Endnote

4 Ibid., p. 123.
CHAPTER ONE
INTRODUCTION

1.1. THE DEVELOPMENT OF MODERN CONCEPT OF HUMAN RIGHTS

Historically speaking, one may note that the issue of human right was one of the most alarming issues that captured the attention of many great nations in the West as well as in the East. Back to the seventeenth century, one will come across the first endeavour which took place as a raging voice of some nations calling for human rights to be instituted and protected. If one peers deeply into the issue of human right and its development from a wider perspective, one may see it as a long sequential process of change and struggle. The long lasting endeavour for human rights restoration and protection had ended with the announcement of International charter of human rights in 1948. Indeed, the present content and status of human rights charter was not a sudden and recent invention of some nations, rather it is considered as long and difficult process of human struggle in many places of the world. This historical process went through many stages and faced many obstacles. The following is a brief account of the development of the historical process of human right’s charters building.

To start with, in the modern world, many attempts have been made to struggle for human rights cause. To mention a few, after success of the American people’s struggle, the American Declaration of Independence was declared in 1776. This event, according to some analysts, is considered as the first attempt in the series
of the modern legalisation and institutionalisation of Human Rights. The Declaration includes the concept of equality between people and the right for living, freedom and the demand for welfare. Additionally, it provides what it is a duty of the states to recognise the rights of people. The document also states that the people have the right to revolt against the government in case of its distortion of these rights. This is followed by the American Constitutional Declaration in 1787, which is repeatedly amended in the topics dealing with rights to freedom in believing, the respect of human life, money and property. Moreover, it has also included the freedom and the right to jurisdiction before conviction, equality and forbidding of slavery. These concepts were included and amended in the period from 1781-1789 and the last Thursday of November 1789 on which the amendment was complete was named as the “Thanksgiving Day” which was considered by the American people as a great festival.¹

Another main contribution to human right cause is the French revolution and its philosophy. Indeed, the French Revolution was another instance which confirmed man's aspiration for freedom and justice, by creating the French constitution of 1791 and 1793. It states that the people are free and they will continue to be free, their property rights are protected and the confiscation of their property is not allowed except in cases of extreme public necessity. However, in such cases reasonable compensation is paid to the people concerned. The same constitution argues that the concept of “innocence until proven guilty” (bara'at al-dhimmah) is meant to disallow all types of possession except by a law. It is also necessary to observe natural human rights, which are right of possession, security and resistance
of injustices.\textsuperscript{2}

In the Atlantic Charter declared by Roosevelt and the British Prime Minister Winston Churchill in the year 1941,\textsuperscript{3} the issue of the four types of freedoms, freedom of speech and expression, freedom of religion, freedom from poverty and freedom from fear, was decreed and instituted. This new development was endorsed by the American President Franklin Roosevelt in 1969.

In 1919, the international agencies concerned with the issue of human rights announced in their official documents the need for the establishment of the United Nations as an international body for the institutionalisation and protection of the human rights. The suggestions of Dombaron Okes were discussed in 1944 and two years later (1946) the mandate of the United Nation began with the establishment of the human right committee. The announcement of the international declaration of human rights was issued in June 1948. The general committee for the United Nations approved the above declaration in December 18, 1948. Till today, this declaration stands for the protection of human rights from injustice, ignorance, sickness and deprivation.

Although these Human Rights were declared many times in many conventions, little of their contents were implemented. This may due to the different perceptions of different nations on what constitutes Human Rights. Many critics have been raised against this convention, which is quite normal for any human endeavour that is always subject to shortage and inefficiency. Moreover, the implementation of the document has always been subjected to many obstacles especially when it comes to conflict between the authorities and influential segments of the society, even in
democratic countries. It is, therefore, not surprising to see acts against Human Rights increasing at an alarming rate in many countries.

In 1966 two international pacts were announced, the first dealt with international convention on civil and political rights and the second was International Convention on Economic, Social, and Cultural Rights. In 1950 the European Council rectified the human rights and basic freedom convention. This was followed by the American Convention for Human Rights in 1969. In the American political culture, this convention is considered as the document of the human rights identification.

It seems that the above-mentioned attempts of human rights restoration formulated the suitable atmosphere for an international campaign for a standardised framework of human rights. Therefore, the need became apparent to establish some obligatory international protocols and conventions. For example, the international convention of social and economic rights and civil and political rights of 1966 were the result of this need. Accordingly, the UN commission of human rights supervises the application of the social and political convention by the concerned member states. On the other hand, the UN human rights committee is in charge to observe the manner in which the civil and political convention is applied by the concerned member states. Indeed, those conventions may be considered as positive attempts made by the UN to address the human right issues.

