'an to a different position.\textsuperscript{84}

Abu Zayed believes that:

Modern scholars of the Qur'an share the concept of the Qur'an as a 'text' despite the different paradigm of 'meaning' each tries to grasp and deduce from the Qur'an. Dealing with the Qur'an as only a 'text' enhance the possibilities of interpretation and reinterpretation but allows as well the ideological manipulation not only of the meaning but also of the 'structure', following the pattern of polemic interpretation of theologians.\textsuperscript{85}

This is a significant transformation from a significant scholar in Islamic studies. The alternative approach, which Abu Zayd suggests, is to pay close attention to the Qur'an as a discourse. It is no longer sufficient to re-contextualize a passage or several passages when it is only needed to fight against literalism and fundamentalism or when it is needed to wave away certain historical practices that seem unfit in our modern context.\textsuperscript{86} The most important point here is that Abu Zayed refuses to invoke modern hermeneutics in his study of the Qur'an in order to prove the historicity of the text. The historicity, as a

\textsuperscript{83} Nasr Hamed Abou Zayd is one of the prominent scholars in Islamic studies. He works now as a professor of Islamic studies in Lieden University, Ibn Rushd Chair of Islam and Humanism at the University of Humanistic, Utrech, Netherland.

\textsuperscript{84} See for example his \textit{Mafrum al-Nass: Daras f \textit{`ulum al-Qur'an} (The Concept of the Text: study in the Qur'anic sciences, Beirut and Casablanca, first published 1990, fourth reprint 1998. For more about the literary approach see his article "The Dilemma of the Literary Approach to the Qur'an, ALIF, Journal of Comparative Poetics, the American University Cairo (AUC), No. 23, Literature and the Sacred, 2003, pp. 8-47.}

\textsuperscript{85} Nasr Abu Zied, Rethinking the Qur'an: Toward a Humanistic Hermeneutics, 2. This is unpublished paper. Prof., Nasr presented it in a conference called "Human Rights and Renewing of Religious Discourse: How Can the Arab World Benefit from the Experiences of the non-Arab Islamic World?, the conference was organized by Cairo Institute for Human Rights Studies and other organizations in Alexandria 18-20 April 2006.

\textsuperscript{86} \textit{Id.} at 3
result, leads to the relativity of the understanding, which is proscribed by some scholars as the most appropriate interpretation. It is important to note here that Abu Zayed calls for "constructing open democratic hermeneutics." It is a call for rethinking and reinvoking the Qur'an and its living status as a "discourse."  

It is believed that this transformation proposed by Abu Zayed is important for Muslim scholars to review their positions and to pay close attention to modern literary theories in texts and their inappropriateness to Qur'anic verses. This is a respectable response to Abou El Fadl's position who deals with the Qur'an as a 'text' overlooking the difficulties and the obstacles that confront him in this regard.

2. Four Main Types of Assumptions

The second element in Abou El Fadl's methodology is "the four main types of assumptions" that the juristic communities should be concerned with. The legal system considers these value-based assumptions necessary or basic. He believes that these assumptions work as the basis upon which the legal analysis is constructed, and at times, serve as the external limits for legal determination. The four assumptions are value based, methodological, faith based, and reason based. "For instance, the preservation of life, the protection of private property, the necessity of modesty, the freedom of speech, or the furtherance of forms of self-expression could all be basic normative values of a

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87 Id. at 3
88 ABOU EL FADL, supra note 9, at 154.
legal system." These are the fundamental necessities, which Muslim jurists describe as the five essential values.

Muslim jurists argue that these values are inspired from the textual analysis in a largely mechanical way. Abou El Fadl's concern here is to prove and connect these values with human rights. "For instance, they contended that the prohibition of murder served the basic value of life, the law of apostasy protected religion, the prohibition of intoxicants protected intellect, the prohibition of fornication and adultery protected lineage, and the rights of compensation protected the right to property." 

Relying on these four assumptions and mainly on the value-based assumptions, Abou El Fadl practices his interpretations upon the Qur'anic verses, trying to solve the dilemma of human rights and its relationship to Islam. It is important to mention here that Abou El Fadl focuses on issues, which related to human rights in their relationship to Islam. He does not defend human rights in Islam as the traditional Muslim scholars often do; he presents the humanistic aspect of the Islamic values and morals. Furthermore, he concentrates on issues that relate to human rights like "democracy and human rights," "interacting with non-Muslim and salvation," and "freedom of religion." In addition, his discourse on the values and the morals in the Islamic perspective is always connected

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89 Id. at 154
90 Id. at 155
91 Id. at 155
92 ABOU EL FADL, supra note 29 at 180.
93 Id. at 203
94 ABOU EL FADL, supra note 9, at 131.
with the term "human". Application of some of his notions on women's rights and its relationship to puritans' perspective will be discussed in the next chapter.

C. Conclusion

There is little doubt that the methodology Abou El Fadl uses will be appealing and plausible to moderates not only in the Islamic world but also worldwide. He provides them much-needed knowledge, which many scholars with a strict Islamic legal background often do not. At the same time, he challenges extremists on their own ground supporting his opinion with credible and authentic traditional Islamic sources that make him a jurist equal to those who argue the right to issue responsa. Notably, the conditions that he places as restrictions on those who want to be qualified as professors of law are very close to what he obtained through his educational process, and equal to the educational process which any of the authoritarians undertake. Therefore, when he gives these humanistic interpretations of the Qur'anic texts and the Islamic traditions and practices, it is appreciated by moderates who are sometimes unable to introduce similar arguments.

Abou El Fadl relies heavily on the idea of the "open text" which can easily supports the idea of multiple interpretations, leading to the relativity of the text, and the relativity of the interpretations. The relativity of the text leads very easily to the relativity of the value, on which he relies in his analysis. What is justice for him is necessarily the same not justice for someone elsewhere relying on the same aspects of this methodology.

95 Abou El Fadl, supra note 69, at 139-140.
96 Abou El Fadl, supra note 29, at 33, 108.
For instance, is it fair for the girl to inherit half of what her brother does? According to some Muslims, it is fair because God revealed this conviction, but there are some Muslims who believe that this conviction does not suit the present because of the responsibilities, which modern Muslim women carry. It is possible to find others who argue that a woman should not only inherit equally to that of a man, but also inherit double of the share of the man. It could be argued that if the woman is responsible for the financial affairs of the family, or when the numbers of women in the country are more than the number of men, they are the responsible of protecting the country, not the men. It is this approach that provides justice. Is this just, from Abou El Fadl’s perspective? The implications of Abou Fadl’s approach will be discussed in the second chapter on aspects of women's rights in Islam.

It can be argued that Abou El Fadl purposely sets forward a case for open text interpretation and relativism in order to support his own understanding of justice. Significantly, Abou El Fadl is aware of the potential criticism, he may face. Therefore, he always puts restrictions on those who want to practice this interpreting perspective on the religious texts. This explains why he bases what he writes on his position as a Muslim legal scholar. 97

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97 He highlights once in one of his books that he has a library in Islamic law contains fifty thousand titles. See Abou El Fadl, supra note 29 at 33.
Chapter Two: Status of Women in Islam

I. Introduction

The status of women in Islam and in Muslim countries is a widely debated and controversial issue. It is obvious that the increasing role that Muslim women have assumed in their societies, even in the most conservative ones, since the beginning of the last century, places this issue in the spotlight of the human rights debate in the Muslim world. The debate is not only limited to the struggle between human rights activists in the Muslim world and the religious scholars or conservatives who frequently hold traditional and conservative perspectives, but also proceeds among human rights activists and Muslim feminists themselves.

