

**IBN HALDUN UNIVERSITY  
ALLIANCE OF CIVILIZATIONS INSTITUTE  
DEPARTMENT OF CIVILIZATION STUDIES**

**PH.D. THESIS**

**THE CONTESTED GROUNDS OF HUMAN RIGHTS IN  
ISLAM AND THE WEST:  
A COMPARATIVE STUDY**

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**THESIS SUPERVISOR  
PROF. DR. RECEP ŐENTÖRK**

**ISTANBUL, 2022**

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**by  
JEROEN VLUG**

**A project submitted to the Alliance of Civilizations Institute in  
partial fulfillment of the requirements for the degree of Doctor of  
Philosophy in Civilization Studies**

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PROF. DR. RECEP ŞENTÜRK**

**ISTANBUL, 2022**

**APPROVAL PAGE**

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Doctor of Philosophy in Civilization Studies.

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## ÖZ

### İSLAM VE BATI'DA İNSAN HAKLARININ TARTIŞILMIŞ TEMELLERİ: KARŞILAŞTIRMALI BİR ARAŞTIRMA

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Bu tezde, İslam ve Batı'da insan haklarının tartışılmalı zemini sorununu ele almaktayız. İnsan haklarının küresel ahlaki tartışmalarımızın merkezinde yer aldığı bir çağda yaşarken, insan hakları Avrupa merkezli etik ve antropolojilerdeki önyargıları nedeniyle sorgulanmaktadır. Aynı zamanda insan hakları yirminci yüzyılda sekülerleştirildi ve herhangi bir felsefi alternatifle desteklenmeden tarihsel teolojik temellerinden koparıldı. Bu durum modern insan haklarını felsefi açıdan temelsiz bırakmış ve bir gerekçelendirme teorisine ihtiyacını doğurmuştur. Mevcut “insan hakları krizi”, özellikle Hıristiyan ve Yahudi etiğinde insan haklarının felsefi temelleri üzerine yeni çalışmaları teşvik etmiştir. İslam hukuk geleneği bu tartışmanın dışında kalmıştır. İslam ve insan hakları üzerine yapılan araştırmalar neredeyse sadece “çatışma anlatısına” odaklanmakta ve klasik İslam hukuku (*fıkıh*) ve hukuk felsefesi (*usûlü'l-fıkıh*) ile derin bir ilişki kurmamaktadır. Hem oryantalistler hem de insan hakları hukukçuları İslam'ın insan hakları kavramına sahip olmadığını ve yalnızca “ödev temelli bir sistem” olduğunu iddia etmişlerdir. Bu tez, hukuki oryantalizmin indirgemeciliğinin ötesine geçmekte ve İslam hukukuna, çağdaş felsefi tartışmalara değerli katkılarda bulunabilecek bir hukuki-felsefi gelenek olarak söylemsel açıdan yaklaşmaktadır. Karşılaştırmalı hukuk çalışmaları ve kavramsal tarih (*Begriffsgeschichte*) çerçeveleri aracılığıyla bu tez, ortaçağ ve erken modern İslam ve Batı'daki modern öncesi insan hakları söylemlerinin izini sürmektedir. Bunu yaparken, insan haklarının nasıl kavramsallaştırıldığını, gerekçelendirildiğini ve

temellendirildiđini ve bunların bugünkü ahlaki kaygılarımıza nasıl hitap edebileceđini arařtırmaktayız.

**Anahtar Kelimeler:** Karřılařtırmalı hukuk, kavramsal tarih, İslam ve insan hakları, İslam hukuku, İslam hukuk felsefesi, hukuki oryantalizm, dođal hukuk, dođal haklar, insan hakları felsefesi, insan hakları tarihi



## ABSTRACT

### THE CONTESTED GROUNDS OF HUMAN RIGHTS IN ISLAM AND THE WEST: A COMPARATIVE STUDY

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In this thesis we explore the problem of the contested grounds of human rights in Islam and the West. While we live in an era in which human rights are at the center of our global moral discussions, human rights have been challenged for their bias in Eurocentric ethics and anthropologies. At the same time human rights were secularized in the twentieth century and divorced from their historical theological underpinnings, without being supplanted by any viable philosophical alternative. This has left modern human rights philosophically ungrounded and in need of a theory of justification. The current “crisis of human rights” has instigated new scholarship on the philosophical grounds of human rights, especially in Christian and Jewish ethics. The Islamic legal tradition is notably absent from this debate. Research on Islam and human rights almost exclusively focuses on a “narrative of conflict” and lacks a sustained engagement with classical Islamic law (*fiqh*) and legal philosophy (*uṣūl al-fiqh*). Both Orientalists and human rights lawyers have claimed Islam has no conception of human rights and is merely a “duty-based system”. This thesis moves beyond the reductionism of legal Orientalism and approaches Islamic law discursively as a legal-philosophical tradition that can make worthwhile contributions to contemporary philosophical debates. Through the frameworks of comparative legal studies and conceptual history (*Begriffsgeschichte*), this thesis traces premodern human rights discourses in medieval and early modern Islam and the West. In doing so, we explore how human rights were conceptualized, justified and grounded, and how they may speak to our current moral concerns today.

**Key words:** Comparative law, conceptual history, Islam and human rights, Islamic law, Islamic legal philosophy, legal Orientalism, natural law, natural rights, philosophy of human rights, history of human rights



## **DEDICATION**

Dedicated to my wife and two sons, Zehra, Yusuf Safa and Faruk Taha.

In loving memory of my late grandmother Theodora Quax-van Ee (d. 2012).



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<sup>1</sup> “*Lā yashkuru Allāh man lā jashkuru al-nās*”, related by Abū Dāwūd al-Sijistānī, *Sunan Abī Dāwūd* (Jam‘iyat al-Maknaz al-Islāmī, 2008), 4811.

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## LIST OF ARABIC TRANSLITERATIONS

Arabic script	English symbol	Arabic script	English symbol
ع	‘	ض	Ḍ
ا، آ	Ā	ط	Ṭ
ب	B	ظ	Ẓ
ت	T	ع	‘
ث	Th	غ	Gh
ج	J	ف	F
ح	Ḥ	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dh	م	M
ر	R	ن	N
ز	Z	هـ	H
س	S	و	ū or w
ش	Sh	ي	ī or y
ص	Ṣ	ة	a or t

# INTRODUCTION

“Any translation into one’s own present implies a conceptual history.”

*Reinhart Koselleck*<sup>2</sup>

“To compare requires seeing two things as whole and complete, then brought into juxtaposition and relationship.”

*Jacob Neusner & Tamara Sonn*<sup>3</sup>

In this thesis we explore the problem of the contested grounds of fundamental rights in Islam and the West. We inhabit an era in which human rights values have never been so widely accepted as the “moral language” of our age. At the same instant, however, their philosophical grounds remain highly contested. What are rights exactly? How can we justify them? And who is allowed to have them? These questions remain unresolved and different cultures and civilizations tend to answer them differently. Two major problems that challenge the modern concept of rights that inhere in all human beings are claims to universality and the charge of “ungroundedness”. In an effort to universalize modern human rights they were secularized during the eighteenth century. But their premodern theological and philosophical grounds were never replaced with anything new. Without proper justifications, some have claimed human rights do not exist at all. This conundrum has been at the center of the modern crisis of human rights.

In order to attempt to answer some of these questions, this thesis explores the grounds of rights in the Islamic and Western legal traditions. How have these premodern traditions attempted to answer these questions? And how can we learn from them today? Using conceptual history and conceptual analysis, we aim to bring clarity to the highly ambiguous concept of rights. And through the methods of comparative law

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<sup>2</sup> Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, trans. Todd Samuel Presner et al. (Stanford, California: Stanford University Press, 2002), 21. For the original German, see Reinhart Koselleck, “Sozialgeschichte und Begriffsgeschichte”, in *Sozialgeschichte in Deutschland*, Vol. 1, eds. Wolfgang Schieder and Volker Sellin (Göttingen: Vandenhoeck und Ruprecht, 1986), 90.

<sup>3</sup> Jacob Neusner and Tamara Sonn, *Comparing Religions Through Law: Judaism and Islam* (London: Routledge, 1999), 1.

and comparative religion we attempt understand how these legal traditions differ and were they have common grounds.

### **1.1. The Contested Grounds of Rights: Problems and Questions**

The theoretical and philosophical grounds of human rights is an emergent field of inquiry attracting scholars from legal history, legal philosophy, comparative law, and religious studies. We live in a global era of rights, in which “rights talk” is the dominant international ethical language, the “moral lingua franca” of our contemporary era.<sup>4</sup> Particularly after World War II, with the promulgation of the Universal Declaration of Human Rights (UDHR) in 1948, fundamental rights principles have become increasingly embedded in our national legal systems, in our constitutions, in regional human rights instruments, in the burgeoning field of international human rights law, and in an array of subsequent human rights conventions and declarations.<sup>5</sup>

Yet, despite the apparent ubiquity and consensus about the importance of fundamental rights, the *grounds* of rights remain highly contested. In fact, there is no consensus on justificatory grounds, which is a main reason why this discussion – which is deeply philosophical in nature – was evaded during the drafting of the UDHR.<sup>6</sup> The contestation over grounds is after all in direct contradistinction to the universalizing tendency of the modern human rights regime, which is catered towards consensus. The language of modern human rights in the twenty-first century was therefore deliberately “secularized” to dissociate it from premodern religious rights discourses. Medieval and early modern discourses on natural law and natural rights had been deeply imbued

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<sup>4</sup> Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), 1.

<sup>5</sup> Mashood A. Baderin and Manisuli Ssenyonjo, “Development of International Human Rights Law Before and After the UDHR”, in *International Human Rights Law: Six Decades after the UDHR and Beyond*, eds. Mashood A. Baderin and Manisuli Ssenyonjo (Farnham, Surrey and Burlington, VT: Ashgate, 2010), 8-12.

<sup>6</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999). Morsink mentions that the drafters of the UDHR strove to use a language that accommodated different ideologies and worldviews in a “tremendous drive toward universality”, 21.

with the Christian theological *Weltanschauung*, thus endangering the envisioned “universality” of modern human rights.<sup>7</sup>

In absence of commonly accepted grounds, various religious traditions and world views – be they Buddhist, Hindu, Christian, Jewish, Islamic, or otherwise – have justified modern human rights in different ways.<sup>8</sup> Non-religious scholars have similarly attempted to ground rights in secular humanism and other secular outlooks.<sup>9</sup> Some critics, such as the well-known neo-Thomist philosopher Alasdair MacIntyre, have argued that modern human rights have no grounds at all, and hence they do not actually exist; that they in fact are akin to belief in “witches and unicorns” or in an earlier elaboration by the early nineteenth-century utilitarian and positivist legal philosopher Jeremy Bentham “nonsense upon stilts”.<sup>10</sup> In short, the perceived “ungroundedness” of the modern human rights discourse has become a major philosophical problem.

The debate around the contested grounds of rights has prompted contemporary scholars to look for inspiration in premodern rights discourses to conceptually substantiate and justify modern human rights. Especially scholars working from the framework of Christian and Jewish ethics have been prolific in this regard.<sup>11</sup> There is now a bulk of literature grounding human rights in premodern Christian notions of divine love (*agápē*) or human createdness in the image of God (*imago Dei*), such as in

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<sup>7</sup> This process of secularization in fact already started in the eighteenth century, and perhaps even earlier, see Michael Freeman, *Human Rights* (Cambridge and Malden, MA: Polity Press, 2017), 28.

<sup>8</sup> For various attempts to ground human rights in different religious traditions and worldviews, see John Witte, Jr. and M. Christian Green (eds.), *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2012).

<sup>9</sup> The most elaborate attempt for a secular grounding of human rights is arguably found in Ari Kohen, *In Defense of Human Rights: A Non-Religious Grounding in a Pluralistic World* (Abingdon, Oxon and New York: Routledge, 2007).

<sup>10</sup> See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Indiana: University of Notre Dame Press, 2007), 69; Jeremy Bentham, “Anarchical Fallacies: Being an Examination of the Declarations of Rights Issued During the French Revolution”, in *The Works of Jeremy Bentham*, Vol. II, ed. John Bowring (Edinburgh: William Tait, 1843), 501.

<sup>11</sup> See for example John Finnis, “Grounding Human Rights in Natural Law”, *The American Journal of Jurisprudence* 60, no. 2 (2015): 199-225. Finnis grounds human rights in the Catholic Thomist natural law tradition, as represented by the medieval legal thought of Thomas Aquinas (1225-1274). For an example of grounding human rights in Jewish ethics, see David Novak, “The Judaic Foundation of Rights”, in *Christianity and Human Rights: An Introduction*, eds. John Witte Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2010), 47-53.

the works of the contemporary Calvinist philosopher Nicholas Wolterstorff, to give but one example.<sup>12</sup>

Notably, an earnest exploration of the rich premodern Islamic legal tradition with its own distinctive “rights talk” is largely missing from the debate on justificatory grounds. Contemporary scholarship on Islam and human rights has mostly remained limited to the “question of compatibility”: does the Islamic legal tradition conform to modern universal human rights standards?<sup>13</sup> The logic of conflict in Islam and human rights scholarship has led to a stereotypical paradigm of “an Islamic culture *necessarily at odds* with international human rights norms”.<sup>14</sup> Regrettably, these debates are oftentimes tainted by either historical illiteracy or apologetics. Modern human rights scholars often lack the historical-Islamicist training and corresponding hermeneutical apparatus needed to seriously engage the premodern Islamic juridical tradition, which was written mainly in – sometimes impenetrable – medieval classical Arabic.<sup>15</sup> The field is furthermore cumbered by a stubborn case of legal Orientalism<sup>16</sup>, up to the point that some orientalist scholars have claimed that there exists no conception of individual rights and liberties in Islamic law *at all*.<sup>17</sup>

As such, the field of Islam and human rights is “acting out of character” when compared to similar scholarship on premodern religious legal traditions and the question of the justificatory grounds of rights. What is lacking in the debate, it could

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<sup>12</sup> The primary expounder of the Christian ethical concept of *agápē* as ground for human rights is Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton, New Jersey: Princeton University Press, 2008), 98-104 and 285-310. For an example of the concept of *imago dei* as a ground for human rights, see Adrian Long, *Paul and Human Rights: A Dialogue with the Father of the Corinthian Community* (Sheffield, England: Sheffield Phoenix Press, 2009).

<sup>13</sup> See for example Ann Elizabeth Mayer, “Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?”, *Michigan Journal of International Law* 15, no. 2 (1994): 307-404; Ruud Peters, “(In)compatibility of Religion and Human Rights: The Case of Islam”, in *Human Rights and the Impact of Religion*, eds. Johannes A. van der Ven and Hans-Georg Ziebertz (Leiden: Brill, 2013), 75-98.

<sup>14</sup> Mayer, *Universal versus Islamic Human Rights*, 308. (Emphasis mine.)

<sup>15</sup> Heiner Bielefeldt, for example, admits to “lacking the language skills needed to explore the sources written in Arabic, Persian, Turkish or Urdu”, see his “Muslim Voices in the Human Rights Debate”, *Human Rights Quarterly* 17, no. 4 (1995), 587, fn. 2. This however does not withhold the author from making major claims about the Islamic legal tradition.

<sup>16</sup> Regarding legal Orientalism, see Wael B. Hallaq, “On Orientalism, Self-Consciousness and History”, *Islamic Law and Society* 18 (2011): 387-439.

<sup>17</sup> See Henry Siegman, “The State and the Individual in Sunni Islam”, *The Muslim World* 14 (1964): 22-24. This assumption is often perpetuated in contemporary scholarship on the topic. See for example Norman Doe, *Comparative Religious Law: Judaism, Christianity, Islam* (Cambridge: Cambridge University Press, 2018), 373-377.

be argued, is an engaged and honest historical inquiry into the classical Islamic legal tradition, taking into consideration its own indigenous legal reasoning, legal language, legal epistemology, and legal anthropology.<sup>18</sup> With this thesis we aim to enrich the scholarly debate around Islam and human rights – moving beyond the mere question of (in)compatibility – by engaging the premodern Islamic legal tradition in a much more sustained manner than has been done so far, much like the work that is already being done in contemporary human rights scholarship on premodern Christian and Jewish legal and ethical traditions in this regard.<sup>19</sup>

This study capitalizes on the newly emerging scholarship on the grounds of human rights debate, which explores premodern conceptions of fundamental rights in the context religious ethics, law and moral philosophy. This type of scholarship is instigated by two concerns: (1) the growing realization that the modern human rights discourse did not simply blink into existence after World War II, but is the product of specific (and contested) historical genealogies in earlier rights traditions, such as medieval and early modern natural law and natural rights, and (2) the foray into premodern religious and legal traditions in the face of the crisis of ungrounded modern human rights, in search for fresh perspectives on modern human rights justifications.

Along this line – and in conversation with – this recent trend of scholarship, this thesis too focuses on premodern conceptions of fundamental rights, albeit bringing the Islamic legal tradition into the conversation. In doing so, this thesis brings premodern Islamic and Western rights discourses into sustained conversation with one another within a comparative and historically engaged framework, taking both the Western and Islamic legal traditions seriously. While this study is situated in the field of comparative law and legal history proper, we hope it will also be of interest to scholars working in the fields of political and moral philosophy, theology and religious studies, international human rights law and legal ethics.

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<sup>18</sup> On Islamic legal language, see Wael B. Hallaq, *Sharīʿa: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), 87-92.

<sup>19</sup> For an excellent collection in this regard, see John Witte, Jr. and Frank S. Alexander (eds.), *Christianity and Human Rights: An Introduction* (New York: Cambridge University Press, 2010).

This thesis pursues the debate on the ground of human rights along the axis of three lines of questioning:

- (I) What are fundamental rights conceptually?
- (II) How are fundamental rights theoretically justified?
- (III) Who is practically included in the scope of fundamental rights?

*I. First line of questioning: What are fundamental rights conceptually?*

The concept of rights is notoriously ambiguous. Rights can be claim-rights, privileges, powers, or immunities. In addition, various terms are uncritically used and conflated when speaking about rights in the Western legal tradition, such as human rights, natural rights, and natural law. Similarly, there is confusion about what the correct terminological correlative of rights is in the Islamic legal tradition. Some have claimed the Islamic tradition has no concept of individual rights. That it is a “duty-based” system. Another conundrum is the difference between moral and legal rights. This is hotly debated in modern human rights scholarship. But premodern Western and Islamic legal traditions also have disparate views on the moral and legal dimensions of rights.

*II. Second line of questioning: How are fundamental rights theoretically justified?*

Legal scholars, theologians, and political philosophers have entertained different rights theories to justify rights. Some have accorded it to human nature and capacity, others to human dignity and worth, others yet have appealed to notions of public benefit and sociability. Justifications have been given on the ground of both reason and religion. Scholars have also discussed the question of how rights are hierarchically prioritized (rights triage). Which rights are more fundamental than others in order to promote basic human dignity and societal flourishing?

*III. Third line of questioning: Who is practically included in the scope of fundamental rights?*

Modern human rights are generally considered to be universal. All humans have them based on their mere humanity. This conception has been criticized in modern scholarship as overly idealistic, unattainable and unenforceable. At the same time, premodern legal traditions had different notions of what it means to be a human and who is included in humanity, particularly when it comes to women, children, indigenous peoples, and cultural/religious minorities. Who is included in the scope of fundamental rights? To whom are they ascribed?

## **1.2. Methodological Concerns**

This thesis is guided by several methodological concerns. These all relate to the lines of questioning in the described research questions above. An important part of this thesis is dedicated to disambiguating the concept of rights in the Islamic and Western legal traditions. The concept is known for its conceptual ambiguity and is discussed on various levels, both in the fields of modern legal studies and in legal history. For this inquiry, the methods of conceptual history and conceptual analysis are utilized. Furthermore, this thesis is comparative in nature. It deals with two distinct legal traditions that are embedded in premodern religious cultures that have similarities and differences. In order to guide this comparative analysis, this thesis makes use of methodological insights from the field of comparative law. Lastly, this thesis is acutely aware of the problematics of legal Orientalism in the study of Islamic law and legal theory. Hence, a section is dedicated to the pitfalls and challenges of legal Orientalism.

### **1.2.1. Conceptual History: A *Begriffsgeschichte* of Rights**

This thesis aims to move the field forward by engaging the contemporary debate on the grounds of fundamental human rights from a conceptual historical and comparative legal framework. A conceptual historical approach to this study is called for because of the notoriously inherent conceptual ambiguity of the concept of “rights” and its jural correlatives (such as privileges, powers, and immunities).<sup>20</sup> This is especially the case

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<sup>20</sup> George W. Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006), xi. The ambiguity of the concept of rights is most famously – and perhaps most exhaustively – addressed by Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1919), 35-64.

with the concepts that are germane to this study, such as “natural law”, “natural rights” and “human rights”. These concepts that are often uncritically and problematically conflated in scholarship.<sup>21</sup>

The methods and theoretical framework provided by conceptual history (*Begriffsgeschichte*), developed by the German historian Reinhart Koselleck (d. 2006) and others, hand us the necessary tools that will assist us in disentangling the concept of rights and to simultaneously trace the semantical changes and transformations the concept has undergone in different historical periods and linguistic contexts.<sup>22</sup> Also utilized here is the conceptual analysis of rights derived from the school of analytical jurisprudence, particularly the Hohfeldian framework for analyzing rights.<sup>23</sup>

Conceptual history as *Begriffsgeschichte* – as opposed to say the conceptual methods of the Cambridge School – arose in Germany in the second part of the twentieth century as a dedicated field of study. Conceptual history sprang from discussions surrounding the lexicon project of *Geschichtliche Grundbegriffe*.<sup>24</sup> It is concerned with the idea that concepts are important to study and should not be taken at face value. Concepts can attain different meanings over time and undergo semantical changes. Similarly, different languages and cultural contexts may use different words to express the same meaning. It also works the other way around; the same word can be used in different languages and cultures but have very different – sometimes even opposite – meanings. A case in point is the concept of our English word “civilization”. In German the word used is *Kultur*, while in English and Francophone contexts civilization or *civilisation* are used. In the German context *Kultur* – corresponding to its English and Francophone correlatives – is used to refer to such things as *Bildung*, high culture, art, science, and intellectual development. The German *Zivilisation*, on the other hand, is

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<sup>21</sup> David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (New York: Oxford University Press 2009), 3 and 12-13.

<sup>22</sup> James J. Sheehan, “*Begriffsgeschichte: Theory and Practice*”, *The Journal of Modern History* 50, no. 2 (1978): 312-319; Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford, California: Stanford University Press, 2002).

<sup>23</sup> For an elaboration of the Hohfeldian framework for analyzing rights, see Chapter III.

<sup>24</sup> For a good overview of the historical background of conceptual history, see Kai Vogelsang, “Conceptual History: A Short Introduction”, *Oriens Extremus* 51 (2012): 9-24.

used to refer to cultural decadence and superficiality, a total opposite meaning of *Kultur*.<sup>25</sup>

Conceptual history is concerned with the disambiguation of key concepts (*Leitbegriffe*). These concepts play a central role in specific discourses, are multilayered, and have multiple meanings (*vieldeutig*).<sup>26</sup> The concept of human rights – certainly in our contemporary age – is such a key concept. It is used in the context of global modern discourses on human dignity and justice, and despite – or perhaps *because* – disputations over its content and application, it is ubiquitous and widespread. But there is also much confusion over its meaning. Scholars disagree over the content of the concept of human rights, its conceptual history, its relation to moral and/or legal dimensions of the law, its similarities and/or dissimilarities regarding earlier expressions in natural rights and natural law, and so on.

The aim of conceptual history is – among other things – a “critical conceptual history of the present”.<sup>27</sup> That is, instead of taking a concept like rights for granted, it is interested in dissecting and disambiguating its multiple meanings and layers. Conceptual history also speaks in this regard about what Koselleck called ‘saddle-time’ (*Sattelzeit*). That is, the time in which key concepts take on their contemporary meanings. For human rights, arguably, this time is represented with the promulgation of the United Declaration of Human Rights in 1948, which represents a new phase in the universalizing language of rights.<sup>28</sup> Conceptual history takes into consideration the *longue durée* histories of key concepts and looks at how concepts are used in language and change over time.<sup>29</sup> This proves especially necessary in the case of the concept of rights, which has conceptual incarnations in the medieval and early modern periods.

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<sup>25</sup> Norbert Elias wrote extensively on this in his *The Civilizing Process: Sociogenetic and Psychogenetic Investigations*, trans. Edmund Jephcott, eds. Eric Dunning, Johan Goudsblom, and Stephen Mennell (Malden, MA and Oxford: Blackwell Publishing, 2000, originally published in 1939), 9-30. On the concept of *Bildung*, see Koselleck’s essay “On the Anthropological and Semantic Structure of *Bildung*” in Koselleck, *The Practice of Conceptual History*, 170-207.

<sup>26</sup> Jan-Werner Müller, “On Conceptual History”, in *Rethinking Modern European Intellectual History*, eds. Darrin M. McMohan and Samuel Moyn (New York: Oxford University Press, 2014), 84.

<sup>27</sup> Müller, *On Conceptual History*, 87.

<sup>28</sup> On the history and meanings of human rights, see Chapter I.

<sup>29</sup> The *longue durée* approach was introduced by the French Annales School of history, see Fernand Braudel, “History and the Social Sciences: The Longue Durée”, trans. Immanuel Wallerstein *Review (Fernand Braudel Center)* 32, No. 2 (2009): 171-203.

Conceptual history is also increasingly used in comparative studies. Moving beyond national conceptual histories, many scholars now speak of “entangled histories” or “global conceptual history”.<sup>30</sup> The realization here, is that concepts travel transnationally and are applied in different national, cultural, and religious contexts. The central concern in comparative conceptual history is to explore how concepts travel, how they are transmitted and translated, and what happens when concepts “move between different kinds of modernities and their associated temporalities”.<sup>31</sup> In terms of the not unimportant matter of translation, comparative conceptual history is tasked with “investigating the prehistory of the translation, comparing meanings of concepts in different textual contexts, and following the trajectory of the concepts in its new surroundings, the adaptations, contestations, and possibly rejections and counter-translations”.<sup>32</sup> This concern is pertinent not only to the study of concepts in the premodern Western legal tradition, in which *ius* as the Latin word for “rights” had very different connotations in Stoic Roman law, medieval Catholic natural law, and early modern Lockean natural rights theories.<sup>33</sup> It similarly counts for the classical Islamic legal tradition and modern Islamic legal culture, which uses modern translations from international human rights law such as *ḥuqūq al-insān* and classical juridical terms such as *ḥuqūq al-ādamiyyīn*, *ḥuqūq al-‘ibād*, *ḥuqūq al-makhlūqāt*, and so forth.<sup>34</sup>

### 1.2.2. Comparative Law: Beyond Functionalism

This study is legal-historical but also comparative in nature. Therefore, it makes use of the methodological insights from comparative law. In doing so, this thesis moves beyond the hitherto dominant functionalist method in comparative legal studies. Functionalist scholarship has been highly criticized in recent years for accommodating Eurocentrism and legal imperialism. It has been taken to task for focusing mainly on the Anglo-American and Romano-Germanic systems of law, at the expense of non-

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<sup>30</sup> See for example Margit Pernau, “Whither Conceptual History? From National to Entangled Histories”, *Contributions to the History of Concepts* 7, No. 1 (2012): 1-11.

<sup>31</sup> Müller, *On Conceptual History*, 88.

<sup>32</sup> Margit Pernau, *Whither Conceptual History?*, 7.

<sup>33</sup> See David Boucher, “Transition from Natural Rights to the Culture of Human Rights”, in *Multiculturalism, Identity and Rights*, eds. Bruce Haddock and Peter Sutch (London and New York: Routledge, 2003), 196-213.

<sup>34</sup> See Anver M. Emon, “*Ḥuqūq Allāh* and *Ḥuqūq al-‘ibād*: A Legal Heuristic for a Natural Rights Regime”, *Islamic Law and Society* 13, No. 3 (2006): 325-391.

Western legal systems.<sup>35</sup> To remedy some of these problems, this thesis employs the more legal-pluralist methodological approaches of conceptual and hermeneutical comparative law.<sup>36</sup> As such, this thesis additionally aims to contribute to the field of comparative law, by engaging the rich classical sources of the Islamic legal tradition in a comparative framework.

In comparative legal studies, four general aims are differentiated. These are (1) comparative law as an instrument for learning and knowledge, (2) comparative law as a study of legal evolution and categorization of “legal families”, (3) comparative law as a means for improving domestic law, and (4) comparative law as a method for harmonization (for example in the case of EU-law).<sup>37</sup> The aims most germane to our study are aims one and two. That is, knowledge about the issue of rights in the Islamic and Western legal traditions and the comparative study of the development of rights discourses in both traditions in relation to the modern human rights regime. The issue of “legal families” is of no interest to this thesis. And in fact, the whole concept of legal families has been criticized. Ultimately, the aim is “to get a better understanding, at this deeper level, of the similarities and differences amongst different legal concepts and regulations”.<sup>38</sup>

For a long time, the functionalist method – developed by German legal scholars Konrad Zweigert and Hein Kötz – has been dominant in comparative legal studies.<sup>39</sup> The basic assumption of the functionalist method is that all legal systems of the world basically attempt to solve the same legal problems, even though the specifically used rules and concepts may be different. The functionalist method is premised upon the key idea – the *praesumptio similitudinis* – that these legal systems ultimately solve legal problems in a similar way. Functionalists in comparative law focus on the “function” of legal rules and how they practically impact societies. These functions

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<sup>35</sup> Mark van Hoecke, “Methodology of Comparative Legal Research”, *Law and Method* (2015): 2 and 9; Nora V. Demleitner, “Combating Legal Ethnocentrism: Comparative Law Sets Boundaries”, *Arizona State Law Journal* 31, No. 3 (1999): 739-755.

<sup>36</sup> Oliver Brand, “Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies”, *Brooklyn Journal of International Law* 32, No. 2 (2007): 405-466; Oliver Brand, “Language as a Barrier to Comparative Law”, in *Translation Issues in Language and Law*, eds. Frances Olsen, Alexander Lorz, and Dieter Stein (Hampshire and New York: Palgrave Macmillan, 2009), 18-34.

<sup>37</sup> Mark Van Hoecke, ‘Methodology of Comparative Legal Research’, *Law and Method* 12 (2015), 2.

<sup>38</sup> Van Hoecke, *Methodology of Comparative Legal Research*, 16.

<sup>39</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (New York: Oxford University Press, 1998, third edition).

are the so-called “common denominator” – the *tertium comparationis* – that is compared across legal systems.<sup>40</sup> It looks at the practical side of the law and how different societies and legal cultures deal differently with a specific set of legal and social problems. These might be in the sphere of criminality, social and civil relations, marriage, inheritance, economic transactions, and so forth. The functionalist approach attempts to comparatively analyze these disparate legal approaches in search of what would presumably be the “best” answer to the problem at hand. Hence, functionalism is sometimes also called the “problem-solution approach”.<sup>41</sup>

Yet, because of the “evaluating” task functionalism has set for itself, it can be seen as highly problematic. For this and other reasons, the functionalist method has been increasingly criticized in recent years. It has been called the *bête noir* of comparative law.<sup>42</sup> In some of its forms, it has been accused of “social engineering” and being “overly progressive and activist”.<sup>43</sup> Functionalism has also been criticized for its alleged Eurocentrism. Functionalist comparative legal studies have focused almost entirely on comparing Euro-American legal systems, at the neglect of non-Western legal systems.<sup>44</sup> Eurocentrism is of course found in other academic disciplines as well. However, it seems particularly abundant in comparative legal studies.<sup>45</sup> It is therefore that the prominent American jurist Karl Llewellyn (d. 1962) stated “Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time: *We are the Greeks, all others are barbarians*”.<sup>46</sup>

We see this, in fact, in many examples in comparative legal studies. A case in point is the comparative law classic by legal scholars René David and John E. C. Brierley, *Major Legal Systems in the World Today* (1985), which includes a chapter on “Muslim Law”. In this work Islamic law is presented as static, monolithic, outmoded, passive,

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<sup>40</sup> Brand, *Conceptual Comparisons*, 409-410.

<sup>41</sup> Zweigert and Kötz, *An Introduction to Comparative Law*, 43-44.

<sup>42</sup> Ralf Michaels, “The Functional Method of Comparative Law” in *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann and Reinhard Zimmermann (New York: Oxford University Press, 2019, second edition), 346.

<sup>43</sup> Michaels, *The Functional Method of Comparative Law*, 366.

<sup>44</sup> Brand, *Conceptual Comparisons*, 414.

<sup>45</sup> We see similar critiques in the study of Islamic law. See the Section 1.2.3. on legal Orientalism.

<sup>46</sup> Cited in Demleitner, *Combating Legal Ethnocentrism*, 742. (Emphasis by the author.)

and incapable of adapting to “modern times”. In addition, the West is presented as a legal model for emulation:

Since its development was arrested in the tenth century, the *fiqh* as a body of law is manifestly incapable of adapting to modern societies. It does not anticipate certain institutions seemingly necessary in these societies. While many of its rules were probably quite adequate in their own time, today they seem outmoded and sometimes even shocking. The inability of the *fiqh* to adapt to modern ideas and conditions has thus created a problem, particularly in those countries with a Muslim majority which have abandoned their passive attitude and have looked since the last century to western nations as a model, attracted not only by their material prosperity but by their political ideas and moral concepts as well.<sup>47</sup>

An alternative to functionalism would need to go beyond the critiques of Eurocentrism, by taking into consideration an appreciation for the complexity of Islamic legal language and legal culture. Because, with the comparison of Western and non-Western legal systems also comes the problem of translatability. Legal sources might be in different languages, particularly when we look at premodern legal traditions, such as Latin for the canon law of the Catholic Church and Arabic for classical Islamic jurisprudence. Indeed, language can prove to be a major barrier and obstacle for any meaningful comparative legal study that deals with non-Western legal traditions, be they Chinese, Russian, Islamic, or otherwise.<sup>48</sup> Language thus becomes an important methodological consideration. Comparative legal scholar Mark Van Hoecke stresses that a good reading knowledge of the indigenous legal language is essential for comparing Western and non-Western legal systems and cultures.<sup>49</sup> In other words, a superficial reading based on secondary sources only will simply not do, as too often is the case in comparative legal studies involving the Islamic legal tradition. The reductionism of the functionalist simplistic “problem-solution approach”, according to some scholars, is the reason why language has often been “sidelined” in comparative legal studies.<sup>50</sup>

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<sup>47</sup> René David and John E. C. Brierley, *Major Legal Systems in the World Today* (London: Stevens & Sons, 1985, third edition), 465.

<sup>48</sup> Oliver Brand, “Language as a Barrier to Comparative Law”, in *Translation Issues in Language and Law*, eds. Frances Olsen, Alexander Lorz, and Dieter Stein (Hampshire and New York: Palgrave Macmillan, 2009), 18.

<sup>49</sup> Van Hoecke, *Methodology of Comparative Legal Research*, 4.

<sup>50</sup> Brand, *Language as a Barrier to Comparative Law*, 31.

Given the fact that there is no agreement over methodology in comparative law, the most often used strategy in choosing a methodology today is to let the aim and question of the research guide which methods could be best utilized. In doing so, different methods are often combined that complement each other.<sup>51</sup> In our case, the aim of the research is comparative in nature, and we are guided by the questions on the concept, justification, and scope of rights. It is also legal-historical, as it compares two premodern legal traditions, the Islamic and Western legal traditions, as they took shape before the advent of the modern human rights regime. Two methods seem to serve particularly well for the purposes of this study, the method of “Conceptual Comparisons” and the “historical method”.

The method of Conceptual Comparisons operates, other than functionalism, on the assumption that the conceptual structure employed by legal systems is important for ordering legal understanding. In addition, it assumes from the outset that “impurities in the comparative act” can – and very well *might* – occur. That is, it works on the understanding that the comparative scholar cannot escape his/her own biases and preconceived notions of their own legal culture and education. The approach of Conceptual Comparisons also takes the legal cultures of non-Western legal systems seriously, by using the domestic classifications and categorizations of the legal system under study as the point of departure.<sup>52</sup> An important part of the method of Conceptual Comparisons, hence, is the initial step of conceptual orientation, and the subsequent step of defining and differentiating properties of the legal phenomenon.<sup>53</sup> Then follows a second phase of systematic comparison. This second phase consists of (1) a descriptive stage, which has various modes of describing the legal phenomena, (2) an identification stage, which focuses on identifying differences and similarities, and (3) an explanatory stage, which accounts for the divergences and resemblances. These legal phenomena are also called *comparanda*, i.e., those phenomena that are to be compared. In the case of this study those *comparanda* are “rights” in the Islamic and Western legal traditions.<sup>54</sup>

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<sup>51</sup> Van Hoecke, *Methodology of Comparative Legal Research*, 1.

<sup>52</sup> Brand, *Conceptual Comparisons*, 435-436.

<sup>53</sup> Brand, *Conceptual Comparisons*, 439-443.

<sup>54</sup> Brand, *Conceptual Comparisons*, 453-457. Ideally, there would also be a fourth stage, which focuses on “contextuality”. That is, the study of how the legal phenomena under study function in

The historical method in comparative legal studies, on the other hand, focuses on the origins and intellectual history of legal concepts, legal rules, legal reasoning, legal epistemology, and so forth. The historical method goes well with the third stage of the method of Comparative Concepts, as historical analysis has especially strong explanatory power.<sup>55</sup> It can help explain if certain legal phenomena developed in parallel or if they had a common ancestry, for example. It also looks at the aims and objectives of the law in each historical legal culture. The historical methods analyze similarities in past legal systems but might also focus on differences in terms of evolutions and development in those legal systems.<sup>56</sup> Both inquiries are relevant to the study of rights and how they developed in the premodern Western and Islamic legal systems.

### 1.2.3. The Problem of Legal Orientalism

A third theoretical and methodological concern is more germane to Islamic studies proper, and the study of Islamic jurisprudence in particular, which has found expression in that field of historical scholarship that has come to be known as legal Orientalism.<sup>57</sup> Legal Orientalism is a scholarly paradigm that tends to study Islamic jurisprudence through the lens of Western law, imposing its legal conceptions and language upon Islamic legal culture, without taking into consideration the particularities of the Islamic legal paradigm. Legal Orientalism is not merely applied to the study of the Islamic legal tradition. It is, in fact, a broader field that extends to other non-Western legal traditions as well, such as the Chinese, Hindu, or Buddhist legal traditions.<sup>58</sup>

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their respective socio-economic, historic, and cultural contexts. This, however, falls beyond the scope of this thesis.

<sup>55</sup> Brand, *Conceptual Comparisons*, 455.

<sup>56</sup> Van Hoecke, *Methodology of Comparative Legal Research*, 19.

<sup>57</sup> See Wael B. Hallaq, *Restating Orientalism: A Critique of Modern Knowledge* (New York: Columbia University Press, 2018).

<sup>58</sup> See for example, Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2013); Hilary McGeachy, "The Invention of Burmese Buddhist Law: A Case Study in Legal Orientalism", *Australian Journal of Asian Law* 4, No. 1 (2002): 30-52; Carol G. S. Tan, "On Law and Orientalism", *Journal of Comparative Law* 7, No. 2 (2013): 5-17.

