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Sociology of Rights: "I Am Therefore I Have
Rights": Human Rights in Islam between
Universalistic and Communalistic Perspectives

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Sociology of Rights: "I Am Therefore I Have Rights": Human Rights in Islam between Universalistic and Communalistic Perspectives*

Recep Senturk

Abstract

"I am therefore I have rights," argues this paper. Mere existence qualifies a human being for universal human rights. Yet human beings do not live in solitude; they are always embedded in a network of social relations which determines their rights and duties in its own terms. Consequently, the debate about the universality and relativism of human rights can be best understood by combining legal and sociological perspectives. Such an approach is used in this article to explore the tensions and contests around the universality of human rights in Islamic law. Whether all human beings or just citizens are qualified for the inviolability of human rights is a question which divided Muslim jurists into two schools: Universalistic School, emanating from Abu Hanifa, advocated for the universality of human rights, while Communalistic School, originating from Malik, Shafii and Ibn Hanbal, advocated for civil rights. Universalistic School was adopted by such great cosmopolitan empires as Umayyads, Abbasids, Mughals and Ottomans. It was also reformed by the Ottomans during the nineteenth century in the light of the new notions of universal human rights in Europe to purge remaining discriminatory practices against non-Muslim citizens and to justify constitutionalism and democracy. Yet the universalistic tradition in Islamic law has been forgotten as the chain of memory was broken after the collapse of Ottoman Empire. This article briefly unearths the forgotten universalistic

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approach in Islamic law to build upon it a modern universalistic human rights theory for which there is a pressing need at this age of globalization.

KEYWORDS: Human Rights, Islam, Culture, Globalization

INTRODUCTION

The age of Descartes was characterized by puzzlement with human existence: How can we rationally prove that we really exist? In response, he offered the famous postulation: *I think therefore I am*. I ask, "then what?" because Descartes' query appears to culminate at that point, without exploring the social and moral implications of human existence. However, because of the change in the *Zeitgeist*, by the shift from the intellectual primacy of metaphysical quest to the pinnacle of the search for human well being on earth, our generation is characterized by puzzlement with human rights: *How can we justify that we have human rights?* Tackling this question, ideologies compete to patronize or monopolize the justification of human rights, an exclusionist position I challenge below. Exclusionist groups who subscribe to secular or religious ideologies claim that only their world-view can justify and provide human rights. However, I argue, along with the inclusionists from these groups, that all universalistic worldviews in the world do so. Islam is one of them.

I postulate my response to this puzzle as *I am therefore I have rights*. My very existence suffices as a substantiation of my rights, irrespective of my innate, inherited, gained or ascribed qualities. By tying human existence to human rights, I explore the prerequisites and the inevitable implications of our existence in society at the universal level. My approach to this question derives from both the Islamic and the modern secular notions of justice, freedom and human rights. Using the example of Islamic legal tradition, I will demonstrate below how both religious (divinely inspired, deriving from scriptures) and secular (rationally inspired, deriving from human mind) world views, may justify human rights in their own terms, yet arriving at parallel conclusions.

There is a gap between two approaches on the universal human rights: legal perspective with an emphasis on universalism and social scientific perspective with an emphasis on relativism. The gap became manifest during the preparation of the UN Declaration in 1948. The American Anthropological Association (AAA) publicly opposed the entire project of the universal human rights declaration. In contrast, the legal approach has triumphantly claimed that the universal human rights can be codified and justified at the universal level, yet they did so within the parameters of a particular culture, namely secular and Western. The anthropological approach has claimed that the universal human rights are impossible to define because of the irreconcilable social and cultural diversity of the people in the world; hence the Western and secular definition and justification is ethnocentric.

I argue that, combining the legal and cultural approaches will allow us to reconcile the tension between these two contesting paradigms. The global cultural diversity does not preclude the possibility of a number of common denominators or universal values; cultures with diverse languages and dialects may justify and interpret human rights differently but can still meet at a common

ground. Anthropologists who initially objected the possibility of universal human rights have also come to this point¹.

One can concur with the universalist and relativist claims on human rights, yet only on a particular level. The problem emerges when these claims are generalized. In my view, law operates at two levels, universal and communal. Both levels have conceptual and sociological dimensions. The former is characterized by uniformity while the latter is characterized by diversity. In other words, there are certain principles on which there is universal consensus while certain issues vary from culture to culture².

Global society requires universal consensus on the rules of exchange, such as reciprocity, for international trade, sports, law and politics to be possible. I call these rules, following traditional Muslim jurists, "axioms of law."³ These principles are unanimously accepted worldwide and taken as given. This is true not only for the field of law and the Science of Law but also for all fields of social and academic life. In every domain of life a consensus is needed on certain principles for this domain to operate well. Such a consensus already exists in the world, most visibly in the area of trade and sports, as it had existed from the very beginning of human history. Therefore, without these axiomatic principles, neither law nor the Science of Law is possible. Furthermore, axioms make diversity and change possible, in an ordered manner, without causing anarchy and disorder, as they draw the line between what is fixed and what is not⁴.

I argue that all universal cultures, be they religious or secular, ancient or modern, commonly agree on the inviolability of all human beings⁵. Yet they do so in their own terms, which is an inevitable outcome of social and cultural diversity. Consequently, there is not a single universalism, which is unanimously accepted by humanity as a whole, instead, there are various universalisms emanating from different cultures. They affirm each other.

Acknowledging such diversity in ways human sanctity is justified brings more strength to human rights cause, instead of undermining it. There is not only a single way to justify and talk about human rights, or any other matter in the world. There are in the world multiple discourses to talk about human rights and multiple grounds to justify human rights, reflecting the diversity of cultures on

¹ A recent declaration by the American Anthropological Association reflects this tension: "Thus, the AAA founds its approach on anthropological principles of respect for concrete human differences, both collective and individual, rather than the abstract legal uniformity of Western tradition." Declaration on Anthropology and Human Rights, Committee for Human Rights, American Anthropological Association, Adopted by the AAA membership June 1999.

² See An-Na'im, Abdullahi A. and Francis M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, D.C. 1990.

³ See Abu Hamid al-Ghazzali, *al-Mustasfa fi 'Ilm al-'Usul*, Beirut: Dar al-Arqam 1414/1994, vol. I, p. 633-637.

⁴ For instance, Ten Commandments played this role for many centuries. For similar rules in the Quran, see Surah Isra, 17: 22-39. The UN Declaration of Human Rights also emerged from a need to regulate global relations after WW II in accordance with universally accepted rules.

⁵ Although it is not our subject here, I should add here that all universal cultures also agree on due process and reciprocity.

the globe. Universalist legal cultures share a common ground which unites them but also there is a great diversity among them. Yet the points of agreement are sufficient to serve as the axioms of a global dialogue among them. These discourses may, however, vary in content, scope and mechanisms of implementation. It would also be a clear anachronism to treat Islamic and modern discourses on human rights as the same because they reflect the different historical circumstances in which they emerged and put in use. Consequently, rather than subscribing to the current blanket generalizations in the academic and popular literature, this study explores similarities and differences between them.

However, currently, some of the representatives of these cultures compete with each other to monopolize the cause of human rights. Each one claims that only her culture grants and protects human rights⁶. Or they claim that human rights had initially originated in their culture. This rivalry is unnecessary, counterproductive and inconsistent with the universalism each ideology claims to represent. I challenge this exclusivist position, regardless of which culture it stems from, and offer an inclusive alternative from a sociological perspective which takes into account the diversity of cultures in the world and their right to produce and maintain their distinct discourse on human inviolability.

We, as humanity, had in our history an ongoing and evolving discourse on human inviolability all along, yet in diverse conceptual and institutional forms. From this perspective, a truly universalistic position on human rights is characterized by three features: accepting the inviolability of all human beings; doing so by virtue of their humanity; acknowledging that other universal cultures also respect the inviolability of all humanity. The claim that only we, as a group, nation or civilization, respect human rights, defies itself inadvertently and turns into an exclusionist ideology, with a claim for superiority, and instigates backlash.

From this perspective, since there is a common ground, it is possible to relate Islamic and modern secular discourse on human rights to each other in the present world. There is a gap which needs to be bridged here.⁷ Historians of religion see Islam as a Western religion. Yet, strikingly, scholars of law are not aware of this history and its implications on legal thought and practice. The classical Islamic discourse on human rights may serve as an antecedent or a significant source, for Muslims and others, to develop or reinvigorate human rights discourse which would more effectively respond to the needs of the modern world in the age of globalization. I think Islamic legacy is important to take into account while re-thinking about human rights at the beginning of the 21st century. Muslims ruled the most troubled areas of the present world for so many centuries in peace under cosmopolitan empires from India to the Middle East and to Balkans.

IS UNIVERSAL HUMAN RIGHTS POSSIBLE?

⁶ Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Ithaca, N.Y. : Cornell University Press, 1989.

⁷ An-Na'im, Abdullahi A., *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse: SUNY Press 1990.

Scholars from a variety of disciplines disagree on whether universal human rights are possible or not. Those who agree that universal human rights are possible also disagree on how. These cleavages in the scholarly community became manifest during the preparation of the UN Declaration in 1948. The politicians and scholars were divided on the issue of whether this was a feasible project. Those who believed that it was feasible were also divided on whether a single culture should patronize the cause of universal human rights or a consensus should be sought among all cultures in the world. Some cultures still express discontent that their voice was not incorporated fully in the UN Declaration. Hence they prepare alternative human rights declarations. A considerable number of Muslims are also among them. In contrast, some Muslims have expressed contentment with the UN Declaration since the beginning.

How to approach to the UN Declaration divided academicians and policy makers from all religious communities and nations thereby bringing to the surface a deeper cleavage between universalists and communalists or inclusivists and exclusivists in those religions and nations. Among the politicians, the supporters of the UN Declaration advocated for the universal human rights while those who opposed it advocated for the Civil Rights, that is the rights of the citizens in their state⁸. Relativist academicians, in particular from Anthropology, accused the UN for being ethnocentric and imposing Western values on the rest of the world. Pious people from different religions tended to perceive the UN Charter as a secular attempt to create a new religion for humanity.

There is also another gap among scholars concerning whether human rights are exclusively modern, Western and secular; in other words, whether universal human rights exist in religious and particularly non-Western cultures. Some argue that religious and non-Western cultures also promote human rights while some argue that these cultures are incompatible with human rights. The latter group aims to universalize a particular kind of approach to human rights which is derived from a certain ideological tradition in the West⁹.