There was some other politically oriented conventions which the UN or its specialised sub-organisations and agencies established. For instance, UNESCO has
made great contribution in this regard. According to the resolution of the UN General Assembly of 1966 on the occasion of celebrating the international year of human rights, the recommendation made by the UN commission of human rights, 1977 UNESCO in a proposal of 1973 urged member states to adopt human rights as a part of the academic curriculum in their universities. In 1974 the General Conference of UNESCO determined the structure of that work plan which was finalised and came into practice by later decisions (N0: 3/3 and 3/4 of 1980). In the conferences to prepare the Universal Islamic Declaration of Human Rights, UNESCO made a positive contribution.\(^5\)

Hence, the attention should also be given to the human right programs of regional organisations. The European Commission and European Court of Human Rights have important role to perform. They are significant in this general concern to support and maintain the principles of human rights as developed by the previous International UN conventions.

On the other hand, one may notice the contribution of Islamic jurisprudence towards the modern conceptualisation of human rights. In this respect, the Islamic contribution should be viewed within the context of the institution of universal religion to mankind. Islam has never claimed to be a new or revolutionary religion, but instead, takes its stand as a reaffirmation of the pre-existing religions and traditions of mankind as long as they do not contradict the essof Tawhid.
1.2. HUMAN RIGHTS IN ISLAM

The subject of Human Rights in Islam has been extensively dealt with by a number of learned scholars. It needs to be emphasised, however, that in Islam the focus is not on Human Rights alone but also on human duties and responsibilities towards Allah and his creatures. Human Rights are complimentary to the duties that a person owes to Allah and his fellows human. Human Rights are therefore not only the rights of the individual but the rights of parents, children, husbands, wives, relatives, neighbours, teachers and their pupils, guests, hosts, orphans, servants, friends and the poor in addition to the rights of the state and society as a whole.

Human Rights in Islam are based on the revelation of The Holy Qur’an which explained and exemplified in the Sunnah of the Prophet (p.b.u.h.). The law of Human Rights is based on revelation and is, therefore, not subject to suggestion or amendment but only to interpretation and application. The rule of law is truly found in Islam, for the law is independent from the legislature, the executive or the judiciary.

1.3. HUMAN RIGHTS IN A MUSLIM NATION-STATE: THE CASE OF ALGERIA

In order to observe the social implications of the Islamic doctrine of human rights, a case study is needed. It is significant to examine one of the most practical examples of the implementation of human rights from an Islamic perspective. A good example in this regard is to examine the fundamental liberties in the Algerian Constitution of 1996 and see to what extent they are reflected in this constitution which has been proposed to protect Human Rights. The articles of the chapter of “the

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rights and liberties” in the Algerian constitution have mentioned the Human Rights and their guarantees in a manner not less than what is phrased in the Western constitutions. But unfortunately, it is not the case in practice, as it will be detailed below. In order to consider the practical application of the Human Rights mentioned in Islam, it is suggested to consider the provisions related to fundamental liberties in the Algerian constitution under the light of the Islamic values.

The comparison of the above mentioned Human Rights will deal firstly with each single Human Rights in the International Charter, secondly as stated in the Algerian Constitution, and finally as stated in the Islamic Law. By doing so, I will point out the concept of Human Right in the International Charter, and in Islamic Law, and its application in the Algerian case. Moreover I will do the same for all the six Basic Human Rights principles. Finally, I will conclude this comparative study by proposing some outlines, which will contribute to a better understanding of Human Rights, both conceptually and practically.

1.4. IMPORTANCE OF THE RESEARCH

Several factors have contributed towards the selection of this topic. This would primarily include my background in Law and my deep concern to study every issue pertaining to Human Rights and liberties. Another factor was the encouragement I received from my teachers and those afflicted by vigorous problems resulting from their involvement in Da‘wah activities and their stand to uphold the truth in Algeria.
The forgoing factors prompted me to study the issue of Human Rights that every individual must enjoy, at least in his capacity as human beings and as a dignified member of society. A strong shield is required in order to protect the fundamental rights of human being from oppression and aggression. With this protection human beings would live peacefully and comfortably without being afraid of the political authority and its transgressions.

To achieve the above goals we must lay down the fundamental principles and the major rules that would protect citizens and prevent their liberties from being violated. These rules are to be moulded from laws or regulations which are binding upon the executive authority. As these laws and provisions are protected, any offence committed in their respect is punishable.

