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Âdamiyyah and *'Ismah:* The Contested Relationship between Humanity and Human Rights in Classical Islamic Law

Recep Şentürk*

In this article it is argued that the cleavage in modern legal discourse between the advocates of universal human rights and domestic civil rights has also been observed in Islamic law since its formative period in the first century of Islam, which corresponds to the seventh century AD. A survey of the works of Muslim jurists from the classical era demonstrates that the relationship between the *'ismah* (inviolability or legal and political protection of basic human rights) and *âdamiyyah* (humanity, personhood) has been contested for centuries, thereby giving rise to a latent cleavage between universalistic and communalistic jurists. This cleavage has yet to be explored, although it is crucial to determine whether there are universal human rights in Islam. This article is a brief presentation of the preliminary findings of an ongoing research.

The relationship between humanity and human rights has long been contested in the world, particularly by the scholars of Islamic and West-

* Associate professor of sociology. Ph. D. from Columbia University, Department of Sociology. Affiliated with the Center for Islamic Research (ISAM), Istanbul. Please direct all correspondence to the author at ras13@tnn.net. I express my gratitude to Prof. Abdullahi A. An-Na'im, the director of the Islam and Human Rights Program, for his invaluable support. My thanks to Prof. Herald Berman, Prof. J.D. van der Vyver, Prof. S. Tipton, Prof. F. Rechner and Prof. Şerif Mardin for their comments and contributions. I also thank Jamilah Bargach, Ekatterina Yahyaoui, Asma Abdel Halim and Vallerie Harden for their friendship and stimulating discussions. My special thanks go to Shelly Brownsberger, the coordinator of the fellowship, for her support. In addition, I am grateful to the support provided by Middle East Research Competition (MERC), Cairo. I also thank my colleagues at ISAM, Istanbul, who attended a workshop where this paper was presented for their comments. An earlier version of this paper was presented at "Contemporary Islamic Synthesis," a symposium organized by American University Center for Global Peace, October 4-5, 2003, Library of Alexandria, Egypt. Another version was presented at a seminar in the Faculty of Economic and Political Sciences, Cairo University, on December 11, 2003. I would like to express my thanks to Ola Abou Zeid and Mustapha Kamel el Sayyed for their comments and contributions.

ern law, because the establishment of this relationship determines who is entitled to human rights. The answers have been diverse and have evolved variably in different parts of the world. This question is still subject to bloody political and legal conflicts, as the problem has yet to be completely solved. Below I will focus on the long debated relationship between humanity and human rights in classical Islamic law, which has wide-sweeping consequences on the relations among Muslims and between Muslims and non-Muslims.

William H. McNeill wrote in his well-known book, *The Rise of the West: A History of the Human Community*, that "between about A.D. 500 and 1000 an intensified ecumenical world system began no nibble away at cultural autonomy—a process registered more sensibly than in any other fashion by the spread of Islam into the newly opened marginal regions of the old world".[1] McNeill attributes this development to the fact that "Persistent cultural pluralism within the realm of Islam was matched by the special restraints on political authority that Islamic law imposed".[2] As McNeill also points out, Islamic law played a significant role in shaping the relations not only within the Islamic society but also between Muslim and non-Muslim communities in a wide geography for an extended period of time.

> Religious and cultural pluralism was in fact institutionalized by the prescriptions of the Koran requiring Moslims to tolerate Christians and Jews. The civilization of Islamic heartland therefore became a mosaic in which separate religious communities managed their own affairs within remarkably broad limits. Conquest and conversions after A.D. 1000, that carried Islam into India, southeast Asia, and across most of the Eurasian steppes, as well as into southeast Europe and a large part of sub-Saharan Africa, added a great variety to this mosaic.[3]

In this paper, I will explore *why* and *how* the classical Islamic law ensured the inviolability of all human beings regardless of their religion, color, language and race against any authority, be it religious or political. Without unearthing the classical doctrines of Islamic law it would be impossible to understand the social structure of the mosaic-like Islamic society which housed many non-Muslim groups during its most powerful times.

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1 William H. McNeill, *The Rise of the West: A History of the Human Community*, Chicago: University of Chicago Press 1991, xxv-xxvi.

2 Ibid.

3 Ibid.

Using the original terms of Islamic law, the contested relationship between *âdamiyyah* (humanity or personhood) and *'ismah* (the inviolability of basic human rights or their legal and political protection)[4] is the key to the different positions classical Muslim jurists took concerning the universality of human rights. Muslims jurists in the classical era agreed more or less on what rights should be protected under the coverage of *'ismah*, but there was a question which severely divided them: Who has the right to *'ismah* and why? Is it humanity in its entirety or Muslims and those who make treaties with them? Can Islamic law legislate for non-citizens in order to grant them human rights? Would it be possible to enforce such legislation outside the *dâr al-Islâm* (the House of Islam), which is beyond the jurisdiction of Islamic authority? Does all of humanity or the citizenry of the Islamic state alone, composed of Muslims and non-Muslims, fall under the jurisdiction of Islamic law? To what extent are Muslims allowed to interact and intervene with other legal traditions under their rule and on what grounds? These questions center on how we define the relationship between humanity and human rights.

Some Muslim jurists from the seventh and eighth centuries AD answered the question of who is entitled to human rights as being humanity in its entirety. Their position is summarized in the following postulate: "Human rights are due for humanity" (*al-'ismah bi al-âdamiyyah*).[5] Below I will call this approach the *universalistic perspective*. From this perspective human rights are born with the person, they are innate, unearned and inalienable. The children of Adam are entitled to these rights everywhere in the world, regardless of their race, gender, language and religion.

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

5 See for instance, al-Marghinani, Burhanaddin 'Ali ibn Abi Bakr (d. 593 H), *al-Hidâyah Sharh Bidâyah al-Mubtadî*, (eds. Muhammad Muhammad Tamir, Hafiz 'Ashur Hafiz), Cairo: Dar al-Salam, 1420/2000, II, 852. The author states that "*al-'ismah al-muaththimah bi al-âdamiyyah*." This will be discussed below in greater detail.

In contrast, other Muslim jurists from the same period stated that the citizenry of the Islamic state alone, consisting of Muslims and non-Muslims, are entitled to human rights. They argued that Muslims gain human rights because of their faith in the religion of Islam, while non-Muslims do so by virtue of the compact they sign with the Muslim political authority. Their stand is summarized in the following postulate: "Human rights are due for faith or treaty" (*al-'ismah bi al-imân aw bi al-amân)*. In this article, this approach will be called the *communalistic perspective.*

This disagreement has broad consequences. If the answer is humanity, every Muslim individual, the Muslim community and the state would be required to stand for the rights of each and every human being in the world. Otherwise, if the answer is the citizenry alone, the state and the Muslim community would be obliged to protect the rights of its citizenry and no one else. Furthermore, the *de facto* state of relations between Muslims and non-Muslims is peace from the universalistic perspective, while it is war from the communalistic perspective.

Here we observe a parallelism in the basic tension characterizing the discourse on rights in Islamic and modern Western law. The universalistic approach is generally known in modern legal discourse as the *universal human rights* perspective, which advocates equal rights for all human beings everywhere, while the communalistic approach is termed the *civil rights* perspective, which advocates equal rights for the citizens of a particular state alone.[6]

Accordingly, there emerged two positions in Islamic law as to the relationship between *âdamiyyah* and *'ismah* or, put more plainly, as to who possesses the basic rights covered under the title of *'ismah*. Abu Hanifa and his followers from the Hanafite and other schools argued that the *'ismah* exists with *âdamiyyah*. In contrast, Malik, al-Shâfii and Ibn

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

Hanbal advocated that only those who have *imân* (declaration of Islamic faith) or *amân* (making a compact of security with Islamic state) are entitled to *'ismah*. There have nevertheless been scholars from these three schools who adopted the universalistic perspective. Consequently, the representatives of the universalistic perspective to human rights constituted an "invisible college" in Islamic law drawing members from all Schools of Law over centuries. The cleavage between the Hanafites and the other schools of law over the universality of human rights has remained as a latent cleavage in Islamic law. However, this long standing legal conflict has become highly relevant today as globalization has brought Muslims and non-Muslims closer than ever and has refigured the structure of social and international relations.

In this article, the divergence between the universalistic and communalist positions and the rationale behind each one will be analyzed. The article will conclude by emphasizing the need to revive the universalistic approach to human rights in Islamic law in the age of globalization, which is characterized by an increased volume of communication and a density of connections between Muslims and non-Muslims throughout the world. The universalistic approach to human rights is curiously, not represented in the current literature on Islamic law. This article will serve as a step towards reviving the universalistic view on human rights in classical Islamic law. However, it should not be expected that this brief paper will do complete justice to the subject by offering a full treatment; such an attempt requires a monograph, which is a future project of the author.

