CHAPTER TWO
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THE CONCEPT OF HUMAN RIGHTS:
AN HISTORICAL PERSPECTIVE

2.1. The Concept of Human Rights in Islamic law

The Islamic law has laid down the main foundations of Human Rights. The
abolishment of slavery, equality between men and women and the unique system to
acquire rights and discharge duties were but a few achievements in the field of
Human Rights. To appreciate the concept of Human Rights in the Islamic legal
system, we shall focus on the following:

2.1.1. Historical Background of Human Rights before Islam

The pre-Islamic period represents the darkest phase in the history of Human
Rights. This phase was full of corruption and distortions. Chaos, anarchy, bloodshed
and insecurity were the order of the day. These features were the main constituents of
that reality. Every important aspect of Human Right was lacking and out of reach. In
fact, humanity during this phase reached the edge of the chaotic life in the absence of all
types of power or agencies that could protect the society from destruction that swept its
very existence. As a whole, the world contained no nation that was healthy in
temperament and no society featured by ethical ideas, no state based on principles of
justice and equality of treatment, no leadership possessed with knowledge and
wisdom and no religion representing pure justice system. The right lines were both
rare and scarce.
Such was the situation all over the world. In respect of the pre-Islamic Arabia the type of life was featured with chaos and anarchy. There was continual bloodshed and insecurity. To kill and be killed was recognized as the common human traits of any tribal system. The Arab Bedouin was either a raiders or avenger or both. Their intensity was aggravated by the ‘assabiya or the blood ties which legalized the concept of the “Th’ar” or vengeance. It was customary for the avenger who is the nearest relative of the victim to avenge the death of his relative whatever the reasons are. Likewise, the right of property was violated openly. The property of a stranger for example was the right of the strongest. The prevailing principle in general was sexual intercourse (al-wata’) rather than the established rules of Human Rights of which was neither protected nor respected in the Arab pre-Islamic era.

2.1. 2. Concept of Rights in Islamic law

Rights are the most vulnerable in a society where the balance between rights and duties has yet to be achieved. In a situation where such balance tilts to press solely for duties and violates rights, beginning with the latter is undoubtedly a matter of priority.

(1) The Literal Meaning of Right

In Arabic, the term “right” is known as al-Ḥaqq with several meanings such as reality, justice, truth and established fact. It is the opposite of al-bāīl, which means false, wrong, unjust and not real. Allah said:

“That the rights justify truth and prove false hood, false, distasteful though it be to those in guilt.” (Surah, al-Anfāl, 18) And He says:
“Truth has (now) arrived and falsehood perished for falsehood is (by its nature) bound to perish.” (Surah, al-Īsā, 81).
Another literal meaning of "right" is justice (al-‘adl) which means the opposite of injustice or inequality. Allah says:

*And God will judge with (justice and) Truth: but those whom (men) invoke besides Him, will not (be in a position) to judge at all. Verily it is God (alone) Who hears and sees (all things)."* (Surah, Ghāfir, 20)

Al-‘Haqq is one of the names (attributes) of Allah and it is the judgement order, justice, (al-Wujūd al-Thābit, al-Sidq, al-Mawt, al-Ḥazm). When the term is used in this way it implies His true existence. Furthermore al-‘Haqq refers to something which is due to God or man. The Islamic jurists do not explain the definition of the right by depending on linguistic meaning, because to them it is not important to give a comprehensive definition. Ibn Nujaim, whoever gave a broad definition of al-‘Haqq. He maintains that the term “al-‘Haqq” which is the opposite of falsehood has been introduced by the revelation to declare the truth of religion. Allah says:

*Nay, we hurl the truth against falsehood, and it knocks out its brain, and behind, falsehood doth perish! woe be to you for the (false) things ye ascribe (to you)."* (Surah, al-Anbiyā’, 18)

In other place, the Qur’an uses the word “‘Haqq” which is the root of the noun “‘Haqq” to reflect the idea of stability and assertion. Allah says:

*“His words is proved true against the greater part of them for they do not believe. “* (Surah, Yāsīn, 7).

Classical Muslim jurists, to use Kamali’s expressions, have not articulated a juridical definition of ‘Haqq. They have instead rely on the linguistic meaning of the word. These jurists, as al-Khafif observed, may have not felt the necessity to do so as the word is clear and indicative of its juridical usage. Ibn Nujaym has for instance, defined
Haqq as the entitlement of a person to a thing (al-Ḥaqq ma yastahiqqahu al-rajul). On another occasion they define al-Ḥaqq as things that existed firmly (al-mawjūd al-thābit). 5

These two definitions are interrelated as they both define al-Ḥaqq by its own derivative. An accurate definition of Ḥaqq which gives a new dimension to the literal meaning of right is that of the right of ownership. Ibn Nujaym terms the right of ownership as an exclusive assignment (l’khṭiṣās hājiz). 6 Thus we find Ibn Nujaym’s definition is comprehensive and comprised every aspects of right for the benefit of man. These classical jurists have, as I will show later, use the word “Ḥaqq” to any rights affirmed by the Shari’ah. 7

(2) Opinions of Usulists (Muslim jurists dealing with Usul al-Fiqh)

The scholars of Usul discuss the meaning of the term “Ḥaqq” and its varieties under the title of al-Ḥukm al-Shar’i. It is a broad subject that comprises a variety of concepts including commands, prohibitions, permissibility and others. All ahkam al-Shari’ah originate in the Qur’an and the Sunnah and constitute what is known as Allah’s communications to mankind’s (Kitāb Allah ila al-‘ Ibād). 8

Some classical and modern scholars maintain that the principle of right and all of its division is nothing but a duty (taklif). These jurists state that al-Ḥaqq is mentioned six times in the Qur’an, connoting to obligation. 3 For example, Allah says in the Qur’an:

“And in their wealth there is a definite right (Ḥaqq ma‘lūm) for those who are needy or deprived”. (al-Ma‘ārij: 24,25)
Al-Qarāfi says: "in respect of any gainfully employed right for any of Allah's servant...There is a duty towards others within." Accordingly, Zakāt is assigned by Allah as a right of the poor and a right of Allah at the same time. Thus, a person who pays Zakāt is actually satisfying both rights: that of Allah and that of the poor. Al-Zarqā’ argues that Haqq is an exclusive assignment by which the legislator bestows upon a person an authority over thing or set an obligation to do an act. This definition signifies Haqq as an exclusive assignment from the Shariah in the form either of power or of demand or obligation (taklif). In other words, al-Zarqā’ defines al-Ḥaqq from the perspective of al-Ḥukm al-Shar‘i.