Before any attempt to answer this question, we should ask: *what makes human rights possible?* I argue that the existence of an inclusive concept of the universal human being, detached from innate, acquired and ascribed qualities, makes the existence of universal human rights likely while its absence makes it impossible. The universal human is a decontextualized conceptualization of the human being, which is constructed by methodologically discarding the inherited,

⁸ For the contrast between "human rights" and "civil rights" see Rex Martin, *A System of Rights*, Oxford: Oxford University Press 1997, pp. 73-126. John Dickinson summarized it as follows: "The term 'civil rights' is sometimes used by the courts in the broad sense of rights enjoyed and protected under positive municipal law in contrast with so-called 'inherent rights' vesting in the individual by virtue of a supposed 'natural law'; more frequently it is used in the United States in a narrower technical sense acquired in constitutional discussion concerning the legal rights of free Negroes in the years before and immediately following the Civil War. It was often coupled by way of contrast with the term 'political rights'..." John Dickinson, "Civil Rights" in *Encyclopedia of Social Sciences*, New York: Macmillan Company [1930] 1935, vol. 2, p. 513.

⁹ See Donnelly, *ibid*, pp. 37-45.

gained and ascribed physical, cultural, racial, geographical, national and religious qualities an individual may have.

The existence of a concept of the universal human is the primary prerequisite for the universal human rights to be possible because it is the subject to which rights are accorded. If the subject is absent, the rights will also be absent. Therefore, prior to posing the question on whether there are universal human rights inherent within a culture, we should first ask whether there is a concept of universal human in the this particular culture. The lack of the latter (abstract concept of a universal human being) is the cause for the absence of the former (universal human rights). In the absence of universal recognition of a human within a society, the legal and political culture relies on the religiously, culturally, racially or geographically determined exclusive categories, which forestalls the rise or appropriation of universal human rights within a culture¹⁰.

All universal cultures have fostered a concept of human being at the universal level and the due process to achieve justice in society. Here lies the common ground universal cultures share. The examples include Buddhism, Judaism, Christianity, Islam and modern secular ideologies after the European Enlightenment such as liberalism and socialism. It is possible that some did so more forcefully in some aspects or in some periods. Secular approaches to human rights tend to neglect the metaphysical dimension in their justification of human rights. The lack of metaphysical foundation in the secular discourses may be seen as a weakness in advocating human rights¹¹. Religious discourses, on the other hand, tend to focus exclusively on the co-believers. The emphasis on the religious community based on brotherhood in the true faith may also be seen as a source of weakness of religious discourses from a secularist perspective¹².

¹⁰ Rorty, Richard, *Truth and Progress: Philosophical Books*, vol. 3, Cambridge: Cambridge University Press 1998. In one of his essays Rorty describes how the Bosnians were dehumanized by the Serbs before the war against them.

¹¹ See the works of Michael Perry, in particular his recent book, *Under God? Religious Faith and Liberal Democracy*, Cambridge University Press, 2003. On the relationship between religion, morality and law, contrast the works of H.L. Hart (*The Concept of Law*, Oxford, [1961] 1997) and his American critics such as Lon Fuller (*Morality of Law*, 1964) and R. M. Dworkin (*Law's Empire*, 1986). The recent edition of Hart's *The Concept of Law* has a Postscript where he responds to the critiques leveled by Fuller and Dworkin, pp. 238-276. Also see, Berman, Harold, *Faith and Law: the Reconciliation of Law and Religion*, Atlanta, Ga.: Scholars Press, 1993; Berman, Harold, *Law and Revolution: the Formation of Western Legal Tradition*, Cambridge, Mass.: Harvard University Press, 1983; Witte, John, Jr. and Johan D. van der Vyver (eds.), *Religious Human Rights in Global Perspective I-II*, The Hague / Boston / London: Martinus Nijhoff Publishers 1996; An-Na'im, Abdullahi A., Jerald D. Gort, Henry Jansen, Hendrik M. Vroom (eds.), *Human Rights and Religious Values: An Uneasy Relationship?*, Grand Rapids, Michigan 1995; Audi, Robert and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate*, Rowan and Littlefield, 1997; Eberle, Christopher, *Religious Convictions in Liberal Politics*, Cambridge University Press 2002; Stout, Jeffrey, *Democracy and Tradition*, Princeton University Press 2004.

¹² Rawls, John, *A Theory of Justice*, Cambridge: Harvard University Press 1971; *Political Liberalism*, New York: Columbia University Press 1993.

There are actual constraints, however, for the realization of the ideal of universal human rights on the ground on a permanent basis. The absence of due process and civil society are among these constraints. Therefore even if we have the universal human rights on the conceptual level, it does not ensure their existence on the ground. Nor does it ensure their implementation on a sustainable manner.

One of the crucial prerequisites for the implementation of human rights in a society is the existence of due process. If due process exists in a society, it is very much likely that human rights will be implemented in that society. Existence of due process is usually a reflection of the rule of law and formally defined principles of justice. If there is no due process, we cannot expect human rights to exist effectively on the ground. Presently, majority of the developing societies suffer from serious problems in the due process. This observation includes Muslim countries with authoritarian regimes, even though due process is required by Islamic law¹³.

The existence of a middle class and civil society, educated about and committed to human rights, is another crucial prerequisite for the steady enforcement and endurance of human rights. Even if human rights exist in a culture on the conceptual level, if there is no civil society to vigilantly defend them for all, they will be violated by the governments on the ground. In countries where there is no middle class, we cannot expect human rights to be implemented in a continuous manner because there will be no deterrent and punishment if the state violates them. Today, the so-called third world countries, including Muslim countries, lack a middle class and hence civil society. Consequently, authoritarian regimes prevail in these countries. Society cannot resist them because they are poor and therefore preoccupied with meeting their most basic needs. Furthermore, they are not organized to defend their rights. In such cases, it would be wrong to blame the culture or religion of these societies for the lack of human rights.

In the absence of a middle class, civil society and the democratic mechanisms to defend human rights, resistance against abusive governments takes the form of rebellion, insurgence and revolution which may bring about more abuse of human rights, and eventually turn into a vicious circle. Ironically in such cases human rights of the citizens are not violated only by the authoritarian states but also at the hands of the groups whose initial goal has indeed been defending human rights. Only on rare occasions did such movements succeed.

¹³ Ann Elizabeth Mayer draws attention the inconsistency between Islamic law in theory and its actual practice today. See her works, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?", *Michigan Journal of International Law*, vol. 15, no 2, Winter 1994, pp. 304-404; also by the same author, *Islam and Human Rights: Tradition and Politics*, London 1991. Richard Bulliet draws attention to the contribution of the Western countries to the oppression in the Muslim world—which means diversion from both Islamic and universal ideals—by supporting authoritarian governments. See Richard Bulliet, *The Case for Islamo-Christian Civilization*, Columbia University Press 2004, p. 120. He writes, "The people we supported as agents of modernity became tyrants."

The above mentioned social constraints can only be removed through a struggle at different levels. The process through which human rights are gained by social groups or nations requires cultural, social and political struggle. States usually resist granting human rights to their citizens and other human beings out of benevolence, except when they are compelled to do so under social and political pressure. Nor do the states continue respecting human rights if these pressures cease to exist. These pressures might be internal or international. Yet, without a solid internal pressure on the state, the international pressure would be a futile effort because it cannot be sustained for a long time.

For the ideal of human rights to be put in practice and protected on the ground, those who demand these rights and wish to enjoy them on a permanent base must struggle for them against the authoritarian state. A social group, society or nation cannot depend on the benevolence of others for the protection of its human rights. Such clientalism, as all other forms of dependency, is an outcome of discrepancy of power between client and patron groups and states. The interference of foreign powers to promote human rights in a society against their existing state may play a delegitimizing role by turning the internal struggle for human rights into an illegitimate cause in the eye of citizens who give priority to freedom of their nation.

The lives of great human rights thinkers in the West and East testify that, besides their theoretical contributions, they also fought for them and a significant number of them risked or sacrificed their lives for that cause. In Islamic legal history, the great jurists, *mujtabids*, not only produced doctrines, *ijtihad*, to advocate civil or human rights but at the same time fought for them. For instance, the father of the doctrine of universal human rights in Islam, Abu Hanifa, sacrificed his life for the cause of human rights as he was put in prison and tortured to death at a very old age merely for refusing to cooperate with the authority. Similarly, Ibn Hanbal, another *mujtabid* and founder of Hanbali School of Law, did not compromise on his *ijtihad* under pressure from state and demonstrated legendary resistance renowned in Islamic history as *mihna*. Another legendary example that deserves mentioning here is Sarakhsi, a great Hanafi jurist, who advocated universal human rights in his books which he dictated to his students while in prison. The theoretical contributions of these scholars will be discussed below.

For law to be free from the control of an authoritarian state, minds of subjects, in particular jurists, must be free. The historical survey below in this paper demonstrates that the most significant contributions to the theory of human rights in Islamic law came from liberal minded *mujtabids* in earlier generations, who worked independently of the state and refused official posts or payments. Likewise, there is a correlation between the lack of theoretical contribution to the theory of human rights in the modern era and the lack of *mujtabids* on the model of earlier ones in Muslim societies. The relationship between advocacy of human rights and *ijtihad* in Islam may not be accidental; it may even be seen as an indication that the march to freedom from violation of human rights begins with freedom of thought which classical scholars called "inviolability of mind," *'ismah al-'aql*. Inner freedom of the agency thus precedes

the struggle for liberation from political oppression and violation of human rights.

Islamic law sanctifies struggle and sacrifice for human rights at the highest level possible by granting them the honorary title of martyrdom. As I will explain below, Prophet Muhammad is reported to have repeatedly said that those who die while protecting their basic human rights such as right to life, property, religion, honor and family against tyrants or violators are martyrs whom God will reward with Paradise in the Hereafter. This is because Islamic law assumes that human rights cannot be protected unless those who have them are ready to struggle and make sacrifice for them. In the subsequent generations after Prophet Muhammad from Abu Hanifa to Malcom X many Muslims acted on that principle and sacrificed their lives. The fight for human rights—since Moses and Socrates—may easily turn into a bloody struggle for people, prophets and thinkers. Consequently, expecting that the ideals Islamic law presents concerning universal human rights will be realized on the ground without Muslims, who wish to put them in practice, struggle for them, as other nations did so, would defy the sociological patterns in the Western and Islamic history of human rights.

These social and institutional prerequisites demonstrate that the issue of human rights is not a merely legal issue which can be solved by reforming law. Instead it requires comprehensive reforms in the legal system and social and economic structure. Human rights emerge when there is a balance of power in the society. Otherwise, in the case of absolute imbalance in power relations between society and the state, the implementation of human rights is left to the benevolence of the ruling class and international pressures, if there is any, which never produce sustainable results and reforms.

