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## THE ISLAMIC PURSUIT OF HUMAN DIGNITY: REVISITING FUNDAMENTAL RIGHTS THEORIES IN ISLAMIC LAW AND LEGAL PHILOSOPHY

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### ABSTRACT

*The emergence of the modern human rights regime in the twentieth century instigated a reconfiguration of cosmopolitan ideals. It is hard to imagine any contemporary discourse on global ethics and justice without reference to human rights language. Notwithstanding its great success in the landscape of international law and politics, human rights discourse has also been criticized for being overly ethnocentric. This article aims to contribute to a diversification of this discourse by exploring the conceptualizations of fundamental rights that are indigenous to the classical Islamic legal tradition. It revisits the idea of fundamental rights in Islam by analyzing core texts from the classical Islamic legal canon, focusing particularly on discussions regarding the rights to life, freedom and property in legal treatises of law (fiqh) and legal philosophy (uṣūl al-fiqh). In doing so, this article hopes to contribute to the diversification of the historical and contemporary human rights discourse and move beyond the dominant “legal Orientalism” which straightjackets Islamic law into Western legal concepts.*

### KEYWORDS

Islam and Human Rights, Islamic Law, *fiqh*, Fundamental Rights, Legal Orientalism, Global Ethics and Justice

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## 1. INTRODUCTION: FUNDAMENTAL RIGHTS IN ISLAM

Islam as a civilization succeeded the Roman and Persian empires and inherited many of the knowledge traditions of the Hellenistic and Persianate world.<sup>1</sup> Through a process of critical appropriation, and in concert with its own indigenous intellectual tradition, by the tenth century Islam developed a high culture, which was able to incorporate a large variety of peoples, cultures and religions.<sup>2</sup> As such, Islamic culture developed a pluralist and open civilization with a rights discourse based on its own ethical theology and legal anthropology.<sup>3</sup> However, the possibility of a specifically Islamic “rights talk” is often questioned in scholarship on Islam and human rights. Some scholars claim there is no conception of individual rights in the classical Islamic legal tradition and that it is merely a “duty-based system”.<sup>4</sup> Other academic accounts in the field of Islam and human rights, conducted by both Muslim and non-Muslim scholars, often lack an in-depth engagement with the textual and interpretative

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<sup>1</sup> See Dimitri Gutas, *Greek Thought, Arabic Culture: The Graeco-Arabic Translation Movement in Baghdad and Early ‘Abbāsīd Society (2<sup>nd</sup>-4<sup>th</sup>/8<sup>th</sup>-10<sup>th</sup> Centuries)* (Routledge 1998); Cristina D’Ancona, ‘Greek into Arabic: Neoplatonism in translation’ in Peter Adamson and Richard C Taylor (eds), *The Cambridge Companion to Arabic Philosophy* (Cambridge University Press 2005). Islamic civilization, in turn, would have a great influence on medieval and early modern European intellectual life and legal thought. See Charles Burnett, ‘Arabic into Latin: The Reception of Arabic Philosophy into Western Europe’ in the same volume; John A. Makdisi, ‘The Islamic Origins of the Common Law’ (1999) 77(5) *North Carolina Law Review* 1635.

<sup>2</sup> For an extensive work on Islamic civilizational encounters and the Islamic intellectual synthesis, see Marshall GS Hodgson, *The Venture of Islam: Conscience and History in a World Civilization* (The University of Chicago Press 1974, 3 vols).

<sup>3</sup> See Mohammad Hashim Kamali, ‘Law and Society: The Interplay of Revelation and Reason in the Shariah’ in John L. Esposito (ed), *The Oxford History of Islam* (Oxford University Press 1999). On Islam as an open civilization, see Recep Şentürk, ‘Unity in Multiplexity: Islam as an open civilization’ (2011) 7 *Journal of the Interdisciplinary Study of Monotheistic Religions* 49.

<sup>4</sup> See Henry Siegman, ‘The State and the Individual in Sunni Islam’ (1964) 54(1) *The Muslim World* 14, 22-24; Joseph Schacht ‘Law and Justice’, in PM Holt, Ann KS Lambton and Bernhard Lewis (eds) *The Cambridge History of Islam*, vol 2B (Cambridge University Press 1970) 541. Also see Mohammad Hashim Kamali’s discussion on Islamic rights conceptions in his *Shari‘ah Law: An Introduction* (Oneworld 2008) 199-205.

tradition of Islamic legal thought or do so in a highly selective manner.<sup>5</sup> The prominent Muslim human rights scholar Abdulaziz Sachedina, for example, claims that mainstream classical jurisprudence never developed a systematic theory of natural law as a basis for the “natural and inalienable rights of human beings”.<sup>6</sup> The assumed absence or inadequacy of an indigenous rights discourse in classical Islamic jurisprudence has prompted some reform-minded Muslim scholars to incorporate Western human rights conceptions in order to radically adjust Islamic legal tradition to modern times.<sup>7</sup>

The fact of the matter is that the scholarly discourse on Islam and human rights, or what we might call *Islamic human rights studies*, is still in an embryonic state. The historical study of the Islamic legal tradition is mainly conducted in highly specialized and isolated academic circles of Islamic legal-historical scholarship, based on classical Arabic manuscripts, often inaccessible to those merely trained in modern law and human rights.<sup>8</sup> Similarly, historians of Islamic law are often unattuned to the concerns

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<sup>5</sup> See, for example, Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Routledge 2013); Irene Oh, *The Rights of God: Islam, Human Rights, and Comparative Ethics* (Georgetown University Press 2007). Both scholars do not refer to the classical Islamic legal tradition at all in their respective works. For a more elaborate survey of current scholarship in Islam and human rights, see Arnold Yasin Mol, ‘Islamic Human Rights Discourse and Hermeneutics of Continuity’ (2019) 3 *Journal of Islamic Ethics* 180.

<sup>6</sup> Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press 2009) 91. Sachedina argues only Mu‘tazilite and Shī‘ite scholars developed the legal and theological doctrines regarding human moral worth and moral agency that could serve as a basis for universal human rights, *ibid.* However, he completely ignored the Hanafi-Maturidi legal tradition, one of the major legal and theological schools of Sunni Islam. See Ulrich Rudolph, *Al-Māturīdī and the Development of Sunnī Theology in Samarqand*, trans. Rodrigo Adem (Brill 2015); Ramon Harvey, *Transcendent God, Rational World: A Māturīdī Theology* (Edinburgh University Press 2021, forthcoming). For a more general overview of these different Islamic theological schools, see Tim Winter (ed), *The Cambridge Companion to Classical Islamic Theology* (Cambridge University Press 2008).

<sup>7</sup> See, for example, Ebrahim Moosa, ‘The Dilemma of Islamic Rights Schemes’ (2000-2001) 15(1-2) *Journal of Law and Religion* 185; Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford University Press 2009).

<sup>8</sup> Aside from the problem of accessibility for non-specialist scholars without mastery of the necessary Islamic languages, there is the additional complication of the deplorable state of Islamic manuscripts and the scarcity of critical editions. Many works in Islamic jurisprudence, and other Islamic disciplines, remain unpublished or are poorly edited. Also, the amount of Islamic manuscripts is vastly more in comparison with the European manuscript tradition, since the printing press was introduced very late

of modern human rights research, which includes a thorough familiarity with modern international law and contemporary Muslim societies. This state-of-the-art makes it increasingly difficult to make general claims about the rights discourse in the Islamic legal tradition.

