

Islamic Law and Human Rights: a contribution to an ongoing debate¹

RUUD PETERS

ABSTRACT *In this essay the author criticizes two opposite approaches to the relationship between Islam and human rights: the incriminating and the apologetic approach. They are either anachronistic in that they judge the rules of classical Islamic jurisprudence by present-day standards, or they entirely ignore its heritage. The author attempts instead to develop a new approach whereby classical Islamic jurisprudence is analyzed in its historical context. In order to examine whether Islam recognized a notion of fundamental rights, the author first tries to establish to what extent the notion of legal equality is recognized in Islamic law. Secondly, he examines two hierarchical legal relationships, viz. that between master and slave and that between husband and wife, in order to find which basic and inalienable rights Islamic law assigns to the weaker party in these relationships. His conclusion is that classical Islamic law offers points of departure for the development of a modern theory of human rights rooted in Islamic notions.*

Introduction

During recent decades a host of publications have seen the light with titles like: 'Islam and X' or 'X in Islam', where X is typically a concept with a positive connotation, such as democracy, peace, social justice, or women's rights. Titles like 'Islam and Human Rights' and 'Human Rights in Islam' have been particularly popular. Publications with such titles are as a rule partisan and indicative of one of two attitudes: they are either incriminating or they are apologetic.

In the first case the authors attempt to prove that Islam does not foster these concepts at all but, on the contrary, propagates doctrines totally contradictory to these notions. In the latter case the authors' purpose is to demonstrate that Islam promotes or enjoins these positively valued concepts to the same extent or even more than 'Western culture' or Christianity and that it has done so for a much longer period. Therefore, whenever I see such a title, I become cautious, and will peruse the book or article with an attitude that is more critical than usual. These topics are fluid, and dealing with them requires special methodological care in order to avoid the traps by which they are surrounded.

In this paper I will start with a critique of the methodological flaws in much of the existing literature and then suggest ways in which the topic may be approached. My intention is to contribute to the debate on Islam and human rights, not to offer ready-made solutions.

A Critique of the Partisan Approaches

No one can expect that Islamic law as laid down in the classical texts of the various law schools (*madhāhib*) should protect human rights as recognized in present-day

international instruments. Islamic law was formulated some thousand years ago, and although it has been subject to some development and elaboration through the ages, there were no drastic changes until the nineteenth century.

The concept of human or fundamental rights, on the other hand, is relatively recent. It was first developed in Western European intellectual circles during the eighteenth century. With the American and French revolutions the legal bases were laid for the enforcement of fundamental rights and they were given a place in the new constitutions in order to underline their special nature. However, we should not forget that these fundamental rights were still in an embryonic stage and applied essentially only to white free men, and not to women and black people, and that slavery was still lawful.

Judging and criticizing these eighteenth-century texts and their contemporary authoritative interpretations by the criteria of a present-day understanding of human rights is meaningless, since this understanding is the result of two centuries of intellectual and juridical development after the proclamation of these cardinal declarations. The same, of course, is true if one compares classical *fiqh* with modern international human rights instruments in order to establish whether or not Islamic law is in conformity with modern human rights standards. Depending on the author's intentions, it leads either to an anachronistic approach, or to an approach whereby the classical heritage of *fiqh* is totally spirited away and replaced by inconsistent and haphazard quotations from Qur'ān and Ḥadīth serving to prove that Islam has always protected fundamental human rights as they are known and recognized nowadays.

Before discussing the approaches that in my view are sound, I will first pay some attention to main currents in the existing literature on the subject.

The Incriminating Publications

There are Western publications arguing that Islam is incompatible with democracy and with the idea of human rights. Their authors' main argument is that the provisions of the Sharī'a are in conflict with these concepts and that these provisions continue to control the minds of Muslims. Now, it is obvious that classical Islamic law, whose foundations were laid by Muslim jurists living between the eighth and eleventh centuries, does not contain much in the way of modern human rights principles. Islamic law is therefore an easy target for criticism: its classical legal doctrine is not founded on universality, nor on equality of persons, religions or beliefs before the law. However, such an approach is anachronistic. It resembles judging Roman law with the yardstick of modern international public law, and at the same time fails to recognize the variety within Islam and the potential for change and development.