The case of human rights in Islam can be understood better against this broader backdrop, rather than exclusively concentrating whether Islam has offered universal human rights at the ideal and conceptual level, which is necessary but not sufficient for their existence and sustained implementation on the ground. The present study will contribute to this broad discussion by providing a balanced and historically well-grounded answer to the following question: *Is there a concept of universal human rights in Islam?* Following the above perspective, the answer is that such a concept is contingent on the existence of the basis for the universal human being in Islamic law: If the basic conceptual groundwork exists, then it is likely that Islamic law does feature universal human rights. Otherwise, without such a framework, it would be impossible to justify universal human rights. Therefore, we should first ask: *Do the fundamental elements of a universal human being already exist in Islamic law?*

HUMAN BEING AND HUMAN RIGHTS IN ISLAM: A CONTESTED RELATIONSHIP

The answer to this much-debated puzzle is not plainly positive or negative, unlike the monolithic arguments found in the majority of the current literature based on sweeping and one-sided generalizations. As the survey of the

relevant classical and modern literature demonstrates, this is a long and widely debated issue in the juridical and theological discourse since the early history of Islam¹⁴. Briefly put, there are rival universalistic and communalistic views represented by a network of Sunni and Shiite scholars, both supported by a rich literature and sophisticated arguments and counterarguments. The universal perspective advocates equal human rights for all. In contrast, the communalistic perspective advocates equal rights only for the citizens of the Islamic state, be they Muslims or non-Muslims. Yet this contest in the Islamic legal tradition is not currently known to most scholars in the field of human rights. The lack of modern literature and research underscores this void in the current discourse.

I argue that the latent tension in Islamic law between the advocates of universalistic and communalistic perspectives, which has so far been circumvented by the researchers, is analogous to the tension between the advocates of the civil rights and human rights paradigms in modern Western legal thought. The recent political debates in the US testify that the advocates of civil rights, concentrated exclusively on the rights of the citizenry, still hold, despite the declaration and ratification of the UN declarations since 1948. This may be attributed to the fact that the European constitutions incorporate the human rights paradigm while the US constitution incorporates the civil rights paradigm. Hence emerges occasional tensions between the UN and the European perspectives, on the one hand, and US policies, on the other. The recent debates on the International Criminal Court (ICC) may be viewed as a manifestation of this tension. The current US policy concerning the ICC has been to forcefully call for exemption of US citizens.

The two rival paradigms in Islamic law have been advocated by two separate networks of scholars. I will briefly present the views of the two schools of thought to highlight the existence of the universalistic approach to human rights—initially formulated by Abu Hanifa, the founder of Hanafite School. Abu Hanifa's universalistic paradigm had been adopted by a wide network of scholars affiliated with different schools of law. However, Abu Hanifa's ideas have yet to be fully explored by modern researchers in the West and the Islamic world.

Most of the concerns and theological arguments of the Muslim jurists who lived during the middle ages no longer have a ground in the present world, characterized as it is with radically different and secular national and international legal concepts and structures.

Likewise, before proceeding further, it is worth noting that it would be a stark anachronism to project modern notions of human rights which emerged during the peculiar conditions following WWII to the writings of the Muslim jurists who lived centuries ago. Consequently, the most appropriate way to approach Islamic legal culture—as it is required for any culture—to try to understand it from within in its own terms. Therefore, we need, for such a daunting task, to adopt

¹⁴ For the concept of right (*haq* pl. *huqûq*) in Islamic law, see 'Abd al-Razzaq al-Sanhuri, *Masadir al-Haq fi al-Fiqh al-Islami*, Beirut: al-Majma' al-'ilmi al-'Arabi al-Islami, 1953-1954, I, 13-99.

the method of *thick description*, as Geertz put it¹⁵, to avoid the mistakes of the *thin descriptions* produced by Muslims and non-Muslims in friendly or adverse terms.

The word "Adam" is one such concept that requires careful treatment. It is commonly used in the Bible and the Quran for "human being," and in particular for the first one, with rich connotations. Furthermore, it is one of the commonly used words which found their way to languages used by Jews, Christians and Muslims worldwide. It is the Hebrew word for man, deriving from *adama*, "earth," just as the Latin *humanus*, "human," is related to the Latin *humus*, earth¹⁶. In Arabic, *âdamî* stands for "man" while *âdamiyya* stands for "woman."

The legal term *âdamiyyah* denotes "humanity," possessing the quality of a human being, or more technically "personhood." Islam, like many other religions, views every human being a perfect creation of God, His representative on the earth, superior to the creation as a whole including angels, and blessed with intellect and free-will to be tried by the Creator. The term *huquq al-âdamiyyin* is used in the classical literature to indicate the rights of human beings.

The term *îsmah* means "inviolability" of a human being which includes the rights to inviolability of her life, property, religion, reason, family and honor¹⁷. It is a synonym to *hurmah*, "legal protection". These rights are hierarchically ordered; for instance, right to life has overriding power over others. Muslim jurists derived them through a survey of the Quran and *hadith* along with rational inquiry. They are justified by evidence from the Quran and Hadith (*dalil manqul*) and also by purely rational arguments (*dalil manqul*).

The issue of universal human rights in Islamic law cannot be comprehended without fully exploring the rise, evolution and the key role played by these two concepts. Yet it is a broad subject for which the present article may serve only as a preliminary introduction. Muslim jurists from the classical period disagreed on the relationship between *îsmah*¹⁸ (inviolability) and *âdamiyyah* (humanity). More plainly put, the debate revolved around who possessed the six

¹⁵ Geertz, Clifford, *The Interpretation of Cultures*, New York: Basic 1973, p. 14; Shankman, P., "The Thick and the Thin: On the interpretive Theoretical Program of Clifford Geertz", *Current Anthropology*, 25 (1984), p. 69; Wuthnow, Robert, *Meaning and Moral Order: Explorations in Cultural Analysis*. University of California Press 1987.

¹⁶ Hendrickson, Robert, *QBP Encyclopedia of Word and Phrase Origins*, 2004, p. 7.

¹⁷ In Arabic: *îsmah al-nafs* or *îsmah al-dam*, *îsmah al-mal*, *îsmah al-dîn*, *îsmah al-'aql*, *îsmah al-nasl*, and *îsmah al-'ird*.

¹⁸ In the lexicon, the verb *asama* means "he protected" which is considered synonymous to *waqâ* and *mana'a*. For instance, *asamahu al-ta'am* as a sentence means "the food protected him from hunger." The infinitive *al-îsmah* means protection. See, al-Fayruzabadi, *al-Qamus al-Muhit*, Beirut: Muessese al-Risala 1419/1998, p. 1198; Ibn al-Manzur, *Lisan al-'Arab*, Beirut: Dar al-Ihya al-Turath al-'Arabi 1419/1999, pp. 244-247. In Islamic theology, the term *îsmah* corresponds to "infallibility" which does not concern us in this article. For the legal concept *al-îsmah*, see Muhammad Rawwas Qal'aji, *al-Mawsu'ah al-Fiqhiyya al-Muyassara*, Beirut: Dar al-Nafais, 2000/1421, vol. I, p. 1401; for the equivalent term *hurmah*, see *ibid*, vol. I, p. 745-747; For the usage of *îsmah* in Islamic law, see Recep Şentürk, "İsmet" *TDV İslam Ansiklopedisi*, vol. 23, p. 137-138; "*îsmah*," in *al-Mawsu'ah al-Fiqhiyye*, vol. 30, pp. 137-140.

basic rights covered under the title of *'ismah*¹⁹. Abu Hanifa and his followers from Hanafite and other schools attached *'ismah* with *âdamiyyah*, while al-Shâfii and his followers from his own and other schools attached it to *iman* (declaration of Islamic faith) or *amân* (making a treaty of security). I call the former Universalistic School and the latter Communalistic School.

Muslim jurists in the classical era unanimously agreed on what rights should be protected under the coverage of *'ismah*, but there was a question that divided them: Who has the right to *'ismah*? Is it the entirety of humanity or a segment of it? Can Islamic law legislate for non-citizens to grant them human rights? Does all of humanity or the citizenry of the Islamic state alone, composed of Muslims and non-Muslims, fall under the jurisdiction of Islamic law? To what extent are Muslims allowed to intervene on legal traditions under their rule and on what grounds? In brief, there has been consensus about what constitute basic human rights but there has also been an enduring contest about who is entitled to them²⁰. Both sides developed arguments to defend their positions. This issue is far from being resolved even today. Below I will briefly survey the arguments advanced by both positions.

A. The Universalistic View: Basic Rights Are Accorded By Virtue Of Being A Human

Abu Hanifa and his followers²¹ advanced the cause of universal human rights – universally and unconditionally granted to all by birth, on a permanent and equal basis, by virtue of being a human - which cannot be taken away by any authority. Abu Hanifa established an unbreakable relationship between the concept of *âdamiyyah* (personhood, humanity) and the concept of *'ismah* (inviolability)²². Based on this relationship, he argued that being a child of Adam or a human, whether Muslim or not, serves as the legal ground for possessing basic rights (*al-'ismah bi al-âdamiyyah*)²³. Although the concepts of *'ismah* and "*âdamiyyah*" require a more thorough explanation, we can phrase this principle in plain English as follows: Basic human rights are granted to all human beings for the sake of their humanity. The Hanafites such as Sarakhsi, Zaylai, Dabusi,

¹⁹ On the concept of *'ismah*, see Johansen, Baber, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, Leiden: Brill 1999.

²⁰ For the emergence and evolution of these concepts, see Recep Senturk, "*Adamiyyah and 'Ismah: The Contested Relationship between Humanity and Human Rights in the Classical Islamic Law*", *Turkish Journal of Islamic Studies*, 2002 (8), pp. 39-70.

²¹ On the history of the Hanafi School of Law, see "Hanefi Mezhebi" in *TDV İslam Ansiklopedisi*, XVI, 1-12.

²² For the concept of *'ismah* in the Hanafi tradition, see "Der 'isma-Begriff im hanafitischen Recht" in Johansen, Baber, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, Leiden: Brill 1999, pp. 238-262.

²³ See for instance, al-Marghinani, Burhanaddîn 'Alî ibn Abi Bakr (d. 593 H), *al-Hidayah Sharh Bidayah al-Mubtadi*, (eds. Muhammad Muhammad Tamir, Hafiz 'Ashûr Hafiz), Cairo: Dar al-Salam, 1420/2000, II, 852. The author states that "*al-'ismah al-muaththimah bi al-adamiyyah*." This will be discussed below in greater detail.

