



**THE
FUTURE OF
RELIGIOUS
FREEDOM**

GLOBAL CHALLENGES

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Human Rights in Islamic Jurisprudence

Why Should All Human Beings Be Inviolable?

RECEP ŞENTÜRK

In the diversity of their religious communities, Muslim cities of the Middle Ages, such as Istanbul, Jerusalem, Baghdad, Samarkand, Bukhara, and Cairo, looked like the modern New York, San Francisco, Berlin, Paris, and London. In contrast, European cities during the Middle Ages were quite homogeneous, usually encompassing one predominant Christian denomination. This continued more or less until the second half of the nineteenth century. Since then Western cities have clearly turned into cosmopolitan metropolitan centers housing diverse faith and ethnic groups.

What made Muslim cities during the Middle Ages similar to modern cosmopolitan centers? I contend that it was because they operated under norms of Islamic jurisprudence regarding universal human rights, particularly freedom of religion. This finding is surprising given the lagging status of religious freedom in many Muslim-majority nations today, and it suggests that recovering that classical Islamic tradition could have enormous global significance.

In previous research I demonstrated that the inviolability of human beings (*ismah al-âdamiyyîn*) has been one of the most fundamental principles of Islamic law and morality.¹ In this chapter I would like to explore the reason that this was so, or, more plainly put, how universal human rights were grounded in Islamic jurisprudence. Paradoxically the ages-old tradition of advocating universal human rights in Islamic jurisprudence has been almost completely forgotten today as the Muslim world suffers from human rights dependency on the West.

I will try to answer the following question: Why should all human beings be inviolable according to Islamic jurisprudence? As I demonstrated in previous work, Muslim jurists are divided on the issue of human rights. One group, led by the Shafii School, advocates for civil rights only, that is, the rights of citizens specifically accorded by the state. Another group, led by the Hanafi School of law, advances rights for all human beings regardless of innate, inherited, or acquired qualities

such as sex, race, religion, and citizenship. My focus here is on these “universalist” Muslim jurists who ground human rights in classic Islamic jurisprudence. By surveying selected works from Abu Hanifa (d. 767) to Huseyin Kazım Kadri (d. 1934), I will demonstrate the continuity of a universal human rights tradition in Islamic jurisprudence from the eighth century until the era of legal secularization in the Muslim world during the early twentieth century. After legal secularization severed intellectual ties with the Islamic legal tradition, the Muslim world became dependent on Western human rights discourse, if not opposing it. I will conclude by offering an explanation for this fateful discontinuity.

Classical Islamic jurisprudence accepted the right of the inviolability of human beings from the time of Prophet Muhammad (d. 632) fifteen centuries ago. However, classical Muslim jurists never claimed that they were the fathers of the idea of universal human rights. On the contrary, they claimed that human inviolability is accepted by all religions since the time of Adam. Thus it is a universal rule that constitutes the foundation of all legal systems past and present. Consequently they called the rights that are covered by inviolability axiomatic rights (*daruriyyat*), foundations or fundamental principles (*usul*), and universal rights (*kulliyyat*), which include the right of the inviolability of life, property, mind, religion, family, and honor. These rules, which constitute a special set of laws in Islamic law, constitute the common ground between Islamic and non-Islamic legal systems. According to Islamic jurisprudence, the rules in this category do not get abrogated (*naskh*) since they are universal and transcend time and space, unlike other legal rules, which may change from religion to religion depending on time and geography. This approach provides a way to justify universal human rights based on eternal precedence. At the same time, it demonstrates that classical Muslim jurists produced a nonexceptionalist jurisprudence and legal philosophy.

Such a claim to Islamic exceptionalism would be against Islam’s self-perception, the way it presents itself in the Qur’an and the sayings of Prophet Muhammad. Islam sees itself as the restoration of the eternal religion of God since the beginning of time rather than a new religion. All the prophets who came earlier are mentioned in the Qur’an with great respect, including Adam, Noah, Moses, and Jesus. Muslims are required to believe in all the prophets, and they venerate the Virgin Mary as well, after whom a chapter is named in the Qur’an. Therefore Islam presents itself as the authentic continuation of the previous heavenly religions rather than their replacement. For this reason, claiming that Islamic law is the first law that granted universal human rights would contradict this concept of religion and law in Islam. This approach is diametrically opposed to Eurocentric exceptionalism, with its claim that universal human rights emerged for the first time in the European secular legal culture. Classical Islam gives priority to emphasizing the common ground and continuity among religions rather than religious innovation.

I divide civilizations into two groups: open civilizations and closed civilizations. An open civilization does not see itself as the only civilization. It respects other civilizations and supports a world order where multiple civilizations can coexist. In contrast, a closed civilization sees itself as the only true civilization and tries to eliminate all other cultures to establish a world order with a single dominant civilization. Classical Islam belongs to the first category, as it established an open civilization extending from Andalusia to India, where Muslims, Christians, Jews, Buddhists, Hindus, and Zoroastrians lived together. Consequently one can say that Muslims experienced in the Middle Ages what the West came to experience only recently. This historical phenomenon brings to mind the following question: Why did Muslims establish an open civilization during the Middle Ages while most of the other religious groups established closed civilizations? How could Muslims accommodate members of diverse civilizations under a polity? In other words, what was the legal and political infrastructure on which civilizational pluralism was founded?

My answer to these questions comes from Islamic jurisprudence, which provided human rights to people regardless of their religion and civilization. It is commonly known that Islam provides human rights to the People of the Book. What is less commonly known is that the universalist Islamic legal tradition provides the same rights to all human beings regardless of their religion. The concrete historical evidence for this is the case of India, where Buddhists and Hindus enjoyed the same rights Christians and Jews enjoyed in Andalusia. If Islamic law had given human rights only to the People of the Book, the Buddhists and Hindus would not have been given these rights, which they enjoyed under Islamic rule for centuries.

Islamic law thus granted human rights by allowing legal pluralism, which may be seen as an extension of freedom of religion, whereby different religious communities can practice their traditional laws if they prefer to do so. This is what is commonly known as the Ottoman *millet* system. Prior to secularization, religious law was an important part of religion. Depriving people of the practice of the law of their religion would have been a source of discontent among the subjects whose behavior was guided by the norms of religious laws. Consequently Islamic law is an "open law" in the sense that it allows not only multiple Islamic schools of law (*madhahib*) to coexist but also non-Islamic legal systems to be implemented at the same time in the same society.

At this point I should mention another important characteristic of Islamic law: it belongs to the Western legal tradition because Islam belongs to the Western Abrahamic religious tradition, along with Judaism and Christianity. It is commonly known that historians of religion group Islam under the category of Western religions vis-à-vis Eastern religions. Therefore it would be inconsistent not to consider Islamic law as part of the Western legal tradition. In addition to their common historical roots, Islamic law reflects many commonalities

with the Jewish, Christian, and Roman laws, and with modern Western jurisprudence as well. This is not to deny the significant differences from Jewish, Christian, Roman, and modern secular jurisprudence. But one of the important areas where classical Islamic law reflects significant commonalities with the modern Western legal tradition is the area of universal human rights. This may be attributed to the fact that they all originate from the same Abrahamic legal tradition.

