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Volume No.5 Issue No.1 January 2016

www.iresearcher.org

ISSN 2227-7471

THE INTERNATIONAL RESEARCH JOURNAL "INTERNATIONAL RESEACHERS"

www.iresearcher.org

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ABSTRACT

This article makes a quick comparative analysis of the basic tenents, conceptual and philosophical foundations of International Law and International Human Rights Law from the perspectives of different philosophies, jurisdictional systems and civilisations. The origin, nature and historical background of these two branches of the law of nations have also been looked into. The message that has clearly and consistently come out of this analysis is that despite our differences of all kind, whether in terms of cultural, ethnic, historical, geographical, civilisational and any other background, the vast majority of the values, privileges and entitlements constituting the *juris corpus* of international human rights do make a lot of sense to all of us and are naturally applicable almost the same way and to the same level to all of us regardless of civilisations, philosophies, jurisdictional systems and other differences of our day to day reality.

Keywords: international human rights, islam, law

1. INTRODUCTION

This essay makes a quick attempt to comparatively analyse the theoretical or philosophical foundation of the modern concept of human rights, its basic premises, origin and historical background from the perspectives of different jurisprudential systems and civilizations. The essay began by analyzing the theoretical foundations of law and rights under the parameters of the seventeenth century natural law philosophy. Consequently, the views and perceptions of some American, European and other Western leading political philosophers and jurists about law and rights were scrutinized. These include:

- Hugo Grotius, who is generally regarded as the founder of modern international Law and of having prepared the ground for secular and rationalistic version of modern natural law (d.1645)
- John Lock, the renowned English political philosopher (d.1704)
- Sir William Black Stone, (1723 – 1780) the famous English legal Philosopher and jurist
- James Wilson, (d. 1798) who was a leading American Jurists of the late 18 century
- Jeremy Bentham, (d. 1832) a leading and prominent jurist of the Utilitarian Theory of law and rights
- John Austin, founder and a leading scholar of the Austinian School of legal positivism
- The American Theory of Legal Realism
- A. V. Dicey – an English political philosopher of the 19 century

The essay also examines the philosophical foundation of law and rights within the Islamic system of jurisprudence. The paper further examines the conceptual foundation of human rights in national legal systems, the origin of domestic human rights and the background of human rights in international law and the nature of international human rights. The soci-economic and political importance of international human rights and the impact of the 1948 human rights revolution on the Muslim world and the political processes of the Islamic countries are also subjected to thorough scrutiny and analysis.

The last question to be addressed by this essay is the origin of international law in Islamic jurisprudence and the contribution of the early Islamic jurists and Muslim state practice in the evolution and development of the legal rules and principles governing inter-state relations.

Finally, the main objective of this essay was to study and establish the true nature and real meaning of human rights and law and the extent to which human rights can and should be respected by all within the legal systems and civilizational contexts of the various nations of the modern time despite vast differences in their political, cultural, religious, geographical backgrounds and legal systems.

The paper then concluded that regardless of all the differences surrounding the modern concept of human rights - be they conceptual, philosophical and historical backgrounds, cultural, religious beliefs, ethnic, geographical and linguistic variations or legal and political systems of nations, there seems to be a general consensus among peoples of different civilizations and legal, cultural and political systems that the individual human being needs protection and must be protected against the state and society in general from any act of aggression, abuse and disrespect of his dignity and rights.

1.a. Law and Rights in General: Some Theoretical / Philosophical Foundations

One of the most obvious features of the seventeenth century natural law philosophy, which has largely influenced the modern concept of law and rights in the West, was the detachment and separation of law from theology and religion. This was accompanied by a great emphasis on the power of reason as one of the distinctive characteristic of man.

Hugo Grotius (d. 1645), one of the most prominent jurists and legal philosophers of the time who is generally regarded as having prepared the ground for secular and rationalistic version of modern natural law, believed that natural law is a dictate of right reason which measures the quality of moral necessity and legitimacy of an act by the extent of its conformity or otherwise with the rational nature of man. So for him the state was an association of free men who agreed to come together for the enjoyment of their rights and common interests. Thus the sole purpose behind the creation and formation of the state was to promote, protect and enjoy the natural rights of men who submitted their sovereign power to a ruler. Some of the dictates of natural law in the view of Grotius include the following:

> To abstain from that which belongs to other persons, to restore to another any goods of his which we may have, to abide by pacts and to fulfill promises made to other persons, to repay any damage done to another through fault and to inflict punishment upon men who deserve it.[1]

These, in brief, are the basic moral foundations of modern international law in general and international law of human rights in particular.

For John Locke (d. 1704), the renowned English Political Philosopher and another believer in natural law, what existed prior to political and any form of social organization or institution was a state of nature under which men live together according to reason without any common superior authority on earth. He believed that in this state of nature men lived together under the guidance of the law of nature by which their rights and responsibilities were determined. Like Grotius and many other natural law philosophers of the same age, John Locke, it appears, did not recognize the importance of divine revelation to law and to the determination of the rights and duties and responsibilities of individuals vis-à-vis one another and society as a whole. This is because the law of nature according to him was an objective rule and measure emanating from God but ascertainable by human reason.[2] Thus Locke, whose political writings, especially the Two Treatises on Civil Government, are believed to have largely influenced the English Revolution of 1688 which gave birth to the 1688 Bill of Rights and subsequently influencing the American and French Revolutions of 1776 and 1789 respectively,[3] was a strong advocate of the natural and inalienable rights of man. He argued that even before government existed, men were free, independent and equal in the enjoyment of those natural and inalienable rights. In his opinion, the most important of such rights were the rights to life, liberty and property. He, however, appeared to have acknowledged the existence of a serious weakness in that state of nature he was talking about. In other words, Locke realized that the state of nature lacked some central and common authority and machinery. So there was the tendency that everybody would have executive power of the law of nature and this made the whole system prone to injustice and partiality or biasness especially when one was to become a judge to one's own case and to those of his friends. So for these obvious weaknesses and inconveniences of the

state of nature, Locke suggested that civil government was the best and the most proper remedy or solution for that problem.[4]

Sir William Blackstone (1723-1780), another English devotee to the theory of natural law, wrote that the law of nature is that which could properly be thought of as human law. He ruled out any role for human beings in making this law. Instead, Blackstone argued that the law of nature was dictated by God and for that reason it was binding over the entire globe in all countries and for all time. He further argued that the role and task of the judge was to try to discover or find out, and apply, but not to make and create this law, and that human laws contrary to the law of nature are invalid, while the valid human law derived its force and authority either mediate or immediately from that original law.[5] I have not been able, however, to detect or even sense throughout his discussion of the law of nature, any incline of recognition by Blackstone of the importance of divine revelation or prophet-hood to the process by which the law of nature was sent down to man. Blackstone who believed in the existence of natural law and therefore natural rights, divided rights into two types namely: Absolute and Relative rights. The relative rights are incident to and due to individuals by virtue of their membership of society. While the absolute rights are those claims, entitlements and privileges that the individual is entitled to by virtue of being a human being. This is what is meant by natural rights. In other words, they are invested in human beings by the immutable laws of nature. The English jurist and political philosopher thought that the principal aim of society and principal view of human laws was to recognize, protect and enforce such rights and their full enjoyment by every individual member of society.[6]

James Wilson, (d. 1798), an American jurist of the late 18th Century and a former associate justice of the United State Supreme Court, was another advocate of the theory of natural law and therefore natural rights of men. He argued that the main function of the law was to guarantee i.e. safeguard and protect the natural rights of the individual against any encroachment by the government. To him, natural law which provides a basis for natural rights and illuminates the ends of government was a God-created absolute standard against which individual and community acts must be measured. The American natural law advocate then defined what he meant by natural rights as the right of the individual to his property, to his character and reputation, integrity and honour, his right to liberty and safety.[7] All of the above concerns the theory of natural law and natural rights. I now consider other theories of law and rights.

As for the Utilitarian theory of law, Jeremy Bentham (d. 1832) held that law is a human creation and that a good deal of law is made by judges. According to his utilitarian theory, law whether made by the judge or the legislature should be in accordance with the Utility Principle and the notion of usefulness, happiness and goodness to society as well as to the individual. So for utilitarians, every right is an ordinary one. In other words, for the utilitarians, who set out one supreme goal of happiness and preference maximization, they would accept, recognize and respect rights only if they are able to bring about their goal of the maximum satisfaction of preferences or happiness. Thus, under the utilitarian construction, an act of torture might be accepted so long as torturing suspects could bring about happiness to society.[9] On the other hand, the Austinian theory of legal positivism emphasizes the aspect of command and sanction in positive law or the command theory of law and sanction theory of duty. The positivists believe that the notion of command implies a relation of superiority and inferiority, i.e. law "Properly so called" is a command from political superiors to political inferiors which, sanctioned with a threat of evil, has to be complied with or obeyed.[10] Thus, under the Austinian doctrine of legal positivism which he developed in his school of analytical jurisprudence which strictly separates law from ethics and morality, the emphasis is on legal rights and there is no talk of any rights in the absence of clear black letter law giving such rights to the individual. This is because legal rights are conferred by statutes and by the decisions of courts. So in order for such claims, moral or otherwise, and entitlements and privileges to be given legal force there has to be an enactment of specific legal rights sanctioning or legally recognizing such claims or rights.[11] So legal rights, according to the legal positivists only exist when there is a specific black letter provision guaranteeing them.