A study on the Islamic legal tradition – in singular or in comparison with other legal traditions – cannot but take account of the Orientalist legacy in historical Islamic legal studies. Orientalism is defined as “the process by which the “Orient” was, and continues to be, constructed in European thinking”.<sup>59</sup> For Edward Said (d. 2003), it was of course much more than merely a process of “knowing the East”, so to speak. And indeed, it *was* more than that. Said thought of Orientalism as a mode of thinking that differentiates – at the ontological *and* epistemological level – between the East and the West (i.e., the Orient and the Occident).<sup>60</sup> For Said, Orientalism – or Orientalist scholarship rather – was not an individualist endeavor. It was something institutionalized, part of a larger picture. He argued that by researching the Orient, writing about it, judging it, evaluating it, educating other people about it, and so forth, Western scholars actually tried to dominate the Orient. To use this knowledge, so to say, for political purposes and to assert power over the Orient.<sup>61</sup>

Said’s work would have tremendous impact on various scholarly domains, such as Oriental studies, Area Studies, Middle Eastern Studies, Near Eastern Languages and Civilizations, and so forth. Throughout the 1990s and beyond, an awareness grew in academia regarding Western modes of approaching the study of the “Orient” and its implications. However, despite how immensely influential Said’s work on Orientalism would become in subsequent decades, he spent almost no attention to Orientalism in *legal studies*. That is, to the study of the Islamic legal tradition from within the Orientalist framework. What is more, Said tended to *minimalize* the role of law in the academic Orientalism. Himself being a scholar of literature first and foremost, he seems to have been especially interested in a particular – and *limited* – set of literary works by Orientalist scholars of the eighteenth and nineteenth century. Other than that, Said merely allotted a “symbolic significance” to the juridical dimension of Islam.<sup>62</sup>

This seems to have been a clear sense of oversight. The oversimplified, and often unsound, evaluations of non-western legal systems by European legal historians and

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<sup>59</sup> Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, *Postcolonial Studies: Key Concepts* (Abingdon, Oxon, and New York: Routledge, 2013), 184-185.

<sup>60</sup> Edward Said, *Orientalism* (London: Penguin Books, 1978), 2.

<sup>61</sup> Said, *Orientalism*, 3 and 12. (Emphasis by the author.)

<sup>62</sup> Hallaq, *Restating Orientalism*, 18. Hallaq mentions that Said only references “law” twice in his *Orientalism*. Also, it was not indexed as a noteworthy concept in his study of European Orientalist scholarship, see page 275 (fn. 34).

philosophers pre-date the emergence of legal Orientalism as a professional field of academic inquiry. Many examples could be cited of instances of premodern or early modern “legal Orientalism”, even in the context of what some consider to be the “precursors” to comparative legal studies in the West, such as Montesquieu (d. 1755) and G. W. F. Hegel (d. 1831). For example, Montesquieu, in his 1748 work *De l’esprit des lois* [The Spirit of the Law] – seen by many as a pioneering work in comparative law – systematically portrays “Eastern” legal systems (such as in Ottoman Turkey or Safavid Persia) as despotic, brutal, and extravagant.<sup>63</sup> The human subjects of this type of “Oriental despotism” Montesquieu calls “lazy, subject to slavery, and in a state of violence”. Western legal systems, on the other hand, are portrayed as “active, industrious, and free”.<sup>64</sup> The religion of Islam is to be blamed for the despotic state of affairs in the “Orient”, according to Montesquieu. Islam “speaks only by the sword”. Also, it “deprives people of their will” and “induces laziness”.<sup>65</sup>

G. W. F. Hegel, in his attempt at comparative law, divides the legal systems of the world into an Oriental, Greek, Roman and Germanic Realm. He argues that the legal systems of the Oriental Realm, which he lumps together as one ‘inwardly undivided’ and static monolith, are undergirded by a *Weltanschauung* that is based upon patriarchy and theocracy in which the ruler is “a high priest or a god”, and in which religion and religious commandments are equated with the constitution and legislation of the state.<sup>66</sup> Oriental legal and political systems are, in his analysis, based on despotism, lawlessness, superstition and what he calls the “accidents” (*Zufälligkeiten*) of personal power and arbitrary rule.<sup>67</sup> In such legal cultures, Hegel poses, “the individual personality *has no rights* and disappears altogether”.<sup>68</sup> Hegel’s comparison of the world’s legal systems – which is informed by his philosophy of world history – is deeply teleological.<sup>69</sup> For him an imperfect principle of personal individuality first arises in the Greek Realm, which subsequently develops into a more evolved idea of

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<sup>63</sup> Michael Curtis, *Orientalism and Islam: European Thinkers on Oriental Despotism in the Middle East and India* (New York: Cambridge University Press, 2009), 80.

<sup>64</sup> Curtis, *Orientalism and Islam*, 84.

<sup>65</sup> Curtis, *Orientalism and Islam*, 87.

<sup>66</sup> G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 2008, originally published in 1820), 377.

<sup>67</sup> Hegel, *Elements of the Philosophy of Right*, 378.

<sup>68</sup> Hegel, *Elements of the Philosophy of Right*, 377. (Emphasis mine.)

<sup>69</sup> For Hegel’s philosophy of world history see his *Lectures on the Philosophy of World History* (originally published in 1837 as *Vorlesungen über die Philosophie der Weltgeschichte*), which was published posthumously and based on his lecture notes on the topic.

private persons that are equal and enjoy formal rights in the Roman Realm.<sup>70</sup> The climax in this tripartite development Hegel reserves for the Germanic Realm, which represents a secular realm that is based on the “companionship of free individuals” and in which the “rationality of rights and law” reigns supreme.<sup>71</sup>

From these examples it may thus be clear that legal Orientalism was widespread, both in premodern *and* contemporary scholarship on the Islamic legal tradition. It is therefore that Islamic legal historian Wael B. Hallaq, in his recent work *Restating Orientalism*, made great efforts to move beyond – and *build upon* – Said’s 1978 classic critique of Orientalism, as broadly understood. Norman Calder, another prominent Islamic legal historian, similarly stated that Western scholarship on Islamic law was almost never objective. Nor was it really reflective of Islamic legal culture and the values and norms it expressed in its own historical and social context. More often, he argued, Orientalist scholarship was imbued by their own values and norms.<sup>72</sup> In other words, Western scholarship on Islamic law often was a reflection of the researcher, rather than the researched.

Admittedly, one must note the diversity of methods in contemporary Oriental studies, as well as a certain diversity in subsequent scholarly output. Orientalism, as a paradigm, however “has shaped and constrained not only the questions that legal Orientalists ask but also the answers that they give”.<sup>73</sup> Hallaq, in this regard, speaks of the issues of topical selection and problem-identification which impacts “the scholarly question-framing-and-answer-giving”.<sup>74</sup> Orientalist scholars of the Islamic legal tradition, when looking for the “law” in Islamic law, look to identify those aspects of the tradition that fit explicitly Western legal conceptions. This process of topical selection “forced the Islamic “legal” tradition into a particular mold, isolating Qur’ānic

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<sup>70</sup> Hegel, *Elements of the Philosophy of Right*, 378-379.

<sup>71</sup> Hegel, *Elements of the Philosophy of Right*, 379-380. It should be noted here that for Hegel the so-called ‘Germanic Realm’ encompassed much more than the modern nation of Germany itself, as it includes England, Scandinavia, France, Italy, Spain, Portugal and several Eastern European nations. Hence, his *Germanic* Realm might be more properly equated with the *Western* Realm. See Hegel, *Elements of the Philosophy of Right*, fn. 2 of § 358, 479.

<sup>72</sup> Norman Calder, “Law”, in *History of Islamic Philosophy*, eds. Seyyed Hossein Nasr and Oliver Leaman (Abingdon, Oxon and New York: Routledge, 2001), 979.

<sup>73</sup> Wael B. Hallaq, “On Orientalism, Self-Consciousness and History”, *Islamic Law and Society* 18 (2011): 390.

<sup>74</sup> Hallaq, *On Orientalism, Self-Consciousness and History*, 390.

morality from “law”<sup>75</sup>. One of the consequences of this approach was the artificial separation between “law” and “morality”, while in the *Shari‘a* tradition, morality and law sometimes conflate. Instead, there is an absence of treating the Islamic sacred scripture, the Qur‘ān, as it functioned in Islamic legal culture, namely as a “moral blueprint” and a “substrate” on which the law rests and from which law is derived.<sup>76</sup> Legal Orientalism significantly distorts the nature of the *Shari‘a* by reducing it to a construction of “Islamic law” that is embedded in the Western *Weltanschauung*.

Legal Orientalism’s construction of “Islamic law”, Hallaq rightly points out, is mostly not an intentional project, but a product of our own cultural biases. He writes:

Legal Orientalism’s paradigm does not always consciously intend or not intend to include or exclude. It just *ontologically* functions in this manner, more often unconsciously, because it is thus *constituted* by its own programmatic cultural presuppositions (in this case about the separation between “law” and “morality”) as well as by the imperatives of the thought-structure that sustains it.<sup>77</sup>

The scholarly critiques of legal Orientalism teach us to take into consideration the alterity and particularity of Islamic legal culture as consisting of its own legal epistemology, legal anthropology, legal norms, legal language and legal reasoning. Those who are interested in comparative law, comparative legal history and human rights studies research would do well to absorb these critiques in order not to fall into the trap of simplistic reductionism or faulty comparison.

### 1.3. The Structure of This Thesis

This thesis consists of six chapters. The first two chapters are literature reviews on two debates that are germane to the concerns of this research: the question of justificatory grounds and the debate on Islam and human rights. In Chapter I, we explore the literature surrounding the debate on the philosophical grounds of modern human

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<sup>75</sup> Hallaq, *On Orientalism, Self-Consciousness and History*, 415.

<sup>76</sup> Hallaq, *On Orientalism, Self-Consciousness and History*, 416.

<sup>77</sup> Hallaq, *On Orientalism, Self-Consciousness and History*, *ibid.* (Emphasis by the author.) Also see his “Groundwork of the Moral Law: A New Look at the Qur‘ān and the Genesis of the *Shari‘a*”, *Islamic Law and Society* 16 (2009): 239.

rights. This chapter first deals with the rise of modern human rights after World War II and proclamation of the Universal Declaration of Human Rights (UDHR) in 1948. It then deals with the subsequent global emergence of the modern human rights regime as the new “moral lingua franca” of the contemporary age, and its gradual acceptance throughout the second half of the twentieth century, with the promulgation of the International Bill of Human rights in the 1970s, the rise of human rights activism, and the legalization of human rights in domestic legal systems, regional human rights instruments, and international law. The chapter then surveys the so-called “crisis of human rights literature”, which deals with two major challenges to the modern human rights regime: claims to universality in the face of religious and cultural diversity and the “ungroundedness” of secularized modern human rights. These challenges have instigated debates about multiple groundings of human rights – both from a religious and secular perspective – which opens new venues of inquiry on the justificatory grounds of rights. Chapter II engages the “Islam and human rights debate” and offers a taxonomy of perspectives based on a survey of the literature. These are: (1) the Conflictual Perspective, (2) the Apologetic Perspective, and (3) the Discursive Perspective, respectively. The chapter situates this study in the third perspective and offers new inroads into *Islamic human rights studies*.

The following two chapters, Chapter III and Chapter IV, are conceptual histories of rights discourses in the Islamic and Western legal traditions. Chapter III first offers perspectives from modern legal studies and analytical jurisprudence on the concept of rights. It deals with the inherent – and frequently debated – conceptual ambiguity of the term. The Hohfeldian framework for analyzing rights and its jural relations (privileges, powers, and immunities) is discussed. We end this section of Chapter III regarding modern legal studies with an exploration of the question of enforceability and the moral and legal dimensions of rights. The remainder of the chapter is a conceptual history of Western rights discourses (*ius*, pl. *iura*), starting from the rediscovery of the Greco-Roman legal heritage in twelfth-century Europe, the tensions between Germanic *Volksrecht* and Roman law (“leges barbarum” and “leges Romanae”), the unification of the European legal system in the twelfth century, the emergence of the medieval natural law tradition through Aquinas and the canon law jurists, and the early modern natural rights theorists, such as Grotius and Locke. It traces the gradual transition of rights language from natural law (*lex naturalis*) to

natural rights (*ius naturale*). This chapter ends with the period of the Enlightenment and the “age of rights declarations” before the emergence of modern human rights.

Chapter IV is a conceptual history of rights in the Islamic legal tradition. It first deals with the problem of translatability, Islamic legal language, and the so-called “prison of language”. It also explores a practical case of legal Orientalism in Kevin Reinhart’s application of the Hart-Dworkin framework to “evaluate” Islamic law. The first section of Chapter IV ends with an exploration of the language of the Islamic jurists (*fuqahā*) and the linguistic (*lughawī*) and technical (*iṣṭilāhī*) terminology of *sharī‘a* and *fiqh*. The rest of the chapter is a conceptual history of Islamic rights discourses (*ḥaqq*, pl. *ḥuqūq*) as expressed in medieval and early modern Islamic juridical literature. It subsequently deals with early Islamic law and the heritage of late antiquity, the formation of the classical schools of law, and the concepts of moral responsibility (*taklīf*), legal personality (*dhimma*), legal capacity (*ahliyya*), and the private-public rights hermeneutic (*ḥuqūq Allāh wa ḥuqūq al-‘ibād*). This chapter ends with the advent of modernity and the age of legal reforms.

The final two chapters are explorations of fundamental rights in the Islamic and Western legal traditions. The exploration and comparison are limited to the rights to life, freedom, and property. Every study needs a scope and both traditions have multiple rights schemes that are considered as *basic* to human dignity and societal flourishing. In addition, not all fundamental rights have equivalents in each tradition (for example, the Western legal tradition knows no right to the protection of honor, as does the Islamic legal tradition). Both John Locke and Abū Zayd al-Dābūsī take these three rights as fundamental, which make these *comparanda* suitable for conceptual comparison. These three rights are certainly not the only fundamental rights, but they suffice for a comparison between both legal traditions in terms of the content, justification, and scope of rights.

Chapter V first explores the concept of fundamental rights as a basic area of human concern. In doing so, it builds on the enumeration of “basic goods” for human and societal flourishing in Thomas Aquinas and John Finnis. It then deals with the issue of “rights triage”, which is the question of prioritizing certain rights over others. What follows is an exploration of the content, justification, and scope of the rights to life,

liberty, and property in the early modern natural rights tradition, building mainly on the theories of Hugo Grotius, Thomas Hobbes, Samuel von Pufendorf, and John Locke. The chapter ends with an evaluation of the scope of rights regarding women, slaves, minorities, and indigenous peoples.

The final chapter of this thesis, Chapter VI, explores conceptions of fundamental rights in the Islamic legal tradition. It does so by first exploring a similar framework for fundamental rights as a basic area of concern for human and societal flourishing, building upon the framework of the “objectives of the law” (*maqāṣid al-sharī‘a*). It then elaborates on two main classical theories of rights in the Islamic legal tradition, the theory of public benefit (*maṣlaḥa*), as espoused by scholars such as Abū Ḥāmid al-Ghazālī and Abū Ishāq al-Shāṭibī and the theory of human dignity (*karāma*), as elaborated mostly by the jurists of the Ḥanafī school of law, such as Abū Zayd al-Dabūsī and Abū Bakr al-Sarakhsī. The chapter then explores the rights of the protection of life, freedom, and property in Islamic jurisprudence from the perspective of the four major Sunnī schools of law. This chapter similarly ends with considerations regarding the scope of rights in relation to women, slaves, and minorities.

The conclusion of the thesis has four parts. It first briefly summarizes the main findings of the study. Then it engages in a comparison between the conceptual histories of rights in the Islamic and Western legal traditions. After that it compares the justificatory grounds and scope of rights in both traditions. Finally, we end this section with some conclusory remarks and suggestions for further research.

# CHAPTER I

## THE CRISIS OF MODERN HUMAN RIGHTS: FROM UBIQUITY TO CONTESTATION

“At the end of the twentieth century there is not a single nation, culture, or people that is not in one way or another enmeshed in human rights regimes.”

*Johannes Morsink*<sup>78</sup>

“Yes, we agree about the rights, but on condition that no one asks us why.”

*Jacques Maritain*<sup>79</sup>

This chapter offers a succinct overview of the triumphant emergence, subsequent spread, and current ubiquity of the modern human rights regime after World War II, and its increasing embeddedness in national legal systems and the international legal and political order (Section 1.1.). It then problematizes the global rise of modern human rights through the exploration of two major challenges to the modern human rights regime; the so-called “crisis of modern human rights”.<sup>80</sup> These are (1) the problem of claims to universality in the face of cultural and religious diversity and (2) the philosophical problem of the “ungroundedness” of secularized modern human rights and the varying debates surrounding justificatory grounds (addressed in Sections 1.2.1. and 1.2.2. respectively). The debate on the philosophical grounds of modern human rights has given an impetus to new research over the past decade, which can be categorized into three main currents of scholarship.<sup>81</sup> An overview of these scholarly currents is given in Section 1.3. The final section (Section 1.4.) summarizes the findings and address how they are germane to the core concerns of this thesis.

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<sup>78</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), x.

<sup>79</sup> Jacques Maritain, *Human Rights: Comments and Interpretations* (New York: Columbia University Press, 1949), 1.

<sup>80</sup> Anthony J. Langlois, “Human Rights in Crisis? A Critical Polemic Against Polemical Critics”, *Journal of Human Rights* 11, No. 4 (2012): 558-570.

<sup>81</sup> A commitment to human rights requires a moral vision of the world and the regulation of human conduct and interpersonal relations. The objective of a philosophy of human rights is to offer “rationally coherent arguments in support of a commitment to human rights”. See Andres Fagan, “Philosophical Foundations of Human Rights”, in *Handbook of Human Rights*, ed. Thomas Cushman (Abingdon, Oxon: Routledge, 2012), 19-20.

## 1.1. The Global Rise of the Modern Human Rights Regime

We live in a global age of rights, in which “rights talk” is the dominant international ethical language. It is – so to speak – the *moral lingua franca* of our contemporary era.<sup>82</sup> The late historian Bruce Mazlish (d. 2016), in his wonderfully written book *The Idea of Humanity in a Global Era*, speaks of the rise of a “new awareness of common humanity” in the twentieth century.<sup>83</sup> Obviously, there had been earlier iterations of common humanity. Many of these – at least in the Euro-American West – found their intellectual roots in Enlightenment thinking, with its appeal to common human reason and dignity.<sup>84</sup> They found their expression in various eighteenth-century rights declarations, such as the English Bill of Rights (1689), the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789). However, the “natural rights” espoused in these declarations – and with it, their conception of a “common humanity” – was deeply antithetical to the social realities of slave-ownership and the slave-based economies of the Euro-American West.<sup>85</sup>

What differentiates the modern twentieth-century era of rights from its earlier iterations, according to Mazlish, is Humanity with a capital “H”. The “rights of men” of the eighteenth-century rights declarations – humanity with a small “h” – had not included slaves, women, indigenous peoples, and the like. Humanity with an “H” encompassed – at least in theory – the *whole* of the human race; men *and* women, freemen *and* slaves, Western *and* non-Western peoples alike. The new conception of Humanity was also more cosmopolitan in nature, in the sense that its scope was not limited to a certain nation (England, America, France). Humanity with an “H” was, Mazlish argues, “a newly conceptualized form of social integration, going beyond that

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<sup>82</sup> Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), 1. Also see David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (New York: Oxford University Press, 2009), 11. Boucher calls human rights the “lingua franca of the international order”.

<sup>83</sup> Bruce Mazlish, *The Idea of Humanity in a Global Era* (New York: Palgrave Macmillan, 2009), 20.

<sup>84</sup> The idea of human dignity was especially pronounced in the work of the Enlightenment philosopher Immanuel Kant (d. 1804). See Oliver Sensen, *Kant on Human Dignity* (Berlin and Boston: De Gruyter, 2011).

<sup>85</sup> Ritchie Robertson, *The Enlightenment: The Pursuit of Happiness* (New York: HarperCollins Publishers, 2020), 764.

of other bonds in the shape of tribal, regional, or national loyalties”.<sup>86</sup> It was this new sense of “common humanity” in the twentieth century, which developed in tandem with the emergence of the new human rights discourse after World War II. With it came also new moral and legal conceptions of human dignity and rights, and a new – more inclusive – sense of who is included in the concept of “Humanity”.<sup>87</sup> These new moral and legal conceptions came to be framed in the *language of human rights* and used to mediate individual moral claims to juridical recognition.<sup>88</sup>

Political theorist Johannes Morsink, the foremost scholar working on the UDHR – arguably the most paradigmatic human rights document in the twentieth century – mentions that in our contemporary times, there is hardly any country that is not in some way or another embedded in human rights, be it in their national legal system or constitution or in relation to international agreements.<sup>89</sup> However, this was certainly not always the case. It was a gradual process of increasing acceptance and incorporation. The adoption of the earlier mentioned eighteenth-century rights declarations did seem to have had a role in preparing the way – so to speak – for a broader acceptance of the idea of human rights, albeit more at the local level.<sup>90</sup> At the same time, up until the 1940s human rights proponents were still fighting for legitimacy. It was World War II, and in its wake the Nazi atrocities, that would form the impetus to reach a new consensus about universal human rights.<sup>91</sup> It was only with the promulgation of the UDHR by the United Nations in 1948 that the human rights discourse truly became internationalized.<sup>92</sup>

In the second half of the twentieth century, human rights would increasingly become integrated into the international legal order. Human rights principles became codified

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<sup>86</sup> Mazlish, *The Idea of Humanity in a Global Era*, 3.

<sup>87</sup> Mazlish, *The Idea of Humanity in a Global Era*, 20.

<sup>88</sup> Jean Porter, “From Natural Law to Human Rights: Or, Why Rights Talk Matters”, *Journal of Law and Religion* 14, No. 1 (1999-2000): 95. For a critical stance towards the modern rights discourse in the political domain, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

<sup>89</sup> Morsink, *The Universal Declaration of Human Rights*, x.

<sup>90</sup> Mashood A. Baderin and Manisuli Ssenyonjo, “Development of International Human Rights Law Before and After the UDHR”, in *International Human Rights Law: Six Decades after the UDHR and Beyond*, ed. Mashood A. Baderin and Manisuli Ssenyonjo (Farnham, Surrey and Burlington, VT: Ashgate, 2010), 3.

<sup>91</sup> Morsink, *The Universal Declaration of Human Rights*, 36-91.

<sup>92</sup> Baderin and Ssenyonjo, *Development of International Human Rights Law Before and After the UDHR*, 3.

and embedded in domestic legal systems, international law, regional human rights systems, and subsequent human rights instruments, charters, and conventions.<sup>93</sup> International human rights law has been one of the fastest growing areas of international law of the past century.<sup>94</sup> While the UDHR itself had not been legally binding, in the 1970s and 1980s several legally binding covenants would be adopted and enforced under the auspices of the United Nations international human rights treaty, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976. Together with the UDHR, these would become known as the ‘International Bill of Rights’.<sup>95</sup> Based on a survey on the influence of the UDHR in the early 1990s, international law scholar Hurst Hannum observed that in the post-World War II period as many as fifty international human rights instruments make explicit or implicit reference to the UDHR and at least twenty-six nations directly refer to the UDHR in their constitutions.<sup>96</sup> In fact, every single state in the world has ratified at the minimum one international human rights treatise.<sup>97</sup>

Human rights activism also seems to have played a major role in the gradual acceptance and growing ubiquity of human rights as an international moral standard. Human rights advocacy groups have worked towards a greater credibility of human rights from early on. Sometimes in the background, and increasingly more often visible and vocal. Already during the *interbellum* transnational human rights groups developed that started to advocate for a “global bill of human rights”, such as the Fédération Internationale des Droit de l’Homme (1922) and the Académie Diplomatique Internationale (1926), both in France.<sup>98</sup> Human rights organizations, such as Human Rights Watch and Amnesty International, played a major role in the global spread and institutionalization of the modern international human rights regime

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<sup>93</sup> Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law”, *Georgia Journal of International and Comparative Law* 25, No. 1-2 (1995): 289.

<sup>94</sup> Thomas Buergenthal, “The Evolving International Human Rights System”, *The American Journal of International Law* 100, No. 4 (2006): 783.

<sup>95</sup> Baderin and Ssenyonjo, *Development of International Human Rights Law Before and After the UDHR*, 8-12.

<sup>96</sup> Cited in Morsink, *The Universal Declaration of Human Rights*, xi.

<sup>97</sup> Baderin and Ssenyonjo (2010), *Six Decades After the UDHR and Beyond*, 11.

<sup>98</sup> Michael Freeman, *Human Rights* (Cambridge and Malden, MA: Polity Press, 2017), 38.

after the collapse of the Soviet Union and the end of the Cold War in 1991.<sup>99</sup> As stated in their respective statutes, both organizations strive for the acceptance and implementation of human rights on a global scale. Amnesty International, for example, describes itself deliberately as a “global community of human rights defenders” with the ultimate vision of “a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments”.<sup>100</sup> Human Rights Watch’s long-time executive director Kenneth Roth similarly stated that, from its inception, the human rights group’s intention was always to “go global”, supported by sufficient time and funds to enable it to do so.<sup>101</sup> Contemporarily, the human rights discourse is still very much at the forefront of public debates on human dignity and societal flourishing. Human Rights Watch’s recent 2022 annual report on the current state of affairs of human rights in over hundred countries – arguably one of the largest annual surveys of global human rights conditions – shows how the deployment of human rights language plays a major role in addressing violations of human dignity and atrocities against humanity worldwide.<sup>102</sup>

Despite its seeming global success after World War II, the modern human rights regime has been under pressure at the beginning of the twenty-first century. It has caused some scholars to speak in terms of “the end of human rights” and “rescuing human rights”.<sup>103</sup> The predicaments of modern human rights has given rise to what some have called the “crisis literature” of human rights.<sup>104</sup> Human rights are critiqued, for example, for having been used to the political advantage of geo-political powers,

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<sup>99</sup> Peter Slezkine, “From Helsinki to Human Rights Watch: How an American Cold War Monitoring Group Became an International Human Rights Institution”, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 5, No. 3 (2014): 365.

<sup>100</sup> <https://www.amnesty.org/en/wp-content/uploads/2021/05/POL2010452019ENGLISH.pdf> (accessed February 24, 2022). Also see, Tom Buchanan, “The Truth Will Set You Free: The Making of Amnesty International”, *Journal of Contemporary History* 37, No. 4 (2002): 575-597.

<sup>101</sup> Slezkine, *From Helsinki to Human Rights Watch*, 345.

<sup>102</sup> Human Rights Watch. *World Report 2022: Events of 2021* (New York: Seven Stories Press, 2022).

<sup>103</sup> See for example, Costas Douzinas, *The End of Human Rights Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000); Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge: Cambridge University Press, 2019); Asım Cüneyd Köksal, “İnsan Haklarının Felsefi Krizi: İslâmî Bir Perspektif”, *Marmara Üniversitesi İlahiyat Fakültesi Dergisi* 58, no. 58 (2020): 25-67.

<sup>104</sup> Anthony J. Langlois, “Human Rights in Crisis? A Critical Polemic Against Polemical Critics”, *Journal of Human Rights* 11, No. 4 (2012): 559. See for example, C. A. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006); Geneviève Souillac, *Human Rights in Crisis: The Sacred and the Secular in Contemporary French Thought* (Lanham: Lexington Books, 2005).

under the guise of military or humanitarian “interventions”.<sup>105</sup> Historian Michael Ignatieff has critiqued modern human rights along similar lines, targeting especially overzealous human rights activism.<sup>106</sup> Marco Duranti pointed to the misuse of the modern human rights discourse as a vehicle for European Christian conservatism.<sup>107</sup> Other authors point to the failures of modern human rights litigation in supra-national courts, such as the European Court of Human Rights, which systematically get rejected or pushed back into the sphere of national courts.<sup>108</sup> The recent critical contributions of the so-called “crisis literature” has in the recent decade pointed to the fact that the modern human rights movement is “replete with paradoxes” and “use and abuse”.<sup>109</sup> Some of these will be explicated in the sections below.

## 1.2. Two Challenges to Modern Human Rights

When surveying the scholarship on modern human rights, one encounters two major problems that challenge human rights on different levels. The first challenge is the problem of cultural and religious diversity in the face of claims that human rights are universal and hence should be accepted and implemented in all nations of the world, regardless of their specific historical, cultural, and religious contexts. The second challenge is related to the first problem, but much more fundamental to the *ontological existence* of human rights. This is the problem of justification: the reality that modern human rights are philosophically grounded in different ways. Or as some scholars have argued, the absence of any philosophical grounds at all: also called the “ungroundedness” of modern human rights. Both problems are a major conundrum for the modern human rights regime and have recently instigated new scholarship and fresh perspectives on the role of human rights in our era.

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<sup>105</sup> Langlois, 559.

<sup>106</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton and Oxford: Princeton University Press, 2001).

<sup>107</sup> Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (New York: Oxford University Press, 2017). In the regard also see, Samuel Moyn, *Christian Human Rights* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2015).

<sup>108</sup> June Edmunds, *Human Rights, Islam and the Failure of Cosmopolitanism* (London and New York: Routledge, 2017), 47.

<sup>109</sup> Langlois, 560 and 564.

### 1.2.1. The Problem of Diversity

The UDHR, a founding document for the modern human rights regime, represents a universalist human rights outlook. In its Preamble it states that the UDHR is a “common standard of achievement for all peoples and all nations”. From this we can clearly grasp the universalizing nature of post-World War II rights language. The Preamble also alludes to the promotion and spread of these principles throughout the world. Hence, not only does the UDHR use this universalizing language, but it also has an almost evangelizing hue to it, in which the clear objective is the furthering of the rights principles stated in its various articles throughout the nations of the world.<sup>110</sup>

Yet, despite its claims to universality, the UDHR has been criticized over time as being overly Eurocentric in nature. Already before its promulgation in 1948 the American Anthropological Association (AAA) issued its critical statement regarding the UDHR and the principles espoused in it in 1947.<sup>111</sup> In it, the AAA expressed its concern over the universalism adopted by the new human rights approach of the late 1940s – vis-à-vis earlier rights declarations, that were rather limited to citizens of certain nation-states – at the expense of cultural particularities. The main challenge to the drafters of the UDHR, the AAA contended, was to draw up a declaration that was at once universal in its language, as well as not a statement of rights that merely reflected the values and norms of the Western worldview, or at least that predominated in societies in the West.<sup>112</sup> The rights that are meant for all human beings in our era cannot, and should not, be a reflection of just one culture of the world population, the AAA asserted.<sup>113</sup> In its rather damning criticism, the AAA referred in its Statement to Western colonialist and imperialist tendencies to suppress alternative cultural values in places where Western powers held domination over non-Western peoples and in a sense asserted their values over them for economic gains. The drafters of the UDHR should not, the AAA meant to say, fall into a mode of thinking that was reminiscent of the *mission civilizatrice*, when non-Western peoples were invariably seen as

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<sup>110</sup> United Declaration of Human Rights (<https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed December 8, 2022). (Emphasis mine.)

<sup>111</sup> Executive Board, American Anthropological Association, “Statement on Human Rights”, *American Anthropologist* 49, No. 4 (1947): 539-543.

<sup>112</sup> AAA, *Statement of Human Rights*, 539.

<sup>113</sup> AAA, *Statement of Human Rights*, 543.

“inferior”, “backward”, or “primitive” as a justification for imperial conquest.<sup>114</sup> Instead, the Statement proposed, the drafting of a new twentieth-century “rights of man” declaration should (1) give due consideration to respect for cultural differences, (2) acknowledge that there are no objective standards for evaluating different cultures, and (3) explicate that the formulation of “standards and values” and “moral codes” are products of specific cultural modes and, in that sense, detract from any claim to universal applicability.<sup>115</sup> The underlying cultural relativism of the AAA Statement should be obvious to anyone reading it, which has been duly critiqued.<sup>116</sup> The AAA has, in fact, slowly but steadily moved towards embracing human rights advocacy in the second half of the twentieth century, especially since the 1990s.<sup>117</sup> This example shows, however, how the new post-World War II human rights claims to universality were contested from the outset.<sup>118</sup>

Despite the UDHR’s claim to universality, many prolific rights theorists and historians in the West have argued that the modern idea of human rights ultimately stems from a genealogy that is historically grounded in the Western *Weltanschauung*. That is to say, the Western intellectual tradition is imagined by these scholars to be uniquely equipped (destined even) – both philosophically and morally – to have functioned as the birthing ground of our modern conceptions about human rights. Several ‘histories of human rights’ have been put forward, that trace back the idea of human rights to the Greco-Roman world of Late Antiquity, particularly in Stoic thought, others have grounded it in the works of medieval Christian natural law and early modern natural rights theorists, such as Thomas Aquinas (d. 1274), Hugo Grotius (d. 1645), Thomas Hobbes (d. 1679), Samuel von Pufendorf (d. 1694), and John Locke (d. 1704).<sup>119</sup>

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<sup>114</sup> AAA, *Statement of Human Rights*, 540.

<sup>115</sup> AAA, *Statement of Human Rights*, 541-542.

<sup>116</sup> I do not further address the problematics of the cultural relativism of the anthropology of the early twentieth century, as this has, with various degrees of success, been done elsewhere. See for example, Wilcomb E. Washburn, “Cultural Relativism, Human Rights, and the AAA”, *American Anthropologist* 89, No. 4 (1987): 939-943.

<sup>117</sup> See Karen Engle, “From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999”, *Human Rights Quarterly* 23, No. 3 (2001): 536-559.

<sup>118</sup> The Statement’s harsh tone must also be read, as rightfully noted by Engle, in the historical context in which it was written. This was in a time when colonialism was still rampant and colonized peoples were by-and-large believed to be biologically and culturally inferior. At that, the AAA statement could be read as an expression of anticolonialism and antiracism. See Engle, *From Skepticism to Embrace*, 539.

<sup>119</sup> See, for example, C. Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (Palgrave Macmillan 2010); John Finnis, “Grounding Human Rights in Natural Law”, *The American Journal of Jurisprudence* 60, No. 2 (2015): 199-225; David Boucher,

Others yet have proposed a strictly modern post-World War II, or even post-Cold War, origin of the idea of human rights.<sup>120</sup> Invariably, all these histories have in common that the genealogy of human rights is based in a decisively Western – and thus not *universal* – historical experience.<sup>121</sup>

The prominent legal historian and medievalist Brian Tierney (d. 2019) might serve as a good example of expressing the concept of human rights as singularly and uniquely Western. Tierney mentions that the very concept of rights that inhere in the human being, that is, rights that all humans have simply because they are humans, is a Western invention. The thought that these kinds of rights should be cherished and safeguarded is something, according to Tierney, that could only follow from cultural patterns that have a Western genealogy. More than that, Tierney argued that rights conceived as such – that is, as an explicitly Western notion of human rights – should be incorporated into the other cultures of the world. Especially into traditional religious cultures that are culturally other than – and perhaps even antithetical to – the West.<sup>122</sup> Here we can observe a similar universalizing and evangelizing tendency.

Others similarly claim universal human rights as a solely Western phenomenon. Samuel P. Huntington, for example, stresses the uniqueness of Western civilization as embodying the values of Christianity, pluralism, individualism and the rule of law, ideas that are expressed and embedded in its legal and social institutions.<sup>123</sup> Citing the American historian Arthur M. Schlesinger Jr., Huntington claims the West as the ultimate wellspring of human rights values, such as democracy, individualism, liberty, and so for. These political and cultural concepts are Western in nature, or have a Western cultural origin, he argued. They can never spring forth from non-Western

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“The transition from natural rights to the culture of human rights”, in *Multiculturalism, Identity and Rights*, eds. Bruce Haddock and Peter Sutch (London and New York: Routledge, 2003), 196-213.

<sup>120</sup> See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts and London, England: Harvard University Press, 2010).

<sup>121</sup> A more extensive overview of the conceptual history of rights in the Western legal tradition is given in Chapter III of this thesis. These examples merely function as an illustration of the *particularism* of modern ‘universal’ human rights histories.

<sup>122</sup> Brian Tierney, “Dominion of Self and Natural Rights Before Locke and After”, in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Vipri Mäkinen and Petter Korkman (Dordrecht: Springer, 2006), 173. (Emphasis mine.)

<sup>123</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (New York: Simon & Schuster, 1996).

culture. And if we do find them, they must somehow have been embraced due to the West.<sup>124</sup>

Jack Donnelly and others already pointed out that some cultures attempt to monopolize the human rights discourse, as one can arguably see in the cases of Tierney and Huntington, by claiming the sole origin of human rights and the unique site for their promotion and protection.<sup>125</sup> This narrative of human rights history seems a-historical and exclusivist. In addition, the idea that the Western world is somehow responsible for the “assimilation” of Western rights concepts in the ‘traditional religious cultures of non-western societies’ – as mentioned by Tierney – is reminiscent of the old *mission civilizatrice*, mentioned earlier, which is aimed at universalizing a single culture at the expense of others.<sup>126</sup> As the Turkish sociologist and human rights scholar Recep Şentürk aptly mentioned:

All universal cultures in the world make some provision for universal human rights (albeit in their own terms), and the emanating discourses and paradigms are incommensurable. It would be contrary to universalism to claim that only our culture provides for the guarantee of universal human rights, and that all remaining world cultures cannot. Claiming monopoly on human rights discourse is but another form of subduing the rest of humanity to our cultural superiority with the very claim that we are equals – which our culture, but not theirs, establishes. That is just another subtle way of saying we are still not equals.<sup>127</sup>

While some degree of present-mindedness undergirds all historical inquiry, it becomes problematic when it distorts that history. In what might be seen as one of the most prominent recent histories of human rights, Lynn Hunt argues that modern human rights stem from the Enlightenment and the democratic age of revolutions.<sup>128</sup> Hunt’s

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<sup>124</sup> Huntington, *The Clash of Civilizations*, 311. (Emphasis by the author.)

<sup>125</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2013) 75- 92.

<sup>126</sup> For the ideological implications of the colonialist European civilizing mission, see Bruce Mazlish, *Civilization and its Contents* (Stanford, California: Stanford University Press, 2004), 20-48. For an analysis of some of the problematics of the civilizational discourse utilized by Huntington and others, see my article “Approaching the Study of Civilization: Norbert Elias’s View”, *International Journal of the Asian Philosophical Association* 12, No. 2 (2019): 179-194.

<sup>127</sup> Recep Şentürk, “Sociology of Rights: Inviolability of the Other in Islam between Universalism and Communalism”, in *Contemporary Islam: Dynamic, Not Static*, eds. Abdul Aziz Said, Mohammed Abu-Nimer and Meena Sharify-Funk (New York: Routledge, 2006), 29.

<sup>128</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Company, 2007).

account places human rights firmly in the modern West, first proclaimed by eighteenth-century American and French revolutionaries, and ultimately leading to the Universal Declaration of Human Rights in 1948. Samuel Moyn, rightly points to the problematics of Hunt's deeply teleological view of human rights history.<sup>129</sup> Hunt envisions the emergence of modern human rights in the West as a historical "cascade of rights", deterministically and triumphally leading to their emergence in twentieth century Euro-America.<sup>130</sup> Moyn, in turn, argues that modern human rights only genuinely became a global concern after the 1970s, when the human rights discourse was claimed by Eastern European dissidents of Communist regimes and the liberal and anti-Communist left.<sup>131</sup>

While it can be strongly argued that Lynn's teleological conception of human rights history as a "cascade of rights" is ultimately flawed, it is equally unconvincing to assume that human rights are a uniquely modern concept.<sup>132</sup> It is true that a major shift occurred in rights thinking during the twentieth century, and after World War II the human rights discourse reached unprecedented levels of global acceptance and institutionalization.<sup>133</sup> Claiming the inherent (Western) modernity of human rights, however, would amount to a crude form of presentism that does not allow for the possibility of premodern human rights thinking.<sup>134</sup> However, there are identifiable premodern human rights concerns and claims in all world cultures and religions, which have been expressed differently in various historical contexts and languages. This is exemplified by the many attempts of scholars and adherents of different world

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<sup>129</sup> Samuel Moyn, *Human Rights and the Uses of History* (London and New York: Verso, 2014), 7-12.

<sup>130</sup> Hunt, *Inventing Human Rights*, 212.

<sup>131</sup> Moyn, *Human Rights and the Uses of History*, 15. Also see Moyn's *The Last Utopia*, where he makes a more elaborate argument for the recent origins of the human rights discourse (see footnote 59).

<sup>132</sup> Both Chapters III and Chapter IV of this thesis are dedicated to premodern conceptions of rights in the Western and Islamic legal traditions, respectively.