To understand the Islamic cosmopolitan tradition we must explore the roots of universal human rights and fundamental freedoms in the teaching of Prophet Muhammad and how later generations of Muslim jurists built on his legacy and systematized it. This survey will demonstrate the continuity in the universalist tradition in Islamic jurisprudence until the twentieth century.

Prophet Muhammad's Farewell Sermon: Universalizing Human Rights

The Farewell Sermon of Prophet Muhammad² vividly illustrates his contribution to the development of human rights and how he laid the foundations of the idea of universal human rights in a world previously dominated by tribalism.³ He gave this sermon to a large group during his last pilgrimage to the Holy Ka'ba in the square of Arafat a few months prior to his death. Hence the title Farewell Sermon.

In his Farewell Sermon Prophet Muhammad said,⁴ "O people! Your lives and your property, until the very day you meet your Lord, are as inviolable to each other as the inviolability of this holy day you are now in, this holy month you are now in, and this holy city you are now in. Have I conveyed the divine message?—O Allah, be my witness!"⁵

This instruction is about the inviolability of life and property. In the original Arabic the term *haram* is used to indicate inviolability and sanctity. It was used even during the pre-Islamic period and was attributed to human beings, times (months, days), places (Mecca), and objects (idols in the Ka'ba). For instance, *al-shahr al-haram* means "the inviolable month"; *al-masjid al-haram* means "inviolable temple." Prior to Islam, Arabs considered four months sacred and thus inviolable: Muharram, Dhi'l-Qa'da, Dhi'l-Hijjah, and Rajab.⁶ During these months people were inviolable according to the Arabic custom. Likewise according to the Arabic custom, the Ka'ba was a sacred place in which human beings were inviolable.

Therefore human inviolability during the pre-Islamic period was limited in time and space. This limitation was a deviation from the laws set by Abraham, the architect of the Ka'ba. For Arabs, such a limited rule of law, security, and peace was needed to make Hajj and commerce possible in Mecca, which they needed to generate income. People were inviolable only in the Ka'ba (Masjid al-Haram) and during the four haram months. This allowed for the powerful Arab tribes to exercise their will in a legally and morally unbound manner during

the rest of the year. However, because total anarchy would have caused the collapse of the economy, they maintained four holy months during which commercial and religious activities could be carried on in peace.

With his statement Prophet Muhammad abolished these time and place limitations, thus universalizing human inviolability in all times and places. This was a revolution against the Arab custom and could easily have been rejected by the community. Prophet Muhammad emphasized his injunction in his wording, as well as the time and place where he uttered it. The sermon was given during Hajj, which took place at a sacred time and in a sacred place, and he repeated his injunction several times on several occasions. He also made it explicit that this injunction was from God and that God was the witness when Prophet Muhammad conveyed it to the people.

What did Prophet Muhammad do by uttering these words? And what did the narrative do after his death? There are two conflicting answers from Muslim jurists which shows the mediating role of agency between narrative and its meaning in the ensuing practices.

Simply put, the question that divided the Muslim jurists is as follows: What did Prophet Muhammad mean when he said "O People"? Did he mean Muslims alone or all human beings? Did he completely abolish all the boundaries among human beings, or did he draw a boundary between Muslims and non-Muslims? Put in a more technical way, did he want to found *universal human rights* or *civil rights*?

Subsequent Muslim generations, in particular jurists, differed in their interpretation of what Prophet Muhammad intended by his Farewell Sermon. Two major answers emerged: one by "universalist" Muslim jurists and one by "communalist" Muslim jurists.

Humanity as a whole is inviolable, argued the universalist jurists. They argued that when Prophet Muhammad said "O People!" (*Yâ ayyuha al-nâs*) he meant all human beings around the world regardless of religion, sex, color, or race. From this perspective, Prophet Muhammad set up the foundations of universalism. This view was adopted by universalist jurists, in particular those from the Hanafi School of law, who argued for the universal inviolability of human beings. For them, the life, property, and honor of all human beings are sacred and inviolable because that is the law given by the Lawgiver (*shâri*), Prophet Muhammad.

However, not all jurists agreed; some argued that when Prophet Muhammad said "O People!" he meant only the Muslim community. From this perspective, what Prophet Muhammad did was justify communalism. In other words, his vision of Islamic law was based on the concept of civil rights, which grants rights only to a nation's citizens. Consequently communalist Muslims translate the statement of Prophet Muhammad as follows: "O People! Just as you regard this month, this day, this city as sacred, so regard the life and property of every Muslim as a sacred trust."⁷⁷ One can easily see how this interpretation is used to justify the communalist argument because the audience is all Muslims.

Nevertheless the Farewell Sermon has been rediscovered and put to a new use by Muslims in support of the 1948 United Nations Universal Declaration of Human Rights.⁸ From this modern perspective, what Prophet Muhammad did was present the first human rights document. Among the first who advanced this view was Muhammad Hamidullah.⁹ This view is very popular today among Muslims. For instance, “The Islamic Charter of Humanity” is the subtitle Nuh Ha Mim Keller uses in his translation of “The Farewell Address of the Holy Prophet Muhammad p.b.u.h.” Tahir Mahmood, an Indian Muslim professor of Islamic law, also interprets the Farewell Sermon in the modern context. His universalistic approach is reflected in the translation of “*Yâ Ayyuhâ al-Nâs!*” as “O mankind!”: “O mankind! The Arab is not superior to non-Arab, nor vice versa; the white has no superiority over the black, nor vice versa; and the rich has no superiority over the poor. All of you are Adam’s descendants and Adam was made of earth.”¹⁰ Tahir Mahmood calls the Farewell Sermon “a Declaration of the Equality of Mankind.”

This view is advanced to serve both as an apology for Islam and as a justification to enhance human rights compliance by Muslim societies. In any case, this is a new usage to which many Muslims have put the Farewell Sermon. A multitude of examples can be found, published in many languages and on the Internet. My goal here is not to provide an exhaustive list of those who use the Farewell Sermon as the first human rights declaration but to provide a few examples to demonstrate the openness of hadith to new usages and interpretations as the context changes.

Down through the generations, the teachings and practice of Prophet Muhammad have been interpreted by universalist jurists to ground universal human rights in Islamic law, in contrast to communalist jurists, who used the same teachings to ground civil rights. This demonstrates that his legacy, like the legacy of all great masters, allows different interpretations. However, because the focus of this chapter is on the grounding of universal human rights, I will survey the works of leading Hanafi jurists—without any claim to be exhaustive—mostly from the formative period when universal human rights were grounded in an Islamic philosophical and conceptual framework.