There are other reasons justifying the selection of this topic. This includes the negative outcome that the modern constitutions and the International declarations formulated on the rights of the individual liberties of people. Furthermore, most of the political authorities worldwide tend to abuse people’s rights when they are supposed to protect them. This situation is aggravated further by the absence of a well-defined set of laws that can effectively guarantee the rights and liberties of people. The existing laws are more or less, similar to slogans which are vague and general.

The above factors can be considered as the main reasons for the study of ‘guarantees of law’ that can protect the fundamental liberty of the individual. The
researcher also will attempt to develop a more appropriate and effective approach of defending Human rights, at least the fundamental ones so that the existence of human being will be preserved and his responsibility carried out.

Human rights have long been the focal issue among thinkers and politicians from the early ages till now, especially in the modern world when much has been said about it. The latter may seem worthless in the absence of a strong enforcement authority that would be able to execute all the declarations made and the laws enacted. Hence, this would guarantee people the return of their stolen rights even if the law itself transgresses these rights. Therefore, balancing between the individual liberties and rights from one side and the social stability and security and the right of the state for penance from the other side, is a genuine declaration of the sovereignty of the law in the state. This is indeed a genuine guarantee for the individual to get the rights he deserves and eligible for.

1.5. METHODOLOGY OF THE RESEARCH

The research deals with a vital issue that continues to plague the so-called 'modern democracies'. To approach such an issue from the point of view of three distinct legal systems, we adopt the following research methodologies:

1.5.1. The Historical Methodology

This methodology is meant for the exposition of the history of human rights, taking into account the main periods and stages of its development including the
Islamic era. The main focus will be placed on exploring the various historical contributions to human rights development.

1.5.2. **The Analytical Methodology**

This methodology is used to know the impetus to human rights, to extract the objectives intended by the ideas and principles advocated by modern organisations, and to understand legal texts, treaties, declarations and charters issued in this respect.

1.5.3. **The Comparative Methodology**

The comparative methodology is used to compare between the Islamic law, secular legislation, the jurist sects, the schools of thought and international formal legislature. Our method in that is presenting the views and leave our dispositions in the end in all objectivity and logic.

1.5.4. **The Documentation Methodology**

This methodology is used to deal with documents and views derived from legal texts, jurisprudence books, legal articles, declaration and treaties texts, the speeches of scholars and thinkers.

1.6. **THE RESEARCH PLAN**

According to the methodology and through the stages mentioned above, I divided this research into five chapters, starting with an introduction in which I incorporated all the technical aspects of the thesis.
1.6.1. The Second Chapter

This chapter provides some historical glimpses on human rights before Islam. Throughout the European dark ages and the reasons of international liberation revolutions which led to the emergence of what is known as international declarations and charters on human rights we traced their development and applications in the modern state led by the west (USA). This chapter contains the definitions of the terms that occur in the research and its usage in Islamic law or international constitutions and declarations. That is in line with its kinds, sources and their philosophical or legal origin.

1.6.2. The Third Chapter

This chapter is the most important part of the research, as it includes all types of basic guarantees which I regard as fundamental for individual and societal rights that face various challenges on a daily basis whether from the state or others.

I divide them into five basic guarantees:

- Parliament Commissioner
- Separation of power legislative guarantees
- Control of the Constitution
- Judicial Guarantees
- People’s control as a guarantee

Each of these guarantees is regarded as a guarantee for the state constitutionality and a practical guarantee for human right. That is in accordance to the comparative methodology; between the Islamic Shari’ah, Western law (international) and the Algerian constitution.
1.6.3. The Fourth Chapter

I have tried to place these guarantees among what I consider the basic ones for individual and societal life in the state. That is to begin with the right to life, the right to equality and the right to work. The right to justice have being placed in the third chapter for the importance of its inclusion under the basic guarantees. I also discuss the right to freedom through the study of other rights. I did not dealt with it independently in order to avoid repetition of what has thoroughly been expounded.

1.6.4. The Fifth Chapter

This chapter is devoted to the conclusion of the whole research and its findings. Some possible means of applying these suggestions are also mentioned.

1.7. LITERATURE REVIEW

The extensive and wide range of human rights studies made it a topic that cannot be covered in one single study or research of human rights. Therefore, the present study does not claim to have exhausted the issue of human rights, rather, it is another attempt which aims at highlighting some important dimensions in the field of human rights research.