Two Key Concepts: *Âdamiyyah* and *'Ismah*

Prior to exploring the relationship between the concepts of *âdamiyyah* and *'ismah*, a brief introduction would be useful for those who are not familiar with these terms. Unfortunately, these two concepts have not received the attention they deserve in the scholarly community. I do not know of any study exclusively focused on the concept of *âdamiyyah*[7]

7 The name *Âdam* and the term *Banî Âdam* (children of Adam) occur in the Qur'an several times. On some occasions the universal divine call is expressed as "O children of Adam!" For a complete list, see Muhammed Fuâd 'Abdulbaqi, *al-Mu'jam al-Mufahras li Alfâz al-Qur'ân al-Karîm*, Istanbul: al-Mektebetu'l-Islami 1982, 24-25. The Qur'an emphatically expresses the superiority of human beings over angels. The Qur'an states that all human beings are created

as used in Islamic law and theology. The same is true for the concept of *'ismah*. An exception is presented by Baber Johannsen, who complained years ago in an article devoted to the concept of *'ismah* that it has not been subjected for an independent study in the form of an article or a book.[8] The purpose of this article is not to analyze the concepts of *âdamiyyah* and *'ismah*, but rather the relationship between them. Therefore, the exploration of the concepts will be brief.

The term *âdamiyyah* is an abstraction, which was used by the jurists to indicate "humanity" on the universal level, including both men and women, Muslims and non-Muslims. In Arabic a man is called "*âdamî*" while a woman is called "*âdamiyya*" The infinitive-adjective *âdamiyyah* denotes to be a human being or a child of Adam; literally translated it means "Adam-hood." The term "*âdamiyyah*" as a universal category on which human rights are based is initially a characteristic of Hanafite thought. Abdulaziz al-Bukhari defines a human being with reference to the purpose for which an *âdamî* (person, human being) is created, as follows: "The purpose (meaning) of a human being (*âdamî*) is what he is created for which is worship of God and His representativeness on earth to establish His laws (rights) and to carry the burden of divine trust".[9]

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perfectly. They are born with perfect souls. All human beings are created in the image of God, not physically, but spiritually, in the sense that their attributes resemble those of God regarding mercy, knowledge, love and justice. The human soul is a divine breath. Physically human beings are not different from animals, but spiritually they are higher than the angels. Every human being is ordained by creation to serve as a vicegerent (*khalifah*) of God on earth, to represent God's will and implement His justice. God's love and providence for humanity are universal, for believers and infidels, for the pious and the sinful. A believer is also required to love God and His entire creation and treat them with compassion accordingly. The following Qur'anic verse illustrates by way of example how the Qur'an approaches the Sons of Adam: "We have honored the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors, above a great part of our creation" (Isra 17/70).

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

9 (*Wa ma'na al-adami huwa ma khuliqa lahu min 'ibadati rabbih wa al-khilafati fi ardihi li iqamat huqûqih wa tahammul-i amânâtih*). 'Abdulaziz al-Bukhari (d. 730), *Kashf al-Asrâr 'an Usul Fakhr al-Islam al-Bazdawi* (ed. Muhammad al-Mu'tasim billah al-Baghdadi), Beirut: Dar al-Kitab al-'Arabi 1418/1997, I, 378. See also Kasâni, *Bedâyi'*, Beirut: Dar al-Fikr 1996, VII, 352.

For Hanafite jurists, humanity (*âdamiyyah*) constitutes the grounds for the right to own property[10] and to establish a family.[11] It is also the attribute by which one gains the right to perform acts with others. Humanity allows one to make proposals to others and to accept or refuse the proposals of others.[12]

The Arabic legal terms, *'ismah, man'* and *hurmah* have been used interchangeably in Fiqh terminology since the first century of Islam. The term, *'ismah,* is known best as a theological concept that indicates the infallibility[13] of the Prophets, according to Sunnites, and also of the imams, according to the Shiites. It occurs on many occasions in the Qur'an.[14] Prophet Muhammad also used it in his sayings.[15]

Muslim jurists have unanimously agreed that a person who is entitled to *'ismah* enjoys what is called in modern human rights law "basic rights" or "irreducible rights".[16] They consist of (1) the right to life (*'ismah al-nafs* or *'ismah al-dam*), (2) the right to property (*'ismah al-mâl*), (3) the right to religion (*'ismah al-dîn*), (4) the right to reason and thought (*'ismah al-'aql*), (5) the right to family and progeny (*'ismah al-nasl*), and (6) the right to honor (*'ismah al-'ird*). In the classical sources, the right to honor and family are considered as being one, but for our purposes here they are listed separately.[17] These rights have a distinct status as compared to other rights in Islamic law. They are known as *al-darûrât* or *al-darûriyyât*, which literally means "axiomatic rights",

10 It is commonly stated in the *Fiqh* literature that "the quality of property ownership is an honor which is required by humanity" (*sifat al-mâlikiyye karâmah wa al-âdamiyya mustad'iyah lahâ*) Marghinani, *al-Hidâya*, II, 537.

11 It is commonly stated that the legal ground on which marriage is founded is humanity (*mahall al-nikah al-âdamiyyah*). Ibn al-Nujaym, *al-Bahr al-Raiq*, V, 16; Kasani, *Bedayi' al-Sanayi'*, VII, 35; Sarakhsi, *al-Mabsut*, XXX, 288. al-Marghinani states that "marriage is a characteristic of humanity" (*al-Nikah min khasais al-Adamiyyah*), *al-Hidaya*, II, 510.

12 It is commonly stated that the power for approval and disapproval of a contract is derived from humanity (*al-'îjab wa al-istîjab bi al-âdamiyyah*).

13 See W. Madelung, *Encyclopedia of Islam*, *'Ismah*, IV, 182. It defines the term as follows: "as a theological term meaning immunity from error and sin is attributed by Sunnis to the Prophet and by Shi'is also to the imams." For the meaning of the term *'ismah* in Islamic mysticism, see Su'ad al-Hakim, *al-Mu'jam al-Sufi*, Beirut: Dar Nadra 1401/1981, 806-810.

14 For the usage of *'ismah* and its derivatives in the Qur'an, see, Muhammad Fuâd 'Abdulbaqi, *al-Mu'jam al-Mufahras li Alfâz al-Qur'ân al-Karîm*, 462.

15 See A. J. Wensinck, *Concordance et Indices de la Tradition Musulmane*, *"'ismah"*, IV, 250.

16 On these two concepts, see Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell Univ. Press 1989, 37-45.

17 Ibrahim b. Musa al-Shatibi, *al-Muwafaqât*, Beirut: Müessese al-Kutub al-Thaqafiyya, 1420/1999, I, 19, II, 12-16.

indicating that they are the most basic and inalienable rights in the sense that without them human life with dignity is impossible.[18]

Classical Muslim jurists agree that the protection of these rights has been the purpose of all legal systems. Therefore, these rights are also called "objectives of law" (*maqâsid al-sharî'ah*).[19] Consequently, none of the Muslim jurists of the classical era claimed that Islam is the first religion to grant these rights to human beings. Instead, they claimed that granting these rights equally to all human beings has always been the common feature of all religions and legal systems.[20]

The concept of right existed in Islamic law and philosophy from the very beginning, that is, since the seventh century AD. The Arabic term *haqq* denotes right. Yet there are other meanings attributed to it as well, such as truth, true news, true path, true knowledge, true faith, actual evidence, the fact of the matter, justice and duty.[21] It is also used as one of the names of God. It occurs 247 times in the Qur'an.[22] It is also frequently used in the sayings of the Prophet Muhammad. The plural of the term, *huqûq*, is presently used to indicate law and the science of law in Arabic, Turkish and most of the other languages Muslims use.

The *human rights* in classical Islamic law are termed *huqûq al-âdamiyyîn* and *huqûq al-nâs*. In the modern Islamic legal discourse the standard term is *huqûq al-insân*. The *rights of persons* are divided into two

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18 See Abu Hamid al-Ghazzali, *al-Mustasfâ fi 'Ilm al-Usûl*, Beirut: Dar al-Arqam 1414/1994, I, 633-637.

19 In addition to ibid, see Sheikulislam 'Izz al-Din 'Abdilaziz ibn Abdisselam (d. 660), *al-Qawa'id al-Kubrâ* (eds. Nezih Kamal Hammad, 'Uthman Jum'ah Damriyyah), Dimash: Dar al-Qalam, I, 8.