Dabusi (d. 1039): The Rights of God Cannot Be Fulfilled without Human Rights

Dabusi is one of the first who theorized on the universality of human rights. We should see him as a link in the chain beginning with Abu Hanifa and his students because he was affiliated with the Hanafi School of law. Dabusi’s views on universal human rights are best illustrated by the following citation:

A human being [*âdami*] is created only and only with this covenant (with God) and the right to personality [*dhimmah*]; it is impossible to

think that he may be created otherwise. A human being is created only and only with a capability to be accorded with legal/public rights [*huquq al-shar'*]: It is impossible to think that he may be created otherwise. Likewise, a human being is created free and with his rights; it cannot be thought that he may be created otherwise. The reason why these honoring gifts [*karâmât*] and legal personality [*dhimmah*] are given to human beings is because he is responsible to fulfill the "rights of God" [*huqûq Allah*].¹¹

This excerpt demonstrates, first of all, that Dabusi accepts the existence of two fundamental rights, which are universally granted to all human beings: freedom and legal personality. However, Dabusi talks about other rights as well without specifically naming them. He emphasizes the importance of these rights to such an extent that, for him, the creation of human beings without them would be unimaginable. For Dabusi, the right to legal personality is a prerequisite for human beings to have other legal rights and duties.

His approach to fundamental rights clearly reflects the idea of "inherent rights" and "God-given rights." This is significant because it demonstrates that Dabusi does not recognize the state authority as the source of basic rights. Instead, for him, basic human rights are born rights, which emanate from God. The consequence of this approach is that the state cannot take these rights away from individuals because the state is not the one that granted them. Nor are the rights based on a contract between the state and the citizens, which is the case in the Shafii School of law.

It is explicit that this excerpt provides a distinct way of grounding universal human rights. For Dabusi, fundamental universal human rights are given to human beings so that they can fulfill the "rights of God." God's right is to be worshipped and obeyed. The term *rights of God* is the opposite of the term *rights of human beings* (*huquq al-'ibad*). Public rights are also considered rights of God, as the victim is not allowed to forgive the violator.

According to Dabusi, God's rights on human beings cannot be fulfilled without basic human rights. We may translate this view into modern terminology as follows: human rights are a prerequisite for freedom of religion. More explicitly, human beings should have freedom and legal personality so that they can fulfill their duties, God's rights on them.

Sarakhsi (d. 1090): God Granted the Right to Inviolability, Freedom, and Property

Abi Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi (d. 490 AH) is among the first scholars who systematically discussed the philosophy and methodology of Hanafi jurisprudence. He is the author of the well-respected *Usul al-Sarakhsi*

(literally translated, The Methodology of al-Sarakhsi) and *al-Mabsut* (literally, The Detailed Book). Sarakhsi is known as the one who systemized the works of scholars from previous generations, such as the work of Muhammad Hasan al-Shaibani, Dabusi, and Bazdawi.

According to Sarakhsi, as he explains in great detail in his *Usul*, all people are addressed and held responsible by God, including non-Muslims, because Prophet Muhammad was sent to humanity as a whole. God calls everyone to be faithful (*al-iman*) and to carry the burden of the responsibility of being a human and enjoying the rights stemming from it. That means God considers everyone equal before Islamic law. In the Qur'an, God commands Prophet Muhammad, "O Muhammad say: O people verily I am God's Messenger to you all." This call beyond doubt includes all human beings, even non-Muslims,¹²

Sarakhsi argues that the divine call has important implications. Being addressed by God gives a special status to human beings. It gives them the right to legal personhood (*al-ahliyyah*) at the universal level. Since God called upon them all, each human being is qualified for equal rights and duties by birth.

According to Sarakhsi, the divine call comprises three fields: faith, criminal law, and transactions and rituals. Refusing faith in the content of the divine message, although it is the most important part of the divine call, does not disqualify one from having rights and responsibilities in other areas. As a result of receiving the divine call (*hukm al-khitab*), even if they do not acknowledge that it is a divine message, the criminal law of Islam is applicable to non-Muslims who live under Islamic rule. Likewise the laws concerning transactions are also applicable to them. As to the other rules, the scholars of Islamic law unanimously accept that non-Muslims will be questioned in the Hereafter for not complying with them. Hasan al-Shaibani said in his *Siyar al-Kabir*, "[W]hoever denies a rule from the rules of Islamic law he has refused the meaning of the statement that 'There is no god but God.'"¹³

The purpose of God in calling humans is to try them (*ibtala*), which can be actualized only if those who are called have free will (*ikhtiyar*) and the freedom (*hurriyyah*) to exercise it. Sarakhsi writes: "The prohibition requires abstention from the prohibited through an action which is attributed to the earning [*kasb*] of the human being and his free will because the prohibition is a trial similar to the obligation. The trial can only be achieved if the human being has a choice in the matter." He emphasizes the issue of freedom by saying that even if people perform what they are commanded and refrain from what they are prohibited, without having the right to choose otherwise this is not what God intends because it is not a trial (*ibtala*).¹⁴ Freedom to choose the opposite is what makes compliance with the divine commands virtuous. The action must be the choice of the person out of his free will.

Related to this issue is the damage caused by animals to human beings. Since animals are not addressed by the divine call and are not free actors, a legal judgment

cannot be attributed to their actions. Muhammad al-Shaibani said that the action of an animal does not incur a legal punishment (*heder*). This is unlike a slave, whose actions can be legally attributed.¹⁵ Consequently if a camel harms someone, the owner is not punishable for it. The fact that he has the right to the inviolability of his property (*ismah*) and the right to property does not make him punishable for the actions of his animal.¹⁶

Sarakhsi dedicated a special chapter to the legal personhood of all human beings, which makes humans qualified to acquire rights and duties¹⁷ and also shoulders them with responsibility.¹⁸ It is a discussion about why every human being (*al-adami*) is qualified for legal personhood (*al-ahliyyah*) for legally required rights and duties. These rights and duties are related to the divine purpose for which human beings are created. Human beings carry the burden of the divine mission, which they took as a trust from God (*al-amanah*).

There are two types of qualifications: qualification for prescribing the laws (*ahliyyat al-wujub*) and qualification for performing the laws (*ahliyyat al-ada'*). The source of these qualifications is responsibility (*dhimmah*) to which legal and moral judgments are attributed. Human beings alone have responsibility.¹⁹ The Arabic word *dhimmah*, which stands for "responsibility" also means "covenant" (*al-'ahd*). The term *ahl al-dhimmah*, which is used for non-Muslims who sign a compact with the Islamic state, is derived from the same origin; it means "those who make a covenant with Muslims." The *dimmah* in this context is used for the covenant of human beings with God before coming to this world. The embryo has only rights but no duties. Therefore he can receive a legacy, he has the right to lineage and family, and he receives what is given to him in a will. Birth makes him qualified for all rights and duties at the level of prescription.²⁰ He is gradually required to perform them as he grows, until he reaches puberty, which is when he is fully required to perform all his duties. God says, "We attached the responsibility of every one to his neck."²¹ At birth one's rights and duties (*mahall*) and their cause (*sabab*) come into existence. Since the child is not able to perform his duties for a while, he is not required to perform them until he can do so. For this reason his qualification is incomplete.

The following passage is an excellent summary of Sarakhsi's views on human rights:

Upon creating human beings, God graciously bestowed upon them intelligence and the capability to carry responsibilities and rights (personhood). This was to make them ready for duties and rights determined by God. Then He granted them the right to inviolability, freedom and property to let them continue their lives so that they can perform the duties they have shouldered. Then these rights to carry responsibility and enjoy rights, freedom and property exist with a human being when he is born. The insane/child and the sane/adult are the same concerning

these rights. This is how the proper personhood is given to him when he is born for God to charge him with the rights and duties when he is born. In this regard, the insane/child and sane/adult are equal.²²

This passage demonstrates that Sarakhsi, like Dabusi, accepts born rights and links basic human rights to the responsibilities of human beings toward God. He also emphasizes the equality of all human beings vis-à-vis these rights.