<sup>133</sup> See Section 1.1. of this chapter on the global rise of the modern human rights regime.

<sup>134</sup> Historical presentism projects modern understandings of phenomena, in this case modern human rights, unto instances in the historical past, distorting them in the process. On presentism in historical scholarship, see John Tosh, *In Pursuit of History: Aims, Methods and New Directions in the Study of History* (Abingdon, Oxon: Routledge, 2015, sixth edition), 161-162; François Hartog, *Presentism and Experiences of Time*, trans. Saskia Brown (New York: Columbia University Press 2015); Steven Seidman, "Beyond Presentism and Historicism: Understanding the History of Social Science", *Sociological Inquiry* 53, No. 1 (1983): 79-91. For a critique of anti-presentism, see Carlos Spørhase, "Presentism and Precursorship in Intellectual History", *Culture, Theory and Critique* 49, No. 1 (2008): 49-72.

religions to ground human rights in their respective intellectual traditions.<sup>135</sup> The multifarious grounds of human rights do not undermine their importance or relevance, rather they might make the case for human rights and their promotion around the world stronger. Hence, it is warranted that this thesis discusses the contribution of Islamic civilization and legal thought to the global rights discourse.<sup>136</sup>

### 1.2.2. The Problem of Justification

Parallel to the scholarly debate on the universality of modern human rights and the problem of cultural and religious diversity, the inquiry into the philosophical grounding of rights also emerged as a second major point of contestation. Part of the conundrum of modern human rights is that they are *philosophically ungrounded*. The drafters of the UDHR had deliberately avoided the use of premodern rights language, such as “natural rights”, given the severe critiques it had received in the eighteenth and nineteenth centuries, from philosophers such as David Hume (d. 1776), Jean-Jacques Rousseau (d. 1778), Immanuel Kant (d. 1804) and Jeremy Bentham (d. 1832). Bentham, especially, would become famous for his expression that natural rights are nothing more than “nonsense upon stilts”.<sup>137</sup> But the secularizing philosophies of Hume, Rousseau and Kant would also deal an intellectual blow to premodern, especially Hobbesian, notions of natural rights.<sup>138</sup> From the eighteenth century onwards, the concept of rights was slowly but steadily secularized and divorced from its theological and philosophical underpinnings.<sup>139</sup> The older conception of “natural rights” was rejected in the modern human rights framework. However – and strikingly – they were *not* replaced by any other philosophical alternative.<sup>140</sup> Because of this, as

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<sup>135</sup> For examples from several world religions, including indigenous religious traditions, see John Witte, Jr. and M. Christian Green (eds.), *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2012).

<sup>136</sup> For an overview of current scholarship on the justificatory grounds of human rights, see section 1.3. of this chapter.

<sup>137</sup> Bentham’s literal words are: “That which has no existence cannot be destroyed - that which cannot be destroyed cannot require anything to preserve it from destruction. *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts”. See John Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 2 (London: Simpkin, Marshall & Co, 1843), 501. Also see, Jeremy Waldron (ed.), *‘Nonsense upon Stilts’: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987).

<sup>138</sup> Richard Tuck, *Hobbes* (Oxford: Oxford University Press, 1989), 95-97.

<sup>139</sup> Freeman, *Human Rights*, 28-29.

<sup>140</sup> Freeman, *Human Rights*, 43. Also see, John Tasioulas, “Taking Rights out of Human Rights”, *Ethics* 120, No. 4 (2010): 647-678.

human rights scholar James Griffin points out, the modern concept of human rights has become “nearly criterionless”.<sup>141</sup> This brings about somewhat of a paradox: while modern human rights as a moral and legal discourse are well-established in international law and legal systems, human rights as such are not – or according to some scholars *cannot be* – theoretically founded.<sup>142</sup>

From its inception, the drafters of the UDHR had also evaded the question of justificatory grounds, being well aware of the intellectual threats it could possibly pose to the universalist ambitions of the project of modern human rights after the Second World War.<sup>143</sup> The drafting committee of the UDHR had consisted of people with a wide variety of ideologies and worldviews that could only reach a measure of agreement by avoiding any explicit mention of religious and philosophical commitments. The text of the UDHR therefore is notoriously vague in wording.<sup>144</sup> The amount of success the UN would subsequently have in arriving at some form of consensus over a body of human rights norms was arguably due to its avoidance of questions regarding their philosophical justifications.<sup>145</sup>

The Catholic natural law philosopher and neo-Thomist Jacques Maritain (d. 1973), even though not a committee member himself, was heavily involved in discussions surrounding the drafting of the UDHR and its propagation after it was promulgated by the General Assembly in 1948.<sup>146</sup> His outlook represents the general tenure – and excitement perhaps – that emanated from the twentieth-century project of modern human rights. Driven by the atrocities of World War II, Maritain believed in the absolute necessity of global humanity to reach an agreement on universal moral

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<sup>141</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 14-15.

<sup>142</sup> Michael Freeman, “The Philosophical Grounds of Human Rights”, *Human Rights Quarterly* 16, No. 3 (1994): 500.

<sup>143</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999). Morsink mentions that the drafters of the UDHR strove to use a language that accommodated different ideologies and worldviews in a “tremendous drive toward universality”, 21.

<sup>144</sup> Freeman, *Human Rights*, 47. For several interesting word-by-word discussions among the UDHR drafters on the avoidance of questioning the justificatory grounds of human rights, see Mary Ann Glendon, “Foundations of Human Rights: Unfinished Business”, *The American Journal of Jurisprudence* 44, No. 1 (1999): 1-3.

<sup>145</sup> Freeman, *Human Rights*, 63.

<sup>146</sup> William Sweet, “Jacques Maritain and the UDHR”, in *Christianity and Global Law*, ed. Rafael Domingo and John Witte, Jr. (Abingdon, Oxon and New York: Routledge, 2020), 165-168.

standards.<sup>147</sup> He was aware, however, of the philosophical problem at hand. He points out that the whole project of giving justificatory reasons for rights is problematic, because it will divide people, rather than bring them together. In an almost relativist wording, Maritain mentions that people firmly believe in their own truths and are very hard to persuade otherwise. People are simply inclined to hold to what is dear to them in terms of values and norms and these values and norms are ultimately based in their own worldview. Any justificatory grounds for human rights values and norms can thus be fundamentally different – or even opposite – and will not help to bring people together.<sup>148</sup>

Maritain thus acknowledges that as long as people with wholly different worldviews, based on different religious and moral convictions, cannot be in agreement, there will always be conflicts between peoples, how they see the world and what they find the best way of living in it. Hence, there will also always be conflicts about the reasons that are used regarding how fundamental rights for human beings are to be grounded.<sup>149</sup>

In Maritain's assessment, the division in the debate on the philosophical grounds of human rights is based on two main positions: one that embraces "natural law" as a basis for human rights, and one that rejects it. The first group, based on natural law reasoning, argues that human beings are endowed with fundamental and inalienable rights that inhere in nature and are the source of social life and the rights and duties that stem from that. The second group argues that no such thing as a "natural law" that precedes societal arrangements exists. For them, rights develop historically and are a *product* of society. Rather than being a set of unchanging and "eternal" pre-societal rights that are both fundamental and inalienable, in this second group rights are conceived of as being "variable and in constant state of flux".<sup>150</sup>

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<sup>147</sup> Deborah Wallace, "Jacques Maritain and Alasdair MacIntyre: The Person, the Common God and Human Rights", In *The Failure of Modernism: The Cartesian Legacy and Contemporary Pluralism*, ed. Brendan Sweetman (Catholic University of America Press, 1999), 132.

<sup>148</sup> Maritain, *Human Rights*, 1.

<sup>149</sup> Maritain, *Human Rights*, 3.

<sup>150</sup> Maritain, *Human Rights*, 5.

According to Maritain, however, philosophical grounds for human rights are *not essential* for reaching the pragmatic goal of practical agreement on a set of rights commonly held to be basic and fundamental for human dignity and societal flourishing. Maritain asks how we might accomplish the common intellectual task of bringing people together on an intellectual level if those same people have different worldviews and corresponding social and religious values and norms that can sometimes be conflictual. In the answer he gives, Maritain employs the pragmatism of common practical ideas (or “common principles of action”) that might be reached “spontaneously”, and not on the basis of agreement over “the same conception of the world, of man and of knowledge”. For Maritain, despite disagreements over the “why” and “wherefore” of human rights, these different systems of thought arrive at similar conclusions regarding prescribed rules of human behavior. They are, he maintains, very similar – at least in a practical sense – in different eras and world cultures.<sup>151</sup> Maritain thus seems optimistic that practical consensus can be reached if we leave our endeavor of theoretically and philosophically justifying the rights for all human beings. Instead, he argues, we should be contented with merely naming them and setting forth lists of human rights that we all find important.<sup>152</sup>

Maritain’s naïve pragmatism is problematic in various regards. First, he seems to contradict himself when he describes the two main positions (pro and contra “natural law”) that – in his interpretation – divide the grounds of rights debate. He mentions for example that surely the rights that are seen as basic for one group of people might not be the same for another group of people. They may in fact be very different.<sup>153</sup> The *thin consensus* on rights on which the drafters of the UDHR depended would prove elusive in the future.<sup>154</sup> Richard McKeon (d. 1985), another major philosopher who was instrumental in formulating the UDHR and its rights language, foresaw that reaching future agreement over the actual interpretation of the agreed upon set of rights principles, reconciling tensions between conflicting rights, integrating new rights, and

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<sup>151</sup> Maritain, *Human Rights*, 2-3.

<sup>152</sup> Maritain, *Human Rights*, 6.

<sup>153</sup> Maritain, *Human Rights*, 6. Maritain uses the word “primitive rights” in the original text, but does not seem to mean rights that are in some way “less developed”. Primitive rights in this instance are used in the meaning of “basic rights”. That is, a subset of rights that are *fundamental* to the “condition of society’s very existence”, more so than other (secondary) types of rights.

<sup>154</sup> Mary A. Glendon, “Knowing the Universal Declaration of Human Rights”, *Notre Dame Law Review* 73, No. 5 (1999): 1162.

the subsequent implementation of the rights would prove to be problematic.<sup>155</sup> In addition, he predicted that the different understandings of the meanings of rights betray a different view of man and society – indeed of *reality* – which might be an incentive for some groups to advance their own “special interests”.<sup>156</sup> As the scholar Elinor Gardner would aptly put it:

Not only is an agreement on universal rights insufficient to guide action (the problem of implementation), but it is also subject to abuse (the problem of interpretation). Vastly conflicting agendas can be supported by reference to the rights found in the UDHR.<sup>157</sup>

Secondly, Maritain’s minimalist requirement of “spontaneous” practical consensus has left many, quite justifiably so, unsatisfied. Its intellectual exiguity is perhaps all the more striking, given Maritain’s central role in the drafting of such a foundational human rights document as the UDHR, which after all makes the weighty claim of being the “common standard of achievement for all peoples and all nations” which deserved universal “recognition” and “observance” by humanity.<sup>158</sup> Significantly, Maritain continued to propagate the position that a Christian-inspired natural law theory was the only “true and solid” foundation for human rights in his other published works. He hoped, in fact, for a “deeper unity among people based on natural law principles and Christian inspiration”.<sup>159</sup> Maritain’s pragmatic minimalism surrounding

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<sup>155</sup> Mary A. Glendon, *Knowing the Universal Declaration of Human Rights*, 1156. McKeon was part of the so-called “Philosopher’s Committee” of UNESCO, which would play a major part in influencing the public discourse on human rights around the time of the promulgation of the UDHR. See Mark Goodale, “The Myth of Universality: The UNESCO ‘Philosopher’s Committee’ and the Making of Human Rights”, *Law & Social Inquiry* 43, No. 3 (2018): 596-617.

<sup>156</sup> Mary A. Glendon, *Knowing the Universal Declaration of Human Rights*, 1157.

<sup>157</sup> Elinor Gardner, “Nature and Rights: The Meaning of a Universal Agreement on Human Rights”, in *Reading the Cosmos: Nature, Science, and Wisdom*, ed. Giuseppe Butera (Washington, DC: The Catholic University of America Press, 2012), 224. Also see, Rebecca Adami, “Intersectional Dialogue: Analyzing Power in Reaching a Universal Declaration of Human Rights in 1948 on Conflicting Grounds”, *Journal of Human Rights* 17, No. 3 (2018): 357-366.

<sup>158</sup> The UDHR would also come to form the “legal baseline” of modern international human rights law, even though the declaration was not binding in and of itself. See, Baderin and Ssenyonjo, *Six Decades After the UDHR and Beyond*, 3 and 5.

<sup>159</sup> Wallace, *Jacques Maritain and Alasdair MacIntyre*, 132-133. Also see Miguel Vatter, “Politico-Theological Foundations of Universal Human Rights: The Case of Maritain”, *Social Research* 80, No. 1 (2013): 233-260. In some of his works, Maritain approaches the debate of the philosophical grounds of human rights from the perspective of Catholic Thomist natural law theory. See for example, Jacques Maritain, *Natural Law: Reflections on Theory & Practice*, ed. William Sweet (South Bend, Indiana: St. Augustine’s Press, 2001).

the drafting of the UDHR and his own philosophical insistence on Christian natural law as the only valid basis for human rights thus seem to be somewhat at odds.

The problematics of Maritain's lack of interest in philosophical groundings in the context of drafting the UDHR has also been pointed out in scholarship. Gardner, for example, argues that the set of rights promulgated in the UDHR is *not* a list of practical conclusions, as Maritain claims, but a set of abstract principles and universal moral claims that "obscure fundamental disagreements about human nature". Without foundational consensus on human nature, Gardner claims, abstract principles cannot sufficiently guide practice and hence – echoing the critique of Alasdair MacIntyre – are "open to both reinterpretation and outright rejection".<sup>160</sup> Human rights, according to Gardner, are to be understood as "moral rules" that serve as a guideline for human conduct, and hence they refer to some conception about what is good and moral. Without a shared moral foundation there is only a *surface consensus* with no deeper philosophical agreement (a "consensus of moral platitudes"). This is not sufficient to guide human action, as there is no means against which moral rules can be measured, for example in cases when such moral rules are in conflict.<sup>161</sup> In a very similar vein, Alasdair MacIntyre argues that the rights language proposed by the UDHR tends to "short-circuit and block genuine dialogue about moral standards".<sup>162</sup>

### 1.3. Current Scholarship on Justificatory Grounds

In line with the authors mentioned above, the legal and political historian Richard Tuck similarly laments the lack of philosophical scholarship on the concept of rights, in his paradigmatic work on the history of rights in the Western legal tradition *Natural Rights Theories* (1979). One of the reasons he puts forwards, is that "the language of rights is difficult to use straightforwardly".<sup>163</sup> While the language of rights remains allusive – as will become abundantly clear throughout this thesis<sup>164</sup> – philosophical scholarship has made some progress since Tuck published his work in 1979. There has in fact been

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<sup>160</sup> Gardner, *Nature and Rights*, 215.

<sup>161</sup> Gardner, *Nature and Rights*, 224.

<sup>162</sup> Wallace, *Jacques Maritain and Alasdair MacIntyre*, 134.

<sup>163</sup> Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 1.

<sup>164</sup> The debate surrounding the language of rights will be addressed in the conceptual history of rights in the Western and Islamic legal traditions provided in Chapter III and IV, respectively.

somewhat of a resurgence of philosophical scholarship on rights in the recent decade, especially in the field of the justification and grounding of rights.<sup>165</sup>

Current scholarship on the philosophical grounds of human rights is broadly divided into four currents. The first current maintains that human rights have no grounds and should therefore – at least on philosophical grounds – be rejected (often in favor of other conceptions of morality and ethics). This line of reasoning is very much in tune with the earlier Burkian and Benthamian critiques of the eighteenth century, aimed at the premodern notions of “natural rights”. Bentham, we have already mentioned above. The conservative philosopher Edmund Burke (d. 1797), on the other hand, called natural rights a “useless metaphysical abstraction” and rejected the universalism of natural rights claims in the face of cultural and national diversity.<sup>166</sup> This current of scholarship is perhaps best represented by the contemporary neo-Thomist philosopher Alasdair MacIntyre, who argues that human rights do not exist and are alike to “belief in witches and unicorns”.<sup>167</sup> MacIntyre is particularly critical of the notion that human rights, or any other of its premodern incarnations, are “self-evident truths” that we can know “intuitively”. However, self-evident truths, MacIntyre argues, do not exist. Hence human rights are mere fictions.<sup>168</sup> MacIntyre’s account of human rights has stirred a lot of debate, some of which is quite critical. Philosopher John Tasioulas, for example, has lambasted MacIntyre for adopting too critical a stance towards human rights based on scant reasoning, and also for not recognizing the possibility a philosophical grounding in Aristotelian virtue ethics (both MacIntyre and Tasioulas being neo-Aristotelians).<sup>169</sup> MacIntyre has also been criticized for his inadequate historical analysis of rights discourses.<sup>170</sup> It seems, in fact, that MacIntyre’s own views on the prospects of grounding human rights have somewhat evolved over time, since

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<sup>165</sup> See for example Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015); John Tasioulas, “Towards a Philosophy of Human Rights”, *Current Legal Problems* 65, No. 1 (2012): 1-30.

<sup>166</sup> Freeman, *Human Rights*, 32-33.

<sup>167</sup> Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Indiana: University of Notre Dame, 2007, third edition), 69.

<sup>168</sup> MacIntyre, *After Virtue*, 69-70.

<sup>169</sup> Alasdair MacIntyre, “What More Needs to Be Said? A Beginning, Although Only a Beginning, at Saying It”, *Analyse & Kritik* 20 (2008): 272. Cf. Mark D. Retter, “The Road Not Taken: On MacIntyre’s Human Rights Skepticism”, *The American Journal of Jurisprudence* 63, No. 2 (2018): 189-219.

<sup>170</sup> Christopher James Wolfe, *After Rights: A Response to Alasdair MacIntyre’s Critique of Rights* (unpublished dissertation, Claremont Graduate University, 2014).

the publishing of his 1981 book *After Virtue*, in favor of a possible philosophical grounding in neo-Aristotelian virtue ethics.<sup>171</sup>

A subset on this line of reasoning is the relativists position of philosophers such as the late Richard Rorty (d. 2007), who did not accept any foundational grounds for human rights on the assumption that there are no grounds for *any* type of conviction.<sup>172</sup> This assumption is of course due to Rorty's post-modern pragmatism that is critical of one and all truth claims, as espoused in his 1979 work *Philosophy and the Mirror of Nature*.<sup>173</sup> As opposed to MacIntyre, however, Rorty *does* allow for a justification of human rights in notion of sentimentality. This notion is rooted in the idea that human atrocities – “human rights violations” – are mostly due to considering others as “sub-human” (or “quasi-human”). By manipulating human sentiments through so-called “sentimental education” people become better acquainted with each other – and each other's suffering – and through the experience of empathy expand their references to “our kind of people” and “people like us”.<sup>174</sup> Even human rights scholar Jack Donnelly, who like Rorty, holds a deeply relativist position that is critical to foundational appeals for grounding human rights, thinks that human rights, like all other social practices, require justifications. He says, for example, that theoretical and philosophical justification for human rights is necessary, even though the debate on them might be highly controversial. Donnelly also does not believe it is impossible to give such justifications.<sup>175</sup>

The second current of scholarship maintains that for human rights to be justified, they must ultimately be grounded in religion and religious values. Arguably, the most articulate proponent of the current that argues for the religious grounds of human rights is the American Calvinist philosopher and theologian Nicholas Wolterstorff.<sup>176</sup> A

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<sup>171</sup> Alasdair MacIntyre, *What More Needs to Be Said?*, 272.

<sup>172</sup> Freeman, *Human Rights*, 64.

<sup>173</sup> Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton and Oxford: Princeton University Press, 2018).

<sup>174</sup> Richard Rorty, “Human Rights, Rationality, and Sentimentality”, in *On Human Rights: The Oxford Amnesty Lectures 1993*, eds. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 122-123. Also see, José-Manuel Barreto, “Rorty and Human Rights: Contingency, Emotions and How to Defend Human Rights Telling Stories”, *Utrecht Law Review* 7, No. 2 (2011): 93-112.

<sup>175</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2013), 22-23.

<sup>176</sup> His most elaborate account is found in Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton and Oxford: Princeton University Press, 2008).

proponent of reformed epistemology, Woltersdorff argues that there is no adequate secular grounding for human rights. If human rights are to be grounded, it can only be a *theistic* grounding.<sup>177</sup> Secular accounts of human rights, in Wolterstorff's understanding, are all "capacity accounts", i.e., accounts that single out the human capacity for rational agency as a basis for human dignity. This capacity is however shared by some higher mammals (and is thus not uniquely human). Opting for more complex forms of capacity, such as the capacity to organize your life, set future goals and systematically works towards those goals is also problematic, since some human beings do not have this capacity, such as people who have some kind of brain disorder or a form of dementia.<sup>178</sup> What then, Woltersdorff asks, is a uniquely human feature that *all* human beings have, and other mammals *do not* have, upon which human dignity and worth can be based? Wolterstorff argues that the basis for human dignity and worth inheres in the uniquely human feature offered by the Christian theistic view that humans resemble the "image of God" (the *imago Dei*). As such, they are in a loving relationship with God. And God's love for human beings is both eternal and includes all the people he created.<sup>179</sup> Wolterstorff's boldly theistic justification for the rights of all human beings, typical for those who adhere to the Christian reformist epistemological school, has found proponents as well as detractors.<sup>180</sup> Similar religious accounts – theistic or non-theistic – have been given by adherents of different religious worldviews.<sup>181</sup>

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<sup>177</sup> Nicholas Wolterstorff, "Can Human Rights Survive Secularization?", *Villanova Law Review* 54, No. 3 (2009): 411-420. Wolterstorff does not think there never might be a secular grounding in the future, nor does he preemptively reject such a grounding if there would be one. In fact, towards the end of his article, he mentions that ideally there would be religious *and* non-religious groundings of human rights that all humans could equally embrace, see pages 417 and 420.

<sup>178</sup> Nicholas Wolterstorff, *Can Human Rights Survive Secularization?*, 414-415.

<sup>179</sup> Nicholas Wolterstorff, *Can Human Rights Survive Secularization?*, 418-419.

<sup>180</sup> For several (secular *and* religious) critiques of Wolterstorff's account, see for example David Redmond, "Against Wolterstorff's Theistic Attempt to Ground Human Rights", *Journal of Ethics and Social Philosophy* 12, No. 1 (2017): 127-134; Paul A. Macdonald, Jr., "Grounding Human Dignity and Rights: A Thomistic Response to Wolterstorff", *The Thomist: A Speculative Quarterly Review* 82, No. 1 (2018): 1-35; Richard J. Bernstein, "Does He Pull It Off? A Theistic Grounding of Natural Inherent Human Rights", *Journal of Religious Ethics* 37, No. 2 (2009): 221-241; Jordan Wessling, "A Dilemma for Wolterstorff's Theistic Grounding of Human Dignity and Rights", *International Journal for Philosophy of Religion* 76 (2014): 277-295.

<sup>181</sup> See for example, Damien Keown, "Are There Human Rights in Buddhism?", in *Buddhism and Human Rights*, eds. Damien V. Keown, Charles S. Prebish and Wayne R. Husted (Richmond, Surrey: Curzon Press, 1998), 15-41; Summer B. Twiss, "Confucian Values and Human Rights", in *Human Rights and Responsibilities*, eds. Joseph Runzo, Nancy M. Martin and Arvind Sharma (Oxford: Oneworld Publications, 2003), 283-300; David Novak, "The Judaic Foundation of Rights", in *Christianity and Human Rights: An Introduction*, eds. John Witte, Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2010), 47-63

The third current of scholarship seeks a secular grounding for human rights. A prominent scholar writing on secular grounds – and to my knowledge to only one to have dedicated a full monograph to its study – is political theorist Ari Kohen.<sup>182</sup> Kohen’s main argument is based on the idea of a political overlapping consensus between the different cultures of the world – embodied by the UDHR – that gives rise to human dignity and collective human rights. Following Richard Rorty, Kohen rejects the idea the any human quality, such as “human nature”, can function as a ground for human rights.<sup>183</sup> Instead, the idea of cross-cultural overlapping consensus, much along the lines of John Rawls (d. 2002), functions as a justificatory ground for human dignity.<sup>184</sup> The drafting of the UDHR represents, according to Kohen, differs substantially from all earlier rights declaration. Pre-World War II rights declarations were largely national affairs, while the UDHR was cosmopolitan and cross-cultural. Kohen admits that many groups were not present at the deliberations surrounding the drafting of the UDHR in the late 1940s, such as many post-colonial African states and indigenous peoples from around the world.<sup>185</sup> But the drafting process, he argues, was “highly inclusive” and “persuasive”. Also, after the promulgation of the UDHR, international human rights institutions became increasingly inclusive and many conventions and declarations were promulgated in favor of women, indigenous peoples, and children, among others. The UDHR, Kohen argues, could therefore be seen as an ideal example of a Habermasian “democratic deliberative process” whereby it has de facto achieved a “justificatory status”.<sup>186</sup> Hence, Kohen states the people of the world are in agreement with regards to the values and norms that are embedded in the UDHR, even though they might have conflictual ideas about many other things. In Kohen’s understanding, the human rights laid out in the UDHR are universal and can be found in all world cultures. The consensus or agreement he observed is a reasonable

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<sup>182</sup> Ari Kohen, *In Defense of Human Rights: A Non-Religious Grounding in a Pluralistic World* (Abingdon, Oxon: Routledge, 2007). Kohen, like Wolterstorff, is accepting of the idea that religious and secular groundings for human rights can exist side by side.

<sup>183</sup> Ari Kohen, “A Non-Religious Basis for the Idea of Human Rights: The Universal Declaration of Human rights as Overlapping Consensus”, in *Handbook of Human Rights*, ed. Thomas Cushman (Abingdon, Oxon: Routledge, 2012), 267.

<sup>184</sup> Kohen, *A Non-Religious Basis for the Idea of Human Rights*, 270.

<sup>185</sup> Kohen, *A Non-Religious Basis for the Idea of Human Rights*, 271.

<sup>186</sup> Kohen, *A Non-Religious Basis for the Idea of Human Rights*, 272-273.

foundation to justify human rights in a manner that is not religiously inspired. Overlapping consensus in this regard at least is secular in nature, and not religious.<sup>187</sup>

The fourth current of scholarship is a sort of mid-position between the second and third currents. This is an intermediate position that seeks complementarity between secular and religious grounds. Indeed, both Wolterstorff and Kohen both admit to the potential complementarity of secular and religious foundations, even though they might prefer – and forcefully argue – for either one position.<sup>188</sup> However, there are also scholars who embrace the complementarity of religious and secular justifications *at the outset*.<sup>189</sup> One such case, is theologian Richard Harries, who argues that ideas like human rights and human dignity are ultimately grounded in the religious traditions of the world – he specifically names Christianity, Judaism, and Islam – while also embracing the idea of secularized “positive human rights” as a historically constructed concept established by the law.<sup>190</sup>

Troels Nørager, also a theologian, similarly seeks a mid-ground between, what he calls, “rigid” pro-secular or pro-religious justifications for human rights.<sup>191</sup> After a comparative study of two human rights scholars that fiercely argue for either religious or secular groundings, Nicholas Wolterstorff and George Kateb respectively, Nørager proceeds to point out several “common grounds” between the two scholars, such as the shared conviction that human rights should be defended and theoretically grounded, the characteristic of their theories as “dignity-based”, and the acknowledgement that an undue focus on human rights might lead to egocentrism and individualism.<sup>192</sup> Nørager laments the “marked opposition” between the theistic and secular positions and offers a “third” way, namely “metaphysical openness to transcendence and ultimate meaning, pointing to an acknowledgement that we are embedded in something larger than ourselves”. This position, Nørager argues, can

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<sup>187</sup> Kohen, *A Non-Religious Basis for the Idea of Human Rights*, 273.

<sup>188</sup> See footnote 177.

<sup>189</sup> See for example, Lisa Sowle Cahill, “Rights as Religious or Secular: Why Not Both?”, *Journal of Law and Religion* 14, No. 1 (1999-2000): 41-52.

<sup>190</sup> Richard Harries, “The Complementarity Between Secular and Religious Perspectives of Human Rights”, in *Does God Believe in Human Rights? Essays on Religion and Human Rights*, eds. Nazila Ghanea, Alan Stephens, and Raphael Walden (Leiden and Boston: Martinus Nijhof Publishers, 2007), 20 and 24-27.

<sup>191</sup> Troels Nørager, “Theistic or Secular Grounding of Human Rights? Human Dignity according to Nicholas Wolterstorff and George Kateb”, *Studia Theologica* 68, No. 2 (2014): 100-121.

<sup>192</sup> Nørager, *Theistic or Secular Grounding of Human Rights?*, 113.

included both theism and the “religious atheism” espoused by Ronald Dworkin in his book *Religion without God*, without “forcing us” to choose between the religious-secular divide.<sup>193</sup>

And thus, we return to Maritain, who as representative of the post-World War II modern human rights discourse had advocated a *disengagement* with inquiries into the “basis and philosophical significance of human rights”, striving instead to achieve universal consensus by the mere “statement and enumerations” of human rights.<sup>194</sup> As shown in our discussion above, this approach has proven to be not only problematic philosophically, but also outdated. Current scholarship problematizes the ungroundedness of modern human rights and is by-and-large committed to the question of justificatory grounds. Because, as Gardner put it, “so long as we put aside the question of foundations, our use of human rights instruments will remain fraught with [...] difficulties”.<sup>195</sup> Hence, we could summarize, based on the succinct overview of current scholarship presented above (and the general discussion in this chapter), that a case for grounding fundamental rights can – and *should* – be made. And there is no viable reason *at all*, that Islamic attempts to ground fundamental rights should not be part of this endeavor.

#### 1.4. Conclusion

In this chapter we have surveyed current debates surrounding the so-called “modern crisis of human rights”. We have seen that human rights have gained tremendous support in the second half of the twentieth century. This was not a given when the UDHR was promulgated in 1948. However, after World War II the modern human rights discourse steadily grew into the “moral lingua franca” of our contemporary world. The decades after the UDHR – which in and of itself is not legally binding – saw human rights gradually integrated and legalized in domestic legal systems, regional human rights instruments, international law and subsequent charters and conventions, such as the ICCPR and ICESCR, which together with the UDHR make

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<sup>193</sup> Nørager, *Theistic or Secular Grounding of Human Rights?*, 116-117. See Ronald Dworkin, *Religion Without God* (Cambridge, Massachusetts and London, England: Harvard University Press, 2013).

<sup>194</sup> Maritain, *Human Rights*, 6.

<sup>195</sup> Gardner, *Nature and Rights*, 228.

up the International Bill of Human Rights. Human rights activism played a major role in the modern human rights regime “going global”. Today, not a single nation in the world is not in some way enmeshed in human rights principles.

At the same time, modern human rights have come under increased pressure at the start of the twenty-first century. Some scholars have hailed this period as a “crisis of human rights” and asked if this may entail the “end of human rights” and if human rights can – or *should* – be “saved”. Main critiques are the political misuses of human rights for military and humanitarian “interventions”, the overzealousness of human rights activism, and the failure of human rights litigation in supra-national courts, such as in the ECtHR. The modern human rights discourse is said to be “replete with paradoxes” and instances of “use and abuse”. In addition, two major challenges confront the modern human rights regime: the problem of cultural and religious diversity in the face of human rights claims to universality and universal applicability, and the problem of the absence of any philosophical justifications for human rights (the ‘ungroundedness’ of modern human rights).

The critique of universality had early iterations in the (in)famous Statement on Human Rights by the American Anthropological Association (AAA). The new human rights discourse of the 1940s strived for universality; to be a “common standard of achievement for all peoples and all nations”. The AAA warned for this new discourse’s inherent Eurocentrism, especially in the wake of the European colonialist legacy that was still very much alive in the 1940s and 1950s. The universality of modern human rights was further problematized by Eurocentric historical accounts of human rights, be they rooted in Greco-Roman Stoicism, medieval natural law, or early modern natural rights discourses. Human rights have been expounded by several prominent scholars as “distinctly Western in origin” and *emphatically* not of “Asian, African, or Middle Eastern origin”. These accounts also retain something of the old colonialist mindset of the *mission civilizatrice*.

On the other side, to claim human rights as a purely modern phenomenon is a crude case of historical presentism. Indeed, the discourse of human rights experienced a major shift in the twentieth century towards secularization, universalization, and globalization. But the historical roots of the modern human rights regime – however

contested they may be – are beyond doubt. Moving beyond a-historical, exclusivist, and presentist historical accounts of human rights, this thesis operates under the understanding that all human cultures, contemporary and historical, make some provisions for human rights, albeit on the grounds of their own specific world views and reasoning. As such, it is warranted – *necessary* even – to include the contributions of Islamic civilization and legal thought in the global rights discourse.

The problem of justification rose to the surface during the drafting of the UDHR and its subsequent promulgation in 1948. The conundrum has its historical roots, however, in the eighteenth century. After the scattering critiques of the early modern natural rights theories of the sixteenth and seventeenth centuries – such as those of Grotius, Hobbes, Pufendorf, and others – the idea of human rights was gradually secularized. Once the theological and philosophical foundations of natural rights were removed, they were not replaced with any viable alternative. Modern human rights, as envisioned by the drafters of the UDHR, were essentially “ungrounded” and “criterionless”. Those involved in the drafting of the UDHR – such as Maritain – were clearly aware of this conundrum. Conflicts over the justificatory grounds might have endangered the “universalizing” project of modern human rights and risk any attempt at global consensus. Hence, a strategy was chosen of “thin consensus” based on “spontaneous” practical and – ultimately – naïve pragmatism. To reach practical consensus we need to move away from discussions over justifications, it was argued, towards a mere listing and enumeration of rights. Maritain was optimistic about reaching consensus, assuming that the world’s cultures would by-and-large come to accept the same list of rights, despite their multiple justifications.

Maritain’s approach can be criticized on numerous accounts. First, we can observe several seeming contradictions, such as that he himself at times mentioned doubt that supporters and detractors of natural law reasoning could come to agreement over rights. Or that he remained a staunch proponent of Christian natural law justifications of human rights, despite his advocacy pragmatic minimalism. Furthermore, his minimalist requirement of superficial “thin consensus” did not anticipate future problems of the actual interpretations of rights, reconciliation of conflicting rights, integrating new rights, implementation of rights, and the advancement of “group interests” and political abuse.

Maritain’s approach also lacked intellectual rigor and was ultimately based on a “consensus of moral platitudes”. Human rights – understood as *moral rules* – derive from some idea of what it means to be “good” or “moral”. In the absence of any deeper philosophical understanding of the morality of human rights, they cannot genuinely guide human action, nor would there be a means to evaluate moral rules. Also, to evade any discussion on justificatory grounds makes a genuine dialogue on underlying moral standards nearly impossible.

The challenges to modern human rights discussed in this chapter have prompted scholars from various disciplines – law, social science, history, theology, philosophy – to reignite the inquiry over the philosophical grounds of human rights. Contemporary scholarship on justificatory grounds revolves around four main currents of scholarship, which can schematically be presented as follows:

<b>Currents of Grounding Human Rights Scholarship</b>		
<i>Current:</i>	<i>Justificatory Ground:</i>	<i>Proponent:</i>
No grounds	None, sentimentality & empathy	MacIntyre, Rorty
Religious grounds	Divine love, <i>imago Dei</i>	Woltersdorff
Secular grounds	Cross-cultural overlapping consensus, democratic deliberative process	Kohen
Religious & secular grounds	Human dignity & historical construction, metaphysical openness to transcendence & ultimate meaning	Harries, Nørager

*Figure 1: Currents of grounding human rights scholarship*

The first current is the argument that modern human rights have no grounds and cannot be theoretically justified (MacIntyre, Rorty). The second current is the argument that only religious or theological foundations are warranted to justify human rights

(Woltersdorff). The third current is the position that secular justifications may be found to ground human rights (Kohen). The fourth and final current is a mid-way position that holds that both secular and religious groundings are possible and can be held concurrently (Harries, Nørager). Given the sustained critique of the first current, it seems hard to hold any conception of human rights if one believes they cannot be philosophically justified in some way. In fact, even relativists such as Rorty and Donnelly hold – albeit in distinct ways – that human rights need some kind of justification. Kohen’s case for secular grounds in “cross-cultural overlapping consensus” seems difficult to sustain, given the similarities it bears with Maritain’s idea of a “thin consensus”. Kohen’s argument is thus subject to the same objections. A mid-way position of justifying grounds in both theological and rational grounds, however, seems to most promising approach. In fact, as will be argued in chapters IV and VI, the Islamic rights hermeneutic seems to provide such an answer.

## CHAPTER II

### THE ISLAM AND HUMAN RIGHTS DEBATE: A TAXONOMY OF PERSPECTIVES

“It seems beyond question that many tensions between traditional Islamic norms and international human rights standards exist.”

*Heiner Bielefeldt*<sup>196</sup>

“Islam has laid down some universal fundamental rights for humanity as a whole”.

*Abū al-A‘lā al-Mawdūdī*<sup>197</sup>

Publications on human rights and Islam are copious and very diverse in nature. Scholars have written on the subject from the perspectives of law, social sciences, philosophy, history and theology. All have interesting offerings to bring to the table. The field of *Islamic Human Rights Studies*, however, is still in its infancy. It lacks a common methodology due to its inherent interdisciplinarity.<sup>198</sup> It also lacks a sense of direction as to where the field should be going in the future. Often, scholars from different fields seem to be talking *past* each other, instead of *with* each other. Part of the reason is the disparity in scholarly demands according to each different subfield.<sup>199</sup> While lawyers of modern international human rights often lack the hermeneutical skills needed to meaningfully engage the classical Arabic sources of medieval Islamic jurisprudence, Islamicists and Islamic Studies scholars often lack the training needed to grasp the concerns of modern international human rights law. Both are arguably needed in order to move the field of *Islamic Human Rights Studies* forward.

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<sup>196</sup> Heiner Bielefeldt, “Muslim Voices in the Human Rights Debate”, *Human Rights Quarterly* 17, No. 4 (1995): 587.

<sup>197</sup> Abū al-A‘lā al-Mawdūdī, *Human Rights in Islam* (Lahore: Islamic Publications, 1977), 8.

<sup>198</sup> Some have critiqued interdisciplinarity for lacking a coherent approach. It is “neither here nor there”. However, some themes – Islam and human rights arguably being one of them – cannot but be studied in an interdisciplinary and comparative manner. For a critical appraisal of interdisciplinarity, see Jerry A. Jacobs and Scott Frickel, “Interdisciplinarity: A Critical Assessment”, *Annual Review of Sociology* 35 (2009): 43-65. For a slightly older but still helpful overview of the debate, see Garry D. Brewer, “The Challenges of Interdisciplinarity”, *Policy Sciences* 32, No. 4 (1999): 327-337.

<sup>199</sup> See Garry, *The Challenges of Interdisciplinarity*, 335.

In this chapter we explore the literature on the so-called “Islam and human rights debate”. In doing so, we offer a taxonomy of perspectives on Islam and human rights research, which will help in evaluating the state-of-the-art of the field. Also, it will assist in situating this study in the broader field of *Islamic Human Rights Studies*. The perspectives under discussion are thus (1) the Conflictual Perspective, (2) the Apologetic Perspective, and (3) the Discursive Perspective. The various approaches are aimed at distinguishing intellectual tendencies and modes of thinking. Hence, they cut through the Muslim/non-Muslim-divide.