This article explores pre-modern Islamic theories of rights (*ḥuqūq*) and how the Islamic rights discourse is expressed in various genres of the classical Islamic legal literature. The article attempts to draw attention to a hitherto largely neglected universalist perspective on rights in the Islamic legal discourse and explore what could be seen as a pre-modern expression of human rights concerns and legal conceptions in the classical tradition of Islamic jurisprudence.<sup>9</sup> The universalist approach to rights in Islam is characterized by the fact that it ascribes rights to all human beings by virtue of their mere humanity, be they Muslim or non-Muslim.<sup>10</sup> This universalist trend in Islamic legal philosophy is represented by the Hanafi school of law, although it would be misleading to limit this approach towards human rights solely to this school.<sup>11</sup> Several scholars from other Sunni and Shi‘i legal schools also adhered to the universalist trend, albeit that the Hanafi school was dominant.<sup>12</sup>

The focus on the corpus of classical Islamic legal literature, as opposed to Islam as a lived religious phenomenon in contemporary societies, is pertinent because this narrative is often absent in both popular and academic discourses on Islam and

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in Islamic history. It was not until the nineteenth century that print became the dominant mode of production for Islamic books, slowly replacing the Islamic manuscript culture. See Ahmed El Shamsy, *Rediscovering the Islamic Classics: How Editors and Print Culture Transformed an Intellectual Tradition* (Princeton University Press 2020) 63-65. That being said, one is hopeful for the advances being made in the field of digital humanities in this regard. See, for example, LWC van Lit, *Among Digitized Manuscripts: Philology, Codicology, Paleography in a Digital World* (Brill 2020).

<sup>9</sup> Notable exceptions are Recep Şentürk, ‘Sociology of Rights: Inviolability of the Other in Islam between Universalism and Communalism’ in Abdul Aziz Said *Contemporary Islam: Dynamic, Not Static*, ed. Abdul Aziz Said et al. (New York: Routledge, 2006); Mol (n 5), 180-206; Tareq Sharawi, ‘The Inviolability of the Non-Muslims in Islamic Law: A Comparative Reading of Modern and Classical Debates’ (2020) 1 *Afkar* 79.

<sup>10</sup> See Şentürk, ‘Sociology of Rights’ (n 9) 29.

<sup>11</sup> *ibid* 35.

<sup>12</sup> On the Hanafi school, see Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire* (Cambridge University Press 2015); Nurit Tsafir, *The History of an Islamic School of Law: The Early Spread of Hanafism* (Islamic Legal Studies Program 2004).

human rights. While studying the practical implementations of human rights in Muslim majority countries is tremendously important, and vital for understanding how contemporary Muslim communities interact with the modern human rights regime, it is merely a part of the story.<sup>13</sup> Engaging the classical legal tradition of Islam might provide us with a better insight into the historical and conceptual framework of Islamic legal thought and offer us tools to engage the modern human rights discourse in a more intellectually and historically rooted manner.

After a brief incursion into the problematics of Islam and human rights research, the article delves into the question of fundamental rights in the classical Islamic intellectual tradition, based on a content analysis of selected legal texts from the Hanafi corpus of Islamic law (*fiqh*) and legal philosophy (*uṣūl al-fiqh*).<sup>14</sup> The central question asked here is can one speak of an indigenous universalist human rights discourse in the classical Islamic legal tradition? In order to answer this question, the article translates and analyzes several key passages of Hanafi legal texts on the Islamic rights discourse. Since the Hanafi school has produced a vast amount of legal literature over the centuries, a full survey would be impossible within the scope of an

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<sup>13</sup> For an overview of the practical implementations of international human rights in the Muslim world, see Shahram Akbarzadeh and Benjamin MacQueen (eds), *Islam and Human Rights in Practice: Perspectives Across the Ummah* (Routledge 2008); Mahmood Monshipouri (ed), *Human Rights in the Middle East: Frameworks, Goals, and Strategies* (Palgrave Macmillan 2011). For a collection of practical case studies on the rule of law, judicial processes and human rights in the MENA region, see Eugene Cotran and Mai Yamani (eds), *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process* (IB Tauris Publishers 2000).

<sup>14</sup> The Islamic legal genre of *uṣūl al-fiqh* is variably translated as “Islamic legal theory”, “Islamic legal philosophy”, “principles of Islamic jurisprudence”, “theoretical jurisprudence” and the like. Here, I opt for the translation “Islamic legal philosophy”. The argument that Islam knows no “philosophy of law”, still perpetuated in some scholarship, seems outdated. The prominent Islamic legal historian Aaron Zysow, to take but one example, has no hesitation comparing *uṣūl al-fiqh* to the works of Western legal philosophers such as John Austin and Hans Kelsen, see Aaron Zysow, *The Economy of Certainty: An Introduction of the Typology of Islamic Legal Theory* (Lockwood Press 2013), 1. In addition, it is well-established in Western scholarship that there is no obvious distinction between legal “philosophy” and “theory”. See for example Edmundson, who calls the distinction “evanescent” and “arbitrary”, in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005). Also see recent contributions to the discussion of legal philosophy in Islam in Peter Adamson (ed), *Philosophy and Jurisprudence in the Islamic World* (De Gruyter 2019).

article. Hence, this article will focus on specific sections from three main Hanafi legal works.<sup>15</sup> The first is *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (The Evaluation of Proofs in Legal Philosophy), a legal-philosophical treatise written by Abū Zayd al-Dabūsī (d. 1039), who is a very early contributor to Hanafi legal philosophy, but who in many ways laid the ground for the majority of subsequent Hanafi legal scholarship.<sup>16</sup> In addition, he was arguably the first legal scholar who explicitly elaborated a theory of rights in his treatise on Islamic legal philosophy.<sup>17</sup> Here, focus will be placed on the chapter of legal capacity (*ahliyya*) in which he elaborated on the three fundamental rights of life, liberty and property for all human beings. Secondly, the article will analyze the chapter of legal capacity in the legal treatise of Abu Bakr al-Sarakhsī (d. 1090), simply called *Uṣūl al-Sarakhsī* (Sarakhsī's Legal Philosophy), who writes more than half a century later.<sup>18</sup> Al-Sarakhsī builds upon the works of al-Dabūsī and corroborates many of his views on rights. He also further elaborates his arguments. Thirdly, and lastly, the article will focus on a section on human inviolability (*iṣma*) in the work of Islamic law of the later Hanafi scholar Burhān al-Dīn al-Marghīnānī (d. 1179) in his legal treatise *al-Hidāya* (The Guidance).<sup>19</sup> This is both to show the continuity of the universalist Hanafi trend in Islamic rights thinking throughout the medieval era and because he directly responds to arguments of opposing legal scholars and defends the Hanafi position on the universality of inviolability for all human beings. The analysis undertaken will be followed by several brief examples of Hanafi legal scholars from the modern period who worked within the universalist legal tradition. This is to show

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<sup>15</sup> Full citations of the works mentioned here are given in section 3 of this article. For biographies of the three Hanafi scholars mentioned here, see the relevant chapters in *Encyclopaedia of Islam* (2<sup>nd</sup> edn, Brill 1954-2005) and *TDV İslam Ansiklopedisi* (Türkiye Diyanet Vakfı 1988-2013).

<sup>16</sup> Very little is known about al-Dabūsī's life and times, although it is well-established that his work influenced all subsequent Hanafi legal scholarship. See Murteza Bedir, *Early Developments of Hanafi Uṣūl al-Fiqh* (unpublished PhD dissertation, University of Manchester 1999).

<sup>17</sup> See Asım Cüneyd Köksal, 'İnsan Haklarının Felsefi Krizi: İslâmî Bir Perspektif' (2020) 58 *Marmara Üniversitesi İlahiyat Fakültesi Dergisi* 25. Köksal writes that al-Dabūsī is one of the leading figures of the Hanafi school who first mentioned fundamental and inalienable rights in his legal works. Al-Dabūsī contributions to Hanafi Islamic legal philosophy were widely accepted after him, *ibid* 26-27.