Furthermore, somewhere near the positivist construction, but far away from the naturalist theory of law, stands the American theory of legal realism. This theory rejects the idea that there are rules of law that have weight, authority and **bindingness** in the law which the judge should look for and apply in any case before the court. Instead, legal realists have placed judges at the center of law making. They maintain that judges do legislate and that the judicial decision making process is a creative rather than a mechanical activity. Obviously, the realists would reject the idea of natural and divine law. Rather, they hold the view that judges are not bound by any existing rules, but that a rule of law is made as soon as the judge announces his/her decision. So the law of a state is that body of rules laid down by judges in the course of their determination of the legal rights and duties of the people vis-à-vis the state and vice versa.[12] So for the realists, who emphasize the centrality of the legislative role of the judge, rights are actually existent and really meaningful only in the course of the judicial process especially at the moment when the judge decides.[13] Unlike the legal positivists, who attribute the function of law to a central and superior political authority, the legal realists emphasize the central role of the judicial process in making the law and concomitantly giving, defining and

protecting the rights of the individual. It is not clear what exactly this school of philosophy is trying to establish. Do the realists want to emphasize the important role of an independent judicial system in the process of defining and ….determination of human rights? Or are they attributing to the judiciary, the legislative role of the legislature when it comes to defining and determining the scope of human rights? What is however clearly understood from the realist construction is the centrality of the role of the judge in the process of adjudication, promotion and protection of human rights. For A.V. Dicey, **another English Political Philosopher of the 19 Century, individual rights were secured not by guarantees**. Set in a formal document but by the ordinary remedies of private law available against those who interfered with those rights. In other words, the common law principles of habeas corpus and action for damages in tort to be declared by common law judges are the basis of actualization by citizens of their rights and liberties. 13

These differences in the theoretical foundations of law and rights among those leading Western legal thinkers do not very much affect the modern concept of human rights, although some controversy still exists over the precise nature, scope and extent of rights. It goes without saying that the modern concept of human rights has been influenced not only by natural law but also, albeit to a greater or lesser extent, by legal positivism, **legal realism and utilitarianism.** However, it is believed that somewhere between the thirteenth and the seventeenth centuries the meaning of the term right, an equivalent of *jus* in the Latin, shifted from doing right to possessing, owning and having a right, a claim, an entitlement and privilege.[14]

Despite the fact that some theoretical differences exist among legal experts over the conceptualization of the value of rights, they all seem to agree on two important aspects of rights first that individuals need protection against the state and government of the day is elected by the majority and that rights whether legal or moral are a necessary if not a sufficient means of ensuring that protection and second – That rights are goods which individuals own or have as theirs.[15]

1.b. Legal and Moral Rights

Rights that are created and conferred by a constitution or a legal system may be termed as pure legal rights i.e. the right to appeal, the right to make a will, the right to dispose of property that is lawfully owned and the like. However, rights that people inherently own or have whether or not they are recognized in a given statute, constitution or a legal system are called moral fundamental, natural and inalienable rights of man. They are also called politico-moral rights. These rights are not created by the legal system but it recognizes them and guarantees their implementation. These rights are said to have possessed a special value because they rest on a moral conception of persons as separate individuals of equal worth. They are sometimes called fundamental rights given that they are recognized in the constitution which is the fundamental law of the country. They are by the same reason also called constitutional rights or basic rights of man.

The civil and political rights invoked by the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man of 1789 belong to this kind of politico-moral rights.[16] We now move on to examine the nature of law and rights in Islamic law.

1.c. Law and Rights from an Islamic Perspective

The Islamic concept of law and rights is fundamentally different from what I have been discussing above. It is not utilitarian, neither is it positivist nor does Islam recognize such loose concepts as legal realism and the theory of natural law. Islamic law, on the other hand, has in the first instance to be placed, understood, interpreted and applied within the context and bounds of the Divine Revelation. Islamic law is of divine origin and its development or growth and expansion had to be guided by the fundamental principles of that revelation i.e. *al-Quran* and *Sunnah* of the Prophet (p.b.u.h). Thus, the typical nature of the law of Islam is that it is of divine origin, it is comprehensive and inclusive of all facets and activities of human life, that it addresses itself to both individual interests and those of society at large, that it is suitable for and applicable by all people of all generations and that the Islamic community id under strict divine obligation to put into effect the rules and principles of Islamic law, (albeit every generation of Islam does so in the most suitable way for the solution of its peculiar everyday problems). To sum up, the practical rules of *Shari'ah* deduced from the detailed evidence of the divine sources of Islam, constitute the juriscorpos of Islamic law.[17] Consequently, Islamic law is the only source of guidance for everything needed and related to the life of Muslims and is the heart of the Islamic system of life. This is why Islamic law has different branches or areas of discipline ranging from the rules of theology, the science of method and sources of the law otherwise known as legal philosophy, to the rules governing family life such as marriage, divorce and maintenance, the rules governing commercial transactions,

the law of inheritance, criminal law, laws governing civil matters, the law of evidence and other procedural accepts of the law.
This specific nature of law in Islam, its intimate relation and interconnection with the Divine Revelation or *Shari'ah* and the special position of *Shari'ah* in the structure of Islam as a way of life, has ruled out any possibility for that law to be separated and detached from theology, faith or religion in a true Islamic society.

So it is this law of Islam which is inseparable from its Divine Revelation that defines and determines the nature and scope of the rights of human beings in that system. It provides the necessary procedure and the right framework and regulates the process of promotion, protection and actualization or realization of those rights. According to al-Shātibī, the overriding objective of *al-Sharī'ah* is the consideration of public interests or *maslahah*. In his famous treatise, al Muwāfaqāt, this Maliki jurist has identified five basic necessities of life which are essential to the existence of life and the survival and prosperity of the human being. Their neglect according to him would result in total chaos and the eventual destruction of human life on earth. These values, whose preservation and protection is what *Shar ī'ah* is all about, are religion *(d īn*), life, (*nafs*) intellect, (*'aql*) lineage or (*nasl*) or progeny and (*māl*) property.[18] These values are to be protected by both positive and negative means i.e. by providing whatever may be necessary for their full realization and enjoyment, on the one hand, and by preventing whatever could cause or lead to their total destruction or disregard on the other.[19]

As for the precise nature of rights in Islam, some contemporary scholars believe that the majority of Muslims jurists did not or have not made any serious attempt to give an exact definition of right or *haqq*. This is perhaps because they feel that the term *haqq* which is the Arabic equivalent of the English word, "right" was so obvious that it did not have to be defined. It (*haqq*) was traditionally used to mean truth, obligation and any benefit or interest and entitlement whether material or spiritual or anything that one legally deserves or is entitled to. It is also defined as meaning both reality and truth. So anything termed *haqq* must conform to the requirements of wisdoms, justice, truth, reality and propriety. It is however, important to understand, as al-Attas explains, that the term *haqq* or right encompasses both "statement" and "actions, feelings, beliefs, judgments and the things and events in existence."[20] Thus, the values referred to under the concept of *haqq* or write include numerous values and entitlements that are all universal, indivisible and inalienable. These are what we refer to in modern time as human rights and fundamental freedoms.

Consequently, I would like to support at this junction the view held by many that, human rights and fundamental liberties in Islam are not mere entitlements and privileges that one has to have, possess and own. Rather, they are necessities of life guaranteed or given not by any human authority but by God the Almighty and must therefore be respected, promoted and protected under all circumstances. [22]

Thus human rights, as Islam teaches, must be preserved, promoted and protected under all circumstances for every human being regardless of faith, nationality, social status and of any other consideration. In other words, since human rights are necessities of life, their protection becomes a fundamental obligation falling not only upon the Islamic state but upon each and every individual as well.[23] What needs to be noted in this connection is that the concept of rights in Islam is not only placed within the context of the Divine Revelation but that it also has to be understood, interpreted and promoted or actualized under the guiding Principles of Islamic jurisprudence (Usūl a-Fiqh).

I have already stated that the overriding objective of Sharī'ah is the consideration, preservation and protection of human interests and the general well-being of the people. But what has to be remembered here according to Muslim theologians is that one of the five fundamental values and necessities that Sharī'ah aims to protect is *din* or religion and according to al-Attas, there are four primary significations for the term *din.* The first two being indebtedness and submissiveness to the will of God. The state of indebtedness requires that one should abase oneself to the service of his Master and Creator to whom the debt of creation is owed. This means that the individual must obey the laws and commandments of God the Creator and Sustainer of the universe to whom every one owes the debt to existence.[24] similarly, the submissiveness to the will of God means total obedience to God's Law i.e. to observe his commands and avoid his prohibitions. The remaining two primary significations of the term *dīn* are:

i. Judicial power i.e. that people's daily routines – commercial and all other transactional activities are to be conducted in accordance with law.
ii. The natural tendency of man to form society and obey laws and establish just governments as well as to obey God the Creator.[25] It, therefore, has to be taken as a fundamental principle of Islamic theology and law that the concept of human rights cannot be separated from and placed anywhere outside the domain of religion.