Marghinani, Ibn Humam, Bâbartî, Kâsânî and Timurtâshi, to name a few, are of this opinion²⁴.

The universalistic jurists used mainly the following arguments while defending their doctrine: (1) God's purpose in creating humanity, the trial (*ibtîla*) and holding them responsible (*ta'kîf*) for their actions, cannot be achieved unless all human beings are granted sanctity and freedom. (2) A human being must be protected because God does not want His creation to be destroyed, which is possible only by granting sanctity to each one of them. (3) God in the Quran and Prophet Muhammad in his sayings strictly prohibited assaulting and slaying any human being²⁵. They ordered protecting non-Muslim women, children and clergy even during war. (4) Disbelief (*kufr*) is not normally harmful to Muslims unless the disbelievers engage in a war against Muslims. So it must be tolerated. (5) Jihad is a defensive, but not an offensive, war. Therefore, when non-Muslims do not assault other people they should enjoy sanctity. (6) The objective of war is not to exterminate the enemies but to force them to make peace and, if required, pay tribute. (7) The justifying reason for war is protecting sanctity against those who assault it. The disbelief of the enemies is not a valid reason to make war against them. Therefore when peace prevails everyone must enjoy sanctity. (8) The non-Muslims must be given chance to learn about Islam which they cannot do unless they are granted sanctity. (9) Compulsion in religion is forbidden in the Quran²⁶. Below we will turn to these arguments in greater detail.

The evidence in the above arguments is either grounded on purely rational thinking (*dalîl ma'qûl*) or on excerpts from the Quran and Hadith (*dalîl al-manqûl*). These arguments are all based on the notion of a universal human and her place in the network of social relations with other people worldwide. It also aims to establish peaceful relations not only between Muslims and non-Muslims but also among non-Muslims from different religions.

²⁴ See for instance, al-Marghinani, *al-Hidaya*, II, 852; Abu Muhammed Badraddin Mahmud ibn Ahmad ibn Musa al-Hanafî al-'Aynî (855/1451) *al-Binaya fi Sharh al-Hidaya*; (ed. Muhammad 'Umar). n.p. : Dar al-Fikr, 1980/1400, vol. V, p. 830-831, al-Kâsânî, Alâ' al-Din Abi Bakr ibn Mustafa, *Bedâi' al-Sanâi' fi Tartîb al-Sharâi'*, Beirut 1406/1986, vol. VII, p. 233-241.

²⁵ "Nor take life - which Allah has made sacred - except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand retaliation or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)" (The Quran 17:33). "O believers, be you securers of justice, witness for God. Let not detestation for a people move you not to be equitable; be equitable - that is nearer to God-fearing" (The Quran 5:8). "...Whoso slays a soul not to retaliate for a soul slain, nor for corruption done in the land, should be as if he had slain humankind altogether" (The Quran 5:32). In the address which the Prophet delivered on the occasion of the Farewell Hajj, he said: "*Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection.*" The Prophet has also said about the dhimmis (the non-Muslim citizens of the Muslim state): "*One who kills a man under covenant (i.e., dhimmi) will not even smell the fragrance of Paradise.*"

²⁶ "Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold that never breaks. And Allah heareth and knoweth all things" (The Quran 2:256).

The protection of six basic rights is also considered the common ground of all religions, which provides a juridical ground for religious pluralism. For this reason they are called “the objectives of the law” (*maqasid al-shariah*). It is apparent that Islamic law assumes that people would always belong to a religion, which is not the case today. According to Islamic theology and jurisprudence, these six principles constitute the unchangeable core of all religions and the legal systems in the world. Islam defines its mission as to re-affirm these eternal and universal principles of law and morality. It is agreed by all Muslims that the creed (*‘aqidah*) does not accept alteration but law (*shariah*) accepts it because societies evolve and undergo change. Therefore the faiths taught by all the Prophets have been the same but the laws issued by them changed over time. Yet the main purpose of all religious legal systems across history--formulated as the protection of six basic rights--remained unchanged.

One consequence of this approach is that Muslims allowed the non-Muslim populations they ruled to practice their laws unless it harmed one of the protected basic rights. For instance, narrative has it that when Egypt was conquered, ‘Amr ibn ‘As allowed the Egyptians to practice their conventional laws except the custom of sacrificing a girl to the Nile for more water. Likewise, it is also reported that, in India, the Hindus were allowed to practice their law except the custom of *sati*, burning the widow with the body of her late husband²⁷. These two customs in Egypt and India were outlawed by Muslim rulers of the time because they contradicted the right to life. It was argued that these customs could not originate from the practice of the founders of these religions because they normally would respect the six protected basic rights. Similarly, the marriage between brothers and sisters were outlawed among Zoroastrians in Iran because it was seen as violating the protection of the family.

The above named scholars considered the protection of the six basic rights necessary based on the argument that the purpose of God in creating the human family on this earth is “trial” (*taklif*), which cannot be achieved unless the human is free and protected. Otherwise, if human beings were not granted basic freedoms and protections, their purpose on earth would be unrealizable²⁸. A

²⁷ The Mogul rulers of India outlawed the *sati* practice although they could not completely exterminate it. See Sri Ram Sharma, *The Religious Policy of the Mughal Emperors*, Bombay: Asia Publishing House 1972, p. 42-44; Zulfakar Mubed (d. approx. 1670 AD), *Hinduism During the Mughal India of the 17th Century*, (tr. David Shea and Antony Troyer), Patna: Khuda Bakhsh Oriental Public Library [1843] 1993, p. 77.

²⁸ It is stated in the best-known Hanafi handbook on Islamic Jurisprudence, *al-Manar* by Ibn Habib al-Halabi, that “*al-Kuffar Mukhatabun*” (Non-Muslims are addressed and held responsible by God.) See for a commentary on *al-Manar*, Ibn Qutlubugha (802-879 AH) *Sharh Mukhtasar al-Manar*, (ed. Zuhair ibn Nasir al-Nasir), Dimashq: Dar Ibn al-Kathir 1413/1993, p. 66-67. The author explains that the jurists disagreed on whether God required non-Muslims to fulfill all His commands or to accept the Islamic faith first as a prerequisite for the rest of the requirements. The Hanafi jurists from Iraq advocated the first view, while scholars from Central Asia defended the second. See also ‘Ala al-Din Abu Bakr Muhammad b. Ahmad al-Samarqandi (d. 539/1144), *Mizan al-Usul fi Nataij al-Uqul* (ed. Muhammad Zaki ‘Abd al-Barr), Qatar 1404/1984, p. 194; Abu al-Barakat Hafizuddin Abdullah ibn Ahmad ibn Mahmud al-Nasafi (710/1310), *Kashf al-Asrar Sharh al-Musannif ‘ala al-Manar*, Beirut: Dar al-Kutub al-‘Ilmiyye 1986.

human's religious choice must be honored even if it is in contradiction with the Islamic teaching. Her life must be protected because this is the only way he can respond to the divine call²⁹. Her reason must also be honored since reason is the mechanism by which moral choices of right and wrong are made. Reason is also the only way through which humans understand the divine message and implement it. The mind of everyone must be honored and protected even if they oppose the way we think. The classical doctors of Islamic law used these theological arguments to justify the six basic rights. For instance, Sarakhsi (d. 1090) wrote:

Upon creating human beings, God graciously bestowed upon them intelligence and the capability to carry responsibilities and rights (person-hood). 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 person-hood 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 equal³⁰.

The idol-worshippers and polytheists, who lived outside Arabia, had been allowed to practice their religions freely under Islamic rule. This is because, in practice, Islamic law extended the status of the "People of the Book" (*ahl al-kitab*) to all religions, including such religions as Zoroastrianism, Buddhism and Hinduism. Therefore these religious communities survived for centuries under Islamic rule until today. They had been seen as *adami* and therefore given basic human rights.

To illustrate this issue further, we may also briefly look at the Hanafite view on war. From the Hanafite perspective, denial of Islam (*kufri*) does not justify war and deprivation from the six basic rights (*'ismah*). For Abu Hanifa, war, not disbelief, is the cause of war. In other words, non-Muslims are protected during peaceful times since they are human beings (*'adamî*), and difference of faith is not a cause for war. Even in the case of war, the enemy side must be granted

²⁹ Abi Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi (d. 490 AH), *Usul al-Sarakhsi*, (ed. Abu al-Wafa al-Afghani), Istanbul: Kahraman yay. 1984, p. 86-88.

³⁰ Sarakhsi, *Usul*, p. 333-334. "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."

certain rights because *ādamiyyah* never ceases to exist; however, certain constraints emerging from the conflict situation apply.

Yet violating the *'ismah* of others result in the termination of one's own *'ismah*, but neither as a whole nor forever. An official court, but not individuals, determines the consequential punishment based on objective rules. Yet, if the public authorities fail to protect the *'ismah* of the citizenry, or if they are the ones who violate the *'ismah* of their own citizens, then, the individual is entitled and obliged to protect his or her *'ismah*. If people die during the struggle to protect their *'ismah*, they are revered as martyrs³¹. In other words, the struggle to protect basic human rights, such as protecting religion, reason, life, family and property, which are necessary for a free and just society, is considered to be equally important as the struggle in the battle to protect the abode of Islam against outside enemies.

This is because the *'ismah* is indivisible and cannot be suspended under any condition for all humans who are in principle granted the same basic rights on the equal and permanent basis. However, as far as the criminals who deserve a punishment are concerned, the *'ismah* becomes divisible according to the Hanafites and thus during the punishment, it is suspended only in part and for a limited period of time. The Hanafites claim that only the relevant part (*maball al-jaz'a*) from the *'ismah* of the criminals, which is legally determined, is suspended during punishment while the rest remains intact. For instance, the property of a burglar should still be protected even if he is punished for burglary.

The Hanafite School has been strongly influential in the Indian Subcontinent, Central Asia, Asia Minor and the Balkans, particularly during the life of the Ottoman State. The discourse of the Ottoman scholars of law confirms the Hanafite perspective, briefly outlined above. Yet, presently, the research is lacking to determine the extent to which the Ottoman State actually followed the Hanafite principles in their seven-centuries-long history. At this moment, the only observation we can make with certainty is that they gave primacy, at least in the official discourse of the Millet System, to the Hanafite law in their effort to rule a multi-national and multi-religious state on a vast geography for an exceptionally longer period of time. The Ottoman legal discourse on the Millet System and the debated rights of non-Muslims under Ottoman rule can be followed in the writings of the Ottoman Shaikhulislams and *Ulama* on *Fiqh*. The Ottoman example is one among many parallel examples from Andalusia to India. Therefore, although it should not be seen as the only or the authentic practice of Islam, Ottoman experience provides a significant and relatively recent Islamic example for a noticeably plural society under Islamic rule.