Kasani (d. 1191): No External Justification Is Needed for Human Inviolability

The well-known Hanafi jurist Kasani argues that the inviolability of a human being is due to an innate quality (*hurmah li 'aynih*).²³ In other words, humans are inviolable in themselves; their very existence is sufficient for them to have the right to inviolability. That means the right to inviolability does not require an external reason other than being human.

However, Kasani argues, the right to the inviolability of property is for external reasons (*hurmah li ghayrih*). That means property is not inviolable in itself. This is because inviolability is not intrinsic to property right; instead it is justified as serving a goal external to its own existence. This line of thought is also maintained, as we will see, by Ibn 'Abidin, who argues that inviolability of property was legislated due to necessity (*darurah*) because God created property in the beginning not for individuals but for humanity as a whole. In other words, personal property came later in human history as a result of social and economic necessity.

Kasani's distinction between life as intrinsically inviolable and property as inviolable for external reasons brings another dimension to the discussion of human rights. His claim that life is essentially inviolable and requires no other justification is a distinct way of grounding the right to the inviolability of life.

Other inviolable rights, in particular property rights, are grounded on the right to life for serving human life. Property is not intrinsically sacred or inviolable, but because human life requires it to be so. From this perspective, the right to life is inviolable in itself, and all other rights are inviolable because they are prerequisites for the right to life.

Marghinani (d. 1197): The Right to Inviolability Is Due to Humanity

Burhan al-Din al-Marghinani²⁴ is the author of *al-Hidayah*, which is the most frequently used and referenced canonical textbook of the Hanafi School of law. Due to its common usage, this book was translated into English after the British

invasion of India. Unlike the other books I analyze in this chapter, *al-Hidayah* focuses on practical issues (*furu' al-fiqh*) instead of doctrinal and philosophical issues (*usul al-fiqh*). However, it explores the ways the legal rules are grounded through rational and traditional or scriptural arguments. Marghinani deals with the issue of human inviolability primarily in the chapter on international law (*kitab al-siyar*), yet it is possible to find references to it in other chapters as well.

According to Marghinani, who follows the traditional Hanafi line of thinking, "the right to inviolability is due to humanity [*al-'ismah bi al-âdamiyyah*]." ²⁵ Marghinani takes "human" as the subject of law to which rights and duties are accorded, which reflects the Hanafi opinion. His concept of inviolability has three important characteristics:

1. The only source for the right to inviolability is being a human.
2. The right to inviolability is granted to all human beings without exception.
3. The right to inviolability is enforced by the state, and violators are punished by predetermined penalties according to Islamic penal law.

These characteristics demonstrate that the principle of the inviolability of human beings in Islamic jurisprudence protects the rights of all human beings, not only Muslims or the citizens of the Islamic state. It also makes explicit that the right to inviolability is not only a moral right but is also a legal right enforced by state power. The penalties for the violation of the right to life, property, freedom of religion, family, and honor are predetermined in Islamic law, some of which are stated clearly in the Qur'an and Hadith. This approach sets Islam apart from other ancient religious teachings, where the inviolability of human beings is accepted as a moral right without predetermined legal enforcement.

The issue of enforcing the right to inviolability plays a significant role in Marghinani's theory of universal human rights. Marghinani discusses the distinction between two types of right to inviolability regarding the consequence of its violation: (1) that which causes sin (*'ismah al-muaththimah*) and (2) that which causes penalty (*'ismah al-muqawwimah*). Consequently he divides the right to inviolability into two categories from the perspective of legal enforcement:

1. *Al-'ismah al-muqawwimah*: the measurable and enforceable right to inviolability whose violators are punished by predetermined penalties. The right to the inviolability of property is the best example of measurable and enforceable inviolability.
2. *Al-'ismah al-muaththimah*: the kind of right to inviolability that cannot be enforced by the state and whose violators cannot be legally punished. Minor violations such as backbiting are impossible to legally enforce.

Also violations outside the territory of the Islamic state are difficult to enforce, particularly given the conditions of the Middle Ages, when there was no international collaboration to fight crimes. However, violators who escape punishment by the authorities, because of the impediments in the realization of this worldly justice, cannot escape from divine justice in the Hereafter.

Marghinani argues that the *'ismah al-muaththimah* is the right of all human beings despite the fact that the state has no power to legally enforce it. Without this right it would be impossible for human beings to carry out the legal and moral responsibilities God gave them. Marghinani argues that human beings can realize the purpose for which God created them only if they enjoy the protection of inviolability (*hurmah al-ta'arrud*).

However, according to Marghinani, measurable and enforceable inviolability (*al-'ismah al-muqawwimah*) is a more developed form of the *'ismah al-muaththimah* because it is accepted not only as a sin but also as a legally punishable crime. For him, the fact that the *'ismah al-mu'aththimah* remains only a moral and religious rule is a shortcoming. He claims that an enforced right is more developed compared to a moral right that is not enforced.

The inviolable rights are hierarchically ordered. The right to the inviolability of life has the highest priority compared to other rights. This is because if life were not inviolable other rights would have no meaning. The right to the inviolability of property comes after the right to the inviolability of life because it is required (*darurah*) to serve the continuity of human life and progeny. Consequently, in case of a conflict between the two, life is given precedence over property.

Marghinani argues that the *'ismah al-muaththimah* is more suitable for the right to the inviolability of life, whereas the *'ismah al-muqawwimah* is more suitable for the right to the inviolability of property. This is because the loss of property is measurable and can be compensated through legal punishment. However, the loss of life is not measurable and cannot be compensated through legal punishment. Even if we impose a punishment for the violation of life, life cannot be brought back. Assessing and determining the amount of the damage requires measurement (*taqawwum*) and commensurability (*tamathul*), which is possible for property but not life.²⁶

On the other hand, the *'ismah al-muqawwimah* is applied only in an Islamic state (Dar al-Islam). Presence in the Dar al-Islam (*al-ihraz bi al-dar*) is necessary for the Islamic state to be able to enforce those rights and produce remedies. Territory is not an obstacle for having human rights, but it poses an obstacle for their enforcement. The legitimacy of political authority comes, according to Islamic law, from its protection of the citizenry. An authority that fails to protect the inviolable rights of the citizenry loses its legitimacy.