There are two positions held by the human rights feminist activists regarding the status of women in Islam. The first group underlines the positive aspects of Shari'a, overlooking the negative aspects.98 The second group emphasizes selectively their favorite verses from the Qur'an, which serve their position and overlook the interpretation of jurists of these verses.99 In spite of the differences, the final goal of these groups is to find a common ground between applying Shari'a and gender equality.100 Significantly, each group relies heavily on their discourse on Shari'a and interprets Shari'a according to their respective positions.

98 An-Na'im, supra note 37, at 40.
99 Id. at 40.
Therefore, it is understandable to the researcher that both An-Na'im and Abou El Fadl devote a considerable amount of space in their writings\textsuperscript{101} to the discussion of women's status in Islamic law specifically and in Islamic discourse generally. It is interesting to note that each one of them focuses on different issues within the same topics. An-Na'im focuses heavily on legal reform of the women's status in Islamic law, searching for an adequate Islamic legal reform methodology, and explores their legal status in some Muslim countries; Abou El Fadl discusses some of the \textit{fatwas or responsa}, jurists' opinions, issued by the Permanent Council for Scientific Research and Legal Opinion.\textsuperscript{102}

The purpose of this chapter is to examine both Abou El Fadl's and An-Na'im's positions on the status of women in Islamic law, and the role that women should play in Muslim society. In part II, I will look at the methodological and religious debater challenges, which face the researchers in this issue. I will analyze the positions of fundamentalists and official leaders on these issues comparing them to the international standards. I take this approach just to let the reader aware of the fundamentalist's perspective before I present the reformists' advances. It will help the reader to examine whether there is a progressive development or not. I will rely, in my comparison, on the Convention on the Elimination of All Forms of Discrimination Against Women\textsuperscript{103} and the work of prominent Islamic authors. In part III, I will discuss the positions of Abou El Fadl and An-Na'im regards women's issues focusing on specific values, and using these

\textsuperscript{101} Although this is not an empirical study, I think it is important here to mention that Abou El Fadl devoted almost three chapters out of seven in his foundational work \textit{Speaking in God's Name}, and a complete chapter in \textit{The Great Theft}, and also in \textit{The Search for Beauty in Islam : A Conference of the Books} to discuss issues relating to women in the Muslim societies and \textit{fatwas}. An-Na'im also devotes many of his articles or parts of them to discuss the same issue; however, he does not devote a significant space to discuss this issue in his foundational book \textit{Toward an Islamic Reformation}.

\textsuperscript{102} Hereinafter, C.R.L.O

\textsuperscript{103} Hereinafter, CEDAW
values as indicators of women's rights in Islam. In the last section, part IV; I will 
examine how Abou El Fadl and An-Na'im apply their methodologies in their writings in 
order to solve these widely debated issues. The purpose of this examination is to assess if 
there is any progressive perspective in their theses different from the other perspective, 
which I will describe in the following section.

II. Contentions Between What is Religious and What is Universal

Any examination of the positions taken by Muslim countries and their respective 
reservations on CEDAW reveals the unequal and inhuman status that Muslim women 
enjoy in their countries. There is a clear consensus among Muslim countries regarding 
this Convention, especially on the articles which apply to equality between men and 
women.\(^\text{104}\) The reason behind the vast majority of reservations to the Convention is the 
contradiction between some articles in CEDAW and Islamic law, which profoundly 
affects the status of women in most of these countries.\(^\text{105}\) In spite of their official 
positions, which most of the Muslim countries declare publicly in the international arena, 
some Muslim scholars refute any kind of contradiction between international standards 
regarding the status of women and Islamic law.

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\(^\text{104}\) For extensive discussion in this issue, see generally, Bharathi Anadhi Venkatraman, *Islamic States and 
the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the 
article some of the common denominators among Muslim countries' reservations. She gives some 
examples of the reservations, which entered to the Convention on the basis of the Islamic law, discussing 
some Muslim countries' reservations like Egypt, Tunisia, Morocco, and Pakistan.

\(^\text{105}\) For a wide survey in the contradictions between Islamic laws as stipulated in *Shari'a* and the CEDAW, 
see generally, Urfan Khaliq, *Beyond the Veil: an Analysis of the Provisions of the Women's Convention in 
substantive provisions of the Women's Convention and their conflict with *Shari'a*.
The aim of this examination is to present the fundamentalist Islamic perspective regarding women's rights and status, and the international standards as stated in CEDAW. This is necessary given the assessment of the two scholars' writings in the latter part of this paper. I will explore whether there is a contradiction between this Convention and Islamic law according to, and relying on the perspective of Muslim scholars under review. At the end of this part, I expose some of the methodological and religious challenges and contentions, which face the Muslim reformists regarding women's issues.

A. The Position of Fundamentalists Regarding Women's Issues

Before moving forward, it is important to determine first what I mean by the word "fundamental." I use the term fundamental here as a translation of the Arabic word 'usuli'. Although there is considerable debate among Muslim scholars as to the precise meaning of the term, I prefer to use this term to indicate to those who claim that they adhere to the original sources of Islamic law, and those who interpret the Qur'an relying on traditional interpretations. This term gives the researcher the required flexibility to categorize the Muslim scholars who adhere to the traditional perspective of Qur'anic interpretations. By using this term, the researcher can incorporate moderate scholars, official religious leaders, and conservative, in one category. To do this, the researcher

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106 ABOU EL FADL, supra note 29, at 18-19 (2005), see also Courtney W. Howland, The Challenges of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter, 35 Colum. J. Transnat'l L. 271, 274-282 (1997); the author discusses in this article the contemporary religious fundamentalism and their effect in the political and social contexts, giving attention to the obedience rule of women to their husbands
will rely heavily on the theses of a few official religious leaders from Egypt,\textsuperscript{107} and a scholar from Qatar\textsuperscript{108} in addition to writings of intellectuals on this issue.\textsuperscript{109}

Among Muslim scholars, it is not contested that women before the Islamic era or \textit{(Jahiliyya)} lived in misery in a callous and unfair status. "They had no rights whatsoever until the advent of Islam, which liberated them and delivered them from the injustice which they had suffered for a long time."\textsuperscript{110} In addition, "the Legal position afforded to women in this society was no more than that of chattel, to be used or disposed of by men as desired."\textsuperscript{111} The practice of killing the girls who were less than six years or \textit{Mawoda} (killed girl) was widespread in this era. Fathers in pre-Islamic society used to do it believing that girls were useless and that there was no benefit from them.\textsuperscript{112} Muslim scholars believe that the humanity of women seems contradictory when Islam was revealed. They argue that Islam restored women's dignity and humanity and confirmed their capacity to perform Allah's commands.\textsuperscript{113} In brief, there were various negative practices in the status of women, which were rejected or transformed when Islam was revealed.\textsuperscript{114}