2.1.3. Classification of Rights

Rights can be divided into several categories according to their nature and to their recipients. Special attention will be given to the following types:

(1) The General rights (Haqq-u- Allah)

This group of rights is for all (public). It is called in Arabic Ḥaqq Allah because it is a common and social right. Therefore, it is considered the most important kind of all rights which includes the doctrinal provision (specification of punishments) which is applied by law and managed by the public authority. Although these rights are for the benefit of mankind they are called Allah's rights. Hence people have no option to choose whether they perform a public legal duty (right) or not; they are obliged to fulfill it, otherwise public interest will be threatened leading to the intervention of the law and its machinery. Ḥaqq-u-Allah is an
obligatory matter on individuals for the public welfare.\textsuperscript{11}

(2) Individual rights (\textit{Haqq al-Abd})

This group of rights is private for each and every person. It is called in Arabic \textit{Huquq al-'Ibad}. An example is the protection of personal rights whatever the circumstance are on the one hand general right that complies with health, children, property and the realization of security and freedom. On the other hand it is a social right that observes ownership, and provide refunding for the extorted, the wife’s right to expenditure (alimony), the mother’s right to nurture, the father’s right to guardianship or warship and human rights in the place of work, etc. This category of rights is the pure right of a person regarding hiproperty. It is this absolute right to demand and acquire it unless someone’s right is harmed by this procedure.\textsuperscript{12}

(3) Joint rights

This right is common between Allah and man. It can be divided into two sub-categories:

i. Allah’s right is predominant such as in case of divorcee’s \textit{Iddat}.\textsuperscript{13} Allah’s right is to take care of the creation and the right of individuals is to take care of the children. Another example is the case of (\textit{al-qadhif}). Some early and contemporary jurists point out that a slanderous accusation of a fornication (\textit{al-Qadhif}), constitutes a violation of both rights. So that it threatens both the public and private interests. It actually defames a person and creates an atmosphere of mistrust among family and community members. Therefore, the slandered person has no right to forgive the
slanderer because the degree of the public interest violated here is more than the private one.

ii. When such a violation of joint rights takes place it affects mostly the private life of the person than the public rights, then the victim is entitled to waive his right if he wishes. For example, in the case of murder, even though it threatens the public security, it concerns more one’s life i.e. a private right. Consequently, victim’s relatives are entitled to demand *Diyyah* (blood money) or to grant forgiveness (resignation of right).\(^{14}\)

In order to make this study comprehensive, it is appropriate to examine how Islamic jurists classified human rights. According to some scholars, it can be broadly divided into two kinds: physical and moral rights. First of all is the personal rights that include the right to life, right to sanctity of dwelling, the freedom of movement, freedom of work and right to ownership. Secondly, is moral rights which refer to the right or freedom of religion, political right, freedom of opinion and expression, freedom of association and assembly, right of education and freedom to cultural life.\(^{15}\)

Modern political system divides right into three categories; the personal freedom, freedom of thought and economic freedom. While the first two comprise the physical and moral rights as the preceding divisions, save that they separated some rights such as the right to ownership and the freedom to commerce and considered it under economic rights or freedom.\(^{16}\)
Muslim jurists of modern constitutional law have identified a number of methods by which they can distinguish fundamental rights from other rights. In countries where the constitution is not written, these fundamental rights can still be identified by reference to rules, conventions and judicial precedence that can be used to identify certain primary and important rights.\textsuperscript{17} However, other jurists are convinced that religion is the only source that can identify fundamental rights from other rights.\textsuperscript{18}

The writing of contemporary Muslim scholars included many classifications of rights.\textsuperscript{19} All of these terms were the practical outcome of the contemporary needs in civilized Muslim society. The early Muslim jurists never hesitated to speak about the rights of individuals, the safety and sanctity of their lives and properties. They are equally demonstrative over the interests and benefits of people, along with other notions concerning rights under many headings of Islamic law. However, these scholars were somewhat less concerned in advancing theories of classification of human rights.\textsuperscript{20}

The \textit{Sahifat Al-Madinah},\textsuperscript{1} established by the Prophet (p.b.u.h) at the beginning of the first Islamic State in Madina, is considered as the first written constitution (\textit{Dustūr}).\textsuperscript{21} Yet, Muslim jurists have unanimously agreed that the most authoritative source of law is the Qur'an and the legislative \textit{Sunnah} which are binding on all Muslims. It is therefore important to distinguish these sources from what was established by him (p.b.u.h) as the Head of the Islamic State in order to solve temporal problems.\textsuperscript{22}
Moreover, the Islamic jurists asserted that the Qur'an is the only reference for the formal distinctions between fundamental rights and other rights.\textsuperscript{23} This is found in the explicit injunctions of the Qur'an such as the right to life, security, equality, justice and work which are to be classified as fundamental rights. Yet, other scholars have divided fundamental rights into two main divisions: rights and freedoms. Rights are then subdivided into two parts, (a) political rights and (b) civil rights. In general, these rights refer to the rights to life, rights to security, rights to property, rights to work, and rights to political participation. On the other hand, freedoms comprise freedom of religion, freedom of opinion, freedom of movement, freedom of education and the sanctity of private dwelling.\textsuperscript{24}

2.1.4. Sources of Right in the Islamic law

There are five fundamental sources of rights in Islamic law namely; the Shari'ah, legal contract, administrative regulation users and interest. In Islamic law all sources of right are from Shari'ah which is derived from the Qur'an and Sunnah.