20 Yet, the former claim emerged in the modern era to demonstrate the superiority of Islam over other religions and legal systems. This was perhaps in reaction to the exclusivist claim advocated by some Western scholars that human rights are a Western innovation. This claim has no historical ground because, as it is demonstrated by the present work, both the "concept" and the "term" human rights (*huqûq al-âdamiyyîn* and *huqûq al-nâs*) have existed in Islamic law since its formative period. However, to claim that only Islamic law grants universal human rights or Islamic law is the first to introduce universal human rights is, as explained above, against the inclusive approach which is traditionally advocated by Islamic jurisprudence. Ironically such a claim is not rare in the Islamic discourse in the era of colonization.

21 For different usages of the term *haqq* in the Qur'an and in various traditional Islamic disciplines, see "Hak" in *TDV İslam Ansiklopedisi*, İSAM: Istanbul 1997, XV, 137-152. For the term "human rights" in Islamic literature, see Recep Senturk, "İnsan Hakları – İslam Dünyasında" *TDV İslam Ansiklopedisi*, Istanbul: İSAM 2000, XXII, 327-330.

22 See, Muhammad Fuâd 'Abdulbaqi, *al-Mu'jam al-Mufahras li Alfâz al-Qur'ân al-Karîm*, 208-212.

different categories: earned (*muktasab*) and unearned (*ghair muktasab*) rights. The unearned rights, which we call today "natural rights," are what we are interested here in this article. These terms (*huqûq al-âdamiyyîn* and *huqûq al-nâs*) are used in contradistinction with *huqûqullah*, literally "the rights of God", which indicates the communal rights the violation of which cannot be forgiven by the victim, the judge or the political authority.

The terms *huqûq al-âdamiyyîn* and *huqûq al-nâs* appear in the *magnum opus* of al-Shafii, *al-Umm*.[23] The respected Shafiite jurist Abu al-Hasan al-Mawardi (d. 450) is among the political theorists who gave a key role to the term *huqûq al-âdamiyyîn* in his respected book *al-Ahkâm al-Sultâniyya*.[24] Likewise, Ibn Nujaym, a prominent Hanafite jurist, also frequently used the same term in his well-known book *al-Ashbah wa al-Nazâir*.[25]

The unearned rights, as mentioned above, are covered under the title *'ismah*, as these rights are considered to have been born with each and every individual person. The earned rights include the rights that are gained due to contracts between legal actors, such as particular privileges enjoyed by a certain person or group. The earned rights can be lost, because they are contingent upon contracts, but the unearned rights, which are due to humanity by virtue of being a human, are never lost, as a person can never lose his or her humanity.

The unearned rights are not listed in a particular verse in the Qur'an or in a *hadith*. Instead, they reflect the spirit of Islamic law as derived through a comprehensive survey of the scriptural sources. They have been determined by jurists who used rational arguments (*dalil ma'qûl*) along with arguments from the Qur'an and the *Sunnah* (*dalil manqûl*).[26] Inviolability of a person or an object can be determined by a *ra'y*, an informed juristic opinion, or by a *khabar al-wâhid*, a saying of Prophet Muhammad. Consequently, it is possible for their range to change. The

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23 Muhammad b. Idris Al-Shafii (150-204 AH), *al-Umm*, "*Kitab al-Aqdiya*," "*Bâb ma yaridu min al-qasam bi 'iddia' ba'd al-maqsûm*," (ed. Rif'at Fawzi 'Abd al-Muttalib), Cairo: Dar al-Wafa 1422/2001, VII, 534-535; see also *al-Umm*, "*Siyar al-Awzaî*," "*al-Musta'man yazni aw yasriq fi dar al-Islam*," IX, 247.

24 See *al-Ahkâm al-Sultaniyya* (ed. Ahmad Mubarak al-Baghdadi) al-Kuwait: Dâr ibn al-Qutayba 1409/1989), 43.

25 Ibn Nujaym, *al-Ashah wa al-Nazair*, Dimashq 1403/1983, 388.

26 al-Mawsili discusses in *al-Ikhtiyâr li Ta'lîl al-Mukhtâr*, "Kitâb al-Jinâyât", the rational and scriptural evidences for the protected rights, following the Hanafi tradition. See al-Mawsili, *al-Ikhtiyâr li Ta'lîl al-Mukhtâr*, "Kitâb al-Jinâyât", Dimashq: Dar al-Khair 1419/1998, II, 499.

source or cause of *'ismah* is called *'âsim*, while the protected right, object or person is called *ma'sûm*, *muhtaram* or *maqhûn*. The *'asim* for Hanafites is humanity (*âdamiyyah*) while for rest of the Schools of Law, the *'âsim* is faith (*imân*) or treaty (*amân*). In the literature, it is stated that life, property, mind, family and honor are *ma'sûm*, *muhtaram* or *mahqûn*. All these terms mean "protected by law as a right of the person who enjoys them."

There are pre-determined remedies for the fulfillment of rights and punishments for their violators. In classical Islamic law the *'ismah* doctrine provides the foundation for the criminal law. These punishments are called *al-hudûd*, literally the borders or protections, which are rather different from the punishments applied today from the perspective of modern criminal law.

Violation of *'ismah* is a key term in Islamic criminal law. The punishment for the violation of the right to life (*'ismah al-dam* or *'ismah al-nafs*) was retaliation (*qisâs*) or reparation, which was also called blood money (*diyah*). Mutilation of the right hand was the penalty for a major and open violation of the right to property. *Jalda* (whipping) or *rajm* (stoning to death) were punishments for the violation of the right to family, *'ismah al-nasl*, for rape or adultery in a public place. Eighty lashes were the punishment for defaming a woman by accusing her of sexual immorality; this was seen to be a violation of the right to the protection of honor (*'ismah al-'ird*). Drinking alcohol in public was punishable by eighty lashes, as it was seen as a violation of the protection of mind (*'ismah al-'aql*)[27], which was not applied to non-Muslims who were permitted by their religions to use alcohol.

In Islamic history, an official court issued these punishments after due process; moreover, according to Islamic law, these punishments cannot be implemented in the absence of an Islamic state. Quite strikingly, the Ottomans rarely applied these punishments; instead the Ottoman *'ulama* chose to implement customary law (*'urf*) in deciding what form of punishment should be applied to a given crime. This approach is in conformity with the letter and sprit of Islamic law and should not be seen as departing from it. Presently, these forms of punishment have been replaced in most Muslim countries by modern punishments.

27 Abu 'Abd Allah Muhammad b. 'Abd al-Rahman al-Bukhari (d. 546/1151), *Mahasin al-Islâm wa Sharâi' al-Islâm*, Beirut 1985, 65.

The claimant can drop some of these punishments, such as retaliation and blood money in the case of a physical assault or killing. For this reason, such punishments are termed the *rights of persons,* or *huqûq al-'ibâd.* In contrast, the claimant cannot drop the punishment if the court has charged the criminal for rape, theft or defaming a chaste woman. This category is termed *huqûq allâh,* literally "the rights of God", that is, communal rights.[28] It is also termed *huqûq al-shar',* "the rights of law."

The existence of these punishments in relation to each protected right and the requirement of an official court to implement them demonstrate that the rights covered by the doctrine of *'ismah* are not merely moral or religious injunctions, which is the case in most other religious cultures in the world. The existence of an Islamic state and the due process are prerequisites for the enforcement and protection of these rights through official court and police system. In fact, the legitimacy of political authority in an Islamic society is derived from its protection of the *'ismah* of its citizens and humanity in general.

However, Muslim jurists have been aware of the limits of the state power in protecting universal human rights and the fact that rights cannot always be enforced by the political system. For instance, the violations outside *dâr al-Islâm* cannot be prevented and punished by the Islamic state as they take place outside its dominion. Likewise, minor infringements such as gossip-mongering cannot be prevented by the state. In such cases, where legal enforcement is not feasible, the criminal is considered as having committed a sin, even if he/she evades legal punishment.

The term *taqawwum* is used to indicate the feasibility of punishment. Consequently, the punishment of a crime is contingent upon the coexistence of *'ismah* and *taqawwum* at the same time. In any case the crime will not go unpunished; God will punish the crime unless the criminal voluntarily repairs for his/her mistake out of moral and religious consciousness. These types of violations are termed *ithm,* which indicates a sinful action but not a legally punishable crime.

Hence, there are two different types of *'ismah* in classical literature: *al-'ismah al-muaththimah* and *al-'ismah al-muqawwimah.* The first one, *al-'ismah al-muaththimah,* can be defined as a right that is morally and

28 For the concept of right (*haqq* pl. *huqûq*) in Islamic law, see 'Abd al-Razzaq al-Sanhûrî, *Masâdir al-Haqq fi al-Fiqh al-Islâmî,* Beirut: al-Majma' al-'ilmi al-'Arabi al-Islami, 1953-1954, I, 13-99.

religiously enforced, and the violation of which is a sin. The second one, *al-'ismah al-muqawwimah*, can be defined as a right that is legally and politically enforced, and the violation of which is a punishable crime. As we will see below, Charles Hamilton, the translator of *al-Hedaya* on Hanafi law, rendered *al-'ismah al-muaththimah* as "sin creating protection", a literal translation which draws attention to the consequence. In parallel with this, I have also rendered *al-'ismah al-muqawwimah* as the "value creating protection." For the lack of a better translation, I use them in this paper.