Consequently, one of the most obvious differences between the Islamic and the Western approaches to understanding human rights is that there is no room for secularism or secularization of human rights in the Islamic system where the whole concept of right is anchored into the heart of Shariah which is the divine law of Islam. This is why Islamic perception of relativism cannot be the same as that of the conventional systems.

According to al-Ghazālī, the spiritual and religious affairs of life of every individual believer have to go hand in hand with the worldly and material aspects or affairs. The two aspects cannot be separated because the basic requirements of *din* include both the spiritual and material well-being of the individual believers. [26]

Human rights are therefore an integral part of the entire structure and edifice of the Islamic way of life. Whereas most conventional political, legal, economic, socio-cultural and state systems of the modern time are premised on the principle of separation of religion from the state and state matters. Finally, what has become clearly visible from this exposition of the nature and the conceptual foundation of law and rights in Islam, is that, unlike modern Western and Westernized constitutions and legal systems where there exists the duality of individual rights and state interests, "Islamic law does not proceed from a position of conflict between the respective rights and interests of the individual"[27] and those of the state. Rather, rights of the individual, their promotion and protection form part of the main functions, duties, responsibilities and interests of the state and moreover, both the state are the individual are, on an equal footing, obliged to follow the rules of *Sharī'ah*. Furthermore, that their mutual relationship is to be conducted in accordance with the dictates of that supreme divine law. The quality of īmān, or faith in God, together with its concomitant aspects of piety, justice, honesty, sincerity and sense of responsibility, should indeed be the foundation of any bill of human rights in an Islamic state.[28]
This precise and concrete nature of rights in Islamic law was perhaps what had impressed a former judge of the International Court of Justice at The Hague, (the I.C.J) when he observed:

> Human rights doctrine in Islam was a logical development from its basic postulates, namely the sovereignty of God and the revelation to the prophet.[29]

The former judge of the I.C.J., C.G. Weeramantry, explains that from such postulates, the basic principles of human rights, including those contained in modern international human rights conventions and treaties, followed logically as a necessary part of Islamic law.[30]

Finally, a closer look at the five fundamental values that, according to Muslim jurists, Shariah has been revealed to protect and preserve, clearly shows that Islamic law has in actual fact adequately guaranteed the protection and ensured the means of actualization of all fundamental human rights and basic freedoms in cooperated in the international human rights conventions and treaties of the modern time i.e. the protection of life, religion, intellect, progeny and property has definitely included all the civil, political, economic, social and cultural rights protected by the modern international law of human rights and various national laws of the nation states of the modern time.

1.d. Can the Concept of Human Rights be Universally and Comprehensively Defined? And what Significance will that definition make?

As the above discussion of the nature of rights reveals there can be no single universal and comprehensive definition for the concept of human rights. The various philosophical perspectives just highlighted above stand to contradict one another. So to give a single definition comprehensive enough to be accepted by all is out of the question.

Similarly the continuing debate and controversy between the theories of universality and cultural relativitism over the scope and relevance of human rights is another factor ruling out the possibility of providing such a definition. While any definition by the proponents of the universality theory would stress, the universal, indivisibility, interdependent and interrelated character of human rights and that they have to be placed beyond the limits of domestic jurisdiction, the cultural relativists would advance a definition which emphasizes the need to consider human rights in their ideological, regional and national context and on the principle of respect for and non interference in the internal affairs of a sovereign state. However, given that the concept or term "rights" is used to describe a variety of relationships the following description of the concept may be recognized although it sounds influenced by the theory of natural rights: Human Rights are those fundamental values inherent in every individual human being on the basis of humanity and recognized by law both domestic and international.

Human rights in this way mean three things i.e. I – immunities, this refers to civil and political rights which protect against encroachment by the government. II – privileges i.e. economic, social and cultural rights for the realization of

which affirmative action by the government is necessary and III – power to create a legal relationship. This is a reference to the formal power of the state to pass laws and regulation in connection therewith. As, for Islam, it is just like the case is in the conventional sense, human rights define the relationship between the state and the individual and that they serve to limit the power of government.[31] What has become very clear out of this precise exposition of the nature of rights in Islam is that the current phenomenon of rampant violation and sheer disrespect and disregard of human rights in many parts of the Islamic world is purely due to attitudinal rather than doctrinal problems. In fact it is no secret that most Muslim countries of the modern time do not follow or apply Islamic law. So Islam has got nothing to do with what is happening there.

Furthermore, I have already indicated that the Islamic approach does not proceed from a position of duality between individual and state interests. So the controversy we have seen in the conventional approach will not apply in an Islamic system, because if the government does its duties properly, the rights of the individuals will receive due protection. Although some contemporary scholars have attempted to define the concept of human rights in Islam, many of such definitions are not comprehensive perhaps because they overlooked the fact that this concept has to be traced in the concept of *hukm shar'ī i.e.* the communication of the law giver conveyed in the form of a command or a prohibition which regulates the conduct of every legally responsible individual or *mukallaf*. Thus, *hukm shari* is a major concept containing a variety of other concepts including that of rights and obligations. Both the command and prohibition constitute the mandatory rules of *Shari'ah* which may require a certain action, or give a choice whether to do or not. Actions so required may be obligatory (*wajib*), recommendable (*mandūb*), permissible (*mubāh*) disapproved (*makrūh*) and prohibited (*haram*). If the enforcement of human rights requires affirmative action they may have to be fitted into one or perhaps all of the first three categories. But if they are to be realized by means of negative action then the latter two criteria may be applied i.e. the obligation to preserve life will fall under *wājib* or mandatory obligation whereas the prohibition of destroying life falls under haram or prohibition .[32] This is why I have referred to al-Shātibi's approach of dividing *maslahah* or human interest into *darūriyyāt, hājiyyāt* and *tahsiniyyāt* as the best way of explaining the precise nature of rights in Islam. Thus what matters is not to define the concept of human rights in Islam or to say what they mean but it should be to say what they are, where they should be placed and how they can be actualized in an Islamic state. And for the last one I believe institutions like *Majlis al – shūrā, qādā'*, and *hisbah* can be effective mechanisms of implementation. Before I end my discussion on this issue let me take a brief look into the position of human rights in national and international law in the past.

2. HUMAN RIGHTS IN NATIONAL LEGAL SYSTEMS

Human rights occupy prominent positions in the national constitutions and legal systems of many countries of modern times including almost all Muslim countries.

In countries like United States of America, India, Pakistan, Malaysia, Indonesia, The Gambia, Senegal, Guinea Conakry, Mali, South Africa and Ghana, fundamental rights are incorporated into the supreme law of the land or the constitution, and therefore, unchangeable by the executive authorities through an amendment process or by way of executive oders.[33]

2.a. Origins of Domestic Human Rights

Domestic human rights law is said to have begun emerging in Europe as early as 1215 when Magna Carta, the Great Charter in which the fundamental rights and privileges of the English people were guaranteed, appeared during the reign of king John and in 1688 when the British Parliament enacted the 1688 Bill of Rights.[11] This was followed later by the American Declaration of Independence and The Bill of Rights and the French Declaration of the Rights of Man of 1776 and 1789 respectively.

Unlike domestic human rights law, the international law of human rights is of a very recent development. Prior to 1945, it was still not developed because international law was generally not concerned with how states treated their citizens. Such matters were regarded as falling under the domestic jurisdiction of each State. Nevertheless, International Human Rights has its origins in the 19th century when it can be historically traced in or attached to a number of international legal documents and institutions such as the doctrine of humanitarian intervention, humanitarian law and the League of Nations.[12]

These documents and institutions, it must be admitted, were largely limited in scope and to some extent political rather than idealistic in motivation. But with all this their significance in the growth and development of international human rights cannot be underestimated.

However, what you may be interested to know at this level is whether human rights enjoyed any significant position or attention in the domestic legal and political systems of Europe and many other countries in the past. Although attempts have been made by some Western scholars to trace the origin of modern human rights in the ancient code of law of the Babylonian King Hammurabi (about 2130-2088 B.C), some legal historians of Europe admitted that the sanctions provided by this code to protect the worthy human values and other objectives, such as the administration justice, marriage and family affairs, were so disproportionately cruel that it is, in our context, preferable not to regard them as being the foundations of this newly developed branch of both national and international law.[34] The same is the case with the Roman Law which guaranteed to the Roman citizen (but not foreigners and slaves) the right to take part in the government of his country by way of participating in the exercise of the power of legislation, in the administration of criminal justice, in electing public officials and in having a share in the police power. The common law of Anglo-Saxon countries also has its own criteria, somewhat similar, to Roman law – as to what is just and fair and provides an objective yardstick for measuring people's conduct in the area of individual rights and freedom. But the two systems i.e. Roman Civil Law and Anglo Saxon common law, have maintained institutions and practices which are inconsistent with some of the fundamental concepts of modern human rights.[35] Furthermore, even the English Petition of Rights of 1628, the bill of Rights of 1688 and of course, the much earlier document known as the Magna Carta of 1215, though they all contained ideas of rights, they did not define or purport to define the basic and fundamental human rights of every individual irrespective of any consideration.[36] This is why some legal experts maintain that human rights "as a term of art" is of recent origin i.e. it goes back only to the last decades of the eighteenth century or the seventeenth century as some others argued.[37] However, there is no doubt that the modern human rights movement has been largely influenced by the Virginia (American) Bill of Rights of 1776 and the French Declaration of the Rights of Man of 1789 both of which symbolized two great revolutions in Western legal, economic and socio-political history. Thus, throughout the 19th and 20th centuries, the American and French examples of providing bills of human rights in their constitutions were followed by a vast number of countries on the continent of Europe and later in the Americas, Asia and Africa.[38] The Russian Revolution of 1917, while following the American and the French precedents by including in the 1918 Constitution some of the rights guaranteed by its Western counterparts, exhibited certain fundamental differences in its pronouncements. The Russian Constitution and, of course, its political system appeared to have viewed such rights as positive rather than negative privileges. i.e. If the American, French and any other Western or Westernized constitution prohibit any violation of the right to freedom of expression, the Russian Constitution believes that for the individual to secure and enjoy the right to freedom of expression, it must abolish the dependence of the press upon capital and that all technical and material means for the exercise of that right i.e. the publication of newspapers, pamphlets, books and similar materials should be handed over to "the working people and the poorest peasantry. Likewise, if the American and French constitutions prohibit any violation of the right to freedom of peaceful assembly, the Lenin 1918 Constitution, in order to secure complete freedom of assembly for the working people and the poorest peasantry offered to guarantee all premises convenient for public gathering, including lighting & heating facilities and furniture.[39]