(1) Revelation

i. The Qur'an

It is the first and the primary source which contains guidance and instructions from God himself. These directives and injunctions cover the entire domain of man's existence.\textsuperscript{25} In the Qur'an not only the directives relating to individual conduct are to be found but also principles regulating all aspects of social and cultural life of man. Qur'an literally means "reading" or "recitation". It may be defined as the book containing the word of God revealed to the Prophet Muhammad (p.b.u.h) in Arabic
and transmitted to us by continuous testimony (Tawātir)\textsuperscript{26} it is a proof of the prophecy of Muhammad (p.b.u.h) and the most authoritative guide for Muslims.\textsuperscript{27} The Qur'an has clearly shown therein as to why Muslims should endeavor to create and establish a state of their own based on the principles of Islam.\textsuperscript{28}

ii. \textit{Sunnah (The Prophet's traditions)}

Literally \textit{Sunnah} means a clear path or a beaten track but it has also been used to imply normative practice or an established course of conduct.\textsuperscript{29} To the 'Ulamā' of Hadith, \textit{Sunnah} refers to all that are narrated by the Prophet, his sayings, deeds and approvals. This includes all the reports which describe his physical appearance and character.\textsuperscript{30}

\textit{Al-Sunnah} is the second source of law and theology in Islam. It shows the way in which the holy Prophet (peace be upon him) translated the ideology of Islam under the light of Quranic guidance into practical and positive social order that were implemented during the \textit{Madihan} period. Rules that we can know from the \textit{sunnah} can be generally categorized in three types:

- **Speech:** Allah say: "\textit{Nor does he say (anght) of (his own) desire it is no less than inspiration sent down to him.}"( Surah, al-Najm, 4).

- **Deed:** The prophet (p.b.u.h) ordered his followers: "\textit{Perform Salāh the way you see me performing it}", and regarding the Ḥajj he similarly instructed peoples to "\textit{Take from me the rituals of the ḥajj.}"\textsuperscript{31}
- Decision: like Prophet's decision on Adhān (call for prayer).

The Sunnah of the Prophet (p.b.u.h) is a source of Shari'ah and a proof (Ijma'ah) for the Qur'an. It stands on the same footing as the Qur'an. Furthermore, Qur'an recognizes the Sunnah authority and enjoins all Muslims to comply with it.

(2) al-Ijtihād

Jurist independent reasoning based on analogy under form of al-Qiyās and consensus. The Muslim philosophers support the need of "human freedom" in the context of democracy in Muslim society not from the point of view of secularism. For a Muslim, thus, conformity to the Shari'ah is equivalent to human rights.

i. Consensus (al-Ijmā’)

It is the agreement of all ‘Ulama after the death of the Prophet Muhammad (p.b.u.h) on legal matters which were not directly covered by the revelation. The Prophet said:

"If it happened in this period not the rule from Qur'an and Sunnah and agreed by the ‘Ulama on their rule in this period on one word this show the rule of Shari'ah."\(^3\)

ii. Analogy (Qiyās)

Reasoning is "assigning of known ruling to new case, that does not have a clear decree, due to its resemblance to that new case which the law has decided its rul."\(^3\) For example, the prohibition of alcohol by the Qur'an is for the reason of intoxication. Qiyās gives the decree of drug prohibition, as they share the same effect, which is intoxication. These are the four agreed sources of rights in Islam. On the other hand, there are some
sources which are disputable among scholars, such as al-Istihsān or the juristic preference, public interest (al-Istislāh), al-‘Urf or custom, habitual actions and sayings,34 al-Istishāb or permanence of the original legal rule, the first legislation and the opinion of sahabah.

2.1.5. Sources of Islamic Human Rights

The sources and references dealing with human rights in Islam are extensive. The provisions in the international charters will be compared with principles set forth in a number of Islamic human rights schemes as well as in the provisions of constitutions of Muslim countries that are purportedly based on Islamic principles.

The treatments of human rights in Islamic constitutions exemplifies the degree to which the drafters are willing to make provisions on human rights in national legal system which conform with the international standards. This is a critical situation, because international human rights rely for its implementation on national laws and institutions. The international standards are meant to serve as models for the schemes of human rights protected under the constitutions and legal systems of the each member country of the international community.

Liberal Muslims tend to embrace international human rights norms whereas conservative Muslims tend to resist these concepts of human rights as far as they contradict Islamic principles. Threatening to the established order, including pre-modern Islamic institutions. These are the classifications that are most useful for characterizing Muslim’s attitude toward human rights. Obviously, many fine
distinctions between different political groups could be drawn, but they would probably out of the scope of this dissertation.

2.1.6. The Rule of Qur'an and Sunnah in protecting Human Rights

The teachings of the Qur'an and Sunnah guarantee human rights. Within the Quranic context human rights are clearly stated and preserved. The Qur'an speaks of Allah as "Rabbu al-Ālamin", the Cherisher and Sustainer of all the worlds. It further states that the entire human race is endowed with the same nature. The Quranic words are "To the pattern on which He has made mankind" (Surah al-Rūm, 30). Humanity is considered by the Qur'an as a single entity, or in other words a family originated from Adam and Eve. The Qur'an says:

"O, mankind: I reverence your guardian-Lord who created you from a single person, created of like nature, his mate and from them twain scattered (like seed) countless men and women." (Surah: al-Nisā': 1).