Marghinani criticizes the Shafii approach to human rights, according to which the right to inviolability is gained by accepting Islam or by becoming a citizen of an Islamic state:

With respect to the arguments of *Shafii*, we reply that his assertion, that “*the sin-creating protection is attached to Islam,*” is not admitted; for, the *sin-creating* protection is attached, *not to Islam*, but to the *person*; because man is created with an intent that he should bear the burdens imposed by the LAW, which men would be unable to do unless the molestation or slaying of them were prohibited, since if the slaying of a person were not illegal, he would be incapable of performing the duties required of him. The person therefore is the original subject of protection, and property follows as the dependant thereof, since property is, in its original state, neutral, and created for the use of mankind, and is protected only on account of the right of the proprietor, to the end that each may be enabled to enjoy that which is his own.²⁷

Marghinani refuses the Shafii claim that the *‘ismah al-muaththimah* is accorded only to the Muslims. This is because for Marghinani, the *‘ismah al-muaththimah* is associated with being a human but not being a Muslim, on the grounds that human beings are created for carrying religious and legal responsibilities. However human beings cannot fulfill these duties unless they are protected against violations. If the murder of a human being is not prohibited, he cannot perform the duties expected of him. Consequently a human being is the primordial subject of inviolability. In connection to this, property also becomes a primary subject of inviolability because, although property in itself is neutral, it is created for the use of humanity. Here again we see the primacy of the right to life and its use to justify the right to property.

Abdulaziz Bukhari (d. 1330): Human Rights Are a Prerequisite for Human Beings to Carry the Divine Trust

Abdulaziz Bukhari is known for his highly detailed commentary on the book of the famous jurist Fakhr al-Islam Bazdawi (d. 1089), whose views on the inviolability of human beings were discussed earlier. In his commentary, Bukhari devoted a considerable amount of space to the philosophical foundations of human inviolability because a human being is, from the perspective of Islamic jurisprudence, the subject of law (*mahkum alayh*) to whom rights and duties are accorded.

Bukhari explains Bazdawi’s text sentence by sentence. Bazdawi states that “all Muslim jurists reached a consensus among themselves that every child of

Adam is born with legal personality [*dhimmah*].” In explaining this sentence, Bukhari demonstrates that legal personality is a prerequisite for human beings to carry the divine trust.²⁸ For him, having divine trust means having rights and duties. It requires human beings to have liability for their actions and license to perform acts (*ahliyyah*), which means being equipped with all the required qualities for God to charge them with duties and to fulfill these duties. God talks about divine trust in the Qur’an: “Human beings shouldered the trust” (Ahzab 72). Bukhari states that all human beings have *ahliyyah* but the children use it through their parents. The term *ahliyyah* is related in his thinking with another term: *’uhdah*. The term *’uhdah* can be understood as the quality of a person to have duties or the human quality to which duties are attached.

According to Bukhari, the foundation of liability is legal personality (*dhimmah*). For him, the fact that all human beings, unique among the creatures, are born with liability is the evidence that they all have legal personality. If human beings are born with legal personality, that means they are born ready to have rights and duties. Similar to Bazdawī, Bukhari also argues that the fact that there is consensus among jurists on the existence of legal personality is sufficient evidence to prove its existence. Showing the continuity in the Hanafi School, Bukhari also confirms that human beings have the right to inviolability (*’ismah*), freedom (*hurriyyah*), and property (*malikiyyah*).²⁹

Bukhari explains in detail the meaning of divine trust (*amanah*) and how human beings are given that trust. He also talks about the two types of inviolability: (1) the inviolability whose violation causes sin (*al-’ismah al-mu’atthimah*), which is enforced by social and religious means, and (2) the inviolability whose violation causes legally determined punishment (*al-’ismah al-muqawwimah*), which is enforced by legal measures.

According to Bukhari, for inviolability to be a right, it must be enforced. Otherwise such a right remains only a religious and moral preaching. Muslim jurists accept the principle of human inviolability as a universal rule, yet they are aware that not every violation of inviolability can be legally enforced in practice. For instance, backbiting and slandering are violations of the inviolability of human beings. However, in practice it is impossible for the state to punish all instances of backbiting and slander. Likewise violations of inviolability that cannot be proved by evidence or witness escape legal punishment. Another example is the violations that take place outside the territory of the Islamic state, which are beyond its jurisdiction.

Consequently Bukhari concludes that only those human rights violations that take place within the territory of an Islamic state (*al-ihraz bi al-dar*) can be legally enforced. However, this limitation does not disprove the rule that inviolability is a universal human right. Those who escape legal punishment, for the reasons mentioned above, will face religious and moral punishment. If a criminal who violated the inviolability of a human being succeeded in escaping from

this worldly punishment (either because it took place outside the territory of the state or because there was not enough evidence to prove it) cannot possibly escape divine justice because he is a sinner in God's eyes.

As a matter of fact, all violations of human inviolability are sins. For this reason, the category of *al-'ismah al-muaththimah* is broader than the category of *al-'ismah al-muqawwimah*. This is because the former encompasses the latter. Bukhari emphasizes that there is no exception to the inviolability of human beings. He states that even the lives of slaves are inviolable because "slavery does not affect the right to inviolability of human beings."³⁰

Bukhari provides an excellent example of how inviolability of religion is grounded in Islamic jurisprudence. For him all religions are inviolable because they are all from God. However, if the rulers in a particular religion inserted a rule that is against human rights, that rule is not acceptable. Thus it falls outside the domains of freedom of religion, such as sati practice in India. God could not possibly set these rules. This is because the inviolability of human beings is an eternal and universal rule and is the foundation of all religions and legal systems. Therefore it must be the same in all religions. However, other rules and practices may change from religion to religion. They are all respected and inviolable even if they contradict Islamic principles and practices.

For Bukhari, this is a result of lack of knowledge, which leads to a defect in liability of people from those religions. These people continue practicing ancient religions because they do not know that Prophet Muhammad is the last Messenger of God. Consequently their religions are inviolable. There is only one single duty for the people in this category: knowing Prophet Muhammad and believing in him. *However, this is a religious duty but not a legal duty.* More plainly put, they are required to know Prophet Muhammad and believe in him out of religious conviction, but this cannot be imposed on them by the state through legal measures. If non-Muslims do not believe in Prophet Muhammad, they will be punished in the Hereafter by God, but not in this world. However, if they voluntarily choose to believe in Islam, they will be required to fulfill all the duties Islam imposes on its followers. Non-Muslims cannot be required to fulfill Islamic commandments before knowing Prophet Muhammad as the last Messenger of God and believing in him. In sum, for Bukhari, religion protects a person from violation (*mani' al-ta'arruz*).³¹

Ibn Humam (d. 1457): Human Inviolability Is a Rational Argument

Ibn Humam is well-known for his commentary on the canonical work of al-Marghinani, *al-Hidayah* (literally, Right Guidance).³² As I mentioned earlier, he disagrees with Marghinani on the relationship between the two types of

inviolability. For him, the moral right to inviolability is not a primitive form of the legal right to inviolability because these are two separate principles.

Ibn Humam argues that the *'ismah al-muqawwimah* is primarily applicable to the violation of property rights because property is measurable and replaceable. In contrast, the *'ismah al-muaththimah* is primarily applicable to the violation of the right to life because life cannot be monetarily measured, compensated, or replaced. However, in practice, although the primary use and application of these two concepts are in different areas, they are used in both cases in jurisprudence and law. This is because in practice measurable penalties are needed to be imposed in cases of violation of life or property.

He argues that the right to inviolability is based on a rational argument rather than a scriptural argument from the Qur'an or the Sunnah: "The idea that human beings have the right to inviolability because of their humanity is a rational argument [*dalil ma'qûl*]." ³³ This statement is extremely significant in demonstrating that Hanafi jurists employed reason in grounding human rights.