³¹ The Prophet Muhammad repeatedly stated that the one who is killed in the struggle to protect his or her life, property and family or to recover a loan, or to defend himself against any kind of aggression is a martyr" (*Man qutila dāne malihi/ahlihi/damihi/daynihi/mazlamatin fa huwa shahīd*). For numerous narrations on this issue, see Bukhari, Mazalim 33; Muslim, Iman 226; Abu Dawūd, Sunnah 29; Tirmidhi, Diyat 21; Nasai, Tahrim 22-24; Ibn Majah, Hudud 21; Ahmad b. Hanbal, I, 79, 187, 188, 189, 190, 305 and II, 163, 193, 194, 205, 206, 210, 215, 217, 221, 324.

The modern concepts of citizenship and rights are based on different philosophical grounds than the way they were viewed by classical scholars of Islamic law. Yet despite the manifest differences between the pre-modern-universalistic approach in Islamic law and the modern legal thought, which I do not need to enumerate here for our present purpose, a similarity is striking concerning the concept of a universal human, which serves in both legal cultures as the philosophical foundation of universal human rights.

Abu Hanifa's influence continued until the beginning of the 20th century. For instance, Al-Miydani (d. 1881), a Syrian scholar from Damascus, wrote at the end of the 19th century that the person has sanctity by virtue of her existence (*al-Hurr ma'sum bi nafsibi*)³². By the fall of the Ottoman State, the Hanafî view suffered from an eclipse until today. The so-called contemporary "Islamic" states disinherited the Ottoman legacy and disowned the universalistic view in Islamic law in favor of the communalistic legal doctrine on human rights, which will be outlined below.

B. The Communalistic View: Basic Rights Are Accorded By Virtue Of Islamic Faith Or A Treaty

The competing discourse network, emanating from al-Shâfiî and crossing the conventional school borders, also gained followers from other schools of thought. This discourse lacks the abstract concept of human *qua* human as the possessor of rights. Instead, it relies on the religiously defined categories, such as disbeliever (*kafir*) and believer (*mu'min*).

Non-Shâfi'ite scholars such as Imam Mâlik (712-795), Ahmad ibn Hanbal (780-855), and the majority of their followers (e.g. Dawud al-Zahiri, Ibn Hajar al-Haythami, Shirbini, Kurtubi, Karafî, Bujayrimi, Ibn Arabi, Khallaf) also defend the same perspective. Although its first renowned advocate was al-Shâfiî, an inter-school network of scholars defends this perspective. The majority of the classical Shiite scholars also adopted the same approach (e.g. Tûsî, and Hillî).

These scholars generally use the following arguments: (1) The injunction on fighting against infidels in the Quran³³ is a general commandment. (2) The Prophet said: "I am ordered to fight against people until they say: there is no deity but Allah." (3) Disbelief (*kufri*), they argue, is the worst sin and cannot be allowed.

Based on my initial research, the category of a universal human as the subject of law, comparable to the Hanafite concept of *âdamiyyah*, does not exist in the legal thought of the scholars who subscribe to the communalistic doctrine. Instead, their legal thought relies on the religiously defined categories of "Muslims" and "non-Muslims." For them, Muslims are qualified for the *'ismah* by virtue of their faith (*iman*). However, non-Muslims are not qualified for the *'ismah* unless they make a treaty with the Muslim state and secure their protection

³² Al-Miydani, *al-Lubab fi al-Sharh al-Kitab*, (ed. Muhammad Muhyiddin Abdulhamid), Cairo 1383/1963, vol. IV, p.128.

³³ Tawba 9:5, 12; Anfal 8:39.

in exchange for the taxes they pay. This treaty is called *dhimmah* and the tax paid for it is called *jizya*. According to Hanafites, the treaty of *dhimmah* is not a reason for *'ismah* (which is already universally present), rather it is an alliance against the third parties and allegiance to the state. Likewise, according to the majority of the Shâfi'ites, being a non-Muslim, with the exception of *dhimmis*, is a cause for war. From the communalistic perspective, since non-Muslims do not have *'ismah*, the relationship between Muslims and non-Muslims is considered to be a continuous state of war unless there is a treaty of peace. Yet, according to the Hanafites, non-Muslims who are not the citizens of the Islamic state are also protected because they have *'ismah* as humans. Likewise, the apostate (*murtadd*) is punishable because of his—but not her—apostasy (*kufr*), according to the Shâfi'ites. For Hanafites, apostasy is punishable, not because it is a denial of Islam as a true religion, but because of the conspiracy it involves against the community and the confusion of faith it causes. (This issue will be further explored below.) These points can be seen as just some implications of the lack of a concept of the universal human and the rights attributed to it in the Shâfi'ite doctrine.

The Shâfi'ite view, which is also shared by a significant number of scholars from the Mâlikite, the Hanbalite and Shi'ite schools, has been influential in Hijaz, Egypt, North Africa, Spain and Iran in varying degrees until the Ottoman rule took over. The Jews and Christians residing in these regions maintained their life as *dhimmis* who possessed *'ismah* due to their treaty with the Islamic rulers who followed the Shâfi'ite doctrine.

A method of historical and contextual interpretation of the legal evidence is needed to critically examine the arguments. This approach has already been used by the scholars who adopted the universalistic approach to basic human rights in their counterarguments against those who called for a communalistic view. The communalistic arguments, as briefly presented above, are criticized as follows: Regarding the first and second arguments, it is claimed that the various orders in the Quran and Hadith to fight against non-Muslims apply to the times of war and to a particular group of Arab polytheists living in Hijaz. Therefore, these orders cannot be generalized to the times of peace and to other people outside Arabia. Against the third communalistic argument mentioned above, it is argued that the non-Muslims must be given chance to learn about Islam. Besides, Islamic law does not punish all sins against God unless they harm other members of the society. Punishing disobedience against God is not the duty of people unless their well-being is affected by it. Furthermore, the compulsion to accept Islam is forbidden. On a more philosophical level, the prominent Hanafi scholar Marghinani (d. 1197) criticized the Shâfi'ite view as follows:

With respect to the arguments of al-Shâfi'i, we reply that his assertion, that the "*sin-creating protection (al-'ismah al-mu'thimah)* 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....³⁴

The universalistic approach crossed the boundaries of the Hanafite school and gained followers from other schools of thought (*madhhab*) in Islam, which gave rise to an inter-school discourse network. A brief survey of other like-minded scholars and their intellectual affiliation will demonstrate this structure. Non-Hanafite scholars such as Ghazzali from the Shâfi'ite school, Ibn Taymiyya and Ibn al-Qayyim al-Jawziyya from the Hanbali school, Ibn Rushd, Shâtîbî and Ibn al-'Âshûr from the Mâlikite school, and Maghniyya from the Jafari Shiite School also share the universalistic view initially advanced by the Hanafites. Therefore, it would be misleading to take the universalistic view on human rights as an exclusively Hanafite perspective—despite the fact that its originator was Abu Hanifa.

IMPLICATIONS OF THE CONTEST BETWEEN UNIVERSALISTIC AND COMMUNALISTIC DOCTRINES

The preceding cleavage shaped many issues in the Islamic legal tradition as the advocates of the contesting paradigms systematically and persistently took their views to their logical ends. They projected their perspectives on all the relevant practical questions in social and international relations. Therefore, there are numerous political and legal issues emanating from it. Fully recovering all the implications is not our purpose here, which may require a painstaking survey of all classical literature. The purpose here is to demonstrate the wide ranging impact of the contest on the relationship between the human and human rights. The examples, presented below, will suffice for this purpose.

1. *What is the subject of law, humans or citizens?*

Abu Hanifa and his followers made “human being” or “person” the subject of law to which rights and responsibilities are accorded. This universalistic approach is evident in the Hanafi definition of law: “knowledge of the self about her rights and duties” (*ma'rifah al-nafs ma laba wa ma alaiha*). It should be noted that, in this definition, law is not restricted to Muslims or

³⁴ Ebtü'l-Hasan Burhaneddin Ali b. Ebi Bekr Merghinani, *The Hedaya or Guide: a Commentary on the Mussulman Laws*, (tr. Charles Hamilton), Karachi: Darul-Ishaat, 1989, II, pp. 201-2.

citizens alone; nor a reference is made to a particular way of knowing rights and duties, be it religious or secular.

In contrast, the subject of law from the communalistic perspective is the citizenry, or more precisely the subjects of the Islamic state, be they Muslims or non-Muslims. Therefore, rights and duties can only be accorded to the citizenry. From this perspective, non-citizens are not seen eligible for "personhood" which would enable them to bear rights and duties. The compact of *dhimmah*, which literally means "liability," entitles them to the right for personhood. It is a prerequisite for the entitlement to all other rights and duties.

2. *What is the de facto state of international relations?*

Peace, the universalistic approach argues, is the *de facto* state of international relations between Muslims and non-Muslims, unless otherwise proven. By default, non-Muslims are friends. If there are indications proving the contrary, then they are considered enemies. For them "the cause of war is war." In other words, if non-Muslims initiate war, Muslims also engage a defensive war against them. The universalistic scholars carefully distinguished between adversity (*harb*) and infidelity (*kufr*): all enemies may be infidels but not all the infidels are enemies³⁵.

War, argues the communalist perspective, is the *de facto* state of relations between Muslims and non-Muslims³⁶, unless otherwise proven, on the grounds that the cause of war is infidelity (*kufr*). Consequently, non-Muslims are by default enemies (*harbi*); if there is an indication to the contrary, then, they are considered friends. Therefore, non-Muslims, with no treaty of peace, have no sanctity.

3. *Whose 'ismah are we required to protect?*

³⁵ Ömer Nasuhi Bilmen, *Hukuk-ı İslamiyye Kamusu*, İstanbul: Bilmen Yayınevi, nd, III, p. 356. Muhammad al-Shaibani authored two important books on the international law, which he termed *al-Siyar*, to help regulate international and inter-communal relations between Muslims and non-Muslims. Al-Shaibani's book on international relations, *al-Siyar al-Kabir*, was among the first books translated into Turkish and published after the Ottomans opened a printing house in İstanbul. (see Ebu Bekr Şemsüleimme Muhammed b. Ahmed b. Sehl Serahsi (483/1090), *Tercüme-i Şerh-i Siyeri'l-Kebir* (trans. Mehmed Münib Ayıntabi) İstanbul : Matbaa-i Amire, 1825.) This evidence demonstrates the significant role of al-Shaibani's legacy in shaping the Ottoman practice. For English translation of al-Shaibani's work, see Muhammad Hasan al-Shaibani, *The Islamic Law of Nations: Shaybani's Siyar*, (tr. Majid Khadduri) Baltimore: John Hopkins University Press 1966. Shaibani's work was also translated to French by Muhammad Hamidullah (Le Grand Livre de la Conduite de l'Etat = Siyerü'l-kebir, Ankara : Türkiye Diyanet Vakfı, 1990).

