

## Islamic Idea of Human Rights

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**Abstract:** The idea of human rights has a formidable conceptual problem. It means different things in different ideologies. This article discusses briefly the idea of human rights in Islamic ideology, after mentioning some other theories relating to the idea of human rights. It also discusses sources of and methodology for human rights in Islam, the notion of *Haqq* (right) in Islamic law, its classifications, the idea of *Haqq* as fundamental rights, some human rights contents of the Qur'an and the *Sunnah*, the role of the *Sunnah* to validate written constitutionalism and fundamental rights in Islamic law etc. It thus endeavours to argue that Islam has necessary legal arrangements to meet human rights problems.

### Introduction

Human rights are some basic needs, autonomy and freedoms to which every human being everywhere in the world is entitled merely by virtue of having been born a human being. Islam has a specific view of human rights. If some norms and principles of Islam are explained it will be evident that Islam not only originated the idea of divine human rights, it also nursed them carefully, and helped them grow in an atmosphere conducive to them. This paper, after mentioning shortly the idea of human rights in different ideologies, discusses Islamic idea of human rights. The paper does not cover the entire Islamic conceptual problem of human rights. It only considers briefly some human rights principles enacted in the Qur'an and the *Sunnah* as some concrete examples with an attempt to illustrate Islamic legal arrangements in this regard.

### The Idea of Human Rights in Different Ideologies

The idea of human rights has an ideological dimension. It means different things in different ideologies. For example, the ancient political doctrine of the West, that is, the doctrine of natural rights holds that rights belong to man by nature. They are as much a part of man's nature as the colour of his skin. The legal theory makes out that rights are the artificial creation of the State. The historical theory of rights holds that rights are the crystallization of customs. The social expediency theory of rights advocates that rights are conditions of social welfare and creation of society. According to the idealist theory, rights are the outer conditions essential to man's inner development. Every man and woman must have opportunity to do and achieve those things which are necessary for the realization of his or her ideas, aims of life and interests, for the development of

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mind, character and personality. To develop his personality and individuality one needs social, legal and political conditions in which one can achieve one's purpose with consent, and if need be, with the aid and support of other individuals. These conditions are called rights.

The above definitions lead to some definitional controversies and formidable conceptual problems. It is, therefore, difficult to define human rights on the basis of a doctrinal consensus. Hence, it is good to find out a definition that might be justified even on highly divergent doctrinal grounds. Human rights, therefore, may be defined as some basic needs, autonomy and freedoms of every human being, everywhere in the world irrespective of race, colour, sex, language, religion, political or ideological differences, social or national origin, property, birth or other status.

Human rights are essential for the promotion of life, dignity, status, equality, prosperity, and happiness of every human being. The State has corresponding duties to give effect to these rights through its domestic laws and institutions. When these rights are guaranteed and entrenched by a written constitution of a state, which consists of the fundamental laws of the land, they are called fundamental rights, because the fundamental laws, that is, the constitutional laws guarantee them. Under an unwritten constitution, as in England, they are variously known as civil rights or civil liberties and freedoms or individual liberty.

### **The Idea of Human Rights in Islam**

Unlike western philosophical and political perceptions of natural rights, Islam does not believe in natural, inherent and inalienable rights of humans. Islamic lawyers hesitated, and still do, to consider human beings as the seat of inborn rights since all claims that can validly be made are conferred by Allah, and by Him alone. If a person has a "human right" to live, this can only be understood by Muslims as a reflex of the general command not to kill (see for example, Al- Quran, XVII: 33; VI: 151; V: 32). Therefore, human rights in Islam actually are rights bestowed by the Supreme Divine Being (Allah).

### **Sources of and Methodology for Human Rights in Islam**

The *Shariah* (the divine legal system) of Islam includes human rights as an offshoot and reflex of divine rulings and principles enacted in the Qur'an and the Sunnah. The *Shariah* contains a catalogue of divine precise norms and wide guiding principles to confer and fulfil human autonomy, needs and freedoms. The Qur'an and the *Sunnah*, the very roots of the *Shariah*, established the rules, principles, general foundations, objectives, sources of legislation etc. and legislated almost all classical concerns of human rights. Thus, unlike western human rights law, a committee of human diplomats does not compose human rights law in Islam. It is rather a corpus of

divine regulations which are crystallized in the Qur'an through the revelation and whose elaborations are enacted in the Hadith and the *Ijtihad* (intensive religious research or reinterpretation by Islamic scholars called the *Fuqaha*). It is a system of Qur'anic axiological principles or values whose deontological applications have been elaborated in the Hadith and the *Ijtihad*.

