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Human Rights in the light of *Maqāṣid al-Sharī'ah*

Lejla Delagic^{*}
Bouheda Ghalia^{**}

Abstract

The reasearch examines the concept of human rights that is undoubtedly one of the most contested contemporary issues of inter-civilizational and inter-religious forums. The authors emphasize on the etymological, historical and ideological roots of Islamic and contemporary Western notions of rights using the framework of the objectives of Islamic Law (*maqāṣid al-Sharī'ah*) on this issue. The qualitative methodology in which the textual and comparative analysis is applied on the written materials that are related to the notion of rights and duties of Islam and Western conception of human rights. Finding reveals that the concept of human rights is an important topic of the discourse in the *maqāṣid al-Sharī'ah* that is in many aspects cannot be fused with United Nations-backed notion of human rights as the later idea has arisen out of anti-religious secular Western tradition.

Keywords: Human rights, *Maqāṣid al-Sharī'ah*, UDHR, Islam, secularism.

Introduction

Nowadays, we hear the phrase 'human rights' very often and it is a concomitant of different organisations (government and non-government) and groups that are fighting for these rights. For us, as Muslims, it is very important to understand this phrase properly and to understand that its emergence is product of Western and secular worldview. However, the phrase 'human rights' is not used only among the westerners – it has also became popular among the Muslims. To get better insight in its proper understanding it is necessary to get familiar with its etymology and terminology and its emergence in Western world, as well as to get some insights in chronology of its development in secular philosophy and law.

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On the other hand, we need to acknowledge that Islamic Law or *Sharī'ah* does not recognize 'human rights' as the secular law does it. The main difference is that most of rights that are meant by these rights in Islamic Law are given by Allah s.w.t. and not by any human factor (king, ruler, organisation etc.) as it is the case in secular law, and that these rights in Islamic Law are granted by Allah s.w.t., and are not subject of change opposite to these rights in secular law which are always changable according to time and circumstances in certain times influenced by the needs and wishes of the current ruler or the ruling party, the intrusive ideologies of various world humanitarian organizations, etc. The other, but not less important difference is that some of these 'human rights' are not in accordance with Islamic principles and cannot be tolerated by Islamic Law.

In order to understand these differences we need to familiarize ourselves with the *maqāṣid al-Sharī'ah* that are the higher objectives and intents of Islamic Law. In this work we will explain what is *maqāṣid al-Sharī'ah* by giving its etymological and terminological definitions and expose its frames and categories, to get prerequisite knowledge for detailed exposure of human rights in the light of *maqāṣid al-Sharī'ah*.

Maqāṣid al-Sharī'ah

Maqāṣid al-Sharī'ah are principles in Islamic Law that include the wisdom of its rulings; good intentions that the legal rulings aim to achieve by preventing or allowing of certain means and they also represent a group of divine intentions and moral concepts on which Islamic law is founded such as justice and humand dignity, generosity, alleviation and social collaboration.¹

Etymological and Terminological Definitions of *Maqāṣid al-Sharī'ah*

Before we define *maqāṣid al-Sharī'ah*, there is a need to explain the meaning of *Sharī'ah*, in both linguistical and terminological senses: The word *al-Sharī'ah* is a noun (sing.) which means , the revealed, or canonical, law of Islam (pl. *Sharā'ir* - prescriptions of religious law).²

Maqāṣid al-Sharī'ah, in the linguistic terms, consists of two words: *maqāṣid* and *al-Sharī'ah*. Since we have already explained meaning of

¹ Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (London – Washington: The International Institute of Islamic Thought, 2007) p.1.

² *The Hans Wehr Dictionary of Modern Written Arabic (Arabic-English)* (Edited by J.M.Cowan, Spoken Language Services. INC., Ithaca, NY with permission of Otto Harrassowitz, Wiesbaden, Germany, 1994) p. 544.

word *al-Sharī'ah*, we should now explain the term *maqāṣid*. The word *maqāṣid* is a noun in Arabic language (sing. *maqṣid*) and it means (place of) destination; intention, intent; design, purpose, resolution; object, goal, aim, end; sense, meaning, import, purport, significance.¹

According to this, the meaning of the term *maqāṣid al-Sharī'ah* in Arabic language in short can be explained as it is given in the Dictionary of Islamic Words & Expressions:

Maqāṣid al-Sharī'ah are objectives of *Sharī'ah*- the purposes for which Islamic Law is instituted, such as preservation of human life and protection of honour and property.²

It is interesting that there is no definition of the term *maqāṣid al-Sharī'ah* in the writings of the *uṣūliyyūn* or other scholars who investigated this subject in early times. Even al-Shāṭibī, who was a pioneer in the field of *maqāṣid al-Sharī'ah*, did not dwell much on a terminological definition of term *maqāṣid al-Sharī'ah*, most probably because he considered that his book *al-Muwāfaqāt* will be used among the scholars well-versed in the sciences of Islamic Law. Perhaps he considered that one who is on that level of knowledge in the field of Islamic sciences does not require any definition of the term *maqāṣid al-Sharī'ah*.³

On the other hand, there are some definitions, or attempts for defining of the term *maqāṣid al-Sharī'ah* among the modern scholars, mostly by Muḥammad al-Ṭahīr ibn 'Ashūr and 'Allal al-Fasi. Ibn 'Ashūr's definitions are not general definitions for these terms, rather they are defined according to the classification of *maqāṣid al-Sharī'ah* (the higher objectives of Islamic Law) into three categories: general objectives, specific objectives and particular objectives. His definition of the general higher objectives of Islamic Law is as follows:

The general objectives of Islamic Law are the meanings and wise purposes on the part of the Lawgiver which can be discerned in most or all of the situations to which the Law applies such that they can be seen not to apply exclusively to a particular type of ruling. Included here are the occasions for the Law's establishment, its overall aim, and the meanings can be discerned throughout the

¹ *The Hans Wehr Dictionary*, p. 898.