For Hanafites, *al-'ismah al-muaththimah* is contingent upon residence in the territory of an Islamic state. From the Hanafi perspective, *taqawwum* does not exist in the *dâr al-harb* although *al-'ismah al-muaththimah* exists everywhere. As a result, the violation of *'ismah* in the *dâr al-harb* is considered to be beyond the jurisdiction of an Islamic state. Therefore the criminal is required expiation alone. The Shafiites disagree with this doctrine and argue that *al-'ismah al-muqawwimah* is not limited to a particular territory. The violation of the rights of a Muslim must be punished, even if such an event takes place in the *dâr al-harb*.

The Universalistic View: Basic Rights are due by Virtue of Being a Human

Abu Hanifa and his followers advanced the cause of universal human rights –universally and unconditionally granted to all by birth, on a permanent and equal basis, and due by virtue of being a human– rights which cannot be taken away by any authority. Abu Hanifa coupled the concept of *âdamiyyah* with the concept of *'ismah* and argued that being a child of Adam, or a human being, whether Muslim or not, serves as the legal ground for possessing basic rights (*al-'ismah bi al-âdamiyyah*).[29] Although the concepts of *'ismah* and *âdamiyyah* require a more thorough explanation, we can phrase this principle in plain English as follows: Basic human rights are due to all human beings by virtue of their humanity.

The students of Abu Hanifa recorded his views on the legal issues, as he himself did not put them into writing personally. He wrote only on

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

theology,[30] not on law. Abu Yusuf (182/798) and Muhammad al-Shaibani (189/805), two of Abu Hanifa's leading students, transmitted the views of their teacher in writing to subsequent generations. Tahâwî (321/933), Qudûrî (428/1037), Dabûsî (430/1039), Sarakhsî (483 or 490/1090), Kâsânî (587/1191), and Marghinânî (593/1197), among many others, systemized these views in encyclopedic works. Sarakhsi's *magnum opus*, *al-Mabsût* has played a significant role in the development of the early Hanafi literature. Later generations of Hanafi jurists expanded, modified and reinterpreted the legacy of Abu Hanifa and his prominent students. Among the prominent Hanafites from subsequent generations are Zaylai (762/1360), Fanârî (834/1431), Molla Khusraw (885/1481), Ibn Humâm (861/1457), Ibn 'Âbidîn (1252/1836) and Ibn Nujaym (970/1563).[31] Babartî (786/1384) Timurtashi (1004/1596) Haskafî (1088/1677) and Khâdimî (1176/1762) are also among prominent Hanafite jurists.[32]

The work of the late Ottoman reformist jurists, led by Ahmed Cevdet Paşa (1312/1895), *Majalla-i Ahkâm al-'Adliyya*, represents the first attempt to codify and enact the Ottoman civil law. It also reflects the same universalistic Hanafi approach.[33] The production of *al-Majalla* (in Turkish spelling *Mecelle*) raised the hopes of observers who saw it as the revival of Islamic law. Unfortunately, with the collapse of the Ottoman Empire, this reform movement was arrested. The majority of the scholars of Islamic law, even those who belong to the Hanafi tradition, have since then neglected the universalistic view. Consequently, the communalistic view prevailed in the Muslim world during the 20th century.

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30 For the works of Abu Hanifa on theology see, İmam-i A'zam Numan b. Sabit el-Bagdadi Ebu Hanife (150/767), *İmam Azamın Beş Eseri*, (tr. Mustafa Öz), İstanbul : Marmara Üniversitesi İlahiyat Fakültesi Vakfı (İFAV), 1992.

31 See al-Marghinani, Burhanaddin 'Ali ibn Abi Bakr (d. 593 H), *al-Hidâyah Sharh Bidâyah al-Mubtadî*, (eds. Muhammad Muhammad Tamir, Hafiz 'Ashur Hafiz), Cairo: Dar al-Salam, 1420/2000.); al-Kâsânî, Alâ' al-Din Abi Bakr ibn Mustafa, *Bedâiu's-Sanâi' fi Tartîb al-Sharâi'*, Beirut 1406/1986; Ibn 'Abidin, *Hashiyet Redd al-Mukhtâr*, İstanbul: Kahraman Yay. 1984, vol. IV, p. 160-161; V, 58. Ibn 'Abidin states that "a human being is inviolable legally even if he is a non-Muslim" (*Al-Adami mukarram shar'an wa law kafiran*), *Hashiya*, V, 58.

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

33 Cevdet Paşa, *Açıklamalı Mecelle* (*Mecelle-i Ahkâm-ı Adliye*) (ed. Ali Himmet Berki), İstanbul: Hikmet Yayınları, 1982. There are voluminous commentaries on the *Mejelle* by Hoca Reşid Paşa, Atıf Mehmed, and Ali Haydar Efendi. For the re-print of the English translation of the *Mejelle* see, *The Mejelle* (tr. C. R. Tyser, D. G. Demetriades and Ismail Hakki Efendi) Kuala Lumpur: The Other Press 2001 [Originally printed by the Ottomans in Cyprus 1901].

The universalistic jurists used rational and scriptural arguments to defend their doctrine. These arguments have been derived from scattered sources in Islamic theology (*kalâm*), Jurisprudence (*usûl al-fiqh*) and Law (*furû' al-fiqh*). Below, first the rational arguments (*dalîl ma'qûl*) will be introduced, prior to the scriptural arguments (*dalîl manqûl*).

The most commonly used argument to defend the universality of human rights derives from the universality of God's call in the Qur'an and the universality of Prophet Muhammad's message. The divine call is termed *al-khitâb*. Allah's universal call, as expressed in the Qur'an and the Prophet Muhammad's universal message, as expressed in his sayings (*ahâdith*), remind humanity in its entirety, without discrimination, of their responsibilities towards God, their fellow humans and other creatures. The term *al-taklîf* is used to indicate these responsibilities given to human beings by God. Since God's call in the Qur'an is universal, human rights must also be universal if humanity in its entirety is to be allowed to respond freely to His message. God's purpose in creating humanity is trial (*ibtilâ*) and holding them responsible (*taklîf*) for their actions which cannot be achieved unless all human beings are granted sanctity and enjoy freedom.[34]

Abi Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi is among the first scholars who systematically discussed the philosophy and methodology of Hanafi jurisprudence concerning human rights. He is the author of the well-respected *Usûl al-Sarakhsi* and *al-Mabsût*. Al-Sarakhsi is known as the one who systemized the works of scholars from the previous generations such as the work of Muhammad Hasan al-Shaibani, Dabusi and Bazdawi.

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

According to al-Sarakhsi, as he explains in great detail in his *Usûl*, all people are addressed by God including non-Muslims because Prophet Muhammad was sent to humanity as a whole. Everyone is called by God to faith (*al-imân*) and to carry the burden of the responsibility of being a human and enjoy the rights stemming from it. That means God considers every one equal before Islamic law. In the Qur'an, God orders Prophet Muhammad the following: "O Muhammad say: O people verily I am God's Messenger to you all." This call beyond doubt includes all human beings even if they are non-Muslims at the moment.[35]

Sarakhsi argues that the divine call has important implications on human rights. Being addressed by God bestows a special status on human beings. It gives them the right to legal person-hood (*al-ahliyyah*) at the universal level. Since God calls upon them all, each human being is qualified for equal rights and duties by birth.

For Sarakhsi, the divine call addresses the issues in three fields: creed, criminal law, transactions and rituals. Refusing the creed which comes with the divine message, although it is the most important part of the divine call, does not disqualify one from having rights and responsibilities. As a result of receiving the divine call (*hukm al-khitâb*), even if they do not acknowledge that it is a divine message, criminal law of Islam is applicable to non-Muslims who live under Islamic rule. Likewise, the laws concerning transactions are also applicable to them. As to the other rules, the scholars of Islamic law unanimously accept that the non-Muslims will be questioned in the Hereafter for not complying with them. It is reported from Hasan al-Shaibani that he said in his *Siyar al-Kabîr*: "whoever denies a rule from the rules of Islamic law has refused the meaning of *There is no god but God.*[36]"

The purpose of God in calling humanity is to try them (*ibtilâ*). Trial can be actualized only if those who are called upon have free will (*ikhtiyâr*) and freedom (*hurriyyah*) to exercise it. Sarakhsi writes: "The prohibition requires abstention from the prohibited through an action which is attributed to the earning (*kasb*) of the human being and his free will because the prohibition is a trial similar to the command. The trial can only be achieved if the human being has a choice in the matter."[37] He

35 Abi Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi (d. 490 AH), *Usûl al-Sarakhsî*, (ed. Abu al-Wafâ al-Afghani), Istanbul: Kahraman yay. 1984, I, 83.