The ever-changing conditions and situations of human life dictate openness and flexibility of law, which demand, in turn, a readiness on the part of the law to meet them in pursuit of its eternal objectives. The *Shari'ah* is eternal, not in its letter, but in its spirit. Except in a few cases, the letter of the prescriptive elaborations of human rights in Islam is not sacrosanct and hence absolutely unalterable. The qualities of eternity and immutability belong to the principles behind the prescriptive elaboration, not to their figurization; i.e., to the legal form given them by translation of the purposes of the law into legislative **prescriptions**. Eternity and absoluteness belong, in the main, to the axiological **postulates**. With the exception of these postulates and directions, all **deontological** elaborations, whether legal or methodological, and other prescriptive particularizations of the *Shari'ah* are ever open to *Ijtihad*. Hence, to enable itself to move with time and to accommodate changing human conditions, the *Shari'ah* established the science of *Usul al-Fiqh* (Principles of Islamic Jurisprudence). This science recognized from the earliest time that the *Shari'ah* has some other sources, besides the texts of the Holy Qur'an and *Sunnah*, which guarantee dynamism and creativity. To this purpose, *Usul al-Fiqh* established the methods of *Ijma* (that is, the consensus of opinions of Islamic jurists of every age on a specific legal issue) and *Qiyas* (that is, the methodology of logical deduction and analogical extrapolation of specific legal issue from the *data revelata*) as two secondary sources of the *Shari'ah*. It also established criteria for an empirical discovery of the common welfare of the people, either through the method of *Istihsan* (juristic preference) or the method of *Maslahah* (juristic consideration of the common weal), under the *Maqasid al-Shari'ah* (the general purpose of the law), which it declared an equally valid source of law. Human rights in Islam are, therefore, anchored in such Qur'anic eternal principles or values whose applications may develop following human situations.

### **The Notion of “*Haqq*” in Islam**

Islam enunciated in the first-half of the seventh century A.C., among other things, the notion of *Haqq* (right) as an idea of divine universal human rights and fundamental freedoms. To denote rights moral, legal, inherent, inalienable, fundamental etc. the expression “*Haqq*” (right) has been invariably used in Islamic Law since the first- half of the 7<sup>th</sup> century A.D. The word occurred frequently in the Qur'an and the Hadith. In the verses 70:24-25, Al- Qur'an says: “Felicitous are those who recognize a *Haqq* (right) to the destitute and the deprived to a share in their wealth.” Thus, in the Qur'anic terminology, *Haqq* means a right as opposed to obligation. There are at least six different Quranic

usages of the term to imply certainty and proof of values, benevolence, rewards, promises, punishments, justice and the truth. Al-Bahiy, therefore, concludes that for these Qur'anic usages, *Haqq* is inextricably linked with justice and benevolence and that they are the ultimate values sought in the Qur'an wherever the word appears in the Qur'an (Bahiy, 1973:30).

In the Hadith, the word is sometimes used to encourage a certain course of conduct. In a Hadith, Abu Hurayrah narrated that "a Muslim has a "*Haqq*" over other Muslims in six matters...." (i.e., to return his/her greeting, accept his/her invitation, give sincere advice, etc.) (Bahiy, 1973:30). All of these conducts referred to as "*Haqq*" in this Hadith are moral rights. This can be an example of the fact that Islamic Law recognizes the concept of moral, as opposed to legal, rights.

### **"Haqq" as defined by Islamic Jurists**

Islamic jurists have tried to provide some definitions of "*Haqq*". Ibn Nujayin, in his *Al-Bahr al-Raiiq*, offering a brief definition, defines "*Haqq*" as "the entitlement of a person to a thing" (Nujaym, 1984:30). Langarudi in his work *Maktabha-e Huquqi dar Huquq – e Islam* states "*Haqq* is a power, whether material or spiritual, that the law has granted to a person over another person, over property, or over both" (Langarudi, 1991:15). Another jurist Musa defines "*Haqq*" as a *Maslaha* (benefit) which the lawgiver has granted to the individual or the community, or both." (Musa, 1954:20). Al- Khafif defines "*Haqq*" as "what is proven by the *Shari'ah* for the benefit of man" (Khafif, 1945:21). Al-Darini, in his *Al-Haqq wa Mada Sultan al Dawlah* defines "*Haqq*" as "an exclusive appropriation or power over something, or a demand addressed to another party which the *Shariah* has validated in order to realize a certain benefit" (Darimi, 1984:20).