<sup>18</sup> See (n 15).

<sup>19</sup> *Idem*.



the persistence of this rights interpretation into our modern times, until the collapse of the Ottoman empire in the twentieth century.

For obvious reasons of scope, and because of the sheer volume, richness and depth of the Islamic legal tradition, the article presents an exploratory overview of the universalist rights discourse in classical Islamic jurisprudence, delving into some of its basic legal concepts and underlying legal reasoning, with the hope that similar attempts will be made in future scholarly endeavors. This, together with delineating some of the theoretical and methodological problematics of current human rights research, will hopefully provide a productive framework for scholars, both in the field of Islamic law and human rights, to critically engage one another in a truly interdisciplinary and cross-cultural manner.

## **2. FROM WHENCE HUMAN RIGHTS? THE CONTESTED GENEALOGIES OF THE MODERN HUMAN RIGHTS REGIME**

Before delving into the question of fundamental rights in Islamic legal discourse, it proves essential to first briefly explore the concept of “human rights” and its contested genealogies. If one wants to move away from the alleged ethnocentrism of contemporary human rights research towards a more inclusive and cross-cultural understanding of human rights, it is pivotal to be aware of some of the theoretical and methodological problematics involved. There are two major obstacles which arguably deflects from reaching this goal: the tendency of presentism amongst historians of human rights (1) and a particularistic vision of human rights amongst some human rights theorists (2). Historical presentism projects modern understandings of phenomena, in this case modern human rights, unto instances in the historical past, distorting them in the process.<sup>20</sup> Particularism in human rights research claims the unique origins, sustenance and development of human rights in one particular culture

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<sup>20</sup> On presentism in historical scholarship, see John Tosh, *In Pursuit of History: Aims, Methods and New Directions in the Study of History* (6<sup>th</sup> edn, Routledge 2015) 161-162; François Hartog, *Presentism and Experiences of Time* (Saskia Brown tr, Columbia University Press 2015); Steven Seidman, ‘Beyond Presentism and Historicism: Understanding the History of Social Science’ (1983) 53(1) *Sociological Inquiry* 79. For a critique of anti-presentism, see Carlos Spoerhase, ‘Presentism and Precursorship in Intellectual History’ (2008) 49(1) *Culture, Theory and Critique* 49.

or civilization, at the exclusion of others. Both approaches are, justifiably, unhelpful for producing culture-sensitive human rights histories and ambiguate the cross-cultural debate surrounding human rights, past and present.

## 2.1. PRESENTISM AND PARTICULARISM IN HUMAN RIGHTS RESEARCH: TOWARDS PLURAL INCLUSIVISM

While human rights have come to enjoy tremendous global support, the historical roots of the idea of human rights have been contested. Some have traced back the idea of human rights to the Greco-Roman world of Late Antiquity, particularly in Stoic thought, others have grounded it in the works of medieval Christian natural law and early modern natural rights theorists, such as Thomas Aquinas (d. 1274), Hugo Grotius (1645), John Locke (d. 1704) and Samuel von Pufendorf (d. 1694).<sup>21</sup> Others yet have proposed a strictly modern post-World War II, or even post-Cold War, origin of the idea of human rights.<sup>22</sup> Invariably, all these histories have in common that the genealogy of human rights is based in the Western historical experience. The prominent legal historian and rights theorist Brian Tierney is perhaps the most poignant example of expressing the concept of human rights as singularly and uniquely Western. He says:

The idea of natural rights or human rights, the idea that all humans, by virtue of their humanity, have certain rights that ought to be acknowledged and protected, is of distinctly western origin. And a major problem of current world politics is to determine whether such rights can be assimilated into the traditional religious cultures of non-western societies.<sup>23</sup>

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<sup>21</sup> See, for example, C. Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (Palgrave Macmillan 2010); John Finnis, 'Grounding Human Rights in Natural Law' (2015) 60(2) *The American Journal of Jurisprudence* 199; David Boucher, 'The transition from natural rights to the culture of human rights' in Bruce Haddock and Peter Sutch (eds) *Multiculturalism, Identity and Rights* (Routledge 2003).

<sup>22</sup> See Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

<sup>23</sup> Brian Tierney, 'Dominion of Self and Natural Rights Before Locke and After', in Vipri Mäkinen and Petter Korkman (eds) *Transformations in Medieval and Early-Modern Rights Discourse* (Springer, 2006) 173.



Others similarly claim universal human rights as a solely Western phenomenon. Samuel P. Huntington, for example, stresses the uniqueness of Western civilization as embodying the values of Christianity, pluralism, individualism and the rule of law, ideas that are expressed and embedded in its legal and social institutions. Citing the American historian Arthur M. Schlesinger Jr., Huntington claims the West as the “unique source” for such ideas as individual liberty, political democracy, rule of law, human rights and cultural freedom. These are, purportedly, characteristically “European ideas, not Asian, nor African, nor Middle Eastern ideas, except by adoption”.<sup>24</sup>

Jack Donnelly and others already pointed out that some cultures attempt to monopolize the human rights discourse, as one can arguably see in the cases of Tierney and Huntington, by claiming the sole origin of human rights and the unique site for their promotion and protection.<sup>25</sup> This narrative of human rights history seems a-historical and exclusivist. In addition, the idea that the Western world is somehow responsible for the “assimilation” of Western rights concepts in the “traditional religious cultures of non-western societies” is reminiscent of the old *mission civilizatrice*, aimed at universalizing a single culture at the expense of others.<sup>26</sup> As the Turkish sociologist and human rights scholar Recep Şentürk aptly mentioned:

All universal cultures in the world make some provision for universal human rights (albeit in their own terms), and the emanating discourses and paradigms are incommensurable. It would be contrary to universalism to claim that only our culture provides for the guarantee of universal human rights, and that all remaining world cultures cannot. Claiming monopoly on human rights discourse is but another form of subduing the rest of humanity to our cultural superiority with the very claim that we

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<sup>24</sup> Samuel P Huntington, *The Clash of Civilizations and the Remaking of the World Order* (Simon & Schuster 1996), 311. (Emphasis by the author.)

<sup>25</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013) 75- 92.

<sup>26</sup> For the ideological implications of the European civilizing mission, see Bruce Mazlish, *Civilization and its Contents* (Stanford University Press 2004). For an analysis of some of the problematics of the civilizational discourse utilized by Huntington and others, see my article ‘Approaching the Study of Civilization: Norbert Elias’s View’ (2019) 12(2) *International Journal of the Asian Philosophical Association* 179.

are equals – which our culture, but not theirs, establishes. That is just another subtle way of saying we are still not equals.<sup>27</sup>

Another matter obscuring the usage of human rights in historical scholarship is its uncritical conflation with other, seemingly similar concepts, such as natural law and natural rights; pre-modern rights discourses which stem from medieval and early modern Europe respectively. There is a lack of clarity about what exactly unites or separates the concepts of natural law, natural rights and human rights.<sup>28</sup> Natural rights theorists tended to dissociate themselves from the idea of natural law, because of its religious undertones and the desire to express rights in a more secular form. At the same time, many rights historians use the terms “natural rights” and “human rights” interchangeably when they speak of pre-modern rights discourses.<sup>29</sup> Recent scholarship tends to agree that in fact natural rights and natural law are much more in harmony than most rights theorists would admit, while natural rights and human rights are conceptually far more distinct.<sup>30</sup> Natural rights theories, such as that of Locke, are grounded upon the idea of the law of nature (expressed in either religious or secular terms).<sup>31</sup> The modern human rights regime, in contradistinction, has moved away from the endeavor to “ground” human rights.<sup>32</sup> Other features distinguish the modern human rights discourse from pre-modern rights, such as the ubiquitous

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<sup>27</sup> Recep Şentürk, ‘Sociology of Rights’ (n 9) 29.