³⁶ For the views of Muslim jurists on other legal systems, see Fakhr al-Islam Bazdawi (d. 482/1089), *Kanz al-Wusul ila Ma'rifat al-Usul*, Karachi: Mir Muhammad Kutuphana Markaz 'Ilm wa Adab n.d. For a commentary on it, see 'Alauddin 'Abdulaziz ibn Ahmad al-Bukhari (d. 730), *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi* (ed. Muhammad al-Mu'tasim Billah al-Baghdadi), Beirut: Dar al-Kitab al-Arabi 1418/1997, pp. 397-405.

We are required to protect the sanctity of all humanity, argue the universalistic jurists. For them, all human beings fall under the jurisdiction of Islam. Therefore, Muslims must stand even for the human rights of non-Muslims. Each individual, community and state is responsible for the entirety of humanity. Failing to act makes each one of them accountable, legally and religiously³⁷.

In contrast, the communalist jurists claim that we are responsible only to protect the sanctity of the citizenry. Disbelief disqualifies non-Muslims who did not make a treaty with the Islamic state to have human rights. Consequently, Muslims are not responsible for the rights of non-Muslims. Also, they argue, only the citizenry falls under the jurisdiction of Islamic state³⁸.

4. *Is apostasy a crime and why?*

The universalistic perspective argues that apostasy alone is not a punishable crime unless it is accompanied by a conspiracy to harm the sanctity of Islam as a religion. This may happen through discrediting Islamic religion with propaganda. The verse in the Quran on apostasy was revealed after a group of conspirators decided to enter Islam as a group and leave it after a short while to persuade others that they could not find what they looked for in Islam³⁹. Therefore, for the stipulation about the punishment to be applicable to a particular case of apostasy, it must be carried on with the purpose of conspiracy against Islam, but not out of mere conviction. From this perspective, a non-Muslim, even if he is an apostate, is not by default an enemy.

³⁷ Hence comes the principle that "a human being is honored, even if he is a non-Muslim." (*al-Adamiy mukarram wa law kafiran.*) Ibn 'Abidin, *Hashiya*, V, 58. Ibn 'Abidin also notes that slavery contradicts with this principle.

³⁸ Ahmet Özel, *İslam Hukukunda Ülke Kavramı: Darulislam, Darulharb*, İstanbul: İz Yayıncılık, 1998, p. 57.

³⁹ "A section of the People of the Book say: "Believe in the morning what is revealed to the believers [Muslims], but reject it at the end of the day; perchance they may (themselves) turn back; and believe no one unless he follows your religion." Say: "True guidance is the Guidance of God. (Fear ye) Lest a revelation be sent to someone (else) Like unto that which was sent unto you? or that those (Receiving such revelation) should engage you in argument before your Lord?" Say: "All bounties are in the hand of God. He granteth them to whom He pleaseth: And God careth for all, and He knoweth all things." For His Mercy He specially chooseth whom He pleaseth; for God is the Lord of bounties unbounded. Among the People of the Book are some who, if entrusted with a hoard of gold, will (readily) pay it back; others, who, if entrusted with a single silver coin, will not repay it unless thou constantly stoodest demanding, because, they say, "there is no call on us (to keep faith) with these ignorant (Pagans)." but they tell a lie against God, and (well) they know it. Nay.- Those that keep their plighted faith and act aright,-verily God loves those who act aright. As for those who sell the faith they owe to God and their own plighted word for a small price, they shall have no portion in the Hereafter: Nor will God (Deign to) speak to them or look at them on the Day of Judgment, nor will He cleans them (of sin): They shall have a grievous penalty. There is among them a section who distort the Book with their tongues: (As they read) you would think it is a part of the Book, but it is no part of the Book; and they say, "That is from God," but it is not from God. It is they who tell a lie against God, and (well) they know it!" (The Quran, 3:73-78).

The communalist perspective, however, argues that apostasy in itself is a punishable crime. This argument is based on the verse from the Quran⁴⁰; it does not take into account the historical circumstances in which the stipulation was made. The apostate loses his citizenship by losing his religion because, for the communalist jurists, citizenship is granted to him by virtue of faith. Consequently, he also loses his sanctity. From this perspective, since the apostate is a non-Muslim who is not a citizen, by default he is considered an enemy.

I should also note that none of the schools in Islamic law requires punishment of an apostate woman who has left Islam. They also unanimously agree that non-Muslim women must not be killed during war because of the utter prohibition by the Prophet Muhammad. Hanafi scholars used this unanimously accepted practice to support their claim that the apostate is not punished for leaving Islam or converting to another religion but for plotting against the Islamic community. They argued that had the apostasy been the ground for the punishment of an apostate, the female apostate would also be punished the same way as the male apostate. Therefore, they conclude, it is not apostasy, but engaging in a war or conspiracy against Muslims is the reason why the apostate is punished.

5. *What are the implications on woman's human rights?*

Since the protection of family is a basic human right, some of the disagreements in the Islamic family law may be traced back to the contesting positions on the human rights. The universalistic perspective does not make a distinction in principle between man and woman; both are considered human, *adami*, and are entitled to the same human rights. However, outside the basic human rights, one can discern, looking back from a modern perspective, that women are treated differently than men in such areas as inheritance, testimony and family law. These practices were not traditionally considered unequal treatment. Yet, the notion of equality and the gender roles have undergone a great change during modernization. These changes may be attributed to the prevailing customs and structures that influence law. Islamic jurisprudence states that custom always changes; so are the rules grounded on them. There is a heated

⁴⁰ "Those who believe, then reject faith, then believe (again) and (again) reject faith, and go on increasing in unbelief, - Allah will not forgive them nor guide them nor guide them on the way. To the Hypocrites give the glad tidings that there is for them (but) a grievous penalty" (The Quran 4:137). "They swear by Allah that they said nothing (evil), but indeed they uttered blasphemy, and they did it after accepting Islam; and they meditated a plot which they were unable to carry out: this revenge of theirs was (their) only return for the bounty with which Allah and His Messenger had enriched them! If they repent, it will be best for them; but if they turn back (to their evil ways), Allah will punish them with a grievous penalty in this life and in the Hereafter: They shall have none on earth to protect or help them" (The Quran 9:74). "And there are those who put up a mosque by way of mischief and infidelity - to disunite the Believers - and in preparation for one who warred against Allah and His Messenger aforetime. They will indeed swear that their intention is nothing but good; But Allah doth declare that they are certainly liars" (The Quran 9:107).

debate currently going on in this area, which falls beyond the scope of this paper⁴¹.

According to Hanafi scholars, a woman, be she a virgin or a widow, can marry herself independently. In all schools, a marriage contract is invalid without the consent of woman. Yet, the communalistic perspective gives greater authority to the family over a woman's marriage; a marriage contract is invalid without the consent of a guardian from the family of the woman. The consent of both the bride and her guardian are among the prerequisites for a valid marriage contract. A virgin cannot conduct the marriage act by herself without the permission of a guardian; only a widow can marry herself independently. Communalist jurists argued that the requirement of consensus concerning marriage contract between the virgin bride and her family serves the interests of the woman better because the guardians are more experienced in the intricacies of marriage than the inexperienced young woman. The Hanafis object to this approach by arguing that if she is allowed to make sales contract—which is unanimously accepted by all schools, she should also be allowed to make a marriage contract because sales contract also involves risks for her interests.

Islamic law has produced a complicated system of ending marriage, involving methods and concepts that may have no parallels in modern law. Marriage may be conducted and dissolved independently, by the consent of the parties involved, without authorization from state or religious authorities. Without going into details, it suffices us to say that the Hanafi law grants equal rights to a unilateral dissolution of marriage (*talaq*); both parties are entitled to negotiate on the three rights of unilateral divorce without the court's decision (*tawfid al-talaq*). According to the Shafii School, however, a woman is not entitled to the unilateral dissolution of marriage (*talaq*). Both schools accept that she is entitled to file a divorce with the court, in which case the dissolution is produced by a court decision (*tafriq*).

6. Does indictment cause *'ismah* to fall entirely or in part?

This issue is related to the rights of the criminals and prisoners. Indictment does not cause the *'ismah* to fall completely in any school of law; all agree that an indicted person still enjoys basic human rights. However, the Hanafi jurists are more attentive to keep it as intact as possible. Consequently, they refuse coupling reparation with punishment. For instance, from the Hanafi perspective, either punishment or reparation is required to punish theft (*sirqat*). However, the Shafii scholars argue that both punishment and reparation apply in the case of theft.

7. What is the Jizya for?

⁴¹ See, Abdullahi A. an-Na'im (ed.), *Islamic Family Law in a Changing World : a Global Resource Book*, London: Zed Books, 2002.

Non-Muslim citizens are required to pay tax to the Muslim state which is termed *jizya*⁴². Scholars disagreed on why such a tax was imposed on non-Muslims. The Communalist School sees the *jizya* as a fee for the security provided by the state to its non-Muslim subjects. Yet the Universalistic School objects to this view. According to the Universalistic school, the *jizya* is merely a tax on non-Muslim citizens, comparable to *zakat* which Muslim citizens are required to pay. For them *jizya* cannot be seen as a fee for security, because security is the natural right of all human beings regardless of their citizenship, who they are and where they live⁴³. Ottomans abolished *jizya* as part of the late nineteenth century reforms in Islamic law because of its discriminatory approach⁴⁴.

These examples are sufficient to observe how the different positions on the issue of *'ismah* led to different legislations. A wide array of judgments emanated from the contest between rival paradigms on human rights. Exploring the tension between universalistic and communalistic perspectives thus allows us better understand the diversity in Islamic law and appreciate the logic behind it.