From these definitions it is evident that *Haqq* is something proven or established by the *Shari'ah* for certain benefits of every individual. The Qur'an and the *Sunnah* established many benefits for every individual in many aspects of life. Prominent of these benefits are the rights to life; corporal integrity; freedom of speech, conscience, and movement; the right to own property and to marry; and the prohibition of discrimination on the basis of race, colour, religion, or sex etc. ( see, for example, Qur'anic verses no.17: 33; 3:110; 67:15; 70:24-25; 30; 21etc.). Hence, these and other benefits mentioned in the Qur'an and the Hadith are recognized as *Huquq al 'Ibad* (human rights).

### ***Haqq* as classified by Islamic Jurists**

In Islamic Law, "*Haqq*" has been classified into many divisions and subdivisions. Western commentators usually assert that Islamic Law does not recognize separation between law and religion. Contrary to this assertion, there is evidently such a recognition in Islamic Law. Legal rights and duties are explicitly identified and separated from their purely religious counterparts.

Islamic Law distinguishes between moral (*mandub* [recommendable], *makruh* [reprehensible], *mubah* [permissible]) and legal (*wajib* and *fard* [obligatory] and *haram* [forbidden]) categories of “*Haqq*” and duties (Amidi, 1982:40). The central feature of such division is to clarify what is legally enforceable and what is only moral advice. The three elements in the moral category are considered advice, with *mubah* being neutral and *mandub* and *makruh* serving as its subvarieties, and as such are not legally enforceable. The two elements in the legal category enjoy a much more limited scope of activity. Therefore, to describe Islamic Law as a “religious Law” or “a system of religious duties” and to assert that it recognizes no separation between law and religion is not in line with the technicalities of Islamic legal thought. Islamic Law is in unison with religion in matters of belief, rituals and in commitment to basic values, yet it clearly recognizes a functional separation between law and religion on an extensive scale.

Islamic jurists divide “*Haqq*” into two other main categories too. These are : “*Haqq Allah*” (the right of Allah or public right) and “*Haqq al-Abd*” (the right of the individual or private right). An individual’s act or conduct can consist of “*Haqq*” of Allah, and “*Haqq*” of individual, or a combination of both. This latter “*Haqq*” can be waived by the right-bearer, whereas the former cannot be waived. As it is beneficial to the community at large, it is not amenable to waiver, reconciliation, or compromise. The “*Haqq*” of Allah is, in other words, a public right and differs from the right of the individual in that its enforcement is a duty of the state. It is also a part of the Islamic concept of the institution of *Hisbah* (i.e., enjoining good and preventing evil) in the sense that anyone may demand its enforcement and adjudication in court, for it does not depend on instituting a particular claim (Amidi, 1982:40). Enforcement of a private right is, on the other hand, up to the individual, who may or may not demand it. This distinction between “*Haqq Allah*” and “*Haqq al-Abd*”, made by Islamic jurists at an early stage of Islamic Law, had no parallel in Roman Law.

Islamic jurists have subdivided “*Haqq*” even further, which shows that, on the whole, Islamic Law recognizes private rights as a prerogative of its bearer. With the exception of a few fundamental rights, rights in general do not inhere in the person or their bearers, in the community’s independent will, or in its government in total isolation from *Shariah* rulings. In essence this is the Ashari and the Akhbari Shiah view, which asserts that rulings, rights and obligations originate in the *Shariah* alone. As a result, human reason cannot create basic values, rights, and obligations independently of the *Shariah*. On the other hand, the Mutazilah claims that human reason provides a valid basis for rulings, whereas the Maturidis adopted a middle position. The majority of Islamic jurists tend to subscribe to the former, whereas the *Hanafi* jurists favour the later (Kamali, 1991:40).

Islamic jurists have further subdivided "*Haqq*" in terms of enforceability into two main categories. These are *Dini* (religious-moral) and *Qadai* (juridical). The former, although validated by Islamic Law, cannot be proven or enforced by a court (Abu Sinnah, 1971:42). To illustrate this, if someone possesses a piece of property for ten years (according to the jurists of the Hanafi and Maliki schools of Law) ownership is established in his/her favour (Abu Sinnah, 1971:42). Thus while the real owner has the moral "*Haqq*" and is the actual owner, the court cannot do anything about it. Similarly, if a debtor denies a creditor's "*Haqq*" to repayment and the later is unable to prove his/her case in court, the court cannot enforce the creditor's "*Haqq*". Most of the "*Haqq*" of Allah (i. e., *ibadat*, *Kaffarat* etc.) are in this category. As no one is expected or authorized to demand their enforcement, they are basically unjusticible, despite the fact that the judge is vested with *Tazir* (discretionary powers) to discipline those who seriously neglect them. "*Haqq*" without a particular party as the *Haqq*- bearer, such as religious endowment for the poor and the indigent, also falls into this category. Juridical "*Haqq*", on the other hand, are susceptible to proof at the behest of the right-bearer, and an Islamic Law court has the power to adjudicate them. Some examples of this "*Haqq*" are the creditor's "*Haqq*" to demand repayment from a debtor and a wife's right to maintenance by her husband.