Nevertheless, one may object that Islamic law is in many countries still being enforced, especially in the domains of family law and the law of succession, and, in some countries, also in the field of criminal law. This is undoubtedly true. However, in these countries, law, including laws based on the Sharī'a, is now enacted by the state, on the basis of legislation and codification. If these sovereign states choose to introduce codes based on Islamic law that are in conflict with the principles of human rights as recognized in international law, then the legislative authorities of these states are to be criticized and not Islamic law. In many countries Islamic family law has been codified and reformed in order to change certain rules that were regarded as socially undesirable. There is no reason why this cannot be done in order to reconcile Islamic law with international human rights standards, without abandoning the principle that the resulting laws are essentially governed by the Sharī'a.

The same can be said with regard to states that have made the choice to Islamize their entire legal system. For this does not necessarily entail the enforcement of all rules to be found in the classical textbooks. For over a hundred years, Muslim scholars have argued that Islamic law can and must be revised and reinterpreted in order to adapt it to present-day needs. Islam and an adherence to Islamic law does not in itself have to be an obstacle to the enforcement of human rights principles.

The Apologetic Publications

Authors of apologetic publications² attempt to prove that Islam has always recognized and proclaimed human rights even before they were known in the West. This is then substantiated by quoting qur'ānic verses and sayings of the Prophet Muhammad, usually with total disregard of the classical exegetical tradition and the classical body of Islamic jurisprudence. The classical tradition is not even criticized or attacked but for the most part ignored. A typical example is the following from a book by the famous Indian Islamist thinker al-Mawdūdī (d. 1979).

The right to equality

The Qur'ān puts strong emphasis on the principle of the equality of the entire human kind, and says that if one person has precedence over another, then this relates only to his character or his faith: 'O mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo! the noblest of you, in the sight of Allāh, is the best in conduct. Lo! Allāh is Knower, Aware' (Q. 49:13). The first point mentioned in this verse is that the origin of all humanity is one and the same and that the difference of races, colours and languages is in reality no reasonable ground for dividing mankind and differentiating between them. The second point is that God has created these differences between peoples only so that they may know one another. Or in other words, no family, tribe or people has a precedence that gives it better rights, increases its importance and diminishes the value of others. (...) The Messenger—may God bless him and preserve him—clarified these notions in different ways. He said in his address after the conquest of Mecca: 'An Arab has no precedence over a non-Arab nor a non-Arab over an Arab, nor a red skinned person over a black skinned person nor a black skinned person over a red skinned person, except in piety. And there is no precedence based on descent.' This means that there is only precedence on the basis of religion and piety, for it is not true that some men are created from silver and others from stone or mud. No, all human beings are equal.³

As will be clear from this quotation, the concept is given a meaning that is slightly different from the one it has in human rights discourse. Equality in Mawdūdī's reasoning refers to equality between ethnic groups, but not to equality between religions or the sexes. Comparable changes of meaning can be observed when the notions of other fundamental rights are discussed by Muslim authors. Freedom of religion is usually interpreted as the right to practice freely one of the tolerated religions and the right to be converted to Islam, but certainly does not include the freedom for a Muslim to embrace another religion.

What the treatment of human rights by Muslim apologetic authors boils down to is that, on the one hand, they claim that Islam has always recognized these human rights,

whereas, on the other hand, they subtly change the contents of these rights. In their argumentation classical *fiqh* does not play a role. It is totally disregarded and the arguments put forward for their claims are as a rule isolated qur'anic verses and Prophetic traditions, quoted out of context and without reference to the classical exegetical tradition. Such an approach, in my view, evidences intellectual poverty and can never be the point of departure for successful attempts to embed present-day concepts of human rights in Islamic law.

Islamic Law and Human Rights: other approaches

In my view there are two methodologically sound approaches for studying the relationship between Islam and human rights: one dealing with the present, the other with the past. As to the study of the present situation, my position is that it should focus on the analysis of documents issued by Islamic authorities and the actions and declarations of governments in the Muslim world insofar as they claim that their words and deeds are prompted by Islamic principles or motives. Such an analysis will help us determine the role of Islamic notions in the human rights policies pursued by these governments. The studies of Professor Mayer are an eminent example of such research.⁴ Whereas her studies address the present, I will focus on another dimension, namely human rights and classical Islamic law.