As the humanity constitutes a single family, it contains the inescapable characteristic of unity. The Qur'an asserts "mankind was but one nation, but differed (later)." (Surah, Yunus, 19). The initial point, in the Quranic concept, is that the community of the Believer constitutes a single fraternity. Allah said: "The Believers are but a single brotherhood." (Surah, al-Hujurat, 10).

This concept of brotherhood plays an important role toward promoting unity of mankind and assuring the rights of man especially the right of equality. The fraternity in Islam was the sign of affection and sincerity. So it creates nothing except for the good interest of the communists and the overflow of affection and helpfulness without causing harm to others. Allah says:
“If anyone slew a person unless it be for murder or for spreading mischief in the land if would be as if he slew the whole people and if anyone saved, a life, it would be as if he saved the life of the whole people.” (Surah, al-Mā'īda, 35).

Allah guarantees the right of food, economic freedom and security in one of the verses which reads:

“Who provides then with food against hunger and with security against fear (of danger)” (Surah, Quraish, 4).

The essential point stressed by Islam is that all human beings are considered equal. This equality is observed irrespective of differences in duties and rights. No one can claim pre-eminence except by the force of his character. The Holy Qur’ān is very clear on this matter. Allah said:

“O, mankind! We created you from a single (pair) of male and female, and made you into nations and tribes, that ye may know each other. Verily, the most honoured of you in the sight of God is (he who Is) the most righteous of you” (Surah, al-Hujurāt, 13).

The same theme was amplified by the Prophet (p.b.u.h.) in his address on the occasion of the farewell pilgrims.35 He said:

“You are all from the Gregory of Adam, and Adam was made of clay. No Arab has superiority over non-Arab (Ajim) as no non-Arab has superiority over an Arab. Neither is a white man superior to a black nor is a black man superior a black nor is a black man superior to a white. Superiority on rests on piety alone. Lo! The noblest of you in the sight of Allah, is he was best in conduct.” 36

Thus the only superiority enjoyed by a human being over other human being is determined by his righteous conduct. This factor negates all “tendencies” that recognize, the superiority, in right and dignity of one race over another.37 In addition to the above, Islam calls upon human beings to serve each other. The Prophet (p.b.u.h) says:
"The human being, as a whole are being sustained by Allah, and the ones who are most loved by him are those who are most useful to them."

In this respect it is clear that the concept of human rights in Islam is supported by the story of the women from the Makhzum tribe who was from a noble descent, Fatima Makhzumiya in the Prophet's time. She stole an item and was convicted by the Prophet and been sentenced to hand amputation. In view of her superior social standing, the Quraish approached the Prophet through Usama and requested concession. This infuriated the Prophet who rejected definitely the intercession and asserted:

"Indeed! The people preceding you met destruction for pardoning the light gentry if they committed theft and executing legal punishment on the week if they stole. I swear of Allah, if Fatima, the daughter of Muhammad had committed theft, I (Muhammad) would have amputed her hand."

From the text of Qur'an and Sunnah, Allah ensured all people their rights since the creation of the universe. Allah prohibits the taking of rights without permission from the people and their leaders. The concept of equality of human right can also be found within a passage of a speech made by the holy Prophet (p.b.u.h) during the farewell Hajj, which states:

"O People your God is one, your ancestor is also one and you are progeny of Adam, who was created from clay. The most respected before God amongst you is one who is most God fearing. An Arab has no superiority over non-Arab, nor a non-Arab over an Arab, neither does a white man posses superiority over the black man, nor a black man over a white one, except by virtue of piety."

In other occasion the Prophet (p.b.u.h) said:

"Verily God has eradicated through Islam the egoism and arrange the time of Ignorance and the (false) pride that people took in their ancestry, people are the descendants of Adam and Adam from (an extract of) clay."

He also explained in the last pilgrimage that humans have all their rights. He
said that there is no discrimination in the eyes of Allah. Islamic law preserves this right from any abuse by the administration of *Hudūd, Qisas* and *Ta'zīr*.

They will be answerable in the sight of Allah in the hereafter. Allah says:

"Say: Shall I seek for judge other than God? - when He it is Who hath sent unto you the Book, explained in detail. They know full well, to whom We have given the Book, that it hath been sent down from thy Lord in truth. Never be then of those who doubt." (Surah, al-Anām, 114).

He also says:

"But no, by the Lord, they can have no (real) Faith, until they make thee judge in all disputes between them, and find in their souls no resistance against Thy decisions, but accept them with the fullest conviction." (Surah, al-Nisā', 65).

This basis of *Shari‘ah* faith, supported by many texts of Qur’ān and *Sunnah*, guarantees Human Right and protects them from any violation. We are asked to obey Allah and His Prophet, as clarified by Ibn al-Qayyim.42

"O ye who believe! Obey God, and obey the Apostle, and those charged with authority among you." (Surah, al-Nisā', 59).

In the same context the Prophet says: "those who promote tribal fanaticism (*Assabiyyah*) do not belong to us nor do the one who fights for ‘Abāsiyyah and those who die for ‘Abāsiyyah.*43
2.2. Western View of Human Rights With Special Reference To International Charters

2.2.1. Historical Background of Human Rights in Western System

(1) Historical Development of Human Rights

It was observable that the issue of human rights in the western context vaguely appear on the philosophical works of the Roman empire. The darkness of middle ages on thinking about human rights in Europe was briefly lifted on occasions like the drawing up of the Magna Carta at Britain in 1215 to limit the authority of the king and the chief and religious leaders over the nation.\textsuperscript{44} In 17th century, several thinkers like John Locke (1632-1704) wrote the letter for toleration in 1689 and two Treatises of Government in 1690 in England, on the theoretical justification of human rights. The writings of John Jack Rosso (1712 - 1778), Adam Smith (1723-1790), and John Papt-Say (1826-1896) asserted the same theme. According to them, the main concern of the law is to protect the freedom of human being. They also stressed the philosophy of rights and the natural freedom which was the goal of the thinker of the natural law.