\textsuperscript{107} \textsc{Mahmoud Zakzouk, Facts About Islam: Questions and Answers} (2004)
\textsuperscript{108} \textsc{Yousuf Al-Qaradawi, The Status of Women in Islam}, available at http://www.masmn.org/documents/Books/Yusuf_Al_Qaradawi/The_Status Of Women In Islam/index.htm
\textsuperscript{109} \textsc{Hoda Helmy, Women Between Islamic Teachings and Their Current Position in Egypt} (2000), and also Khaliq, \textit{supra} note 105.
\textsuperscript{110} \textit{Zakzouk supra} note 8 at 75, Zakzouk is the minister of Endowments (\textit{Al-Awqaf}) in Egypt and the Chairman of the Supreme Council for Islamic Law.
\textsuperscript{111} Khaliq, \textit{supra} note 105 at 6.
\textsuperscript{112} Helmy, \textit{supra} note 109 at 8.
\textsuperscript{113} \textsc{Al-Qaradawi, supra} note 108 available at http://www.masmn.org/documents/Books/Yusuf_Al_Qaradawi/The_Status Of Women In Islam/003.htm
\textsuperscript{114} For a comparative study of the practices and rights which women enjoyed before Islam and after in comparison with the rights, which are afforded to women in the West, see Nayer Honarvar, \textit{Behind the Veil: Women’s Rights in Islamic Societies}, 6 J. L. & Religion 355 (1988).
In this part, I examine the rights, which Islam gives to women. I will focus on some of the values which serve as indicators of other rights, because the aim of this study is not to give a comparative study of the rights that women enjoy in Islam in comparison to international standards, but to analyze the Islamic perspective toward these rights. I will focus on equality between men and women in Islamic literatures, *qawwama*, and inheritance. I selected these rights as indicators because the one who believes in full equality between men and women will accordingly believe in numerous rights regarding women's rights to divorce, marriage, travel without a relative and the like. Consequently, he/she will call for an equal share in inheritance and will reject the idea of *qawwama* as mentioned in the traditional Islamic *fiqh*.

1. Equality

Islam gives emphasis to the fact that all human beings, men and women, are alike. God created them from one soul. The Qur'an states "O mankind! Be careful of your duty to your Lord Who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women. Be careful of your duty toward Allah in Whom ye claim (your rights) of one another, and toward the wombs (that bare you). Lo! Allah hath been a Watcher over you." [4/1]115 Prophet Muhammad also described women as the counterpart of men, stating that they have the same rights as they have obligations in equity.116 There are numerous traditions in Islam, from which the reader can clearly understand from them that men and women are equal and complement

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115 See ZAKZOUK, supra note 107 at 76. For a comprehensive interpretation and discussion of this verse see, HELMY, supra note 109, at 20-25.
116 See ZAKZOUK, supra note 107 at 76.
each other."  According to the hadith, "the only distinction that can be made between human beings is a distinction based on their fear of God, and only God can discriminate."

The aforementioned equality does not mean that there is no distinction between men and women in Islam. There are "a number of Islamic fundamentalists who explicitly declare men to be superior to women." However, this distinction of superiority is not "due to any preference by Allah, The Almighty, of the man or the woman on any account of being nobler or closer to the Lord." This distinction is conditioned by the diverse tasks which are assigned to women or men because of their natural personality or disposition. In this regard, the Qur'an is clear in stressing that men and women are equal in humanity and origins. The difference "is only determined by their deeds and how much better each carries out his work."

Paradoxically, the Cairo Declaration on Human Rights in Islam does not emphasize this equality, which the previously mentioned scholars defend. In many places in the Declaration, the reader finds clear denial of women's rights and equality with men. The Declaration deprives women from enjoying numerous rights and puts limitations on many

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117 See the Qur'an in [17/70], [16/97], and [3/195].
118 Dahlia Eissa, Constructing the Notion of Male Superiority over Women in Islam, WLUML Occasional Paper No. 11, 5 November (1999), the author relies here on hadith states "All People are equal, as equal as the tooth of a comb. There is no claim of merit of an Arab over a non-Arab or a white over a black person, or a male over a female. Only God-fearing people merit a preference with God."
119 See Howland supra note 106 at 308, and see the footnotes in this mentioned article 164-169
120 QARADAWI, supra note 108 available at http://www.masn.org/documents/Books/Yusuf_AI_Qaradawi/The_Status_Of_Women_In-Islam/004.htm
121 Id. at http://www.masn.org/documents/Books/Yusuf_AI_Qaradawi/The_Status_Of_Women_In-Islam/004.htm
122 HELMY, supra note 109 at 25.
123 Adopted and issued at the nineteenth Islamic conference of foreign ministers in Cairo on 5 August 1990
of their rights such as equality, freedom of movement. Finally, there is a restriction, which limits all the rights that are mentioned in the Declaration, which are restricted by Shari'a. The Declaration states in Article24: "All the rights and freedoms stipulated in this Declaration are subject to Islamic Shari'ah." In general, all Islamic discourses, which discuss equality between men and women, stress their equality in nature, duties, and responsibilities, not rights.

2. Qawwama

The term qawwama is mentioned in Qur'an [4/34]. The translation of the verse goes according to Pickthall's translation reads:

[M]en are in charge of women, because Allah hath men the one of them to excel the other, and because they spend of their property (for the support of women). So good Women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High Exalted, Great.

There is a considerable debate surrounding the interpretation of this verse. While secular feminists emphasize, relying on this verse, that "Islam is structurally patriarchal," some Muslim scholars interpret this verse differently.

For the purposes of this part, the researcher will focus on the first part of the verse. It is a controversial verse because of the term qawwamun which Pickthall translates as

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124 Article 1, there is recognition of dignity and duty between men and women but not in rights. Comparing Article 6 in the light of Article 1, the reader can find many limitations upon women's equality and rights. See Article 12, the Declaration gives only men the freedom of movement.


meaning in charge of, or responsible. There is a variety of interpretations for this verse. The word *qawwam* singular of *qawwamun* can be translated as "head," "boss," "protector," "guide," "guardian," "manager," "advisor," or "maintainer."¹²⁸ There are differences between the traditional and modern interpretations of this verse. While most of the Muslim scholars in academia interpret this verse to avoid any amount of superiority being given to men, the reader finds Sheikh Yousuf al-Qaradawi's alternative reasons for this verse stating:

Allah assigns guardianship to the man by virtue of the Qur'anic verse: "Men are the protectors and maintainers of women, because Allah has made the one of them to excel the other and because they spend (to support them) from their means." [Surah 4:34] There are two reasons for this, one has to do with a natural quality, and the other relates to something acquired. First, Allah has provided the man with a quality of greater strength whereas he has equipped the woman with a lighter and usually more delicate physique. Secondly, Allah has delegated the man to be the family provider. If the family collapses, he must bear the brunt of the collapse. This responsibility naturally entails deference and support.¹²⁹

It is obvious here that there is great diversity among Muslim scholars themselves on interpretation of this verse. The diversity is not limited to the differences between the traditional and contemporary scholars; it also exists among modern thinkers themselves. It appears easy to conclude that the official and conservative understanding of this verse goes along with what Sheikh Qaradawi says.¹³⁰ However, the reader will find a number of modern efforts, which interpret this verse differently giving it the humanistic and acceptable interpretation favored by many of women and supported international standards.¹³¹ Al Hibri counters al-Qaradawi’s argument, when she says that:

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#Guardianship
¹³⁰ See also HELMY, *supra* note 109, at 55-76.
This analysis sheds new light on the traditional insistence that the husband must maintain the wife (so that any condition in the marriage contract to the contrary would be void). It reveals that a husband who does not maintain his wife would lack one of the two prerequisites necessary for qi'amah (regardless of the meaning of that word), and hence would not be qawwam. The traditional prohibition against women entering the workforce can also be viewed in the same light. It perpetuates their financial dependence on men.