What has to be noted here is that in the leninian concept of rights, the so called "working class or poorest peasantry" were not provided the choice of purposes for which such rights to freedoms of expression, assembly and the like were given, rather, it was for the state to make that choice for them. Thus, the basic difference then between the Western Capitalist and what used to be the Soviet Socialist conceptions of human rights, as seen in their national constitutions, is that while rights in the Western approach are designed in order to prevent interferences, especially on the part of the public authorities, with fundamental rights, the Soviet Socialist approach did not entertain that idea. Rather, it promised to provide and make available all technical facilities for such rights to be enjoyed by the people but it refused to promise freedom in the choice of purpose for which the technical facilities would be used.

Another difference in their domestic approaches to human rights is that the West emphasized the traditional civil and political rights.[40]

However, what I have tried to explain in this brief discussion is that beginning from the 18th century, the concept of human rights and fundamental liberties started to force its way into the national constitutions and legal systems of many countries of the world including even those of the socialist bloc and Islamic countries.

Finally, it should be noted at this juncture that all Muslim countries which have in cooperated human rights and fundamental freedoms in their national constitutions have followed the American and the French modern.

3. THE MODERN CONCEPT OF HUMAN RIGHTS IN INTERNATIONAL LAW AND THE NATURE OF INTERNATIONAL HUMAN RIGHTS

The relation or connection between international law and the modern concept of human rights and fundamental liberties is a substantial one. Although international law has itself taken from the concept of the right of man, it has given more than it has taken. This is further demonstrated by the addition of the phrase "international" to that of "human rights". Thus within the structure of the law of nations, human rights as a political concept assumes the name: "International Human Rights" or International Human Rights Law" or International Law of Human Rights.[41] In practice, but not in theory, international law's concern with human with human rights has manifested itself in two different ways i.e. through the doctrine of humanitarian intervention and the adoption of international treaties.

As far as the general concept of fundamental rights of man is concerned, it suffices here to say that, starting from the 17th century and throughout the 18th, 19th and 20th centuries, the doctrine of humanitarian intervention was and is still, on a number of occasions, invoked by the major powers, and that international treaties, as they (major power) would argue, were and are still concluded in order to come to the rescue and protection of the oppressed populations and endangered groups, to deal with matters of religious liberty, to combat terrorism slavery and the slave trade, to improve labour conditions, to arrange for the supervision and administration of certain mandated territories, to provide, under the auspices of the defunct League of Nations or the present United Nations Organization, for the protection of the rights and interests of racial, linguistic, religious or cultural minorities especially in Eastern and central Europe, Africa, Asia and South America.[42] The military interferences by the major Western powers and their allies, under the auspices of the United Nations, in Bosnia, Somalia and the Great Lake Region of Africa and the intervention by troops of the Economic Community of West African States (the ECOMOG) in Liberia, Sierra Leone, Guinea Bissau, Ivory Coast and Mali provide us with good examples. So, international law has been heavily involved in the refinement and development of many of the basic concepts of fundamental rights of man as they exist and are understood in modern times.

As for the question of when and how the modern concept of human rights might be said to have originated in international law, it is believed that attempts to discover this i.e. to seek a foundation for the fundamental rights of the individual in the Law of Nations, go back to the early or first half of the 16th century when the Spanish theologian and lawyer, Francisco Devitoria (1480-1546), who in his work, *De Indis Noviter Inventis* of 1532, gave a series of lectures about the Indians recently discovered by the Spanish settlers in the Americas.[43]

So, by strongly pleading for the rights of the indigenous Indians, Francisco Devitoria did not only influence the growth of the modern concept of human rights in international law, but he is also thought to be the first scholar (in the West) who had attempted:

> To uses "legal reasoning, moral principle and political courage in support of a cause "which might be considered as" involving human rights as well as international law". [44]

3.a. Nature of International Human Rights

International Human Rights, hereinafter, may be described as that branch of modern International Law which is concerned with the protection of individuals and groups against possible violations by governments, other institutions, and individuals internationally recognized rights in one hand and with the promotion of these rights on the other. [45] Expressions like international human rights law, international protection of human rights and international bill of human rights, are sometimes used to refer to this branch of the law of Nations (L.N.). the latter expression is however, confined to major human rights treaties concluded at the level of the United Nations i.e. the Universal Declaration of Human Rights (U.D.H.R), the International Convention on Civil and Political Rights (I.C.C.P.R), the International Convention of Economic, Social and Cultural Rights (I.C.E.S.C.R) and other subsidiary conventions dealing with human rights promotion and protection.[46] International Human Rights has, by virtue of its definition, significantly departed from the traditional attitude of international law which is usually defined as the law governing relations between nation states exclusively binding on them in their mutual intercourse.[47]

Although, the scope of the definition of international law was somewhat expanded after the first World War to include some of the newly created inter-governmental organizations deemed to deserve some or certain limited rights under international law, individual human beings were still excluded and not deemed to deserve international legal rights as such. Instead, they were said to be objects rather than subjects of international law. Furthermore, the law of Nations was in its very nature, still inapplicable to the manner in which a state treated its own people as this was entirely within the state's domestic jurisdiction.[48] Oppenheim did however, indicate that individuals might, under certain circumstances, be conferred rights and imposed duties of international law.[49] At this point however, we will conclude by saying that one of the most obvious weaknesses of modern international law is that it addresses itself exclusively to state institutions rather than individuals who make up or create and run these institutions. This is completely different from the position of the Islamic Law of Nations (I.L.N) which is an integral part of Islamic law. The Islamic

Law of Nations, otherwise known as Islamic International Law, originated in the basic sources of Islam. It is meant for all time and universally applicable to all men and institutions. This argument finds support in the legal meaning of the term *siyar*, the typical name for Islamic International Law. Juridically, it is that branch of *fiqh* or Islamic jurisprudence which regulates the conduct of the Islamic state in its relationship with other states and regulates the conduct of the believers in their relations with unbelievers of enemy or other territories as well as with the people with whom the believers have made treaties either as *mustā'mins* – non – Muslim aliens or *dhimmis* – non- Muslim citizens. Siyar also regulates the manner in which Muslims should deal with apostates and rebels or *būghāt*.[50]

While concluding my discussion of the nature of international human rights I must mention that it is, like any other system of law that purports to regulate human conduct, a normative order in the sense that its rules stipulate what ought and ought not to happen and as one expert puts it, "not necessarily what will or will not happen."[51] In other words, law is naturally unable to make things happen or to prevent them from happening. Rather it provides guidelines for right things to happen the right manner.

It is also described as a primitive law in its early stage of development, intended to govern a society which is in its collective sense, a primitive one possessing only a few centralized legislative, judicial and executive organs.[52] Thus, international human rights has the usual normative character of law and of legal rules i.e. just as there is no guarantee that a law will be obeyed, neither does it follow that all offenders or violators of the law will be punished. In fact, the likelihood of punishing those who violate the human rights law is more remote. This is because the validity of law does not depend on its being obeyed or on whether sanctions will be applied in the event of any disobedience. Instead, a law is valid in the juridical sense, if the system recognizes its source as competent.[53]

Finally, international law of human rights should not be confused with international humanitarian law (I.H.L.). The latter is concerned with human rights protection during wartime and is thus defined as "The Human Right Component of the Law of War."[54] Whereas the former, it appears, addresses itself to peacetime situations. However, International humanitarian law but it also has some influence on the latter.