Now what is the sense of discussing Islam and human rights with regard to the past? In the beginning I said that such an approach is by its very nature anachronistic.⁵ That is true, if one judges classical *fiqh* by the standards of modern human rights discourse. My intention, however, is different. In my view it might be useful to examine and analyze classical *fiqh* texts in order to find out what are the elementary values and inalienable rights of individuals recognized and protected by Islamic law. These are certainly not identical with or as numerous as the human rights that are now internationally recognized. But this analysis may serve as a basis for an Islamic human rights discourse, which is better founded and intellectually stronger than much of the discourse nowadays current in the Muslim world.

I will discuss two points:

1. Universality and equality before the law;
2. Elementary rights protected by Islamic law.

Universality and Equality before the Law

As we all know, the operation of Islamic law is not meant to be universal. It is restricted to the 'Abode of Islam' (*dār al-islām*) and according to most legal schools, Muslims entering the 'Abode of War' (*dār al-ḥarb*) are no longer subject to the Shari'a, in the sense that if they commit crimes there, they cannot be tried for them after their return. *A fortiori*, the same rule applies to non-Muslims residing in enemy territory (*ḥarbīs*). Being enemy persons and not falling under the protection of the Islamic state, their legal capacity is suppressed to the extent that it is virtually non-existent and their lives, property and freedom are not safeguarded. It is true that certain categories of persons may not be killed, but this protection is rather academic, since a violation of this protection, according to the majority of scholars, does not entail an action for retribution or bloodmoney.⁶ The extremely weak legal personality manifests itself only insofar as *ḥarbīs* may be party to certain binding agreements. In addition, as soon as

they lawfully enter Islamic territory,⁷ they acquire a legal capacity which is almost equal to that of a free Muslim.

Within the Islamic territory, all lawful residents are protected by the law. That is, their lives and bodies are protected and this protection may result in legal action in the case of its being violated. Furthermore, if they are free, their freedom and property are safeguarded by the law. This last statement, however, shows that not all persons have the same legal capacity or legal personality. Like all pre-modern legal systems, Islamic law does not recognize the notion of the natural equality of all persons before the law. There are several categories of person and their legal capacities are different from each other. Legal personality in Islamic law is defined by three dichotomies, creating legal boundaries between dominant and non-dominant groups:

Muslims *vis-à-vis* non-Muslims
 Men *vis-à-vis* women
 Free persons *vis-à-vis* slaves.

Every person's legal capacity is a function of these three dichotomies and therefore there are eight categories of persons. The differences in legal capacity have effect in most spheres of the law. The fullest legal capacity is that of a free Muslim male. All others have fewer rights. The clearest illustration of the existence of these categories is the differentiation in bloodmoney, the amount of money to be paid if a person is killed. The highest amount must be paid for a free Muslim male, whereas no bloodmoney is due if a *ḥarbī* is killed. Non-Muslim lawful residents in the Abode of Islam do enjoy protection of life, property and freedom. However, their legal capacity is restricted by the fact that they are incapable of performing legal acts implying any form of authority over Muslims or of entering into such legal relationships. Therefore, they cannot hold public office, be guardians over Muslim minors or possess Muslim slaves. Moreover, non-Muslim men may not marry Muslim women, whereas there is no legal impediment for Muslim men to marry Christian and Jewish women. This is a logical rule in view of the notion of marriage in Islamic law, which confers on the husband matrimonial authority over his wife. In order to emphasize the divide between Muslims and non-Muslims, the law lays down that protected non-Muslims must distinguish themselves in their attire from the Muslims and imposes certain restrictions on their social life aimed at making manifest their subject position. These restrictions affect e.g. their ways of transport—they are not allowed to ride horses—and their houses, which have to be lower than neighboring houses in which Muslims live.

The distinction between free persons and slaves is of a different nature. Slaves are both property and persons. Their lives are protected, but they lack the capacity fully to own property or to have legal authority over free persons. The limitations on their legal capacity are a function of their owners' property rights over them and of their lower status, which prevents them from having legal authority over free persons.

Finally there is the distinction based on gender. I will not elaborate here, as the legal status of women in Islamic law is well-known. Although in financial matters women have the same rights as men, this is not the case in other fields of the law such as family law, succession procedure and public law. As in the case of non-Muslims and slaves, the inferior status of women precludes legal authority over free men.