² *Dictionary of Islamic Words & Expressions* (Riyadh: Maktaba Dar-us-Salam, 2011) p. 142.

³ Ahmad al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, translated from the Arabic by Nancy Roberts (London, Washington: The International Institut of Islamic Thought, 2005) p. xxi.

Law. It likewise includes objectives which are not observable on all types of rulings, although they are observable in many of them.¹

Furthermore, he give also the definition of the specific objectives where he define specific objectives of Islamic Law as:

...the ways in which the Lawgiver achieves beneficial human objectives or preserves people's general interests through their private conduct, that is, through the specific acts they engage in. Such specific objectives include every wise purpose reflected in rulings governing people's behavior, such as ensuring trustworthy conduct through contracts having to do with pledges or security, consolidating domestic and family order through marriage contracts, and preventing long-term harm by allowing for the legitimacy of divorce.²

On the other hand, 'Allal al-Fasi give one concise definition for all three categories: the general, specific and particular objectives. He says:

What is meant by '*maqāṣid al-Sharī'ah*' is its purpose or goal, and the underlying reasons which the Lawgiver has placed within each of its rulings.³

Where the 'its purpose or goal' refers to the Law's general objectives, and the 'underlying reasons which the Lawgiver has placed with in each of its rulings' refers to its specific or particular objectives.⁴ At another place in his book *Maqāṣid al-Sharī'ah al-Islamiyyah wa Makārimuhā*⁵, 'Allal al-Fasi gives more detailed definition of general higher objectives of Islamic Law:

The general higher objective of Islamic Law is to populate and civilize the eart and preserve the order of peaceful coexistence therein; to ensure the earth's ongoing well-being and usefulness through the piety of those who have been placed there as God's vicegerents; to ensure that people conduct themselves justly, with

¹ Ibid, p. xxii.

² Al-Raysuni, *Imam al-Shatibi's Theory*, p. xxii.

³ Ibid, xxiii.

⁴ Ibid.

⁵ *Maqasid al-Shari'ah al-Islamiyyah wa al-Makarimuha*, Allal al-Fasi, Dar al-Gharb al-Islami, 1993, pp.45-46.

moral probity and with integrity in thought and action,
and that they reform that which needs reform on earth,
tap its resources, and plan for the good of all.¹

Based on these definitions of *maqāṣid al-Sharī'ah* and its explanations, provided by Ibn 'Ashūr and 'Allal al-Fasi, as well as based on the different uses of this term and clarifications by scholars who have discussed the topic of *maqāṣid*, Ahmad al-Raysūnī gives following definition of the term *maqāṣid al-Sharī'ah* in his book *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*:

...*al-maqāṣid* are the purposes for whose realization the Law was established to fulfill for the benefit of humankind.²

It is worth to mention that there are two main terms which are used interchangeably in a single meaning with *maqāṣid al-Sharī'ah*- the higher objectives of Islamic Law and they are:

maqāṣid al-Shāri' - the higher objectives of the Lawgiver, and
al-maqāṣid al-Shar'iyyah - legal objective.

Beside these terms, some scholars identify the term *maqāṣid* with the term *maṣāliḥ*- human interests, pl. of word *maṣlaḥah* which in Arabic language means "that which is beneficial, helpful, or promoting; advantage, benefit, interest, good, welfare",³ since the basis for divine percepts is the preservation of human interests, which developed in Islamic Law.⁴

¹ Al-Raysuni, *Imam al-Shatibi's Theory*, xxii.

² Ibid.

³ *The Hans Wehr Dictionary*, p. 610.

⁴ One of them is al-Ghazali who mentioned *maqāṣid* in context of *maslak al-munasabah* or "appropriateness approaches" which is based on interpretation of legal rulings in terms of their underlying bases ('*ilal*) in terms of the benefits which they achieve or the harm which they prevent. So, according to al-Ghazali these appropriate objectives are those which point to the various aspects on interests and their indications, where 'interest' is based on achievement of a benefit or the prevention of harm. More explicit explanation about this 'interest' he provides in *al-Mustasfa* when he talks about arguments of validity of *istislah* (reasoning based on unrestricted interests) and *al-maṣāliḥ al-mursalah* (unrestricted interests), defining *al-maṣlaḥah* as the preservation of the Lawgiver's objective and asserted that those interests which are not based on preservation of objectives from the Qur'an, Sunnah and '*ijma* are invalid and unacceptable while those which are based on preservation of a legitimate objective, which is known to be intent of the Qur'an, *sunnah* and '*ijma* are not beyond these principles, however it is not called *qiyas* but rather as unrestricted interests. See: al-Raysuni, *Imam al-Shatibi's Theory*, 17-18.

The frame of *Maqāṣid al-Sharī'ah*

Since we explained the etymology and terminology of the term *maqāṣid al-Sharī'ah* realised that the purpose of *maqāṣid* is preservations of human interests, we need to mention that these purposes of *maqāṣid* are classified in various ways mostly according to their aspects or dimensions, but among them are predominant traditional classification (based on teachings of earlier *uṣūliyyūn*) and contemporary classification (which is made by the modern scholars to facilitate the practice of *Sharī'ah* in contemporary time).¹

Traditional classification of *maqāṣid al-Sharī'ah* which is based on the levels of the necessity, divide them into the three main levels: necessities (*ḍarūrāt*), needs (*ḥājjiyāt*), and luxuries (*taḥsīniyyāt*), while first level – necessities (*ḍarūrāt*) is further divided in preserving of faith, soul, wealth, mind, offspring and honor. According to this traditional classification, it can be seen that they considered the first level of necessity as most important, essential for human life.²

Contemporary classification of *maqāṣid al-Sharī'ah* includes some aspects more: frame of the rulings aiming to achieve purposes, frame of people included in purposes and level of universality of the purposes.³ According to that *maqāṣid al-Sharī'ah* (the higher objectives of Islamic Law) are divided into three categories: general (*al-Maqāṣid al-Āmmah*), specific (*al-Maqāṣid al-Khāṣah*) and particular objectives (*al-Maqāṣid al-Juz'iyah*).