In the Quran and the Sunnah, textual rulings are generally addressed to individuals and the Muslim community. Both groups are commanded, persuaded, encouraged, discouraged, warned and prohibited in a style that is versatile and not necessarily confined to the juristic style of a legal code, bill, charter or declaration. Quranic legal injunctions are normally in the form of commands and prohibitions. This is the main area in which "*Haqq*" and obligations are created either directly or by indication. The other areas, in which there is no explicit indications in the texts, are essentially non-legal. These may create moral "*Haqq*" and responsibilities. These may provide a basis for *Ijtihad* (i. e., the instrument of interpreting the divine message and relating it to the changing condition of the society) and the subsequent development of a moral "*Haqq*" or value into a legal "*Haqq*".

The style of legislation in the Quran and the Sunnah sometimes results in the relevant text not being self-evident and explicit, as it may lay down only a broad principle rather than a concrete ruling. This is why it is often in need of interpretation and *ijtihad*. The concepts enacted in the Quran and the Sunnah are also conveyed in the linguistic form of an injunction, while only imparting a recommendation or permission. The precise evaluation as to whether a specific linguistic command bears a juridical obligation, a recommendation, or a mere permission, or whether the text validates a "*Haqq*" or an obligation having legal import, are determined by text's language and the *Shariah*'s general principles and goals.

A perusal of the legal contents of the Quran and the Sunnah indicates that the texts are not always categorical concerning the evaluation (i.e., obligatory, recommended, permissible, reprehensible, or forbidden) of their rulings. Only occasionally do they speak in terms of obligatory or forbidden, while the intermediate three categories (i.e., recommended, permissible, reprehensible) are not specified as such, but are often understood from the language of the text or extraneous evidence. The scale of five values is basically a juristic construction of Islamic jurists, for one does not find categorical affirmation for it in the Quran and the Sunnah. Thus the categories are in many ways open-ended and subject to interpretation. Likewise, determining whether a ruling represents a "*Haqq*" of Allah, or a "*Haqq*" of the individual, or a combination of both is often a matter of interpretation. One jurist can conclude that a certain "*Haqq*" is a "*Haqq*" of Allah, while another can be able to justify classifying it as a "*Haqq*" of the individual. Their conclusions may also differ in the degree of emphasis assigned to one or the other of these *Huquq* (pl. of *Haqq*).

#### ***Haqq* as Fundamental Right**

A "*Haqq*" may be considered fundamental if it is founded in the clear injunctions and basic or primary principles of the Quran and the Sunnah. Although Islamic Law makes no categorical pronouncements that identify fundamental human rights as a separate category, the Quran does contain a set of principles that is reiterated and upheld in the Sunnah and the consensus of Islamic jurists. As such, they are fundamental to Islam and its legal system. These tenets and principles tend to have an overriding influence and permeate almost every level and development of Islamic legal thought.

A formal distinction between fundamental and other *Huquq* in Islamic Law can be made by referring to the Quran itself. *Huquq* founded on clear Quranic injunctions (i.e., *Huquq* (rights) to life, property, privacy, movement, justice, personal dignity, honour, equality before the law, and of parents over children etc.) may be classified as fundamental human rights enacted in the Quran (Al-Quran, 17:33;4:29;67:15;4:58 etc.). The Quran and the Sunnah expound certain norms and principles that give Islamic Law its distinctive identity and tend to have a great influence on its rules and doctrines. Such Quranic principles as *hisbah* (promoting good and preventing evil), *amanah* (trust), *istikhlaf* (vicegerency), and *taawun* (cooperation) (Al-Quran, 3:104;2:30;2:34 etc.) may well provide textual authority for identifying many fundamental human rights, whether of the individual, the community, the environment or whether it be within or beyond a state's territorial boundaries.

The Quran contains principles substantiated by the Sunnah, such as the removal of hardship. The Sunnah itself deals with many other themes in almost every area of law. These may or may not directly embody a fundamental human right, but may well provide authority for identifying a particular right as basic and fundamental. The Quran and the Sunnah further provide authority for each of the

five essential values: life, religion, intellect, property, and lineage (Al-Quran, 17:33; 4:29; 2:256 etc.). Many of these norms and principles have been identified and articulated by Islamic jurists as legal maxims (*qawaid Kulliyah*) that express the objectives of Islamic Law on an impressive variety of themes. These maxims could be used as guidelines for a theory of fundamental human rights in Islamic jurisprudence.