<sup>28</sup> David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (Oxford University Press 2009) 3.

<sup>29</sup> See, for example, Richard Tuck, *Natural Rights Theories: Their Origin and Developments* (Cambridge University Press 1979), 76; Rex Martin, ‘rights and human rights’ in Bruce Haddock and Peter Sutch (eds) *Multiculturalism, Identity and Rights* (Routledge 2005) 183-184; Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150-1625* (William B Eerdmans Publishing Company 1997) 74, 194, 214, 268, 346-347. Also see the citation from Tierney (n 23), in which he conflates natural and human rights.

<sup>30</sup> Boucher, *The Limits of Ethics* (n 28) 3.

<sup>31</sup> See A John Simmons, *The Lockean Theory of Rights* (Princeton University Press 1992).

<sup>32</sup> The “ungroundedness” of modern human rights has instigated an ongoing scholarly debate on the crisis of the philosophical grounds of human rights. See Michael Freeman, *Human Rights* (Polity Press 2017) 43, 63-68; Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

nature of human rights on a global scale and the political and legal institutionalization of human rights on national and international levels.<sup>33</sup>

The modern human rights regime, however, retains a “residue of the natural law and natural rights traditions”.<sup>34</sup> And while there are fundamental differences between modern and pre-modern human rights discourses, there is also overlap, for example in the idea that rights are ascribed by virtue of humanity, not limited to a certain group or nation. The idea that human beings inhabit a cosmopolis that transcends political communities and that humans are part of a universal community that is governed by universal principles is what binds modern and pre-modern human rights discourses.<sup>35</sup> It is in this sense, as the article will attempt to show in section three, that the universalist Islamic rights discourse can be regarded as a “human rights” discourse.

While some degree of present-mindedness undergirds all historical inquiry, it becomes problematic when it distorts that history. In what might be seen as one of the most prominent recent histories of human rights, Lynn Hunt argues that modern human rights stem from the Enlightenment and the democratic age of revolutions.<sup>36</sup> Hunt’s account places human rights firmly in the modern era, first proclaimed by eighteenth-century American and French revolutionaries, and ultimately leading to the Universal Declaration of Human Rights in 1948. Samuel Moyn, rightly points to the problematics of Hunt’s deeply teleological view of human rights history.<sup>37</sup> Hunt envisions the emergence of modern human rights as a historical “cascade of rights”, deterministically and triumphally leading to their emergence in the twentieth century.<sup>38</sup> Moyn, in turn, argues that modern human rights only genuinely became a global concern after the 1970s, when the human rights discourse was claimed by

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<sup>33</sup> Something Boucher refers to as the human rights “juridical revolution”, *The Limits of Ethics* (n 28) 311-329.

<sup>34</sup> *ibid* 13.

<sup>35</sup> *ibid* 19.

<sup>36</sup> Lynn Hunt, *Inventing Human Rights: A History* (WW Norton & Company 2007).

<sup>37</sup> Samuel Moyn, *Human Rights and the Uses of History* (Verso 2014) 7-12.

<sup>38</sup> Hunt (n 36) 212.

Eastern European dissidents of Communist regimes and the liberal and anti-Communist left.<sup>39</sup>

While it can be strongly argued that Lynn's teleological conception of human rights history as a "cascade of rights" is ultimately flawed, it is equally unconvincing to assume that human rights are a uniquely modern concept. It is true that a major shift occurred in rights thinking during the twentieth century, and after World War II the human rights discourse reached unprecedented levels of global acceptance and institutionalization.<sup>40</sup> Claiming the inherent modernity of human rights, however, would amount to a crude form of presentism that does not allow for the possibility of pre-modern human rights thinking. However, there are identifiable pre-modern human rights concerns and claims in all world cultures and religions, which have been expressed differently in various historical contexts and languages. This is exemplified by the many attempts of scholars and adherents of different world religions to ground human rights in their respective intellectual traditions.<sup>41</sup> Similar attempts have been made on secular grounds.<sup>42</sup> The multifarious grounds of human rights do not undermine their importance or relevance, rather they might make the case for human rights and their promotion around the world stronger. Hence, it is warranted that this article discusses the contribution of Islamic civilization and legal thought to the global rights discourse.

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<sup>39</sup> Moyn, *Human Rights and the Uses of History* (n 37) 15. Also see his *The Last Utopia* (n 22) where he makes a more elaborate argument for the recent origins of the human rights discourse.

<sup>40</sup> Johannes Morsink, in this regard, mentions that "at the end of the twentieth century there is not a single nation, culture, or people that is not in one way or another enmeshed in human rights regimes", see his *The Universal Declaration of Human Rights: Origins, Drafting, and Intentions* (University of Pennsylvania Press 1999) x.

<sup>41</sup> For examples from several world religions, including indigenous religious traditions, see John Witte Jr and M Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2012).

<sup>42</sup> See Ari Kohen, *In Defense of Human Rights: A Non-Religious Grounding in a Pluralistic World* (Routledge 2007); Lisa Sowle Cahill, 'Rights as Religious or Secular: Why Not Both?' (1999-2000) 14(1) *Journal of Law and Religion* 41.

2.2. ISLAM AND HUMAN RIGHTS: BEYOND LEGAL ORIENTALISM

A second theoretical and methodological concern is more germane to Islamic studies proper, and the study of Islamic jurisprudence in particular, which has found expression in that field of historical scholarship that has come to be known as legal Orientalism.<sup>43</sup> Legal Orientalism is a scholarly paradigm that tends to study Islamic jurisprudence through the lens of Western law, imposing its legal conceptions and language upon Islamic legal culture, without taking into consideration the particularities of the Islamic legal paradigm.

Admittedly, one must note the diversity of methods in Oriental studies, as well as a certain diversity in subsequent scholarly output. Orientalism, as a paradigm, however “has shaped and constrained not only the questions that legal Orientalists ask but also the answers that they give”.<sup>44</sup> The prominent Islamic legal historian Wael B. Hallaq, in this regard, speaks of the issues of topical selection and problem-identification which impacts “the scholarly question-framing-and-answer-giving”.<sup>45</sup> Orientalist scholars of the Islamic legal tradition, when looking for the “law” in Islamic law, look to identify those aspects of the tradition that fit explicitly Western legal conceptions. This process of topical selection “forced the Islamic ‘legal’ tradition into a particular mold, isolating Qur’ānic morality from ‘law’”.<sup>46</sup> One of the consequences of this approach was the artificial separation between “law” and “morality”, while in the *sharī‘a* tradition, morality and law sometimes conflate. Instead, there is an absence of treating the Islamic sacred scripture, the Qur’an, as it functioned in Islamic legal culture, namely as a “moral blue print” and a “substrate” on which the law rests and from which law is derived.<sup>47</sup> Legal Orientalism significantly distorts the nature of the *sharī‘a* by reducing it to a construction of “Islamic law” that is embedded in the Western *Weltanschauung*.

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<sup>43</sup> See Wael B Hallaq, *Restating Orientalism: A Critique of Modern Knowledge* (Columbia University Press 2018).

<sup>44</sup> Wael B Hallaq, ‘On Orientalism, Self-Consciousness and History’ (2011) 18 *Islamic Law and Society* 387, 390.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid* 415.

<sup>47</sup> *ibid* 416.