She relies here on the changes of circumstances and conditions in order to eliminate the reasons behind this guardianship or maintenance. Briefly, she tries to reconcile international standards on women's rights and the Islamic perspective.

However, other scholars like Qaradawi not pay much attention to this process of reconciliation. Furthermore, some scholars manipulate this kind of guardianship emphasizing the reasons for, and the wisdom behind this guardianship, putting limits on its practice.132 Put simply, they do not reject it, rather they attempt to manage it.

Nevertheless, most of these scholars overlook another Qur'anic verse and do not try to address it as they do with the qawwama verse although it clearly stresses and supports the superiority of men over women. The verse states,"[A]nd they (women) have rights similar to those (of men) over them in kindness, and men are a degree above them. Allah is Mighty, Wise." [2/228]

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132 See HELMY, supra note 109, at 59-76.
3. Inheritance

Before Islam, women did not have the right of inheritance in addition to many other rights of possessions. However, with the advent of Islam, they were granted a definite share of the inherited estate, despite the opposition voiced by many Arabs at the time who considered that the right to inheritance was a privilege for men, since they defended the tribe and fought its enemies. With this perspective, which Arabs believed in, there was no hope of inheritance for women. Some scholars believe that the changes, which Islam brought into Arab society, are radical and revolutionary.

The share, which Muslim women hold in inheritance, is mentioned in the verse, "Allah chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females." Muslim scholars classify this verse as a definitive text, which means that the verse is clear and obvious to the limit that it does not need to be interpreted. Because of this, Muslim scholars do not resist, or interpret this verse according to equality, which they highlight. For them, it affirms that men's inheritance, in some cases, is double the inheritance of women. It is difficult, if not impossible to find one prominent Muslim scholar who interprets this verse differently.

Although Qaradawi acknowledges the differences between men and women regarding inheritance, he attributes these differences to the duties and costs that each of them have

134 ZAKZOUK, supra note 107 at 81.
135 See Chaudhry, supra note 133 at 513
136 For extensive analysis to the meaning of definitive texts, see ABDUL WAHAB KHALAF, ILM USUL AL-FIQH, 31 (2002), MAHMOUD MOHAMED TANTAWI, USUL AL-FIQH AL-ISLAMI, 476-480 (3d ed. 2001)
137 Zakzouk, supra note 107 at 81.
to cope with.\textsuperscript{138} It is not a privilege to one of them. In many cases, Muslim women receive a superior share, more than what Muslim men do. Qaradawi gives the following example:

For instance, if a woman dies leaving a husband, mother and two brothers and one sister by her mother, the sister alone gets a sixth; whereas only one sixth is given to the two brothers. Also if a woman dies leaving a husband, a full sister and a brother by her father, the husband gets half the inheritance and the sister the other half, whereas the half-brother gets nothing being merely an agnate. But if the half sibling is a sister and not a brother, she gets a sixth, as sustenance.\textsuperscript{139}

Although Muslim scholars emphasize the differences between the share of women and men in inheritance, they do not consider these differences as discriminating on the status of women, or of abuse of the equality between men and women. On the contrary, they believe that the amount of money will give men the ability to maintain and provide for what his family needs. It is unjust to criticize Islamic rules on this issue. From the Muslim scholars’ perspective, Islam gives women half of what men receive in just four cases, but there are more than 30 cases in which they both inherit equally or women inherit more than men do. Sometimes, Muslim women inherit and men do not inherit anything.\textsuperscript{140}

In summary, I presented in this section the perspective of Islamic fundamentalists and officials, accompanied by academic writings, which largely defend the Islamic perspective. Most of these writings seek to reconcile Islamic teachings and texts and the international standards on women's issues. In this regard, examining international

\textsuperscript{138} QARADAWI, supra note 108, at http://www.masnm.org/documents/Books/Yusuf_Al_Qaradawi/The_Status_Of_Women_In_Islam.
\textsuperscript{139} Id.
\textsuperscript{140} See HAXAQ AL ISLAM FI MOWAGAHAT SCHUBUHAT AL MUSCHAKKIKIN, p. 556-559 (2002)
standards on women's issues is important in order to recognize the potentiality of such reconciliation. In the following section, I am going to present international standards concerning women's issues relying on CEDAW.

B. The Universality of the Rights: The Convention on the Elimination of All Forms of Discrimination Against Women

While the international Human rights documents provide for fully- fledged equality between men and women, there is still tension between what is being provided, the international standards by the international community, and what is written in Shari'a, which is practiced by some Muslim countries. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)\textsuperscript{141} has given women all over the world rights which women are seen as being denied access and practice of those rights. The purpose of this part is to shed light on international standards that the international treaties guarantee on women's rights, focusing on those rights that discuss equality.

The Convention that is prescribed by some scholars as the most "concise and useful document adopted during the Decade [for women]\textsuperscript{142} guarantees some crucial and vital rights to women and seeks to eradicate sexual discrimination against them. The rights, which this Convention guarantees, are wide and various. Reading the first Article of the Convention gives a comprehensive understanding of the meaning of "discrimination against women," which the Convention tries to eliminate. The first Article states

\textsuperscript{141} Admitted by the United Nations General Assembly in 1979, and interred into force in 1981.
For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.\textsuperscript{143}

"The definition can be read to encompass any differential treatment on the basis of gender\textsuperscript{144} that: "1) disadvantages women, 2) prevents the recognition of women's rights in the domestic and public domain, or 3) prevents the exercise of women's rights and fundamental freedoms.\textsuperscript{145} It is obvious from the Convention that equality is one of the ambitions the Convention seeks to achieve in all life's fields. Therefore, the Convention, in Article 2, asks State Parties to undertake the appropriate means to embody the principle of equality in their constitutions and legislations. Furthermore, it urges State Parties to "modify or abolish existing laws, regulations, customs, and practices, which constitute discrimination against women."\textsuperscript{146} Therefore, it is not a surprise that most Muslim countries have reservations on this article.\textsuperscript{147} The declared reason behind the vast majority of these reservations is that it conflicts with the Islamic Shari'a or the national constitutions, which rely heavily on or consider Shari'a as either a source or the source of legislation.\textsuperscript{148}

\begin{footnotesize}
\textsuperscript{146} CEDAW: Article 2.
\textsuperscript{147} See the status of the declarations and reservations, available at: \url{http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm}.
\textsuperscript{148} \textit{Id.}
\end{footnotesize}
Article 15 and 16 in CEDAW guarantees the full equality between men and women. Article 15; for example, deals with the equality of women before the law in all life aspects. Article 15(2) gives women the right to administer property on an equal footing with men, and shall treat them equally in stages of procedures in courts and tribunals. Article (16) (1) guarantees rights to both parents and they have the same responsibilities in respect to bringing up children. This is assigned in the Convention regardless of marital status, which means parents can be married, divorced, or unmarried.