MUSLIMS VIS-A-VIS UNIVERSALISTIC HUMAN RIGHTS IN THE MODERN ERA

The dichotomy between the Universalistic and Communalistic Schools in Islamic law played a decisive role in determining the approach Muslims adopted toward modern universal human rights discourse. The reaction of the Muslims to the rise and spread of universal human rights in the era of modernization is also characterized by their earlier familiarity with the abstract concept of the universal human. The contemporary impact of the time-honored conflicting views on who has the *'ismah* is also observable in a survey of the diverse Muslim responses to the evolution of human rights in the West and their penetration in the Islamic world. The first concrete action on the state level begins with the Declaration of the *Tanzimat* (Royal Charter of Regulations) in 1839 in the Ottoman State by Sultan Mahmud II. The latest significant example may be "the Cairo Declaration on Human Rights in Islam" by the Organization of the Islamic Conference (OIC) in 1990.

The Ottoman Caliph, advised mostly by the Hanafite *Ulama*, granted equal rights to non-Muslims for the protection of life, property, honor and religion in the 1839 declaration of *Tanzimat*. Later, other declarations concerning human rights had also been issued in the reforming Ottoman State, which, in

⁴² For the rights of non-Muslims under Islamic rule, see Senturk, Recep, "Minority Rights in Islam: From *Dhimmi* to Citizen" in *Islam and Human Rights: Advancing a U.S.-Muslim Dialogue* (Shireen T. Hunter, with Huma Malik, ed., Washington, D.C.: CSIS, forthcoming 2005); Zaydan, 'Abd al-Karim, *Ahkam al-Dhimmiyyin wa al-Musta'manin fi Dar al-Islam*, Baghdad: Maktabat al-Quds, 1982.

⁴³ On this discussion see, Ibn Qayyim al-Jawziyya, *Ahkam Ahl al-Dhimma*, (ed. By Subhi Salih), Beirut: Dar al-'Ilm li al-Malayin [1961] 1983, pp. 18-25. Ibn Qayyim refutes the Shafii view.

⁴⁴ Mehmet Yıldız, "1856 Islahat Fermanına Giden Yolda Meşruyet Arayışları: Uluslararası Baskılar ve Cizye Sorununa Bulunan Çözümün İslami Temelleri," *Türk Kültürü İncelemeleri Dergisi* 7, İstanbul 2002, 75-117.

some aspects, resembled the decrees by earlier sultans known as *Adalatname*⁴⁵ or *Kanunname*. Faced with Western ideological and cultural influence, the Ottomans had to compete with the European powers in extending rights to their citizens on equal basis. They had Hanafite law at their disposal to achieve this objective. The universalistic approach to human rights made it possible for them to reform Islamic law, parallel to changing legal customs.

The major debate, carried on by the Ottoman bureaucrats, *Ulama* and the intellectuals, during the second half of the nineteenth century, revolved around whether rights should be given equally to all citizens and how to limit the power of the Ottoman sultan. The Charter of Alliance in 1808, between the Sultan and the Dignitaries, ignited this trend. The Ottomans had framed the declaration of *Tanzimat* as a public reiteration of the rights already granted by the classical Islamic law, *Shari'ah*. Consequently, these legal reforms did not get any significant opposition from the conservative *Ulama*. The execution of the reformist Pertev Pasha in 1837 prompted bureaucrats like Rifat Pasha to take measures for their own protection, which should also be viewed as another major reason behind the declaration of the first human rights charter by a Muslim state. This was coupled by the considerable pressure from European allies for reforms concerning the rights of minority Christians.

When Europe was shaken by the French Revolution in 1789, Selim III (1789-1807) ascended the Ottoman throne as the Sultan-Caliph. Ruling from 1789 until 1807, Selim III also initiated a highly radical reform project. With the purpose of getting feedback from the public, he issued a decree to civil, military and religious dignitaries requesting them to submit their views on the possible causes of the weakness of the Ottoman society and the state as well as their proposals for their reform. Following the Ottoman tradition, the dignitaries, from a wide ranging social spectrum, presented their ideas in the form of memorials. Three distinct perspectives emerged from these reform proposals: (1) Conservative: recover the glories of the Ottoman golden age by reverting to its traditional methods. (2) Eclectic: reconcile the European system with the existing order. (3) Radical: replace the traditional system with a modern one.

The Sultan adopted the third and the most radical of the perspectives, which was also maintained by his successors persistently until the collapse of the Ottoman State. He promulgated, in 1792 and 1793, a whole series of new instructions and regulations which came to be known collectively as the New Order (*Nizam-i Cedid*). He established a new corps of regular infantry, trained and equipped on the modern European model, and a special new treasury to fund it. He also took some disciplinary measures to reform the administration. He improved diplomatic relations with the European states. For this purpose, he established regular and permanent Ottoman embassies in major European capitals such as London, Paris, Vienna and Berlin. Prior to him, Ottomans did not have embassies in European capitals.

Mahmud II, who ascended the Ottoman throne in 1808, rigorously maintained the reform program of Selim III. The first outcome was the above

⁴⁵ İnalçık, Halil, "Adâletnâmeler", *Belgeler*, vol. III, no 3-4, 1965, Ankara 1967.

mentioned Charter of Alliance (*Sened-i İttifak*), which was an agreement between the Sultan and the dignitaries (*Ayan*). With this document, the Sultan's sovereign power was limited for the first time in the Ottoman history; therefore historians consider it an important document⁴⁶, signaling the move toward more political representation of people's will, broader political inclusion, democratic reforms, limits to the power of the state and the Sultan, and more rights for citizens. This document is also seen as the first step towards a constitution.

Constitutional movements during the Ottoman period commenced toward the end of the 18th century. Sultan Selim III (1789-1808) set up the Advisory Assembly (*Meclis-i Meshveret*), within the context of the New System (*Nizam-i Cedid*), initiating the march towards a constitutional government system. His successor Mahmud II, who was also a radical reformer, signed the Charter of Alliance (*Sened-i İttifak*) in 1808, which is seen as the first important document from the point of view of a constitutional order. It restricted Sultan's power and delegated some authority to the senate body, called the *Ayan*.

The Royal Decree of the Rose Garden (*Gülhane Hatt-ı Hümayunu*) was launched in 1839, during the *Tanzimat* Reforms⁴⁷. This declaration, which may be seen as the first declaration of human rights by a Muslim state, assured all citizens their basic rights: right to life, property, freedom of religion, protection of honor, education, employment and due process. The *Tanzimat* declaration was grounded on the doctrine of *ismah* in Islamic law. The document is especially significant for its recognition of equal rights in education and in government administration for those of Christian persuasion, exemplifying egalitarian principles. The Ferman declared: "All Muslim or non-Muslim subjects shall benefit from these rights. Everyone's life, chastity, honor and property is under the guarantee of the state according to the *Shari'ah* laws." Representatives of all religious groups and the ambassadors of European states were present in the declaration ceremony, which was closed by the prayer of Shaikh al-Islam. In 1875, the Imperial Edict on Justice (*Ferman-i Adalet*) provided for independence of the judicial courts and ensured the safety of judges.

⁴⁶ The history of Ottoman reforms in Islamic law during the 19th century has yet to fully documented in English. For a general history of this period, see Stanford Shaw, *Between Old and New, The Ottoman State Under Sultan Selim 1789-1807*, Cambridge, 1971. For "Sened-i İttifak" see; Akyıldız, Ali, "Sened-i İttifak'ın İlk Tam Metni" *İslam Araştırmaları Dergisi*, 1998 (2), pp. 209-222; Also see, İnalcık, Halil, "The Nature of Traditional Society: Turkey," in Robert E. Ward ve Dankward A. Rustow, *Political Modernization in Japan and Turkey* (Princeton, N.J.: Princeton University Press, 1964), pp. 13-14.

⁴⁷ *Tanzimat* (tân'zemat) , [Turkish, reorganization], the name referring to a period of modernizing reforms instituted under the Ottoman State from 1839 to 1876. In 1839, under the rule of Sultan Abdulmecid , the edict entitled Hatt-i Sharif of Gülhane laid out the fundamental principles of *Tanzimat* reform. Foremost among the laws was the equal citizenship, security of honor, life, and property for all Ottoman subjects, regardless of race or religion. Other reforms, which sought to reduce theological dominance, included the lifting of monopolies, fairer taxation, secularized schools, a changed judicial system, and new rules regarding military service. *Tanzimat* is commonly considered to have ended in 1876 during the reign Abdulhamid II, when the ideas for a Turkish constitution and parliament were first implemented and then rejected by the same sultan. The constitution and parliament were reintroduced after Abdulhamid II was dethroned by the Young Turks in 1908.

The 1876 Constitution marks the most important step along the road to the rule of law, initiating the First Constitutional Period, which continued for only a year under the rule of Abdulhamid II. The first Ottoman constitution is seen somewhat restrictive in the exercise of powers, but nevertheless for the first time it recognized a parliamentary system. This constitution has provisions covering basic rights and privileges and the independence of courts and the safety of judges, among other aspects. In 1908, the Young Turks who dethroned Abdulhamid II launched the Second Constitutional Period and laid the foundations of a parliamentary system, which continued until the fall of the Ottoman State⁴⁸.

The Ottoman efforts to establish universal human rights through legal reforms had been promoted by the rising Ottoman civil society and middle class which operated within the parameters of a religious paradigm. Intellectuals played a decisive role in the process. Yet, by the fall of the Ottoman state, the activities of this middle class seized. Under the newly established Turkish Republic, there was a total state control on all fields of social, economic, legal and cultural life to ensure the paradigm shift from Islamic to a secular worldview. Yet the new Turkish Republic with a strictly secular and anti-Ottoman ideology paid little attention to philosophically grounding human rights in the Turkish and Islamic culture. Instead, human rights have been copied and translated verbatim from the West by the State officials. The Turkish Muslims had no objection to these rights in their new secular dress but they remained for the most part on paper with limited implementation on the ground due to lack of democracy, due process and civil society. Therefore it was impossible to promote human rights until the emergence of a middle class and civil society was allowed after the democratic reforms around 1950 as pressures from inside and the West amounted on the ruling elite.

As the theory of *'ismah* went into an eclipse, the period after the fall of the Ottoman State may be described as "human rights dependency," during which human rights came to Muslim world through the efforts of international organizations. Indigenous efforts, in the absence of a civil society and due process, hardly bore any fruit. Muslims became recipients of human rights but they were no longer contributors to the human rights cause⁴⁹. The doctrine of universal human rights was no longer rooted in the native Islamic or Turkish culture.

The contemporary Turkish Muslim scholars have displayed a favorable approach towards the universal human rights during the twentieth century although these rights were presented within the parameters of a secular paradigm and discourse. The fact that universal human rights were codified by a secular Western institution did not pose a problem for them. They were struck by the

⁴⁸ For the intellectual and political history of this period, see for instance, Mardin, Şerif, *The Genesis of Young Ottoman Thought*, Princeton: Princeton University Press, 1962; Hanioglu, M. Şükrü, *The Young Turks in Opposition*, New York : Oxford University Press, 1995.