## 2.1. Islam and Human Rights: Contemporary Practices and Responses

Before we delve into the three trends of scholarship mentioned in the introduction of this chapter, it would serve well to briefly mention other types of scholarship that fall beyond the scope of these three trends proper. The first type considers Muslim responses to the emergence of the modern post-World War II human rights regime, often in the form of alternative Islamic rights declarations, such as the Universal Islamic Declaration of Human Rights (UIDHR) of 1981 and the Cairo Declaration of Human Rights in Islam (CDHRI) of 1990.<sup>200</sup> The second type concerns monographs, edited volumes, and journal articles that focus on mainly on two topics. One of them focuses on contemporary implementations – or violations – of human rights in the modern “Muslim world”.<sup>201</sup> They will be mentioned here only briefly to give a sense of the broader field on Islam and human rights research.

In the first type of research on Islam and human rights, the focus is on evaluating either responses to the United Declaration of Human Rights (and its later two Conventions)

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<sup>200</sup> For an overview of Islamic human rights declarations, see Abdul Azeez Maruf Olayemi, Abdul Majeed Hamzah Alabi, and Ahmad Hidayah Buang, “Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI in Context of UDHR”, *Journal of Islam, Law and Judiciary* 1, No. 3 (2015): 27-36.

<sup>201</sup> What entails the “Muslim world” is a contested issue. Since the dissolution of traditional Islamic states in the advent of European colonialism, Islamic legal systems were by-and-large supplanted by European legal codes. Modern incarnations of Islamic law in several post-colonial states do not necessarily reflect traditional Islamic legal culture. As such, there has been a “disruption” in the Islamic legal tradition after 1800. For a discussion on modern incarnations of Islamic law and governance, see Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* (New York: Columbia University Press, 2013). For a discussion on the contested idea of the ‘Muslim world’ as a monolith, see Cemil Aydin, *The Idea of the Muslim World: A Global Intellectual History* (Cambridge, Massachusetts and London, England: Harvard University Press, 2017).

or the promulgation of alternative Islamic rights declarations. Scholar of comparative religion Jacques Waardenburg, for example, discusses the abstention from voting on the UDHR of Muslim countries such as Saudi Arabia, certain Arab Gulf States, and Mauritania. He also discussed – or summarizes rather – various subsequent Islamic rights declarations, such as the Saudi memorandum concerning Human Rights in Islam (1970), the Organization of Islamic Conference’s *Wāthiqa huqūq al-insān fī al-islām* [Document on Human Rights in Islam] (1980), and the Islamic Council of Europe’s Universal Islamic Declaration (1981).<sup>202</sup>

Waardenburg also discusses – albeit rather briefly – some of the differences and similarities between Islamic rights declarations and the UDHR, such as regarding notions of freedom and equality.<sup>203</sup> Waardenburg laments the depiction of some commentators of modern Muslim alternative rights declarations as a sign of “religious fanaticism”. According to him, these are authentic protests against violations of human dignity and “a call for a transcendent source of justice, when mundane justice has failed and human dignity is violated in so many ways”.<sup>204</sup>

In the second type of scholarship, focus is laid on contemporary practices in what is considered the “Muslim world” as a measuring rod for evaluating to what extent Islam is in sync with modern human rights concerns. A case in point is Mahmood Monshipouri’s *Human Rights in the Middle East*, which deals with contemporary human rights practices and implementations in Muslim majority countries.<sup>205</sup> It deals with case studies of human rights practices and/or violations in Saudi Arabia, Iraq, Iran, Egypt, Turkey, Palestine, the UAE, and other Muslim-majority countries. The book seems to have a broadly liberal outlook and does not significantly depart from a universalist approach to international human rights law standards.

Ruud Peters, in his analysis of human rights practices in modern Muslim-majority countries, argues that many of the basic premises in modern human rights thinking are

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<sup>202</sup> Jacques Waardenburg, “Human Rights, Human Dignity, and Islam”, in *Islam: Historical, Social, and Political Perspectives*, Jacques Waardenburg (Berlin: De Gruyter, 2002), 167-173.

<sup>203</sup> Waardenburg, *Human Rights, Human Dignity, and Islam*, 175-179.

<sup>204</sup> Waardenburg, *Human Rights, Human Dignity, and Islam*, 184.

<sup>205</sup> Mahmood Monshipouri (ed.), *Human Rights in the Middle East: Frameworks, Goals, and Strategies* (New York: Palgrave Macmillan, 2011).

guaranteed in modern national legal systems that are (in part) inspired by Islamic law. Most countries in which Muslims are a majority provide for religious liberty, for example. And people adhering to different religions are in principle not discriminated against by law. In some case, such as laws surrounding family matters or succession law for gender equality has not always been reached in all cases. However, major improvements have been made regarding the legal position of women. In addition, most Muslim-majority countries have endorsed the international human rights covenants that have been promulgated over the years.<sup>206</sup>

In Waardenburg's estimation violations of human rights in Muslim majority countries happened despite, not because of Islam. He says:

It is not Islam, however interpreted, that is the reason for such degradations of human existence. I would say, on the contrary, that it is thanks to their particular religious faith, their Islam, that so many Muslims are still aware of their human dignity and live accordingly. They formulate human rights the way they do and certainly are keen to communicate with men and women of good will everywhere who also defend universal human rights and strive to uphold human dignity, our humanity.<sup>207</sup>

On a similar note, Heiner Bielefeldt argues that the violations of basic rights – such as arbitrary detentions, violent maltreatment, and persecution for political reasons– are a feature of many countries, be they Muslim majority countries or not. These should not be seen, he argues, as having a specifically Islamic rationale. Islam should not be blamed overall, even if these practices occur in some countries where adherents to the religion of Islam are the most dominant among its citizens.<sup>208</sup>

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<sup>206</sup> Peters, *(In)compatibility of Religion and Human Rights*, 80-81. That being said, some Muslim countries have stipulated restrictions on said international human rights covenants in light of *Shari'a* principles.

<sup>207</sup> Waardenburg, *Human Rights, Human Dignity, and Islam*, 184. On a similar note, Elisabeth Mayer writes: "Islam itself is not the cause of the human rights deficiencies in the Middle East. Human rights abuses may be every bit as pervasive and just as severe in countries where Islamic law is in abeyance and religious impulses are suppressed as in countries where it figures, at least officially as the legal norm. One must recognize that, depending on the political context, supporters of Islamization may easily turn out to be the victims of rights violations committed by secular regimes, and the violations of their human rights must be taken as seriously as any other rights violations". See Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder, Colorado and Oxford: Westview Press, 2007), xvi.

<sup>208</sup> Bielefeldt, *Muslim Voices in the Human Rights Debate*, 595.

Irene Oh, in her global survey of Muslim responses to human rights violations, mentions that people living in nations where Muslims are a majority are equally worried about human rights violations that might occur in their respective countries or in the “Muslim world” at large, and this does not seem to be in contradistinction to their adherence to Islamic values.<sup>209</sup> In other words, Muslims by-and-large, see no conflict in condemning human rights violations and their personal Islamic beliefs.

However, more germane to the concerns of this study or not contemporary practices but scholarship on modern human rights and the classical Islamic legal tradition. To this scholarship we now turn.

## 2.2. The Conflictual Perspective: Presentism and Orientalism

A large bulk of contemporary scholarship on Islam and human rights focuses on the idea of the inherent incompatibility of Islamic law with universal human rights principles. The claim is often made that Islamic law does not recognize any notion of individual and inalienable human rights.<sup>210</sup> Even if it does, it is – at most – as a correlative to duties. The basic point of departure here, is the assumption that Islam is fundamentally a “duty-based” legal system. One can find examples of this abundantly in Orientalist scholarship of the second half of the twentieth century, such as in the works of Joseph Schacht (d. 1969).<sup>211</sup>

But the Orientalist trope is also perpetuated in contemporary scholarship. The contemporary legal scholar Norman Doe, for example, in his recent study on *Comparative Religious Law* (2018), mentions:

Human rights do not constitute a distinct category in traditional Islamic jurisprudence. Rather than that of a right (*haqq*), the focus of Islamic law is on duties (*taklif*) – duties towards God and duties towards others – and, therefore,

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<sup>209</sup> Irene Oh, “Islamic Conceptions of Human Rights”, in *Handbook of Human Rights*, ed. Thomas Cushman (Abingdon, Oxon: Routledge, 2012), 255.

<sup>210</sup> See for example, Henry Siegman, “The State and the Individual in Sunni Islam”, *The Muslim World* 54, No. 1 (1964): 23. Also see, Ann Elizabeth Mayer, “Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?”, *Michigan Journal of International Law* 15, No. 2 (1994): 321.

<sup>211</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 11.

for some scholars, to the extent that they exist, human rights are correlative to duties.<sup>212</sup>

The Conflictual Perspective in research on Islam and human rights tends to focus on the so-called “compatibility question”.<sup>213</sup> Instead of a thorough engagement with the Islamic legal tradition *on its own terms*, this trend of scholarship engages Islamic law and jurisprudence from the vantage point of liberal ethics and uses international human rights law formulations as a “measuring rod” to evaluate if Islam is compatible with secular-liberal modernity. In that sense this approach is “presentist”.<sup>214</sup> It approaches the study of Islam and human rights with the assumption that Islamic legal culture is by nature inherently antithetical to values and norms espoused by the human rights discourse.<sup>215</sup> In other words, it tends to focus on the so-called “narrative of conflict”.<sup>216</sup>

In his article, Bielefeldt sums up the “areas of conflict” that according to him lay at the root of the Shari‘a-human rights divide. Overall, he argues, problems arise in terms of emancipatory principles, which according to Bielefeldt is a modern invention, not present in the premodern Islamic tradition. The main points of contention, Bielefeldt says, are the legal status of women, restrictions on religious liberty, and various types of corporal punishment.<sup>217</sup> Ruud Peters enumerates a similar list of “contentious issues”. These are criminal law, religious liberty and legal equality. Comparing premodern classical Islamic law with modern universal human rights standards in this way however, he argues, is an “anachronistic operation”.<sup>218</sup>

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<sup>212</sup> Norman Doe, *Comparative Religious Law: Judaism, Christianity, Islam* (Cambridge: Cambridge University Press, 2018), 373.

<sup>213</sup> Dominic McGoldrick, “The Compatibility of an Islamic/Shari‘a Law System or Shari‘a rules with the European Convention on Human Rights”, in *Islam and English Law: Rights, Responsibilities and the Place of Shari‘a*, ed. Robin Griffith-Jones (New York: Cambridge University Press, 2013), 43.

<sup>214</sup> For an account of presentism and its perils in historical scholarship, see Carlos Spoerhase, “Presentism and Precursorship in Intellectual History”, *Culture, Theory and Critique* 49, No. 1 (2008): 49-72; Richard Reid, “Past and Presentism: The ‘Precolonial’ and the Foreshortening of African History”, *Journal of African History* 52 (2011): 135-155.

<sup>215</sup> Mayer, *Universal versus Islamic Human Rights*, 308. Also see Heiner Bielefeldt, ““Western” versus “Islamic” Human Rights Conception?: A Critique of Cultural Essentialism in the discussion on Human Rights”, *Political Theory* 28, No. 1 (2000). At page 102 Bielefeldt says: “one can hardly deny that the relationship between Islam and Human rights is complicated and raises a number of problems”.

<sup>216</sup> See Nathan C. Funk and Abdul Aziz Said, “Islam and the West: Narratives of Conflict and Conflict Transformation”, *International Journal of Peace Studies* 9, No. 1 (2004): 1-28. A primary example is of course the now fairly outdated, but still influential, book of Samuel P. Huntington, *The Clash of Civilizations and the Making of the New World Order* (New York: Simon & Schuster, 1996).

<sup>217</sup> Bielefeldt, *Muslim Voices in the Human Rights Debate*, 595-601.

<sup>218</sup> See Peters, *(In)compatibility of Religion and Human Rights*, 77-80.

In listing his perceived points of contentions Bielefeldt does provide some nuance and historical background. He mentions, for example, that historically non-Islamic minorities were for the most part granted religious liberty and equal rights as citizens.<sup>219</sup> In addition, he mentions how some of the corporeal punishments stimulated in classical medieval Islamic jurisprudence historically did not play a major role in societies under Islamic rule.<sup>220</sup>

One of the most prominent writers in Western scholarship on Islam and human rights is Ann Elizabeth Mayer. In her scholarship on Islam and human rights over the past decades Mayer perpetually portrays the classical Islamic legal tradition as incompatible with modern international human rights norms. In her 2007 article *The Islam and Human Rights Nexus*, for example, she alludes to the rules and regulations stipulated in the Islamic law surrounding the position of women in Islam. These rules and regulation, according to Mayer, show a “pattern of legal discrimination against women”.<sup>221</sup> She maintains, based upon her interpretations of Islamic law as it pertains to gender equality, that the rulings and regulations of classical Islamic law regarding women conflict with the basic principles of “modern secular legal systems and human rights norms”.<sup>222</sup>

In the eyes of Mayer, Muslim scholars who want to take the Islamic legal and intellectual tradition seriously are “reactionary ideologues” that are “committed to the rules set forth in medieval jurisprudence”. She accuses them of entertaining “ossified jurisprudential methodologies and narrow mindsets” and “sclerotic modes of analysis”. Mayer also accused them of conspiracy thinking, in terms of seeing human rights activism as some kind of evil conspiracy conducted by Western powers to subdue, contaminate and ultimately rule over the Islamic world.<sup>223</sup> At the same time Mayer applauds explicitly feminist and reformist trends of Islamic thought, which she labels as a “pattern of resistance”, “fresh modes of thinking”, and “new feminist

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<sup>219</sup> Bielefeldt, *Muslim Voices in the Human Rights Debate*, 598.

<sup>220</sup> Bielefeldt, *Muslim Voices in the Human Rights Debate*, 612.

<sup>221</sup> Ann Elizabeth Mayer, “Law and Religion in the Muslim Middle East”, *The American Journal of Comparative Law* 35, No. 1 (1987): 141.

<sup>222</sup> Mayer, *Law and Religion in the Muslim Middle East*, 141.

<sup>223</sup> Ann Elizabeth Mayer, “The Islam and Human Rights Nexus: Shifting Dimensions”, *The Muslim World Journal of Human Rights* 4, No. 1 (2007): 7-8.

critiques”.<sup>224</sup> We see similar selective support for particular modernist modes of Islamic activism in the work of Heiner Bielefeldt, who on that same note applauds “liberal Muslim intellectuals”, “liberal reformers” and a “new hermeneutic approach”.<sup>225</sup>

Interestingly, the only Muslim scholar Meyer critiques by name in her 2007 article is Mashood Baderin, who has explicitly stated to be against what he calls “blind conservatism”. In his work on Islam and human rights he mentions a rather nuanced approach to the discussion: “while legal conformism (*taqlid*) is not in itself an undesirable practice, it must be distinguished from blind conservatism that does not allow for reflective and contextual application of classical precedents”.<sup>226</sup>

In Mayer’s analysis, contemporary Muslim practices and modern responses to human rights give every reason to believe Islam is antithetical to human rights values. For example, in her analysis of the Cairo Declaration on Human Rights in Islam (1990), she mentions that when measuring the Cairo Declaration to the “standards” of the International Bill of Human Rights, she found that “the deficiencies are revealed to be both serious and extensive”.<sup>227</sup> In addition, referring to Samuel P. Huntington’s clash of civilizations thesis, Mayer mentions that such Islamic alternative rights declarations “would support Huntington’s assumption that human rights do not fit into Islamic culture”.<sup>228</sup> In another article Mayer mentions that Muslim responses to human rights conventions have strengthened the impression in her the Islamic worldview by nature conflicts with the values espoused by human rights, and are indeed in opposition to them.<sup>229</sup>

What is often missing in the Conflictual Perspective in Islam and human rights scholarship is a contextualized historical study of the Islamic legal system and a

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<sup>224</sup> Mayer, *The Islam and Human Rights Nexus*, 7-8.

<sup>225</sup> See Bielefeldt, “*Western*” versus “*Islamic*” Human Rights Conception?, 108 and 110.

<sup>226</sup> See Mashood A. Baderin, *International Human Rights and Islamic Law* (New York: Oxford University Press, 2003), 39.

<sup>227</sup> Mayer, *Universal versus Islamic Human Rights*, 347. For an analysis of the Cairo Declaration, see Abdullah al-Ahsan, “Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC’s Cairo Declaration of Human Rights”, *Journal of Law and Religion* 24, No. 2 (2008): 569-597.

<sup>228</sup> Mayer, *Universal versus Islamic Human Rights*, 347.

<sup>229</sup> Mayer, *The Islam and Human Rights Nexus*, 5.

thorough engagement with the classical Arabic juridical sources of Islam. For example, Mayer says about al-Mawdūdī – whom we will treat in the next section – that he “utilized Western examples and precedents to prop up the legitimacy of shari‘a rules that restrict human rights. [...] However, such Western-inspired rationales are utterly irrelevant from the standpoint of Islamic jurisprudence and would play no role in any rights scheme that was actually based on Islamic sources”.<sup>230</sup> It is perhaps ironic that Mayer accuses al-Mawdūdī of a lack of engagement with the classical Islamic legal tradition, while she herself makes no use of any Arabic sources in her own work.

### 2.3. The Apologetic Perspective: Reactionism and Anachronism

The second approach to the question of Islam and human rights is the Apologetic Perspective. This approach claims that universal human rights were instigated by Islam from its inception in the seventh century. It uses a defensive tone and, often, makes a caricature of its Western counterpart. This type of literature is characterized by accusations of Eurocentrism and imperialism, while at the same time presenting Islam as the more superior civilization. As some scholars have observed, human rights as a political and legal project are utilized and instrumentalized as a means to prove or show the supremacy of the Islamic worldview vis-à-vis the Western worldview.<sup>231</sup>

A case in point is the work of the reformist and modernist scholar Abū al-A‘lā al-Mawdūdī (d. 1979).<sup>232</sup> In his *Human Rights in Islam* he accuses “the West” of civilizational arrogance. In his work al-Mawdūdī accuses those who live in the West of cultural arrogance. In his understanding, the West tends to ascribe all that is virtuous and good in the world to themselves. All that is virtuous, helpful and effective in the world is somehow due to the capacities and talents inherent in Western culture. Without the West, the non-Western world would be living in darkness and blindness.

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<sup>230</sup> See Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder, Colorado and Oxford: Westview Press, 2007), 71.

<sup>231</sup> Oh, *Islamic Conceptions of Human Rights*, 262. Oh rightfully mentions that many of these responses were articulated in the context of postcolonialism and, in fact, often coincide with the end of Western colonial states in the second half of the twentieth century. Hence, they should be understood in this historical context.

<sup>232</sup> See Roy Jackson, *Mawlana Mawdudi and Political Islam: Authority and the Islamic State* (Abingdon, Oxon: Routledge, 2010).

Basically, al-Mawdūdī charges, the West tends to perceive itself as the pinnacle of civilization, while the rest of the world is basking in barbarity.<sup>233</sup>

After a description of historical and contemporary human rights violations at the hands of the West, al-Mawdūdī purports that the whole idea of universal rights stems from Islamic civilization. He says, for example, that the right to life ultimately originates in Islam. It is Islam who have presented this value to humanity. In that same vein, he asserts the supremacy of Islamic notions of liberty and free expressions, compared to similar notions that dominate in Western societies and cultures.<sup>234</sup> In his section on “Freedom of conscience and conviction” al-Mawdūdī elaborates on the issue of religious freedom. But he does so rather selectively. He makes no mention, for instance, of the contested issue of apostacy and does not engage the classical Islamic legal tradition in this regard.<sup>235</sup> Al-Mawdūdī also seems to make a historical caricature of premodern Western notions of international law and the laws on warfare:

In the days when Islam came into focus the world was completely unaware of the concept of humane and decent rules of war. The West became conscious of this concept for the first time through the works of the seventeenth century thinker, Grotius. But the actual codification of the ‘international law’ in war began in the middle of the nineteenth century. Prior to this no concept of civilized behaviour in war was found in the West. All forms of barbarity and savagery were perpetrated in war, and the rights of those at war were not even recognized, let alone respected.<sup>236</sup>

Towards the end of his discussion on Islamic conceptions of universal human rights – interspersed with negative evaluations of Western counterparts – al-Mawdūdī described the civilizational superiority of the Islamic rights scheme with a tone of triumphalism. He asserts that fourteen centuries ago, Islam brought civilization to mankind. Before that nations and tribes were basically in a perpetual state of war. Instead, Islam brought the rule of law and stability to human societies. Al-Mawdūdī

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<sup>233</sup> Al-Mawdūdī, *Human Rights in Islam*, 11.

<sup>234</sup> Al-Mawdūdī, *Human Rights in Islam*, 15 and 28.

<sup>235</sup> Al-Mawdūdī, *Human Rights in Islam*, 29-30. For more on apostacy in classical Islamic jurisprudence, see Rudolph Peters and Gert J. J. de Vries, “Apostacy in Islam”, *Die Welt des Islams* 17, No. 1-4 (1976-1977): 1-25. Also see Bielefeldt, “Western” versus “Islamic” Human Rights Conception?, 104. Bielefeldt calls al-Mawdūdī’s approach a “superficial and uncritical “Islamization” of human rights”.

<sup>236</sup> Al-Mawdūdī, *Human Rights in Islam*, 35.

mentions he finds inspiration in the realization that for all of the triumphalism of the West, and all of the claims to civilizational and scientific advance, the West was unable to bring forth the legal and social frameworks based in equity and equality that were brought forth by Islamic civilization all those centuries ago.<sup>237</sup>

Interestingly, and scholar Ruud Peters observed this as well, al-Mawdūdī made no reference to the classical Islamic legal tradition at all in his work on human rights.<sup>238</sup> Nowhere does he cite the classical jurists of Islam and their juridical literatures. He merely cited disparages verses from the Qur'ān and prophetic narrations (*ḥadīth*, pl. *aḥadīth*). In his treatment of the conundrum of Islam and human rights, al-Mawdūdī shows himself to be completely disconnected from the discursive legal and intellectual tradition of Islam. In that sense, there is no real difference to speak of between the Apologetic and Conflictual Approaches to Islam and human rights. Both seem to be highly ideological, albeit at opposite directions of the spectrum. But more importantly, both represent a discontinuity with the legal and intellectual tradition of Islam.

In addition, and this seems to be a fair critique, it is argued that al-Mawdūdī merely harmonizes modern human rights concerns with traditional Sharī'a-values. But he does so in a manner that in no way addresses any of the contentious issues, such as those mentioned by Bielefeldt above. In formulating his response to modern notions of human rights, and how they relate to Islamic religious perspectives on human dignity, al-Mawdūdī's approach seems to be rather selective.<sup>239</sup> To give but one example, al-Mawdūdī mentions only color, race, language, and nationality in the context of human equality. But he makes no mention of religious and gender equality.<sup>240</sup> On a more positive reading of al-Mawdūdī, however, Irene Oh argues that despite al-Mawdūdī being conservative and vehemently against the West, he still supported the idea of universal human rights, regardless of their perceived "Western origins". While al-Mawdūdī saw human rights, according to Oh, as a being perfected

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<sup>237</sup> Al-Mawdūdī, *Human Rights in Islam*, 39.

<sup>238</sup> Ruud Peters, "Islamic Law and Human Rights: A Contribution to an Ongoing Debate", *Islam and Christian-Muslim Relations* 10, No. 1 (1999): 7-8.

<sup>239</sup> See Bielefeldt, *Muslim Voices in the Human Rights Debate*, 603.

<sup>240</sup> Al-Mawdūdī, *Human Rights in Islam*, 23.

by Islam, in al-Mawdūdī's perception they endorse basic principles, such as democracy, social coexistence, liberty of thought, and so forth.<sup>241</sup>

Al-Mawdūdī who wrote his work in 1977, is fairly early in his response to the emerging modern human rights regime. He seems to be the first Muslim scholar to have extensively written on the subject and is certainly the most cited scholar in secondary literature on the topic.<sup>242</sup> But he was certainly not sole in writing apologetically about Islam and human rights, and several have followed in his footsteps. And while these works seem to be more balanced – and more well-written – the basic approach remains the same. A case in point is Maher Hathout's *In Pursuit of Justice: The Jurisprudence of Human Rights in Islam* (2006), which is a much more elaborate and impressive treatment of the subject of Islam and human rights (written in a staggering 485 pages), but remains by-and-large a collection of Qur'ānic verses and prophetic narrations.<sup>243</sup> Even though its tone is much less apologetic than the work of al-Mawdūdī, it still fails to engage the classical Islamic legal heritage.

It must be said that citing these fundamental texts of the religious tradition is not misplaced in and of itself. However, the question remains how these texts were utilized and interpreted by the scholars of Islam. How were they historically contextualized and what place did they have in the interpretative and hermeneutic tradition of classical Islamic jurisprudence. The approaches we have discussed so far by-and-large seem to have been lacking in this regard and therefore can hardly claim to have genuinely engaged the Islamic legal tradition, let alone make generalizing claims about it.

#### **2.4. The Discursive Perspective: Traditionalism and Revivalism**

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<sup>241</sup> Oh, *Islamic Conceptions of Human Rights*, 261.

<sup>242</sup> Al-Mawdūdī figures prominently, for example, in the work of Mayer, *Islam and Human Rights*, at 29, 65-66, 71, 73, and 81.

<sup>243</sup> Maher Hathout, *In Pursuit of Justice: The Jurisprudence of Human Rights in Islam* (Los Angeles, California: Muslim Public Affairs Council, 2006). Also see the work of Ibrahim Abdulla Al-Marzouqi, *Human Rights in Islamic Law* (Abu Dhabi, 2000), which seems to be much more scholarly in scope. For example, it has a chapter on Islamic legal theory (*uṣūl al-fiqh*) and makes use of classical Arabic legal sources. However, it is not an academically published – let alone peer-reviewed – work.

The Conflictual and Apologetic Perspectives described above might be criticized on the grounds that they are simplistic and one-sided. On the one side, those who ascribe to the Conflictual Perspective do not seriously engage or explore the rich Islamic legal and intellectual tradition. Instead, they focus on a selection of peripheral scholars that write in the contemporary period, such as al-Mawdūdī. Similarly, they tend to look at extreme practices in Muslim majority countries as a measuring rod for perceived Islamic stances towards the modern human rights discourse. On the other side, apologists tend to entertain too simplistic of an approach that is often superficial. It does not consider the complexities and intricacies of modern international human rights law. In addition, it tends to reduce the modern human rights project as an extension of Eurocentric imperialism. Lastly, it also praises Islam as the exclusive herald of human rights to humanity.

Similar critiques have been voiced by Ruud Peters and Mashood Baderin. Peters, for example, criticizes what he calls the “incriminating” and “apologetic” approach.<sup>244</sup> For Peters, Islamic law – like all premodern legal systems – cannot be expected to meet the concerns of present-day people. To do so would be a crude form of presentism, since the bulk of the Islamic juridical literature was formulated approximately a thousand years ago. Peters argues that even eighteenth-century rights declarations proclaimed in the West, such as France and America, were severely compromised as they did not concern women, nor did they concern blacks. Eighteenth-century rights declarations fundamentally endorsed only rights for men who were white. In addition, these rights only counted for men who were free, as slavery was still fully endorsed and practiced in these societies.<sup>245</sup> Just as evaluating 200-year old declarations according to present-day understandings would be rather meaningless, according to Peters, so would it be to just classical Islamic jurisprudence according to modern international human rights instruments.

Mashood Baderin similarly observes that a lot of the previous scholarship on Islam and human rights was either religious apologetics or based on highly exclusionist – and we might add Eurocentric – interpretations of international human rights law. This arguably strengthens the Conflictual Perspective’s theory of incompatibility. Baderin

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<sup>244</sup> Peters, *Islamic Law and Human Rights*, 5-14.

<sup>245</sup> Peters, *Islamic Law and Human Rights*, 6.

rightly points out this is to the detriment to those aspects – and according to Baderin there are many – of international human rights law and Islamic law that are in harmony with each other or overlap in certain ways.<sup>246</sup> As Waardenburg points out, scholars of religion have allotted insufficient attention to notions such as justice – and I might add human dignity – in the Islamic intellectual tradition.<sup>247</sup>

First, it might be helpful to consider that Islamic responses to the emergence of the modern human rights regime are not monolithic. Not only are there Muslim intellectual and theologians who wholly accept or reject modern human rights, as the Conflictual and Apologetic Perspectives would have it. In fact, there is a wide variety of positions in between that reflect the inherent plurality and openness of Islamic civilization. Irene Oh sums the various positions up well in her survey of Islamic conceptions of human rights. She points out that even though the idea of human rights has been critiqued – sometimes severely – by Muslim scholars in the modern era, the vast majority of them have come to accept human rights values. Muslim scholars and intellectual form different proclivities and schools of thought, ranging from more conservative to more progressive or liberal, incline to accept the compatibility of human rights with the Islamic worldview. However, they are also in agreement that there is a certain Western partiality or bias in the way international human rights are interpreted and practiced. What Muslim scholars disagree about, Oh argues, are their interpretive methods and hermeneutics with regards to the Islamic intellectual tradition vis-à-vis the openness or closeness to ideas from the West, including Western interpretations of human rights values.<sup>248</sup>

What we see here, is a very nuanced view of the relationship between Islamic values and human rights. The majority of Islamic intellectuals and theologians, by far, does not wholeheartedly reject the idea of modern human rights but in fact embraces it on its own terms on the basis of Shari'a values. Nor does it neglect the Western or Eurocentric bias that often undergirds contemporary discussions on human

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<sup>246</sup> Mashood A. Baderin, *International Human Rights and Islamic Law* (New York: Oxford University Press, 2003), 3.

<sup>247</sup> Waardenburg, *Human Rights, Human Dignity, and Islam*, 183. For a notable recent contribution that *does* engage the Islamic intellectual tradition, see Ramon Harvey, *The Qur'an and the Just Society* (Edinburgh: Edinburgh University Press, 2018).

<sup>248</sup> Oh, *Islamic Conceptions of Human Rights*, 261.

rights.<sup>249</sup> In doing so, modern human rights are critically evaluated and not taken at face value. In doing so, the community of Islamic intellectuals and theologians – rather than a simplistic black-and-white bifurcation of rejection or acceptance – tend to occupy a large margin of grey area between a continuum of either more progressive or more conservative inclinations.

Based on these considerations, we might opt for a third approach. This approach we might call the Discursive Perspective.<sup>250</sup> It seeks to go beyond mere reductionist presentism and defensive triumphalism and argues that it might be more productive to treat the Islamic legal tradition as a lived discursive tradition, which takes into consideration both its historical context *and* its internal diversity, continuity, dynamism and potential for change. The legal tradition of Islam is characterized by scholarly debates, both between contemporaries and between the historical generations of scholars and jurists.<sup>251</sup> It is characterized by legal plurality and debate about the sound understanding and proper application of sources texts, within the hermeneutical framework of Islamic law and legal theory.<sup>252</sup> The Discursive Perspective thus approaches the debate on Islam and human rights from the principle of openness.<sup>253</sup> That is, it tries to avoid the two extremes of reducing Islamic law and human rights to inherent conflict and incompatibility on the one side, and pure religious apologetics on the other side. It treats the Islamic legal tradition as a lived tradition that is based on hermeneutical openness and that approached the world from a perspective of hermeneutical flexibility, that is provided by and imbedded in the interpretive principles of Islamic legal and intellectual culture, and that's strives towards social stability, coexistence and basic rights for all human beings.<sup>254</sup>

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<sup>249</sup> These we have extensively discussed in chapter one of this thesis.

<sup>250</sup> The idea of Islam as a discursive tradition stems from the work of Talal Asad, “The Idea of an Anthropology of Islam”, *Qui Parle* 17, No. 2 (2009): 1-30.

<sup>251</sup> Oh, 263.

<sup>252</sup> Peters, 2013, 94.

<sup>253</sup> For the idea of openness as an “open science”, see Recep Şentürk, “Toward an Open Science and Society: Multiplex Relations in Language, Religion and Society – Revisiting Ottoman Culture”, *İslâm Araştırmaları Dergisi* 6 (2001): 93-129.

<sup>254</sup> Javaid Rehman, “Conflicting Values or Misplaced Interpretations? Examining the Inevitability of a Clash between ‘Religions’ and ‘Human Rights’”, *Does God Believe in Human Rights?*, eds. Nazila Ghanea, Alan Stephens, and Raphael Walden (Leiden and Boston: Martinus Nijhof, 2007), 83.

## 2.5. Conclusion

In this chapter, we have discussed three main perspectives on Islam and human rights research. These approaches may be summarized as follows:

<b>Main perspectives in Islamic human rights research</b>		
<i>Perspective:</i>	<i>Characteristics:</i>	<i>Relation to Tradition:</i>
Conflictual	Presentist, Orientalist	Discontinuous
Apologetic	Reactionary, anachronistic	Discontinuous
Discursive	Traditionalist, revivalist	Continuous

*Figure 2: Main perspectives in Islamic human rights research*

The Conflictual Perspective argues that Islam is inherently opposite to modern human rights. It tends to focus on the so-called “narrative of conflict”. This approach is presentist in nature, as it judges a premodern legal tradition according to modern understandings of international human rights instruments. Thereby, it refuses to understand Islamic law in its historical complexity and treats it as a monolithic and static legal tradition. Apologetic Perspective, on the other hand, is defensive in nature and argues that human rights have always existed in Islam, even before they emerged in Western modernity. It lambasts the supposed Eurocentrism and imperialism of the modern human rights project and exhibits a rather crude form of simplistic triumphalism. Arguably, both approaches are unhelpful to genuinely shed light on the question of how the Islamic law and modern interpretations of human rights might be compared. Both approaches seem to lack a thorough engagement with classical Islamic legal tradition on its own terms, taking into consideration both its historical context and its internal diversity and complexity.

This thesis adopts a Discursive Perspective and seeks to go beyond the reductionism and presentism of the Conflictual Perspective and the defensive triumphalism of the Apologetic Perspective. It argues that it might be more productive to treat the Islamic legal tradition as a lived discursive tradition, which takes into consideration both its

historical context *and* its internal diversity, continuity, dynamism and potential for change. As such, it is guided by the principle of openness.



## CHAPTER III

### FROM *LEX NATURALIS* TO *IUS NATURALE*: RIGHTS DISCOURSES IN THE WESTERN LEGAL TRADITION

“At the root of the disagreement over the language of rights is a question of moral ontology.”

*Oliver O’Donovan*<sup>255</sup>

“*Ius* is a moral quality of a person, enabling him to have or do something justly.”

*Hugo Grotius*<sup>256</sup>

If we are to retrace the historical roots of the modern concept of rights and we want to be able to identify rights discourses in premodernity, we need to have a sound understanding what the concept of rights entails. What are rights according to different legal thinkers, both historical and contemporary? The first section of this chapter (Section 3.1.) delves into the concept of rights from the perspective of modern legal studies. In this section we deal with the conceptual ambiguity of the legal concept of rights, the Hohfeldian analytical framework of rights and its jural relations, and the question of moral rights versus legal rights.

The second section of this chapter (Section 3.2.) gives an overview of various – often contested – historical accounts of rights discourses in the pre-modern west. Making use of methodological insights of conceptual history (*Begriffsgeschichte*), we compare and contrast the different histories of rights discourses and evaluate the arguments presented by some of the main authors in the field of the history of rights. This section deals with the Greco-Roman heritage, medieval natural law, early modern natural rights theory, and the Enlightenment age of rights declarations. In the final section

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<sup>255</sup> Oliver O’Donovan, “The Language of Rights and Conceptual History”, *Journal of Religious Ethics* 37, No. 2 (2009): 202.

<sup>256</sup> Translated from Latin in Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Georgia: Scholars Press, 1997), 325.

(Section 3.3.) we offer our conclusions related to the concerns that are germane to this thesis.

### **3.1. Coming to Terms with Rights: Modern Legal Perspectives**

Before we attempt to elaborate on a conceptual history of rights in the Western and Islamic legal traditions, we would do well to define what we mean by “rights” today. Here, we are not so much concerned with the historical trajectories of rights discourses and their semantical shifts throughout various historical epochs in corresponding juridical literatures. Rather, we want to present an overview of the normative definitions of rights as one would encounter them in the dominant scholarly literatures of modern academic legal studies on the topic. This, we do with the aim of “embedding” our conceptual histories of premodern rights in modern normative understandings of rights, while also informing our historical inquiries into premodern rights discourses in the subsequent chapters of this thesis.

#### **3.1.1. Conceptual Clarity: Taking Rights Language Seriously**

Rights language is deeply imbued with conceptual ambiguity. One of the reasons the debate is so obscured is because several terms are used to convey the idea of rights. Terms like “natural law”, “natural rights”, and “human rights” are often used interchangeably in legal-historical and modern legal scholarship.<sup>257</sup> And while these terms might – or might *not* – be conceptually related, they are certainly not the same. This uncritical conflation of terms might be the reason why some historians of rights have pointed out that “the language of rights is difficult to use straightforwardly”.<sup>258</sup> There is, as historian David Boucher mentions, a “lack of clarity about what separates, and what unites, the natural law, natural rights, and human rights idioms”.<sup>259</sup>

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<sup>257</sup> See for example Brian Tierney, “Dominion of Self and Natural Rights Before Locke and After”, in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Vipri Mäkinen and Petter Korkman (Dordrecht: Springer, 2006), 173; And Jean Porter, “From Natural Law to Human Rights: Or, Why Rights Talk Matters”, *Journal of Law and Religion* 14, no. 1 (1999-2000), 77. Porter explicitly mentions “Throughout this paper, I treat the terms ‘human’ and ‘natural’ rights as synonyms”, which is highly problematic as we shall see throughout this chapter.

<sup>258</sup> Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 1.

<sup>259</sup> David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (New York: Oxford University Press, 2009), 3.

The difficulties of rights language have not only been noted in legal history. Modern legal scholarship has similarly lamented its abstruseness. In his legal tractate *Preliminary Treatise on Evidence* (1898) the American legal theorist and scholar of the common law, James Bradley Thayer (d. 1902) already complained of the increasing complexity of modern legal language, and hence the increasing need to clarify legal terminology and better discriminate between legal concepts that are often all-too-easily conflated with one another.

In his treatise, Thayer stresses that how language is phrased is extremely important, as legal culture develops and progresses into the future. Human societies are becoming increasingly complex, and people are confronted with an ever-growing diversity of issues and happenings in their lives. Hence, we need to be able to discriminate and distinguish in our legal language, in order to accommodate these new developments. Legal language, so to say, must constantly catch up to modern realities and developments. In that manner, law and legal language is not that much different, Thayer, argues, from other fields of knowledge and human intellectual inquiry, in that conceptual clarity will help us understand these new realities better. In addition, uncaredful use of legal language might have damaging and detrimental effects on the lives of people. Hence, we would do well to take “phraseology”, as he names it, seriously.<sup>260</sup>

In the spirit of Thayer, contemporary legal scholarship stresses the pivotal role of legal concepts in understanding and analyzing the law. The German legal philosopher Dietmar von der Pfordten, for example, notes that “conceptual analysis is crucial for legal reasoning”. He also points out that an extensive inquiry into the formation and interpretation of legal concepts “as they appear in their natural legal environment” is necessary for a complete and sound understanding of their role in a given legal system.<sup>261</sup> This is why conceptual clarity is of the utmost importance when

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<sup>260</sup> Cited in Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1919), 35, fn. 25.