In brief, the Convention seeks and urges all State Parties to eliminate any kind of discrimination against women and rights completely equalize and responsibilities between men and women. Furthermore, there are some rights addressed and advocated in the Convention that Shari'a does not deal with.\textsuperscript{149}

\textsuperscript{149} See Khaliq, \textit{supra} note 105 at 5.
III. Methodological and Religious challenges

One of the problems, which confronts any Muslim scholar working both in the field of human rights and Islamic law, is that he/she realizes that the comparison between Islam and international human rights law reveals that Islam broadly restricts rights related to women's issues.\textsuperscript{150} The dilemma here is that Muslim countries place heavy reservations on the international law under the title, 'conflicts between Shari'a and the Article.'\textsuperscript{151} Muslim countries, by holding this position on Shari'a and the international conventions, place sever discrimination on women in their countries.

Human rights activists and moderates who are involved in human rights and Islam are in a very sensitive position. As Muslims, they cannot interpret the Qur'an while overlooking the traditional interpretations, which they have inherited in their culture. Furthermore, they cannot challenge the Qur'anic verses, which have clear and explicit meanings as categorized under definitive texts as we mentioned above. It is a dilemma because most of these verses discuss aspects of current international human rights such as the status of women and *hudud* (punishments).\textsuperscript{152}

It is submitted that this tension is the main problem, which faces the adoption of human rights in the Muslim world in addition to the effect of customs and traditions.\textsuperscript{153} Unfortunately, human rights activists and Muslim scholars cannot express their efforts to their societies safely because of the risks, which they face in this regard. Most of the

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\textsuperscript{150} *Id.* at 43-44.

\textsuperscript{151} See the status of the declarations and reservations, available at: http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm

\textsuperscript{152} In addition to the resources which I mentioned in this regard before, see MOHAMED ABOU ZAHR: *USUL AL-FIQH*: 115 (2004)

\textsuperscript{153} An-Na'im, *supra* note 12, at 494.
human rights activists' viewpoints and perspectives concerning *Shari'a* are not broadly accepted. They are perceived to be secularists or infidels.\(^{154}\)

In the next part, I will discuss some of the efforts made by Abou El Fadl and An-Na'im to address some of these methodological and religious challenges. I will examine whether they present an innovative methodology and interpretation of these problematic issues or not. The reader will be able to compare between the aforementioned viewpoints that I have described as fundamentalists, and those that are categorized as reformist.

\(^{154}\) Mashhour, * supra* note 100 at 594, footnote 185.
IV. Reformists' Approaches

In earlier parts, I discussed the status of women in fundamentalist Islamic discourse and presented the international perspective regarding the same issue. The aim of this part is to critically review the position of Abdullahi Ahmed An Na'im and Khaled Abou El Fadl on the same issues. I will divide this part into two sections. The first section will discuss Abou El Fadl's perception of women's rights and issues. I will analyze his interpretations and the methodology that he uses to explore these issues. I will start with Abou El Fadl because he discusses the same issues, which I examined in part II, and apply the methodology, which I criticize in the first chapter. In the second section, I will follow the same steps with An-Na'im although An-Na'im does not apply his methodology on the issues, which I am interested in here, with the exception of the issue of *qawwama*. Therefore, I will focus on the methodology, which Ustadh Mahmoud includes in his book and on which An-Na'im heavily relies in his methodology.

A. The Status of Women in Abou El Fadl's Perspective

In this section, I am going to discuss the perception of Abou El Fadl on women's issues. How he analyzes and criticizes the puritans' perspective on this issue. In addition, I am going to critically analyze how he applies his methodology, which he uses to give humanistic interpretation to the Qur'anic texts. It is not proposed to criticize the broad methodology, which Abou El Fadl presents in his books as I did that in the first chapter. Therefore, the criticism will be limited to his application of this methodology. I will focus on three specific issues: equality, *qawwama*, and inheritance as I did in part II to examine the differences between Abou El Fadl's perspective and the Muslim scholars, which we also discussed in the latter part.
Abou El Fadl, in his discussion of the status of women in Shari’a and their role in Islam, is clear. In short, he believes that the puritan discourse is responsible for the current degrading status of Muslim women. Thus, he does not discuss whether the role or the status of women is complete in theory or not. Nor does he discuss whether religious texts give Muslim women their rights compared to international human rights standards or even compared to Muslim men. Abou El Fadl's concern is to criticize and analyze the textual religious sources that discuss the status and role of women in Islam, the sources that puritans rely on in their discourse. Therefore, he does not limit his discussion to the notion of qawwama or hijab. Rather, he additionally analyzes numerous religious scriptures that talk about kinds of marriage, women as seduction, equality between slaves and women, segregation between men and women in public life and places, in addition to every day occurrences.

Abou El Fadl is interested in discussing the social and political contexts, which have created this atmosphere whereby Muslim women are perceived as victims, weak, and discriminated against. Consequently, he interprets the Islamic texts, which deal with the status and role of women in Muslim societies, giving these texts a modern reading relying on Islamic jurisprudential rules. Although he does not discuss the legal rights for women in Islam directly, one can anticipate his position on this issue based on his opinion on the subject in related issues.

155 ABOU EL FADL, supra note 9, at 179.
156 Id. at 239-243.
157 Id. at 245-246.
158 Id. at 181-182.
It can be argued that an analysis like this is crucial in our societies today for many reasons. Some of these include the presence and prevalence of the current puritan discourse in media and satellite; the widespread practices, which puritans preach in these channels, and, most importantly, the genuine Islamic resources on which Abou El Fadl relies in his analysis of the *fatwas*, which the conservative and puritan jurists declare from time to time. Such an analysis is the first step towards obtaining and attaining the genuine role that Muslim women should play in their societies. Gaining the legal rights should be accompanied by social understanding of the importance of the role of women in Muslim societies. Customs, traditions, culture, and, most significantly, religious texts are the elements that form and construct the social understanding that we need to change first in order to change the legal status of Muslim women in Islamic societies. Therefore, there is agreement with Abou El Fadl when he deconstructs the discourse of puritans and conservatives in Islamic countries believing that this discourse is the most important factor causing the inhuman and degrading treatment, which Muslim women suffer from.

The root of discrimination against women in Muslim societies, in Abou El Fadl's perspective, does not come from the religious texts, but comes from the puritan understanding of the religious texts. He is directly involved in a deep discussion and confrontation with puritans and authoritarians in their perception of the role of women in Islam. First, Abou El Fadl does not believe that the puritan attitude toward Muslim women is based on "the sexual lures of women-the issue is power."\(^{159}\) Furthermore, the complete marginalization and exclusion that Muslim women experience in public life comes from the power exercised over them by puritans who seek a complete dominance

\(^{159}\) *Abou El Fadl*, *supra* note 29, at 254.
in public life. He does not believe that Muslim women suffer because of certain textual interpretations, but because of the anger and vehemence in the treatment of women, "as if the more women are made to suffer, the more the political future of Islam is made secure."\textsuperscript{160} It is a political and social analysis of the status of women in Muslim society rather than just a critical reading of the puritan discourse.

1. Equality

It is interesting to note that many of Muslim jurists talk about equality. They talk about equality in responsibilities and duties, not rights. Moreover, they do not talk about equal rights they talk about equality in the nature of humanity. They believe that women and men are equal but are not the same. Accordingly, there are limits to this equality.\textsuperscript{161} In order to discover what the meaning of equality is, in one of the scholar's thesis, one should examine this thesis by putting the term 'equality' in front of other terms in Islamic law like 'inheritance and 'qawwama'. This is the mechanisms used to reveal the meaning of equality in Abou El Fadl thesis.