Notwithstanding the considerable number of studies and publications on the issue of human rights, the researcher finds few of them are relevant to the present study. The first important study on the issue of human rights is presented by Theodor Meron in 1983. In his book: "Human rights in International Law: Legal and policy
issues,” Theodor discusses the subject of human rights and most of its aspects. This study dealt extensively with the contribution of scholars who specialise in various theoretical and practical perspectives of human rights. The author referred to Richard B. Lillich who studied the theoretical framework of human rights and provided an ideal system on which the state is supposed to be established in order to be able to protect civil rights. The author also mentioned the study of John P. Humphrat on: “Political and Related Rights.” The author also referred to the economic aspects of human rights. In this respect the study of David M. Trubek on: “Economic, Social and Cultural Rights in the Third World: Human Rights law and Human needs Programs” is put into focus.

Other western scholars consider human rights as natural for man and should never be transgressed or violated. Among them are Leo Strauss and Morton A. Kaplan. From their perspectives, these scholars stress the division of rights into natural and acquired rights. The natural rights are born with man like the right to life, security, food and others. The acquired rights are obtained by man through the law, the state’s system, or through judicial verdict and others. Some scholars focus on justice and equality as the basic human rights. Others, like Jack Greenberg, emphasised on the issues, such as race, sex and religion.

On the other hand, some Muslim scholars have made some contributions to the study of human rights. In this regard, the works of Sheikh Muhammad Ghazali, Muhammad Al-Said Ramadhan al-Buti, Ahmad Khalil, Ahmad Hamad, are of vital importance. Most of the Muslim scholars are of the view that the present framework
of human rights is western and reflects the cultural and historical backgrounds of the western man.

The Muslim scholars argue that the content and principles of human rights are not unequally a western product. Islam was one of the religions which made considerable contributions not only to the establishment of human rights but also in their implementation. This can be seen in what has been recorded from the oral and practical Prophetic traditions, the path of his companions, and those guided after them. The subject of human rights in Islam is discussed separately in the introductory part of Islamic studies, books of Islamic history, and courts injunctions in various places to the extent that the reader cannot distinguish them from the rest of the other injunctions. However, it is notable that the issue of guarantees was not extensively discussed by Muslim scholars as in the case with western counterparts. Muslim scholars have never studied the issue of guarantees within the present context except for what some writers and thinkers have pointed to in the religious or social aspects. For instance, in his book Individual’s Guarantee in Islamic Shari’ah, Ahmad Hamed mentions five types of guarantees:

- Basic guarantees
- Personal Guarantees
- Guarantees in the Family
- Guarantees assured by the society
- Guarantees assured by the state.

In an attempt to confine my study to the Shari’ah law, I approach the subject not from Western perspective. I have to present the topic by comparing the Islamic
system as a divine law and the western system as a man made laws. I take a practical example of the Muslim context in order to discuss the difference between the secular and Islamic contexts.

Similarly, Muhammad Al-Zuhayli has treated the subject of guarantees in his books Human Rights in Islam: A Comparative Study Between The Universal Declaration and The Islamic Declaration of Human Rights, in the last chapter of the book after discussing its basic principles. He made the conclusion about the practical and theoretical guarantees for them. The Islamic guarantees, according to him are:

- Guarantees for creed belief and education for human rights.
- Guarantees of the Islamic state for human rights.

In the book annexation of M. Zuhayli, he talks about human rights guarantees before the court in Islam. He started it by evaluating the human instinct in Islamic legislation followed by judicial arrangement for human rights protection under which he summarised some features of these guarantees.

- The necessity for a judiciary protection of these rights.
- The right to judicial settlement.
- Equality between the parties of dispute.
- Man is innocent unless found guilty.
- The defendant’s right.
- Responsibility of personality.
- Witnesses’ honour.
- Difference of punishment for human rights.
- Human rights in executing judicial sentences.

He concluded his book by suggesting some measures presented at human rights organisations. From my study of some published researches in magazines, journals, newspaper, and other mediums, I found that the subject of guarantees to be a challenging subject that requires much more attention and research, thought and organisation in order to make use of the Islamic concepts and rulings on human rights and prove their relevancy to the present Muslim situation.

That is why it is very hard to attain objectivity since nobody is free from religious, racial or national impulse or personal inclination. Even though every attempt is made to be objective as much as possible, because truth is which more essential to any prejudice.

My approach may be described as subjective for having focused on the Islamic system with its pure theoretical aspect represented in the law of Allah (the Qur'an and Sunnah) and the norms of governance and policy featuring the political system established by the Prophet and his rightly guided Caliphs.

This I consider as an example of objectivity because it is a historical fact. I might also be taken to task for criticising the present Muslim countries. The fact remains that the latter continue to adopt and assimilate the Western legal theories, ignoring the social and cultural differences that exist between the two worlds.
CHAPTER ONE