The Bill of Rights enacted by the English Parliament after the "Glorious Revolution" in 1689, the same year in which Locke first published his theory of government named also the right to trial by jury. The bill prescribed that in all courts of law excessive bail should not be required, nor excessive fines be imposed, nor cruel and unusual punishment be inflicted.

The English Bill of Rights had a great influence throughout the civilized
world. In Virginia on June 1776, a bill of Rights was adopted by a representative convention, and its first clause proclaimed:

"That all men are by nature equally free and independent, and have certain inherent of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness."45

Here the right to happiness is added to those of Locke. The same word recurs in the Declaration of Independence issued by the thirteen American states in July 1776 which is stated as:

"We hold these truths to be self evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."46

The United States Constitution of 1789 as amended defined these rights in detail. It specified freedom of speech and press, the right of the people to be secure in their persons, houses, property and from any effects against unreasonable searches.

In addition to securing the right of an accused person to a speedy and public trial by an impartial jury of the state and the right to the free exercise of religion. Nineteenth-century amendments made slavery illegal and also stated that:

"The right of citizens of The United States to vote shall not be denied or abridged by The United States or by any state on account of race, color, or previous condition of servitude."

The Declaration of The Rights of man and citizens issued by the Constituent Assembly in France follows closely the English and American models. It asserts that

"Men are born and remain free and equal in Rights" indeed that "the purpose of all political association is the conservation of natural and
inalienable rights of man; these rights are liberty, property, security, and resistance to oppression."

In the same French Declaration liberty is defined as: "being unrestrained in doing anything that does not interfere with the liberty of another." Property was also defined as: "an inviolable and sacred right." The French Declaration specifies the right to freedom in speech, press, religion, and from arbitrary arrest. Citizens of certain Greek states enjoyed such rights as equal freedom of speech and equality before the law, which are prominent among the rights claimed in the modern world.47

The Declaration of Rights proclaimed by the nationalist German liberals in 1848 was Hegelian and not Lockian. The American and French declarations asserted the rights of man, where as the German manifesto spoke of "The Rights of The German People" instead. Hegel's follower F.H. Bradley wrote in 1894:

"The rights of the individual are today not worth serious criticism...the welfare of the community is the end and is the ultimate standard. In addition, over its members the rights of its moral organism are absolute. Its duty and its right is to dispose of these of these members as it seems best."

The Soviet Union, in its Constitution of 1936 and again in its revised Constitution of 1974, formulated the rights of its citizens on the model of the Constitution of America and France and other bourgeois countries Article 125 of the Soviet Constitution states:

"The citizens of The U.S.S.R are guaranteed by law, (a) freedom of speech; (b) freedom of the press; (c) freedom of assembly, including the holding of mass meeting; (d) freedom of street processions and demonstrations."

When The United Nations was created after the Second World War, one of
the first and most important tasks assigned to it was what Winston Churchill called "The Enthronement of Human Rights."\(^{48}\)

Leaving aside, for the moment, the question of what these constitutional guarantees are worth, what does it mean to say that men have rights.\(^{49}\)

(2) The History of Charters and Declaration of Human Rights

To grasp the essence of the development of the Charter and the declaration of human rights a brief account of history is needed. To begin with, the British Charter of rights is referred to as a milestone on the evolution of the Charter. The revolution of 1668 in Britain was the reason for the implementation of the charter rights. This was when the revolutionist succeeded in removing the reign of James II. William Orange which extended, the charter rights on 13\(^{th}\) February 1677 to create the fundamental of rules which guarantee to cultivate the economic interest of the middle class. This charter transfers the majority of authority to the parliament. In the same context, the American Charter was introduced.

The Politicians and historians maintain that the first record of human rights charter resulted from the revolution of America, prevail on 4\(^{th}\) July 1776. In the declaration of 1781 mentioned that: all people have equality and enjoy their rights which are not transferable such as the right to life, freedom and the quest for happiness.\(^{50}\) On the other hand, the French declaration was also introduced. The French revolution was considered as a major development on the declaration of rights. The following articles of the French declaration of rights provided that men
are born and remain free and equal in rights. Social distinctions may be founded only upon the general good. The aim of all political association is the preservation of the natural and indispensable rights of man. These rights are liberty, property, security and resistance to oppression.

2.2.2. History of Algeria’s Human Rights

Algeria has been known for its ongoing struggles and fight for freedom. By virtue of the Islamic Religion the tribal system of the country was unified under one banner. In the period of al-Khilīfa al-‘Uthmāniyyah the states had strong power but weakened after the fall of the ‘Uthmān’s reign in 1824 and finally collapsed in the Navarín war in 1827. This situation gave a chance for France and it allies to take over Algeria. When Algeria fell under the French colonialism in 1830, the human rights condition was worst than in other countries like Tunisia and Morocco.

2.2.3. Western concept of Human Right

Rights in western view defined as freedom. They affirm the freedom of human being to do something without encountering any moral or legal obligation. In other words, it is a license to do something without any obstacles or to refrain from doing something without any enforcement. According to Webster’s new world dictionary, freedom is the sun of Rights and exemptions possessed in common by the people of a community or a state. On the other hand, Rights is defined as ‘the state of being justly entitled to do something which one may do or have by the law the power to claim anything such as: the right of labor, an inherent right to non-interference; or the right to acquire property. It is also described as ‘something to

39
which one has a just claim; birthright; privilege.\textsuperscript{54} Thus, a certain similarity and convergence is obvious between the definitions of these two terms, i.e., Freedom and Right.