The basic argument, which Abou El Fadl presents to describe the relationship between men and women in Muslim society looks literally like the argument that Ustadh Mahmoud presents in his book. They both defend and call for equality in Muslim societies between men and women relying on "the moral eternal law of Shari'a-is justice."\textsuperscript{162} It is interesting that both of them rely on the moral principles and objectives

\textsuperscript{160} Id. at 255.
\textsuperscript{162} Abou El Fadl, supra note 29 at 261
of Shari'\textquoteleft a although they have different methodologies when they deal with Qur'an.\textsuperscript{163} It is notable that Abou El Fadl does not mention \textit{Ustadh} Mahmoud or An-Na'im in his work although they presented such an argument before him.

Nevertheless, the pertinent point here is that both of them are not pioneers in such a proposal. In 1978, the Indian Sunni scholar Ahamed Hassan published his work \textit{The Doctrin of ijma in Islam} in Islamabad. Hassan presents an argument based on the same notion, which Abou El Fadl presents here. Hassan argues that the rules of Islam are moral rather than legal. "He believes that the aim of the [Koran] is to build an Islamic society on the basis of morality and justice and not strictly on legal foundations."\textsuperscript{164} I think this is exactly what Abou El Fadl calls for although he does not call for an Islamic society. He pursues a methodology based on the objectivity of the Islamic sources.

Apparently, Abou El Fadl believes in and calls for equality. However, a close examination of this proposition can produce different results. Therefore, it is proposed to measure equality, inheritance, and \textit{gawwama} using two different referencepoints.

\textbf{2. Inheritance}

The equality, which Abou El Fadl seeks to achieve, is not only conditioned by the puritan discourse, but also, interestingly, within his discourse. He believes that "if within the social dynamics of the time, women carry a financial responsibility equal to men; it is

\textsuperscript{163} \textit{See} TAHA, \textit{supra} note 53, at 104-110 and ABOU EL FADL in many places of his books, but I think the reader should carefully read what Abou El Fadl writes in \textit{The Great Theft} p. 261-262 to realize how close he is to what \textit{Ustadh} Mahmoud writes in his book which we mention above.

\textsuperscript{164} ANN SOFIE ROALD, \textit{WOMEN IN ISLAM}, 100 (2001).
more consistent with *Shari'a* to allow women an equal share to men in inheritance." This is a clear condition giving women an equal share in inheritance, which one could argue, contradicts with the value of equality, which he tries to defend. In this case, this is not equality. However, he attempts to defend this conditional equality by placing legal proportionality in front of the rights and duties. This puts Abou El Fadl in a very critical position. What if Muslim women are not working or do not carry financial responsibility? Is it just to not equalize their inheritance? An analysis of Abou El Fadl's position is vague and does not fit in with his equality argument. It is a peculiar analysis because he insists on a link between duties and rights, as if women are not going to take there rights without carrying out their duties. Abou El Fadl does not deal with rights as integrated in the human being with this analysis.

It is important to note here that Abou El Fadl does not discuss the inheritance issue in detail. It is a problematic issue controlled by definitive verses, which Muslim scholars avoid challenging as we noted above. It is obvious in this context that Abou El Fadl do not discuss the idea that the share, which women get in inheritance, differs according to her position in the family. The avoidance is understandable to the researcher in the absence of the interpretation of the clear definitive texts\(^{165}\) in Abou El Fadl's discourse.

3. *Qawwama* 166

Related to equality and inheritance is the idea of *qawwama*. Abou El Fadl's perspective on this issue is that this verse of *qawwama* "has often been cited to legitimate inequality between men and women." 167 However, he interprets this verse differently, concluding that:

The authority given to men over women is not because they are men but because, in a particular historical context, men financially provided for women. But if the circumstances change, and women share financial responsibility with men, authority must be equally shared between the two as well. 169

The result of this interpretation is another conditional right. It could be argued in this context that if women do not share financial responsibility with men; then is the authority also not equally shared between men and women? It is apparent that Abou El Fadl is a supporter of women's rights, but his discourse regarding equality is not stated forthrightly, which leaves an impression of doubt regarding his real motives. The explanation behind this doubt comes from the language in which Abou El Fadl uses in his thesis. It is questionable whether Abou El Fadl does seek full equality between Muslim men and women or he is just defending the moderates' position with some caution. It is submitted

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166 Abou El Fadl discusses this issue in many of his books, see supra note 29 at 267-268, supra note 9 at 210-211, and KHALED ABOU EL FADL, CONFERENCE OF BOOKS, 167-176 (2001).

167 ABOU EL FADL, supra note 29 at 267.

168 In his translation to this verse Abou El Fadl argues that: [t]he verse I am referring to could be read to say: "Men are the guardians of women in accordance with the favors God has bestowed upon some over others, and in accordance with the wealth they spend to provide others" (emphasis mine). The verse could also be read to say: "Men are the supporters of women in accordance with the favors God has bestowed upon some over others, and in accordance with the wealth they spend to provide for others" (again, emphasis mine). In Arabic, the word that I emphasized is *qawwamun* and the variant translations depend on the way that the word *qawwamun* is understood and interpreted-the word could mean "guardians," "supporters," masters," or "servants."

Id. at 267.

169 Id. at 268.
that he can take a stronger stand seeking full equality, which he, as a human rights scholar, should promote.\textsuperscript{170}

One of the significant characteristics of Abou El Fadl's writings is that he easily applies his methodology in his writings. It is notable that he applies the methodology when he criticizes the \textit{fatwas}, which are issued by the C.R.L.O. Although he carefully selects many of the \textit{fatwas} that affect the daily life of Muslim women and affects their relationship with the world outside the house, he carefully avoids\textsuperscript{171} many of the \textit{fatwas} that discuss crucial issues like inheritance and \textit{qawwama}.

As explained in the first chapter, Abou El Fadl relies heavily on two important elements in his methodology. Firstly, he deals with the Qur'an as an open text, which needs human agents to interpret, and Islamic value-based assumptions. Citing authentic and traditional references and sources is one of the ways in which Abou El Fadl pursues his methodology in order to persuade the reader.\textsuperscript{172} In addition to that, he frequently uses well-known Islamic legal principles that support his opinion. However, he does not do that all the time relying on rational dialogue, which he pursues in the texts and puritans. Think can be considered one of the weaknesses in Abou El Fadl methodology because he

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{170}] For extensive interpretation, translation and analysis for this verse see also al-Hibri, \textit{supra} note 127 at 27-35.
\item[\textsuperscript{171}] He heavily relies on the \textit{fatwas} of C.R.L.O, see \textit{ABOU EL FADL supra} note 9 at 173.
\item[\textsuperscript{172}] See how he applies this methodology according to the steps, which I mention here when he discusses the permissibility of photographs in, Abou El Fadl, \textit{supra} note 9 at 197.
\end{itemize}
\end{footnotesize}
always asks his opponents for references or principles to prove their *fatwas* while he lacks these references in some of his responses.  