1. General objectives: Are those objectives which the Law protects and intends to achieve in all, or many, areas of legislation.⁴ Under general objectives al-Shāṭibī considered following objectives:

- preservation of order,
- achievement of benefit and prevention of harm or corruption,
- establishment of equality among people,
- causing the Law to be revered, obeyed and effective,
- and enabling the Ummah to become powerful.⁵

However, majority of scholars identified these *maqāṣid* as preservation of religion (*al-Dīn*), life (*al-Nafs*), reason (*al-'Aql*), progeny (*al-Nasl*) and property (*al-Māl*).¹

¹ Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law*, pp. 3-9.

² Ibid, p. 3-4.

³ Ibid, p. 4.

⁴ Al-Raysuni, *Imam al-Shatibi's Theory*, p. xxiii.

⁵ Ibid.

2. Specific objectives: Are those *maqāṣid* which the Law intends to achieve in a specific area or in several similar legislative areas. Ibn Ashur particularly focuses on this category of objectives. Defining specific objectives of *maqāṣid al-Sharī'ah* he points to the ways in which the Lawgiver achieves beneficial human objectives or preserves people's general interests through their behavior, that is, through the specific acts they engage in. He says that such specific objectives include every wise purpose in rulings related to people's actions, such as: the purpose of securing of the contracts on the pledge, establishing family and domestic order through marriage contracts, preventing permanent harm in the legalization of a marriage divorce.² His classification of this category of objectives can be expressed as follows:

- *maqāṣid al-Shārī'* in family law.
- *maqāṣid al-Shārī'* in financial transactions.
- *maqāṣid al-Shārī'* in transactions related to employment and employees
- *maqāṣid* related to the judiciary and testimony.
- *maqāṣid* related to contributions.
- *maqāṣid* related to penaltie.³

3. Particular objectives: Are those which the Lawgiver intends through each particular legal ruling such as: obligation, prohibition, recommendation, prevention, permission, condition, cause, etc... Examples that can be applied to this category are cited by Ibn Ashūr such as the assertion that the purpose of the pledge contract is to secure a contract, the purpose of the marriage contracts is establishing and consolidating of the family institution while the purpose of legislation of divorce is terminating of permanent harm.⁴

Maqāṣid al-Sharī'ah as a science has been developing throughout the history, from the very beginning of its emergence until now.⁵

Each of prominent writers on *maqāṣid* has gave own contribution to its development, by developing the certain theory of precedeed *uṣūliyy* or adding new objectives to the higher objectives of Law under specific group of legal rulings. For example, al-Ghazali stated that preservation of human

¹ Musfir bin Ali al-Qahtani, Abridged Edition of Musfir bin Ali al-Qahtani's Original: Undesrtanding Maqasid Al-Shari'ah: A Contemporary perspective, Abridged by Wanda Kranse, IIIT Books-in-Brief Series, IIIT: 2015., p. 2 & 4.

² Al-Raysuni, *Imam al-Shatibi's Theory*, p. xxiv.

³ Ibid.

⁴ Al-Raysuni, *Imam al-Shatibi's Theory*, p. xxiv.

⁵ Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law*, p. 13.

life, the faculty of reason, protection of chastity and material wealth are the clear intent of the *Sharī'ah*,¹ Ibn Ashur included to *maqāṣid al-Sharī'ah* 'care for the family',² freedom of belief, orderliness, civility, freedom and equality, etc.³ Analysing the above mentioned classifications we can conclude that *maqāṣid al-Sharī'ah* cover the necessities of all 'human's rights'. Even al-Shatibi considered *maqāṣid al-Sharī'ah* to be the 'fundamentals of religion, basic rules of the law, and universals of belief (*usūl al-dīn wa qawā'id al-Sharī'ah wa kullīyah al-millah*).'⁴ During its development through history, *maqāṣid* experienced changes even in the terms of terminology of legal rulings, so-called 'contemporarisation' of *maqāṣid* terminology, such it was the case with 'preservation of honor' in al-Ghazali's and al-Shatibi's terms which falls under the level of necessity, it became replaced with the term 'preservation of human dignity' and in the last period is mostly used among the *uṣūliyyūn* as 'protection of human rights' as a purpose of Islamic Law in its own right.⁵

However, compatibility of term 'human rights' and *maqāṣid al-Sharī'ah*, and Islam generally, is questionable from the very appearance of this term in Islamic Law literature. As we mentioned in the introduction of this paper, Islamic Law or *Sharī'ah* does not recognize 'human rights' as the secular law does it.

Human rights

Talking about the human rights, by most governments and international organisation today this phrase usually refers to the rights that are recognizes in international and national law. As example, this can be seen in the one of the various definitions of human rights: "Human rights constitute a set of norms governing the treatment of individuals and groups by state and nonstate actors on the basis of ethical principles incorporated into national and international legal systems."⁶ But among the major population, this phrase is used mostly as expression of individual rights as a way organization of society in sense of ensuring of fair opportunities for life to everyone.⁷

¹ Al-Raysuni, *Imam al-Shatibi's Theory*, pp. 18-19.

² Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law*, p. 22.

³ Halim Rane, *Human Rights trough the Lens of Islamic Legal Thought*, u *Human rights in the Middle East: Frameworks, Goals and strategies* (Ed. Mahmood Monshipouri, Palgrave Macmillan, 2011) p. 63.

⁴ Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law*, p. 21.

⁵ Ibid, pp. 22-23.

⁶ <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/human-rights>

⁷ Andrew Clapham, *Human rights: A very short introduction*, (New York: Oxford University Press, 2007) pp. 22-23.