John Salmond defined right as an interest recognized and protected by the law. Respects for whatever is a duty and disregards for whatever is a wrong.\textsuperscript{55} While Holland said: “right is a capacity residing in one man with the assent and assistance of the state.” In contrast, Holland’s definition places more emphasis on the role of the state in helping an individual to control the violation of a person’s individual right by others.\textsuperscript{56}

The spectrum of definitions pertaining to right is broad and illuminating in its different implications and ideological positions.

Based on the above definitions, rights can be possessed, claimed, demanded, asserted, exercised and enjoyed. John Burke gave an excellent definition of rights, he says: “in its most general sense, is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to do or abstain from doing a particular thing.” He also gave another definition of legal rights, as: “is a capacity residing in one man of controlling which the assent and assistance of the state.”\textsuperscript{57}

\textbf{2.2.4. Sources of Right}

The validity and plausibility of rights depends chiefly on the sources from which
they are derived. We may mention the sources that only serve the objectives of this research.

(1) Religion

The term ‘Human Rights’ as such is not found in traditional religions. Nonetheless, theology presents the basis for human rights, a theory stemming from a law higher than the state and whose source is the Supreme Being. This theory presupposes an acceptance of revealed doctrine as the source of such rights. Equality of all human beings in the eyes of God would seem a necessary development from the common creation of God, but freedom to live, as one prefers is not. Indeed, religions generally impose severe limitations on individual freedom. Moreover, revelation is capable of having different interpretations even in respect of equality. Some religions have been quite restrictive toward slaves, woman and non-believers, even though all are God’s creations.

Despite the problems in the theological approach, religious doctrine offers the possibility, as Professor Pagels has pointed out, of selecting elements of various religious traditions to construct a broad intercultural rationale which supports the vital principles of equality and justice in an international scope of Human Rights. Indeed, once the leap to belief has been made, religion may be the most attractive of the theoretical approaches. When Human being are not visualized in God’s image then their basic rights may lose their metaphysical raison d’etre. The concept of Human beings created in the image of God certainly endows men and woman with worth and dignity from which the components of a comprehensive Human Rights
system can logically flow.\textsuperscript{58}

(2) Natural law: the Autonomous Individual

Philosopher and jurist do not leave the question of human rights solely to theologians. In their search for a law that can be higher than positive law, they developed the theory of natural law. Natural law theory has underpinnings in Sophocles and Aristotle, but it was first elaborated by the Stoics of the Hellenistic period and later of the Roman period. They believed that natural law embodies those elementary principles of justice which were suitable to reasoning, i.e., in accordance with nature, unalterable and eternal.\textsuperscript{59}

The Modern secular theories of natural law, particularly as enunciated by Grotius and Pufendor, detached natural law from religion, laying the groundwork for the secular, rationalistic version of modern natural law. According to Grotious,\textsuperscript{60} a natural characteristic of human beings is the social impulse to live peacefully and in harmony with others. Thus whatever conformed to the nature of man and woman as rational, social beings was right and just and whatever opposed it by disturbing the social harmony was wrong and unjust. Grotius defined natural law as a dictate of right which points out that an act, is either for or against rational nature. It has in it a quality of moral foundation or moral necessity.\textsuperscript{61}

It should be noted that Grotius was also a father of modern international law. He saw the law of nations as embodying both laws the first one originated from the will of man and the second one derived from the principles of the law of nature. This
theory has immense importance for the status and legitimacy of human rights as part of a system of international law.\textsuperscript{62}

Natural law theory led to natural rights theory which is mostly associated with modern human rights. The first, to present this theory was John Locke, who developed his philosophy within the framework of seventeenth century humanism and political activity. Locke imagined the existence of human beings in a state of freedom, able to determine their actions and in a state of equality in the sense that no one was subjected to the will or authority of another. To end certain hazards and inconveniences of the state of nature, man and woman entered into a contract by which they mutually agreed to form a community and set up a political body. However, in setting up that political authority they retained the natural rights of life, liberty and property that are of their own.\textsuperscript{63} Government is compelled to protect the natural rights of its subjects and if government neglected this obligation, it would forfeit its validity and legitimacy.

Natural rights theory makes an important contribution to human rights. It affords an appeal from the realities of naked power to a higher authority which is asserted for the protection of human rights. It is identified with human freedom and equality from which others human rights easily flow, providing dependence in properties, security and support for a human rights system both domestically and internationally.\textsuperscript{64}

Under Locke's view of human beings, in the state of nature, all that was
needed was self-dependency, life, liberty and property that constitute the inherent rights that met this demand. But how about a world unlike the time of Locke, in which there are not ample resources to satisfy human needs? Opportunity in such a world may be less important than an assured outcome. Does natural law theory have the flexibility to satisfy new claims based on contemporary conditions and modern human understanding? Perhaps it does, but that very potential for flexibility has been the basis for the chief criticism of natural rights theory. Critics point out that most of the norms setting natural rights theories contain a priority element deduced by the norm setter. In short, the principal problem with natural law is that the rights considered to be natural differ from theorist to theorist, depending upon their conceptions of nature.65

Because of this and other difficulties, natural rights theory becomes unpopular with legal scholars and philosophers.66 For example, considered natural rights as so much 'bawling a paper, on-quoted is his colorful attack: 'right is a child of law come real rights... natural rights is simple nonsense: natural and imprescriptibly rights, rhetorical nonsense, - nonsense upon stilts Bentham, Anarchical fallacies. For a summary of Bentham's critique of natural rights theory, see Hart, "Utilitarianism and natural rights." However, in revised form natural rights philosophy a renaissance in the aftermath of World War II, as we shall discuss shortly.67