36 Sarakhsi, Ibid.

37 Sarakhsi, *Usûl*, 86-88.

emphasizes the issue of freedom by saying that even if people perform what they are commanded and refrain from what they are prohibited, without having the right to chose otherwise, this would not be what God has intended because it would not be a true trial (*ibtilâ*). Freedom to choose the opposite is what makes compliance with the divine commands virtuous. The action must be the earning of the person out of his free will.

Related with this issue is the damages caused by animals to human beings. Since animals are not addressed by the divine call and are not free actors, they are not responsible for the consequences of their actions. The condition for being qualified for legal jurisdiction is to be a free actor (*li enne ma i'terada 'illetun sâlihatun li al-hukm wa huwa fi'lun hasala 'an mukhtâr 'ala wajh al-qasd ilaih*). Therefore a legal judgment cannot be attributed to the actions of animals. Muhammad al-Shaibani said that the action of an animal does not cause a legal punishment (*heder*); its action is not qualified for a jurisdiction to be attributed to it (*wa huwa ghair sâlih li idâfat al-hukm ilaihi*) because of the absence of the prerequisite which is considered the cause for receiving a normative judgement. This is unlike a slave who is legally qualified for attribution of a legal judgment to his actions.[38] Consequently, if a camel harms someone, the owner is not punishable for it. The fact that he has the right to property and the right to the inviolability of his property does not him punishable for the actions of his animal.[39]

Sarakhsi dedicated a special chapter to the legal person-hood of a human being which makes him qualified to acquire rights, duties[40] and other responsibilities (*Bab ahliyyat al-adâmi li wujûb al-huqûq lahû wa 'alayhi wa fi al-amânât allati hamalaha al-insân*). It is a discussion about why every human being (*al-âdami*) is qualified to legal person-hood (*al-ahliyyah*) for legally acquiring rights and duties. These rights and duties are related to the divine purpose for which human beings are created. Human beings consented to bear the burden of the divine mission which they took as a trust from God (*al-amânah*).

38 Sarakhsi, *Usul*, 326.

39 Sarakhsi, *Usul*, 327.

40 The term Sarakhsi uses is "*wujub al-huqûq lahû wa alaihi*" which literally means "the necessary imposition of the rights for him and the rights upon him". He is following the terminology used earlier by the founder of the Hanafi School, Abu Hanifa, who defined *al-Fiqh*, the Science of Law, as "the knowledge of the self about the rights for him and upon him" (*al-Fiqh ma'rifat al-nafs ma lahâ wa mâ 'alayhâ*). Al-Sarakshi, *Usul*, 332.

There are two types of qualification: qualification for prescribtion of laws (*ahliyyat al-wujûb*) and the qualification for performing the laws (*ahliyyat al-adâ'*). The source of this qualification is responsibility (*dhimmah*) to which legal and moral judgments are attributed. Human beings alone have responsibility, unlike the other animals, who have no responsibility (*wa li hadha ikhtassa bihi al-adâmi dûne sâir al-hayawânât allatî laysat lahâ dhimmah sâlihah*). The Arabic word *dhimmah* which stands for responsibility means covenant (*al-'ahd*). The term *ahl al-dhimmah*" which is used for the non-Muslims who sign a compact with the Islamic state is derived from the same origin; it means those who made a covenant with Muslims. The *dimmah* in this context is used for the covenant of human beings with God before coming to this world. Yet the embryo has only rights but no duties. Therefore he can inherit; he has right to lineage and family, and he receives what is given to him in a will. Birth makes him qualified for all rights and duties at the level of prescription.[41] He is gradually asked to perform them as he grows until he reaches puberty which is the time he becomes fully required for performing all his duties. God says "We attached the responsibility of every one to his neck".[42] By birth the place of rights and duties (*mahall*) and their cause (*sabab*) come to existence. Since the child is not able to perform his duties for a while he is not required to apply them until he can do so. For this reason his qualification is deficient (*al-ahliyyah al-qâsirah*).

> Upon creating human beings, God graciously bestowed upon them intelligence and the capability to carry responsibilities and rights (person-hood). This was to make them ready for duties and rights determined by God. Then He granted them the right to inviolability, freedom and property to let them continue their lives so that they can perform the duties they have shouldered. Then these rights to carry responsibility and enjoy rights, freedom and property exist with a human being when he is born. The insane/child and the sane/adult are the same concerning these rights. This is how the proper person-hood is given to him when he is born for God to charge him with the rights and duties when he is born. In this regard, the insane/child and sane/adult are equal.[43]

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41 Sarakhsi writes: "*Za'ama ba'd mashayikhuna* [he is al-Qadi Abu Zayd] *enne bi'tibar salahiyyat al-dhimmah yathbut wujûb huqûqullah ta'ala fi haqqih min hinin yuledu wa innema ma yasqut ma yasqut ba'd dhalik bi 'udhr al-sabâ li daf' al-haraj.*" *Ibid.*

42 An'am 17/13. "*Wa kull insânin alzamnâhu tâirahu fi 'unuqih.*"

43 Sarakhsi, *Usul*, 333-334. "*Li anna Allah ta'ala lemma khalaqa al-insan li haml amanatih akramahu bi al-'aql wa al-dhimmah li yakuna biha ahlan li wujûb huqûqillâh ta'alâ alaihi. Thumma athbata lahû al-'ismah wa al-hurriyyah wa al-mâlikiyyah li yabqâ fa yatamakkana min adâ'i ma hummila min al-amânât. Thumma hazihi al-amanah wa al-hurriyyah*

In brief, according to al-Sarakhsi, the plausibility of the universal divine call requires universal human rights along with free will (*ikhtiyâr*) and freedom (*hurriyyah*) as prerequisites because the purpose of God in creating the human family on this earth is a "trial"; this cannot be achieved unless human beings are free, inviolable and protected. Otherwise, if human beings were not granted basic freedoms and protection, God's purpose in creating humanity on earth would be unrealizable. The religious choices of human beings must be honored, even if they are in contradiction with Islamic teachings; they are a reflection of free will and thought. Human life must be protected because this is the only way they can respond to the divine call. Human reason must also be honored since reason is the mechanism by which moral choices of right and wrong are made. Reason is also the only way through which human beings can understand the divine message and implement it. From this perspective, the mind of everyone must be honored and protected, even if they oppose the way Muslims think.

The jurists who do not ground the protection of human rights on humanity claim that the tax collected from non-Muslim citizens of the Islamic state, which is known as *al-jizya*, is the fee of the security these citizens enjoy under Islamic rule. Al-Saraksi argued otherwise:

> The *jizya* is not the fee of protection of life. This is because the life of a person is originally inviolable. The permissibility [of war] is due to an assault. When the assault disappears with the treaty of citizenship, the original inviolability returns. Also, permissibility of killing a non-Muslim [in a war] is a punishment he deserves as a Communal Right. Therefore, it is impossible to repeal inviolability for money/tax.[44]

Since al-Sarakshi follows the universalistic Hanafi view, he grounds human rights on humanity. For him, human rights are due to non-Muslims because they are human beings, not because they pay tax. Paying *jizya* is not a prerequisite of human rights, according to the Hanafi doctrine. From this perspective, non-Muslims enjoy human rights even if they do not pay *jizya*. Furthermore, as a general principle in Islamic law,

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wa al-mâlikiyyah thabitah li al-mar'i min hînin yûladu, al-mumayyiz wa ghayr al-mumayyiz fîhi sawâun. Fakazâlika al-dhimmah al-sâliha li wujûb al-huqûq fîha thâbit lâhu min hînin yûlad yastawî fîhi al-mumayyiz wa ghayr al-mumayyiz."

44 *"Wa la huwa [al-jizya] badal 'an haqn al-dam li enne al-adamî fi al-asl mahqûn al-dam wa al-ibâha bi ârid al-qitâl fa idhâ zâle dhâlik bi 'aqd al-dhimmah 'âda al-haqn al-aslî wa li anna qatl al-kâfir jazâ mustahaqq li haqqillâhi te'âlâ fa lâ yajûzu isqâtuh bi mâl aslâ"* (Sarakhsi, *al-Mabsût*, X, 81-82).

rights and duties are treated separately. Consequently, enjoying rights is not contingent upon fulfilling duties. One still has rights even if he or she fails to do his or her duties.