<sup>261</sup> See Jaap C. Hage and Dietmar von der Pfordten (eds.), *Concepts in Law* (Dordrecht: Springer, 2009), xi and 18-19.

investigating legal terminology, especially when it concerns a multilayered, malleable, and ambiguous concept such as “rights”.<sup>262</sup>

In modern legal scholarship rights are commonly defined as “entitlements” or “claims”. More precisely, it refers to the idea that individuals or groups of individuals possess certain entitlements that in turn obligates others to both acknowledge and respect those entitlements.<sup>263</sup> Rights thus understood are the prerogative of a person or group of persons – or other persons or groups of persons – to either perform or *not* perform certain actions, or to be or *not* to be in certain states.<sup>264</sup> One way of thinking about rights – common mostly in legal philosophy – is along the lines of analytical or normative aspects of rights. Normative aspects of rights have to do with the proper content and distribution of rights, whereas analytical aspects of rights pertain to the fundamental characteristics of rights and its jural relations with correlative concepts, such as duties, privileges, powers and immunities.<sup>265</sup> Normative aspects of rights are further divided into substantive concerns and procedural concerns. Substantive concerns focus on questions regarding the contents of rights, while procedural concerns focus on questions regarding the determination of rights. That is, the question of who decides to whom rights are allotted (i.e., who is encapsulated within the scope of certain rights).<sup>266</sup>

### 3.1.2. Rights and Jural Relations: The Hohfeldian Framework

In the field of modern legal philosophy (especially in analytical jurisprudence) the foundational work of the American jurist Wesley N. Hohfeld (d. 1918) has played a major role. In his collection of legal essays, *Fundamental Legal Conceptions as Applies in Judicial Reasoning*, Hohfeld developed a scheme for analyzing the jural relations of rights. While Hohfeld’s typology of rights is most frequently used in modern legal studies, it has also been fruitfully applied in legal history. Historian of

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<sup>262</sup> For an overview of modern usages, see George W. Rainbolt, *The Concept of Rights*. (Dordrecht: Springer, 2006).

<sup>263</sup> Peter Jones, *Rights* (Hampshire and London: The Macmillan Press, 1994), 1.

<sup>264</sup> Leif Wenar (2021), “Rights”, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2021) (<https://plato.stanford.edu/archives/spr2021/entries/rights/>, accessed June 14, 2022).

<sup>265</sup> Matthew H. Kramer, “Rights in Legal and Political Philosophy”, in *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (New York: Oxford University Press, 2008), 414.

<sup>266</sup> Kramer, *Rights in Legal and Political Philosophy*, 421-427.

medieval law Charles Reid, for example, eloquently applied Hohfeldian analytical vocabulary to the medieval European canon law tradition.<sup>267</sup>

The problem at the root of the ambiguity of rights, says Hohfeld, lies in a certain reductionism in which only certain types of jural relations are taken into consideration at the expense of others. In his important work, Hohfeld decries reductionism and simplification in the legal language surrounding right. Rights, he argues, consist of all kinds of jural relations, and should not be merely reduced to rights and duties. This would be an obstacle to conceptual clarity and transparent thinking about the law and legal matters. The simplified reduction of the right-duty binary is inadequate to address the complexities of legal relations and interests involving rights. It simply does not help us, because words then remain vague and ambiguous. In that sense, Hohfeld thinks, words such as “rights” can be “chameleon-hued”, in the sense that they can have different meanings in different context, if we do not elaborate on its definitions and various aspects that make up the whole.<sup>268</sup>

The originality of Hohfeld’s rights scheme lies in the realization that rights consist not of one but a *variety* of jural relations.<sup>269</sup> Hohfeld aims to be exhaustive in elaborating the various jural relations that come into play when dealing with such claims between people. The term “rights”, he argues, is indiscriminately applied to cover not only claim-rights (or rights *proper*), but privileges, powers, and immunities as well.<sup>270</sup> For Hohfeld, rights *in a narrow sense*, are rights that correlate with duties. For example, when X has a right against Y to not have his property violated, then Y has the corresponding duty not to violate X’s property. A proper synonym for the term “right”, he argues, would be a “claim”.<sup>271</sup> Thus, someone has a “right” or “claim” over someone else, and that person conversely has duties towards the rights-holder or claimant. To specify these kinds of rights – i.e., claims that entail duties – they are also sometimes called “claim-rights”.

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<sup>267</sup> see Charles J. Reid Jr., “The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry”, Boston College Law Review 33, no. 37 (1991): 37-92.

<sup>268</sup> Hohfeld, *Fundamental Rights Conceptions*, 35.

<sup>269</sup> Duncan Ivison, *Rights* (Stocksfield: Acuman, 2008), 12.

<sup>270</sup> Hohfeld, *Fundamental Rights Conceptions*, 36.

<sup>271</sup> Hohfeld, *Fundamental Rights Conceptions*, 38.

In order to further disambiguate the various usages of the term “rights”, Hohfeld developed a rights typology that includes eight fundamental jural conceptions. Four of these are a comprehensive general classification of legal rights in a generic sense. These are claim-rights, privileges, powers, and immunities. The other four jural conceptions are their respective correlatives classified in four legal burdens, namely duties, “no-rights”, liabilities and disabilities. Some of these terms were neologisms coined by Hohfeld himself, such as “no-rights”, which basically refers to the “absence of duties”. *Rights* are the affirmative claims persons can have over other people, which corresponds to the legal burden of a *duty*. *Privileges*, on the other hand, do not have corresponding duties. Hence, their correlatives are *no-rights* or the “absence of duties”.<sup>272</sup> In the same vein as the example above, whereas X has the *right* that Y does not violate his property, X has the *privilege* to freely use his own property. Privileges are otherwise also called “permissions” or “liberties” in modern legal language.<sup>273</sup> In the narrow sense of the meaning, according to the Hohfeldian rights scheme, a right without a corresponding duty is not a right proper, but a liberty.

*Power* refers to the legal ability (or “volitional control”) of a person to alter the legal relations of other persons or of the person’s own legal relations. For example, in the case when X extinguishes his own legal interests (also known as “abandonment”) and then transfers his legal interests to Y, such as in the transfer of the ownership of property. Or when X uses his legal power to create contractual obligations in others. A person whose legal relations are altered due to the exercise of someone else’s legal power, on the other hand, is under *liability*.<sup>274</sup> *Immunity* refers to a person that is not subject to the power of another person to alter the legal relations of that person who has a right to something. In other words, when a person has immunity, that person’s legal relations cannot be changed by the acts of any other person. *Disability*, lastly, refers to those persons who cannot change the legal relations of other persons (i.e., they are under a disability).<sup>275</sup>

### The Hohfeldian Rights Framework

<sup>272</sup> Hohfeld, *Fundamental Rights Conceptions*, 35-50

<sup>273</sup> Ivison, *Rights*, 11.

<sup>274</sup> Hohfeld, *Fundamental Rights Conceptions*, 50-60.

<sup>275</sup> Hohfeld, *Fundamental Rights Conceptions*, 60-64.

<i>Jural</i>	Right	Privilege	Power	Immunity
<i>Opposites</i>	No-right	Duty	Disability	Liability
<i>Jural</i>	Right	Privilege	Power	Immunity
<i>Correlatives</i>	Duty	No-right	Liability	Disability

Figure 3: Chart of the Hohfeldian Rights Framework (source: Hohfeld, *Fundamental Rights Conceptions*, 36).

In the Hohfeldian rights scheme, thus, powers stand in contrast to immunities in very much the same way as rights stand in contrast to privileges. A right is one's affirmative claim against another, while a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative control over the legal relationship of another, while immunity is one's freedom from the control (i.e., legal power) of another with regards to one's legal relations.<sup>276</sup>

In most instances, rights involve a "bundle of Hohfeldian elements".<sup>277</sup> For example, regarding owning some kind of property (a house, a bicycle, or a book). If X owns a certain type of property, he has the right not to be interfered by others in his possession of the property. But X also has the privilege to use and enjoy his property in whichever way he sees fit. He also has the power to temporarily rent his property out, to sell it, or to give it away. At the same time, X has certain immunities against others with regards to altering any of the legal relations he is involved in.

### 3.1.3. The Question of Enforceability: Moral Rights versus Legal Rights

Hohfeld's rights scheme is based on a conception of rights as *legal* rights, although some have argued his typology of rights can be equally applied to *moral* rights.<sup>278</sup> The distinction between the "moral" and "legal" dimensions of the law seems to be a distinct development particular to Western legal history. This is in contradistinction to the Islamic legal tradition, in which the Shari'a framework entertains no such

<sup>276</sup> Hohfeld, *Fundamental Rights Conceptions*, 60.

<sup>277</sup> Ivison, *Rights*, 12.

<sup>278</sup> See Peter Jones, *Rights* (Hampshire and London: The Macmillan Press, 1994), 47-49; William A. Edmundson, *An Introduction to Rights* (New York: Cambridge University Press, 2012, second edition), 76-82.

dichotomy between the moral and the legal.<sup>279</sup> The dichotomy is also distinctly *modern* and did not exist in pre-Enlightenment Europe.<sup>280</sup> It was only in the twentieth century, that legal philosophers of the school of legal positivism have sought to make a strict distinction between the “moral” and the “legal” dimensions of the law.

The critique on rights as moral rights extends back to Jeremy Bentham (d. 1832). In his treatise on utilitarian philosophy and jurisprudence, Bentham laments the “emptiness” of moral claims. What poses for “morality”, he argues, is more often simply an expression of human appetites and passions, based in crude feelings such as desire, egoism, viciousness and greed. In the end, they are flawed and unimportant.<sup>281</sup>

This critique on the morality of the law was extended by John Austin (d. 1859) and reached its fullest expression, perhaps, in the works of the contemporary legal positivist philosopher H. L. A. Hart (d. 1992).<sup>282</sup> Austin was still very much connected to earlier debates on the usefulness of moral theories embedded in the natural rights tradition of theorists like Grotius and Pufendorf. These were writers of the so-called “law of nations” genre of juridical literature, whom Bentham accused of a “confusion of ideas” by mixing “positive international morality” (i.e., the law of nations) with their own “vague conceptions of international morality as it *ought to be*” (i.e., the law of nature).<sup>283</sup> Hart similarly maintained that no necessary relation existed between morality and the law.<sup>284</sup>

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<sup>279</sup> Wael B. Hallaq, “Groundwork of the Moral Law: A New Look at the Qur’ān and the Genesis of Shari’ah”, *Islamic Law and Society* 16 (2009): 239-279.

<sup>280</sup> Hallaq, *Groundwork of the Moral Law*, 257.

<sup>281</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Batoche Books, 2000, originally published in 1789), 95. (Emphasis by the author.)

<sup>282</sup> John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (New York: Cambridge University Press, 1995, originally published 1832);

<sup>283</sup> Austin, , *The Province of Jurisprudence Determined*, 160. At this point, it must be mentioned that despite Austin’s strict separation between law and morality, he did in fact not deny that the content of legal rules is not informed by morality. See Isabel Turégano Mansilla, “Reconstructing Austin’s Intuitions: Positive Morality and Law”, *The Legacy of John Austin’s Jurisprudence*, eds. M. Freeman and P. Mindus (Dordrecht: Springer, 2013), 299.

<sup>284</sup> For a succinct elaboration of his theory, see H. L. A. Hart, “Positivism and the Separation of Law and Morals”, in *Essays in Jurisprudence and Philosophy*, H. L. A. Hart (Oxford: Clarendon Press: 1983), 49-87.

Apart from the school of legal positivism, however, the vast majority of metaethical theories that inform legal studies agree that moral rights *do* indeed exist.<sup>285</sup> Our ideas and beliefs about rights are shaped, at least in part, by the arguments of our moral convictions.<sup>286</sup> On this understanding, the distinction between the moral and legal aspects of the law is artificial. In fact, Hart's later student and successor, the legal and political philosopher Joseph Raz, would come to accept that morality *can* be part of the law. In his work he defends what he calls a "moderate" version of legal positivism that endorses a "necessary connection between law and popular morality" (also called "social morality").<sup>287</sup> Many contemporary legal scholars have come to hold the position that it is a mistake to think of rights as primarily a "moral" *or* "legal concept", while in fact they are both.<sup>288</sup> There has also been a resurgence in modern natural law scholarship – despite its severe critiques in early modernity by the likes of Hume, Bentham, and Kant – that argues for the intimate relationship between morality and the law. A case in point is the work of John Finnis, who argues that modern human rights should be grounded in moral precepts of the natural law.<sup>289</sup>

Some scholars assume that moral and legal rights are essentially the same.<sup>290</sup> This seems to be an oversimplification. A better way to think about it, perhaps, is that moral and legal rights might – or might *not* – have the same subject, object, and content (such as that a person has the legal *and* moral right to receive what they have paid for). In this understanding, moral rights are implied by a moral rule system, while legal rights are implied by a legal rule system.<sup>291</sup> Another way of thinking about moral and legal rights is genealogical in nature. This is the understanding that underneath the very idea of legal rights lies a moral framework. In some sense, legal rights are 'moral

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<sup>285</sup> Rainbolt, *The Concept of Rights*, 80. Some have even claimed that legal positivism – like logical positivism – is effectively dead. For example, see Maurice Cranston, "Are There Any Human Rights?", *Daedalus* 112, No. 4 (1983): 6.

<sup>286</sup> Ivison, *Rights*, 6.

<sup>287</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 39 and 45.

<sup>288</sup> Ivison, *Rights*, 1.

<sup>289</sup> John Finnis, "Grounding Human Rights in Natural Law", *The American Journal of Jurisprudence* 60, No. 2 (2015): 199-225. For an overview of recent scholarship, see George Duke and Robert P. George (eds.), *The Cambridge Companion to Natural Law and Jurisprudence* (Cambridge: Cambridge University Press, 2017).

<sup>290</sup> See for example David Lyons, "The Correlativity of Rights and Duties", *Noûs* 4, no. 1 (1970): 45, fn. 3.

<sup>291</sup> Rainbolt, *The Concept of Rights*, 77-78.

rights that find expression in legal form.<sup>292</sup> As with positive legal rights, moral rights can be subdivided into different categories, such as moral rights pertaining to a single person, a specific group or people, or the moral rights of *all* human beings in all situations.<sup>293</sup> The latter group of moral rights seems to correspond well to our modern conception of human rights.

The idea of moral rights remains of primal importance because it serves the double role of establishing the function of government, which has the responsibility to protect its citizen's rights, and at the same time to *limit* the authority of the government when it transgresses its citizen's rights. Both functions need moral rights formulated *independently* of governments because they ultimately decide how a government should act in a particular situation. They must be moral rights because legal rights spring forth from governments themselves. These legal rights, then, may be recognized and enforced by the law but they ultimately have a "non-legal foundation".<sup>294</sup> Thus natural moral rights – rights *tout court* – are transferred into a particular legal system as "positive legal rights", i.e., the rights that are enjoyed by citizens living under a certain constitution or jurisdiction that are upheld by its courts.<sup>295</sup> Rights as such – vis-à-vis other types of moral claims – are sometimes described as aspiring to "institutional embodiment" and "enforceability".<sup>296</sup> That being said, not all moral rights necessarily *ought* to be legal rights. There are many examples of moral rights that arguably cannot – should not – per se be legislated by law, such as that parents have a "moral right" to be obeyed by their children or that the elderly have the "moral right" to be taken care of in their old days.

Modern human rights are considered by many scholars as universal moral rights. Legal philosopher John Finnis, for example, argues that human rights are "fundamental and general moral rights".<sup>297</sup> Johannes Morsink, the primary historian of the United Declaration of Human Rights, similarly refers to modern human rights as "more or

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<sup>292</sup> Ivison, *Rights*, 30.

<sup>293</sup> Cranston, *Are There Any Human Rights?*, 10-11.

<sup>294</sup> Jones, *Rights*, 45.

<sup>295</sup> Cranston, *Are There Any Human Rights?*, 10-11.

<sup>296</sup> Ivison, *Rights*, 7.

<sup>297</sup> John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 2011), 198. It should be noted here that Finnis uses the terms "natural rights" and "human rights" synonymously. The "modern grammar of rights", he argues, is simply a "contemporary idiom" for natural rights. The problematics of the uncritical conflation of these terms is addressed in Section 3.2. of this thesis.

less abstract moral rights and principles”.<sup>298</sup> But not *all* moral rights are human rights. A distinction is to be made between human rights – as universal moral claims – by the mere virtue of being a human being, and special moral rights that pertain to only *some* human beings by virtue of particular properties, offices, or relations to other people they have (such as the rights for children, the elderly, criminal defendants, or citizens).<sup>299</sup>

### 3.2. A Conceptual History of Rights in the Western Legal Tradition

Various historical accounts have been given for our modern notions of human rights. The genealogy of human rights remains highly contested. Some scholars argue that premodern rights discourses started to develop in the medieval Christian natural law tradition of Thomas Aquinas (d. 1274) and his contemporaries.<sup>300</sup> Most commonly though, the history of rights discourses as mature *theories of rights* is situated in the early modern natural rights tradition that extends from Hugo Grotius (d. 1645) to John Locke (d. 1704).<sup>301</sup> In the eighteenth century, the theory of rights would find a new form of expression in the idea of the “rights of man”. In this “age of rights declarations” rights theories would be infused with Enlightenment ideas of human dignity and inherent worth, such as in the works of Immanuel Kant (d. 1804).<sup>302</sup> All of these various rights discourses entail different “incarnations” of the idea of rights and their histories relate to each other in complex ways.<sup>303</sup> These historical accounts have in common that the idea of modern human rights stems from Western civilization. They argue that certain values and ideas in the Western *weltanschauung* somehow uniquely prepared the world the emergence of the human rights regime in the West. As such, they are Eurocentric in nature. The histories presented here should be

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<sup>298</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), xi.

<sup>299</sup> Joel Feinberg, “In Defense of Moral Rights”, *Oxford Journal of Legal Studies* 12, No. 2 (1992): 154.

<sup>300</sup> See C. Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (New York: Palgrave Macmillan, 2010).

<sup>301</sup> Knud Haakonssen, “Early Modern Natural Law Theories”, in *The Cambridge Companion to Natural Law and Jurisprudence*, eds. George Duke and Robert P. George (New York: Cambridge University Press, 2017), 76-102.

<sup>302</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York and London: W. W. Norton & Company, 2007).

<sup>303</sup> See the methodological reflections in the introduction of this thesis.

understood in light of our discussions on legal Orientalism and the realization that all human cultures and societies have some expression of human rights.

### **3.2.1. Rediscovering the Greco-Roman Heritage: The Emergence of Medieval Canon Law**

Some legal historians, such as the late John M. Kelly (d. 1991), trace the Western legal tradition back to the legal cultures of ancient Greece and Rome. In his view, the Greco-Roman tradition belongs to a “more or less continuous European tradition” that extends back from Aristotle to the medieval canon and civil law traditions of Europe.<sup>304</sup> However, to claim that the Aristotelian tradition is exclusively part of a continuous Western legal tradition is historically problematic. Rather, the Greco-Roman heritage – and its Aristotelianism – is a shared intellectual tradition, as it was also inherited, criticized, developed, and eventually absorbed into Islamic civilization.<sup>305</sup> In addition, it was not until the twelfth century that medieval canon law jurist “rediscovered” the Greco-Roman tradition. Often, this happened through Latin-Arabic translations and commentaries written by Muslim scholars.<sup>306</sup> Surely, the Western legal tradition was influenced by both Judeo-Christian (i.e., Mosaic and Christian Old Testament law) and Greco-Roman legal elements, but to claim a continuous Western legal tradition that extends back to Greek Antiquity seems to be an instance of “inventing Europe”.<sup>307</sup>

In fact, we can only really speak of a unified and distinct Western legal tradition from the twelfth century onwards, which is where our inventory into Western rights

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<sup>304</sup> John M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992), 1.

<sup>305</sup> Dimitri Gutas, *Greek Thought, Arabic Culture: The Graeco-Arabic Translation Movement in Baghdad and Early 'Abbāsīd Society (2<sup>nd</sup>-4<sup>th</sup>/8<sup>th</sup>-10<sup>th</sup> Centuries)* (London and New York: Routledge, 1998).

<sup>306</sup> See Charles Burnett, “Arabic into Latin: The Reception of Arabic Philosophy into Western Europe”, in *The Cambridge Companion to Arabic Philosophy*, eds. Peter Adamson and Richard C. Taylor (Cambridge: Cambridge University Press, 2005), 370-404.

<sup>307</sup> The “invention of Europe” is a recurring theme in the self-consciousness and social imaginary of the West. It entails a continual process of invention and reinvented of the European self-image and imagination with every generation. It stems from a discourse that is engrained in what Gerard Delanty calls “the West-East dualism and the corresponding counter-factualism of an ‘us’/‘them’ polarity”. This line of reasoning contributes to the “us” and “them” binary that Otherizes Islam as the cultural and intellectual other. Hence the need — at least from a legal comparative perspective — for a more historically grounded approach to the Western legal tradition. See Gerard Delanty, *Inventing Europe: Idea, Identity, Reality* (Hampshire and London: Macmillan Press, 1995).

discourses begins. As Harold Berman mentions in his seminal history of the Western legal tradition, there was no unified legal culture to speak of before the twelfth century in Europe. From the vantagepoint of a late medieval European legal scholar, the so-called Germanic “folk law” (*Volksrecht*) must have appeared rather bleak. Berman mentions:

In 1000 there was no professional legal scholarship. There was no class of trained lawyers to act as judges, advocates, or advisers in ecclesiastical, royal, city, manorial, mercantile, or other courts. There was no concept of law as a body of principles, a *corpus juris*, in which diverse and contradictory customs and laws were reconciled. There were no textbooks on law and no professors to gloss them. There was no concept of law as an object of study distinct from theology and philosophy; indeed, theology and philosophy were themselves not yet conceived as distinct scholarly disciplines.<sup>308</sup>

Prior to twelfth century, Europe was ruled by highly localized traditions of Germanic law. This was the so-called *leges barbarorum* or “laws of the barbarians” as later European jurists – quite condescendingly – would come to call it (as opposed to *leges Romanae* or the “Roman law”).<sup>309</sup> The designation of Germanic legal culture as “barbaric” was arguably part – as Norbert Elias would have it – of Europe’s own imagined civilizing process.<sup>310</sup>

Europe before the twelfth century was a scarcely populated agricultural society and legal traditions were mostly customary and local, inspired by elements of European tribal and feudal culture. The rights discourse – if any – was not encapsulated in the law or written down in juridical texts.<sup>311</sup> They were an expression of local customs and community values and not an expression of universal moral principles. Interestingly, the coming of Christianity had almost no effect on the Germanic legal system. This is

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<sup>308</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts and London: Harvard University Press, 1983), 76.

<sup>309</sup> Berman I, 53. This condescending narrative of Germanic legal culture is perpetuated in modern scholarship. See for example Randall Lesaffer, *European Legal History: A Cultural and Political Perspective*, trans. Jan Arriens (New York: Cambridge University Press, 2009). At page 123, Lesaffer says: “Culturally speaking, the Germanic conquerors of the Roman Empire lagged behind the Romans. They proved incapable of maintaining Roman civilisation or of replacing it with anything worthy of the name. Europe entered an age of decline and disruption: the Dark Middle Ages”.

<sup>310</sup> Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations*, trans. Edmund Jephcott (Malden, MA and Oxford: Blackwell Publishing, 1994), 51-52.

<sup>311</sup> Berman, *Law and Revolution*, 77.

in contradistinction to the coming of Islam to the Arabian Peninsula, which would have major implications on the legal culture of that region.<sup>312</sup> Christianity appealed to the Germanic peoples, among other reasons, because it brought a new sense of community that transcended Germanic tribalism. Indeed, Christianity changed the worldview of Germanic tribes, but it was not particularly interested in reforming social institutions such as the law. Germanic customs and traditions in a legal sense were mostly perpetuated.<sup>313</sup>

It is only in the late eleventh century and early twelfth century – during what Berman calls the “Papal Revolution” – that a unified and distinct Western legal tradition started to take shape. This happened with the eventual papal supremacy over the entire Western Church and its subsequent independence over secular European powers. This instigated the development of professional courts, a body of legislation, legal professions, legal literature and – most importantly perhaps – a new so-called “science of the law”.<sup>314</sup> That is, a separate scholarly discipline that systematically studied and developed the law. An important part of the formation of the twelfth-century Western legal tradition was the rediscovery of Roman law in the eleventh and twelfth centuries.<sup>315</sup> Especially those medieval jurists involved in the creation of the new “science of the law” took an interest in reading and studying the Roman jurists of old, such as the compendium of Roman juridical writings called the *Digest*.<sup>316</sup> After the fall of the Roman Empire in the fifth century, Roman law had all but disappeared in northern and western Europe, except for a crude form of “vulgar Roman law” in a few places in Spain, northern Italy and southern France.<sup>317</sup> The rediscovery of Roman juridical writings would be the intellectual impetus for the emergence of a distinctly European legal tradition which came to be known as the *ius commune*, i.e., the civil and canon law.<sup>318</sup> Some rights historians have argued that it was among the medieval

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<sup>312</sup> See chapter four of this thesis.

<sup>313</sup> Berman, *Law and Revolution*, 63-64.

<sup>314</sup> Berman, *Law and Revolution*, 50.

<sup>315</sup> Cary J. Nederman, “Rights”, *The Oxford Handbook of Medieval Philosophy*, ed. John Marenbon (New York: Oxford University Press, 2012), 644.

<sup>316</sup> Alan Watson (trans.), *The Digest of Justinian*, 4 Vols. (Philadelphia: University of Pennsylvania Press, 1985).

<sup>317</sup> Berman, *Law and Revolution*, 53.

<sup>318</sup> Nederman, *Rights*, 644.

legal scholars that contributed to the new science of the law, that the first rights theories – albeit in a rudimentary form – were developed.<sup>319</sup>

### 3.2.2. The Medieval Natural Law Tradition: *Ius* and *Dominium*

Alasdair MacIntyre had claimed in the languages of the Middle Ages there is no expressions to be found that resembles our modern notion of rights. That is, at least until the fifteenth century. Not in any of the major languages of the world civilizations of the time, be it Latin, Greek, Hebrew or even Arabic.<sup>320</sup> MacIntyre seems mistaken in his overgeneralizing claim. It has in fact been argued that claims to rights are transhistorical and that they find expressions in all societies and cultures of the world.<sup>321</sup> Islamic civilization, arguably, had a discourse on rights (*ḥuqūq*) from its inception in the seventh century, and in a more formalized form in the legal works of early Muslim jurists, such as Abū Zayd al-Dābūsī (d. 1039).<sup>322</sup> There seems to be some truth to MacIntyre’s statement, however, if we specify his claim for the pre-medieval Greco-Roman legal tradition. For example, Richard Tuck, following the work of the French legal historian Michel Villey (d. 1988), mentions that the Roman jurists did use the term *ius* (pl. *iura*), which would become associated with the meaning of “right” or “rights” in the later European middle ages.<sup>323</sup> But Roman legal scholars used it in the more general sense of “what is always fair or good” (*ius naturale*) or “what is best for all or most in a particular society” (*ius civile*).<sup>324</sup> Similarly, one can come across pre-medieval usages of the plural form of *iura*, such as in Psalm 119 of the Old

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<sup>319</sup> Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 13; Oliver O’Donovan, “The Language of rights and Conceptual History”, *Journal of Religious Ethics* 37, No. 2 (2009): 193.

<sup>320</sup> Alasdair MacIntyre, *After Virtue* (Notre Dame, Indiana: University of Notre Dame Press, 2007, third edition), 69.

<sup>321</sup> See Michael Freeman, “The Philosophical Foundations of Human Rights”, *Human Rights Quarterly* 16, No. 3 (1994): 507.

<sup>322</sup> Abū Zayd al-Dābūsī, *Taqwīm al-adilla fī uṣūl al-fiqh*, ed. Khalīl Muḥyī al-Dīn al-Mays (Beirut: Dār al-Kutub al-‘Ilmiyya, 2001), 417. See Chapter IV of this thesis for an elaborate discussion on rights discourses in the Islamic legal tradition.

<sup>323</sup> Michel Villey would publish extensively on the medieval origins of Western rights discourses throughout the second part of the twentieth century. His works, all written in French, was an impetus for English scholarship on the topic. See for example, Michel Villey and Michel Villet, “L’idée du droit subjectif et les systèmes juridiques romains”, *Revue historique de droit français et étranger* 24 (1946-1947): 201-228.

<sup>324</sup> Tuck, *Natural Rights Theories*, 8.

Testament, which talks about loving the “statutes” of God.<sup>325</sup> However, these usages actually did not refer to rights in their proper contemporary meaning (as in Hohfeldian “claim-rights”). The so-called “statutes” (*iura*) of God are taught to people and venerated by them, but they are not necessarily “possessed” by individual persons as claim-rights would be, which led some to conclude that the ancients did not have a separate language of rights.<sup>326</sup>

For a long time, it has been argued that the idea of natural rights was a modern invention that was instigated by early modern natural rights theorists, particularly of John Locke in the seventeenth century. Various arguments have now been made that the idea of subjective natural rights is to be found – in a more or less developed sense – in medieval juridical thought.<sup>327</sup> The existence of rights discourses in medieval European juridical literature indeed seems abundant. But which *type* of rights were elaborated upon by medieval jurists – *legal* rights, *natural* rights, or *human* rights – is much more contested.<sup>328</sup> The existence of a juridical discourse on legal rights seems rather straightforward, as there is ample textual evidence to be found.<sup>329</sup> Many discussions on rights seem to revolve around the issues of property and ownership (*dominium*). The discussion was taken up by medieval Christian jurists and scholars with regards to the issue of Church-owned property and the partaking – or *not* – of religious clerics in property rights and ownership. This question even extended to the pope, who as the highest authority of the unified Roman Catholic Church could have some claim on church-property, albeit that his claim – if he indeed had one at all – was also disputed by some medieval Christian scholars. The discussion also extended – and this is perhaps much more relevant to our discussion on rights as *natural* or *human*

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<sup>325</sup> The NRSV translated *iura* not as “statutes” but as “decrees”: “All the wicked of the earth you count as dross; therefore I love your decrees.”, Michael D. Coogan (ed.), *The New Oxford Annotated Bible: New Revised Standard Version* (New York: Oxford University Press, 2010), 874.

<sup>326</sup> O’Donovan, *The Language of Rights and Conceptual History*, 198.

<sup>327</sup> The strongest case is perhaps that of Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Georgia: Scholars Press, 1997). Also see, Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997). For a critical view of the position of Tierney and Brett, see Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 2013).

<sup>328</sup> Jean Porter argues that many of the rights histories of the medieval period are actually talking about legal rights but suggests that the scholastics of the period “did have the linguistic and conceptual resources to develop a doctrine of natural rights”, see Porter, *Natural Law to Human Rights*, 81.

<sup>329</sup> Nederman, *Rights*, 644-645.

rights – to the property of the laity; were the laypeople able to have property rights and ownership over their own properties? It is in this context, arguable, that the medieval scholastics and jurist started to talk about rights in terms of “subjective” rights (otherwise also called “personal” or “individual” rights), as distinguished from “objective” rights.<sup>330</sup>

A case in point is the dispute surrounding the property rights of the Church and the laity in the work, *De Potestate Regia et Papali* [On Royal and Papal Power], of the Dominican friar and scholar John of Paris (d. 1306).<sup>331</sup> In this work, John of Paris discusses the idea of ownership regarding the “external goods” of laypeople. That is, referring here to non-church owned properties. Over these, he argued, the laypeople could and should have ownership and property rights (i.e., *dominium*). The Church – not even the pope – had any property rights regarding the property of the laypeople. In other words, John of Paris argues in terms of legal private rights for the laity. This was opposed to properties owned by the Church, which he says are “community goods”. These are owned by the Church in the sense that they administer and control these properties for the benefit and use of the believers.<sup>332</sup>

Another example occurs in the fourteenth century discussion surrounding property rights as *dominium*. The Italian Dominican theologian Silvestro Mazzolini da Prierio (d. 1527) was heavily involved in theological and juridical disputes about what property entails and who is deserving of property rights. He mentions that: “*Dominium*, according to some people, is the same thing as *ius*. So that anyone who has a *ius* in something, has *dominium* over it; and anyone who has a *ius* to the use of something, has *dominium* in it, and vice versa”.<sup>333</sup> In this passage the Dominican scholar argues that property and rights used in conjunction means one has sovereignty over it and that one has certain subjective (i.e., individual) rights over the property that

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<sup>330</sup> See Michel Villey and Michel Villet, “L’idée du droit subjectif et les systèmes juridiques romains”, *Revue historique de droit français et étranger* 24 (1946-1947): 201-228;

<sup>331</sup> See Gerson Moreno-Riaño, “John of Paris, Private Property, and the Study of Medieval Political Thought”, *John of Paris: Beyond Royal and Papal Power*, ed. Chris Jones (Turnhout, Belgium Brepols Publishers, 2015), 225-238.

<sup>332</sup> Nederman, *Rights*, 646-649. It has been argued that John of Paris influenced John Locke’s theory of property rights. See Janet Coleman, “*Dominium* in Thirteenth and Fourteenth-Century Political Thought and its Seventeenth-Century Heirs: John of Paris and John Locke”, *Political Studies* 33 (1985): 73-100. For a more elaborate discussion on property rights in the Western legal tradition, see chapter 5.

<sup>333</sup> Translated from the original Latin by Tuck, *Natural Rights theories*, 5.

one owns. His opponents would argue the opposite, that *dominium* and *ius* are not identical and that one does not have sovereignty over property, for example in the case of an “inferior” versus a “superior” person in a relationship. To have both *dominium* and *ius*, the other group argues, one must also have superiority in the relationship over the other.<sup>334</sup> The discussion on ownership and property rights would make up a good deal of the discussions on rights in juridical and theological circles throughout the late Middle Ages. While legal historian Richard Tuck and Michel Villey have identified (rudimentary forms) of rights discussions in fourteenth century debates on property, Brian Tierney has argued for an even earlier history of Western rights conceptions in the canonistic jurisprudence of the late twelfth century, similarly surrounding the issue of private property rights.<sup>335</sup>

The medieval theologian and church father Thomas Aquinas (d. 1274) is also often referred to as a proto-natural rights thinker. In his magnum opus *Summa Theologica*, Aquinas speaks of rights (*ius*) in the context of his discussion on justice.<sup>336</sup> In doing so, he remains close to the Roman legal definition of *ius*. Finnis, a contemporary interpreter and expounder of neo-Thomist natural law theory, argues that the object of the virtue of justice – Aquinas’ main topic in his treatise on justice – is rights.<sup>337</sup> He argues that justice, fairness and equity in the thought of Aquinas are fundamental to his conception of basic rights. Basic rights, for Aquinas are just as important as duties. Especially when concerning other human beings, duties are a “duty of justice”, which corresponds in turn with the right-holders justified claim to a basic right.<sup>338</sup>

Notwithstanding Finnis’ contemporary neo-Thomist revisionism, Aquinas himself has no explicit rights discourse in his *Summa Theologica* that can be understood as “rights inhering in individuals”.<sup>339</sup> Instead, he elaborates upon a discourse of “natural duties”. Aquinas does seem to come close to elaborating some rudimentary ideas that resemble

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<sup>334</sup> Tuck, *Natural Rights theories*, 5-7.

<sup>335</sup> Tierney, *The Idea of Natural Rights*, 43-77. Tierney is especially interested in canon juridical writings surrounding the *Decretum Gratiani*, see Anders Winroth, *The Making of Gratian’s Decretum* (Cambridge: Cambridge University Press, 2004).

<sup>336</sup> Thomas Aquinas, *The Political Ideas of St. Thomas Aquinas: Representative Selections*, trans. Dino Bigongiari (New York: The Free Press, 1953), 96-104.

<sup>337</sup> Finnis, “Grounding Human Rights in Natural Law”, *The American Journal of Jurisprudence* 60, No. 2 (2015): 214.

<sup>338</sup> Finnis, *Grounding Human Rights in Natural Law*, 216.

<sup>339</sup> Porter, *From Natural Law to Human Rights*, 84.

(subjective) rights thinking. For example, he develops a theory of property. But he never wrote specifically about a “right” (*ius*) to property.<sup>340</sup> Similarly, he elaborates upon an idea of human freedom in terms of an “immunity” from the interference of others, but he does *not* phrase it in terms of a “right to freedom” as could, for example, be defended in a court of law.<sup>341</sup>

In the final analysis, thus, Aquinas seems to have remained loyal to an objective theory of natural law (*lex naturalis*). Even though some elements of his thought have been interpreted as providing some preliminary grounds, he does not actually propose a subjective theory of natural rights. Titles one comes across in contemporary human rights studies, such as C. Fred Alford’s *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights*, thus appear to be somewhat misleading. It seems a long stretch to argue from Aquinas to modern international human rights. And, in fact, Alford does not come close to providing such an account.<sup>342</sup> In sum, in the medieval period as discourse seems to have developed around the issue of property rights. But it is debated whether these are objective or subjective rights. Some medieval scholars, such as Aquinas, were arguably really talking about something else. And even if there were subjective rights, such as in the case of some canon law jurists, these were for specific individuals or groups (the bishop, the pope, lords, the laity, etc.).<sup>343</sup> They were not “natural rights” that counted equally for everyone.

### 3.2.3. Early Modern Natural Rights: Separating *Ius* from *Lex*

Notwithstanding the debates regarding if medieval natural law theorists had a full-fledged theory of natural rights, the early modern period is commonly recognized as the starting point of Western natural right theory. It covers much of the seventeenth century and stretches from the Dutch jurist and theologian Hugo Grotius (d. 1645) to the British political philosopher John Locke (d. 1704), with important intermediary contributions of both Thomas Hobbes (d. 1679) and Samuel von Pufendorf (d. 1694).

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<sup>340</sup> Tierney, *The Idea of Natural Rights*, 146.

<sup>341</sup> Porter, *From Natural Law to Human Rights*, 86.

<sup>342</sup> C. Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (New York: Palgrave Macmillan, 2010). See especially pages 21-48.

<sup>343</sup> Michael Freeman, *Human Rights* (Cambridge and Malden, MA: Polity Press, 2017), 18.

This has also been called the period of “classical texts of rights theory”.<sup>344</sup> The natural rights discourse would only really reach its mature state with John Locke, who would build upon and rework the ideas of Grotius, Hobbes and Pufendorf. This is why some have considered him the first legal and political theorist in the Western legal tradition to have espoused a mature theory of rights.<sup>345</sup>

Natural rights in this early modern sense are often portrayed as expressions of claims and duties that human beings have by virtue of their mutual participation in an objective moral order.<sup>346</sup> Sometimes natural rights have been used interchangeably with moral rights. This was particularly the case in the eighteenth-century rights discourse. The “natural” here was contrasted with the “artificial”. Natural rights were not perceived as something created by human beings but something eternally existent and to be “discovered” in nature through the use of human reason.<sup>347</sup>

Natural rights have been defined in different ways. However, we can discern some basic elements that are common to these definitions. In the concept of natural rights, we find the idea that human beings have certain powers and liberties to do or not do certain things. In doing so, they are the sole owner of their minds and bodies, and the products or fruits produces by his mind and body. These in turn are his “private property”. The idea of private property is furthermore justified on the grounds of human individuality (you have these rights *because* you are a human individual). These rights, then, are inalienable. No one can take them away from you. In principle, not even the state.<sup>348</sup>

In the above definition, the idea of rights being something that individuals possess, that inhere in “the individual human subject”, is especially important. As we will see in our subsequent discussion, a major part of late medieval and early modern discussions will evolve around the question if human beings have objective or subjective rights. Another important development is the transition of thinking about

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<sup>344</sup> Tuck, *Natural Rights Theories*, 2.

<sup>345</sup> Freeman 2017, 11.

<sup>346</sup> Porter, *From Natural Law to Natural Rights*, 82.

<sup>347</sup> Joel Feinberg, “In Defense of Moral Rights”, *Oxford Journal of Legal Studies* 12, No. 2 (1992): 153.

<sup>348</sup> Nederman, *Rights*, 644.

rights in the singular and in the plural, i.e., as a right being what is *just* and as a particular set of claim-rights that people can possess.

Natural rights developed in an age of great political unrest in Western Europe. Hobbes had written his *Leviathan* partly in response to the English Civil War (1642-1651), while John Locke's *Two Treatises of Government* was published right after the Glorious Revolution (1688-1689). It is no wonder then, that early modern rights theories developed in response to West-European political turmoil. The political bearing of natural rights meant that, if they were violated by a government without due process, no claim could be laid upon civil obedience: natural rights would come to supersede any public rights imposed by political institutions.<sup>349</sup> As such, early modern natural rights theories seem to have been more a *reaction* to political realities, than something which sprang forth from a particular moral or religious worldview, although the underpinnings and justificatory grounds of early modern natural rights theories would have both rational and moral-religious elements.