### **Some Examples of Fundamental Rights in the Quran**

Unlike the Universal Declaration of Human Rights or the International Covenants on Human Rights, no particular *Surah* of the Quran provides for a bill of fundamental rights. Since Allah revealed the Quran piecemeal to meet the requirements of the Islamic movement at its different stages, fundamental rights are to be found scatteredly in various verses of different *Surahs* of the Quran. Al-Quran directly embodies many fundamental rights. For example, recognizing the fundamental human right to privacy, the Quran commands: "O believers! Enter not houses other than your own until you have asked leave and saluted the inmates. If you find no one therein, do not enter until you are given permission ((Al-Quran, 24:24). In this command, a negative right is created in favour of the occupants of the house not to be disturbed by strangers. As they have exclusive right (i.e., ownership) to the house they occupy, they can refuse permission to those seeking to enter. This "*Haqq*" is known as an exclusive appropriation. This text thus creates a basic concern to right to privacy within the framework of a prohibitive ruling.

As regards the fundamental right to be presumed innocent until proved guilty in a court of law, Al-Quran commands: "O believers, avoid most of suspicion, for suspicion in some cases is sin... and spy not, nor backbite one another... surely Allah is Merciful ((Al-Quran, 49:12). The text conveys a decisive ruling on the illegality of espionage and gives a clear indication that only some forms of suspicion may be justified and tolerated. Espionage is a concrete activity that can be proven by evidence and is therefore a proper subject for a ruling, but suspicion is not. This is why the Quranic language leaves room for flexibility. Moreover, a reasonable suspicion based not on malice but on the prevention of criminal activity or evil may be permitted on a restrictive basis. The fact that the Quranic ruling on privacy and espionage occurs in the form of prohibition could be because it creates a negative right and also in order to add emphasis, for a prohibitive ruling is generally more emphatic than an affirmative command.

To declare the most important fundamental right, the right to life, the Quran commands: "Kill not a soul which Allah has made sacrosanct save in the cause of justice" ((Al-Quran, 17:33). To proclaim the right to personal dignity, the Quran says: "We bestowed dignity on the progeny of Adam" ((Al-Quran, 17:70). The right to life is further substantiated by the Quranic proclamation that: "Whoever killed a person ...it shall be as if he had killed all mankind, and who gave life to one, it shall be as if he had given life to all mankind ((Al-

Quran, 5:30). Similarly, the right to personal dignity is further substantiated by the prohibition of slanderous accusation (Al-Quran, 24:3). Al-Quran further says: Let no one people deride another people ... and defame not your own people, nor call one another by (insulting) nick-names ((Al-Quran, 49:11).

To mention the fundamental right to work and lawful earnings, the Quran commands more than one instance: “ O believers, spend of the lawful and pure substances you have earned and of the resources We have in store for you in the earth” ((Al-Quran, 2:267). “and when the prayer is finished, disperse in the land and seek of Allah’s bounty” (Al-Quran, 62:10). “Men have a right to what they have earned and women are entitled to what they have earned” (Al-Quran, 4:32). In these proclamations, taking a profession to maintain livelihood is emphatically considered as an economic fundamental right.

The Quran also proclaims fundamental rights to private property and ownership. It commands: “And devour not each other’s property wrongfully unless it be through lawful trade and your mutual consent” (Al-Quran, 4:29; 2:188). The rights of lawful trade, work, and transactions of mutual consent are thus recognized as principal means of acquiring wealth. Wealth obtained through lawful means is not reprehensible. On the contrary, it maintains just the opposite. Al-Quran commands: “Say! who has forbidden the adornment of life, which Allah has provided for His servants? Say ! they are for the believers in this life” (Al-Quran, 7:32).

The Quran recognizes and validates fundamental right to movement, especially when it is used to preserve the integrity of one’s faith and conscience (Al-Quran, 4:97;8:72). Migration and travel in the cause of righteousness forms the theme of many Quranic texts and its merit is generally emphasized. In fact, all freedom of movement, regardless of its ultimate objective, is allowed in the Quran. The Quran proclaims: “He it is Who has made the earth subservient to you, so travel in its tracts and benefit from its bounty” (Al-Quran, 67:15). As regards the normative validity of the fundamental right to religion and conscience, the Quran unequivocally declares that “there shall be no compulsion in religion” (Al-Quran, 2:256).