On a more philosophical level, the prominent Hanafi scholar Marghinani (d. 1197) criticized the Shâfi'ite view as follows:

> With respect to the arguments of al-Shâfii, we reply that his assertion, that the "sin-creating protection (*al-'ismah al-mu'thimah*) is attached to Islam" is not admitted; for, the sin-creating protection is attached, not to Islam, but to the person; because man is created with an intent that he should bear the burdens imposed by the LAW, which men would be unable to do unless the molestation or slaying of them were prohibited, since if the slaying of a person were not illegal, he would be incapable of performing the duties required of him. The person therefore is the original subject of protection, and property follows as the dependant thereof, since property is, in its original state, neutral, and created for the use of mankind, and is protected only on account of the right of the proprietor, to the end that each may be enabled to enjoy that which is his own...[45]

Marghinani claims that the *sin creating protection*[46] (*al-'ismah al-muaththimah*) is granted to the person as part of being a human. This is because God creates human beings to carry the burden of moral and legal responsibilities, and this can only be possible if human beings enjoy the prohibition of the violation of their human rights (*hurmah al-ta'arrud*). The right to the protection of property follows the right to the protection of life as it is necessary (*darûrî*) for the survival of the human family.

Al-Marghinani argues that the *value creating protection* (*al-'ismah al-muqawwimah*) is best suited to property rights. This is because appraisal allows for the return of the loss, something which is possible for the loss of property but not for the loss of life. Appraisal (*al-taqawwum*) requires correspondence (*al-tamâthul*), which is possible for property but

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45 Ebü'l-Hasan Burhaneddin Ali b. Abi Bekr Marghinani, *The Hedaya or Guide: a Commentary on the Mussulman Laws*, (tr. Charles Hamilton), Karachi: Daru'l-Ishaat, 1989, II, 201-2.

46 The translator of *al-Hidâya*, Charles Hamilton, rendered the term *al-'ismah al-muaththimah* as "sin creating protection." This is a literal translation, which does not completely reflect the meaning of the concept. Above I have defined it as "religiously and morally enforced right to protection", the violation of which is a sin. This is in contrast with *al-'ismah al-muqawwimah*, which is "legally and politically enforced right to protection", the violation of which is a legally punishable crime. In parallel to Hamilton's translation of *al-'ismah al-muaththimah* as "the sin creating protection", I rendered *al-'ismah al-muqawwimah* as "the value creating protection". One should be aware that these translations are imprecise.

not for life.[47] Consequently, the inviolability of property is philosophically based on the inviolability of life. Furthermore, the *value creating protection* on the property is valid when the property is in the *dar al-Islâm* (*al-ihrâz bi al-dâr*). This is required as a condition because it is argued that the legal authority can only be exercised by a political power which can protect its subjects. In other words, political authority cannot be maintained if there is not sufficient power to protect the rights of subjects from violation. This principle applies to the right to life and property. Furthermore, the religious law does not accept the authority of non-Muslims on Muslims.[48] It seems that in the absence of inter-governmental cooperation against crimes and violations of human rights during the Middle Ages, the power of religion and morality was called on to provide a practical solution for the protection of human rights outside areas controlled by the Muslim state.

Kamaluddin Ibn Humam (d. 593) states in his commentary on the work of al-Marghinani, *Fath al-Qadîr,* that the idea concerning the existence of *'ismah* with personhood is a rational argument (*dalil ma'qûl*). He also explains that the two types of *'ismah* represent two separate principles. Therefore, it would be wrong to concieve the *value creating protection* as the perfect form of the *sin creating protection.* Nor is the *sin creating protection* the less developed form of *'ismah. 'Ismah al-muqawwimah* makes punishment by law possible in the form of blood money or other types of penalties. However, violation of the *'ismah al-mu'aththimah* causes punishment in the Hereafter. Yet one can be pardoned by God by atonement or expiation (*kaffârah*) unless there is a right due to other human beings. Religious law has determined the expiation for each sin which are paid on a voluntary basis.[49]

There is also another fundamental difference between the right to life (*'ismah al-nafs*) and the right to property (*'ismah al-mâl*): the original state of life is characterized by sanctity, in contrast, the original state of property is characterized by the permissibility of usage for all. However, the *'ismah* of non-Muslims is temporarily canceled if they declare war against Muslims. As the state of war ends, their original state is restored; they regain their *'ismah* because they are human beings. The *value*

47 See 'Abdulaziz al-Bukhari (d. 730), *Kashf al-Asrar 'an Usul Fakhr al-Islam al-Bazdawi* (ed. Muhammad al-Mu'tasim billah al-Baghdadi), Beirut: Dar al-Kitab al-'Arabi 1418/1997, I, 378-379.

48 al-Marghinani, *al-Hidâya*, II, 852.

49 Al-Marghinani, *al-Hidâya*, II, 852.

creating protection of the property derives its legitimacy from the *sin creating protection*. More plainly put, the right to life requires for its realization the right to property. Therefore, right to property is subordinate to right to life.[50]

According to Marghinani, the only people who live in the abode of Islam, *dâr al-Islâm,* can enjoy the *'ismah al-muqawwimah*. He defends his view on the grounds that the power to implement this requires political authority, which Muslims do not have in an abode of war, a *dar al-harb*. This applies to both the right to life and the right to property. Marghinani does not accept cooperation with the non-Muslim authority in *dar al-harb* for punishing criminals because, for him, Islamic law does not accept the authority of the non-Muslims.[51]

According to al-Shafii, Muslims enjoy *al-'ismah al-muqawwimah* everywhere, whether in *dar al-islam* or not; because the ground for *'ismah* is that one is a Muslim. However, Hanafi scholars argue that only the Muslims who live in *dâr al-islâm* enjoy *al-'ismah al-muqawwimah,* not those who live in *dar al-harb*. For Shafiites, the protection of Muslims who live in *dâr al-harb*, which is outside the control of Muslim authority and the punishment of those who violate their sanctity, remains in question. Due to this concern, the Hanafites ruled out *al-ismah al-muqawwimah* for those in *dâr al-harb*.[52] Kasani wrote that "*al-taqawwum* for us [the Hanafites] is dependent on residence in *dar al-Islam* while for him [al-Shafi'i] it is dependent on being a Muslim".[53]

Although Hanafites believe in the universality of human rights, the lack of institutional arrangements to enforce it legally and politically prompted them to characterize the protection of human rights outside the *dâr al-islâm* as a moral and religious responsibility. From this perspective, the Islamic state is not responsible for protecting its citizens outside its borders. Given the nature of international relations at that

50 Al-Marghinani, *al-Hidâya*, II, 852.

51 Al-Marghinani, *al-Hidâya*, II, 852.

52 However today, cooperation against crimes and criminals is subject to many international treaties, which have been signed by Muslims as well. Therefore, it is possible to enforce *al-'ismah al-muqawwimah* even in countries which are ruled by non-Muslims.

53 On the issue of *taqawwum*, correspondence between life and money, see Kasani, *Bedayi' al-Sanayi'*, VII, 252. See also "Kitab al-Siyar" in the same book. 'Abdulaziz al-Bukhari states that money does not correspond to life neither in form nor in content (*al-Mal laysa bi mithl li al-nafs la sûratan wa lâ ma'nan li anna al-âdami mâlikun wa al-mâl mamlûkun.*), *Kashf, al-Asrar*, I, 378.

time, there existed no way other than appealing to the authority of morality and religion, but today international instruments exist to enforce the human rights law worldwide.

The position of the two types of *'ismah vis-à-vis* each other is long debated. Above, I have mentioned that for Marghinani the *'ismah al-muqawwimah* is the superior or perfect form of the *'ismah al-mu'aththimah*. However, the commentator of Marghinani's work, Ibn Humam disagrees with the author and argues that the two forms of *'ismah* are independent principles. Therefore, one cannot be seen as being a more developed or superior form of the other.[54]

Ibn Humam states that the *'ismah al-muaththimah* is applicable primarily to the right to life, as life cannot be assessed monetarily. In contrast, the primary implementation of the *'ismah al-muqawwimah* is for crimes against property, as property loss can be assessed and compensated monetarily. Although their primary usages take place in different fields, both are used concerning the right to life and the right to property.[55]

Kasani states repeatedly that the sanctity of a human being is due by virtue of his or her own intrinsic value (*hurmah li 'aynihi*) which never falls.[56] In contrast, the sanctity of property is due for exterior reasons (*hurmat li ghayrih*). Ibn 'Abidin states that the inviolability of property rights (*'ismah al-mâl*) is justified by necessity (*darûrah*), this is because God created property initially for the benefit of the human family in its entirety, without personal ownership.[57]

Human rights, for Ibn 'Abidin, are the prerequisites for human beings to lead a prosperous and peaceful life on earth. Social and economic life requires that basic rights are granted to all human beings; without meeting this necessary (*darûri*) condition, social and economic life becomes impossible.[58]

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54 Ibn Humâm, *Fath al-Qadîr*, IV, 356.