This has been a brief survey of some aspects of the classical Islamic law of persons. It is clear that its purview is not universal but restricted to Islamic territory and that the *Shari'a* does not, at first sight, recognize the principle of the natural legal equality of persons. However, in spite of this, there are important notions of universality and

equality to be found in the Shari‘a. For these we have to turn to legal theory, the *uṣūl al-fiqh*, and here we find some basic principles that can be regarded as an expression of the idea of the universality of the law and some elementary equality of all human beings. The most important of these is that all are endowed with legal personality and thus are proper subjects of law. This is a requirement for legal capacity. The following passage from a fourteenth-century Ḥanafite work on legal theory may demonstrate this point:

The capacity of a human being (...) in legal usage means his ability to have lawful rights and obligations [in other words, his legal capacity. RP]. This is a trust that is borne by every man as God—Who is powerful and exalted—has informed [us]: ‘[Lo! We offered the trust unto the heavens and the earth and the hills, but they shrank from bearing it and were afraid of it.] And man assumed it’ (Q. 33:72). (...) Legal capacity (*ahliyyat al-wujūb*) is based on the existence of legal personality (*dhimma*) (...) since this legal personality is the center of obligations and rights. Because of it, only human beings can have obligations and not the living beings that do not have legal personality. As soon as a human being is born, he has a legal personality capable of having rights and obligations. (...) This is based on the promise [made by God] in the past. Thus it is certain that man possesses legal personality, i.e., in legal usage, the quality by means of which a person becomes capable of binding himself and others. This certainty is the result of the promise in the past that took place between the servants and the Lord, as God has informed us in His words: ‘And (remember) when thy Lord brought forth from the Children of Adam, from their reins, their seed, and made them testify of themselves, (saying): Am I not your Lord? They said: Yea, verily. We testify. (That was) lest ye should say at the Day of Resurrection: Lo! of this we were unaware’ (Q. 7:172).⁸

It appears from this text that Islamic law is founded on the notion that God has endowed every human being equally with legal personality. This innate and universal legal personality cannot be eliminated but may be affected by accidental attributes, such as unbelief or slavery, which then results in a diminished legal capacity.

Another indication of the universal character of Islamic law is the view held by the Shāfi‘ites and many Ḥanafites that the precepts of the Shari‘a address all mankind. As to the secular provisions of Islamic law (*aḥkām al-dunyā*), they are binding in Islamic territory for Muslims and non-Muslims alike. With regard to religious rules there is an authoritative view that these are universal and address all mankind, regardless of a person’s status, gender or religion. This means that non-Muslims will be punished in the Hereafter not only for their failure to convert to Islam, but also for not having heeded the commands of the Shari‘a.⁹

Although this universality does not extend to other fields of the Shari‘a and there are, for all practical purposes, legal differences between various categories of persons, there is this deep fundamental level at which the Shari‘a can be regarded as universal, addressing all humankind and based on an essential equality of human beings.

Elementary Rights Protected by Islamic Law

In order to establish what elementary rights or legal values classical Islamic law protects, I want to examine unequal legal relationships in which one party has nearly

total control over the other and is entitled to be obeyed. The limits set by the law to the powers of the party in control may tell us something about the elementary rights and legal values protected by classical Islamic law. The first domain of the law where one would look is, of course, constitutional law. Here the individual is confronted with the all-powerful state and in this context the doctrine of the inalienable rights of the citizen *vis-à-vis* the state was first formulated in Western Europe and America. In Islam, however, constitutional law is not well developed. The standard text books of *fiqh* do not have special chapters on the subject, and the first treatise on the subject was not composed until 1050 when al-Māwardī wrote his *Al-aḥkām al-sultāniyya* (The Rules of Statecraft). This work and the few that were written after it discuss the organization of government and the duties of the ruler rather than the rights of individuals *vis-à-vis* the ruler. Most authors assert that the ruler is bound by the Sharī'a and must enforce it and that the duty of a subject to obey and assist the ruler ceases whenever carrying out the ruler's orders implies committing a sin. However, these principles are not elaborated into something resembling a Bill of Rights of the subjects. They remain very global and, consequently, the topic does not yield very much for our purposes. Therefore I will not pursue it, and leave the field of constitutional law.