The Quran can best be characterized as a stable source of authority and influence that is partly open to interpretation, but having definite injunctions and a basic value structure that cannot be altered. This continuity of values is the dominant feature of the Quran. It then follows that the basic concept of fundamental human rights and their identification in the Quran and the Sunnah are acceptable and recommended, insofar as this articulates the essentials of Islamic Law in this area. It also gives them a concrete expression that could be used as a basic indicator of the place of a particular *Haqq*, norm, or principle in the general framework of Quranic values.

Fundamental rights are a manifestation of human dignity. Constitutional proclamations of the rights of citizens are generally reflective of a society's commitment to the dignity and value of its members. Human rights, therefore, are defined as those minimal rights which every human being must have by virtue of his dignity of being a member of the human family, irrespective of any other consideration (Basu, 1994:5). The Quranic declaration on the dignity of each and every member of human family is so vividly objective that it makes human dignity one of its cardinal objectives (Al-Quran, 17:70). As a fundamental Quranic theme, references to human dignity occur in a variety of contexts. The Quran elevates humanity to a rank higher than the angels and honours it by the trust of being appointed vicegerent of Allah on earth (Al-Quran, 2:30-34). The angels were told to prostrate before Adam, the first man and the archetypal human being. This moral latitude of humanity is then complemented with a reference to the physical nobility of its origin: "Surely We have created man in the best mould" (Al-Quran, 95:5). Another passage of the Quran affirms humanity's competence and trustworthiness in the eyes of Allah (Al-Quran, 33:72). Furthermore, Allah has subjected "whatever is in the heavens and whatever in the earth" to humanity (Al-Quran, 45:13). And lastly, one could hardly overestimate the Quran's emphasis on the sanctity of human life, as it equates the enormity of killing one innocent individual to the destruction and massacre of all humanity (Al-Quran, 5:32).

Such evidence in the Quran has led Qutb and al-Sibai to conclude that, in Islam, dignity is a natural right belonging to every individual irrespective of any other consideration. An individual is not honoured for personal attributes or status in society, or for racial or tribal distinctions, but because he/she is a human being. His personal piety may enhance this dignity but it undoubtedly belongs to him because of the mere fact that he is a human being. Both the authors, therefore, say that human dignity is the absolute right of every human being (Qutb, 1954:35).

### **Some Documents of the Sunnah Relating to Human Rights**

Quranic injunctions are often expounded and translated into practice by the Sunnah of the Prophet (s.). 'Sunnah' literally means a way, practice, rule of life; and refers to the exemplary conduct or the model behavior of the Prophet (s.) in what he said, did or approved (Kamali, 1991:32). The Sunnah deals with almost all classical issues of fundamental rights. The Prophet (s.) as a statesman constituted some remarkable legal documents during his ten years rule. The Charter of Madina which was issued fourteen hundred years ago (Khan, 1975:570) has become a weighty and significant document in the recent decades. The grant of civil liberties in this Charter in a land of Madina still ruled by tribal aristocrats was of far more political significance and should serve as a pointer to the modern civilized world. Because of its application to the conditions and changed circumstances which its author had in mind, the Charter of Madina has

become the most important single document in the development of constitutional law in the contemporary Muslim world (Hamidullah, 1958:16). What is said to have been given to the modern civilized world by several Euro-American documents such as the Magna Carta (1215), the American Declaration of Independence (1776), the French Revolution (1789), and the Universal Declaration of Human Rights (1948) etc. were already embodied in this Charter. This Charter deals with more than 47 Articles containing, among other things, several rights and duties (Hamidullah, 1958:16). The text of the Charter has been preserved by many Islamic historians and came to us in toto (Watt, 1961:221-225).

The Magna Carta of King John of England (1215A.C.) is often quoted as a landmark in the development of constitutional and legal freedom of modern England and other European countries (Jennings, 1955:44-48). But a closer scrutiny would reveal the fact that it was not a Charter of civil liberties guaranteeing certain rights or privileges to the citizens. It was rather a feudal document. As Neuman says, "It was purely a feudal document in which the king granted to nobles the rights, which in their opinion, and probably correctly, they already possessed" (Neuamn, 1955:9).

On the other hand, the Charter of Madina was not a feudal document. It was rather a federal document of different religious and clannish peoples in which they had been guaranteed liberty of conscience, equality, equity, fraternity etc. (Hamidullah, 1958:16). It was given to the most conflicting Arab peoples at a time when Europeans were still passing through the darkest period of absolutism (Hamidullah, 1958:16). None of the European peoples of that time of 7<sup>th</sup> century A . C. could think of such freedom and liberties as guaranteed in this document. Under this medieval Islamic document all individuals of the Madina State equally enjoyed virtually all the rights and privileges. Under this document, Muhammad (s.) became the head of the State and, as such, the final adjustment centre, the authority who spoke the last word under Allah's guidance and direction (*Wahi* i.e., revelation). But in spite of his being the head of the State and his primacy of honour as the Prophet, he could not behave like a despot of the ancient times. He had to adhere to and remain under the Divine regulations.