55 Ibn Humâm, *Fath al-Qadîr*, IV, 356.

56 Kasâni, *Bedâyi al-Sanayi'*, "Kitab al-Jinayat, Vujub al-Diyah," Beirut: Dar al-Fikr 1417/1996, VII, 349.

57 Ibn 'Abidin, *Hâshiyat*, IV, 159-165.

58 Ibn 'Abidin states that property was permissible for all as God declares that he created everything on earth for the entire human family. Yet, the right to property emerged out of necessity (*darûra*) to give the owners exclusive benefit of what they own. See Ibn 'Abidin, *Hâshiyat*, IV, 159-165.

From the Hanafite perspective, disbelief (*kufr*) is not normally harmful to Muslims unless the disbelievers engage in a war against them. It must therefore be tolerated. It is not the responsibility of human beings to punish sins against God -this punishment will come in the Hereafter- on the condition that such sins do not cause harm to others. Law can punish only the sins that violate the rights of other people while the punishment for the rest of the sins is deferred to God.

From the Hanafi perspective, *jihâd* is a defensive war, and an offensive war is not permitted.[59] Therefore, as long as non-Muslims are not attacking other people they should enjoy sanctity.[60] A war is legitimate only if it is waged against those who make war against the *dâr al-Islâm,* because they do not show respect to the *'ismah* of the others, which results in the loss of their own *'ismah*. Violating the *'ismah* of others makes it legitimate for others to violate one's own *'ismah*. For the Shafiite jurists, however, the legitimacy for war is derived from the fact that such people do not have a true religion and have denied the message of Islam (*kufr*).[61]

To illustrate the universalistic approach to human rights further, the Hanafite view on war may be examined briefly. From the Hanafite perspective, a denial of Islam (*kufr*) does not justify war nor the deprivation of the six basic rights (*'ismah*). For Abu Hanifa, making war against Muslims, but not disbelief, is the reason to wage war against non-Muslims. In other words, non-Muslims are protected during peaceful times since they are human beings (*âdamî*), and divergence of faith is not a cause for war. Even in the case of war, the opposing side must be granted certain rights, as *âdamiyyah* never ceases to exist; however, certain constraints that emerge from the conflict situation apply.

The limits of one's *'ismah* are demarcated by the *'ismah* of others. As a general rule the violation of the *'ismah* of others will result in the termination of one's own *'ismah,* but never completely or irrevocably. An official court, not individuals, will determine the consequential punishment based on objective rules. Yet, if the public authorities fail to protect the *'ismah* of the citizenry, or if they violate the *'ismah* of their own

59 Ahmet Özel, *İslam Hukukunda Ülke Kavramı: Darulislam, Darulharb,* İstanbul: İz Yayıncılık 1998, 54-56.

60 Hanafites generally state that "the cause of war is war" (*'illat al-harb al-harb*).

61 Ömer Nasuhi Bilmen, *Hukuk-ı İslamiyye Kamusu,* İstanbul: Bilmen Yayınevi, nd, III, 356.

citizens, then the individual is entitled and obliged to protect his or her own *'ismah*. If people die during the struggle to protect their own *'ismah*, they are to be revered as martyrs.[62] In other words, the struggle to protect basic human rights, such as religion, reason, life, family and property, which are necessary for a free and just society, is considered to be equally important to the struggle in battle to protect the abode of Islam against outside enemies.

As Kâsâni states *'ismah* is indivisible and cannot be suspended for all human beings under any condition; all human beings are in principle granted the same basic rights on an equal and permanent basis. However, according to the Hanafites, as far as criminals, who deserve to be punished, are concerned, the *'ismah* becomes divisible and thus during the punishment the *'ismah* is partially and temporarily suspended. The Hanafites claim that only the relevant part (*mahall al-jazâ*) of the *'ismah* for criminals, which is legally determined, is suspended during the punishment, while the remainder stays intact. For instance, the property of a burglar should still be protected even when he is being punished for burglary.

The justifying reason for war is the protection of sanctity from those who are attacking it. The fact that the enemies are not believers is not a valid reason to make war against them. Therefore when peace prevails, everyone must enjoy sanctity. The objective of war is not to exterminate the enemies, but to force them to make peace with Muslims and to protect Muslims from their assault[63].

From the Hanafite perspective, an apostate is not punished for abandoning Islam, but rather for being a warrior against the Islamic religion and Muslims, *al-harbî*. This is because the quality of *âdamiyyah* never ceases to exist with a person, even if he changes his religion. An apostate is considered a potential ally of the enemies of Islam, with no loyalty

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

63 Abu 'Abd Allah Muhammad b. 'Abd al-Rahman al-Bukhari (d. 546/1151), *Mahasin al-Islam wa Sharai' al-Islam*, Beirut 1985, 72. The author also discusses social benefits of *'ismah* in 99-102.

to the Islamic government in *dâr al-Islâm*. He is seen as someone who is ready to join the ranks of the enemies of Islam, *al-harbiyyûn*, and to work to undermine the Islamic political and religious authority.

The protection of six basic rights is also considered the common ground of all religions and legal systems, one which provides a juridical ground for religious and legal pluralism. For this reason these rights are called "objectives of law" (*maqâsid al-sharîah*). It is apparent that Islamic law assumes that people will always belong to some religion, but this is not the case today. According to Islamic theology and jurisprudence, these six principles constitute the unchangeable core of all religions and the legal systems in the world. It is agreed by all Muslims that the creed (*'aqîdah*) does not accept alteration, but rather that the law (*shariah*) accepts it because societies evolve and undergo change. Therefore, the faiths taught by all the Prophets have been the same, but the laws issued by them have changed over time. Yet the main purpose of all religious legal systems throughout history, formulated as the protection of six basic rights, has remained unchanged.[64]

Another reason why Hanafi jurists adopt a universalistic view can be found in their approach towards other religions. Zamahshari, the well-known Mutazilite scholar who followed the Hanafi school in legal matters, represented this universalistic approach when he stated that the religion of our forefathers is our religion (*Anna shar'u man qablanâ shar'un lanâ*).[65] Islamic jurisprudence gives a very high status to the laws of previous religions; it considers them as legitimate sources to derive laws to be adopted and practiced by Muslims.

One consequence of this approach is that Muslims allowed the non-Muslim populations they ruled to practice their laws unless such harmed one of the protected basic rights. For instance, in India, the Hindus were allowed to practice their laws, all except the custom of burning the widow

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

65 Zamahshari, *Ruûs al-Masâ'il: al-Masâ'il al-Khilafiyya bayn al-Hanafiyya wa al-Shafi'iyya*, (Abdullah Nazir Ahmad, ed.) Diyarbakir: İslami Kitaplar Naşiri, n.d. 454. Retaliation in Islamic law was inherited from previous religions. See the Qur'an, al-Mâidah, 5/45.

with the body of her late husband, known as *sati*.[66] Among the social reforms Akbar made was to permit the remarriage of widows among Hindus. These customs in India were outlawed by the Muslim rulers of the time because they contradicted the right to life. It was argued that these customs could not originate from the practice of the founders of these religions, as these founders would have respected the six basic rights.

These arguments are all based on the notion of a universal human being and his/her place in the network of social relations with other people worldwide. The underlying purpose is to establish peaceful relations not only between Muslims and non-Muslims, but also among non-Muslims from different religions. Many non-Muslim communities with different religions lived under Muslim rule for many centuries in Andalusia, the Ottoman Empire and in India. Islamic law was expected to regulate the relations, not only among Muslims and non-Muslims, but also among the non-Muslim communities.

In addition to the above-cited rational arguments, Hanafi jurists also used scriptural arguments derived from the Qur'an and the *Hadith*, teachings of the Prophet Muhammad, to justify universal human rights. The scriptures of Islam declare universal providence for all the creatures of God because He is the Lord of the Worlds. The Qur'an makes it clear that "let there be no animosity except against the oppressors!" (*fa la 'udwâna 'illa 'ala al-zâlimîn*).[67] Compulsion in religion is forbidden in the Qur'an.[68] God commands the protection of His creation in numerous verses. The human must be protected because God does not want His creation to be destroyed; this is only possible by granting sanctity to each human being.[69] God in the Qur'an and the Prophet Muhammad in

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

67 "And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in God. But if they cease, let there be no hostility except to those who practise oppression" (al-Baqara 193).