Legal Orientalism's construction of Islamic "law", Hallaq rightly points out, is mostly not an intentional project, but a product of our own cultural biases. He writes:

Legal Orientalism's paradigm does not always consciously intend or not intend to include or exclude. It just *ontologically* functions in this manner, more often unconsciously, because it is thus *constituted* by its own programmatic cultural presuppositions (in this case about the separation between "law" and "morality") as well as by the imperatives of the thought-structure that sustains it.<sup>48</sup>

An exemplary instance of legal Orientalism is to be found in a recent chapter on "law" in Jamal Elias's *Key Themes for the Study of Islam*, written by a scholar of Islamic religious studies A. Kevin Reinhart, who is otherwise known for his excellent contributions to Islamic legal studies.<sup>49</sup> Reinhart explicitly frames "Islamic law" along the lines of Western legal philosophy, building upon the legal interpretations of H. L. A. Hart (d. 1992) and Ronald Dworkin (d. 2013), representatives of the legal positivist and interpretivist schools of Anglo-American legal studies respectively.<sup>50</sup> He mentions that "Hart and Dworkin's understanding of law is a *standard* one for philosophy of law, and to determine in what sense "Islamic law" is law, we may begin by examining the *sharī'a*-system within the Hart-Dworkin framework", which he then proceeds to do in the remainder of the chapter.<sup>51</sup>

He, for instance, examines several books of *fiqh*, al-Mawṣilī's *al-Ikhtiyār li-Ta'līl al-Mukhtār* and Ibn Rushd's *Bidāyat al-Mujtahid*. These, Reinhart says, are not legal statute books but read more like "discursive works with copious argumentation, alternative views, and digressions".<sup>52</sup> In that sense, he concludes, they read rather like the Talmud, one of the central legal-theological texts of Rabbinic Judaism, then the *Public Statutes of the State of New Hampshire and General Laws in Force*, which is more

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<sup>48</sup> *ibid.* (Emphasis by the author.) Also see his 'Groundwork of the Moral Law: A New Look at the Qur'ān and the Genesis of the Sharī'a' (2009) 16 *Islamic Law and Society* 239.

<sup>49</sup> See A Kevin Reinhart, 'Law' in Jamal J Elias (ed) *Key Themes for the Study of Islam* (Oneworld 2010).

<sup>50</sup> See HLA Hart, *The Concept of Law* (first published 1961, Oxford University Press 2012); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

<sup>51</sup> Reinhart (n 49) 224. (Emphasis mine.)

<sup>52</sup> *ibid* 225.



like a Bill of Rights.<sup>53</sup> The chapter overflows with remarks that “show” how books of Islamic law are not similar to legal statute books, as known in the West. They contain matters of religious ritual (such as ritual ablution and prayer) and all kinds of “rules” that are “recommended” or “discouraged”, things the Muslim “ought” and “ought not” do, all of which however are not enforceable by law. These kind of “extraneous matters”, Reinhart argues, belong more properly to the domain of morality and not law.<sup>54</sup> The latter point, reinforces Hallaq’s critique of artificially separating Islamic law from its moral and ethical-religious worldview. Reinhart’s designation of the Hart-Dworkin framework as “standard”, and thus as the ultimate measuring rod and criterion to judge the Islamic legal tradition, is deeply problematic in light of the discussion on legal Orientalism.

As the late scholar of Islamic civilization and language Bernard G. Weiss (d. 2018) mentioned, it is ultimately misleading to simply equate the Islamic *sharī‘a* with law, as was done in the example we cited above.<sup>55</sup> This is something one should be aware of when comparing Western human rights law perspectives with those in the field of Islamic legal studies. While some of these observations may make sense from the perspective of Western legal philosophy, such a theoretical and methodological approach does more to confuse and obscure, rather than clarify what the *sharī‘a* is and what Islamic legal culture genuinely entails. The scholarly critiques of legal Orientalism teach us to take into consideration the alterity and particularity of Islamic legal culture as consisting of its own legal epistemology, legal anthropology, legal norms, legal language and legal reasoning. Those who are interested in cross-cultural human rights studies and Islamic human rights research would do well to absorb these critiques in order not to fall into the trap of simplistic reductionism or faulty comparison.

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<sup>53</sup> *ibid* 225.

<sup>54</sup> *ibid* 225-234.

<sup>55</sup> Bernard G Weiss, *The Spirit of Islamic Law* (The University of Georgia Press 2006) 17.

### 3. FUNDAMENTAL RIGHTS IN ISLAMIC LEGAL DISCOURSE: CLASSICAL ISLAMIC LAW AND LEGAL PHILOSOPHY

#### 3.1. THE CONCEPT OF RIGHTS IN CLASSICAL ISLAMIC JURISPRUDENCE: RIGHTS TALK IN THE ISLAMIC *HUQŪQ* DISCOURSE

Conceptual clarity is of utmost importance when investigating legal terminology, especially when it concerns a multilayered, malleable and ambiguous concept such as rights.<sup>56</sup> The scholars of Islamic jurisprudence and legal philosophy were very meticulous when it came to legal language and would dedicate a considerable amount of space to expounding legal concepts and terms in treatises of Islamic legal philosophy (*uṣūl al-fiqh*). In fact, many legal scholars would begin their legal treatise with a dedicated section on legal language, since almost all issues in legal philosophy depend upon linguistical interpretation. Hence, a deep understanding of Islamic legal language is a prerequisite for the practice of legal reasoning.<sup>57</sup> Islamic scholars took great care to differentiate the linguistic (*luḡhawī*) and technical (*iṣṭilāḥī*) meanings of legal concepts. For example, when one studies the primer on Islamic legal philosophy written by the Bosnian-Ottoman Hanafi jurist, Ḥasan Kāfī al-Āqḥiṣārī (d. 1615), he goes into great detail explaining the different definitions and layers of meaning of the word *fiqh*; a term which has much broader connotations than its mere technical legal sense of “Islamic law”.<sup>58</sup> His treatment of the term includes linguistic analysis, technical legal analysis, as well as historical conceptual analysis in which he analyzes how the meanings of the word changed over time.<sup>59</sup>

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<sup>56</sup> See George W Rainbolt, *The Concept of Rights* (Springer 2006).

<sup>57</sup> For more on Islamic legal language, see Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge University Press 1997) 42-85.

<sup>58</sup> For a modern interpretation of *fiqh* understood in broader terms as a “social science”, insofar as it deals with the realm of human action, see Recep Şentürk, ‘Intellectual Dependency: Late Ottoman Intellectuals Between *Fiqh* and Social Science’ (2007) 47(3-4) *Die Welt des Islams* 284.

<sup>59</sup> Ḥasan Kāfī al-Āqḥiṣārī, *Sharḥ Samt al-Wuṣūl ilā ‘Ilm al-Uṣūl* (Dār Ibn al-Jawzī, 2010), 68-72. Al-Āqḥiṣārī’s work is in fact a commentary (*sharḥ*) on the legal-philosophical treatise of the famous twelfth-century Hanafi scholar Abū ‘1-Barakāt al-Nasafī (d. 1310), called *Manār al-Anwār fī Uṣūl al-Fiqh*, which was widely studied in Ottoman religious seminaries (*madāris*, sing. *madrasa*).

Al-Āqhiṣārī details, for example, that the term *fiqh* initially had a much broader meaning than what we now perceive as “Islamic law” in Islamic legal history. Linguistically the term *fiqh* merely means “understanding” (*fahm*). It was only later that *fiqh* became a technical legal term that became associated with legal judgements (*ḥukm*). In terms of the *sharī‘a* al-Āqhiṣārī evokes the famous explanation of *fiqh* by Abū Ḥanīfā (d. 767), the eponym of the Hanafi legal school, that *fiqh* is “to know oneself, what is for one and what is against one” (*ma ‘rifat al-nafs mā lahā wa mā alayhā*), which al-Āqhiṣārī explains refers to what is allowed and what is prohibited.<sup>60</sup> This broader meaning, however, went well beyond the legal scope and incorporated the allowed and disallowed in the realms of religious beliefs (*i‘tiqādat*), theology (*kalām*) and even spirituality (*taṣawwuf*).<sup>61</sup> Only after this elaboration he comes to the definition of *fiqh* as the “science of legal judgements with regards to the *sharī‘a*”.<sup>62</sup> A more detailed analysis of al-Āqhiṣārī’s conceptual history of the term *fiqh* would take us away from the proper scope of this article, but this brief example shows the complexity and multi-faceted nature of Islamic legal language and how much care Islamic legal scholars took to elaborate that language.