However, the idea of human rights being closely related to the worldview and religious, cultural, historical, philosophical and social identity of a community can hardly be made universal and applicable to all nations and communities worldwide. This difficulty was palpably felt by the drafters of what is today known as the Universal Declaration of Human Rights (UDHR), a chief United Nations' document on human rights which was drafted immediately after the establishment of the UN, and ever since it has been widely promoted as the 'universal' document, covering all the fundamental rights and having globally applicable character, to which no meaningful challenge can nor should be advanced. Yet, as the drafting process and the aftermath of the adoption of the UDHR was not as smooth as some of its strong advocates had hoped for, the debate and reservations from various circles have elucidated the weaknesses of the document, particularly in regards to its alleged universality. Since the focus of this paper is to examine the notion of human rights from the perspectives of *maqāṣid* and modern Western tradition, the variety of non-Muslim critiques of the UDHR will be only mentioned in footnotes.

Etymological and Terminological Definitions of Human Rights

It is evident that the phrase human rights has its background in Western world, so definitions that we will expose are taken from Western dictionaries and encyclopedias on human rights.

Etymological Definition

Searching for a definition of term human rights in both senses, linguistical and terminological, we found that they explain this term in the same way. So, definition in Dictionary of Human Resources and Personnel Management give its etymological explanation as follows: “**human rights** / *hju:mən raɪts*/ plural noun the rights of individual men and women to basic freedoms, such as freedom of speech and freedom of association”.¹

Terminological definition

Within the modern Western secular context, the notion of human rights is defined and illustrated as:

...norms that helps to protect all people everywhere from severe political, legal, and social abuses. Examples of human rights are the right to freedom of religion, the

¹ *Dictionary of Human Resources and Personnel Management* (third edition), (London: A&C Black Publishers Ltd, 2006) p. 129.

right to a fair trial when charged with a crime, the right not to be tortured, and the right to engage in political activity. These rights exist in morality and in law at the national and international levels.¹

It is evident from this working definition that the applicability of human rights includes all human beings under all, or at least, under vast majority of circumstances. The definition of human rights by UN gives almost the same illustration of these rights:

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.²

Chronology of Historical Development of Human Rights in Western Philosophy and International Law

Regarding the observation that 'human rights' are founded in Western philosophy we will give insight to emergence and development of the idea of human rights in their philosophy. Since Western philosophy is mostly based on Greek philosophy, the very philosophical idea of human rights is based on the idea of the Greek's philosophers, to be more precise on the idea of Stoics that all humankind have the same rights. They claimed that nature provided the best guidance for people's behavior and have accordingly introduced natural law in human philosophy. Along the lines of their philosophy, all human beings are equal and should treat each other with respect. That was the very beginning of the idea of modern theories of human rights, namely, this idea was in the 5th century accepted by philosophers in modern Europe.³

In more precise terms, as for legal development of human rights, the notion of human rights is documented in the treaty known as *Magna Carta* – the first contract between the English King John and the Barons unsatisfied with taxes as agreement that 'freeman' will be not arrested or

¹ James, Nickel "Human Rights" in The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.), PDF version of the entry Human Rights available at <https://plato.stanford.edu/archives/spr2017/entries/rights-human/>

² Human rights, available at: <http://www.un.org/en/sections/issues-depth/human-rights/>

³ James R. Lewis and Carl Skutsch, *The Human Rights Encyclopedia* (Sharpe Reference, 2001) p. 748.

exiled by the king without proper judge trial, which was on the other hand still keep to be privilege only for wealth people. Thus, at that point it is questionable if *Magna Carta* was the first legal document on human rights or rather a socio-political accord?¹ Despite that, this English expression of rights was expanded in 1628 by the Petition of Right and 1689 by the English Bill of Rights. However, the real very beginning of the legal document on human rights came by John Locke (1632-1704) from his theory of human rights based on natural law focusing on three rights: life, liberty and estates that became foundation of modern human rights, as starting point for philosophers of Enlightenment, as Voltaire, Cesare Beccaria, Denis Diderot and Tomas Jefferson.² The principles of Locke's theory of human rights were further expounded and enshrined in the U.S. Constitution (1787) and Bill of Rights (1789).³

Thus, this is short history of emergence and development of human rights in Western philosophy, which ended with Universal Declaration of Human Rights by UN. The notion of human rights has therefore acquired its institutional character with the series of charters conventions and declarations adopted in the UN. The landmark document and an attempt to universalize the human rights came in the form of UDHR. This declaration was a brief exposition of fundamental human rights that needed further elaboration. It was also planned to elevate this declaration to the level of a binding treaty, a convention that would have to be adopted and implemented by all members of the UN, the ultimate outcome was modest in comparison with the initial desire. This meant that the UDHR has remained as a set of recommendations, a nonbinding declaration that offers advisory guidelines to states members of the UN. However, the elaboration of the UDHR was spelled out in the successive conventions put forward in the form of treaties that would serve as binding legal provisions in the event of their ratification by member states. The list of treaties is rather long but the most important of them are: International Convention on the Elimination of All Forms of Racial Discrimination (UN 1965), International Covenant on Civil and Political Rights (UN 1966), International Covenant on Economic, Social, and Cultural Rights (UN 1966), Convention on the Elimination of All Forms of Discrimination Against Women (UN 1979), and Convention on the

¹ Clapham, *Human Rights*, p. 6.

² Lewis and Skutsch, *The Human Rights Encyclopedia*, p. 749.

³ Origins of human rights, available at <http://www.globalization101.org/human-rights-vs-natural-rights/>

Rights of the Child (UN 1989).¹ The totality of these conventions has formed what is known today as International Human Rights Law (IHRL).