3.b. Socio-political Importance of International Human Rights

The domain of modern human rights is a multi-disciplinary subject. It has been the product of different powerful Socio-Cultural forces that have come together to constitute and shape human society. Consequently, human rights have become the meeting point of a large number of academic disciplines which sprang out of those Socio-Cultural forces i.e. historical, philosophical, religious, legal, social, cultural political and economic forces.[55]

Thus, it is against this highly exciting background that the importance of international law of human rights and indeed the role of the United Nations and the regional and Sub-regional systems in its rapid growth should be valued. Although the development of international human rights norms and standards predate the inception of the United Nations Organization, it is a well-known fact that the end of the Second World War and the subsequent establishment of the U.N.O had substantially contributed to the restructuring, definition and rapid growth and development of international law in general and the development and crystallization of international law of human rights in particular. The period from 1945 to the present day has been witnessing the fast growth and virtual crystallization of a new branch international law which has in turn, drastically changed and reshaped the field of international legal and political relations among member countries of the community of nations. The long standing attitude of international law towards individuals as objects and not subjects have virtually been changed and the scope of its traditional doctrines of domestic jurisdiction and non-intervention in the internal affairs of a sovereign state have been drastically limited or narrowed down by the advent of international law of human rights. Since the end of the Second World War, a large number of human rights treaties, both global and regional, have been concluded under the auspices of the United Nations and other regional groupings, and then signed, ratified or acceded to and in some cases incorporated into domestic laws. All those international human rights instruments are mainly concerned with the socio-economic, political, civil and cultural rights of the individual based on the philosophy or fundamental principle of his being a human, his human worthiness and inherent dignity as such.[56] Earlier, the U.N. Charter was also equipped with comprehensive provisions on human rights which provide the basis for elaboration of the vast materials on international law of human rights that have later been concluded by the United Nations. The human rights provisions of the U.N. Charter recognize the close relationship and intimate nexus between respect for the human worth of the individual, on one hand, and peace, tranquility and prosperity or socio-economic progress of the individual and society at large on the other.[57]

Likewise, the Universal Declaration of Human Rights recognizes that in order to save man from the scourge of wars, from the outrages of barbarism, oppression, racial and ethnic discrimination and other socio-political and economic injustices which sometimes necessitate rebellions and in order to secure and ensure international peace and security,

it is necessary to establish a just international order and that respect for human rights should be the paramount and essential foundation for the establishment of that order.[58] In other words, recognition and respect by everyone, of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of peace, freedom, justice and prosperity in the world. This is an axiomatic fact because experience has shown that disregard and contempt for fundamental human rights have often resulted in barbarous and brutal rebellious reactions which ultimately would deeply shock and outrage or injure the conscience of mankind. The internal conflicts that hit the Horn of Africa, the Great Lake regions and North and West Africa regions during the current decade are a good example.

In the early 1980s due perhaps to the active involvement by UNESCO and other U.N. specialized agencies in the promotion of international peace, economic development and education and research, certain values and norms began to take shape within the structure of international law of human rights.

These international values or rights, identified by some experts as "the five cardinal human rights" are: "the right to peace, the right to development, the right to a healthy environment, the right to enjoy the common heritage of mankind and the right to humanitarian assistance."[59]

In 1986 the General Assembly of the United Nations recognized the right to development as a collective human right.[60] It is however; important to note that all these five rights are collective rights and those that belong to the so-called third generation rights.

Thus, the importance of the modern international law of human rights to the socio-economic, civil, political and cultural life and development of the individual is clearly visible in the provisions of the Universal Declaration of Human Rights and of the two human rights covenants adopted by the United Nations in 1966 in furtherance of the human rights provisions of the Charter. They have called for and in most of the cases secure for the individual, the precious rights to life, liberty and security of person, the rights against torture, slavery, arbitrary arrest and detention/exile, the right to fair trial, the right to freedom of movement, of thought, freedom of religion and conscience, to freedoms of opinion or of expression, assembly and association and the right to freely participate in the government of one's country.[61] The socio-economic rights they called and guaranteed for the individual include, the rights to work, to an adequate standard of living which ranges from enough food, clothing, housing, medical care and the like, to the right to education etc.[62]

Whereas the cultural rights include the right to participate in the cultural life of one's community in all aspects, the right to share in scientific advancement and the right to the protection of the moral and material interests resulting from one's scientific, literary and artistic production.[63]

Most of this wide range of rights has now forced its way into many national constitutions and the legal system of many countries. As we already stated in this section, international law of human rights has introduced some drastic changes in the domain and course of international politics. The most obvious of these changes is that the scope of the traditional doctrine of domestic jurisdiction has been severely curtailed so as to exclude gross violations of human rights by states against their own citizens. This has now become a matter of concern for the international community as a whole. Under chapter 7 of the U.N Charter the Security Council is mandated with the power and authority to take necessary measures to deal with the problem of armed conflicts and any situation or act of aggression that breaches or threatens international peace and security.

Today serious denials of human rights or gross violations of fundamental rights by a state, of its own citizens are viewed as constituting a cause for armed conflict or a breach or a threat to international peace and security and therefore prompting the U.N. Security Council and even sometimes, certain major powers and regional groupings to intervene in the internal politics of that country.

The civil wars that we witnessed during the last and the present decades in the Balkans, the Great Lake Region, in the Horn of Africa as well as in West Africa, in the Middle and Far Eastern countries, and the interventions of regional, sub regional and other blocks in those conflicts clearly illustrate the point under consideration.[64] Themes like prevention of genocide, war crimes and crimes against humanity, gross violation of fundamental rights of the people and fighting against drug trafficking and international terrorism have been used by major powers, like the United States of America and the EU not only to have or maintain strong political influence and secure huge economic and political interest but also to establish military bases and to keep and apply effective strategies in certain strategically important countries in Europe, the Middle East, Asia and Africa.

Similarly, due to the strong impact of the global human rights movement, heinous crimes and inhumane practices like slavery and the slave trade, apartheid, racial segregation and all sorts of racial, sexual and other forms of discrimination which were once legitimized or accepted as part of the political process in countries like the U.S.A. and South Africa have now been outlawed at least in theory by international Law and their own domestic measures. However, we must admit that such discriminatory practices have in actual practice not completely disappeared in those and many other countries. In the United Kingdom, where the government functions without a completely written constitution and a bill of human rights, relentless efforts are being made for the E.U. Human Rights Convention to be eventually incorporated into domestic law and thereby providing the British citizens with their first ever comprehensive Bill of Human Rights.[65] Likewise, the Declaration on the Granting of Independence to Colonial Countries and People adopted by the General Assembly of the United Nations in 1960 has an important effect in decolonizing many Afro-Asian Dependent territories of the time.[66]

Thus, by becoming independent from Western colonialism and political domination, the people of those dependent territories and colonies, especially in Africa and the Caribbean countries, have had the tremendous opportunity to fully enjoy their basic and inalienable right to self determination i.e. to determine their political fate and to shape and run their political and economic institutions by themselves.

Furthermore, human rights have always gained a prominent and conspicuous position in the foreign policy agenda of the major Western European countries and of the United States government. These countries have always included the promotion of and respect for human rights among their foreign policy objectives. Governments in these countries are sometimes faced with the problem of deciding whether, when and in which country, they would give a higher priority whenever the question of respect for and promotion of human rights of their own people became an issue as compared to others, foreign policy objectives, such as national security, international trade and similar huge economic and political interests and other forms of co-operation.[67] Despite all these problems, the major powers of the world often warn state offenders and violators of human rights that their wrongful acts will not go unchecked and that economic and other benefits may be affected. So, the former labour government of Prime Minister Tony Blair had repeatedly warned that the United Kingdom will not sell arms or give aid nor will she grant licenses to export arms and weapons of strategic importance or even to give significant development aids to any state which violates human rights.[68]

Some of the major powers would sometimes refuse to give foreign aid or economic and military assistance or to engage in any bilateral or even multi-lateral transactions with countries they accused of being involved in massive human rights violations against their own citizens. During the Bulkau War the United State and her Western European allies imposed wide ranging economic, trade, diplomatic and military sanctions against Serbia for the Latter's atrocities and gross violations of human rights in the former Yugoslavia i.e. in Bosnia, Crotia and in the province of Kosovo.

There is, however, a major cause for concern with regard to the use of human rights as a foreign policy objective in the conduct of a country's foreign relations. That is, the major powers sometimes use double standards especially during the days of the Cold War, in their attitudes towards South Africa before the end of the apartheid era and toward the Arab-Israel conflict. The United States for instance, would be prepared to punish Iraq, Iran, Libya, Sudan Syria and Cuba for what she terms as gross violations of human rights or for failing to honour a U.N. Security Council's binding resolution, while she is doing absolutely nothing against Israel, despite the fact that the Jewish State is always accused of human rights violations. Israel persistently violates international law and arrogantly disregards the U.N. Security Council's resolutions. Just few years ago, Israel has come under severe critism by the United Nations for the former's continuous use of torture against the Palestinian suspects and detainees. The Jewish State, however, defended itself by describing her action as a legitimate method of interrogation.[69]

In the same way, in countries where the major Western powers have maintained huge political and economic interests, such as those of the Arabian Gulf and the Middle East, massive and systematic violations of human rights are often ignored, simply because they do not want to embarrass or anger their political allies in those countries and thereby jeopardizing such economic and political interests. While in those countries where they have few interests and the rulers are not on good terms with them (the Western powers) especially when they reject the Western version of democracy like Cuba and Venezuela for instance, every bit of human rights violation is blown out of proportion and reported by the most reputable international media organizations. This kind of double standard is, in my opinion, a result of their over-politicization of international protection of human rights which is doing great harm to the global human rights movement and eventually retarding the rapid development of international law in that area.

We now turn our attention to the impact of the global human rights movement in the Islamic World.