Instead, I have selected two other legal relationships, belonging to the domain of civil law and entailing the wielding of power of one party over the other, namely marriage and slavery. I intend to examine the basic and inalienable rights of wives in relation to their husbands and those of slaves in relation to their masters. Of course, these relationships differ a great deal from the relationship between the state and its subjects, which forms the framework of the Western doctrines of human rights. The greatest difference, in my view, is that the relationship between the state and its subject is an anonymous and impersonal one, whereas both the other relationships are eminently personal, not least because of affection and physical proximity. Therefore, much of the interaction within these relationships remains outside the sphere of the law, at least law in the Western sense. Yet, the classical jurists of Islam discuss these relationships from the point of view of the law, and define the limits of lawful behaviour both for the husband with regard to his wife and for the master with regard to his slave. It is these limits that I want to examine here in order to establish which inalienable rights are guaranteed by the Sharī'a.

Marriage—I shall first consider the relationship between husband and wife. One of the legal effects of the marriage contract is that the husband is under obligation to provide his wife with maintenance. Another is that, if certain conditions are satisfied, he is entitled to marital control over his wife. After the conclusion of the marriage contract and the payment of the brideprice, the husband may demand that his wife 'deliver herself' (*taslīm nafsahā*) to him, or 'put herself at her disposal' (*tamkīn nafsahā*), provided she is capable of sexual intercourse or longs for it and provided he can offer to her adequate housing. Putting herself at his disposal means first that she goes to live in the conjugal home, secondly, that she enters his control, which is sometimes referred to as detention or custody (*iḥtibās*), and thirdly, that she is available for sexual intercourse. If after the conclusion of the marriage contract the wife does not put herself at her husband's disposal without good cause, she forfeits her right to maintenance. The same happens if she withdraws from his control without good reason, usually by leaving the conjugal home without his consent or by failing to comply with his demands. She is then considered to be rebellious or disobedient, *nāshiz*. In this connection the *fiqh* books discuss two questions. First the question of when she can

lawfully refuse to put herself under his control or leave his control and, secondly, the question of whether or not she is still entitled to maintenance, even if she acted lawfully in refusing to put herself under her husband's control or leaving his control. Finally, the jurists explain the lawful measures that the husband has at his disposal in order to force his wife to compliance, if she is disobedient but has not left the conjugal home.

From the texts on these topics¹⁰ it appears that a wife has the following elementary rights that her husband may not infringe.

1. The right not to be subjected to acts that may impair her health.¹¹ I have deliberately not used the term 'right to physical integrity' since a married woman (like a slave girl) is not entitled to refuse intercourse, unless there is a lawful excuse, such as illness or physical or psychological incapability of having intercourse.¹²
2. The right to perform her religious duties. The test case here, of course, is the obligation of *ḥajj*. The jurists agree that a wife, if the *ḥajj* is religiously obligatory for her, is entitled to perform the *ḥajj*, even without her husband's consent, provided she travels in the company of a close relative, though he is not then obliged to pay for her maintenance.¹³ And if she is fasting during Ramaḍān, her husband may not demand intercourse during daytime. This right to perform religious duties also extends to non-Muslim wives.¹⁴
3. The right to own and administer her own property.
4. The right to have relations with her parents and relatives.¹⁵
5. The right to lawful social intercourse within her home. Although the husband is entitled to confine his wife to the conjugal home, she has the right not to be alone. If there are no children or servants, the wife is entitled to a female companion.¹⁶

Slavery—The nature of the legal relationship between a slave and his master is totally different from matrimony. Marriage is a synallagmatic contract between two legal persons who by virtue of this contract acquire rights and obligations towards each other. The relationship of slavery is not based on a contract between the owner and his slave. On the contrary, in this relationship the slave is first and foremost property. His master is entitled to the fruits of his labour. As to female slaves, their masters can have lawful sexual intercourse with them. However, since the slave is endowed with legal personality and has not totally lost his or her legal capacity he or she has certain rights, which can be enforced against the owner. The discussion of these rights in the *fiqh* books is rather terse, but it is possible to identify certain elementary rights.