Human Rights in the Light of the Western Philosophy and Secular Law in Brief

The notion of human rights as formulated and put forward within modern Western philosophy is an offshoot of post-Enlightenment philosophical development and ideologies that are typically reductionist and exclusivist in nature. One of the underlying assumptions of this philosophical tradition is the belief that human beings are not only capable of shaping their destiny, but they possess the faculties and means for doing so independently, free from any metaphysical principles that in pre-modern times had mostly originated from various religions. This is what various contemporary Muslim scholars have identified as the principle of secularity or the process of secularization.² The principle of secularity of human rights is also coupled with the ideology of humanism, which makes it obligatory upon human beings to shape their individual lives and societies in accordance with human reason, rather than any other sources that from without purely human faculties of knowledge.³ In addition to these doctrines, there are a number of other principles that to a higher or lesser extent comprise the basic notions of humanism, rationalism and secularism in their treatment of the notion of human rights.

In line with philosophical underpinnings of the Western post-Enlightenment intellectual tradition, the notion of human rights has gradually evolved from more general intellectual doctrines to concrete legal provisions and into the so-called core human rights instruments promulgated by the UN organs. These UN human rights instruments promote a set of human rights that should be adopted by all countries and should thus create inter-state relations and complementarity among countries in all spheres of international relations. These human rights instruments can be seen as interfering into countries' affairs in the sense that point to individual countries' strengths and shortcomings, which can supposedly be

¹ James Nickel, "Human Rights" in *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), PDF version of the entry Human rights available at <https://plato.stanford.edu/archives/spr2017/entries/rights-human/>. The full list of 18 most important human rights documents can be seen at the official OHCHR web site: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

² Umar Ahmad Kasule, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment*, (Kuala Lumpur: IIUM Press, 2009) 41-42. See also: Syed Muhammad Naquib al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993), chapter 2.

³ John C. Luik, "Humanism" in *Routledge Encyclopedia of Philosophy*, Version 1.0, Ed. By Edward Craig, (London and New York: Routledge, 1998) 3674.

reinforced by aligning their national legal provisions with the UN treaties and recommendations. One of the main objectives of international human rights is also to attempt to bring continents and nations into a single community, that could meaningfully interact with the one another in a bilateral and equal manner devoid of hegemony and discrimination. If this goal is achieved, the result would be promotion and actualization of international peace and overall progress. However, the drafters of the UDHR and the subsequent UN conventions on human rights have overlooked the differences in worldviews, religious and cultural doctrines adhered to by various nations. As such, their attempt to create a universal set of human rights is only an expression of a particular understanding of human nature and human rights akin to a particular civilization and tradition that has no right to claim objectivity and universality.

The notion of human rights in the context of modern Western philosophy and law is based on a set of principles whose understanding is vital whenever these are compared and contrasted with conceptualization of human rights in non-Western traditions and worldviews, especially when we compare them with Islamic or, more specifically, *maqāṣid* approach to human rights.

The first principle that is discernible from the main UN human rights instruments is, therefore, the principle of 'universality'. This principle assumes that a particular set of values is shared by all people or things in the world in a body composed of a number of organizations or groups. When this claim is appended to the human rights it stands for their applicability to everyone and the belief that everybody is entitled to these rights as a human being. In line with this principle, as the UDHR provides, all the principles of human rights found in this cornerstone human rights convention must be shared by all people, regardless of their country of origin, civilization and religion. The imperative tone of the convention leaves no room for objection but calls for immediate alignment and obedience of its articles.

The other principles of contemporary UN-backed notion of human rights are summarized by Binti Rafie in the following manner:

The second principle aims to present the provisions of human rights conventions as a whole, leaving no room for promotion of some rights in a selective fashion. It is, thus, called the principle of indivisibility. According to this principle, governments and individual subjects are required to adhere to the totality of human rights no matter which sphere of life these rights pertain to, whether they touch on legal, political, socio-economic, cultural or religious rights. The third fundamental principle of the Western notion of human rights as these are embodied in key UN human rights conventions

calls for all segments of a society, governmental and non-governmental ones to take active part in decision-making concerning definition and promulgation of human rights. In order to facilitate the implementation of human rights, governments need to create atmosphere where the input from all relevant subjects, intellectuals and civil society on relevant issues is welcome. In accordance with this invitation to participate, this third fundamental tenet is referred to as the principle of participation. It remains unclear, however, how much actual room there is for participation after governments have signed the international conventions on human rights or even before ratification if a certain number of countries have become party to the convention. The fourth principle, known as the principle of accountability, involves making governments responsible for possible violations of human rights provisions after these principles have been included in the national legislations. The fifth principle is similar to the fourth one in the sense that it strives toward making the decisions and judgements related to human rights made by government officials transparent and easily accessible upon request by individual researchers or organizations. Hence, the fifth principle is named the as the principle of transparency. Finally, the sixth principle calls for equality and abolition of all modes of discrimination within a country. Starting from the ideal that all human beings are born free, this principle provides that all people ought to share the same rights without possibility to legislate and implement any laws and rules that are discriminatory or preferential in nature.¹

Chronology of Historical Development of ‘Human Rights’ In Islamic Worldview and *Maqāṣid Al-Shar‘ah*

As we already mentioned before, *maqāṣid* as discipline was developing throughout centuries where its purpose among the most prominent *ususliyyun* was defined as *maṣāliḥ* (interests): *al- maṣāliḥ al- ‘āmmah* (public interests) by al-Juwaynī, *al-maṣāliḥ al-mursalah* (unrestricted interests) by al-Ghazali and al-Razi, al-Tufī provided a little more precise definition of *maṣlaḥah* by emphasizing that it refers to the

¹ Multazimah Binti Rafie, Che Wan Nurazura Binti Che Wan Nordin & Shahrul Mizan Bin Ismail, *The Universal Declaration of Human Rights and Maqasid Syariah: Gauging Resemblance & Aberration*. (Unpublished Conference Paper, National University of Malaysia, 2018) p. 2-3. Available at: https://www.researchgate.net/profile/Shahrul_Ismail3/publication/322405973_The_Universal_Declaration_of_Human_Rights_and_Maqasid_Syariah_Gauging_Resemblance_Aberration/links/5a57dd360f7e9bbacbfac0a/The-Universal-Declaration-of-Human-Rights-and-Maqasid-Syariah-Gauging-Resemblance-Aberration.pdf

fulfilment of the purpose of the Legislator and in the 19th century al-Qarafi continued this tradition of using the terms *maṣlaḥah* and *maqāṣid* in close connection with each other by stating that these two terms have to be linked by a fundamental rule which points that a purpose or *maqṣid* is not tenable if it does not lead to the fulfilment of some benefit (*maṣlaḥah*) or the removal of some mischief (*mafsadah*). Therefore, a *maqṣid*, purpose, objective, principle, intent, goal, end, or principle in the Islamic law is there for the interest of humanity.