(3) Positivism: The Authority of the State

Another approach to human rights study is that of legal positivism. This
philosophy came to dominate the legal theory during most of the nineteenth century and proved to be the most adequate in the twentieth century. Classical positivists deny an appropriate source of rights and assume that all authority stems from what the state and officials have prescribed. This approach rejects any attempt to discern and articulate an idea of law transcending the empirical realities of existing legal systems. Under positivist theory, the source of human rights is to be found only in the enactment of the system of law with sanctions attached to it. The need to distinguish with maximum clarity law as it is from what it ought to be was the theme that haunts positivist philosophers and they condemned natural law thinkers because they had blurred this vital distinction.68

The positivist contribution is significant. If the state's processes can be brought to bear the protection of human rights, it becomes easier to focus upon concrete deprivations and upon the specific implementation that is necessary for the protection of particular rights. Indeed, positivist thinkers such as Bentham and Austin were often in the vanguard of those who sought to bring about reform in the law. A positivist system also offers flexibility to meet changing needs since it is always under human control.69

The methodology of the positivist jurists in the technical building of legal conceptions is also pragmatically useful in developing a system of rights in international law. For example, the human rights treaties dealt with in this capacity reflect a positive set of rights, i.e., rules developed by the sovereign states themselves, and then made part of a system of international law. While states differ
on the theoretical basis of the rules, the rules themselves remain to provide a legal grounding for human rights protection. On the other hand, in theory, positivism tends to determine an international basis for human rights because of the emphasis positivists place on the supremacy of national sovereignty without accepting the restraining influence of an inherent right above the state. Under this view, rules of international law are not law but merely rules of positive morality set or imposed by opinion. Furthermore, by emphasizing the role of the nation-state the positivist approach produces the view that the individual has not status in international law.

The positivist theory has been widely criticized and we can deal here with only a few of its deficiencies. One of them is that law is no better than the source of its authority. An authority whose tradition may include concepts, which do not promote human rights and which are, indeed, anti-Human Rights. Positive legal theory with its emphasis on the 'is' in the law also tends to discourage thought of what the law 'ought' to be by philosophically splitting a legal system from the ethical and moral foundation of society. The system prefers any motive for action or goals for future development. What is worse, if positive law is the only law, then it encourages the belief that law must be obeyed, no matter how immoral it may be. The anti-Semitic ethics of the Nazis, although abhorrent to moral law, were obeyed as positive law. The fact that positivist philosophy has been a central focus for much of the modern criticism.

An influential moral philosopher, H.L.A. Hart, has done much to refine positivist philosophy and to free it from some of its mistakes. Hart finds the authority
for the rules of law in the background of legal standards against which the government acts, standards that have been recognized and accepted by the community for that government. This legitimizes the decisions of the government and gives them the warp and wood of obligation that the naked commands of classical positivist locked. Accordingly, positivism becomes a good bit more edible. Still, when his theory is applied to iniquitous law (e.g., Nazi purification laws), Hart does not say, this is not law, but rather74 'this is law, but it is too iniquitous to obey.'75 In short, he continues to argue for concepts of law which allows the invalidity of law to be distinguished from its morality This remains a basic difference between natural right philosophy and positivist philosophy.


To many scholars, each of the theories of rights discussed so far is deficient. Moreover, the twentieth century is quite a different place from the nineteenth. Natural and social sciences have developed and begun to increase understanding about people and their culture, their conflicts and their interests. Other disciplines have adopted others insights as theirs. These developments have inspired what has been called the sociological school of jurisprudence. ‘School’ is perhaps misnomer since what has evolved is the number of disparate theories, which have the common denominator in trying to line up the law with the facts of human life in society. Sociological jurisprudence tends to move away from both a priori theories and analytical types of jurisprudence.

This approach in so far as it relates to human rights, directs attention to the
questions of institutional development; sometimes focuses and specifies problems of public policy that have a concern on human rights; sometimes aims at classifying behavioral dimensions of law and society. In a human rights context the approach is useful. It identifies the empirical components of human rights system in the context of the social process.

For human rights theory, a primary contribution of the sociological school is its emphasis on obtaining an equilibrium of interests among prevailing moral, social and economic conditions of time and place. In any way this approach can say to be built in ‘William James’ pragmatic principal that ‘the essence of good is simply to satisfy demand’. This approach also was related to the development in the twentieth-century society to the increased demands for a variety of needs beyond classical, civil and political liberties, such as helping the unemployed, the handicapped, the underprivileged, minorities and other elements of society.

It is not possible here to outline the particular approaches of the leading sociological thinkers, but Roscoe Pound's analysis merits a special reference. Pound points out that during the nineteenth century, the history of law was written largely as a record of an increasing recognition of individual rights. In the twentieth century, he continue, “this history should be written in terms of continually wider recognition of individual, public and social rights.” He did not try to give value preferences to this interest. His guiding principle is one 'of social engineering', that is the ordering of human relations through politically organized society so as to secure all interests.
However, a problem with an approach that merely catalogues human demands is a lack of focus on how rights are interrelated or what priorities should be. As Llewellyn says: "A descriptive science in the social field is not enough. That seems equally true in the human rights field." Interest theorists, in general, suffer from a certain lack of goal identification. They do not answer the logical question of how a normative conclusion about right can be empirically derived from factual premises such as the having of interest. Their approach thus provides a useful method, which needs a philosophy. Nonetheless, by providing a quantitative survey of the interests which demand satisfaction, this school sharpens perceptions of the values involved and the policies necessary to achieve them.

2.2.5. The Sources of Human Rights in International Charters:

Even with a focus narrowed to civil and political rights, the range of potential sources regarding international standards for those rights are too vast to permit exhaustive citation and examination in the course of the present stu. The International Human Rights will largely leave aside the huge academic literature on international human rights, relying instead primarily on principles taken from the so-called Bill of Human Rights, which will be treated as an example for the standards of public international law in reference to civil and political rights.