1. The right to life. The existence of this right *vis-à-vis* third parties is obvious. Like all other lawful residents of Islamic territory, a slave's life is protected by his *'isma* and if someone violates this protection, the owner of the slave can sue him and, under Ḥanafite law, even demand the killer's life, if the killing was wilful and unlawful. If the killing was accidental, the owner can demand bloodmoney, which for a slave is equivalent to his market value. Since the slave's owner is the 'avenger' (*walī al-dam*), there is a procedural problem if the owner himself has killed the slave. Most jurists assert that, although he cannot be sued for retribution or for payment of the blood price, the state can punish him on the strength of *ta'zīr*.¹⁷ The right to life further includes the right to be kept alive. The slave has an enforceable claim against his owner for maintenance (including the expenses of medical treatment), which is not dependent on whether or not the slave has worked. He may take what he needs from the owner's property if the owner is

- absent or refuses to give it to him. Unlike a wife's right to maintenance, a slave's right is not lost in the case of his disobedience. If the owner cannot support him and the slave cannot be sold or hired out, the slave has a claim against the Treasury (*bayt al-māl*) for maintenance.¹⁸
2. The right not to be subjected to acts that may impair his health.¹⁹ As in marriage, this right does not include the right of a female slave to refuse intercourse without a lawful excuse.
 3. The right to perform religious duties such as prayer and fasting during Ramaḍān. This does not include the right to perform *ḥajj*, since the *ḥajj* is not obligatory for a slave, having no financial means and being deprived of the free disposal of his body. Further, male slaves cannot participate in *jihād* without their master's consent, because of the risk of losing his property.²⁰
 4. Male slaves are, according to some law schools, entitled to lawful sexual intercourse. Upon the slave's demand, his master must provide him with a wife.²¹
 5. Slave women have the right to take care of their young children. During this period transfer of her ownership without that of the child is, according to most schools, null and void.²²

Conclusions

The exercise I have followed, i.e. the analysis of classical *fiqh* in a search for certain elementary values and inalienable rights related to the modern concept of human rights, was not meant to be judgmental. In my introduction I emphasized that it is meaningless to judge classical Islamic law by present-day values and standards. My aim, therefore, was not to demonstrate that Islamic law has always protected human rights, nor that Islamic law is essentially incompatible with the notion of human rights. What I wanted to show is that Islamic law recognizes certain basic values and inalienable rights. The contents of these values and rights must be seen against the historical background of the period when Islamic law was created and developed. But the fact that they are there, can be the starting-point for a debate on a new interpretation of Islamic law that recognizes and protects human rights as they are now internationally accepted. This debate, however, is one that must in the first place be conducted by Muslims.

NOTES

1. I would like to thank Joost Hiltermann, Ann Mayer and Chibli Mallat for having read the draft of this article and for their constructive comments and criticisms that helped me shape this version.
2. For an analysis of the main themes discussed in these publications, see V. Rispler-Chaim, 'Human rights in Islam: the literary genre,' in: BRISMES *Proceedings of the 1991 International Conference on Middle Eastern Studies, London 10–12 July 1991* (Exeter, 1991), 478–490.
3. Abū al-A'lā al-Mawdūdī, *Al-ḥukūma al-islāmīyya*, 2nd impression (Cairo, n.d.), 263–4.
4. Ann Mayer, *Islam and Human Rights: tradition and politics*, 2nd edn (Boulder, CO 1995).
5. For a similar critique of anachronistic approaches, see Chibli Mallat, 'Introduction—On Islam and Democracy,' in Chibli Mallat (Ed.), *Islam and Public Law: classical and contemporary studies* (London, Graham & Trotman, 1993), 1–18.
6. Only the Shāfi'ites hold that the killing of a *ḥarbī* woman or minor entails liability for bloodmoney. See e.g. Ibn Qudāma, *Al-Mughnī* (Beirut, Dār al-Tūrāth al-'Arabī, n.d.) Vol. 7, 796–797.
7. These can be permanent residents or *dhimmīs*, who must pay a special tax, the *jizya*, or temporary residents, who by virtue of a safe-conduct, may reside one year in Islamic territory.
8. 'Abd al-'Azīz b. Aḥmad al-Bukhārī, *Kashf al-asrār: sharḥ kanz al-wuṣūl ilā ma'rifat al-uṣūl li-Muḥammad b. al-Ḥusayn al-Pazdawī* (Istanbul: 1308 H.), Vol. 4, 237–238. A similar text is to be found in al-Ghazālī, *Al-mustaṣfā fī 'ilm al-uṣūl* (Beirut, Dār al-Kutub al-'Ilmiyya, 1993), 67. The

latter argues that all beings endowed with reason are capable of understanding God's commands and, therefore, have legal capacity.