As it can easily be noted, this is the most rationalistic view of the discipline of *maqāṣid* and the one that comes closer to the principles developed out of the Islamic scholarly tradition, such as the notions of human rights and women rights. In recent times, some Muslim scholars have expanded the objectives of *Sharī'ah* to include a number of aspects that have been promoted by global organizations such as the United Nations. Among these newly-added objectives are the human rights and women rights. The inclusion of the human rights into the scope and perspective of *maqāṣid* has been done by Yusuf al-Qaradawi,¹ and the addition of preservation of women rights among the objectives of *Sharī'ah* was proposed by Rashid Ridā.²

We already mentioned that the use of term human rights in Islamic Law literature emerge gradually, by replacing the term 'preservation of honor' to term 'preservation of human dignity' and in last period to term 'protection of human rights' as a purpose of Islamic Law.³

Related to that, in attempts to justify Islamic perspectives on human rights with the perspectives of Universal Declaration of Human Rights by UN and to harmonize Islamic thought in general with and with the UDHR, declared a few documents on human rights as a recommendations and guidances for national policy. The first document was the *Human Rights in Islam* by al-Mawdudi, written in 1976.⁴

In 1970, Sultan Hussein Tabandeh declared *A Muslim Commentary on the Universal Declaration of Human Rights* which was written as an guidance based on Islamic attitude on Universal Declaration on Human Rights for representatives of every Muslim country at the Tehran International Conference on Human Rights 1968.⁵

¹ Rane, *Human Rights through the Lens of Islamic Legal Thought*, p. 63.

² Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law*, p. 5.

³ Clapham, *Human rights*, pp. 22-23.

⁴ Abul A'la Mawdudi, *Human rights in Islam* (Lahore: Islamic Publications, 1995)

⁵ Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London, 1970)

In 1981, September 19th in Paris, the Islamic Council of Europe proclaimed the document *Declaration of Human Rights* as the second fundamental document, the first being the *Universal Islamic Declaration* announced at the International Conference on The Prophet Muḥammad S.A.W and his Message, held in London in 1980, April 12-15. In foreword of this document is stated that “the *Universal Islamic Declaration of Human Rights* is based on the Qur'an and the Sunnah and has been compiled by eminent Muslim scholars, jurists and representatives of Islamic movements and thought.”¹

In 1990, August 5th, in Cairo was adopted and issued at the Nineteenth Islamic Conference of Foreign Ministers *Cairo Declaration on Human Rights in Islam* (CDHRI).²

Besides that, some Muslim countries signed the Universal Declaration of Human Rights by UN, that made additional pressure to Muslims and their perspective on human rights in Islam, which on one way can explain the arise of use of this term in Islamic thought.

Human Rights In The Light of *Maqāṣid*

We already acknowledged that Islamic Law or *Sharī'ah* does not recognize 'human rights' in the same sense as the secular law recognizes it, primarily because all rights that a human being has are in Islamic Law given by Allah s.w.t. and not by any human factor (king, ruler, organisation etc.) as it is the case in secular law. These rights in Islamic Law are granted by Allah s.w.t., and are not subject of change opposite to these rights in secular law which are always changable according to time and circumstances that are subject of influence of the aims and ideologies of governments, non-government and world humanitarian organisations, etc.

Thus, it is evident that all human beings have certain rights but these right in Islam are given only from Allah s.w.t., and His Law, that is applicable to us trough *maqāṣid al-Sharī'ah*. There is no one that can change these rights or withdraw them or abrogate them, no conference or amendment that can change it nor any human authority has right to do that. These rights as guaranteed by Allah s.w.t., to those who are believing and who abide by His orders and avoid His prohibitions. On the other hand, according to Mawdudi these rights are addressed to all human beings no matter what religions they are or from which country they are,

¹ *Universal Islamic Declaration of Human Rights*, adopted by the *Islamic Council of Europe* on 19 September 1981/21 Dhul Qaidah 1401.

² *Cairo Declaration on Human Rights in Islam*, Adopted and Issued at the Nineteenth Islamic Conference of Foreign Ministers on 5 August 1990.

hence they are universal to all human beings oppose to human right by UN that are not applicable to all.¹ Although it is claimed that the human rights that are stated in all Islamic declarations on human rights are based on *Sharī'ah*, on percepts that are found in the Qur'an and Sunnah, we will not talk about those human rights because they are declared in attempts to make it closer human rights in Islam with those from Universal Declaration of Human Rights declared by UN trying on that way to make it universal and bridge the gap between the Islamic and Western perceptions of human rights and thoughts in general which is not possible,² as in the case with the Mawdudi's statement that Allah s.w.t. gives rights to all human beings no matter are they believers or not.

Thus, we will talk about the rights that are found in the Qur'an and Sunnah as granted to His believers in accordance with the exposition of the traditional *uṣūliyyūn*, the rights of man in the light of *maqāṣid al-Sharī'ah* which are treated in the first category of *maqāṣid* or *ḍarūrāt*.