However, the recognition of the Prophet (s.) as the Chief Justice and Messenger of Allah in this constitution by the people of the document meant, in fact, the acceptance of *Pax-Islamica* which, for the first time, in an unruly world of the 7<sup>th</sup> century Arabia and elsewhere treated man as the most noble creature and guaranteed to the citizens and subjects alike the fundamental rights at a time when Westerns still preached the doctrine that man is born sinful and that Jesus Christ sacrificed himself for the atonement of the Christians. Thus the security of *Pax-Islamica* was practically appreciated by those whom the attitude of the two great empires, the Roman and the Parsian, filled with a sense of insecurity of life. That seems to be the reason why in the closing years of the Prophet's (s.)

alliance with the Islamic State promised greater security than was otherwise attainable. In short, this medieval first Islamic Constitution of Madina Federation undoubtedly exalted justice and guaranteed the fundamental rights to all along with equal emphasis on the obligations of the citizens.

The Farewell Pilgrimage Address (632 C.E.) is another document of the Prophet (s.) in which there are fifteen items which taken collectively could be styled "The Manifesto of World Peace" (Khan, 1975:853,854). In this sermon, which was given in the 23 February, 632 C.E. at Arafat, the Prophet (s.) emphasized on human relationship tending to establish peace amongst human beings and security in the World. Racialism is given no place of pride in this Address. However, the Address deals with the following fundamental rights:

(I) Right to life, honour and dignity and right to security of property. In this regard the Prophet (s.) said :

Allah has hallowed your blood and your property like the sanctity of this land until you meet your Lord (Khan, 1975:853,854).

He further said :

Allah has made sacred and inviolable the life and the property of each of you unto the other like this day of the *Hajj* until you meet your Lord (Khan, 1975:853,854).

(II) The right to equality and nondiscrimination irrespective of race, colour etc. In this regard the Prophet (s.) said:

All men are from Adam and Eve. An Arab has no superiority over a non-Arab; also a non-Arab has no superiority over an Arab, except by good actions (Khan, 1975:853,854).

(III) The right to security of women. In this regard the Prophet (s.) said:

O people ! you have certain rights over your wives, and so have your wives over you. They are the trust of Allah in your hands. So you must treat them with all kindness. You have taken them only as a trust from Allah, and you have the enjoyment of their persons by the words of Allah (Khan, 1975:853,854).

(VI) The Address also deals with various fundamental rights of Slaves. In this regard the Prophet (s.) said:

And as regards your slaves, see that you give them to eat of what you yourselves eat, and clothe them with what you clothe yourselves. If they commit a fault which you are not inclined to forgive, then part with them; for they are the servants of the Lord, and they are not to be harshly treated (Khan, 1975:853,854).

Furthermore, the Address includes such issues as the abolition of family distinction, the brotherhood of Muslims anathematization of transgression in

any form or shape, the enforcement of the Law of cease- fire, Interdiction of usury i.e., economic exploitation, interdiction of bloodshed resulting from old feuds etc (Khan, 1975:853,854).

Khaybar Treaty (629 C.E.) is another document of the Prophet (s.)

dealing with some fundamental rights of the Jews-a minority group of the Madina State. In this instrument the Prophet (s.) ensured the defeated Jews of Khaybar, among other things, the religion and conscience, the rights to life, security, property, citizenship of State etc. (Khan, 1975:853,854).

Thus, besides the Quranic injunctions the Sunnah provides almost all roots of fundamental rights for the later development. In his study of human rights and fundamental freedom in the Arab Middle East Luca concluded thus : The Koranic text has a stronger hold on the mind of the Arabs than declarations contained in their formal constitutions (Luca, 1975:25).

### **The Role of the Charter of Madina to validate Written Constitution in Islamic Law**

Western writers on modern constitutional law have identified several methods that can be used to distinguish fundamental human rights from other rights. The most obvious one, in the context of western law, is to refer to the constitution and ascertain whether the right in question is expressed and recorded as such (Bridge, 1973:26). In countries where the constitution is unwritten, fundamental human rights can still be identified by reference to the rules, conventions, and judicial precedents that may be identified certain rights as of primary importance to the legal system's structure and content (Bridge, 1973:26). For example, in English Law the rights to vote and to issue a writ of *habeas corpus* are both fundamental human rights as a matter of practice and history, as they are necessary for the proper working of the constitution (Bridge, 1973:26).