The “new” language of the early modern natural rights discourse would differ from earlier medieval expositions of the natural law. Natural rights were a byproduct of the origins of the emergence of the modern state in Europe.<sup>350</sup> The “old” language of Medieval natural law, as espoused by for example Aquinas and the canon lawyers, was inspired by Roman natural law thinking and Christian ethics, embedded in a religious worldview. The conception of natural rights in the early modern period changed the medieval meaning of *ius naturale* from singular and objective to plural and subjective (i.e., into individual rights). That is, it changed from the idea of an objective right (in what is right and just) to subjective rights (rights that are personal entitlements of claims).<sup>351</sup> In addition, these were rights that individual human beings could possess, that inhered in human beings.

As Samuel Moyn points out the law of nature was something transcendent. Something outside the realm of human perception, which in turn could be known rationally by

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<sup>349</sup> Nederman, *Rights*, 644.

<sup>350</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts and London: Harvard University Press, 2010), 21.

<sup>351</sup> Freeman, *Human Rights*, 17.

human beings. But the principal matter is that it was part of an objective natural order, to which human beings would be subdued. Going against this objective order would be against nature (*contra naturam*).<sup>352</sup> Natural rights, on the other hand, became a plurality of rights (as opposed to mere “right”) that were subjectively enjoyed and “owned” by human individuals.<sup>353</sup>

Hugo Grotius represents an important change in the rights language of the early modern period. For many scholars, he symbolized the transition from medieval natural law thinking to modern natural rights.<sup>354</sup> For some commentators, Grotius’ theory of natural rights exemplifies the starting point of the so-called “secularization” of modern rights discourses. However, Grotius constantly refers to God and religious scripture throughout his work. So, to seek the initiation of secularizing discourses in Grotius’ natural law doctrine might be somewhat of an exaggeration. In fact, when we read closely Grotius’ *De iure belli ac pacis* [On the Law of War and Peace], we see him constantly referring to God and the divine origins of his theory of the natural law. For example, in his definition of the law of nature, Grotius mentions natural rights are based on reason. Human nature, however, should also be morally consistent with the commands and prohibitions of God, whom he calls the “author of nature”.<sup>355</sup>

Here, we read that Grotius believes that the law of nature – and the natural rights that stem from it – has its ultimate source in the divine realm. In another place, Grotius compares natural law to what he calls the “divine voluntary law”. Both types of law originate from God, although, where natural law was promulgated by the mere fact of the creation of the world itself, divine law is known by human beings through revelation (which in the context of Grotius’ Protestant Christianity, is of course the Bible).<sup>356</sup> Grotius says about the divine law:

The divine voluntary law (as may be understood from the very name) is that which is derived only from the will of God himself; whereby it is distinguished

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<sup>352</sup> Moyn, *The Last Utopia*, 21.

<sup>353</sup> Moyn, *The Last Utopia*, 21.

<sup>354</sup> Tuck, *Natural Rights Theories*, 58; Tierney, *The Idea of Natural Rights*, 316.

<sup>355</sup> Hugo Grotius, *The Rights of War and Peace: Book I*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005, originally published in 1625), 150-151.

<sup>356</sup> Christoph Stumpf, “Hugo Grotius and the Universal Rule of Law”, in *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (eds. Anthony Carthy and Janne Nijman (Oxford: Oxford University Press, 2018), 189.

from the natural law, which in some sense, as we have said above, *may be called divine also*. [...] God does not will a thing because it is just; but it is just, that is, it lays one under an indispensable obligation, because God wills it.<sup>357</sup>

In this passage we read, not only that divine law is inspired by God because the “wills it”, but we also see Grotius affirming the earlier passage that the natural “may be called divine also”. In other words, both the natural *and* the divine law have transcendent and metaphysical origins.

That being said, Grotius mentioned that the theory of natural law propounded in his work would remain true in principle, even if we would not accept a transcendent divine reality. He notoriously said, for example, that “what we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, *that there is no God...*”.<sup>358</sup> In this thought experiment Grotius considers that if God would not exist – something he did *not* believe as a strict Calvinist protestant – that natural law still would exist and could be known through independent human reasoning. This idea would provoke new modes of thinking about natural rights. It is statements like this, which ultimately entail that the natural law can be known without any religious commitments. This inspired subsequent generations of natural rights theorist to conceive of the possibility of a secular theory of natural rights.<sup>359</sup> That being said, these rights theorists did not seek to displace religiously grounded natural rights theories, as the later drafting committee of the United Declaration of Human Rights would attempt to do. These theories, rather, would exist side by side without being mutually exclusive. Non-religiously grounded natural rights, rather, were an attempt to make natural rights more universal, so that they would find broader acceptance, beyond the scope of the Christian oikumene.

Again, Grotius is often seen as the instigator of modern natural rights theories. But what exactly is the “modernity” of Grotius’ natural rights scheme is disagreed upon. Some argue that in Grotius’ work “natural law” gradually moved to the background and served merely as a ground from which natural rights are derived, while others

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<sup>357</sup> Grotius, *The Rights of War and Peace: Book I*, 164. (Emphasis mine.)

<sup>358</sup> Translated from Latin by Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Georgia: Scholars Press, 1997), 318. (Emphasis mine.)

<sup>359</sup> Freeman, *Human Rights*, 22.

focus on his infamous if “there is no God” statement as a sort of pioneering statement for a new secular-rationalist approach. Legal historian Brian Tierney has convincingly argued that Grotius’ infamous statement was quite common in his early modern intellectual milieu. He also showed that the natural law discourse and the natural rights discourse remained firmly side by side throughout early modern natural rights literature.<sup>360</sup> In fact, as we will see, the natural law still figures prominently in John Locke’s ideas about natural rights. So yes, we might speak of a shift in language. But the shift was not as major as some have come to believe. The connection between the two discourses seems to be much more continuous than is often suggested.<sup>361</sup>

In the rights discourse articulated by Thomas Hobbes rights are reduced to the singular natural right of the survival of the individual.<sup>362</sup> In this, Hobbes is very close to the natural rights theory espoused by Grotius. But Hobbes seems to have been much straightforward in his distinguishing between natural law and natural rights. In his *Leviathan*, Hobbes explicitly differentiates the law as “lex” and right as “jus” (or *ius*). In his explanation what the “law of nature” (*lex naturales*) is – i.e., general rules derived from reason that facilitate self-preservation – Hobbes mentions how both are conflated, while they or not the same. They should, therefore, be used separately. Right, he says, relates to the freedom to do something, while law is limiting human action.<sup>363</sup>

If the usage of reason is the hall mark of the “secularization” of natural law, then Hobbes – himself having on multiple occasions being accused of atheism – might be a better suited candidate, as opposed to Grotius, as the first “secularizing” natural rights theorist. Be that as it may – and Hobbes did seem to use a more rationalizing discourse – Boucher rightly argues that we must distinguish between the “the method or means by which we come to know the natural law, and the *grounds* for our obligation to follow it”.<sup>364</sup> For all the natural rights theorists discussed here – be it

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<sup>360</sup> Tierney, *The Idea of Natural Rights*, 319.

<sup>361</sup> Also see Boucher’s discussion in this regard, see David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (New York: Oxford University Press, 2009), 69-100.

<sup>362</sup> O’Donovan, 197.

<sup>363</sup> Thomas Hobbes, *Leviathan*, ed. J. C. A. Gaskin (New York: Oxford University Press, 1996, originally published 1651), 86.

<sup>364</sup> Boucher, *The Limits of Ethics in International Relations*, 74. (Emphasis mine.)

Grotius, Hobbes, Pufendorf, or Locke – human reason is, partly or wholly, responsible for knowing and understanding the natural law, but ultimately it is the divine that obliges us to follow the natural law. This means that, not reason, but God is the source of the natural law. And it is on the grounds of this divine origin that we are necessitated to show dutiful obedience to the law.

Pufendorf would go on and revise and synthesize the natural rights theories of both Grotius and Hobbes. Although Pufendorf is not much studied in our contemporary times, he was by far the most read legal and moral philosopher of the seventeenth and eighteenth centuries. Although his heritage would be overshadowed by the work of Immanuel Kant (d. 1804).<sup>365</sup> It is through Pufendorf that Locke would inherit the notion of a sharp distinction – opposition even – between natural right (*jus naturale*) and natural law (*lex naturale*).<sup>366</sup> This would enable Locke to explore a richer rights language in his own works than his predecessors. What would differentiate Pufendorf from his predecessor Grotius, is that – while he accepted its basic veracity of Christian divine revelation and its importance to the natural law – he acknowledged that it would not be accepted as universal. Hence, Pufendorf was to use theological language to a much lesser extent than Grotius did.<sup>367</sup> Incidentally, he would also occupy the first professorial position in the jurisprudence of natural law and the law of nations at Heidelberg. This arguably contributed to the professionalization and secularization of early modern natural rights language.

We can summarize that in the transition from the medieval period to early modernity, there was a slow but steady shift of emphasis from the natural law (*lex naturalis*) to natural rights (*ius naturale*). In addition, while there is an argument to be made that a discourse on subjective rights started to form amongst the jurists of the medieval canon law – especially surrounding the issue of property rights (in the sense of *dominium*) – this discourse was rather minimalist and arguably even absent in main natural law thinkers, such as Aquinas, who was still very much committed to an objective theory of natural law. The early modern natural rights theorists, such as Grotius and

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<sup>365</sup> Boucher, *The Limits of Ethics in International Relations*, 9.

<sup>366</sup> Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton, New Jersey: Princeton University Press, 1994), 192.

<sup>367</sup> Boucher, *The Limits of Ethics in International Relations*, 96.

Pufendorf, spoke much more explicitly and elaborately about rights as *subjective* (i.e., personal or individual) rights. Grotius, for example, clearly states about *ius naturale* that it is a “*Ius* is a moral quality of a person, enabling him to have or do something justly”.<sup>368</sup> Pufendorf, on the other hand, speaks of a right (*ius*) in relation to power over one’s actions (*libertas*), power over other people’s actions (*imperium*), power over things one possesses (*dominium*), and power over other people’s possessions (*servitas*).<sup>369</sup> Both examples clearly show a usage of rights as subjective rights, in which rights are understood as something you *possess*.

For Locke, natural rights theories take on a much more individualistic hue. He argues that human beings are rational and have a personal obligation to know and observe the law of nature. In order to fulfil these obligations human beings were born with a natural state of freedom. At the outset of his *Second Treatise of Government*, Locke mentions that human beings are born free and by nature they are in an inherent state of “perfect freedom”. This freedom entails human acts to do or not do something, but it also entails having possessions (or doing away with them). In doing so, according to Locke, no one in principle has to have permission of any other human beings or take their considerations into account.<sup>370</sup>

Locke’s stress on personal autonomy and freedom would be of influence on later Enlightenment thinkers in the eighteenth century.<sup>371</sup> However, Locke’s idea of liberty was not unlimited. But being in this state of liberty, Locke argues, is not a state of “uncontrollable liberty” for a human being to do what he wants. For example, he does not have the liberty to harm himself. Nor does he have the liberty to harm other people. People cannot, Locke argues, infringe upon the rights and freedoms of other people, especially not in such a way that it would damage, hurt or wound them.<sup>372</sup> In addition, he mentions that the laws dictated by the laws of nature obliges all human beings and that these laws can be understood rationally. In doing so, according to Locke, human

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<sup>368</sup> Translated from Latin in Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Georgia: Scholars Press, 1997), 325.

<sup>369</sup> Boucher, *The Limits of Ethics in International Relations*, 99.

<sup>370</sup> John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven and London: Yale University Press, 2003, originally published in 1689), 101. (Emphasis mine.)

<sup>371</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York and London: W. W. Norton & Company, 2007), 60-61.

<sup>372</sup> Locke, *Two Treatises of Government*, 102-103.

beings (and he explicitly mentions “mankind” as a whole) would see and come to understand that human beings are equal in their rights to life, but also to basic health, to freedom and liberty and to ownership and possession.<sup>373</sup>

So, while Locke’s use of natural rights language is much more clearly referring to subjective rights (i.e., rights that are possessed by individual persons), it cannot be qualified as merely individualistic. It has in fact been pointed out that there is somewhat of a tension between the individualism of Locke’s rights theory and its more social dimension, as he also often mentions the “collective good of society”.<sup>374</sup> Human beings being created as “rational” beings, according to Locke, would agree to live under a government that was entrusted with honoring the law of nature and to promote the public good.<sup>375</sup> Therefore he argued that human beings are responsible for the preservation of their lives (and the lives of others). He may not hurt himself and likewise may not hurt other people. Nor may he infringe upon their basic rights to “life, liberty, health, limb, or goods”.<sup>376</sup>

Locke’s rights theory has the seeds in it of the universalizing message that would imbue later rights declarations and inspire the American Revolutionaries, such as Thomas Jefferson, in their writing of the American Declaration of Independence.<sup>377</sup> In his *Two Treatises of Government*, Locke constantly refers to “all of mankind” being born free, being equal, having fundamental rights to life, liberty, and property, and so forth. Notwithstanding his seemingly universalizing message, Locke – like Grotius, Hobbes, and Pufendorf – had all been implicated in slavery. In addition, the natural rights discourse had been used to justify European colonialism of the indigenous peoples of America.<sup>378</sup> Locke himself had been co-author of the Constitution of Carolina, which explicitly condoned slavery.<sup>379</sup> It has in fact been argued that Locke was more popular than Hobbes and Grotius, because Locke did not challenge slavery

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<sup>373</sup> Locke, *Two Treatises of Government*, 102.

<sup>374</sup> Freeman, *Human Rights*, 25.

<sup>375</sup> Freeman, *Human Rights*, 24.

<sup>376</sup> Locke, *Two Treatises of Government*, 102.

<sup>377</sup> Ronald Hamowy, “Jefferson and the Scottish Enlightenment: A Critique of Garry Wills’s *Inventing America: Jefferson’s Declaration of Independence*”, *The William and Mary Quarterly* 36, No. 4 (1979), 506-511.

<sup>378</sup> Boucher, *The Limits of Ethics in International Relations*, 15 and 202.

<sup>379</sup> David Armitage, “John Locke, Carolina, and the *Two Treatises of Government*”, *Political Theory* 32, No. 5 (2004): 602-627.

directly and was seen by the American revolutionaries as more conducive for their state of affairs.<sup>380</sup> Hence, there seems to be a clear tension in the universalizing language of early modern rights theories on the one hand, and its limited scope with regards to slaves – but also to women, minorities, and indigenous peoples.<sup>381</sup>

There is a significant change in the rights language used by early modern rights theorists, such as Hugo Grotius (d. 1645) and John Locke (d. 1704), who still very much move within the framework of natural rights and natural law, and eighteenth-century Enlightenment thinkers, such as Immanuel Kant (d. 1804) and G.W.F. Hegel (d. 1831). The latter two develop a rights language that is not so much imbedded in natural law thinking, but rather in the idea of human dignity and recognition.<sup>382</sup> Both Kant and Hegel, of course, work in the period after the excruciating critiques of natural rights theory by the likes of Jeremy Bentham (d. 1832) and Edmund Burke (d. 1797), who did not hold back any possible attempt to ridicule the idea of natural rights as mere “nonsense upon stilts”.<sup>383</sup>

### 3.3. Conclusion

We have seen that rights are not a straightforward concept. It is an ambiguous, malleable and multilayered concept. This has been recognized in both legal historical and modern legal scholarship. A clear conceptual analysis of the concept of rights is necessary. Also, it is necessary to analyze the rights discourse in its “natural environment”. The most basic definition is that rights are entitlements or claims that entail duties upon others. These entitlements need to be acknowledged and respected by others. Hohfeld provided an exhaustive framework for rights and its jural relations. When people talk about rights, they conflate many concepts. Claim-rights that have corresponding duties are “proper” rights. Other corresponding concepts are privileges, powers and immunities. These in turn have corresponding legal burdens: duties, ‘no-rights’, liabilities, and disabilities. Rights almost always entail a “bundle” of these jural relations that people enjoy simultaneously.

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<sup>380</sup> Lynn, *Inventing Human Rights*, 118-119.

<sup>381</sup> We will return to some of these tensions in chapter V of this thesis.

<sup>382</sup> Ivison, *Rights*, 94-5.

<sup>383</sup> See Jeremy Waldron (ed), *‘Nonsense Upon Stilts’: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), 34.

Rights are often differentiated as “moral” and “legal” rights. The school of legal positivism (Bentham, Austin, Hart) have argued to separate both dimensions of the law. However, most modern legal scholars have come to accept the moral dimension of the law, as do some legal positivists, albeit in a minimal way. To equate moral and legal rights is an oversimplification. The conundrum is better thought of as the underlying moral framework for legal rights. Moral rights are “expressed” in legal form. Legal rights have a non-legal foundation in morality. Moral rights can be individual, attached to groups, or the whole of humanity. The latter seems to correspond to our modern notions of human rights. Moral rights are necessary to protect citizen rights and to limit the authority of governments.

The concept of natural rights is often conflated with either natural law or human rights. This is problematic because they are not exactly the same and sometimes can even have opposite meanings. The terms have different histories that relate to each other in complex ways. These historical accounts are mostly Eurocentric and should be understood in the context of legal Orientalism. One problem is the idea of historical continuity between the Greco-Roman legal tradition and the medieval European legal tradition. This seems to be an instance of “inventing Europe”, as Roman law completely dwindled after the fifth century, when Germanic tribes conquered that waning Roman Empire. We can only speak of a unified Western legal tradition after the “papal revolution” in the twelfth century. In addition, the Greco-Roman tradition is a shared intellectual heritage with Islamic civilization. Its rediscovery by Europe was often through Arabic-Latin translations of Muslim works.

Around 1000 Europe had mostly local custom-based Germanic legal practices (*Volkrecht*). There was no legal system in place, no legal professional class, no *corpus juris*, no legal textbooks, and no “science of the law”. With the papal revolution and the superiority of the Church over secular power, Europe developed its own tradition of canon and civil law (*ius commune*). It also rediscovered Roman natural law. However, MacIntyre’s observation that there were no rights discourses before 1400 might hold true, at least for Western Europe. The Roman jurists used *ius* as referring to “what is always fair and good” (*ius naturale*) or “what is best for all or most in society” (*ius civile*). Christian religious scripture also did not use *ius* in the meaning

of rights that are possessed by human beings (such as “statutes” of God in Psalm 119). What we do see are proto-rights discourses surrounding the debates of Church property and property in general, in which the laity are allotted certain subjective rights. But the discussion between *ius* and *dominium* is far from settled. In addition, Aquinas – often mentioned as a predecessor to human rights thinking – makes no mention of *ius* and appears to be committed to an objective theory of natural law (*lex naturalis*).

A far more distinct shift in rights language we see in the early modern period, with natural rights theorists such as Grotius, Hobbes, Pufendorf, and especially Locke. Of these four, Locke is mostly seen as the scholar that for the first time developed a “mature” theory of natural rights. In most accounts, Grotius is presented as the first to have applied modern rational-secular modes of thinking about rights. This seems to be an exaggeration, as his rights language is imbued with religious undertones. But his thought experiment in which he claimed that even “without God” the natural law would still exist and be discovered, has inspired subsequent generations of natural rights theorists to look for secular grounds. A big difference with the modern drafters of the UDHR, is that early modern rights theorists did not seek to supplant the religious underpinnings of natural rights. Both existed parallel to each other. They were used, rather, to universalize natural rights and make them more acceptable to humankind. Pufendorf has played a major role in this development, who was a great synthesizer and popularizer of Grotius and Hobbes. Hobbes seems to be a better candidate as a starting point for the secularizing and rationalizing trend in natural rights theory-making. He is also the first one to have made a strict distinction between law as “lex” and right as “jus” (or *ius*), a distinction that was adopted by Pufendorf and Locke.

Of all four natural law theorists, Locke seems to have a much more elaborate rights discourse. He also clearly stresses individuality and subjective rights that human beings possess. His main claim is that all human beings are free in the state of nature and are created as rational beings so they can fulfill their obligations. This stress on autonomy and freedom would inspire later Enlightenment thinkers. But this freedom is not unrestricted: you cannot harm yourself or others (in life, health, liberty, possessions). Also, there seems to be a tension in his individualism and his attention for the “collective good of society”. Rational beings, Locke argued, would agree to live under a government that honors the law of nature and promotes public good.

Locke's seemingly universalizing message – that is to a lesser extent also present in the other natural rights theorists – has a downside. While frequently referring to “all mankind” having fundamental rights, natural rights theorists were often involved in slavery (or condoning slavery). Natural rights theory was also utilized to rationalize European colonization over indigenous peoples. There thus seems to be a clear tension between the universalizing message of early modern natural rights theories and their limited scope regarding slaves, women, minorities, and indigenous peoples. The eighteenth century represents a significant change, in which right theorist such as Kant and Rousseau move further away from “religiously imbued” natural rights language, towards a language grounded the language of human dignity and worth.



## CHAPTER IV

# THE HERMENEUTICS OF *HUQŪQ*: RIGHTS DISCOURSES IN THE ISLAMIC LEGAL TRADITION

“If concepts are defined by language, then language is not only the framework that delimits concepts but also that which controls them.”

*Wael B. Hallaq*<sup>384</sup>

“The human is not created but a free person and in possession of the rights ascribed to him.”

*Abū Zayd al-Dabūsī*<sup>385</sup>

In this chapter, we explore the concepts of “law” and “rights” in Islamic legal language and culture through the framework of conceptual history (*Begriffsgeschichte*). I outline the historical emergence of the Islamic legal system in the context of pre-Islamic late antique Middle Eastern societies<sup>386</sup> and the subsequent formation of the classical Sunnī legal schools of Islamic law.<sup>387</sup> We then present a survey of rights discourses (*huqūq*)

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<sup>384</sup> Wael B. Hallaq, *Sharī‘a: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), 2.

<sup>385</sup> Abū Zayd ‘Ubayd Allāh ibn Muḥammad ibn ‘Umar ibn ‘Isa al-Dabūsī, *Taqwīm al-adilla fī uṣūl al-fiqh*, ed. Khalīl Muḥyī al-Dīn al-Mays (Beirut: Dār al-Kutub al-‘Ilmiyya, 2001), 417.

<sup>386</sup> The term “Middle Eastern societies” I take from Islamic historian Ira M. Lapidus, who defines Middle Eastern societies as the complex of institutions and social patterns that were infused by the constellation of lineage and tribal, religious and political structures of the Mesopotamian city-states and empires of the third millennium BC. See Ira M. Lapidus, *A History of Islamic Societies*, 2<sup>nd</sup> edition (Cambridge: Cambridge University Press, 2002), xix and 3-9. The idea of Islam as a religion of “Late Antiquity” has gained prominence in scholarship on Islamic origins mainly through the works of the historian Robert Hoyland. For a concise introduction to this idea, see Robert Hoyland, “Early Islam as a Late Antique Religion”, in *The Oxford Handbook of Late Antiquity*, ed. Scott Fitzgerald Johnson (New York: Oxford University Press, 2012), 1053-1077 (for a more thorough discussion on this, also see paragraph 2.3.).

<sup>387</sup> It should be noted that in this chapter (and throughout the thesis) I have chosen to limit my historical overview of the Islamic legal tradition and its classical juridical literature to the dominant mainstream Sunnī legal schools of law, thereby excluding (for now) the Shī‘a schools of law on the account that they represent a separate legal tradition with an appreciably different historical outlook and structure. Herein, I follow the approach of Wael B. Hallaq, who stated in his history of Islamic legal theory that “No doubt they [i.e., the Shī‘a schools of law] stand on their own, and, like their Sunnī counterparts, they demand an independent treatment. Thus no apology is in order for excluding non-Sunnī legal theories”, see his *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (New York: Cambridge University Press, 1997), viii. Also, historically the Sunnī schools have been most dominant in the Muslim world. While due attention should be given to minority voices, this delimitation facilitates the comparative framework of this thesis. For a similar justification, see Jacob Neusner and Tamara Sonn, *Comparing Religions Through Law: Judaism and Islam* (London: Routledge, 1999), 6-11. (For further elaboration, also see the methodological considerations in the

and relevant legal terminology in Islamic law (*fiqh*) and legal philosophy (*uṣūl al-fiqh*) through the lens of medieval and early modern Islamic judicial literature and introduce the basic terms and concepts that make up the Islamic *ḥuqūq* hermeneutic, such as legal personality (*dhimma*), legal capacity (*ahliyya*), and the dichotomy between public rights (*ḥuqūq Allāh*) and private rights (*ḥuqūq al-‘ibād*). Finally, we explore the development of Islamic rights discourses in the era of early modernity in the context of legal reforms before the emergence of the modern human rights regime.<sup>388</sup>

#### 4.1. Lost in Translation: Towards a Conceptual History of Rights in Islam

We now turn to our endeavor to embark upon a conceptual history of rights in the Islamic legal tradition. This immediately presents to us a major challenge, which is primarily an issue of language. Or rather, of the *delimiting nature* of language. This is especially the case in the context of a comparative analytical study, such as this thesis. The trouble arises when we attempt to compare and contrast a legal concept such as “law” or “rights” (and its historical trajectories) across legal cultures, while modern manifestations of these concepts are firmly embedded in a Western linguistic context. After all, any so-called “rights talk” in modern (mostly English) scholarship refers to specific rights discourses that ultimately stem from linguistic genealogies in the premodern West.<sup>389</sup> Islamic legal historian Wael B. Hallaq points to the limitations of

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introductory chapter of this thesis). An extensive introduction to the Shī‘a legal tradition is provided in the monumental work of Devan J. Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System* (Salt Lake City: University of Utah Press, 1998).

<sup>388</sup> In the final section of this chapter, I deal with relevant historical developments up until approximately 1800, thus including only the Early Modern period. After the 1800s, with the rise of industrial modernity and the advent of Western hegemony, the world changes so radically, as to deserve a separate treatment. This is not included within the scope of this thesis, which deals primarily with premodern rights discourses in Islam and the West. However, the rise of modern human rights and Islam’s engagements with the modern human rights discourse are covered in chapters one and two of this thesis, respectively.

<sup>389</sup> There is some discussion on how far back Western historians trace the idea of “rights” in Western legal history, with some opting for its genealogy tracing back to medieval natural law theology and others to the natural rights tradition of Enlightenment thought. But the consensus among the vast majority of Western historians is that the modern human rights discourse is rooted in premodern Western thought. See, for example, C. Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (New York: Palgrave Macmillan, 2010); Jean Porter, “Natural Law to Human Rights: Or, Why Rights Talk Matters,” *Journal of Law and Religion* 14, No. 1 (1999-2000): 77-96; S. Adam Seagrave, “How Old Are Modern Rights?: On the Lockean Roots of Contemporary Human Rights Discourse,” *Journal of the History of Ideas* 72, No. 2 (2011): 305-327. A notable exception is of course Samuel Moyn, who argues for a 1940s post-WO II (or even a 1970s post-Cold War) genealogy of modern human rights, discontinuous from earlier historical rights traditions. See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2010).

language – or what he calls the “prisons of language” – by remarking at the outset of his monumental study of Islamic Law:

Our language fails us in our endeavor to produce a representation of that history which not only spoke different languages (none of them English, not even in British India), but also articulated itself conceptually, socially, institutionally and culturally in manners and ways vastly different from those material and non-material cultures that produced modernity and its Western linguistic traditions.<sup>390</sup>

In other words, one cannot escape some amount of deformity when expressing, explaining and interpreting a legal system in a language (English or any other European language) that is alien to the indigenous legal culture and language from which it historically sprang, which in this case is Islamic legal culture as mediated through the vehicle of classical Arabic (*al-‘arabīyyat al-fuṣḥā*).<sup>391</sup> The act of translation ultimately is, as the Italian expression goes, an act of treason (*traduttore, traditore*).<sup>392</sup> This refers to the troublesome – and often thankless – toil of the act of translating across cultures. The translator (who is simultaneously always an *interpreter*) is not merely transposing words from the original language into the target language but must also do his or her best to communicate the connotated world of ideas, cultural sensitivities and civilizational alterity to which the original work belongs.<sup>393</sup> This in most (if not all) cases is an endeavor set up for failure.<sup>394</sup> However, that by no means implies that Islamic legal culture is “untranslatable”. Nothing is completely untranslatable, as Derrida famously claimed in his *Monolingualism of the*

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<sup>390</sup> Wael B. Hallaq, *Sharī‘a: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), 1.

<sup>391</sup> Islamic civilization was a multilingual civilization and other major Islamic languages produces vast amounts of scholarship, such as Persian and Ottoman Turkish. The bulk of medieval and early modern legal literature however remains mainly in classical Arabic. For a discussion on other languages being ‘Islamic’, see Kees Versteegh, “Can a Language be Islamic?,” *Eurasian Studies* 18 (2020): 5-25.

<sup>392</sup> Literally: “The translator is a traitor”.

<sup>393</sup> For the idea of civilizational alterity (or civilizational “otherness”), see Johann P. Arnason, “Interpreting History and Understanding Civilizations,” in *The Benefit of Broad Horizons: Intellectual and Institutional Preconditions for a Global Social Science*, Eds. Hand Joas and Barbro Klein (Leiden and Boston: Brill, 2010), 167-184; Johann P. Arnason, *Civilizations in Dispute: Historical Questions and Theoretical Traditions* (Leiden and Boston: Brill, 2013), 167-184.

<sup>394</sup> See Gregory Rabassa, “If This Be Treason: Translation and Its Possibilities,” *The American Scholar* 44, no. 1 (1974-75): 29-39. Some scholars of translation studies talk in this context about the term “invisibility,” which refers to “the translator’s own manipulation of the translating language” which in many cases results in “the ethnocentric violence of translation.” See Lawrence Venuti, *The Translator’s Invisibility: A History of Translation*, 2<sup>nd</sup> Edition (Abingdon, Oxon and New York: Routledge, 2008), 1-34.

*Other*, but the “untranslatable” to some extent always remains, which prevents us from fully inhabiting “the language of the other”.<sup>395</sup>

Therefore, it is all the more important that we take into consideration the alterity and particularity of Islamic legal culture as consisting of its own legal epistemology, legal anthropology, legal norms, legal language, and legal reasoning.<sup>396</sup> It is, in other words, important to study Islamic legal culture through the interpretive and discursive tradition from which it emerged.<sup>397</sup> As the Islamic legal historian Norman Calder aptly stated: “Understanding of the law is achieved through understanding of tradition, not through independent or personal assessment of the meaning of revelation”.<sup>398</sup> This interpretative tradition we speak of was expressed in Islamic civilization through its copious juridical literature. As Talal Asad argued, Islam is neither a “distinctive social structure” nor is it a “heterogeneous collections of beliefs, artifacts, customs, and morals” but it is a discursive tradition that revolves around certain *foundational texts*.<sup>399</sup> Thus, any attempt to genuinely understand the rights discourse in the Islamic legal tradition cannot but engage the legal literary genres produced by the scholars of Islamic law and jurisprudence (*al-fuqahā*).

## 4.2. Islamic Law and Legal Language: What’s in a Name?

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<sup>395</sup> In his typical paradoxical style of continental philosophizing, Derrida mentions that “In a sense, nothing is untranslatable, but in *another sense*, everything is untranslatable”, by which he points to the fact that one can never fully “inhabit the language of the other”, i.e., one cannot ever fully grasp the entirety of its meanings and connotations if one does not understand, speak and live it. See Jacques Derrida, *Monolingualism or The Prosthesis of Origin* (trans. Patrick Mensah, Stanford, California: Stanford University Press, 1998, originally published as *Le monolinguisme de l’autre*, Editions Galilée, 1996), 56-7. Also compare the idea of “language as Habitus”, see Rey Chow, “Reading Derrida on Being Monolingual,” in *Enduring Resistance: Cultural Theory after Derrida*, Eds. Sjeff Houppermans, Rico Sneller and Peter van Zilfhout (Amsterdam and New York: Rodopi, 2010), 193-211.

<sup>396</sup> For more in Islamic legal epistemology, norms, language and reasoning, see Hallaq (2009), *Shari‘a*, 78-92 and 100-110.

<sup>397</sup> For the notion of Islam as a “discursive tradition”, see Talal Asad, “The Idea of an Anthropology of Islam,” *Qui Parle* 17, No. 2 (2009): 1-30; Mohamed Amer Meziane, “Comparer les traditions discursives: Islam et critique du symbolisme dans l’anthropologie de Talal Asad,” *Socio-anthropologie* 36 (2017): 59-74; Ovamir Anjum, “Islam as a Discursive Tradition: Talal Asad and His Interlocutors,” *Comparative Studies of South Asia, Africa and the Middle East* 27, No. 3 (2007): 656-672.

<sup>398</sup> Calder, *Law*, 994.

<sup>399</sup> Asad, *Anthropology of Islam*, 20.

The construction of the term “Islamic law” is, at least to some extent, an invention of Western Orientalist scholarship. While the term has found its way into modern Arabic usage as *al-qānūn al-islāmī*, the terms employed in classical Islamic juridical sources are *fiqh* and *sharī‘a*.<sup>400</sup> The transposition of a Western legal conception of “law” to an Islamic legal framework can prove – and has in fact been proven – to be problematic. It can, indeed, function as a vehicle for legal Orientalism. Legal Orientalism, as pointed out in the introductory chapter, is a scholarly paradigm that tends to study Islamic jurisprudence through the lens of Western law, imposing its legal conceptions and language upon Islamic legal culture, without taking into consideration the particularities of the Islamic legal paradigm.<sup>401</sup> Being historically linked to European colonialism, Enlightenment universalism and the imperialist mindset, legal Orientalism as a “domination-based thought structure” is prone to induce and facilitate so-called “epistemic violence”.<sup>402</sup>

A case in point is the chapter on “Law” in Jamal Elias’s *Key Themes for the Study of Islam*, written by the scholar of Islamic religious studies A. Kevin Reinhart, who is otherwise known for his excellent contributions to Islamic legal studies.<sup>403</sup> Reinhart explicitly frames “Islamic law” along the lines of Western legal philosophy, building upon the legal interpretations of the well-known legal philosophers H. L. A. Hart (d. 1992) and Ronald Dworkin (d. 2013), representatives of the legal positivist and interpretivist schools of Anglo-American legal studies, respectively.<sup>404</sup> He mentions that “Hart and Dworkin’s understanding of law is a *standard* one for philosophy of

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<sup>400</sup> Norman Calder, “Law”, in *History of Islamic Philosophy*, eds. Seyyed Hossein Nasr and Oliver Leaman (Abingdon, Oxon and New York: Routledge, 2001), 980. We see modern titles bearing the name, such as that of the 20<sup>th</sup>-century Muslim modernist thinker Sayyid Abū al-A‘lā al-Mawdūdī (d. 1979), *al-Qānūn al-islāmī wa ṭuruq tanfīdhihi* [Islamic Law and Its Implementation] (al-Dār al-Sā‘ūdiyya, 1985), as well as modern works on specific branches of the law, such as constitutional law or criminal law. See for example Ahmad al-Awaḍī, *al-Qānūn al-dustūrī al-islāmī* [Islamic Constitutional Law] (Amman: Maṭba‘at al-Azhar, 2007); and Majid Khadduri, *al-Qānūn al-dawlī al-islāmī: kitāb al-siyar lil-Shaybānī* (Beirut: al-Dār al-Muttaḥidah lil-Nashr, 1975), which is the Arabic translation of his *The Islamic Law of Nations: Shaybānī’s Siyar* (Baltimore, Maryland: The John Hopkins Press, 1966).

<sup>401</sup> Wael B. Hallaq, “On Orientalism, Self-Consciousness and History,” *Islamic Law and Society* 18 (2011): 387-439. For an elaboration of legal Orientalism and its implication for this study, see the methodological section in chapter 1 of this thesis.

<sup>402</sup> Hallaq, *On Orientalism*, 400.

<sup>403</sup> See A. Kevin Reinhart, “Law”, in *Key Themes for the Study of Islam*, ed. Jamal J. Elias (London: Oneworld Publications, 2010), 220-244.

<sup>404</sup> See H. L. A. Hart, *The Concept of Law*, 3<sup>rd</sup> edition (Oxford: Oxford University Press, 2012, first published in 1961); and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

law, and to determine in what sense “Islamic law” is law, we may begin by examining the *sharī‘a*-system within the Hart-Dworkin framework”, which he then proceeds to do in the remainder of the chapter.<sup>405</sup>

For instance, he examines several books of *fiqh* (and comparative *fiqh*), such as *al-Ikhtiyār li-ta‘līl al-mukhtār* [The Selection for Explaining the Selected] of the Iraqi Hanafī jurist ‘Abd Allāh ibn Maḥmūd al-Mawsilī (d. 1284) and *Bidāyat al-mujtahid wa al-nihāyat al-muqtaṣid* [The Beginning of the One Who Can Conduct Independent Legal Reasoning (i.e. the master-jurist) and the End of the One Who is Limited (i.e.) in knowledge of the *sharī‘a*] of the Andalusian Muslim philosopher and Mālikī jurist Abū al-Walīd Muḥammad ibn Aḥmad ibn Rushd, popularly known in Western scholarship as Averroes (d. 1126).<sup>406</sup> These works, Reinhart says, are not legal statute books but read more like “discursive works with copious argumentation, alternative views, and digressions”.<sup>407</sup> In that sense, he concludes, they read rather like the Talmud, one of the central legal-theological texts of Rabbinic Judaism, then the *Public Statutes of the State of New Hampshire and General Laws in Force*, which is more like a Bill of Rights.<sup>408</sup> The chapter overflows with remarks that “show” how books of Islamic law are not similar to legal statute books, as known in the West. They contain matters of religious ritual (such as ritual ablution and prayer) and all kinds of “rules” that are “recommended” or “discouraged”, things the Muslim “ought” and “ought not” do, all of which however are not enforceable by law. These kind of “extraneous matters”, Reinhart argues, belong more properly to the domain of morality and not law.<sup>409</sup> The latter point, reinforces Hallaq’s critique of artificially separating Islamic law from its moral and ethical-religious worldview.<sup>410</sup>

Reinhart’s designation of the Hart-Dworkin framework as “standard”, and thus as the ultimate measuring rod and criterion to judge the Islamic legal tradition, is deeply problematic in light of our discussion of legal Orientalism. As the late historian of

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<sup>405</sup> Reinhart, *Law*, 224. (Emphasis mine.)

<sup>406</sup> ‘Abd Allāh ibn Maḥmūd al-Mawsilī, *al-Ikhtiyār li-ta‘līl al-mukhtār*, 4 vols., ed. Shu‘ayb al-Arnā‘ūt (Damascus: Dār al-Risāla al-‘Alimiyya, 2010, 2<sup>nd</sup> edition); Abū al-Walīd Muḥammad ibn Aḥmad ibn Rushd, *Bidāyat al-mujtahid wa al-nihāyat al-muqtaṣid*, ed. Mājid al-Ḥamdī (Beirut: Dār Ibn Ḥazm, 2017).

<sup>407</sup> Reinhart, *Law*, 225.

<sup>408</sup> Reinhart, *Law*, 225.

<sup>409</sup> Reinhart, *Law*, 225-234.

<sup>410</sup> This also ties into our discussion of moral rights and legal rights (see section chapter 3).

Islamic law Bernard G. Weiss (d. 2018) mentioned, it is ultimately misleading to simply equate the Islamic *sharīʿa* with “law”, as was done in the example we cited above.<sup>411</sup> While “law” in some sense is indeed part of the *sharīʿa* it can never be equated with “law *simpliciter*”.<sup>412</sup> Such a theoretical and methodological approach does more to confuse and obscure, rather than clarify what the *sharīʿa* is and what Islamic legal culture genuinely entails.