In summary, although Abou El Fadl appears to be a moderate Muslim who defends Islamic values and morals as he argues in his articles and book, I submit that his thesis should be examined carefully to clearly define his position, and to determine whether he is a real supporter of human rights as embedded in the international treaties and conventions or not. This is a significant point because although he is a prominent Islamic scholar in Western universities, he is also a human rights activist who teaches human rights in the universities. Clarifying his position would reflect the tension internalized by Muslim human rights activist. It is an interesting point because although he spends considerable time discussing specific *fatwas* like wearing of brassieres, high heels, and woman who want to visit graves, he does not devote the same space to discussing equal shares of inheritance, which Muslim women should enjoy. He dispenses with this issue and mentions it briefly in 'The Great Theft' which may indicate that he does not want to discuss it in detail like he does many other issues relating to women in Islam in 'Speaking in God's Name'.

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173 ABOU EL FADL, supra note 9 at 194. I think it is important here to mention that Abou El Fadl in 'The Great Theft' in the chapter which he devotes to discuss the nature and the role of women in Islam, he does not cite any authentic or traditional reference except the Qur'an and Asbab al-Nazul, al-Suyuti.

174 Abou El Fadl, supra note 9 at 177.
175 Id. at 177-178.
176 Id. at 181-183.
177 ABOU EL FADL, supra note 29 at 267
B. The Status of Women in An-Na'im's Perspective

In this section, I discuss the perception of An-Na'im on women's rights and legal status in the Islamic law offering a criticism of it. Then, I will discuss his opinion regarding *qawwama* and examine how he deals with this term in his writings. Finally, I critically analyze his methodology and its application, which *Ustadh* Mahmoud presents in his book. The reason behind the differences between the structure of this part and the prior parts is that An-Na'im does not analyze the problematic aspects of women's issues in Islamic *Shari'a* in the same manner Abou El Fafdl does.

1. Status of Women in the Islamic Law

An-Na'im's position on the status of women in Islamic law is problematic and sometimes contradictory. On one hand, he believes, in theory, that a Muslim woman has a complete legal personality. He asserts that for a long time, *Shari'a* has had a positive impact on the status and rights of women. *Shari'a* guarantees Muslim women many rights such as an independent legal personality, access to education, a specific share in inheritance, decent treatment as a wife, and restricted polygamy. On the other hand, An-Na'im recognizes, "*Shari'a* treats women as the wards of men." Moreover, he realizes the limitations and restrictions, which Muslim women face because of the historical perspective of *Shari'a*.

It is problematic because An-Na'im realizes that the reason behind this situation is one of historical status, which Muslim women suffered, during the last centuries, and still

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178 An-Na'im, *supra* note 12 at 495.
suffer from. Moreover, he does not try to eliminate this contradiction by interpreting the verses, which discuss the status of women in Islam vis-a-vis men's rights. There are many verses, which An-Na'im does not refer to when he discusses the status of women when he discusses the status of women in the historical Shari'a or in the modern perspective. Nor does he discuss the status of the rights, which he argues that Shari'a guarantees to Muslim women, today.

The dilemma of An-Na'im's position is that he calls for an alternative interpretation of the Qur'an and Sunna believing that this interpretation "should not be confused with the current authoritative view of Shari'a as accepted by the vast majority of Muslims." In addition, in another article he disparages those who rely selectively on some of the Qur'anic verses, which support and enforce the status of women because they fail to put into consideration the ways in which the parts they select have been interpreted by the Shari'a jurists. It is a dilemma because he knows that the authoritative view of Shari'a, as accepted by the vast majority of Muslims, contradicts his proposition and methodology, which we reviewed in the first chapter. Moreover, as submitted, An-Na'im does not give Shari'a jurists any attention or authority when he suggests interpreting the Qur'an differently, relying on the methodology of Ustadh Mahmoud especially in annaskh (abrogation). Neither his opinion nor Ustadh Mahmoud's opinion, is accepted according to Shari'a jurists, simply because neither of them suggested these opinions before and any reader of Shari'a or usul al-fiqh books will not find such opinions.

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180 See the Qur'an (2:223) "And they (women) have rights similar to those (of men) over them in kindness, and men are a degree above them. Allah is Mighty, Wise."
181 An-Na'im, supra note 12 at 497.
182 An-Na'im, supra note 37 at 40.
Furthermore, An-Na'im understands that the problematic aspects of Shari'a are based on some clear, definite, and categorical texts in the Qur'an and Sunna.\(^{183}\) There is a clear inferior status of Muslim women "under Shari'a when compared to other contemporary legal systems or when judged by the emerging international standards."\(^{184}\) In addition to that, he does not limit the violations that Muslim women face in the interpretations of Shari'a. He adds the influence of the local customs and institutions that affected these interpretations.\(^{185}\)

Another related point is his discussion of the discourse, which human rights activists should follow in order to convince Muslims that human rights are not alien to Islamic values. It is argued with An-Na'im that human rights activists should play a role in convincing moderates in the Muslim world.\(^{186}\)

However, he does not point out the way we should follow to convince Muslims of these international values. Alternatively, nor are the strategies which we should follow to convince societies of the importance of women's rights, presented. Rather, he presents his methodology to reconcile Islam with human rights, a methodology, which is not applicable as will be discussed later in this section.

\(^{183}\) An-Na'im, \textit{supra} note 37 at 49.
\(^{184}\) An-Na'im, \textit{supra} note 12 at 495.
\(^{185}\) \textit{Id.} at 494.
\(^{186}\) I think the process of convincing is difficult because it is a process of transplanting different values in different cultures. "This process of transplanting legal and ethical concepts of rights between two different cultures is an extremely arduous task." See Carla Makhlof Obermeyer, \textit{A Cross Culture Perspective on Reproductive Rights}, 17 Hum. Rts. Q. 366, 367 (1995).
2. Qawwama

An-Na'im repeatedly states that the cause of the entire problem, which Muslim women suffer from, is the notion of *qawwama* or the guardianship of the male over the woman. The origin of the notion of *qawwama* exists in the verse "4:34" of the Qur'an: "Men have *qawwama* (guardianship and authority) over women because of the advantage they (men) have over them (women) and because they (men) spend their property in supporting them (women)."187 This verse, according to An-Na'im, characterized Shari'a family law in the many "features of inequality between men and women in marriage, divorce, and related matters."188

In his articles discussing the issue of women in Islam and human rights, An-Na'im repeatedly states that the notion of *qawwama* is the cause behind the inequality between men and women especially, in Shari'a family law as we mentioned above. However, An-Na'im does not present a new interpretation of this verse. Nor does he discuss the traditional interpretations of this verse, and the reason behind the inequality, which Muslim women suffer from. A different understanding, or a different interpretation, is not promoted or cited, which presents different understanding for this verse.189 Put simply, the suggested methodology in the articles and his book is not applied to the issues of women.

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187 I rely here on the translation of An-Na'im, *supra* note 37, at 37.
189 I think it is not difficult at all to do so. There are many references that present this modern understanding and modern reading to this verse. I presented in the prior part many of these interpretations.
In relation to women's status in Shari'a, this is the only verse, on which An-Na'im relies in his articles. He does not discuss or refer to various verses that cause many of the violations that Muslim women suffer. He does not refer to the several hadiths which Muslim jurists relied on to reduce, restrict, and violate the rights and the status of women within Shari'a. With an issue like the status of women in Islam, it is crucial for the reader and writer to deeply search for the status of women in the scriptures, traditions of the Prophet, and the tradition of the Muslim jurists. It is crucial to identify whether the problem comes from the Qur'anic verses or from the hadith. A careful examination should be carried out in order to identify the root of the problem. In so doing, the research can identify an appropriate solution to eliminate the discriminations. Such an approach is necessary to examine which interpretation the reader can rely on to understand the historical context of the verses. Then, discuss the different interpretations according to the spirit of the modern era in which we live. It is vital to identify the injustice, which Muslim women suffer from, because of the specific understanding of the verses or hadith. This is to redefine and understand the verse or hadith differently because it is not compatible with the values of Islam.