In Islamic Law, neither the *Shariah* nor the juristic doctrine of Muslim scholars provides a specific pattern for the constitution of an Islamic state. Since there is no consensus on the essential features of such a state, the matter must, therefore, remain open to initiative and *ijtihad*. In recent decades, statesmen and scholars have been actively engaged in elaborating the basic themes and attributes of an Islamic polity and a pattern may be emerging. Another reason for lack of a model or definitive precedent on the constitution of an Islamic state is the fact that the idea of a written constitution as a supreme law of the state does not find a clear origin in Islam. The Charter of Madinah, also known as the Constitution of Madinah, that was enacted after the migration of the Prophet (s.) to Madinah may be considered as authority to validate introduction of a written constitution. The question of harmony or otherwise of such a document with the principles of Islam is, of course, another matter. It has been suggested that the Companions did not promulgate a written constitution for reasons perhaps that they did not see the need for one. This pattern prevailed and Muslim rulers did not introduce

written constitutions nor a bill of rights until the *Tanzimat* reforms of nineteenth century in Turkey, which were marked by the issuance of Imperial decrees on constitutional themes under Sultan Abdul Majid (Hammad, 1987:30).

In response to a question whether constitution-making was at all acceptable to Islam, Rashid Rida issued a *fatwa* (legal decision) in which he answered the question in the affirmative stating that since the cardinal duty of government in Islam was to implement the laws of *Shariah*, the idea of a limited government whose powers were defined by the constitution, and a consultative government which was committed to the basic rights of people was acceptable to Islam. If enacting a formal constitution operated as a check on despotism and contributed to the ideals of equality and justice, there was no question of it being repugnant to Islam. If however the constitution contains rules which may be repugnant to the teachings of Islam, then it may be said to be *ultra vires* with regard to its controversial elements only. To substantiate this point, Rida further observed that in the history of Islamic jurisprudence one finds numerous instances where the jurists have made errors in their *ijtihad* and in the books they have authored. We ought only to reject the views that are erroneous but not the whole of their endeavour. The error must be corrected at an early opportunity so that the community is protected against deviation (Hammad, 1987:30). Mahmud Hilmy concurs with this view and comments that there is nothing in the *Shariah* against enacting a written constitution (Hammad, 1987:30).

In fact, the promulgation of the Madinah Charter by the Prophet (s.) in the medieval world directed Muslims, long before the American initiative for a written constitution, to the ideal that an Islamic state should have a written constitution outlining the broad principles of the structure of government and the limits within which its various organs and institutions would work. The constitution should also guarantee not only the fundamental rights and duties of the citizens but protect the rights and interests of the minorities with meticulous care. It should also clearly provide that no law should be contrary to the letter and spirit of the *Shariah*, as revealed in the Quran and the Sunnah and that all unethical practices are to be eliminated. The state should devise ways and means for the exercise of fresh *Ijtihad* and *Ijma* (consensus of opinion), keeping in view the modern scientific and technological advancement. In this way alone Muslims of the world can contribute adequately to the promotion and establishment of a sane, progressive and viable world order. In this sphere Islam with its message of universal equality, brotherhood and cooperation on a moral plane, without giving any consideration to short term political expediency, has something vital to contribute to human progress. It is, therefore, imperative that an Islamic state should address itself to the task of cementing inter-Muslim unity, not in order to exclude the rest of humanity, but in order to contribute positively to the peace, happiness and progress of the rest of mankind.

It is matter of hope that there is already a legacy of experience and precedent in constitution-making available in contemporary Muslim countries. This legacy is often predicated on the binary division of rights and liberties into constitutional and ordinary. But since constitutionalism as a movement is a western phenomenon that was closely imitated by postcolonial and newly emerging Muslim states, the experience tends to lack any attempt to forge a link with the indigenous Islamic heritage. The foreign origin of this experience does not necessarily proscribe or make the endeavour reprehensible, but it does imperil the task of coherence and integration. In fact, retaining or formulating many such elements in the light of the guidelines of the *Shariah* is distinctively desirable, for this would develop harmony and coherence in the legal and cultural experiences of the contemporary Muslims.

### **Conclusion**

From the above discussion it is evident that Islam originated a unique idea of divine human rights, the elements of which originate from the Quran and the Sunnah. Both the Quran and the Sunnah laid down almost all necessary rules, norms and principles of human rights. For all that there may be problems of human rights that are not specified in the Quran and the Sunnah. These problems are left to the provision of *Ijtihad* (religious research) to be decided by the Islamic jurists in conformity with the spirit of Islam as envisaged in the Quran and the Hadith -Sunnah- the two primary sources of Islam.

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