The forgoing inquiry on Orientalist intimations of the “law” in Islamic law begs the question of how Islamic legal scholars, the *fuqahāʾ*, themselves defined *sharīʿa* and *fiqh*. How were legality, legal norms and legal language expressed in the indigenous Islamic juristic tradition? At the outset it must be stressed that the jurists and legal theorists of Islam were very much aware of the linguistic intricacies and semantical nuances of language, especially in the context of legal education. In fact, the study of language has historically been central in legal training and has traditionally been part of any treatise of Islamic legal philosophy (*uṣūl al-fiqh*).<sup>413</sup> The Shāfiʿī jurist and legal theorist Abū Ishāq al-Shīrāzī (d. 1083), among others, counted knowledge of language (*luḡha*) and grammar (*naḥw*) as one of the prerequisites for being a jurisconsult (*muftī*) who is certified to pronounce legal opinions (*fatwā*, pl. *fatāwā*), along with other conditions such as comprehensive knowledge of the legal judgements (*aḥkām*) stemming from the Qurʾān and the Sunna.<sup>414</sup> Given the centrality of language in Islamic legal scholarship, Weiss pointed out that the condition of linguistic competency as a condition for attaining mastery of the law was perhaps most developed in Islamic civilization, when compared to other legal cultures of the world. In his 1984 article on the topic, he writes:

The importance of linguistic science as a tool of other sciences is perhaps in none of mankind’s cultural traditions more fully recognized than in medieval Islam. Particularly in the field of law the Muslim divines regarded the study of

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<sup>411</sup> Bernard G. Weiss, *The Spirit of Islamic Law* (Georgia, Atlanta: The University of Georgia Press 1998/2006), 17.

<sup>412</sup> Weiss (1998/2006), *The Spirit of Islamic Law*, 8.

<sup>413</sup> Šukrija Husejn Ramić, *Language and the Interpretation of Islamic Law* (Cambridge: The Islamic Text Society, 2003), XIV. For a succinct survey of premodern Islamic legal and theological education, see Hallaq (2009), *Sharīʿa*, 125-158.

<sup>414</sup> Abū Ishāq Jamāl al-Dīn Ibrāhīm ibn ʿAlī ibn Yūsuf al-Shīrāzī, *al-Lumaʿ fī uṣūl al-fiqh*, ed. Muḥyī al-Dīn Dīb Mastū and Yūsuf ʿAlī Badawī (Damascus: Dār Ibn Kathīr / Dār al-Kalām al-Tayyib, 2016), 254.

language as an absolute requirement without which a would-be jurist could not aspire to even a minimal degree of competence.<sup>415</sup>

The primacy of language is clear from the hierarchy of the sciences (*‘ulūm*) in classical Islamic legal and theological education. Before endeavoring upon a study of the “higher” Islamic sciences (*al-‘ulūm al-‘āliyya*), such as Islamic law (*fiqh*), legal philosophy (*uṣūl al-fiqh*), philosophical theology (*kalām*) and Qur’ānic commentary (*tafsīr*), students were expected to first immerse themselves into a deep study of the so-called “instrumental sciences” (*al-‘ulūm al-āla*). These entailed a systematic study of morphology (*ṣarf*), grammar (*naḥw*), logic (*manṭiq*), rhetoric (*balāgha*), argumentation theory (*munāzara*), and philosophy of language (*waḍ‘*).<sup>416</sup> This educational curriculum was central in law schools and theological seminaries (*madāris*, sing. *madrasa*) throughout the premodern Muslim world, up until modern times.<sup>417</sup> It was in many ways akin to the liberal arts and sciences tradition in the medieval European scholasticism and was arguably at the root of the historical development of the first universities in Western civilization, such as those in Oxford, Bologna, and Salamanca.<sup>418</sup>

From the middle of the tenth century, Islamic scholars started to produce legal treatises fully devoted to the genre of legal philosophy (*uṣūl al-fiqh*). Discussions on the theory of the law had been written before but were scattered in various other literatures. It was only then that *uṣūl al-fiqh* started to mature as an independent field of intellectual inquiry. One of the first works (that has been preserved) is arguably *al-Fuṣūl fī al-uṣūl* (The Resolutions in Juristic Principles) by the Ḥanafī jurist Abū Bakr al-Jaṣṣāṣ (d.

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<sup>415</sup> Bernard G. Weiss, “Language and Tradition in Medieval Islam: The Question of al-Tarīq Ilā Ma‘rifat al-Lughā”, *Der Islam: Zeitschrift für Geschichte und Kultur des Islamischen Orients* 61, No. 1 (1984): 91; cf. on Arabic philology, lexicography, syntax, and stylistics at the service of the legal scholar, Weiss (1998/2006), 23.

<sup>416</sup> For an early modern Ottoman example of this curriculum, see Aḥmad b. Muṣṭafā b. Khalīl Ṭāshkubrī Zāda (also known in Turkish as Taşköprüzade Ahmed Efendi, d. 1561), *Miftāḥ al-sa‘āda wa miṣbāḥ al-sayāda* (The Key to Happiness and the Lamp of Lordship) (Beirut: Dār ibn Ḥazm, 1431/2010). For similar early modern examples in other places in the Islamic world, such as North Africa, see Khaled El-Rouayheb, *Islamic Intellectual History in the Seventeenth Century: Scholarly Currents in the Ottoman Empire and the Maghreb* (New York: Cambridge University Press, 2015).

<sup>417</sup> See John Walbridge, *God and Logic in Islam: The Caliphate of Reason* (New York: Cambridge University Press, 2011), especially 107-120.

<sup>418</sup> For an argument for Islamic influences on the emergence of Western universities in the Middle Ages, see George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981).

981).<sup>419</sup> A notable exception is the (much) earlier work done by the eponym of the Shāfi'ī school of law, Muḥammad ibn Idrīs al-Shāfi'ī (d. 820), called *al-Risāla*, which preceded al-Jaṣṣāṣ's *Fuṣūl* no less than 161 years, albeit that no extant complete and independent work of *uṣūl al-fiqh* was written between that span of time.<sup>420</sup> These juridical-philosophical treatises however were peppered with questions of linguistics and semantics.<sup>421</sup> Abū Ishāq al-Shīrāzī, for example, whom we mentioned above, spends several chapters on language-related postulates in his work *al-Luma' fī uṣūl al-fiqh* [The Refulgence in Legal Theory]. Before delving into matters of legal methodology proper, such as abrogation (*naskh*), consensus (*ijmā'*), and analogy (*qiyās*), al-Shīrāzī delves into the linguistics related to the parts of speech (*aqsām al-kalām*), literal and metaphorical speech (*ḥaqīqa* and *majāz*), and linguistic analysis from the point of view of language (*lugha*), custom (*'urf*), law (*shar'*) and analogy (*qiyās*).<sup>422</sup> Language, as broadly attested to by philosophers before and after the advent of Islam, can be notoriously ambiguous.<sup>423</sup> Hence, in order to understand as precisely

<sup>419</sup> Abū Bakr Aḥmad ibn 'Alī al-Jaṣṣāṣ, *al-Fuṣūl fī al-uṣūl*, Ed. 'Ujayl Jāsim al-Nashamī, 4 Vols. (Kuwait: Wizārat al-Awqāf wa Shu'ūn al-Islāmiyya, 1994). For more on al-Jaṣṣāṣ, see Otto Spies, "Al-Djaṣṣāṣ", in *The Encyclopedia of Islam*, 2nd Edition, Vol. II, Eds. P. J. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, W. P. Heinrichs et al. (Leiden: E. J. Brill, 1965), 486; Mevlüt Güngör, "Cessās", in *TDV İslām Ansiklopedisi*, Vol. 7 (Istanbul: Türkiye Diyanet Vakfı, 1993), 427-8; Murteza Bedir, "Al-Jaṣṣāṣ (d. 370/981)," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, Eds. Oussama Arabi, David S. Powers and Susan A. Spector (Leiden and Boston: Brill, 2013), 147-66. There is some debate about a possibly even earlier text, namely *Uṣūl al-Shāshī* by a Hanifi jurist of disputed identity, although this is contested by some. For more on this debate, see Youcef L. Soufi, "Why Study *Uṣūl al-Fiqh*?": The Problem of *Taqlīd* and Tough Cases in 4<sup>th</sup>-5<sup>th</sup>/10<sup>th</sup>-11<sup>th</sup> Century Iraq," *Islamic Law and Society* 28 (2021), 1-31; Jonathan Brown, *The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Hadīth Canon* (Leiden and Boston: Brill, 2007), 186, fn. 121; Murteza Bedir, "The Problem of *Uṣūl al-Shāshī*," *Islamic Studies* 42, no. 3 (2003): 415-436.

<sup>420</sup> Abū 'Abd Allāh Muḥammad ibn Idrīs ibn Abbās al-Shāfi'ī, *al-Risāla*, ed. Muḥammad Kīlānī (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1969). For further discussion on the so-called gap period between al-Jaṣṣāṣ's *Fuṣūl* and al-Shāfi'ī's *al-Risāla*, see the important contribution of Ahmet Temel, *The Missing Link in the History of Islamic Legal Theory: The Development of Uṣūl al-Fiqh between al-Shāfi'ī and al-Jaṣṣāṣ during the 3<sup>rd</sup>/9<sup>th</sup> and Early 4<sup>th</sup>/10<sup>th</sup> Centuries* (unpublished dissertation, University of California, Santa Barbara, 2014); cf. Wael B. Hallaq, "Was al-Shafi'ī the Master Architect of Islamic Jurisprudence?," *International Journal of Middle East Studies* 25 (1993): 587-605.

<sup>421</sup> Hallaq (2009), *Sharī'a*, 73.

<sup>422</sup> Abū Ishāq al-Shīrāzī, *al-Luma'*, 37-44.

<sup>423</sup> The ambiguity of language has preoccupied the minds of the brightest human intellects, from the Ancients, such as investigations into language by the Greek philosopher Aristotle (d. 322 BC) in his collection of works *Organon* (and part of the *Corpus Aristotelicum*), until the so-called "linguistic turn" in 20<sup>th</sup>-century Western philosophy, exemplified by Ludwig Wittgenstein (d. 1951), Richard Rorty (d. 2007), and others. For a succinct overview, see Lyle Campbell, "The History of Linguistics", in *The Handbook of Linguistics*, eds. Mark Aronoff and Janie Rees-Miller (Oxford and Malden, MA: Blackwell Publishers, 2003), 81-104. Cf. on linguistics in the Islamic tradition, Peter Adamson and Alexander Key, "Philosophy of Language in the Medieval Arabic Tradition", in *Linguistic Content: New Essays on the History of Philosophy of Language*, eds. Margaret Cameron, and Robert J. Stainton (New York: Oxford University Press, 2015), 74-99; Bernard G. Weiss, "Ilm

as possible what God, the Lawgiver (*al-Shāri*), expected of human beings in order to live the good life and flourish in this life and the hereafter, the jurists of Islam developed intricate systems of hermeneutics delineating language that was “clear” or “ambiguous”, that was “speculative” or “definitive”, and so on. The different schools of jurisprudence would also develop different ideas about textual indication. Ḥanafī scholars such as Abū al-‘Uṣr al-Bazdawī (d. 1089) would, for example, differentiate between four levels of textual indication: (1) explicit meaning (*‘ibārat al-naṣṣ*), (2) alluded meaning (*ishārat al-naṣṣ*), (3) inferred meaning (*dalālat al-naṣṣ*), and required meaning (*iqṭidā’ al-naṣṣ*).<sup>424</sup> Shāfi‘ī scholars such as Sayf al-Dīn al-Āmidī (d. 1233), on the other hand, would differentiate only two levels of textual indication, namely: (1) pronounced meanings (*dalālat al-manṭūq*) and (2) implied meanings (*dalālat al-mafhūm*).<sup>425</sup> The Muslim jurists also differentiated between words (*wāḍiḥ*) that are “clear”, words that are “ambiguous” (*mubham*), words that are “general” (*‘āmm*), and words that are “specific” (*khāṣṣ*). The classifications of words into these various categories would have major implications for their legal applications in the law.<sup>426</sup>

Another indication of the intimate familiarity of the jurists of Islam with language is their minute attention for defining words. Almost every chapter in legal treatises start with defining terms. Islamic scholars took great care to differentiate the linguistic (*luḡhawī*) and technical (*iṣṭilāḥī*) meanings of legal concepts. To give but one example, the Bosnian-Ottoman Ḥanafī jurist Ḥasan Kāfī al-Āqhiṣārī (d. 1615) in his primer on Islamic legal philosophy *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl* [Commentary on The Way of Attainment to the Science of Juristic Principles] goes into great detail explaining the different definitions and layers of meaning of the word *fiqh*; a term which has much broader connotations than its mere technical legal sense of “Islamic

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al-waḍ’: An Introductory Account of Later Muslim Philological Science”, *Arabica* 34, No. 3 (1987): 339-356.

<sup>424</sup> Ḥusām al-Dīn Ḥusayn ibn ‘Alī ibn Ḥajjāj al-Sighnākī, *al-Kāfī fī sharḥ Uṣūl al-Badawī*, ed. Fakhr al-Dīn Sayyid Muḥammad Qānit (Maktaba al-Rushd, 2001), 203.

<sup>425</sup> Abū al-Ḥasan Sayf al-Dīn ‘Alī ibn Muḥammad ibn Sālim al-Sa‘labī al-Āmidī, *al-Iḥkām fī uṣūl al-ahkām*, Vol. 3, ed. ‘Abd al-Razzāq al-‘Afīfī (Dār al-Ṣamī‘ī, 2003), 81. For an elaborate discussion on the differences between Ḥanafī and Shāfi‘ī intimations of textual indications, see Ramić (2003), *Language and the Interpretation of Islamic Law*, 1-64.

<sup>426</sup> For a succinct overview of these classifications and a comparison between especially the Ḥanafī and Shāfi‘ī schools, see Šukrija Husejn Ramić, *Language and the Interpretation of Islamic Law* (Cambridge: The Islamic Text Society, 2003).

law”.<sup>427</sup> His treatment of the term includes linguistic analysis, technical legal analysis, as well as historical conceptual analysis in which he analyzes how the meanings of the word changed over time. Al-Āqhiṣārī details that the term *fiqh* initially had a much broader meaning than what we now perceive as “Islamic law” in Islamic legal history. Linguistically the term *fiqh* merely means “understanding” (*fahm*). It was only later that *fiqh* became a technical term that became associated with legal judgements (*ḥukm*, pl. *aḥkām*). In terms of the Sharī‘a, al-Āqhiṣārī evokes the famous explanation of *fiqh* by Abū Ḥanīfa (d. 767), the eponym of the Ḥanafī legal school, that *fiqh* is “to know regarding oneself what is for one and what is against one” (*ma ‘rifat al-naḥs ma laḥā wa mā ‘alayhā*), which he explains refers to what is allowed and what is prohibited.<sup>428</sup> This broader meaning, however, went well beyond the legal scope and incorporated the allowed and disallowed in the realms of religious beliefs (*i ‘tiqādāt*), theology (*kalām*), and even spirituality (*taṣawwuf*). Only after this elaboration he comes to the definition of *fiqh* as in the ‘science of legal judgments with regards to the Sharī‘a’.<sup>429</sup>

The linguistic (*luḡhawī*) meaning of term *sharī‘a* is a “path that leads to a water hole”.<sup>430</sup> Or, according to some sources, it is the road that leads riding camels (*al-ibil*, pl. *ābāl*) to a source of running water (*al-mā’ al-jārī*), which is a striking metaphor given the aridity and barrenness of the deserts of the Arabian Peninsula (and hence perhaps an indication of its significance for early Muslim society).<sup>431</sup> In the Qur’ān the form “Sharī‘a” is used only a singly time.<sup>432</sup> In verse 45:18-20 it speaks of a clear “path” (*sharī‘a*) for the Muslims to follow and the revelation of the Qur’ān providing insight (*baṣā’ir*), guidance (*hudā*), and mercy (*raḥma*) on this path:

<sup>427</sup> Ḥasan ibn Tūrkḥān ibn Dāwūd ibn Ya‘qūb al-Zīnī al-Būsnaḥī al-Āqhiṣārī, *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl*, (Dār Ibn Jawzī, 2010), 332-343. Al-Āqhiṣārī’s *Samt al-wuṣūl* is itself an abridgement of the widely studied treatise on Islamic legal philosophy *Manār al-anwār fī uṣūl al-ḥukm* [The beacon of lights in the principles of jurisprudence], by the famous early fourteenth-century Ḥanafī scholar Abū al-Barakāt al-Nasafī (d. 1310), which was widely studied in Ottoman religious seminaries (*madrasa*, pl. *madāris*).

<sup>428</sup> See section 2.4. on the development of the classical Sunnī schools of law.

<sup>429</sup> Al-Āqhiṣārī, *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 68-72.

<sup>430</sup> Nail Okuyucu, *Fıkıh İlmine Giriş: Metinler Seçkisi* (Istanbul: Ketebe Yayınları, 2019), 371; Talip Türcan, “Şeriat”, *TDV İslâm Ansiklopedisi*, Vol. 38 (Istanbul: Türkiye Diyanet Vakfı, 2010), 571-572; Weiss (1998/2006), *The Spirit of Islamic Law*, 17.

<sup>431</sup> Okuyucu, *Fıkıh İlmine Giriş*, 371; Weiss, *The Spirit of Islamic Law*, 17.

<sup>432</sup> The term Sharī‘a and its derivatives also prominently figure in the corpus of prophetic narrations (*ḥadīth*, pl. *aḥadīth*). For examples, see Türcan, *Şeriat*, 571-572.

(18) Now We have set you [Muhammad] on a clear religious path (*sharī‘a*), so follow it. Do not follow the desires (*ahwā’*) of those who lack [true] knowledge – (19) they cannot help you against God in any way. Wrongdoers (*al-zālimīn*) only have each other to protect them; the righteous (*al-muttaqīn*) have God Himself as their protector (*walī*). (20) This [revelation] is a means of insight (*baṣā’ir*) for people, a source of guidance (*hudā*) and mercy (*raḥma*) for those of pure faith (*li-qawmin yūqinūn*).

In addition, derivatives of the word “Sharī‘a” (such as “shir‘atan”) have been used to denote different “laws” and “paths” (*minḥāj*, pl. *manāḥij*) for the people of all divinely guided religions. Such as for examples in verse 5:48, which speaks about God sending a plurality of “scriptures” over time that provide the guiding laws for each particular people. This plurality is then sanctioned by God by stating that he could have made all of humanity into “one community” (*ummatan wāḥidatan*) but chose to not do so. Instead, the Muslims are to “judge between them” according to the truth:

We sent to you [Muhammad] the Scripture with the truth (*bi-l-ḥaqq*), confirming [all] the Scripture that came before and protecting it: so judge between them (*faḥkum baynahum*) according to what God has sent down. Do not follow their whims (*ahwā’ahum*), which deviate from the truth (*al-ḥaqq*) that has come to you. We have assigned a law (*shir‘atan*) and a path (*minḥājan*) to each of you. If God had so willed, He would have made you one community (*ummatan wāḥidatan*), but He wanted to test you through that which He has given you, so race to do good (*al-khayrāt*): you will all return to God and He will make clear to you the matters you differed about.

This verse is often discussed in juridical treatises in the context of the question of the role of the divinely revealed laws from before the advent of Islam. This would have practical implication on the law, since the answer to this inquiry – about which the jurists differed in opinion – would determine the utilization, if at all, of pre-Islamic monotheistic laws, such as those of Christianity or Judaism, on issues where the Islamic law was silent.<sup>433</sup>

As a legal concept, the stand-alone term of Sharī‘a is not often elaborately discussed in legal treatises. As a legal term its more widespread usage (as well as that of the form *shar‘*) seems to have occurred particularly after the eighth century. In one the early

<sup>433</sup> For a discussion on this topic, see Hallaq, *A History of Legal Theories*, 115-117.

juridical text, the *Risāla* of al-Shāfi‘ī (d. 820), the eponym of the Shāfi‘ī school of law, the word appears only once in its plural form (*al-sharā‘i*).<sup>434</sup> Instead, the jurists of Islam seem to have been much more concerned with the idea of the Sharī‘a as a “body of categorizations” regarding human action (*al-aḥkām fī-l-af‘āl* or *al-aḥkām al-‘amaliyya*), or in other words “Sharī‘a categorizations” (*al-aḥkām al-shar‘iyya*), such as “prohibited”, “disliked”, “recommended”, “unlawful”, and so forth.<sup>435</sup> In that sense Sharī‘a encompasses and governs all human action (and interaction).<sup>436</sup> It is a totality of legal, moral, and ritual norms that “constitutes an entire way of life”.<sup>437</sup> As Weiss points out, the Sharī‘a might well be “the most comprehensive concept of Islam” and indeed constitutes “the very core of Islam”.<sup>438</sup> As a term that expresses the entirety of Islamic values, it is stressed more even that the term *dīn*, which refers to the basic notion of “religion”.<sup>439</sup> It is for that exact reason that Muslim jurists never made a distinction between the legal and moral dimensions of “Islamic law”, as was the case in the legal positivism of the modern West from the eighteenth century onwards.<sup>440</sup>

The Islamic legal tradition differentiates between the Sharī‘a categorizations as such (*al-aḥkām al-shar‘iyya*) and their understanding by the legal scholars of Islam (*fuqahā‘*), articulated in the science of *fiqh*. In *fiqh* the human being as a legal scholar is its subject, while the subject of the Sharī‘a is God as Lawgiver (*shāri‘*).<sup>441</sup> In this context, Weiss makes the further distinction between “law as an object residing in the being of God” and “law as a construction of fallible jurists” (i.e., “Sharī‘a law” and

<sup>434</sup> Türcan, *Şeriat*, 572. For the exact occurrence, see Muḥammad ibn Idrīs al-Shāfi‘ī, *al-Risāla*, ed. Aḥmad Muḥammad Shākir (Cairo: Maṭba‘a Muṣṭafā al-Bābī al-Ḥalabī, 1939), 92.

<sup>435</sup> Weiss, *In Search of God’s Law*, 1; Weiss, *The Spirit of Islamic Law*, 18. For a more elaborate discussion on the Sharī‘a categorizations, see section 2.5.1.

<sup>436</sup> This is why according to some contemporary scholars *fiqh* – the science that comes out of the *sharī‘a* – could arguably be seen a “social science”. See, for example, Recep Şentürk, “Toward an Open Science and Society: Multiplex Relations in Language, Religion and Society: Revisiting Ottoman Culture”, *İslâm Araştırmaları Dergisi* 6 (2001): 93-129.

<sup>437</sup> Weiss, *The Spirit of Islamic Law*, 8 and 17.

<sup>438</sup> Weiss, *The Spirit of Islamic Law*, 16.

<sup>439</sup> Türcan, *Şeriat*, 572. For an engaging exposition of the concept of *dīn*, see Rushain Abbasi, “Did Premodern Muslims Distinguish the Religious and the Secular? The *Dīn-Dunyā* Binary in Medieval Islamic Thought”, *Journal of Islamic Studies* 31, No. 2 (2020): 185-225. In light of our discussion on legal Orientalism, it is worth pointing out that similar critiques exist on the use of the term “religion”. For an excellent discussion on this, see Markus Dressler and Arvind-Pal Mandair (eds.), *Secularism and Religion-Making* (New York: Oxford University Press, 2011), 5-24.

<sup>440</sup> Hallaq, *sharī‘a*, 85. For an overview of legal positivism and its division of morality and legality, see Brian H. Bix, “Legal Positivism”, in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, eds. Martin P. Golding and William A. Edmundson (Malden, MA and Oxford: Blackwell Publishing, 2005), 29-49.

<sup>441</sup> Weiss, *Searching for God’s Law*, 13.

“jurists law”).<sup>442</sup> The science of *fiqh* thus refers to the academic endeavor of “exploration, interpretation, analysis and presentation of the law, whether this takes place in books, in schools, in the mind or in formal response to a specific question”.<sup>443</sup> The science of *fiqh* is further divided into substantive law (*furū‘ al-fiqh*) and legal philosophy (*uṣūl al-fiqh*), or the “branches of *fiqh*” and the “roots” (i.e., principles) of *fiqh*.<sup>444</sup> The Shafi‘ī jurist al-Shīrāzī defines *fiqh* in his legal treatise *al-Luma‘* as “knowing the rulings (*aḥkām*) of the Sharī‘a that are the way to legal reasoning (*al-ijtihād*)”.<sup>445</sup> The Ḥanafī legal scholar al-Āqhisārī, in his commentary on the legal primer *Samt al-wuṣūl* refers to the known definition mentioned earlier.<sup>446</sup> He adds to that the legal definition: “to understand the subtle meanings (*al-ma‘nā al-khafī*) that relate to legal rulings (*al-ḥukm*)”. In a second, slightly more elaborate definition, al-Āqhisārī defines *fiqh* as: “the science of the legal rulings of the Sharī‘a with regards to human actions (*al-aḥkām al-shar‘iyya al-‘amaliyya*) as they are derived from their detailed proofs (*adillatihā al-tafṣīliyya*)”.<sup>447</sup> The other branch of *fiqh*, namely *uṣūl al-fiqh*, which could also be translated as the philosophy of the law, is defined as “the science of the principles (*qawā‘id*) through which one can reach the rulings of the law (i.e. *al-aḥkām al-shar‘iyya*) with a method of careful examination (*‘alā wajhi al-tahqīq*)”.<sup>448</sup>

<sup>442</sup> Weiss, *The Spirit of Islamic Law*, 120.

<sup>443</sup> Calder, *Law*, 981.

<sup>444</sup> The Islamic legal genre of *uṣūl al-fiqh* is variably translated as “Islamic legal theory”, “Islamic legal philosophy”, “principles of Islamic jurisprudence”, “theoretical jurisprudence” and the like. Unfortunately, the argument that Islam knows no “philosophy of law” is still perpetuated in some scholarship, which is an outdated perspective. The prominent Islamic legal historian Aaron Zysow, to take but one example, has no hesitation comparing *uṣūl al-fiqh* to the works of Western legal philosophers such as John Austin and Hans Kelsen, see Aaron Zysow, *The Economy of Certainty: An Introduction of the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press 2013), 1. In addition, it is well-established in Western scholarship that there is no obvious distinction between legal “philosophy” and “theory”. See for example Edmundson, who calls the distinction “evanescent” and “arbitrary”, in Martin P. Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005). Also see recent contributions to the discussion of legal philosophy in Islam in Peter Adamson (ed), *Philosophy and Jurisprudence in the Islamic World* (De Gruyter 2019).

<sup>445</sup> Al-Shīrāzī, *al-Luma‘*, 34 [*ma‘rifat al-aḥkām al-shar‘iyya allatī ṭarīquhā al-ijtihād*].

<sup>446</sup> See footnote 133.

<sup>447</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 68 [*al-wuṣūf ‘alā al-ma‘nā al-khafī alladhī yata‘allaqa bihi al-ḥukm*] and 70 [*al-‘ilm bi-l-aḥkām al-shar‘iyya al-‘amaliyya min adillatihā al-tafṣīliyya*].

<sup>448</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 72-73 [*al-‘ilm bi-l-qawā‘id allatī yutawaṣṣala bihā ilayhi ‘alā wajhi al-tahqīq*].

The juridical literature in the various legal sciences of *fiqh* described above took shape in a variety of literary genres throughout the Middle Ages until early modernity (and beyond). The main treatises of substantive law (*furūʿ al-fiqh*) dealt with themes related to worship (*ʿibādāt*) and social transactions (*muʿamalāt*), such as marriage, inheritance, contracts and obligations, taxes, property law, criminal offenses and the like. These types of works eventually came to be subdivided into legal digests (*mukhtaṣar*) and detailed explorations of the law (*mabsūṭ*).<sup>449</sup> Works on legal philosophy (*uṣūl al-fiqh*) dealt mainly with the basic proofs for legal rulings and the principles for legal reasoning, but also dealt with such issues as legal personality (*dhimma*), legal capacity (*ahliyya*), and rights (*ḥuqūq*). In addition, there were many other legal genres, such as books on juristic biographies (*ṭabaqāt*) and legal responsa (*fatāwā*). These literary genres make up the corpus of classical juridical source texts in which the Islamic rights discourse was stipulated, analyzed and developed, which will be explored in the next sections of this chapter and in Chapter VI of this thesis.

### **4.3. Rights Discourses in Medieval and Early Modern Islamic Juridical Literature**

Islamic law arose on the historical horizon of human history with the advent of the religion of Islam and the prophetic message at the outset of the seventh century of the Common Era.<sup>450</sup> As a dynamic civilization infused with new ideas, modes of piety and religious ethics, Islam brought a tremendous amount of intellectual and cultural creativity and vitality to the seventh century Arabian Peninsula and beyond. At the same time, Islamic societies where the inheritors of established frameworks of ancient Middle Eastern civilizations, including modes of living and social arrangements, such as family and tribal structures, agriculture, urban centers, market economies, monotheistic religious ethics and bureaucratic empires.<sup>451</sup> The sources of the formation of the Sharīʿa however, were not a foreign intrusion. They were an internal

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<sup>449</sup> Treatises from the *mukhtaṣar*-genre would mostly serve as a teaching primer in a *madrasa*-curriculum, which would be a gateway to ever more advanced texts on the path of mastering a particular school of law and becoming a jurist (*faqīh*) or jurist-consult (*mufīṭ*), see footnote 120. For an excellent overview on legal education in premodern Islam, see Hallaq, *Sharīʿa*, 125-158.

<sup>450</sup> My usage of the term “Islamic law” hereon forward should be understood in the context of my discussion of the term in paragraph 2.2.

<sup>451</sup> Lapidus, *A History of Islamic Societies*, 3.

development. However, it was the case that Islam inherited certain pre-existing social institutions, such as polygamy and slavery which broadly existed in human societies in late antiquity. The institutions, however, Islam highly regulated and emancipated.<sup>452</sup>

From the formative period of the Islamic Schools of Law in the tenth century and afterwards until the advent of modernity – and in its wake the rise of European colonialism and imperialism – the Islamic legal tradition was able to flourish and develop with remarkable consistency and continuity. This, it may be said, was due to a plethora of reasons, some of which are religious in nature, while others are socio-political, educational, or even economical in nature. Legal historian Norman Calder remarks in this regard:

Islamic law, in the thousand years or so of its cultural dominance, was the product of a highly sophisticated civilization. It was intimately related to an educational system which was more or less homogeneous throughout all pre-modern Muslim societies. Its long-term flourishing was due to the inherent flexibility of a conceptual structure which served to describe revelation, tradition and society.<sup>453</sup>

Wael B. Hallaq speaks in this regard about “a structural and systemic unity”, despite cultural variety. He argues that in whatever geography of the vast stretches of the Islamic world – be it in the Western parts of the Islamic world, such as the Maghreb, or in the Eastern parts of the Islamic world, such as Central Asia – legal practices shared many similarities. These included legal procedures, legal ethics, substantive laws and more. There was a certain legal paradigm and ethic that was imbedded in Quranic notions of justice, which focused on social stability on shared community. In also included, Hallaq argues, despite its internal varieties, many similarities regarding law, legal doctrine and the moral framework of a just society.<sup>454</sup>

The possibility of a specifically Islamic “rights talk” is often questioned in scholarship on Islam and human rights.<sup>455</sup> Some scholars claim there is no conception of individual

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<sup>452</sup> For the early history of Islamic law, see the elaborate discussions in Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (New York: Cambridge University Press, 2005).

<sup>453</sup> Calder, *Law*, 984.

<sup>454</sup> Hallaq, *Shari‘a*, 16.

<sup>455</sup> For an extensive survey of Islam and human rights scholarship, see chapter 2 of this thesis.

rights in the classical Islamic legal tradition and that it is merely a “duty-based system”. Henry Siegman, for example, claimed – based on his analysis of Islamic statehood – that “no such abstraction as “individual rights” could have existed in Islam”.<sup>456</sup> The Orientalist scholar Joseph Schacht (d. 1969) asserted about the Islamic legal tradition that Islam was not revealed to humanity to bring a new system of law but to educate human on how to conduct life in order to secure their afterlife. Therefore, Schacht argues, Islamic law is a “system of duties” that consists of certain religious rituals and obligations.<sup>457</sup>

The late scholar Bernard G. Weiss (d. 2018) had a somewhat more lenient view than we have seen from older-generation Orientalists like Schacht and Siegman. He stresses, for example, that Islamic law – through its various genres of legal literature (*fiqh*-manuals, legal commentaries, fatwa collections, and so on) – does accord a “large measure of freedom to human beings” and also “takes pains to safeguard their legitimate rights”.<sup>458</sup> In the end however, he supports Schacht’s view of Islamic law as a “duty-based system” by arguing that Islamic law’s primary concern and emphasis is not of rights and freedoms but on “duties and constrains”.<sup>459</sup>

These claims were made not only by Orientalists. Similar claims have been made by Muslim scholars of modernist proclivity. The prominent Shī‘ī Muslim human rights scholar Abdulaziz Sachedina, for example, claims that mainstream Sunnī classical jurisprudence never developed a systematic theory of natural law as a basis for the “natural and inalienable rights of human beings”.<sup>460</sup> According to Sachedina, only Mu‘tazilī and Shī‘ī scholars developed the legal and theological doctrines regarding human moral worth and moral agency that could serve as a basis for universal human

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<sup>456</sup> See Henry Siegman, “The State and the Individual in Sunni Islam”, *The Muslim World* 54, No. 1 (1964): 22-24.

<sup>457</sup> Joseph Schacht, *In Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 11. In this regard, also see N. J. Coulson, “The State and the Individual in Islamic Law”, *International and Comparative Law Quarterly* (1957): 51-52; Joseph Schacht, “Law and Justice”, in *The Cambridge History of Islam*, Vol. 2B, eds. Ann K. S. Lambton and Bernard Lewis (Cambridge: Cambridge University Press, 1970), 541; Mohammad Hashim Kamali, *Shari‘ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 199-205.

<sup>458</sup> Weiss (1998/2006), *The Spirit of Islamic Law*, 145.

<sup>459</sup> Weiss (1998/2006), *The Spirit of Islamic Law*, 145.

<sup>460</sup> Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press, 2009), 91. For a different perspective on Islam and natural law, see Anver M. Emon, *Islamic Natural Law Theories* (New York: Oxford University Press, 2010).

rights. In doing so, however, he completely ignored the Ḥanafī-Māturīdī legal tradition, one of the major legal and theological schools of Sunnī Islam.<sup>461</sup> In addition, the assumed absence or inadequacy of an indigenous rights discourse in classical Sunnī Islamic jurisprudence has prompted some reform-minded Muslim scholars to incorporate Western human rights conceptions in order to radically adjust Islamic legal tradition to modern times.<sup>462</sup>

Indeed, the presumed absence of the literal word of “right” (or a similar correlate) in Islamic legal discourse – if for the sake of the argument we would agree this is the case – does not imply the absence of the related idea or concept of rights.<sup>463</sup> In fact, similar claims have been made by historians about the Western legal tradition. Benjamin Constant (d. 1830), the influential political theorist who would influence modern liberal notions of liberty with his famous his 1819 speech *The Liberty of Ancients Compared with that of Moderns*, for example, would state that the ancients had “no notion of individual rights” and that the individuality of the ancients meant a complete subjection to “the authority of the community”.<sup>464</sup>

So, *what* then, could be considered a “right” in the Islamic legal tradition? In the following sections we consecutively discuss the basic ideas of moral responsibility (*taklīf*), legal personality (*dhimma*) and legal capacity (*ahliyya*), which are necessary elements for human beings to be considered “rights-holders” and enables them to legitimately make claims upon other people. We then delve into the rights hermeneutic of the so-called “rights of God” (*ḥuqūq Allāh*) and “rights of human beings” (*ḥuqūq al-‘ibād*), which could be compared to the distinction of public and private rights in the Western legal tradition.

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<sup>461</sup> See Ulrich Rudolph, *Al-Māturīdī and the Development of Sunnī Theology in Samarqand*, trans. Rodrigo Adem (Brill 2015); Ramon Harvey, *Transcendent God, Rational World: A Māturīdī Theology* (Edinburgh University Press, 2021). For a more general overview of these different Islamic theological schools, see Tim Winter (ed), *The Cambridge Companion to Classical Islamic Theology* (Cambridge University Press 2008).

<sup>462</sup> See, for example, Ebrahim Moosa, “The Dilemma of Islamic Rights Schemes”, *Journal of Law and Religion* 15, No. 1-2 (2000-2001): 185; Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (New York: Oxford University Press, 2009).

<sup>463</sup> Duncan Ivison, *Rights* (Stocksfield: Acumen, 2008), 4.

<sup>464</sup> Cited in Ivison (2008), *Rights*, 3. Benjamin Constant made an astute impact upon the thinking of political philosopher Isaiah Berlin and his dual conception of positive and negative liberty in the now famous essay “Two Concepts of Liberty”. See Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty* (New York: Oxford University Press, 2002). For an elaborate discussion on the (contested) histories of Western notions of rights, see chapter 3 of this thesis.

### 4.3.1. *Taklīf* and *Dhimma*: Moral Responsibility and Legal Personality

Islamic law regulates human action and human relationships in its totality. It does so by taking into consideration both the private sphere and the public sphere of human life. Part of Islamic law are also offers regulations regarding worship and religious rituals; the so-called five pillars of faith, mentioned by the prophet of Islam in a famous narration (*buniya al-islām ‘alā khams*) and stipulated throughout the Qur’ān.<sup>465</sup> These are the testimony of faith (*al-shahāda*), prayer (*al-ṣalā*), the alms-tax (*al-zakā*), the pilgrimage (*al-ḥajj*), and fasting (*al-ṣawm*).<sup>466</sup> In addition, Islamic law categorizes human acts on a continuum from being strictly obligatory to strictly forbidden. These categorizations vary among the schools.<sup>467</sup> But what the schools have in common is the gradations between the two opposites of strictly obligatory (*farḍ*) and strictly forbidden (*ḥarām*), such as merely permissible (*mubāḥ*), recommended (*sunna*), and discouraged (*makrū*). The elements of rulings about worship, religious rituals and human acts that are neither obligatory nor forbidden (but somewhere in between) have prompted some Western scholars of Islamic legal history to comment that, strictly speaking, these elements of “Islamic law” should not be considered “law” proper but belong to the realm of morality.<sup>468</sup> To do so, however, is maintaining an evaluation of

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<sup>465</sup> See Ibn Hajar al-‘Asqalānī, *Fath al-bārī bi-sharḥ ṣaḥīḥ al-Bukhārī*, Vol. 1, ed. Shu‘ayb al-Arnā‘ūt and ‘Adil Murshid (Beirut: al-Risāla al-‘Ālimiyya, 2013), 106. For examples from the Qur’ān, see verses 64:8, 20:14, 9:71, 2:197 and 2:185, among many others.

<sup>466</sup> The testimony of faith is usually used in its dual form of ‘the two testimonies of faith’ (*al-shahadatayn*), referring to the testimony that God is one and that the Prophet Muḥammad is his messenger (*shahādati an lā ilāha illa allāh wa anna muḥammadan rasūl Allāh*).

<sup>467</sup> The Ḥanafī school, for example, would differentiate between obligatory acts (*farḍ*), unlawful acts (*ḥarām*), necessary acts (*wājib*), recommended acts (*sunna*), permissible (*mubāḥ*), discouraged acts (*makrū*), and voluntary acts (*nafl*) (with further subcategorizations, such as “somewhat recommended”, “highly recommended”, etc.). See Ḥasan Kāfī al-Āqḥisārī, *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl*, (Dār Ibn Jawzī, 2010), 306-319. For categorizations in other schools, see for example ‘Abd al-Wahhāb Khallāf, *‘Ilm uṣūl al-fiqh*, 2<sup>nd</sup> Edition (Cairo: Maktaba al-Da‘wa al-Islāmiyya, n.d.), 105-116.