Ibn 'Abidin (d. 1836): Human Rights Are a Prerequisite for Prosperity and Peace

Ibn 'Abidin is considered one of the greatest Hanafi jurists of the nineteenth century. His voluminous commentary *Hashiya ibn 'Abidin* (Commentary by Ibn 'Abidin) is still being used as a major reference worldwide by followers of the Hanafi School. He wrote his book at a time when Muslims faced modernity and Western expansion for the first time.

For Ibn 'Abidin, human rights constitute a prerequisite for human beings to lead a peaceful and prosperous life. Social and economic life requires that basic human rights are given to all human beings; without fulfilling this prerequisite (*daruri*), social and economic life is impossible.

Ibn 'Abidin argues that the inviolability of property (*ismah al-mal*) was legislated as a result of necessity. Initially human beings had no personal property. Yet without recognizing personal property as an inviolable right, economic and social life is impossible. Therefore all human beings are allowed to have property. However, the right to property expanded beyond the limits of necessity (*darurah*). ³⁴

Ibn 'Abidin postulated that "a child of Adam, even if he is an infidel, has the right to dignity according to Islamic law [*al-adamiy mukarram shar'an wa law kafiran*]." ³⁵ The fact that even an infidel is protected by Islamic law demonstrates Ibn 'Abidin's universalism of human rights. Of course, this view is not peculiar to Ibn 'Abidin. His writing reflects the traditional universalist Hanafi doctrine on human rights.

The Paradox of Apostasy and Freedom of Religion

At the close of this survey of authorities from the Hanafi School of Islamic jurisprudence, I want to present their views on apostasy. Outsiders may find it quite paradoxical that Islamic law pioneered in giving freedom of religion to non-Muslims, prohibited forcing people to convert to Islam, and grounded religious liberty on a sophisticated jurisprudential thinking—yet still prohibited apostasy. More plainly, once a person accepts Islam out of his free will he is not allowed to leave it. One should keep in mind that only the male apostate is punished by death. This is what seems paradoxical: if one chooses to remain outside of Islam, one is granted complete freedom of religion. However, if one enters Islam and wants to leave it, one has no freedom to do so. Why is this so? I will try to explain how this issue is viewed by the classical Muslim jurists.

According to traditional Islamic law, when a person leaves Islam and declares it in public he is considered an apostate. Islamic law requires that the apostate should be questioned about his reasons and motives for leaving Islam and Muslim scholars should be brought to clear his doubts and expose the weakness of his arguments—if he has any—against Islam. Once it is demonstrated to him in a convincing manner that his doubts and arguments are not grounded, which may take days or weeks, if he still insists on his apostasy, and involves in a war against Muslims as a combatant (*harbi*), he is punished by death.

I think it is exactly because Islam granted total freedom to non-Muslims in not choosing Islam that it limited freedom to leave Islam. One is completely free in not accepting Islam, but not so in leaving Islam after accepting it. That means one has to make a firm commitment and decision before entering Islam and should not become a Muslim unless one is completely convinced in an unshakable manner.

Yet an apostate who is not proven to be a combatant (*harbi*) against Islam and Muslims cannot be punished by death because his life remains inviolable. Punishing apostasy by death is, according to the Hanafi jurists, due only through involvement in a war against Islam but not because of the apostasy. This is because the universalist Hanafi jurists do not accept apostasy as a reason for taking away the right to inviolability of a human being. In their view, a human being loses his right to inviolability only when he becomes a combatant (*harbi*) against Islam, akin to a traitor in modern law. Therefore according to the Hanafi jurists, an apostate can be punished only when he is involved in a war against Islam, which may take the form of making propaganda against Islam or collaborating with the enemies of Islam (*dar al-harb*).

However, for the Shafii jurists, apostasy itself constitutes the legitimate ground for capital punishment because it is the greatest sin and should not be tolerated. For them, the right to inviolability is gained either due to faith in

Islam or, if one is non-Muslim, due to citizenship in the Islamic state (*dhimmi*). Consequently if a person loses his citizenship status as a Muslim or *dhimmi*, he loses his right to inviolability. An apostate who abandons Islam loses his citizenship. Therefore he loses his right to inviolability also.

This jurisprudential discussion between the Hanafi and Shafii jurists demonstrates explicitly that religion at the time of the Prophet meant something more than what it means today: it was the ground for citizenship and political allegiance to a nation. In the modern age, on the other hand, when political citizenship has little tie to religion, apostasy laws lost their ground.

The Forgotten Universalist Tradition

Fatefully, modern human rights discourse in the Muslim world represents a break from the universalist tradition in Islamic jurisprudence. The chain of memory through which the universal human rights tradition had been transferred from generation to generation was severed with the collapse of the Ottoman Empire, the last state to adopt the human rights doctrine of the Hanafi School.

The Ottoman Empire had made significant reforms in Islamic law during the second half of the nineteenth century. These reforms are known as Tanzimat (declared with a royal edict by Sultan Mahmud II in 1839), which required reorganization and reregulation of the Ottoman legal and political system without severing ties with the Islamic tradition. Tanzimat as a reform project was based on combining modern Western and traditional Islamic ideas and institutions. In this reform period, Ottomans introduced universal citizenship and abolished the different statuses between Muslim citizens and non-Muslim citizens (*dhimmis*). In accordance with this, they abolished the special poll tax (*jizya*) collected from non-Muslim citizens. They adopted the constitutional parliamentary system with multiparty elections by which non-Muslims could enter the Ottoman Parliament.³⁶

The significance of these reforms comes from the fact that they gained the approval of the caliph, the leader of Muslims worldwide, and the sheikhulislam, head of the religious scholars, Ulema. Therefore their Islamicity cannot be disputed. This is unlike other reform projects by academics or intellectuals, which can easily be disputed by their colleagues because they lack the approval of the highest traditional religious and political authorities.

These reform efforts were brought to an end in 1918 by the British invasion of Istanbul, which closed the Ottoman Parliament and sent the representatives into exile. This terminated an effort to establish a democratic system with universal human rights grounded in Islamic jurisprudence. The new Turkish Republic shifted to a new paradigm to Westernize the state and totally secularize the

legal system. It should be noted in passing that Turkey did not adopt Western models of secularism but the Soviet model and put religion under the strict control of the state rather than separating state and religion. This model was more restrictive and authoritarian than French laicism, wherein the church has autonomy and religious education is not given by the state. In contrast, in the Turkish secular system religious education can be given only by the secular state, which is unheard of in the West. This meant ending all the reform efforts in Islamic law to give universalist Islam a modern voice.

Beyond Turkey, the Muslim world was almost completely colonized. Nation-states with secular ideologies were set up by the colonizers to rule Muslim populations. In the postcolonial era, the reaction against the West provoked a majority of Muslim intellectuals to depict the human rights project after World War II as yet another imperialist project to strengthen Western hegemony. Key Turkish Muslim scholars, however, supported the UN Universal Declaration of Human Rights in 1948.³⁷

Another important development took place. As secular ideologies such as nationalism and socialism lost public appeal because of their failure to deliver what they promised, Islamists gained popularity. The regimes they established, unfortunately, were divorced from the universalist Islamic legal tradition; instead they adopted reactionary practices that cannot be justified from the perspective of Islamic law as understood and practiced by universalist jurists for centuries. In particular these regimes gave strikingly disproportionate emphasis to penal law, to the extent that they almost equated Islam with the penal law of sharia.