In the Arabic language the corresponding term to “right” is *ḥaqq* (plural *ḥuqūq*), although the term’s meaning in Arabic is much more multileveled and varied linguistically and conceptually.<sup>63</sup> In classical Arabic the term *ḥaqq* was used in a much more expansive semantic field, encompassing the theological, moral and legal

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<sup>60</sup> *ibid* 68-69.

<sup>61</sup> *ibid*. *Taṣawwuf* is more popularly known in the West as Sufism, which is oftentimes presented as the antipole of orthodox *sharī‘a*-minded Islam. The fact that Sufism is mentioned in a treatise of Islamic law contradicts this perspective. In fact, Sufism, *kalām* theology and Islamic law would form the intellectual synthesis of mainstream Islam for the most part of the medieval and early modern period, and many major Islamic legal scholars were also Sufis. See Ahmet T Karamustafa, *Sufism: The Formative Period* (University of California Press 2007); Christopher Melchert, ‘Origins and Early Sufism’, in Lloyd Ridgeon (ed), *The Cambridge Companion to Sufism* (Cambridge University Press 2015). For an example of the synthesis between Sufism and Islamic law and theology, see Abū ‘l-Qāsim al-Qushayrī, *Al-Qushayrī’s Epistle on Sufism* (Alexander Knysh tr, Garnet Publishing 2007).

<sup>62</sup> Al-Āqhiṣārī (n 59) 70.

<sup>63</sup> For more on the Islamic concept of rights, see Mohammad Hashim Kamali, ‘Fundamental Rights of the Individual: An Analysis of *Ḥaqq* (Right) in Islamic Law’ (1993) 10(3) *The American Journal of Islamic Social Sciences* 340.

realms.<sup>64</sup> Outside of a strictly legal and juridical context it refers to the broader meanings of “truth” and “justice” and is associated with other important Islamic religious concepts, such as that which is socially just (*‘adl*), right (*mustaqīm*) and equitable (*qist*).<sup>65</sup> It is also one of the names with which God refers to Himself in Islamic sacred scripture (*al-Ḥaqq*).<sup>66</sup> In Islamic spirituality and moral psychology (*tasāwwuf*, *‘ilm al-naḥs*, *al-fiqh al-wijḍānī*) *ḥaqq* is used to refer to such things as *ḥuqūq al-naḥs*; the essential requirements for the existence of the human self.<sup>67</sup> *Ḥaqq* is also used to connote reality, fact, true, authentic, genuine, sound, right judgment, rightness or correctness, as opposed to opposite connotations, such as incorrect judgment or falsehood (*bāṭil*).<sup>68</sup>

In the plural form of *ḥuqūq*, however, the meaning was almost always grounded in an idea of rights.<sup>69</sup> In the legal sense of *ḥuqūq*, Arabic lexicographers have variously given us meanings such as rights, entitlements, (legal) claims or “anything that is owed”.<sup>70</sup> In the classical Islamic legal literature *ḥaqq* is also used for those type of rights that specifically belong to individual human beings. For these rights the Islamic jurists used the terms *ḥuqūq al-ādamiyyīn* or *ḥuqūq al-nās*, which literally translated as the “rights of man” or “human rights”. Sometimes these rights are also referred to as the rights of servants (*ḥuqūq al-‘ibād*).<sup>71</sup> These were claim-rights, such as the rights to the

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<sup>64</sup> Wael B Hallaq, “God Cannot Be Harmed’: On *Ḥuqūq Allah/Ḥuqūq al-‘Ibād* Continuum’ in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds), *Routledge Handbook of Islamic Law* (Routledge 2019) 69.

<sup>65</sup> *ibid* 67.

<sup>66</sup> See, for example, the Qur’anic verses 22:62, 24:25 and 31:30.

<sup>67</sup> P Bearman and others (eds), ‘Ḥuḳūḳ’ *Encyclopaedia of Islam* (2<sup>nd</sup> edn). For more on the different usages of the human self (*al-naḥs*) in Islam, see Sara Sviri, ‘The Self and Its Transformation in Ṣūfism: With Special Reference to Early Literature’ in David Shulman and Guy G Stroumsa (eds) *Self and Its Transformation in the History of Religions* (Oxford University Press 2002).

<sup>68</sup> Edward William Lane, *An Arabic-English Lexicon*, vol 1 (Williams & Norgate, 1863) 607-608. Ibn Manẓūr (d. 1311 / 1312) in his famous thirteenth-century Arabic lexicon *Lisān al-‘Arab* records *ḥaqq* as “the opposite of falsity” (*naqīḍ al-bāṭil*), 939.

<sup>69</sup> Hallaq, ‘God Cannot be Harmed’ (n 64) 67.

<sup>70</sup> See Hans Wehr, *A Dictionary of Modern Arabic* (first published 1979, J Milton Cowan ed, 4<sup>th</sup> edn, Spoken Language Services 1994) 224; Lane (n 68) 608.

<sup>71</sup> The translation of “servants” here refers to the whole of humanity and creation, since in the Islamic religious tradition the whole of creation worships and glorifies God (even inanimate objects), see for

inviolability of life or property.<sup>72</sup> Conversely, these rights entailed the duty of others not to infringe upon these rights. The protection of individual rights, which belonged to the private sphere proper, was categorized by the Islamic jurists under human rights (*ḥuqūq al-ādamiyyīn*).<sup>73</sup> These incorporate the protection of rights against violations that are instigated between individual human beings, and in that sense belong to the civil sphere. Islamic human rights (*ḥuqūq al-ādamiyyīn*) also contained a category of so-called “unearned rights” (*ghayri muktasab*).<sup>74</sup> These rights can be seen as natural rights that are inalienable and inborn in every human being. The Hanafi scholars, as this article will demonstrate shortly, would count the fundamental rights to life, liberty and property among those these rights. These rights fall under human inviolability (*‘iṣma*) and inhere in all individual human beings.

The idea of Islamic human rights (*ḥuqūq al-ādamiyyīn*) is often coupled in Islamic legal literature with the divine rights (*ḥuqūq Allah*), as the Islamic religious worldview also accords certain claims the Creator can make upon his creation.<sup>75</sup> The term “divine rights” might be easily misunderstood. The Islamic perception of God is that He is omnipotent and self-sufficient, and hence in no need of anything, including “rights”.<sup>76</sup> These rights generally pertain to public interests that cannot be claimed by any individual in particular and hence must be administered by the state. Hence, human beings are the ultimate beneficiary of divine rights.<sup>77</sup> These are generally catered towards the preservation of an orderly society and the benefit of human life, such as

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example Qur’an verses 17:44, 24:41, 51:56 and 30:26. Hence these Islamic human rights are sometimes also called the rights of creation (*ḥuqūq al-makhlūqāt*), see Mol (n 5) 191-192.

<sup>72</sup> *ibid* 191. Further examples of Islamic human rights, as expressed in the Hanafi legal tradition, are given in the following section. This section merely serves as an introduction to the terminology.

<sup>73</sup> Khaled Abou El Fadl, ‘Shari‘ah and Human Rights’, in Anthony Tirado Chase (ed) *Routledge Handbook on Human Rights and the Middle East and North Africa* (Routledge 2017) 278; Reem A Meshal, *Sharia and the Making of the Modern Egyptian: Islamic Law and Custom in the Courts of Ottoman Cairo* (The University of Cairo Press 2014) 177-210.