The majority of scholars are of the opinion that there are five fundamental interests of human being: religion, life, mind, wealth and offspring which are called *maqāṣid ḍarūriyyah* or *ḍarūriyyah khamsa*, and that these basic human individual and collective rights must be preserved, maintained and secured.³

In addition, scholars of Islamic law has also explained on the priorities of the five types of *Maṣlaḥah*, namely, religious interests being highest is deemed to be more important than the interest of the soul, while the interests of the people must take precedence over the interests of the mind and the importance of the intellect must take precedence over the interests relating to lineage and offsprings. Conversely, descent interests take precedence over the interests of the property.⁴

The first of these interest clasified as preservation of religion or *hiḍḍ al-Dīn*, pertains to preservation of religion and can be define as right on freedom of religion as it is mentioned in *āyah* 256 of *sūrah al-Baqarah* and *āyah* 99 of *sūrah Yunus*, *āyah* 6 in *sūrah al-Kāfirūn*, *āyah* 19 in *sūrah Āli- 'Imrān*, where it can be clear seen that although is in the sight of Allah Islam only true religion, all human beings have right to belief

¹ Mawdudi, *Human rights in Islam*, p. 12.

² Kasule, *Contemporary Muslims and Human Rights Discourse*, pp. 185-186.

³ Musfir bin Ali al-Qahtani, *Abridged Edition of Musfir bin Ali al-Qahtani's Original: Undesrtanding Maqasid Al-Shari'ah: A Contemporary perspective*, Abridged by Wanda Kranse (IIIT Books-in-Brief Series, IIIT: 2015) p. 2.

⁴ Rafie, Che Wan Nordin & Mizan Bin Ismail, *The Universal Declaration of Human Rights and Maqasid Syariah*, pp. 3-4.

and to choice to believe or not, to choose their religion without coercion or any sanction or punishment if their choice is not Islam:¹

There shall be no compulsion in [acceptance of] the religion.² (*Al-Baqarah*: 256)

If it had been thy Lord's will, they would all have believed - all who are on earth! Wilt thou then compel mankind, against their will, to believe!³ (*Yunus*: 99)

"...For you is your religion, and for me is my religion."⁴ (*Al-Kāfirūn*: 6)

Indeed, the religion in the sight of Allah is Islam. And those who were given the Scripture did not differ except after knowledge had come to them - out of jealous animosity between themselves.⁵ (*Āli- 'Imrān*: 19)

The second interest *ḥifz al-Nafs*, can be defined as the right to life and safety and the right to obtain justice as it is found in *ayah* 33 of *sūrah al-'Isrā'*, *āyah* 32 of *sūrah al-Mā'idah*, *āyah* 151 of *sūrah al-An'am*, *āyah* 135 of *sūrah an-Nisā'* and *āyah* 8 of *sūrah al-Mā'idah*. The right on life is the most basic and sacred right of all human beings and there is no other human being permitted to take someone's life, except in the cases to serve justice after a fair trial:

And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law].⁶ (*Al-'Isrā'*: 33)

...whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind

¹ Submission to the will of God is regarded as a preferable way of life for human beings but is regarded as a matter of conviction that some human beings will embrace, while others remain free to reject. In sum, the *maqasid* of these verses are the preservation of conditions under which human beings are free to choose their religious convictions, quotes Halim Rane in Human Rights through the Lens of Islamic Legal Thought, 70. See more on pages pp. 69-70.

² *Al-Baqarah*: 256.

³ *Yunus*: 99.

⁴ *Al-Kāfirūn*: 6

⁵ *Āli- 'Imrān*: 19

⁶ *Al-'Isrā'*: 33.

entirely and whoever saves one - it is as if he had saved mankind entirely...¹ (*Al-Mā'idah*: 32)

...take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.² (*Al-An'am*: 151)

O you, who have believed, be persistently standing firm in justice, witnesses for Allah...³ (*An-Nisā'*: 135)

O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do.⁴ (*Al-Mā'idah*: 8)

The third interest *hifz al-'Aql* include the right to equality and dignity to all human beings no matter what gender, race and colour they are, which can be found in *āyah* 70 of *sūrah Al-'Isrā'*, *āyah* 13 of *sūrah al-Hujurāt*, *āyah* 124 of *sūrah an-Nisā'* and in the *Hadīth* of Prophet, a.s.:

And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference.⁵ (*Al-'Isrā'*: 70)

O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.⁶ (*Al-Hujurāt*: 13)

And whoever does righteous deeds, whether male or female, while being a believer - those will enter Paradise and will not be wronged, [even as much as] the speck on a date seed.⁷ (*An-Nisā'*: 124)

¹ *Al-Mā'idah*: 32.

² *Al-An'am*: 151.

³ *An-Nisā'*: 153.

⁴ *Al-Mā'idah*: 8.

⁵ *Al-'Isrā'*: 70.

⁶ *Al-Hujurāt*: 13.

⁷ *An-Nisā'*: 124.

All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over a black, nor a black has any superiority over a white – except by piety and good action.¹

As for the gender equality Qur'an is very clear not only regarding the spiritual equality of men and women and equal rewards for their good deeds but also concerning the family matters, relations between spouses and their social affairs and responsibilities, as it is found in *āyah* 21 of *sūrah Ar-Rūm*, *āyah* 34 of *sūrah an-Nisā'*, *āyah* 71 of *sūrah at-Tawbah* and *Ḥadīth* of Prophet S.A.W:

And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought.² (*Ar-Rūm*: 21)

Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard.³ (*An-Nisā'*: 34)

The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give zakah and obey Allah and His Messenger. Those-Allah will have mercy upon them. Indeed, Allah is Exalted in Might and Wise.⁴ (*At-Tawbah*: 71)

Oh people, your wives have a certain right over you and you have a certain right over them. Treat them well and be kind to them for they are your committed partners and committed helpers.⁵

Fourth interest *ḥifẓ al-Māl* pertains to the right of protection of wealth, by earning money and other properties in fair, lawful way, as well by spending wealth in the correct and moderate way and giving the

¹ *Khutbah Wada'*, Prophet Muhammad's Last Sermon

² *Ar-Rūm*: 21.

³ *An-Nisā'*: 34.