Currently universalist Islamic jurisprudence and its doctrine of human rights are not implemented anywhere in the world by a state nor clearly represented by an intellectual community. Secularism, on the one hand, and radicalism, on the other, pushed aside the universalist Islamic tradition and cut the chain of memory. Therefore I can describe the present legal and human rights practice in the Muslim world as a deviation from the Islamic universalistic tradition.

Consequently confusion about universal human rights prevails in the Muslim world. We saw a lack of consensus among Muslim countries in their approach to the Universal Declaration of Human Rights: some approved all of it, and some objected to various articles. If Muslims recover a clear idea about their human rights tradition, we will not have these disagreements about whether or not an article is compatible with Islamic law.

I term this state of the Muslim world "human rights dependency on the West," by which I mean positioning oneself as the receiver or the opponent of the human rights discourse without making any contribution or offering an alternative to it. In their approach to human rights there are two groups of Muslim intellectuals. One group accepts and employs the present human rights discourse yet without contributing to it. The other group rejects the present human rights discourse but without formulating a viable alternative to it.

I think it is high time for Muslims to make a dialogical contribution to the current human rights discourse in the world instead of simply accepting or rejecting it. In my opinion, the only way for Muslims to critique and contribute to the present human rights discourse is to firmly ground their approach in the universalist legal tradition in Islam and its practice over centuries and extending from eastern Turkistan to India, the Balkans, and Andalusia.

Conclusion

Although the foregoing survey is not exhaustive, it clearly demonstrates how classical Muslim jurists grounded the right to human inviolability over centuries. Drawing on the work of these jurists, and my own experience, I conclude that all human beings are inviolable because inviolability is a prerequisite to fulfill the divine purpose for which the universe and humanity were created. God created this universe to try and test human beings. Yet a fair test cannot be achieved if people are not granted the right to inviolability. People who act without choice cannot be punished or rewarded for their actions.

If true freedom of religion does not prevail in the world, the very purpose of the creation, and of Paradise and Hellfire, cannot be achieved. This is because action under pressure cannot be rewarded or punished by God, either in this world or in the Hereafter. Therefore universal human rights and freedom of religion are prerequisites to achieve the purpose and meaning of Creation.

The foregoing study does not make the claim that Islam fathered universal human rights because Islamic law is a nonexceptionalist law. It does not present itself as the only true religion and the Prophet Muhammad as the only Messenger of God. Instead it presents Islam as the last manifestation of the same religion God sent to humanity over and over through countless Messengers. Muslims are required to believe in the message of Jesus, Moses, Abraham, and all the other previous prophets mentioned in the Qur'an and the Bible. From an Islamic perspective, God is one and He has only one religion, though its expressions over time may vary, especially in the field of law.

This self-perception has implications for Islam's view on human rights. It accepts that basic principles of all religions and legal systems are the same because they come from the same God. These are called "axiomatic rights" (*daruriyyat*).³⁸ They involve six basic rights: the right to the inviolability of life, property, religion, mind, honor, and family. That means Islam has no claim to being exceptional in granting these rights for the first time. This is what I call the non-exceptionalism of Islam. In contrast, the claim that these rights had always been recognized, even before Islam, provides legitimacy for their existence in Islamic law also. This view grounds universal human rights on primordial precedence and universal consensus.

Notes

1. Recep Şentürk, "Sociology of Rights: Inviolability of the Other in Islam between Communalism and Universalism," in *Contemporary Islam*, ed. Abdul Aziz Said, Mohammed Abu-Nimer, and Meena Sharify-Funk (New York: Routledge, 2006), 24–49; Recep Şentürk, "Sociology of Rights: *I Am Therefore I Have Rights*. Human Rights in Islam between Universalistic and Communalistic Perspectives," in *Islam and Human Rights: Advocacy for Social Change in Local Contexts*, ed. Mashood A. Baderin, Lynn Welchman, Mahmood Monshipouri, and Shadi Mokhtari (New Delhi: Global Media Publications 2006); Recep Şentürk, "Minority Rights in Islam: From *Dhimmi* to Citizen," in *Islam and Human Rights*, ed. Shireen T. Hunter and Huma Malik (Washington, D.C.: Center for Strategic & International Studies, 2005), 67–99; Recep Şentürk, "Sociology of Rights: Human Rights in Islam between Communal and Universal Perspectives," *Muslim World Journal of Human Rights* 2, no. 1 (2005): 1–30; Recep Şentürk, "Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in the Classical Islamic Law," *Turkish Journal of Islamic Studies* 8 (2002): 39–70. See also my book in Turkish, *İslam ve İnsan Hakları: Fikhi ve Sosyolojik Yaklaşımlar* (İstanbul: Etkileşim yayıncılık, 2007).
2. It is commonly known in Arabic as the *khutbah al-wadâ'*. It is cited in almost all books of Hadith. Following Ahadith in *Sahih Al-Bukhari* refer to the sermon and quote part of it. See Al-Bukhari, Hadith 1623, 1626, 6361. Sahih of Imam Muslim also refers to this sermon in Hadith 98. Imam al-Tirmidhi has mentioned this sermon in Hadith 1628, 2046, 2085. Imam Ahmed bin Hanbal has given us the longest and perhaps the most complete version of this sermon in his Musnad, Hadith 19774.
3. Another important document that should be remembered in this context is the Wathîqa, the Constitution of Medina under the rule of Prophet Muhammad, which is considered to be the first written constitution in the world based on a consensus by the followers of different religions to constitute a pluralist state.
4. Bukhârî, Hajj, 132; Maghâzî, 77, 78; Muslim, Hajj, 132, 147, 283; Qasâme, 26; Jihâd, 20; Abû Dâwûd, Manâsik, 56, 77; Talaq, 40; Tirmidhî, Juma, 80; Radâ', 11; Tafsîr, 10; Manâqib, 32; Ibn-i Mâjah, Manâsik, 63, 76, 84; Sadaqa, 9; Dârîmî, Muqaddima, 24; Manâsik, 34, 84; Ahmad ibn Hanbal, V, 30; Ibn Hishâm, IV, 275–76; Ya'qubî, II, 109–10; Hamîdullâh, al-Wathâiq, pp. 360–68.
5. For a complete translation in English by Nuh Ha Mim Keller, see <http://muslimcanada.org/farewell.htm> (last visited on May 26, 2012).
6. The Qur'an says that at times powerful Arab tribes changed the established order to get around the prohibition of war during these months. This practice was called *nasi'* (Tawba 37).
7. "The Last Sermon of the Prophet," <http://www.soundvision.com/info/hajj/lastsermon.asp>.
8. For the uses of the Farewell Sermon as the first Islamic human rights document, see the following sources: Ahmed Akgündüz, *İslâm'da İnsan Hakları Beyannamesi* (İstanbul: OSAV, 1997); Haydar Baş, *Veda Hutbesinde İnsan Hakları* (İstanbul: İcmal yayınları, 1994); M. Emin Demirçin, "Hz. Peygamberin Getirdiği İnsan Hakları," in *Doğu'da ve Batı'da İnsan Hakları* (Ankara: TDV, 1996), 155–61; Osman Eskicioğlu, "Veda Hutbe'sinin İnsan Hakları Yönünden Kısaca Tahlili," in *Doğu'da ve Batı'da İnsan Hakları* (Ankara: TDV, 1996), 125–30; Osman Eskicioğlu, *İnsan Hakları Alanında Temel Belgeler* (İstanbul: Nun Yayıncılık, 1996); Muhammed Hamidullah, "İslam'da İnsan Hakları," in *İslam ve İnsan Hakları*, trans. Tahir Yücel and Şennur Karakurt (İstanbul: Endülüs Yayınları, 1995), 147–52; Hayreddin Karaman, *İslâm'da İnsan Hakları* (İstanbul: Ensar Neşriyat, 2004).
9. Hamidullah, "İslam'da İnsan Hakları," 147–52.
10. See, Tahir Mahmood, "Human Rights in Islamic Law" (New Delhi: Genuine Publications, 1993).
11. Abu Zaid Abdullah ibn Umar ibn Isa al-Dabusi, *Taqwim al-Adillah fi Usûl al-Fiqh*, 1421 (Beirut: Dar al-Kutub al-'Ilmiyyah, 2001), 417.
12. Abi Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi (d. 490 ah), *Usul al-Sarakhsi*, ed. Abu al-Wafa al-Afghani (İstanbul: Kahraman yay, 1984).
13. *Ibid.*, 73.
14. *Ibid.*, 86–88.
15. *Ibid.*, 326.
16. *Ibid.*, 327.