⁴⁹ For a survey of the Islamic discourse on human rights discourse in Arabic see, Silmi al-Khadra al-Jayusi (ed.) *Huquq al-Insan fi al-Fikr al-'Arabi*, Beirut: Markaz al-Dirasat al-Wahdah al-'Arabiyya 2002.

convergence of the Islamic universalist understanding of human rights with the Western paradigm.

In 1949, Hüseyin Kazım Kadri, a renowned author on Islam, wrote an Islamic commentary on the UN Charter where he concluded that it is in complete conformity with Islamic law⁵⁰. After the declaration of the UN Charter, Ali Fuad Başgil, a religiously oriented professor of law from Istanbul University, strongly supported the concept of universal human rights in his public lectures⁵¹. But the state followed an “a-religious” approach to human rights, completely banning religious education in the country for decades. Ali Fuad Başgil could barely save his life from the military rule and was not allowed to participate in politics to implement his views on human rights. He was accused for being a “reactionary” because of his belief in and advocacy for the freedom of expression.

The first school of theology was opened in Ankara, the capital of Turkey, under pressure from NATO during the early sixties and it remained the only one until 1982. The religious life and education have been under strict control of the state. The irony is that this secular Tsarian (or Caesarianist) system, which had no parallel in the Western world, except the USSR, was introduced as a part of Westernization and modernization project. Consequently, it may pose a great problem for the prospective integration of Turkey in the EU. The recent efforts of integration with the EU unmasked this phenomenon. The authoritarian Turkish ruling elite claims defending Western values but there is a great divergence between the European models of secularism and the Turkish system, which was instituted allegedly as Western.

The EU has been pressuring Turkey, as did NATO, for more human rights, freedom of religion and the separation of religion and state. The Turkish government is also under pressure from major human rights organizations for its negative record. Ironically, the conservative Islamist wing rigorously supports integration with the EU, for gaining better human rights and particularly freedom of religion. Whether they will use more freedom of religion, if they ever get it, to undermine and abolish the democratic system which provides it remains unknown. This is the worry their opponents highlight to discredit them.

The authoritarian governments, be they secular or religious, tend to misuse both religion and secularism to silence voices for better human rights, which they expediently frame as political opposition⁵². The absence of a viable middle class, civil society and public sphere cripples all the efforts in the struggle for better human rights. The Muslim population, who sees no internal solution after exhausting all the potential strategies, eventually turns to international

⁵⁰ Kadri, Hüseyin Kazım, *İnsan Hakları Beyannamesi'nin İslâm Hukukuna Göre İzahı*, (Yay. Osman Ergin) İstanbul 1949.

⁵¹ Başgil, Ali Fuat, *Cihan Sulhu ve İnsan Hakları*, İstanbul n.d.; *Vatandaş Hak ve Hürriyetlerinin Korunması Meselesi ve Anayasamız*, İstanbul 1956; *Vatandaş Hürriyeti ve Bunun Teminatı*, İstanbul 1948.

⁵² Juxtaposing the cases of Ali Fuad Başgil in Turkey and Mahmoud M. Taħa in Sudan demonstrates how.

organizations to bring more pressure on their own governments, which signed international documents on human rights.

During the preparation of universal human rights documents, the delegations from Muslim countries confused the world by displaying inconsistent attitudes, particularly on the rights of workers and women. Some Muslim states expressed objections against some of the provisions of the UN Declaration in 1948. Yet, some voted for it without any objection. Those who signed have not taken them as seriously as their Western counterparts have done; it has usually remained as a lip service.

The so-called Muslim states and some intellectuals which have displayed discontent with the UN Declaration produced two alternative international human rights declarations: UNESCO Declaration (1981) and the ICO Declaration (1990), known as the "Cairo Declaration on Human Rights in Islam."⁵³ All Muslim states signed the latter document, which took around two decades to prepare. The Islamic Conference Organization (ICO) seems to be the most significant platform and vehicle for the advancement of human rights in the Muslim world. Yet its voice is hardly heard as Muslim societies face great challenges and grave human rights violations today.

Without putting the issue into an historical and sociological perspective, the confusion on and deprivation from human rights cannot be understood and solved in the Muslim world. Nor can the human rights dependency, on the part of Muslims who believe in human rights, be overcome without linking the chain of memory to the past cultural reservoir. Human rights discourse in the Muslim world needs philosophical, moral and historical roots to grow on, gain strength and bear fruits. Otherwise, its defenders will remain dependent on the Western discourse and consequently will get easily dismissed by the conservative population, traditional *Ulama* and the authoritarian rulers. The power of precedence, on the theoretical and historical levels, must be put in use in justifying human rights in Islam today.

The over all Western attitudes are also confusing for the observers inside and outside the Muslim world. On the one hand, they carry on a rhetoric which champions human rights in the Muslim world yet on the other hand they ally themselves with the oppressive regimes. This confusion is usually guided by "instrumental rationality" which gives priority to short-term political and economical interests. We have to wait until "value rationality" with an emphasis on the "ideal interests" such as human rights will prevail in the Western approach to Muslim world. Those who adopt value rationality among Muslims and Westerners need to coordinate their efforts until such a major paradigm shift occurs on the international level. This is required to overcome the constraints in implementing and maintaining the universalistic legal tradition on human rights in Islam. Otherwise, the lack of international support combined with the lack of due process, civil society and middle class to promote human rights, the universalistic tradition in Islamic law may remain in eclipse forever.

⁵³ Adopted and issued at the Nineteenth Islamic Conference of Foreign Ministries in Cairo on August 5, 1990.

On a broader level, a global coordination is needed among the civil communities and intellectuals from around the globe, acting with the "value rationality," to cure the human rights dependency of the non-Western world. Reinvigorating the universalistic approaches in all cultures and combining them with the modern notions will provide a remedy to human rights dependency of the non-Western world for the benefit of all around the globe.

CONCLUSION: I AM THEREFORE I HAVE DUTIES

I conclude by reiterating my claim that *I am therefore I have rights*. My very existence justifies my rights. They are indivisible and inalienable. Yet, this means at the same time that *I am therefore I have duties*. My rights are best justified by my duties. I am charged to stand for my own rights and for the rights of the entire humanity. It is a duty for me to recognize all my fellow human beings as equal persons and protect their rights the same way I do for my own rights. My community and state must also do the same. Law is not about rights alone but also about duties. Since society is a network of interdependent relations, duties of one are the rights of the other. Therefore, fulfilling duties is the best way to assure one's own rights. Otherwise, rights remain as mere abstractions.

Protecting human rights must be the objective of all legal systems, if it is already not. The legitimacy of the political authority and the law should be judged by their conformation with basic human rights. Individuals should not defer their moral capacity to their superiors and therefore always judge the judgments and the judges from the perspective of human rights.

These are some of the principles one may also derive from the classical Islamic law. They are ancient yet still speak to us. Nevertheless, the universalistic view, represented by a branch of the classical Islamic law, is curiously neglected in the Modern Islamic discourse on human rights. Today, the Turkish and Arabic discourse on human rights occasionally utilize the term *'ismah* (sanctity) but rarely do they utilize the category *âdemîyyah* (humanity), the absence of which cripples any attempt to philosophically ground human rights on the universal level.

Unfortunately, with the break in the chain of memory, the modern Islamic legal discourse has lost the universal dimension that characterized the discourse of some jurists in the classical era. Most of the modern Islamic discourse on human rights revolves around religiously defined social categories such as *muslim* and *kafir* (non-Muslim), rather than a universally inclusive concept of humanity (*adamîyyah*). Unearthing and reintroducing the classical Islamic concept of universal human can transcend this communalistic approach.

Even though the traditional-Islamic and modern-Western approaches to universal human rights share a common ground, they cannot be expected to completely converge due to the historical, cultural and religious reasons. Therefore it would be wrong to jump to the conclusion that what the UN constructed after the World War II in the second half of the 20th century had already existed in the Islamic culture. At best, this would be a great anachronism. Yet it would also be wrong, as it is presently done by some of the leading figures

in the field, to claim that universal human rights are alien to or incompatible with Islam.

The segments of Muslim society who have welcomed the rise of universal human rights in the West, culminating in the UN declaration, have been those who have already found in their cultural repository some of the abstract constructions on which the Declaration was based, the most important one being the abstract concept of a universal human. This concept exists in one strand of Islamic law and needs to be unearthed to provide a solid philosophical foundation for universal human rights in Islam, toward which this paper is a preliminary step. The theory of *ādamiyyah* and *'ismah* needs to be researched further and explained in modern human rights language to both Muslims and non-Muslims. Deriving from this theoretical ground, we can extend this venue until a full-fledged theory of universal human rights is developed and expressed in modern language to meet the present needs of the Muslim society in its internal relations with other fellow Muslims and external relations with other fellow humans—a pressing need in the present globalized world.

Muslims lagged behind the modern world regarding the universal human rights despite the classical universalistic tradition in Islamic law and the rigorous reforms by the Ottomans during the 19th century to bring traditional Islamic polity in line with its modern counterparts. Yet, with the collapse of the Ottoman State, the chain of memory has been broken in the Islamic civilization. Presently, some Muslim states and intellectuals try to start over in producing and justifying rights. I offer an alternative strategy which exploits the authority of precedence, on theory and practice of law.

I also recognize the need for each culture and religion to do so. This is an obligation and a right for each culture today. This approach contradicts with the dominant ideological approaches characterized by an exclusivist claim for the justification of human rights. Diverse ways of justifying human rights by different cultures in their own terms will empower human rights cause and increase compliance globally. A historical precedence for this claim comes from the Islamic tradition, which is by no means an exception to the rule.

A strategy needs to be adopted to indiscriminately combine the ideas and notions from different cultures, past and present, East and West, on the meaning, prerequisites and implications of human existence in society. There is a room in this perspective for the universality and relativity. Universalism cannot be monopolized or patronized by a particular ideology. Nor can it be precluded because of the social and cultural diversity on the globe. Globalization helps us increasingly discover the commonality of human experience from different cultures, times and places. Yet we need to make an effort to discover the links, and to fill the gaps, among them to demonstrate how they bear upon each other. Such an integrative view makes human rights paradigm multi-potential and fluid, rather than exclusivist and static. Diverse cultures of the world, be they religious or secular, may thus variably reaffirm the universality of human rights in their own terms, adding to the power of each other and to the power of the human rights paradigm and cause.