9. Some scholars object to this view, arguing that a person cannot be required to perform something of which he is incapable, since complying with the religious commands of Islam is conditional upon being a Muslim. This argument is parried with the following analogical reasoning: since the command to perform *ṣalāt* addresses also Muslims who are in a state of religious impurity and therefore cannot comply with the command immediately without first taking ablutions, one must assume that it is possible that commands address people who cannot obey immediately but only after complying with a condition if this is in their power. See al-Bukhārī, *Kaṣḥf al-asrār*, Vol. 4, 234, 243–244; al-Ghazālī, *Al-mustaṣfā*, 73–74.
10. With regard to marriage, I have mostly relied on Ḥanafite texts, especially Muḥammad Qadrī Pasha, *Al-aḥkām al-sharʿiyya fī al-aḥwāl al-shakḥiyya* (Cairo, 1327 H). This contains a reliable survey of Ḥanafite family law, focusing on the legal rules and omitting the religious aspects.
11. This is a generalization. The classical texts mention a number of specific rights: e.g. the right, in case of illness, to refuse to enter her husband's custody and to refuse intercourse. Moreover the husband's right to chastise her when she is disobedient, does not extend beyond light beating. If he beats her excessively, he can be punished by the judge on the basis of *taʿzīr*. See Qadrī Pashā, articles 163, 167, 211.
12. Such a case is discussed in a nineteenth-century Mālikite *fatwā*. A married woman had left her husband and had gone to live with her father. She then claimed maintenance from her husband, arguing that she was entitled to do so since she was incapable of sexual intercourse and lived in constant fear that her husband would force her to it. The only way to get rid of her fear was by leaving her husband's house. The muftī decided that under these circumstances she had acted lawfully and was still entitled to maintenance. See Muḥammad ʿIllaysh, *Fath al-ʿalī al-mālik fī fatwā ʿalā madhhab al-imām Mālik* (Cairo, 1319 H) Vol. 2, 69.
13. Qadrī Pasha, article 168.
14. A. Fattal, *Le statut légal des non-musulmans en pays d'Islam*. (Beirut, Imprimerie Catholique, 1958), 131–132.
15. She has the right to visit her parents once a week and her other relatives once a year, but she is not allowed to spend the night there. Although the husband may refuse access to his wife's relatives, he may not prevent her from seeing them and talking to them. A wife may lawfully refuse to follow her husband if he intends to live at a distance of more than three days walk (*masāfat al-qaṣr* in Ḥanafite law) from the place where the marriage has been concluded. The husband may not withhold his consent if his wife goes to live with her parents in the case of her presence being indispensable for nursing her sick father. See Qadrī Pasha, articles 162, 215, 216.
16. Qadrī Pasha, article 187.
17. Bukhārī, *Kaṣḥf al-asrār*, Vol. 4, 288.
18. *Ibid.*; Shaykhzāde, *Majmaʿ al-anhur fī sharḥ multaḳā al-abḥur*. (Istanbul, 1301 H), Vol. 1, 469–470; Al-Bājūrī, *Ḥāshiyā ʿalā al-qaṣṣ al-mukhtār fī sharḥ ghāyat al-ikhtisār* (Cairo, n.d.), Vol. 2, 188.
19. This is manifest from the following rules:
 - a. Slaves may not be overburdened with work and are entitled to adequate periods of rest.
 - b. If an owner maltreats his slave, the judge, under Mālikite law, can force him to sell the slave. See *EF*², s.v. ʿabd, Vol. 1, 27.
20. Bukhārī, *Kaṣḥf al-asrār*, Vol. 4, 287; *EF*², Vol. 1, 26.
21. Ibn Qudāma, *Al-mughnī* (Beirut, n.d.), Vol. 7, 631–632.
22. *EF*², Vol. 1, 26.