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

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

his sayings strictly prohibited assaulting and slaying any human being.[70] They even ordered protecting non-Muslim women, children and clergy during war. The Qur'an declares the purpose of creation to be as follows: "Blessed is He in Whose hand is the Sovereignty, and, He is Able to do all things. He Who created Death and Life, that He may try which of you is best in deed: and He is the Exalted in Might, Oft-Forgiving."[71]

The Abbasids, the Ottomans and the Mughals gave precedence to Hanafite Law in their practice, although they allowed the practice of other Schools of Law as well.[72] Consequently, the Hanafite School was strongly influential in the Indian Subcontinent, Central Asia, Asia Minor and the Balkans. The discourse of the Ottoman scholars of law also followed and built upon the Hanafite perspective. Yet, at the present time, research is lacking to determine the extent to which the Ottoman State actually followed the Hanafite principles in their seven-century reign. At this moment, the only observation that can be made for sure here is that the Ottomans gave primacy, at least in the official discourse of the *Millet* System, to the Hanafite law in their effort to rule a multi-national and multi-religious state over a vast area for an exceptionally long period of

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

71 Al-Mulk 67/1-2.

72 Although Abu Hanifa refused to accept the office of chief judge under the Abbasid rule, his two prominent students Abu Yusuf and Muhammad al-Shaibani served under the Abbasids. Abu Yusuf authored *Kitab al-Haraj* to help regulate the government expenses and finances. Muhammad al-Shaibani authored two important books on the international law, which are termed *al-Siyar*, to help regulate international and inter-communal relations between Muslims and non-Muslims. Al-Shaibani's book on international relations, *al-Siyar al-Kabir*, was among the first books translated into Turkish and published after the Ottomans opened a printing house in Istanbul. This evidence demonstrates the significant role of al-Shaibani's legacy in shaping the Ottoman practice. For English translation of al-Shaibani's work, see Muhammad Hasan al-Shaibani, *The Islamic Law of Nations: Shaybani's Siyar*, (tr. Majid Khadduri) Baltimore: John Hopkins University Press 1966.

time. The evolution of the Ottoman legal discourse on the *Millet* System and the rights of non-Muslims under the Ottoman rule can be followed in the writings of the Ottoman *Shaikhulislams* and *Ulama* on *Fiqh*. The Ottoman example is one among many parallel examples that range from Andalusia to India. Therefore, although it may not be seen as the only or the authentic practice of Islam, the Ottoman experience provides a significant and relatively recent Islamic example for a noticeably pluralist society under Islamic rule.

Abu Hanifa's influence continued until the beginning of the 20th century. For instance, Al-Miydânî (d. 1881), a Syrian scholar from Damascus, wrote at the end of the 19th century that the person has sanctity by virtue of his existence (*al-Hurr ma'sûm bi nafsihi*).[73] At the time of the fall of the Ottoman State the Hanafite view had been eclipsed, which continued until today. The so-called contemporary "Islamic" states disinherited the Ottoman legacy and disowned the universalistic view in Islamic law in favor of the exclusivist or communalistic doctrine on human rights, which will be outlined below, in reaction against western colonialism.

The modern concepts of citizenship and rights are based on philosophical grounds which differ in how they were viewed by classical scholars of Islamic law. Yet despite the manifest differences between the premodern universalistic approach in Islamic law and the modern secular legal systems, which do not need to be outlined individually here, there is a striking similarity concerning the concept of the universal human being, which serves in both legal cultures as the philosophical foundation of universal human rights and the subject to which human rights are accorded.

The Communal View: Basic Rights are due by Virtue of Islamic Faith or a Peace Treaty

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

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

The non-Shâfi'ite scholars, such as Imam Mâlik (712-795), Ahmad ibn Hanbal (780-855), and the majority of their followers (e.g. Dâwûd al-Zâhirî, Ibn Hajar al-Haytamî, Shirbinî, Qurtûbî, Qarâfî, Bujayrimî, Ibn Arabî, Khallaf) also defend the same perspective. Although its first renowned advocate was al-Shâfii, an inter-school network of scholars defends this perspective. The majority of the classical Shiite scholars, such as Tûsî and Hillî, also adopted the same approach.

These scholars generally use the following arguments: (1) the injunction on fighting against infidels in the Qur'an (Tawba 9/5, 12; Anfal 8/39) is a general commandment. (2) The Prophet said: "I am ordered to fight against people until they say: there is no deity but Allah." (3) Disbelief (*kufr*), they argue, is the worst sin and cannot be allowed.[74]

In the communal line of legal thought, the category of universal human being is not central. Instead, the communalist legal thought relies on the religiously defined categories of "Muslims" and "non-Muslims". Muslims are qualified for the *'ismah* by virtue of their faith (*iman*). However, non-Muslims are not qualified for the *'ismah* unless they make a treaty with the Muslim state and secure their protection in exchange for the taxes they pay. This treaty is called *dhimmah* and the tax paid for it is called *jizya* or *kharaj*. According to Hanafites, the treaty of *dhimmah* is not the reason for *'ismah* (which is already universally present), rather it is an alliance against third parties. Likewise, according to the Shâfi'ites, being a non-Muslim, with the exception of *dhimmis*, is a cause for war. From the communal perspective, since non-Muslims do not have *'ismah*, the relationship between Muslims and non-Muslims is considered to be a continuous state of war unless there is a treaty of peace. Yet, according to the Hanafites, non-Muslims who are not the citizens of the Islamic state are also protected, because they have *'ismah* as humans. Likewise, the apostate (*murtadd*) is punishable because of his apostasy (*kufr*), according to the Shâfi'ites. For Hanafites, apostasy is punishable, not because it is a denial of Islam as a true religion, but because it may pose a political danger to the state and cause confusion of faith—which is not always the case. These points can be seen as just some implications of the lack of a concept of the universal human being and his or her rights in the Shâfi'ite doctrine.

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74 Ahmet Özel, *İslam Hukukunda Ülke Kavramı: Darulislam, Darulharb*, İstanbul : İz Yayıncılık, 1998, 57. See also the classical sources cited in this work.

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

The communalistic arguments, summarized above, are criticized as follows: Regarding the first and second arguments, it is claimed that the various orders in the Qur'an and the *Hadith* to fight against non-Muslims apply to times of war or to a particular group of Arab polytheists living in the Hijaz. Therefore, these orders cannot be generalized. Against the third communal argument mentioned above, it is argued that the non-Muslims must be given a chance to learn about Islam. Besides, Islamic law does not punish sins against God unless they harm other members of the society. Furthermore, the compulsion to accept Islam is forbidden by God in the Qur'an.[75]

Conclusion

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

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

Today, the Islamic universalistic approach to human rights is almost completely neglected by specialists in Islamic law.[76] Nor is it implemented by an Islamic state. Therefore, there is a need to explore and introduce the historical foundations of this perspective and revive it in the light of new developments in international, inter-communal and inter-religious relations.

Globalization, which has put all religious communities into close contact with one another, requires Muslims to re-derive from this universalistic tradition their legal and moral norms while reconfiguring their relations with fellow humans from other faiths. The legal legacy of Muslims provides a solid universalistic approach, which the Muslims of today can use to contribute to the development of human rights around the globe.

Özet

"Evrensel insan hakları" ve "dahili vatandaş hakları" yaklaşımlarını savunanlar arasında bir kamplaşma vardır. Bu makale söz konusu kamplaşmayı hem modern hukuk söyleminde hem de daha baştan beri klasik İslam hukuku söyleminde gözlemlemenin mümkün olduğunu savunmaktadır. Müslüman hukukçuların klasik dönemdeki eserlerinin taranması, "ismet" (dokunulmazlık veya siyasi ve hukuki korunmuşluk) ve "âdemiyyet" (insan olma özelliği) kavramları arasındaki ilişkinin asırlar boyunca tartışmalı olduğunu göstermektedir. "İsmet âdemiyetledir" prensibinden hareketle evrensel insan haklarını savunan Hanefi hukukçulara karşılık, Maliki, Şafii ve Hanbeli hukukçuların çoğunluğu "İsmet iman veya emânladır" prensibinden hareketle sadece vatandaşlık haklarını savunmuşlardır. İslam'da insan haklarının konumunu anlamak için son derece gerekli olduğu halde, bu ihtilaf günümüzde henüz ortaya çıkarılmamıştır. Bu makale halen devam etmekte olan bir araştırmanın ilk bulgularını tartışmaya açmaktadır. Bundan dolayı amaç konunun kapsamlı bir şekilde ele alınmasından ziyade insan hakları literatüründeki önemli bir boşluğu doldurmaya yönelik bir adım atmaktır.

76 For a survey of the Islamic discourse on human rights discourse in Arabic see, Silmi al-Khadra al-Jayusi (ed.) *Huquq al-Insan fi al-Fikr al-'Arabi*, Beirut: Markaz al-Dirasat al-Wahdah al-'Arabiyya 2002. The universalistic view of Hanafites is strikingly absent in this book.