17. The term *Sarakhsi* uses is *wujub al-huquq lahu wa alaihi*, which literally means “the necessary requirement of the rights for him and the rights upon him.” He is following the terminology used earlier by the founder of the Hanafi School, Abu Hanifa, who defined *al-Fiqh*, the science of law, as “the knowledge of the self about the rights for him and upon him [*al-Fiqh ma’rifat al-nafs ma laha wa ma ‘alayha*].” *Ibid.*, 332.
18. *Bab ahliyyat al-adami li wujub al-huquq lahu wa ‘alayhi wa fi al-amanati allati hamalaha al-insan.*
19. *Wa li hadha ikhtassa bihi al-adami duna sair al-hayawanat allati laysat laha dhimmah salihah.*
20. *Sarakhsi* writes, “*Za’ama ba’d mashayikhuna [he is al-Qadi Abu Zayd] enne bi’tibar salahiyat al-dhimmah yathbut wujub huququllah ta’ala fi haqqih min hinin yuledu wa innema ma yasqut ma yasqut ba’d dhalik bi udhr al-saba li daf’ al-haraj.*”
21. *An’am 17/13.* “*Wa kull insanin alzamnahu tairahu fi unuqih.*”
22. *Sarakhsi, Usul*, 333–34. “*Li anna Allah ta’ala lemna khalaqa al-insan li haml amanatih akramahu bi al-‘aql wa al-dhimmah li yakuna biha ahlan li wujub huquqillah ta’alah alayhi. Thumma athbata lahu al-‘ismah wa al-hurriyyah wa al-malikiyyah li yabqa fa yatamakkana min ada’i ma hummila min al-amanati. Thumma hazihi al-amanah wa al-hurriyyah wa al-malikiyyah thabitah li al-mar’i min hinin yuladu, al-mumayyiz wa ghayr al-mumayyiz fih sawaun. Fakazalika al-dhimmah al-saliha li wujub al-huquq fiha thabit lahu min hinin yulad yastawi fih al-mumayyiz wa ghayr al-mumayyiz.*”
23. *Kasani, Badayi’ al-Sanayi’*, 1417 (Beirut: Dar al-Fikr, 1996), VII, 349. There is a detailed discussion on this issue in *Kitab al-Siyar* (international law).
24. *Burhan al-Din ibn Abi Bakr al-Marghinani* (d. 593 ah/1197 ce) was born in Marghinan, which is located in Farghana, presently in Uzbekistan. He was martyred by the soldiers of Cengiz Khan during the massacre in Bukhara. His Islamic law book, *al-Hidayah*, has been used as the highest level textbook in the Hanafi madrassas in Central Asia, India, and the Ottoman Empire as well as other parts of the Muslim world until today. The book was translated into English twice and Turkish.
25. *Abu al-Hasan Burhanaddin Ali ibn Abi Bakr Marghinani, al-Hidayah Sharh Bidayah al-Muhtadi*, 1420, ed. Muhammad Muhammad Tamir and Hafiz Ashur Hafiz (Cairo: Dar al-Salaam, 2000).
26. *Bkz. Abd al-‘aziz al-Bukhari* (d. 730), *Kashf al-Asrar ‘an Usul-i Fakhri’l-Islam al-Bazdawi*, 1418, ed. Muhammad Mu’tasim Billah al-Baghdadi (Beirut: Dar al-Kitab al-‘Arabi, 1997), I, 378–79.
27. *Marghinani, The Hedaya or Guide: A Commentary on the Muslim Laws*, trans. Charles Hamilton (Karachi: Darul-Ishaat, 1989), II, 201–02.
28. *Ala al-Din Abdulaziz ibn Ahmad al-Bukhari, Kashf al-Asrar ‘an Usul-i Fakhri’l-Islam al-Bazdawi*, 1417, ed. Muhammad al-Mu’tasim billah al-Baghdadi (Beirut: Dar al-Kitab al-‘Arabi, 1997), IV, 393–94.
29. *Ibid.*, IV, 322.
30. *Ibid.*, IV, 488–90.
31. *Ibid.*
32. *Kamal al-Din Muhammad ibn Abd al-Wahhab ibn Abd al-Hamid ibn Humam, Sharh-u Fath al-Qadir* (Bulaq: al-Matba’ah al-Kubra al-Amiriyyah, 1315), IV, 356.
33. *Ibid.*
34. *Ibn ‘Abidin, Radd al-Mukhtar ‘ala al-Durr al-Mukhtar Sharh Tanwir al-Absar*, 1415 (Beirut: Dar al-Kitab al-‘Ilmiyyah, 1994), IV, 159–65.
35. *Ibid.*, V, 58.
36. For details, see my article “Minority Rights in Islam: From Dhimmi to Citizen,” 67–99.
37. See, for instance, *Huseyin Kazim Kadri, İnsan Hakları Beyannamesinin İslam Hukukuna Göre İzahı*, ed. Osman Ergin (İstanbul: Sinan Matbaası, 1949). In this book, which was written before the UDHR was officially declared, the author defended the UDHR project and tried to convince Muslims to support it by providing an explanation for each item in it from the perspective of Islamic law.
38. These rights are referred to in classical Islamic jurisprudence as *daruriyyat*, *kulliyat*, *ismah*, *hurmah* or *huquq al-adamiyyin*. The terms *daruriyyat* and *kulliyat* imply that these rights are axiomatic and universal in the sense that all legal systems are founded on them.