<sup>74</sup> Recep Şentürk, ‘Âdamiyya and ‘Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law’ (2002) 8 *İslâm Araştırmaları Dergisi* 47.

<sup>75</sup> Mol (n 5) 191.

<sup>76</sup> See Umar F Abd-Allah, ‘Theological Dimensions of Islamic Law’ in Tim Winter (ed) *The Cambridge Companion to Islamic Theology* (Cambridge University Press 2008) 237-257; Abū Ja‘far al-Taḥāwī, *al-Aqīdat al-Taḥāwīyya* (Hamza Yusuf tr, Zaytuna Institute 2007).

<sup>77</sup> Mol (n 5) 193.

public order and safety, infrastructure, markets and taxes levied upon the population.<sup>78</sup> Sometimes divine rights and human rights were mixed, and hence needed considerable deliberation and legal interpretation (*ijtihad*) on the part of the jurisconsult (*mujtahid*).<sup>79</sup> Together human rights and divine rights represent a legal heuristic that aims to clarify the Islamic scheme of rights and obligations within the public and private sphere of human action.<sup>80</sup>

### 3.2. FUNDAMENTAL RIGHTS IN THE ISLAMIC *HUQŪQ* REGIME: THE UNIVERSALIST PERSPECTIVE

Islamic legal scholars differed with regards to the proper subject of the law. Here there emerged two legal paradigms in Islamic law.<sup>81</sup> Some argued that the inviolability of rights is only guaranteed for Muslims and those non-Muslims who are protected under a peace treaty with the Islamic state. This idea has been encapsulated through the legal principle (*al-‘iṣma bi-l-imān aw al-amān*), which means that inviolability is according to faith (*imān*) or peace treaty (*amān*). However, the universalist trend, with whom this article is concerned, argued that rights are inherent in all human beings, by virtue of their mere humanity. They argued that the inviolability of fundamental human rights is by virtue of humanity (*al-‘iṣma bi-l-ādamiyya*).<sup>82</sup> In some sense, one could say that these two competing legal paradigms ascribed to a “citizen rights” approach and a “human rights” approach to rights, respectively. The former assumes an understanding of rights that is in some ways reminiscent of the legal positivist paradigm, in which the state promulgates the law within the boundaries of the Islamic

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<sup>78</sup> *ibid* 192.

<sup>79</sup> See, for example, Abū Ishāq al-Shāṭibī, *al-Muwafaqāt fī ‘ulūm al-sharī‘a*, vol. 1, (Imran Ahsan Khan Nyazee tr, Garnet Publishing 2012) 205.

<sup>80</sup> For more details about *ḥuqūq al-ādamiyyīn* and related concepts, see Miriam Hoexter, ‘*Huqūq Allah and Huqūq al-‘Ibād as Reflected in the Waqf Institution*’ (1995) 19 *Jerusalem Studies in Arabic and Islam* 133; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill 1998) 190-218; Anver M Emon, ‘*Huqūq Allah and Huqūq al-‘Ibād: A Legal Heuristic for a Natural Rights Regime*’ (2006) 13(3) *Islamic Law and Society* 325; Wael B Hallaq, ‘God Cannot Be Harmed’ (n 64).

<sup>81</sup> For more on these two legal paradigms, see Şentürk, ‘*Ādamiyya and ‘Ismah*’ (n 74) 43-50; Sharawi (n 9) 91-109.

<sup>82</sup> Şentürk, ‘*Sociology of Rights*’ (n 9) 30; Sharawi, 94-99.



polity for citizens of that polity (Muslim and non-Muslim). The latter, in the spirit of Boucher's remarks mentioned earlier, adheres to a more global and cosmopolitical ethic that transcends the boundaries of the Muslim polity and bestows rights on all of humanity.<sup>83</sup>

The eleventh-century Muslim legal philosopher Abū Zayd al-Dabūsī (d. 1039), a central figure in the Hanafi school of law, in his highly sophisticated and influential legal-philosophical treatise called *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (The Evaluation of Evidences in Legal Philosophy), argues for the existence of fundamental rights in Islam for all human beings by virtue of their humanity. In his work he mentions:

When God Almighty created man in order to enable him to bear His trust (*amāna*), He dignified him with reason (*‘aql*) and legal personality (*dhimma*), so that he would become capable of fulfilling the rights and obligations incumbent upon him, and He endowed him with the rights of inviolability (*‘iṣma*), liberty (*ḥurriyya*) and property (*mālikiyya*). [...] The human is not created but a free person (*ḥurr*) and in possession of the rights ascribed to him. He established for him these honors (*karamāt*) and legal personality (*dhimma*) in order to enable him to fulfill the divine rights.<sup>84</sup>

In this early classical text of Islamic jurisprudence, al-Dabūsī argues for the protection of fundamental human rights, the term which he uses for this is *ḥuqūq al-nās*.<sup>85</sup> These fundamental rights, as we can grasp from this passage, are the rights to life, liberty and property.<sup>86</sup> Any contemporary scholar of the history of the modern human rights discourse, perhaps in surprise, will be struck by some sense of recognition, as John Locke (d. 1704), the renowned sixteenth-century philosopher and political theorist of

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<sup>83</sup> Boucher, *The Limits of Ethics* (n 28) 19.

<sup>84</sup> Abū Zayd al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (Dār al-Kutub al-‘Ilmiyya 2001) 417. Unless otherwise stated, the translations from Arabic in this article are mine.

<sup>85</sup> Which is an equivalent for human rights (*ḥuqūq al-ādamiyyīn*), see section 3.1.

<sup>86</sup> Inviolability (*‘iṣma*) in the context of Islamic legal terminology refers to the inviolability of both life and property. See Recep Şentürk, ‘İsmet’, *TDV İslâm Ansiklopesi*, vol 23 (Türkiye Diyanet Vakfı 2001) 137-138; Baber Johansen, ‘Der ‘iṣma-Begriff im hanafitischen Recht’, in *La Signification du Bas Moyen Age dans l’Histoire et la Culture du Monde Musulman. Actes de 8<sup>me</sup> Congrès de l’Union Européenne des Arabisants et Islamisants* (Aix-en-Provence, Septembre 1976), 89-108 (republished in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill 1999) 238-262).

the European Enlightenment, famously argued for these very same three fundamental rights in his *Two Treatises of Government*, albeit speaking of “estate” rather than property.<sup>87</sup> This prompted human rights scholar Michael Freeman to designate Locke’s work as the “first systematic human-rights theory”, even though al-Dabūsī wrote more than six centuries earlier.<sup>88</sup>

In the passage cited here, al-Dabūsī argues that every single created human being is endowed with intellect and legal personality. These are given to her or him in order to receive and take responsibility for their inborn and God-given fundamental rights (i.e. the rights to life, liberty and property) and their corresponding duties (i.e. not to infringe upon these same rights in relation to other human beings). Human beings are all created free (*hurr*) in order to be able to fulfill their responsibilities on earth. Without freedom and fundamental rights, full human potential and flourishing cannot be reached. These fundamental rights are the basis of human dignity and hence are called “honoring gifts” (*karamāt*) bestowed upon human beings by God.<sup>89</sup> Abū Bakr al-Sarakhsī (d. 1090), who writes more than half a century later and builds upon the works of al-Dabūsī, further corroborates the three fundamental rights of life,

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<sup>87</sup> John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Ian Shapiro ed, Yale University Press 2003). Locke’s exact words are “Man being born, as has been proved, with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty, and estate, against the injuries and attempts of other men; but to judge of and punish the breaches of that law in others”, *ibid* 136. For an elaborate exposition of Locke’s rights theory, see Simmons (n 31).