An-Na'im is in the position where he cannot criticize Shari'a for its convictions regarding the status of women because he believes, as a Muslim, that the convictions of Shari'a on this issue are inspired by definite Qur'anic verses that he believes are from a divine source, and, accordingly as a Muslim, he cannot criticize them. Although, he often criticizes traditional interpretations that drive women's status to its current unjust position, this approach cannot justifying ignoring these traditional interpretations, which served and gave women their rights in a very specific historical moment, whereas our historical
moment is completely different. It is obvious that what gives this suggested methodology a kind of credibility is An Na'im's reliance on the authoritative interpretations and Shari'a jurists. However, the average Muslim reader closely reading his methodology will not find this reliance workable. The Muslim reader will not find any reference to sources in Qur'anic interpretations' books or Qur'anic Sciences books in An-Na'im's methodology, or in his footnotes. This indicates that he does not rely on them. Alternatively, the secular Muslims will not understand this insistence on the part of An-Na'im, to rely on the Shari'a jurists and traditional interpretations, believing that they "were men and we are men," and that they interpreted the Qur'anic verses to meet their needs and we need to interpret them differently to meet our needs regardless of what their opinions were.  

3. The Methodology and the Application

It is significant that An-Na'im does not mention how and why this methodology is important and vital to improve the status of women in Muslim countries. What are the improvements relying on this methodology, which we can develop? In the case that we apply this methodology, what are the differences between the status of women in Shari'a, according to this methodology, and its perception and interpretation of Shari'a in relation to the international standards of human rights? How can this methodology make a difference to the reality of Muslim women in their countries whether they are Muslim countries or non-Muslim countries? It can be argued here that there is no reference to Shari'a, but we import the international standards and apply them to the Islamic

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190 See generally, ABDULLHADI ABDULLRAHMAN, SULTAT AL-NAS (The authority of the text, in Arabic), 21-65 (2d ed., 1998), also see generally, HUSSIEH AHMED AMIN, HAWLA AL-DA'WA ILA TATBEEQ AL-SHARI'A AL-ISLAMIA (Regarding the call for implementing the Islamic Shari'a), 21-74 (3d ed., 1992). The reader can find in these two references a clear call for ignoring the traditional interpretation and generating a modern interpretation according to the current era's needs.
convictions regardless of the problematic coexistence between the two aspects, and apart from the interpretations of the texts themselves.

An-Na'im does not discuss the impact of customs and traditions on Shari'a. Yet how do customs and traditions affect Shari'a? Where do exactly the customs and traditions start and end, and when precisely does Shari'a start and end? What are the suggested solutions to separate this relationship between customs and traditions on one hand, and Shari'a on the other? Are there any positive aspects of some of the customs and traditions that influence Shari'a? If so, how do Muslim scholars use them? There is total silence regarding these questions in An-Na'im's discourse. I think that it is important to speak out and discuss without fear these issues both individually and collectively to achieve shared understanding of women's rights.

Interestingly, when the reader examines what Ustadh Mahmoud writes in his book 'The Second Message of Islam' he will find that neither does Ustadh Mahmoud support his arguments with appropriate and definitive references and arguments. An-Na'im sometimes does not support his argument with verses from the Qur'an or even hadith. This is significant also because he generalizes his opinions in the same manner with the issue of al-hijab (veil) when he says that the origin in Islam is to be unveiled relying on the story of Adam and Eva in Qur'an. Regardless of the difference of this opinion, which is in fact unprecedented, it can be argued that Ustadh Mahmoud is committed to proving his opinion of Qur'an or hadith or at least to discuss in depth the

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191 I rely here on the Arabic version from the book. See TAHA, supra note 53, 104-110.
192 Id. at 108-109.
verse, which orders Muslim women to wear veil. The same demand applies to the response on the status of women in Islam. He should first discuss the verses, which relate to the issue and then present his opinion and the application of the methodology, which he suggests in his book.

The generalization, which I mentioned above, is clear when Ustadh Mahmoud discusses inequality between men and women in Islam. The title of this topic, addressed in one page, is "inequality between men and women is not an origin in Islam." This page of text purports that complete equality is the origin of Islam, because in the Hereafter, each one will be judged individually, referring to some verses from the Qur'an discussing the individuality of the judgments. Subsequently, he refers to the historical cruel status of Arab women in practices prior to Islam. Relying on the historical factors, society was not ready, neither women nor men, to receive such legislation which would allow for equalization between them. It requires time for both the individuals and society to be developed. According to An-Na'im, it was understandable that there was no equality between men and women and why women should be half of men, and why women should obey men in everything, relying on the verse of qawwama [4:34], which is mentioned above.

In summary, Ustadh Mahmoud relies on the idea that society was not ready to receive the real message of Islam. Accordingly, women and men were not ready to receive appropriate legislation to equalize between them. However, he does not explain why God revealed this message, which he describes as 'the second message of Islam' first. The

193 Id. at 104-105
vagueness of this idea is one of the factors can drive the average Muslim away from its essence.
Conclusion

This paper endeavored to present two different reformist approaches to Islamic law. Abou El Fadl and An-Na'im were chosen as representatives of new Islamic methodologies, which Muslim scholars can rely on in their calls for reform. Both scholars have similar realizations of the crisis under which the Islamic law and the Islamic discourse suffer. Reformist approaches face many obstacles and difficulties in the Muslim countries. Although Muslim scholars have the methodologies and the theories, which they seek to implement in order to reform the Islamic law and the Islamic discourse generally, missing is the important and crucial factor - the average Muslim, who both seeks reform and needs reform.

This paper endeavors to highlight the absence of the average Muslim in the methodologies of the reformist approaches under discussion, while making a case for a fuller understanding of the restrictions arising out of reform, definitive text, and the methodologies that seek consensus while avoiding conflict and integration of Sharia with human rights. The methodologies presented here have appealed, and are appealing to the elites in the Muslim societies, and those who are interested in the reform of Islamic law and the Islamic discourse. However, the average Muslim is not exposed to such theories; the discourse in the media tends to be outside much of the reformist debate.

Muslim scholars must search for alternative means of delivery their methodologies, ideas, opinions, and calls for reform, instead of limiting their presentation to books, conferences, and academic fields. As discussed in the body of the paper, the average Muslim can be confused by methodologies that rely on avoidance rather than elucidation.
in respect to Quranic evaluation and a rationale for rights. Reformists must search for supporters, backers, and advocates, in order to attain the required impact in the society. They must not give up; they must develop the methodologies, which provide certainty for the average Muslim.

It is not a temporal issue, which affects the acceptance of such proposals as An-Na'im argues in one of his articles. It is an issue of the means, sources, and discourses, which are used. More importantly, in order to achieve the required success, Islamic groups or institutions must actively address these proposals. The experience which Muslim societies have witnessed during the last three decades make it imperative to actively pursue open discourse to avoid further confrontation to the compatibility of human rights and Islam.

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194 An-Na'im, supra note 37, at 49 (1990).