4. THE IMPACT OF THE 1948 HUMAN RIGHT REVOLUTION ON THE MUSLIM WORLD

Finally, the global human rights movement has also pervaded almost all parts of the Islamic World. There are several examples showing how the international human revolution has left its footprints on various sports of international world.

First, most Muslim countries on the three continents of Europe, Africa and Asia have either signed and ratified or acceded to the main international human rights conventions which constitute the backbone of international law of human rights i.e. The U. N. D. H R, the I. C. C. P. R. the I. C. E. S. C. R and other subsidiary conventions. Human rights movements and associations have been formed in most of these countries i.e. Egypt, Sudan, Pakistan, Malaysia, Nigeria, Turkey, Senegal and the like. Similarly, their respective constitutions have given substantial recognition to most of the modern norms of human rights. The constitutions of Malaysia, the Islamic Republic of Iran, the Islamic Republic of Pakistan and the Gambia's 1994 constitution can be cited examples.

Second and most importantly there has been a series of conferences on human rights in Islam held in Tehran – Iran and Cairo – Egypt in recent years. In January 29th – 31st 1987 the Iranian government organized an international conference on human rights in Islam. At the conclusion of the conference delegates who came from different Muslim countries affirmed in their recommendations that being a way of life that conforms to the nature of man, Islam has provided its followers with all the necessary human rights and fundamental liberties. These include the right to respect for the dignity of the human person, the rights to life, equality and non-discrimination, the rights to freedom and security.[70] Similarly all Muslim countries in Africa with the exception of Morocco are active members of the African human rights system and signatories to the African Charter on Human and People's Rights.

4.a. The Universal Islamic Declaration of Human Rights

Another possible influence of the Human Rights Revolution in the Islamic East is the introduction or adoption of the Universal Islamic Declaration of Human Rights adopted in 1981 by the International Islamic Council of Europe in Paris, France. The Islamic Declaration comprises a preamble and 23 articles covering a wide range of human rights which are essentially the same as those found in modern international treaties on human rights. In its preamble the Islamic Declaration emphasizes the divine origins of human rights as they were drawn from *al-Qurān* and *Sunnah*. So for this reason the rights were eternal, inalienable and can under no circumstances be suspended, abrogated and tampered with by any human authority or institution, except only in accordance with strict procedures established by *Sharī'ah*. The Islamic Declaration then affirms in the preamble its conviction that the recognition, respect or acceptance of the rights it declares is a prerequisite for the establishment of a true Islamic society based on the principles of *tawhīd*, (belief in the absolute or oneness of God) justice, equality, the rule of law or supremacy of *Sharī'ah* and equality before the law as well as government by *amānah* or trust and accountability – both to God and to the people. All of these, according to the Declaration, were the foundations of peace and prosperity of the people. The wide range of rights contained in the Islamic Declaration include the following: The rights to life, [71] to liberty and security of person[72] to equality and to equal opportunity for the use of the natural resources by all, [73] the rights to justice i.e. equal and easy access to justice,[74] to fair trial,[75] the right to be protected against the abuse of power by government authorities,[76] the right against torture,[77] the right of the individual against defamation of his /her character,[78] the right of refugees running away from oppression, tyranny and injustices to be granted asylum,[79] the rights of the minorities,[80] the right of the individual to take part in all aspects of public life including of course, the political life,[81]the right to freedoms of thought, belief and expression,[82] the right to freedom of religion,[83] the right to freedom of assembly, association and to take part in *Da'wah* or the propagation of Islam,[84] the economic rights i.e. to work, development, private ownership and to initiate investment projects,[85] the right to establish a family,[86] the marital rights of women,[87] and a number of other rights.[88]

Finally, it should be noted here that Islamic Council of Europe is neither an official organ of the Organization of Islamic Cooperation (O.I.C), nor does it represent any Islamic country or group of countries and that its declaration on human rights has not yet been adopted by any Islamic country. Nonetheless the fact the principles and individual rights established in the universal Islamic Declaration of Human Rights are substantiated in the general principles of Islamic law as stipulated in the Holy Quran and Sunnah of Prophet (SAW) makes it absolutely important and very relevant to and part of the International Human Rights Revolution.

5. ISLAM AND THE ORIGIN OF INTERNATIONAL LAW

Many Western European writers and legal experts often claim that the modern law of human rights, like any other rule of international law is a pure product of European Christian civilization. According to them, international

law is the product of the European mind and beliefs and is therefore based on European state practices developed and consolidated during the last three centuries.

The Westerners argue that, due to the impact of colonialism, Asian and African countries lost not only the ancient rules which they used to observe in their inter-state conduct but also lost their international status and personally as members of the family of nations. For this reason, Afro-Asian countries were unable to play any role in the formulation and consolidation process of international law.[89]

While Hugo Grotius a sixteenth century Dutch jurist, is identified as the founder of modern international law, the modern concept of human rights in the West is claimed to have its origins in the Magna Carta of Britain which contained principles of trial by jury, habeas corpus and the control of Parliament of taxation. However, the claim that habeas corpus has its origin in the Magna Carta, is itself debatable. In other words it might have been taken from religion because as Syed al – Attas says: "The legal concept of habeas corpus (you must have the body) as a fundamental procedure of justice is perhaps only a mere imperfect reflection of awesome and irrefutable procedure to come."[90]

In this part, the essay examines Islamic rules of inter-state relations which offer a precedent refuting the above assertion. We do not know what they mean when they claim that international law is a product of Western Christian civilization and that the modern concept of basic human rights originates from the Magna Carta of 1215.

We in the developing countries will however, disagree with this view, because their ideas in this regard are tantamount to saying that before the 16th century the whole world was steeped in absolute ignorance, barbarism and savagery. This, of course, was steeped in absolute ignorance, barbarism and savagery. This, of course, was not the case since every fair-minded person, Muslim or otherwise, who knows a little about Islam and Islamic history, would readily acknowledge the great contribution that Islam made. They would similarly be aware of Islam's huge impact upon human civilization, cultural refinement and enlightenment through its vast heritage of knowledge and belief – the richest ever known to mankind. As already indicated, it is not correct to generally conclude that before Grotius the world did not know about nor have rules of inter-state conduct presently known as the Law of Nations. It is proved beyond reasonable doubt that even in Europe itself there were some people who well before the Dutch jurist, spoke about rules of conduct among nations. These included some early 16th century Spanish theologians like Francisco DeVitoria, Francisco Suarez and the Italian jurist Alberico Gentili.[91] As from the Islamic perspective, I would call it an insult to all Muslims to say that their system of belief has not provided clearly defined and cohesive of Inter-state relations

Furthermore, it is confusing to claim that international law is a product of Christian civilization when its founding father Grotius himself admitted that up to the time he was writing his work, Christian people and countries throughout the world had no law regulating the conduct of warfare. He was quoted as saying:

> I observe everywhere in Christendom a lawlessness in warfare of which even barbarous nations would be ashamed. Nations would ruche to arms on the slightest pretext or even without cause at all.[92]

Grotius was referring to the law of war presently known as international humanitarian law which is the backbone of modern international law. The question posing itself here is how is it reasonable to claim that international law is a product of Christian civilization and? Indeed, which Christianity are we referring to? Is it the original and true one or the Westernized or secularized version of it?

We are saying this because from the Muslim point of view, as Syed Al-attas explains, "there are two Christianities, the original and true one and the Westernized version of it. Original and true Christianity conform to Islam."[93] However, it is worth mentioning at this juncture that the secularization process which Christianity has undergone in the West has its origin not in the biblical faith as one might be deceived in believing, but in the misunderstanding and misinterpretation of the biblical faith by the European philosophers.[94] Which is one of the reasons why the difference between Islam and Christianity has become a fundamental one. Regarding the Muslim's contribution to international law, every fair-minded jurist would not deny the fact that Muslims have written by great scholars of Islam who lived in its early days. I would say, with all confidence, that the first scholar to write about international law in the history of human civilization was Imam Muhammad Ibn al-Hasān al-Shājbani, one of the founding fathers and the most authoritative jurist of the Hanafi School. Some Western Scholars, I have learnt, to my astonishment, refer to al-Shāybāni as the Grotius of Islam, although he died almost eight hundred years before Grotius.[95] The reverse would seem to be more apt i.e. Grotius is Al-Shāybāni of the West. This jurist who wrote his work, in the early days of Islam and died in 182 of the *Hijrah* (d. 804 while Grotius died in 1645) dealt with many aspects of the law of warfare and

many other issues relating to mutual legal relations between Muslims and non-Muslims both at state and individual levels.[96]

Similarly, many other Muslim jurists produce extensive treatises on the subject of Islamic International Law. They include Ibn Hisham, Ibn Ishaq, Sarakhsi and others. Furthermore, these scholars did not create the rules of Islamic International Law on their own, instead, they deducted them from the most basic sources if Islam i.e. *al – Qurān* and *sunnah* of the Prophet himself and those concluded at the time of the four rightly guided caliphs.[97] This is because, *siyar* or Islamic International Law is an integral part of *fiqh* or Islamic law. Thus, the only sense in which Western Writers could be correct and justified in attributing the growth and development of international law to themselves is, when they mean those rules of inter-state conduct based on the idea of humanism and secular principles which are completely devoid of religious or divine origin, inspiration and guidance.