<sup>88</sup> Freeman (n 32) 11. A recently published article by a Turkish legal historian argues that Locke might have been indirectly influenced by al-Dabūsī, and similar Islamic legal theorists, through the canon lawyers of the medieval Christian natural law (*ius naturale*) tradition, see Köksal (n 17). While the intellectual and cultural influence of Islamic civilization on medieval Latin Europe is beyond question, the specific claim of a possible link between classical Islamic legal thought and Locke’s theory of rights needs to be further substantiated with historical evidence. This, however, lays beyond the proper scope of this article.

<sup>89</sup> Very little research has been done on this important Hanafi legal philosopher, even though he is copiously cited in subsequent Hanafi legal works. In fact, many later Hanafi scholars build upon his work. See Bedir (n 16). I intent to write a more detailed analysis on al-Dabūsī’s contributions to the rights discourse in Islamic legal philosophy in a future article.

liberty and property, spoken of by his predecessor. He elaborates that these rights are inborn in every human being:

These rights of inviolability, liberty and property are inborn. No distinction is made between those that are able to discern (i.e. adults) or not yet discern (i.e. children). Therefore, the legal personality that enables humans to receive fundamental rights are established by birth.<sup>90</sup>

To demonstrate the universalist Hanafi perspective on rights and human inviolability, which is grounded upon the concept of *ādamiyya* (humanity), the example of al-Marghīnānī, who's legal treatise was to become the most central reference for legal verdicts (*fatwa*) in the Hanafi school of jurisprudence warrants attention.<sup>91</sup> In this passage he critiques the position of al-Shafi'ī, who is the eponym of another of the four Sunni schools of Islamic law, who argues that inviolability is grounded upon being a Muslim, and not by virtue of humanity.<sup>92</sup> Al-Marghīnānī rejects al-Shafi'ī's position and rather affirms that inviolability is not attached to Islam but to the human person, as he argues:

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 the 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 a dependent 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.<sup>93</sup>

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<sup>90</sup> Abū Bakr al-Sarakhsī, *Uṣūl al-Sarakhsī*, vol 2 (Abū al-Wafā' al-Afghānī ed, Dār al-Kutub al-'Ilmiyya 2015) 334.

<sup>91</sup> See Sohail Hanif, *A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the Hidāyah of Burhān al-Dīn 'Alī ibn Abī Bakr al-Marghīnānī (d. 593/1197)* (unpublished PhD thesis, University of Oxford 2017).

<sup>92</sup> For an overview of the four Sunni schools of law, see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9<sup>th</sup>-10<sup>th</sup> Centuries C.E.* (Brill 1997).

<sup>93</sup> Cited in Recep Şentürk, 'Ādamiyyah and 'Ismah' (n 74) 57. (Emphasis mine.)

The universalistic approach to an Islamic conception of human rights, expressed by al-Dabūsī and others during the High Middle Ages, carried right into modern times.<sup>94</sup> To mention but a few examples, the nineteenth-century Damascene jurist ‘Abd al-Ghanī al-Maydānī (d. 1881), famous for his detailed commentary (*sharḥ*) on one of the major legal primers (*mutūn*) of the Hanafi school of legal thought, *al-Lubāb fī Sharḥ al-Kitāb*, mentions that human beings possess sanctity merely by virtue of their existence (*al-ḥurr ma ‘ṣūm bi nafsihi*).<sup>95</sup> Another late scholar and jurist, Ibn ‘Ābidīn (d. 1836), in his marginal gloss (*hāshiya*) called *Radd al-Muḥtār ‘alā Durr al-Mukhtār*, which became the most authoritative legal text for the issuing of legal verdicts (*fatwa*) in the late Hanafi school, in a similar spirit, mentioned that all human beings enjoy the inviolability and protection of their basic rights, be they Muslim or non-Muslim (*al-adamī mukarram shar ‘an wa law kāfiran*).<sup>96</sup> It has also been suggested that major modern Islamic legal reforms, such as the championing of equal rights for all citizens in the Ottoman Empire, Muslims and non-Muslims, in the so-called *Gülhane Hatt-ı Şerif* (Edict of Gülhane) of 1839, were inspired by the same trend of Islamic legal universalism.<sup>97</sup>

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<sup>94</sup> Here, I use the term “High Middle Ages” out of scholarly convention. The common periodization of history into Antiquity, Middle Ages and (Early) Modernity, however, is an invention of sixteenth-century European Renaissance scholars, mostly unsuitable for world historical purposes. In the context of Islamic history, al-Dabūsī’s time would more accurately be called the “Earlier Middle Period”, in order to better reflect the historical flow of time indigenous to Islamic civilization. See Hodgson (n 2) vol 2.

<sup>95</sup> ‘Abd al-Ghanī al-Maydānī, *al-Lubāb fī Sharḥ al-Kitāb*, vol 4 (Muḥammad Muḥyī al-Dīn ‘Abd al-Ḥamīd ed, Cairo: 1963) 128.

<sup>96</sup> Muḥammad Amīn b. ‘Ābidīn, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Absār*, vol 5 (Dār al-Kutub al-‘Ilmiyya 1994) 58.

<sup>97</sup> See Recep Şentürk, ‘Sociology of Rights: ‘I Am Therefore I Have Rights’: Human Rights in Islam between Universalistic and Communalistic Perspectives’ (2005) 2(1) *Muslim World Journal of Human Rights* <https://doi.org/10.2202/1554-4419.1030> (accessed September 5, 2020). In line with al-Dabūsī, the edict affirms fundamental rights for all human beings based on Islamic legal principles, such as the rights of life, property, freedom of religion, protection of honor, education, employment and due process. It writes: “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 *Sharī‘a* laws”, *ibid*.

#### 4. CONCLUSION: TOWARDS A FIELD OF ISLAMIC HUMAN RIGHTS STUDIES

From this brief survey of textual examples from the Hanafi legal corpus, it is possible to conclude that one can speak of an indigenous rights discourse in the Islamic legal tradition. The Islamic scholarly legal tradition explored in this article argues for the fundamental rights of life, liberty and property for all human beings. These rights are inalienable, inborn and are granted to humans by virtue of their humanity. The Hanafi school represents a universalist pre-modern human rights discourse which has hitherto been understudied in the context of Islamic human rights research and, as such, is deserving of more scholarly attention.

Having delved, to some extent, into the intricacies of Islamic rights language and the legal reasoning behind Islamic conceptions of *ḥuqūq*, this article attempted to demonstrate the complexity of the classical Islamic legal tradition, as well as its potential for engagement with human rights research. As was stressed at the beginning of this study, historians of Islamic law and scholars of modern human rights research often talk past each other. This, in addition to the inaccessibility of much of the Islamic legal tradition, which remains today largely in classical Arabic and in manuscript form, complicates the matter further. Those scholars who are interested in engaging the field of Islam and human rights studies, would do well to bear in mind some of these challenges, as well as some of the theoretical and methodological problematics involved in doing this kind of research, such as historical presentism, exclusivism and legal Orientalism.

However, there is much to be hopeful for. While half a century ago an early Orientalist study still could blatantly, though mistakenly, claim that Islamic law knows no conception of individual rights and liberties or that it is merely a “system of duties”, scholarship is now starting to be increasingly aware of the ubiquity and complexity of the Islamic human rights discourse in the Islamic legal tradition.<sup>98</sup> Similarly, the trend towards cross-cultural approaches to human rights, including a diversity of voices and positions regarding modern human rights, is making modern human rights scholars more aware of the biases of ethnocentrism and presentism in

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<sup>98</sup> See Siegman and Schacht (n 4).

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their field of scholarship. It is to be expected that future human rights scholars will reap the fruits of these advances currently being made in the field.