The International Bill of Human Rights consists of the Universal Declaration (UDHR) of 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and the International Covenant on Civil and Political Rights (ICCPR) of 1966, along with the its Optional Protocol. The last 1966
Covenants was inforced on 1976. The universal declaration has, since its adoption by the UN General Assembly, achieved great international publicity as authoritative statements of the modern standards of human rights protections, which is the only most influential statement among the international human rights principles. I do not assume that there are no controversies about what international human rights entail, nor do I claim that the international Bill of Human Rights is universally acknowledged by legal scholars and philosophers to constitute a perfect summation of human rights norms.\textsuperscript{78}

The comparison is made between the international human rights documents. Their formulations of human right principles are succinct enough to allow easy comparisons. The broad outlines of the Islamic documents in many instances are clearly inspired by provisions in International Bill of Human Rights, even though they may differ in some important aspects. In particular to the UDHR, people in the Middle East are more familiar with it than other international communities.


The main articles which dealt with the issue of rights in respect to the Algerian case can be found in the following reference and sources: (Art.1-Art.11) and Fundamental Rights (Art.12-Art.22) and National Liberation Front (Art.230, Art.26), and the Exercise as Sovereignty, The National Assembly (Art.27-Art.38), the Executive power (art.39-Art.59), judiciary (Art.60-62) and The Constitutional Council (Art.63-Art.64), The High Councils (Art.65-art.70), Constitutional
Amendment (Art.71-Art.74) and Transitional Provisions (art75-78).

With the Algerian Constitution of September 8th 1963 in accordance with that of the Central African Republic of December 28th, 1962, we conclude a system in which the origin and the justification of the authority such as the political institution would be found in one unique party. Generally saying Algeria’s presidential system functions in a closed circuit. The president of the republic who is the secretary-general of a party, is responsible politically in front of the national assembly, but the members of this one government are named by the party and not by the president of the republic, etc.

Anyhow, there is no objection to the definitions, classifications or to the use of a particular terminology. Islam takes an affirmative stance on almost all of them, no matter what they are called. This seems to be testified throughout Islamic history. Furthermore, the sources of right in Islam may be the guarantees of human rights.
Endnotes

4 Ibid. p.9.
6 Ibid. p.136.
8 Al-Khaṭīf, op. cit.,p. 35.

13 Period of waiting during which a widow or a divorcee may not remarry.
18 ‘Abd-Allah, op. cit, p.31.
20 Walid, op. cit. p.28.
The Qur’an also calls itself by alternative names, such as Kitāb, Huda, Furqān and Dhikr (Book, Guide, distinguished, and remembrance respective). When the definite article, al, is prefixed to the Qur’an, it refers to the whole of the book; but without this prefix, the Qur’an can mean either the whole or a part of the book, thus one may refer to a singular Sura or Āyah there of as the Qur’an, but not as al-Qur’an (kamali, *principle of Islamic jurisprudence*, Cambridge, 1991-notes-).


Mawdudi, op.cit. p. 196.

Kamali, op.cit. p. 44.

Thus we read in a Hadith, “whoever sets a good exemple (He and all those who act upon it shall be rewarded till the day of resurrection, and whoever sets a bad exemple He and all those who follow it will carry the burden of its blame till the day of resurrection)” See Asnawi, Nihāyah. vol. 2, P.170 and Shawkani,, *Irshād al-Fuhūl*, p. 33.

(Man Sannah fi al-Islām Sunnah Hasanah Falahu Ajruhā wa Ajru man ‘amilah bihā...Wā man Sannah fi al-Islām Sunnah Sayyi’ah falahu wizruhā wa wizru man ‘Amila bihā...).

Shaṭibi, op.cit. p.178.


Ibid.


*The English Bill Of Rights 1776*, from Internet site.


Theodor, op. cit. p. 79

Ibid., p. 39.


Ibid. p. 1561.

Merriam-Webster, thesaurus. By: Walid Idris, op.cit. p.11


Theodor, op. cit. p.77.


Medieval Christian Philosophers, such as St.Thomas Aquinas, put great stress on natural law, which conferred certain immutable rights upon individuals; they viewed it, however, as part of the law of God (Henle, A Catholic view, of human rights A Thomestic refraction, in rosembaum, imptra note: 24, at 87-97).


Thoedor, op.cit. p. 79.

Ibid.


Theodor, op. cit. p. 79.
69 Thoudor, op. cit., p. 80.

Where Fuller seeks to established that lawmaking (positivism) necessarily involves compliance with certain substantive moral standards for a criticism of fuller’s theses.

71 Thoudor, op., cit., p. 80
72 The same is true of the immoral apartheid practices used to be in South Africa law (no lower in practice.

75 Hart’s argument is that by withholding legal recognition from iniquitous rules, we may crossly oversimplify the variety of moral issues to which they give rise. There is not only the moral question of obedience: Am I to do this evil thing?; there is also Socrates question of submission: Am I to submit to punishment for disobedience or make my escape? Hart argues that a concept of law which allows the invalidity of law to be distinguished from its immorality rubles us to identify more clearly the complexities and variety of the different problems.

76 L. R. Pound, *Jurisprudence* (1959). Pound’s individual interest includes personality (physical integrity, liberty, reputation, freedom og opinions, etc). And domestic relaying and substance (property, contracts, etc.) Public interest of the state as a juristic person and as a guardian of social interests. Social interest includes general security, security of social institutions, general morals, conservation of social resources, general progress, and individual life.
77 Theodor, op. cit. pp. 79-81.
78 H.L.A. Hart, op. cit., p. 64, Theodor, op. cit., p. 4.