In another development, it is equally incorrect to claim that human rights are of Western origin and that they are the product of the Western mind and civilization.[98]

It is however important to note that Magna Carta came into existence about six hundred years after the advent of Islam Moreover, it is believed that the principles of basic human rights found in the Magna carta were included therein unconsciously because until the seventeenth century no one in the Western world knew that the English Charter contained those basic rights already alluded to.[99]

Muslims, on the other hand, had for many centuries before the Magna Carta, been enjoying what are now being called the basic or fundamental rights of man. This reality may not be clearly visible to or understood by non-Muslims or Western scholars who fail to realize that, in the Islamic system of belief, there does not exist in the duality that they have created between religion and state, philosophy and theology or between the spiritual and material life of man. Thus, in Islam, rights are not granted by any king or a legislative assembly or by a dictator. Instead, they are given by God the Absolute Sovereign. For this reason no king, dictator, legislative assembly or government on earth has the power, right or authority to interfere with these rights. They can, under no circumstances, be suspended, withdrawn or violated in any way. Human rights in Islam, in the words of Maudūdī,

> are not like those basic rights which are conferred on paper for the sake of show and exhibition and denied in actual life when the show is over; nor are they like philosophical concepts which have no sanctions behind them.[100]

The Islamic principles containing the human or basic rights of man are found in the primary sources of Islam i.e. *al – Quran* and Sunnah of the Prophet (S.A.W) as well as the traditions and administrative practices of the four rightly guided caliphs and those of their successors.

In the same way, many early Muslims rulers, thinkers or jurists and writer had either spoken or written about people's right to have their dignity, human worthiness and freedom as well as the security of the person and life preserved and respected by others.

In *al-Quran* (40:13), Allah says that he created mankind from a single pair of a male and female and that tribes, races, nations into which they are made are just convenient labels by which they recognize each other and identify their differing characteristics and not for them to despise or look down upon one another. Indeed the verse continues, he most honoured of mankind in the sight of God is he who is the most pious or righteous of them. This verse established the most fundamental principle of the rights of a human being to equality, the right to respect for one's personal dignity human worthiness. According to al-Tabarī, to be most righteous means to be punctual, regular and sincere in performing one's obligation imposed by Allah and that it is only this way that one can be better or higher in status than others who are trailing behind.[101] This verse also embodied the right of everybody against discrimination based on sex, race, social status and any other consideration. According to al-Qurtūbī, the verse was revealed on the day of *fath Makkah* or the conquest of Makkah to dismiss any form of discrimination in Islam. He said, the whole issue was triggered when some of the companions uttered racist remarks against Billal who was ordered by the Prophet S.A.W to call *ādhān* immediately after the conquest.

Al-Qurtūbī quoted one of these racist remarks attributed to al-Harith Ibn Hishām who allegedly said: "didn't Muhammad find anyone to make ādhān except for this black eagle.:" (Bilāl). He concluded that by virtue of this verse there can be no grounds for the superiority or preference of one person or group over another just because of race, sex, social status or any other consideration other than that already mentioned i.e. on the grounds of piety and righteousness.[102] In the *sunnah*, there is a large number of traditions embodying the principle of respect for human dignity and for all privileges or rights granted to man by God.

Some of these traditions made it clear that, apart from piety or righteousness, there does not exist in Islam, any grounds on which a person or group of persons can claim superiority, virtue or honour over another or the rest: your lord is one, your father (Adam) is one and that an Arab is not better than a non-Arab, nor a non-Arab is better. Likewise, a red (white) man was not better than a black man and nor a black was better than a red man. The best and most honoured among you is he who is the most pious and righteous.[103] In another tradition reported by al-Būkhārī, the Prophet (S.A.W) said that "the best among all the people is he who is sacrifices his life and Property on the path of Allah.[104]

In similar tradition reported by al-Tabārī, the Prophet (S.A.W.) said that no one is more virtuous, privileged or advantaged than others (in the sight of Allah) except by dīn.[105] In all these traditions the word "*fadl*" or its derivative "*afdal"* is used and according to Ibn Manzūr the term *fadl* has got many significations. Such as, increase, betterment, priviledge, advantage, distinct position and a state of being discriminated or given special favourable treatment.[106] Thus the principle of equality and non-discrimination which is one of the pillars of modern international law not only has its origins in the most basic sources of Islam, but was also practically demonstrated by early Muslims rulers, scholars and thinkers.

As for the Sahābāh, the four rightly guided caliphs were known to be strict in their adherence to the Islamic Principles of justice, respect for human dignity and people's rights and freedoms during their successive administrations.

Umar Ibn al-Khatāb, for instance, was famous for being scrupulously strict, just humble and very keen to see that the rights or interests of the masses were promoted and protected. His rule was just perfect and, as far as I can understand his administration practically demonstrated the twin principles of responsible and limited government more than anyone else who came after him. In fact, these concepts have remained a mare high idea or dream yet to be achieved by governments of the so-called modern period.[107] The second caliph was one day quoted as saying "why should you enslave the people when they are born from their mothers, free.[108]

Umar said these strong words as a warning and admonition to his governor to Egypt, Ibn al – 'As. It is reported that a son of Ibn al'Āas had taken part in a horse racing event with some ordinary Egyptians. At the end of the race, scuffles broke out between the son of the governor and his opponents in the event. Consequently, he beat one of them severely, claiming that he was the son of the honourable (governor). When the whole story was reported to the Caliph, he summoned the governor and his son to his headquarters in Madinah and ordered the victim to take his revenge on both Ibn al'Ās and his son. This is because the latter used and abused the former's power to act aggressively towards others.[109]

Among the early Muslims thinkers and jurist who spoke about people's rights was Abū Yūsuf Yaqūb a co-founder of the Hanafi School. In the introductory part of his book (*Kitāb al-Khārāj*) he advised the then caliph, Harūn al-Rashīd, to treat his people equally, to protect their rights and interests and makes sure his government was founded on the pillars of *taqwā* or righteousness. He warned that any government not built on righteousness would just collapse.

Similarly, Abū Yūsuf warned the caliph against corruption and corrupt practices in the administration. To him, justice i.e. (putting everything in its proper and rightful place) was the only guide for rulers.[110] In view of the above exposition of the position of rights in Islam, I would say that the question is not about their origin but about how they are understood and interpreted in a given context or civilization.

It is my view that the same misunderstanding and misinterpretation that the West had regarding the biblical faith is being repeated with regard to the modern concept of human rights whose contents are considered by Westerners in the context of a purely secular perspective. For this reason, I would suggest, the scope of freedom or liberty in the West continues to expand and it is today claimed to have included acts or activities which are quite contrary to God's commandments. Acts like marriage of a couple of the same sex, and the rejection of one's own faith are being endorsed or approved in the West under the pretext of freedom. Human rights campaigners in Britain and Australia have recently been calling their respect governments to decriminalize lesbianism and homosexuality. They argued that the laws penalizing these offenses were violative of people's basic right to freedom.[111]

If the concept of human rights understood and interpreted in this way, is what they refer to when they say: human rights are Western in origin, I have no objection because, in Islam rights are weighed against duties and responsibilities. They are interpreted in the context of the Divine Revelation from which they have been drawn.

Thus, in Islam there can be no right to perform any act or practice which violates Gods commandments, so the scope of freedom in Islam cannot be extended so as to cover any act that goes against Islamic principles. This is because

freedom in Islam means that man should be consciously and willingly, submit himself to the will and commands or authority and the law of God.[112] This perhaps is one of the reasons why the Islamic way of life is referred to as dīn, a term which in its most basic form reflects in true testimony, the natural tendency in man to form societies and obey laws, of course Gods law and to strike for or seek just government.[113] I will conclude my discussion of this issue by registering my subscription to and complete agreement with Syed al-Attas that the problem with Western man is that he is inclined to regard

> His culture and civilization as man's cultural vanguard and his own experience and consciousness as those representatives of the most evolved of the species. So that all the people are in the process of lagging behind them.[114]

In spite of Islam's unprecedented contribution to the history of the emancipation and enlighten or cultural refinement of mankind and the great importance it attaches to the preservation and protection of people's interests and rights, a considerable number of Muslim countries have been involved in systematic and persistent violations of their people's basic rights. These range from various forms of harassment, arrest and detention, imprisonment, sending into exile and in extreme cases, killing of their political opponents in the name of curbing religious or Islam extremism or fundamentalism. However the latter term is created by their Western political allies and former colonial powers and therefore alien to Islam. This criticism of Muslim governments does not however, intend to exonerated Western or non-Islamic countries from gross violations of basic human rights. In fact, some of the worst and the most sophisticated violations of human rights take place in those countries often called the major powers of the world. They are often accused of systematic torture of detainees, initiating racially motivated proceedings against certain minorities and the imprisonment of conscientious objectors.[115] This issue will be dealt with in detail in the following chapters.

Lastly, it may be pointed out that even some of those at the International Court of Justice in The Hague would acknowledge that Islam has contributed enormously to the development of international law and human rights. A former judge of the I.C.J. from Sri Lanka believes that his has happened in many ways: first, the relationship between man and God is vertical whereas that between him (i.e. man) and his fellow human being is horizontal and when man's vertical relationship with his creator receives due care the horizontal and when man's vertical relationship with his creator receives due care the horizontal relationship between him and his fellow humans, tends automatically to receive due attention. This is because duties imposed by God are comprehensive and all encompassing. In other words, human rights are best promoted and protected through our performance of God's commandments.