⁴ *At-Tawbah*: 71.

⁵ *Khutbah Wada'*, Prophet Muhammad's Last Sermon

help to the poor and the needy people, as found in *āyah* 172 and 188 of *sūrah al-Baqarah*, *āyah* 157 of *sūrah al-ʿAʿraf*, *āyah* 26 of *sūrah al-Isrāʾ* and in the *Ḥadīth* of the Prophet, S.A.W:

O you, who have believed, eat from the good things which We have provided for you and be grateful to Allah if it is [indeed] Him that you worship.¹ (*Al-Baqarah*: 172)

And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property.² (*Al-Baqara*: 188)

Believe in Allah and His Messenger and spend out of that in which He has made you successors. For those who have believed among you and spent, there will be a great reward.³ (*Al-Hadid*: 7)

And give the relative his right, and [also] the poor and the traveler, and do not spend wastefully.⁴ (*Al-Isrāʾ*: 26)

It was narrated from Miqdam bin Ma'dikarib (Ar-Zubaidi) that the Messenger of Allah (S.A.W) said: "No man earns anything better than that which he earns with his own hands, and what a man spends on himself, his wife, his child and his servant, then it is charity."⁵

The last, fifth interest of (*ḍarūriyyah al-Khamsah*), *ḥifz al-Nasl*, refers to the right to progeny or right to marriage, as trough prescription of marriage and prohibition of abortion and infanticide as well trough prohibitions of adultery, fornication intermingling of the sexes, as found in *āyah* 5 of *sūrah al-Mā'idah*, *āyah* 31 and 32 of *sūrah al-ʿIsrāʾ* and *āyah* 59 of *sūrah al-Ahzāb*:

And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you, when you have given them

¹ Al-Baqarah: 172.

² Al-Baqarah: 188.

³ Al-Hadīd: 7.

⁴ Al-Isrāʾ: 26.

⁵ Ibn Majāh, *Sunan Ibn Majāh*, Vol.3, Book 12, p.225, (Book: Chapters On Business Transactions, Chapter: Encouragement To Earn A Living. Hadith 2138).

their due compensation, desiring chastity, not unlawful sexual intercourse or taking [secret] lovers.¹ (*Al-Mā'idah*: 5)

And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin.² (*Al-Isrā'*: 31)

And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.³ (*Al-Isrā'*: 32)

O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful.⁴

It is important to emphasize here that rights in Islam are always accompanied with duties or obligations and that these rights must be preserved and secured. The fundamental basis for the principles of these rights Muslims also should, beside in the Qur'an, to look in the *Khutbah Wada'* and the Medina Charter, rather than in declarations of Islamic human rights mentioned above. The Prophet, a.s., in his last *khutba* give the instructions and guidance to all Muslims how to preserve Islam, how to protect life and property, how to deal with the wife respectfully, and advocate them to be justice towards self and towards each other in order to get Allah Pleasure and Mercy in this world and hereafter.⁵ Moreover, the Medina charter includes chapters with various themes as a guidance for all Muslims, its aim was to refine the obligations and rights of all ethnic and religious groups living in Medina including the rights of freedom, security and protection, religious freedom, the right of life, justice, protection of property of all people in Medina, "it guaranteed the protection of human rights, the protection of women rights, social rights, cultural rights, religious freedom, and the rights of minorities living in the state."⁶

¹ Al-Mā'idah: 5.

² Al-Isrā': 31.

³ Al-Isrā': 32.

⁴ Al-Ahzāb: 59.

⁵ Saifur-Rahman Al-Mubarakpuri, *Al-Raheeq Al-Makhtum (The Sealed Nectar) Biography of the Noble Prophet*, Riyadh: Maktaba Dar-us-Salam Publications, 1996, pp. 463-465.

⁶ Shaykh-ul-Islam Dr Muhammad Tahir-ul-Qadri, *The Constitution of Medina [63 Constitutional Articles]*, London: Minhaj-ul-Quran Publications, 2012, p. 2.

In summary, human rights and obligations can be traced in Islamic Law, but these rights are defined and clarified specifically within Islamic context and worldview and researchers need to exercise caution before any hasty comparison with human rights in the modern Western intellectual tradition. Moreover, these rights are not new nor the result of gradual refinement and elucidation, as has been the case with UN notion of human rights. In summary, every Muslim is given the responsibility to protect, respect and defend these human rights so long as it does not conflict with the fundamental principles of Islamic law.

Conclusion

On the concluding note, it is vital to reiterate that the phrase 'human rights' has emerged within modern Western intellectual milieu and that it clearly stresses the human dimension of rights. As aforesaid, its philosophical background and legal development that culminated in the series of declarations, conventions and resolutions formed in the various organs of UN undoubtedly show that legislation process followed the precepts of modern secular institutions, such as drafting, voting and adoption by members of legislative chambers or parliament. The lawgiver in this sense is human factor or purely human reason, as opposed to divine origin of Islamic law and its *maqāṣid*. This is the fundamental difference between the two conceptualizations of human rights. Another essential difference between the two formulations of human rights is in the fact that the original Arabic term denoting rights is *haqq*/pl.*huquq* which denotes that something is unquestionably true, correct, sound and unchangeable. The term itself has scriptural origin and, as elaborated by traditional *usuliyyun*, this term and what it stands for is not subject to drafting, voting, amending and other common actions performed in the definition, drafting and refinement of secular conceptions of human rights. In the Islamic scholarly tradition and institutions there was no need to draft particular conventions and resolutions about the specific cultural, economic, political, religious and other types of rights, when these were clarified and classified in the early works of Islamic jurisprudence and its higher intents or objectives. To this list of specific rights, one could add the rights of children and women, the rights of combatants and civilians during armed conflict and in peace, and all these rights acquired their clear form in the early centuries of Islam. The totality of the rights of Muslims and non-Muslims have to a greater or lesser extent been implemented in the institutions of Muslim states.

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