Second, the principle of Trust, *amānah,* is another way in which Islam has contributed to the development if international law, especially the newly emerging international environmental law. By virtues of this principle, man is told to use the earth and everything on it as a trust property and should therefore not abuse, spoil or destroy the environment. The exercise of political power or government authority and the conduct of international relations also come under the principle of *amānah.*

Thus, Islam in his opinion fertilizes universal thinking in the field of human rights and international law through many of its notions and concepts i.e. the notions of universalism, brotherhood and solidarity, human dignity, supremacy of the law, limited sovereignty, the right to privacy, presumption of innocence and many more. While other non Muslim scholars acknowledged that the right to freedom of religion has from the very beginning, been entrenched in the Islam tolerated other religions. They conceded that Islamic recognition of other beliefs as being of divine origin is the theological basis for its (unprecedented) toleration of non Muslims.[116] Similarly; African and Asian countries have influenced the growth and development of modern international law and human rights. After gaining independence, Afro-Asian countries have, due to a high level of solidarity and c0-operation in a number of important issues, influenced the growth of contemporary international law i.e. rights of refugees, questions of legality and the banning of nuclear tests, reciprocal recognition, the right to self-determination, fighting terrorism, enjoyment of media rights and the like.[117]African cultural tradition is also said to have contained basic norms and ideas of respect for human dignity, rights and liberty.[118]

6. CONCLUSION

In conclusion, the main objective of this article was to study and establish the true nature and real meaning of human rights and law and the extent to which human rights can and should be applied and respected by all within the legal systems and civilizational contexts of the various nations of the modern time despite the existence of vast differences in their political, cultural, religious, geographical backgrounds and legal systems.

The paper would therefore, concluded that regardless of all the differences surrounding the modern concept of human rights - be they conceptual, philosophical and historical backgrounds, cultural, religious beliefs, ethnic, geographical and linguistic variations or legal and political systems of nations, there seems to be a general consensus among peoples of different civilizations and legal, cultural and political systems that the individual human being needs protection and must be protected against the state and society in general from any act of aggression, abuse and disrespect of his dignity and rights under all circumstances.

The differences highlighted above in the theoretical foundations of law and rights among nations of different civilizations do not necessarily affect the value, content and usefulness of application and actualization of the values and principles in cooperated under the modern concept of human rights, although some controversy still exists over the precise nature, scope and extent of some of the rights guaranteed by the International Human Rights Conventions.

In other words, despite the fact that some theoretical differences exist among legal experts over the conceptualization of the value of rights, they all seem to agree on two important aspects of rights first that individuals need protection against the state and the government of the day which is elected by the majority to serve popular interest. Similarly, those rights whether we call them human, legal or moral, they are a necessary if not a sufficient means of ensuring sustainable peace, security and stability of society at large. Second – that human rights are goods which individuals own or have as theirs under all circumstances. As from the Islamic perspective of rights the paper has concluded that Human rights are an integral part of the entire structure and edifice of the Islamic way of life. This is in total contrast to almost all conventional political, legal, economic, socio-cultural and state systems of the modern time which are premised on the principle of separation of religion from the state and state matters. According to al-Ghazālī, the spiritual and religious affairs of life of every individual believer have to go hand in hand with the worldly and material aspects or affairs of life in general. The two aspects cannot be separated because the basic requirements of *din (way of life)* include both the spiritual and material well-being of the individual believers.

Finally, what has become clearly visible from our exposition of the nature and the conceptual foundation of law and rights in Islam, is that, unlike modern Western and Westernized constitutions and legal systems where there exists the duality of individual rights and state interests, Islamic law does not proceed from such a position of conflict between the respective rights and interests of the individual on one hand and those of the state on the other. Rather, rights of the individual, their promotion and protection form part of the main functions, duties, responsibilities and interests of the state and moreover, both the state and the individual are, on an equal footing, obliged to follow the rules of *Sharī'ah* governing the Islamic obligation of protecting the dignity, human worth, life and basic rights of the individual.

7. End Notes

Law and Rights in General: Some Theoretical Foundation.

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(1987)
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Philosophy. 22-42 (1978)

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Political Writings 132-154 (1991).
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[19] Ibid.
[20] Al-Attas, Islam and The Philosophy of Science 18 (1989). Also see,
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ii. Qutūb Muhammad Qutūb, Islam wa Huqūq al-Insān-Dirāsatun Muqārānah 32-34 (1984).
[21] Al-Māwardi, Al-Ahkām al – Sultāniyyāh. 319-322 (1985).
[22] 'Amrah, Al-Islām wa Hūqūq al-Insān: Darūrātun la Hūqūq 14-17 (1405 A.H./1985).
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i. Maudūdi, "Human Rights, The West and Islam" Human Rights in Islamic Law 1 – 3 (9993).
ii. Khan, "The Universal Declaration of Human Rights and the Human Rights in Islam – A comparative study, Ibid., 65 at 69.
[24] Al – Attas, Prolefomena to Metaphysics of Islam – An exposition of the Fundamental Elements of the World View of Islam 41 – 69 (1995)
[25] Al – Attas Ibid.
[26] Al – Ghazālī, Al – Iqtisād final – l'tiqād 135 (N.D.).
[27] Kamali, Freedom of Expression of Expression in Islam 18 (1994).
[28] Al-Mawardī, Adāb al Wazīr 3 – 4 (1994)
[29] Weeramantry, "Islam and Human Rights", Human Rights in Islamic Law 3.
[30] Ibid
[31] Dixon and McCorquodate, Cases and Materials on International Law 192 – 94 (1995). Also see, Australian Legal Dictionary, S.V. "Human Rights".
[32] Kamali, Freedom of Expression of Expression, 18. Also, Mahmasani, Falsafat al – Tashrī fi al Islām 14 – 17 (1946).
[33] See Arts 6, 13 and 8 of the American, Indian and Pakistani Constitutions respectively. Also Sec. 4 of the Gambian Constitution article 7.
[34] International Encyclopaedia of Social Science, (1972 ed.) S.V. "Human Rights", by Schwelb.
[35] This is a reference to the practice of slavery under Roman and the absence of a written constitution and a Bill of Human Rights which limit the powers of modern government, as well the notion of parliamentary supremacy under English common law. See Ibid.
[36] See these documents in Gisbert's Constitutions of the Countries of the World 71 – 151 and 273 (1997).
[37] Schwelb, Human Rights, 540
i. Abdal Rahim, Fikrat Hūqūq al Insān, 40.
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[39] Arts 39 – 69 of the Russain Constitution of 1918 as amended in 1977. See Simons (ed.) The Constitutions of The Communist World 343 at 362 – 368.
[40] Schwelb, "Human Right", 541.
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54 Buergenthal, International Human Rights, 14.
55 Weeramantry, Justice Without Frontiers: Furthering Human Rights 4 – 5 (1997). Also see: O. D. Schutter, International Human Rights Law, 3 – 5 and 4 – 146 (2014)
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60 Quoted in Ibid.
61 Arts. 3,4,5,9,10,13,17,18,19,20 and 21 of the U.D.H.R and the corresponding articles of the International Convention on Civil and Political Rights 1996 (The I. C.C.P.R.)
62 Arts. 23,25and 26 of the U.D.H.R and the corresponding articles of the International Convention on Economic Social and Culture of 1996 (The I.C.E.S.C.R)
63 Art. 27 of the U.D.H.R and the corresponding articles of the I.C.E.S.C.R.
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66 U.N Reso. 1514 (tv) see BrownLie, Basic Documents on Human Rights 28 1992). It is interesting to note that when this declaration was being adopted the major colonial powers i.e. U.S.A., U.K, France, Spain and Portugal abstained from voting. See Ibid.
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70 See the U.N.'s Chart of Ratification issued in 1996. Also see Human Rights in Islam Papers Presented at the 5th Islamic Thought Conference in Tehran – Iran, from January 29 – 31st 1987 p. 10 (1978).
71 Att. 1
72 Art. 2
73 Art. 3
74 Art. 4
75 Art. 5
76 Art. 6
77 Art. 7
78 Art. 8.
79 Art. 9
80 Art. 10
81 Art. 11
82 Art. 13
83 Art. 15
84 Art. 14
85 Art. 15
86 Art. 19
87 Art. 20
88 The remaining three articles 16,17 and 18 deal with the right of the individual against any encroachment on or interference with his property, except only in accordance with procedure established by *Shari'ah* or Islamic law and the rights of employers and employees as well as the right of the individual to be provided with the basic necessities of life and a fairly adequate standard of living by the government or at least to be given the chance to achieve that standard of living by his own effort, respect.

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103 5 Ibn Hanbal, Al-Musnād 411 (1995).
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106 5 Ibn Manzūr, Lisān al-'Arab 3428 – 3429 (N.D.).
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108 1 'Aqād, Al-'Abqariyyāt al-Islāmiyyah 421 (1983).
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113 Ibid., 4.
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115 For further detail see Amnesty International Report 186 – 268 (1985).
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117 Elias, News Horizons in International Law 29 – 43 (1992).
118 Thiam, "Human Rights in African Cultural Tradition, Human Rights Teachings 4 – 10 (1997).