<sup>468</sup> Reinhart (2010), *Law*, 220-244; Weiss (1998/2006), *The Spirit of Islamic Law*, 17-23; Weiss (2010), *In Search of God’s Law*, 2-8. In the latter work, Weiss admits that to speak of the *Sharī‘a* in terms of the “law versus morality” dichotomy is to superimpose a language that is alien to the Islamic *Weltanschauung*, as both dimensions that are nominally considered as ‘moral’ and ‘legal’ in Western philosophy are combined in the *Sharī‘a*, see 6-7. The idea of strictly separating morality and law gained ground in the West especially with the work of legal positivist John Austin, in which he says, among other things: “Having determined the distinguishing marks of positive moral rules, I determine the respective characters of their two dissimilar kinds: namely, the positive moral rules which are laws imperative and proper, and the positive moral rules which are laws set by opinion”. See John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (New York: Cambridge University Press, 1995), 15.

the Sharī'a that is grounded in legal Orientalism and does injustice to the Islamic *Weltanschauung* and its moral religious-philosophical underpinnings.<sup>469</sup>

In the Islamic worldview God has created the universe and everything in it. God, being the creator of all there is in existence (*al-mawjūdāt kulluhā*), is ultimately the Owner (*Mālik*) and Legislator (*Shāri'*) of the world.<sup>470</sup> But He also describes Himself as just, merciful and bountiful.<sup>471</sup> Hence, he bestowed upon humanity his bounties and blessings and made them into caretakers of the earth (*khalīfa*).<sup>472</sup> In the Qur'ān, God described the moment before the creation of the earth, when he first created the souls of human beings, and asked: “Am I not your Lord?” (*alastu bi-rabbikum*). To which the souls of mankind answered: “Yes, we bear witness” (*qālū balā, shahidnā*).<sup>473</sup> On this basis God made a primordial covenant (*mīthāq*) with humanity, which includes the fulfilment of rights and duties upon human beings.<sup>474</sup> Other words that are used to connote similar meanings in the Islamic religious scripture are the Arabic synonym for “covenant” (*'ahd*) and several secondary words, such as “burden” (*iṣr*), “trust” (*amāna*), and “promise” (*wa'd*).<sup>475</sup> Especially the ideas of fulfilling God's covenant (*'ahd*) and trust (*amāna*) figure dominantly in Islamic juridical literature, as we will see in our discussion on legal personality (*dhimma*) and legal capacity (*ahliyya*). Both terms are used in the Qur'ānic discourse in the meaning of “trust” and “covenant”, referring to the characteristics of the believers as those “who are faithful to their trusts and covenants” (*alladīna hum li-amānātihim wa 'ahdihim rā'ūn*).<sup>476</sup> Some scholars have argued that the “covenant terminology” in the Qur'ān also extends to meanings such as *aslama* (a derivative of *salām*, i.e., “peace”) – as in “to enter a state of peace” – and *barā'a* (immunity or being released from obligations).<sup>477</sup> These references

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<sup>469</sup> Hallaq (2009), *Groundwork of the Moral Law*, 239-279.

<sup>470</sup> See Abū Hāmid al-Ghazālī, *al-Maqṣad al-asnā fī sharh al-ma'anī asmā Allāh al-ḥusnā*, ed. Bassām 'Abd al-Wahhab al-Jābī (Beirut: Dār Ibn Ḥazm, 2003), 140-141.

<sup>471</sup> Qur'ān, 3:74, 62:4, 21:47.

<sup>472</sup> Qur'ān, 2:30.

<sup>473</sup> Qur'ān, 7:172.

<sup>474</sup> The Qur'ān also refers to the concept of *mīthāq* as a “prophetic covenant” between God and the prophets that he sent, such as Muḥammad, Nūḥ, Ibrāhīm, Mūsā, and 'Isā. In that sense it mentions the covenant of the prophets (*mīthāq al-nabiyyīn*), see Qur'ān 3:81, 33:7.

<sup>475</sup> For an elaborate explanation of the idea of a divine covenant in Islam, see Joseph E. B. Lumbard, “Covenant and Covenants in the Qur'an”, *Journal of Qur'anic Studies* 17, No. 2 (2015): 1-23; John Wansbrough, *Quranic Studies: Sources and Methods of Scriptural Interpretation* (New York: Prometheus Books, 2004), 8-12.

<sup>476</sup> Qur'ān, 23:8, 70:32.

<sup>477</sup> Qur'ān, 54:43, 9:1.

offered the “locus probans” for the juristic theory of treaty making in Islamic legal discourse.<sup>478</sup>

The Sharī‘a is thus fundamentally based on the idea of honoring the covenant with God and the moral responsibility (*taklīf*) upon human beings that come with that. Hence, to eliminate from the idea of “Islamic law” the moral foundations of the law, is to deny the very religious and philosophical grounds of what law entails in the Islamic *Weltanschauung*, which is to fulfill the covenant of God. In this regard, all human beings *in essence* are held responsible under the law (*mukallif*), although legal responsibility might be impeded upon due to various reasons, ranging from not having reached the age of majority (*bulūgh*) to being mentally impaired (*junūn*).<sup>479</sup> Both of these are examples of human states in which human beings are unable to fulfil the rights and obligations that are upon them. Other than that, human beings are subject to the law and its stipulations. But it also makes them bearers of rights and duties (*huqūq*) and as such have the legal capacity (*ahliyya*) to be subject to legal relations, such as entering into contracts, getting married, receiving or giving inheritance, paying different forms of taxes, or litigating in courts in the case of criminal acts.<sup>480</sup>

To be a legal person is to be subject of rights and duties, or in other words to have the “capacity for legal relations”.<sup>481</sup> As opposed to a mere synonym to “human being”, as Charles Taylor describes in his essay on personhood, the idea of a “person” plays a role specifically in moral and legal discourse, as a “being with a certain moral status, or a bearer of rights”.<sup>482</sup> In that same way, human beings in Islam are perceived as

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<sup>478</sup> See Wansbrough, *Quranic Studies*, 11.

<sup>479/479</sup> For some of the legal conditions (*shurūf*) for a person to be considered morally responsible (*al-maḥkūm ‘alayh*), see Khallaf, *Ilm uṣūl al-fiqh*, 134-136.

<sup>480</sup> We give more elaborate explanation of theories of legal capacity (*ahliyya*) and rights (*huqūq*) in the following two sections of this chapter.

<sup>481</sup> Bryant Smith, “Legal Personality”, *Yale Law Journal* 37, No. 3 (1928): 283. For a critical view of the term “legal personality”, see W. W. Geldart, “Legal Personality”, *Law Quarterly Review* 27, No. 1 (1911): 95. In which the author mentions the view: “legal personality is a phrase which has no intelligible meaning: law is only concerned with legal capacity; we must not however think of legal capacity as an attribute inhering in a personal subject, but as being itself the subject to rights and duties”. Also, see Martin Wolff, “On the Nature of Legal Persons”, *Law Quarterly Review* 494, No. 4 (1938): 494-521.

<sup>482</sup> Charles Taylor, *Human Agency and Language: Philosophical Papers 1* (Cambridge and New York: Cambridge University Press, 1985), 97. Underlying the idea of a human being as a legal person that has a certain moral status, Taylor says, are certain “capacities”. We will delve deeper into the idea of legal capacity within the Islamic legal discourse in the next section of this chapter.

rights-bearers, or rather bearers of *ḥuqūq*.<sup>483</sup> The term *dhimma* in the *fiqh*-literature corresponds largely to the concept of legal personality in modern law and refers to the ground of existence (the *raison d'être*) of basic human rights and duties in Islamic law.<sup>484</sup> There is mention of the term *dhimma* in the sense of the “protection of God” (*dhimmat Allāh*) in the early seventh-century Islamic treaty called the “Constitution of Madina” (*ṣaḥīfat al-madīna*), which laid out the rights and duties of Muslim and non-Muslim citizens of the city of Madina.<sup>485</sup> According to scholarship, however, the term *dhimma* was first used by the Ḥanafī jurist Abū Zayd al-Dabūsī (d. 1039) as a philosophical grounding for a “legal person” who therefore has rights and duties.<sup>486</sup>

The linguistic (*lughawī*) meaning of *dhimma* is “promise” (*al-‘ahd*) because breaching it requires condemnation (*al-dhamm*).<sup>487</sup> The concept of *dhimma* occurs in the Islamic religious scriptural sources, the Qur’ān and Sunna, in both its linguistic as well as in its technical (*iṣṭilāhī*) legal meaning, albeit that in the *ḥadīth*-literature it is mostly used in its linguistic sense.<sup>488</sup> But even in the Qur’ān the term *dhimma* is used sparingly. In various verses it is understood in its technical sense of a covenant (or treaty) and the mutual duties that follow from it. In *sūra* 9:7-10, for example, God urges the Muslims to honor to their agreements with the non-Muslims, as long as they reciprocate this loyalty as well. It then reprimands the idolators (*al-mushrikīn*) of Mecca for having breached a treaty with the Muslims, saying:

How could there be a treaty (*‘ahd*) with God and His Messenger for idolaters? – But as for those with whom you made a treaty (*‘āhattum*) at the Sacred Mosque, so long as they remain true to you, be true to them; God loves those who are mindful of Him. – (7) [How,] when, if they were to get the upper hand over you, they would not respect any tie with you, of kinship or treaty (*dhimma*)? They please you with their tongue, but their hearts are against you

<sup>483</sup> In this account of legal personality, I focus on the natural personality (human beings) and not juristic personality (charitable foundations and the like). For an account of juristic personality in Islamic, see Mahdi Zahraa, “Legal Personality in Islamic Law”, *Arab Law Quarterly* 10, No. 3 (1995): 193-206.

<sup>484</sup> Eyüp Said Kaya & Hasan Hacak, “Zimmet”, *TDV İslâm Ansiklopedisi*, Vol. 44 (Istanbul: Türkiye Diyanet Vakfı, 2013), 424.

<sup>485</sup> See R. B. Serjeant, “The ‘Constitution of Medina”, *Islamic Quarterly* 8, No. 1 (1964): 3-16. The terms *‘ahd* and *mīthāq* however do not occur in the Constitution of Medina, see Wansbrough, *Quranic Studies*, 9-10.

<sup>486</sup> Eyüp Said Kaya & Hasan Hacak, “Zimmet”, *TDV İslâm Ansiklopedisi*, Vol. 44 (Istanbul: Türkiye Diyanet Vakfı, 2013).

<sup>487</sup> Nail Okuyucu, *Fıkıh İlmine Giriş: Metinler Seçkisi* (Istanbul: Ketebe Yayınları, 2018), 361.

<sup>488</sup> Kaya & Hacak, *Zimmet*, 424.

and most of them are law-breakers. (8) They have sold God's message for a trifling gain, and barred others from His Path. How evil their actions are! (9) Where the believers are concerned, they respect no tie of kinship or treaty (*dhimma*). They are the ones who are committing aggression. (10)

In the juridical sense, *dhimma* is defined in various ways. Some of the *fuqahā'* have considered *dhimma* a quality (*wasf*) and have defined it as "the quality that enables the capacity in a person for having rights and duties" (*ahlan lil-ijāb lahu wa 'alayhi*). Yet others have considered *dhimma* as a person (*dhāt*), rather than a quality, and defined it as "someone who has a covenant" (*nafsun lahā 'ahd*). However, according to all the jurists of Islam, every human being is born with valid *dhimma* that capacitates them to have rights and duties (*al-insān yūlidu wa lahu dhimma ṣāliha lil-wujūb lahu wa 'alayhi*), in contradistinction to other living creatures.<sup>489</sup> Hence the Ḥanafī jurist Abū Zayd al-Dabūsī, among many others, said in his legal-philosophical treatise *Taqwīm al-adilla fī uṣūl al-fiqh* [The assessment of proofs in legal philosophy]: "When God Almighty created man in order to enable him to bear His trust (*amāna*), He dignified them with reason (*'aql*) and legal personality (*dhimma*), so that he would become capable of fulfilling the rights and obligations incumbent upon him".<sup>490</sup>

Although in juridical practice there are some distinctions between men and women, Muslims and non-Muslims, slaves and free men, the basic principle in Islamic law is that all human beings have *dhimma* and are thus proper subjects of the law, which is also a basic requirement for legal capacity (*ahliyya*).<sup>491</sup> Islamic law thus recognizes a "human all-embracing *dhimma*".<sup>492</sup> From the outset of early Islamic law in the seventh century and with the formation and formalization of classical Islamic law in the centuries after that, legal personality was accorded by Islamic law to *all human beings*. Woman, for example, also had full legal personality and as a result had equal access to courts as men. In addition, they had economic power that translated into legal autonomy.<sup>493</sup> In this sense, as scholar of Islam Ruud Peters mentioned, there is a "deep

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<sup>489</sup> Nail Okuyucu, *Fıkıh İlmine Giriş: Metinler Seçkisi* (Istanbul: Ketebe Yayınları, 2018), 361.

<sup>490</sup> Abū Zayd al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-‘Ilmiyya, 2001). 417. We will return to the centrality of the human intellect (*'aql*) in the matters of moral responsibility (*taklīf*) and legal capacity (*ahliyya*) in the next section of this chapter.

<sup>491</sup> Ruud Peters, "Islamic Law and Human Rights: A Contribution to an Ongoing Debate", *Islam and Christian-Muslim Relations* 10, No. 1 (1999): 10. See the next section for an elaboration of the Islamic juridical theory of legal capacity (*ahliyya*).

<sup>492</sup> Zahraa, *Legal Personality in Islamic Law*, 205.

<sup>493</sup> Lapidus (2012), 270.

fundamental level at which the Shari‘a can be regarded as universal, addressing all humankind and based on an essential equality of human beings”.<sup>494</sup>

### 4.3.2. *Ahliyya*: The Islamic Concept of Legal Capacity

The theory of legal capacity (*ahliyya*) in Islamic law emanates from the concept of legal personality (*dhimma*).<sup>495</sup> Legal capacity refers to the capability of a person to engage in legal transactions. In term of its linguistic (*lughawī*) meaning, the term *ahliyya* connotes with meanings such as authority, suitability, capacity and competence. In Islamic legal theory it has come to be associated with the suitability of a person to be subject to religious and legal judgements. As a term, hence, the word *ahliyya* was a neologism coined by the Islamic jurists to connote a legal meaning, although derivatives of its linguistic meaning can be found in the religious sources of Islam as well.<sup>496</sup>

The human intellect (*al-‘aql*) – or the human capacity for reasoning – plays a major role in how the jurists of Islam conceptualized legal capacity. The human intellect has, of course, been extensively discussed in Islamic theology (*kalām*) and other sciences of Islam. The Shafi‘ī scholar Abū Ḥāmid al-Ghazālī (d. 1111), for example, discussed various levels and dimensions of the intellect in the chapter on “knowledge” (*Kitāb al-‘ilm*) of his magnum opus the *Iḥyā’ ‘ulūm al-dīn* (Revival of the Islamic sciences).<sup>497</sup> Al-Ghazālī mentions four types of intellect. The first type of intellect is a quality (*waṣf*) that distinguishes human beings from other animals and through which they are able to understand the theoretical sciences (*al-‘ulūm al-naẓariyyā*). He also calls this type of intellect an “instinct” (*gharīza*) through which to grasp these sciences. Al-Ghazālī explains this instinct as a “light cast in the heart” that helps prepare one to comprehend things (*nūr yaqdhifu fī al-qalb bihi yasta‘iddu li-idrāk al-ashyā’*). He also criticizes those that limit the intellect merely to axiomatic knowledge (*al-‘ulūm al-ḍarūriyya*). The second type of intellect applies to knowledge that is manifested even in discerning

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<sup>494</sup> Peters, 10.

<sup>495</sup> Hallaq, *Sharia*, 227; Zahra, *Legal Personality in Islamic Law*.

<sup>496</sup> Ali Bardakoğlu, “Ehliyyet”, *TDV İslām Ansiklopedisi*, Vol. 10 (Istanbul: Türkiye Diyanet Vakfı), 533.

<sup>497</sup> Abū Ḥāmid Muḥammad al-Ghazālī, *Iḥyā’ ‘ulūm al-dīn*, Vol. 1 (Jedda: Dār al-Minhāj, 2011), 312-320.

children (*al-ṭifl al-mumayyiz*), who are able to distinguish between that which is possible (*al-jā'izāt*) and this which is impossible (*al-mustaliḥāt*), such as that two is greater than one or that one person cannot be in two places simultaneously. This, al-Ghazālī mentions, is how (some of) the theologians (*al-mutakallimīn*) defined the intellect (i.e., as relating to axiomatic knowledge), stressing once more that – while the theological definition in and of itself is correct – it is faulty (*fāsid*) if the intellect in the meaning of “instinct” (*gharīza*) is denied, while maintaining that only axiomatic knowledge truly exists. The third type of intellect refers to knowledge that is reached through experiences (*al-tajārib*) (i.e., empirical knowledge). And the fourth and final type of intellect, al-Ghazālī says, refers to developing the powers (*quwwa*) of the mentioned “instinct” to such a degree, that the intellect is able to understand the consequents of matters (*awāqib al-umūr*), so that a person would be able therewith to defeat and subjugate his or her immediate desires (*al-shahwa al-ājila*). Al-Ghazālī reiterates that this type of intellect too differentiates human beings from other types of animals.<sup>498</sup>

However, for the jurists of Islam, what ultimately matters most with regards to the human intellect is the capacity for judgement or discernment. The jurists of Islam explain that legal capacity is dependent upon the human intellect (*al-ʿaql*).<sup>499</sup> This directly relates to the conception of *taḳlīf* or being *mukallaf*, i.e., having the moral and legal responsibility to answer the divine address (*khitāb*) of God. Hence, legal rulings (*al-ḥukm al-sharʿī*) are defined as the address of the Lawgiver (*khitāb al-shāriʿ*) regarding the acts of the morally responsible (*afʿāl al-mukallifīn*).<sup>500</sup> The two major conditions for having *taḳlīf* are intellect (*ʿaql*) and majority (*bulūgh*), which in classical Islamic law would be the age of seven.<sup>501</sup> Hence, the age of maturity is also called the “age of discernment” (*sinn al-tamyīz*). After having reached the age of majority, human beings are considered to be able to responsibly use their intellect and hence become legally responsible. Legal capacity in Islamic law is divided into two main

<sup>498</sup> For a further elaboration of how al-Ghazālī relates these types of intellect to each other, see al-Ghazālī, *Iḥyāʾ ʿulūm al-dīn*, 315-320.

<sup>499</sup> Al-ʿAqḥisārī, 370.

<sup>500</sup> Khallaf, *ʿIlm uṣūl al-fiqh*, 100-101

<sup>501</sup> Discernment is defined as when a child is able to eat, drink and clean himself or herself after having used the bathroom without the assistance of an adult (i.e., independently). See Aḥmad ibn Luʿlu ibn al-Naqīb al-Misrī, *Umdat al-Sālik*, trans. Nuh Ha Mim Keller (Maryland: Amana Publications, 1994), 109.

categories, namely the capacity for having rights and duties (*ahliyyat al-wujūb*) and the capacity to fulfill these rights and duties (*ahliyyat al-adā*). And the capacity to fulfill rights and duties is again subdivided in to “complete” *ahliyya (kāmila)* and “deficient” *ahliyya (qāšira)*, as the person having legal capacity must have certain qualities.

From the survey on the ideas of legal personality and legal capacity we can understand that Islam indeed recognizes notions of inalienable and enforceable human rights that are endowed in all human beings. These rights do not only extend to Muslims, but also to non-Muslims. Ruud Peters elaborates on this in several of his articles on the subjects. He affirms that legal personality is accorded to all human beings in Islamic law, and not a particular group of people. He also mentions what he calls “proto-human rights” regarding the dignity of human beings absolute and inviolable. Islamic law takes into consideration the factor of power in human relationships and restricts those in power from exerting their power over other, while protecting that might have a weaker position. For example, wives, children and slaves have certain basic rights protected. Peters thus argues that Islamic law stresses such basic rights as the right to life en religious freedom and the protection from bodily harm for all human beings, both Muslims and non-Muslims.<sup>502</sup>

#### **4.3.3. *Ḥuqūq Allāh* and *Ḥuqūq al-‘Ibād*: The Public-Private Rights Dichotomy in Islamic Law**

In the Arabic language the corresponding term to “right” is *ḥaqq* (pl. *ḥuqūq*), although the term’s meaning in Arabic is much more multileveled and varied linguistically and conceptually.<sup>503</sup> In classical Arabic the term *ḥaqq* was used in a much more expansive semantic field, encompassing the theological, moral and legal realms.<sup>504</sup> Outside of a strictly legal and juridical context it refers to the broader meanings of “truth” and

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<sup>502</sup> Ruud Peters, “(In)compatibility of Religion and Human Rights: The Case of Islam”, in *Human Rights and the Impact of Religion*, eds. Johannes A. van der Ven and Hans Georg Ziebertz (Leiden and Boston, 2013), 78. (Emphasis mine.)

<sup>503</sup> For more on the Islamic concept of rights, see Mohammad Hashim Kamali, “Fundamental Rights of the Individual: An Analysis of *Ḥaqq* (Right) in Islamic Law”, *The American Journal of Islamic Social Sciences* 10, No. 3 (1993): 340.

<sup>504</sup> Wael B Hallaq, “‘God Cannot Be Harmed’: On *Ḥuqūq Allāh/Ḥuqūq al-‘Ibād* Continuum” in *Routledge Handbook of Islamic Law*, ed. Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (London and New York: Routledge, 2019), 69.

“justice” and is associated with other important Islamic religious concepts, such as that which is socially just (*‘adl*), right (*mustaqīm*) and equitable (*qist*).<sup>505</sup> It is also one of the names with which God refers to Himself in Islamic sacred scripture (*al-Ḥaqq*).<sup>506</sup> In Islamic spirituality and moral psychology (*tasāwwuf*, *‘ilm al-naḥs*, *al-fiqh al-wijdānī*) *ḥaqq* is used to refer to such things as *ḥuqūq al-naḥs*; the essential requirements for the existence of the human self.<sup>507</sup> *Ḥaqq* is also used to connote reality, fact, true, authentic, genuine, sound, right judgment, rightness or correctness, as opposed to opposite connotations, such as incorrect judgment or falsehood (*bāṭil*).<sup>508</sup>

In the plural form of *ḥuqūq*, however, the meaning was almost always grounded in an idea of rights.<sup>509</sup> In the legal sense of *ḥuqūq*, Arabic lexicographers have variously given us meanings such as rights, entitlements, (legal) claims or “anything that is owed”.<sup>510</sup> In the classical Islamic legal literature *ḥaqq* is also used for those type of rights that specifically belong to individual human beings. For these rights the Islamic jurists used the terms *ḥuqūq al-ādamiyyīn* or *ḥuqūq al-nās*, which literally translated as the “rights of man” or “human rights”. Sometimes these rights are also referred to as the rights of servants (*ḥuqūq al-‘ibād*).<sup>511</sup> These were claim-rights, such as the rights to the inviolability of life or property. Conversely, these rights entailed the duty of others not to infringe upon these rights. The protection of individual rights, which belonged to the private sphere proper, was categorized by the Islamic jurists under human rights (*ḥuqūq al-ādamiyyīn*).<sup>512</sup> These incorporate the protection of rights

<sup>505</sup> Hallaq, *God Cannot Be Harmed*, 67.

<sup>506</sup> See for example, Qur’ān 22:62, 24:25, and 31:30.

<sup>507</sup> P. Bearman et al, (eds.), “Ḥuḳūk”, in *Encyclopaedia of Islam* (second edition). For more on the different usages of the human self (*al-naḥs*) in Islam, see Sara Sviri, “The Self and Its Transformation in Ṣūfism: With Special Reference to Early Literature” in *Self and Its Transformation in the History of Religions*, eds. David Shulman and Guy G. Stroumsa (Oxford: Oxford University Press, 2002).

<sup>508</sup> Edward William Lane, *An Arabic-English Lexicon*, Vol. 1 (Williams & Norgate, 1863), 607-608. Ibn Manẓūr (d. 1311-1312) in his famous thirteenth-century Arabic lexicon *Lisān al-‘Arab* records *ḥaqq* as “the opposite of falsity” (*naqīḍ al-bāṭil*), 939.

<sup>509</sup> Hallaq, *God Cannot Be Harmed*, 64.

<sup>510</sup> See Hans Wehr, *A Dictionary of Modern Arabic*, ed. J. Milton Cowan (Spoken Language Services: 1994, fourth edition, first published 1979), 224; Lane, *An Arabic-English Lexicon*, Vol. 1, 608.

<sup>511</sup> The translation of “servants” here refers to the whole of humanity and creation, since in the Islamic religious tradition the whole of creation worships and glorifies God (even inanimate objects), see for example Qur’ān 17:44, 24:41, 51:56 and 30:26. Hence these Islamic human rights are sometimes also called the rights of creation (*ḥuqūq al-makhlūqāt*), see Arnold Yasin Mol, “Islamic Human Rights Discourse and Hermeneutics of Continuity”, *Journal of Islamic Ethics* 3 (2019): 191-192.

<sup>512</sup> Khaled Abou El Fadl, “Shari‘ah and Human Rights”, in *Routledge Handbook on Human Rights and the Middle East and North Africa*, ed. Anthony Tirado Chase (London and New York: Routledge,

against violations that are instigated between individual human beings, and in that sense belong to the civil sphere. Islamic human rights (*ḥuqūq al-ādamiyyīn*) also contained a category of so-called “unearned rights” (*ghayri muktasab*).<sup>513</sup> These rights can be seen as natural rights that are inalienable and inborn in every human being. The jurist of the Ḥanafī school of law, for example, would count the fundamental rights to life, liberty and property among these rights. These rights fall under human inviolability (*‘iṣma*) and inhere in all individual human beings.

The idea of Islamic human rights (*ḥuqūq al-ādamiyyīn*) is often coupled in Islamic legal literature with the divine rights (*ḥuqūq Allāh*), as the Islamic religious worldview also accords certain claims the Creator can make upon his creation.<sup>514</sup> The term “divine rights” might be easily misunderstood. The Islamic perception of God is that He is omnipotent and self-sufficient, and hence in no need of anything, including “rights”.<sup>515</sup> These rights generally pertain to public interests that cannot be claimed by any individual in particular and hence must be administered by the state. Hence, human beings are the ultimate beneficiary of divine rights. These are generally catered towards the preservation of an orderly society and the benefit of human life, such as public order and safety, infrastructure, markets and taxes levied upon the population.<sup>516</sup> Sometimes divine rights and human rights were mixed, and hence needed considerable deliberation and legal interpretation (*ijtihād*) on the part of the jurisconsult (*mujtahid*). Together human rights and divine rights represent a legal heuristic that aims to clarify the Islamic scheme of rights and obligations within the public and private sphere of human action.<sup>517</sup>

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2017), 278; Reem A. Meshal, *Sharia and the Making of the Modern Egyptian: Islamic Law and Custom in the Courts of Ottoman Cairo* (Cairo: The University of Cairo Press, 2014), 177-210.

<sup>513</sup> Recep Şentürk, “Ādamiyya and ‘Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law”, *İslām Araştırmaları Dergisi* 8 (2002): 47.

<sup>514</sup> Mol, *Islamic Human Rights Discourse and Hermeneutics of Continuity*, 191.

<sup>515</sup> See Umar F. Abd-Allah, “Theological Dimensions of Islamic Law”, in *The Cambridge Companion to Islamic Theology*, ed. Tim Winter (Cambridge: Cambridge University Press, 2008), 237-257; Abū Ja‘far al-Taḥāwī, *al-Aqādat al-Taḥawiyya*, trans. Hamza Yusuf (California: Zaytuna Institute, 2007).

<sup>516</sup> Mol, *Islamic Human Rights Discourse and Hermeneutics of Continuity*, 192-193.

<sup>517</sup> For more details about *ḥuqūq al-ādamiyyīn* and related concepts, see Miriam Hoexter, “*Ḥuqūq Allāh* and *Ḥuqūq al-‘Ibād* as Reflected in the *Waqf* Institution”, *Jerusalem Studies in Arabic and Islam* 19 (1995): 133-156; Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1998), 190- 218; Anver M. Emon, “*Ḥuqūq Allāh* and *Ḥuqūq al-‘Ibād*: A Legal Heuristic for a Natural Rights Regime”, *Islamic Law and Society* 13, No. 3 (2006) 13(3): 325-391; Hallaq, *God Cannot Be Harmed*, 67-81.

After this brief survey, let us take a closer look to an early modern example of the Islamic *ḥuqūq* discourse. The early modern Bosnian-Ottoman Ḥanafī jurist Ḥasan Kāfi al-Āqhisārī (d. 1615), in his commentary (*sharḥ*, pl. *shurūḥ*) on his own juridico-philosophical treatise on *Samt al-wuṣūl ilā ‘ilm al-uṣūl* [The way of attainment to the science of legal philosophy], succinctly explains the rights scheme of Islamic law.<sup>518</sup> According to his categorization (*tafṣīl*) rights can be divided into four types: (a) rights that belong purely to God, (b) rights that belong purely to human beings, (c) rights that belong to both God and human beings in which the *right of God* predominates, and (d) rights that belong to both God and human beings in which the *right of human beings* predominates.<sup>519</sup> Since latter two categories of rights involve the mixing of the rights of God and mankind to various gradations, we might refer to them as “mixed rights I” and “mixed rights II”, respectively. The first two categories of rights, on the other hand, refer specifically and “purely” (*khālīṣa*) to the rights of either men or God. These types of rights we might call “special rights”.

The first category of rights belongs purely to God (*ḥuqūq Allāh khālīṣa*) and is defined by al-Āqhisārī as those rights that are related to public benefit (*al-naḥḥ al-‘ām*).<sup>520</sup> This definition clarifies the easy misapprehension that these “rights of God” are for His own benefit. This is not the case, since in the Islamic *Weltanschauung* God is free of any need. The Qur’ān states “People, it is you who stand in need of God (*antum fuqarā’ ilā Allāh*) – God needs nothing (*huwa al-ghanī*) and is worthy of all praise”.<sup>521</sup> The rights of God go beyond the right to be worshipped as the Creator of “all things in existence” (*al-mawjūdāt kulluhā*).<sup>522</sup> These rights also refer to the prevention of public harm. In contradistinction to the second category of rights, the rights of human beings (*ḥuqūq al-‘ibād*), these rights are not connected to the infringement upon the rights of

<sup>518</sup> Ḥasan ibn Tūrkḥān ibn Dāwūd ibn Ya‘qūb al-Zīnī al-Būsawī al-Āqhisārī, *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl*, (Dār Ibn Jawzī, 2010), 332-343. Al-Āqhisārī’s *Samt al-wuṣūl* is itself an abridgement of the widely studied treatise on Islamic legal philosophy *Manār al-anwār fī uṣūl al-fiqh* [The beacon of lights in the principles of jurisprudence], by the famous early fourteenth-century Ḥanafī scholar Abū al-Barakāt al-Nasafī (d. 1310), which was widely studied in Ottoman religious seminaries (*madrasa*, pl. *madāris*).

<sup>519</sup> Al-Āqhisārī, *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 332-333.

<sup>520</sup> Al-Āqhisārī, *Sharḥ Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 332.

<sup>521</sup> Qur’ān, 35:15. Among other verses, also see 6:133, 29:6, 31:12, 39:7, 47:38.

<sup>522</sup> Qur’ān 14:34, 51:56. of this thesis. For an explanation of God as Owner of “all things in existence” (*al-mawjūdāt kulluhā*), see Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *al-Maqṣad al-asnā fī sharḥ al-ma‘anī asmā Allāh al-ḥusnā*, ed. Bassām ‘Abd al-Wahhab al-Jābī (Beirut: Dār Ibn Ḥazm, 2003), 140-141. For more on the Qur’ānic moral-legal framework of Islamic law, see section 6.4.2. of this thesis.

an individual person, but they aim to protect the whole of human society. A case in point, given by al-Āqhisārī, is the prohibition of sexual misconduct (*zinā*).<sup>523</sup> If the illicit sexual relations are mutually consented between two people, no individual rights are infringed upon. There is however, according to Islamic ethical considerations, societal harm, such as the spread of corruption and immorality in society or children being born out of wedlock if sexual misconduct becomes widespread (and children lacking legal protection as a consequence). These rights, in other words, are *public rights*.

The second category of rights, on the other hand, belongs purely to human beings (*ḥuqūq al-ʿibād khāliṣa*). These types of right do not relate to public benefit but to specific interests (*maṣlaḥa khāṣa*) of human beings, and hence involve the infringement upon *private rights*.<sup>524</sup> The example given by al-Āqhisārī in this instance is the inviolability of the property of other people (*ḥurmat māl al-ghayr*).<sup>525</sup> Since in this case we are dealing with private rights, the author explains, the owner of the property (*al-mālik*) can also give permission to others to freely use or rent property, for example. While on the other hand, no such permissibility is in order for those committing sexual misconduct.<sup>526</sup>

The third category of rights (mixed rights I) belongs to both God *and* human beings, in which the right of God predominates (*ḥaqq Allāh fihī ghālib*).<sup>527</sup> The example given here, is the punishment for slanderous accusations of sexual conduct (*ḥadd al-qadhf*).<sup>528</sup> In this case there is, once more, a public harm that needs to be deflected. But there is also a private interest, which involves the protection of the honor of the victim. In this case, however, the right of God is predominant. In classical Islamic legal practice, this means that in the circumstances of a court case the plaintiff cannot waive his or her rights (i.e., the *ḥadd* punishment must still be exercised, even if the plaintiff pardons the defendant).<sup>529</sup>

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<sup>523</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 332. The author also mentions in this regard the protection of lineage (*nasb*, pl. *ansāb*).

<sup>524</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 332.

<sup>525</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 332. Property rights in the Islamic legal tradition are extensively dealt with in chapter 6 of this thesis.

<sup>526</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 332.

<sup>527</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 332.

<sup>528</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 332.

<sup>529</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ʿilm al-uṣūl*, 333.

The fourth and last category of rights (mixed rights II) belongs to both God *and* human beings, in which the right of human beings predominates (*ḥaqq al-‘ibād ghālib*).<sup>530</sup> In this case, again, both rights are infringed upon. Al-Āqhisārī offers the example of murder (*qiṣāṣ*) or bodily violence.<sup>531</sup> In the case of bodily violence or murder there is a clear public harm for society at large, which necessitates the “freeing of the world from corruption” (*ikhhlā’ al-‘ālam ‘an al-fasād*).<sup>532</sup> In such a case the person who was violently attacked or the relatives of the person who was murdered may demand punishment or compensation in order to preserve their interests. However, they may also waive their rights and pardon the perpetrator.<sup>533</sup>

<b>The private-public dichotomy in the Islamic rights scheme</b>				
<i>Category of right:</i>	<i>Allocation of right:</i>	<i>Private-public dichotomy:</i>	<i>Example:</i>	<i>Possibility of pardon</i>
Special rights of God	God’s right purely	Public rights	Prohibition of sexual misconduct ( <i>zinā</i> )	No
Special rights of Men	Men’s right purely	Private rights	Protection of other’s property ( <i>māl</i> )	Yes
Mixed rights I	God’s right predominates	Public and private rights	Punishment for slanderous accusations ( <i>qadhf</i> )	No
Mixed rights II	Men’s right predominates	Public and private rights	Punishment for murder ( <i>qiṣāṣ</i> )	Yes

Table 1: The *ḥuqūq* scheme in Islamic law

<sup>530</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 333.

<sup>531</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 333.

<sup>532</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 333.

<sup>533</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 333.

Before the advent of modernity from the eighteenth century onwards, there was a certain continuity and internal unity in the Sharī‘a and the Islamic legal outlook that would cease to exist afterwards. Hallaq speaks in this regard of the “systematic components of the Sharī‘a’ that produced its own *legal episteme*”. Despite – or perhaps because – the Sharī‘a’s many cultural variations and a great capacity for adaption, Islamic law and legal culture had always entertained “structures of authority and discursive and cultural practices that did not change over time and space”.<sup>534</sup> In other words, the internal logic of the Sharī‘a and its overall legal-moral vision for human dignity and societal flourishing was continuous and stable, but at the same time possessed a dynamism and organicity that would eventually become lost in the modern world, especially after 1800.<sup>535</sup> This continuity was established and promoted throughout the centuries through legal education, legal scholars, public legitimacy, and political patronage, and communicated through the juridical, political and ethical literatures of Islamic civilization.

#### 4.4. Conclusion

In this chapter we have explored the *ḥuqūq* discourse in the Islamic legal tradition. Before doing so, we have elaborated upon the challenges of doing a conceptual history of Islamic rights schemes in the context of comparative legal studies. We have seen that scholarship in Western languages – be it English, German, French, or otherwise – linguistically delimits the Islamic *Sharī‘a* discourse in serious ways. In this context, we have spoken about the so-called “prisons of language” and the problem of (un)translatability of a legal tradition that is by-and-large expressed in medieval texts written in classical Arabic (*al-‘arabīyyat al-fuṣḥā*). More often than not – and this also ties into our discussion of legal Orientalism in the introduction of this thesis – Western scholarship has resulted in a “monolinguisism of the Other”, in which the Islam and Muslims are Otherized. Instead, we have argued for Islam as a discursive tradition,

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<sup>534</sup> Hallaq, *Sharī‘a*, 15.

<sup>535</sup> For a discussion on some of the dramatic changes in the Muslim world and its effect on Islamic legal developments, see Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London: Hurst & Company, 2005), 222-253; Marshall G. S. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization, Gunpowder Empires and Modern Times*, Vol. 3 (Chicago and London: The University of Chicago Press, 1961), 176-248; Ira M. Lapidus, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 2002, second edition), 453-468; In general, also see Part III, “The Sweep of Modernity”, in Hallaq, *Sharī‘a*, 357-499.

with its own internal logic and dynamism. Hence, any comparative study of the Islamic legal tradition should involve a serious engagement with its own legal culture, legal epistemology, legal anthropology, legal norms, legal language, and legal reasoning. This can only be achieved by engaging the juridical literature of the classical scholars of Islam (*fuqahā*).

Furthermore, we have compared how English scholarship on the Islamic legal tradition has framed “Islamic law” in comparison with how Islamic jurists defined *fiqh* and *sharīʿa*. As a case study in legal Orientalism, we have analyzed Kevin Reinhart’s application of the so-called Hart-Dworkin framework for evaluating Islamic law. We have concluded that this approach is problematic because it does not engage the Islamic legal tradition on its own terms. Instead, it uses the Western legal tradition – and a thoroughly modern incarnation at that – as a “measuring rod” for Islamic “law”. In doing so, it artificially separates the moral and legal dimension of the Islamic law along the lines of the legal positivist perspective.<sup>536</sup> Furthermore, we have given several examples of classical Muslim jurists and how they defined central Islamic legal terminology, such as *sharīʿa* and *fiqh*, based on the Qur’ānic moral-legal framework set out in various genres of Islamic juridical literature, such as *fiqh* and *uṣūl al-fiqh*. In doing so, we have also aimed to show the importance Islamic legal scholars gave to the intricacies of language, and model that is arguable worthy of emulation for any scholar, be they Muslim or non-Muslim.

After that we have explored in detail some examples of the rights discourse in the medieval and early modern Islamic legal tradition. A survey of the historiographical literature has shown that the Islamic legal tradition emerged as a legal tradition in the seventh century and showed remarkable creativity and resilience. It inherited some of the social institutions of the late antique world but developed by-and-large as an independent legal tradition based on its own legal and religious sources. After its formalization in the tenth century and afterwards through the formation of the classical schools of Islamic law, the Islamic legal tradition remained more or less homogenous throughout pre-modernity. Despite cultural variety in the various geographies to which Islamic civilization spread, it exemplified a “structural and systemic unity”, that was

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<sup>536</sup> See our discussion of the moral and legal dimensions of the law in Chapter III.

maintained by a developed *corpus juris*, a class of legal scholars, and developed curricula of legal education throughout the Muslim world.

Orientalist scholarship on Islam and human rights has differed on the question if the Islamic legal tradition has its own “rights discourse”. Some have claimed that Islam has no conception of individual rights and that it is a “duty-based” system. We have seen similar claims in certain reformist trends of contemporary Muslim scholarship. Our survey of Islamic juridical literature, however, shows that there is a rich rights discourse in the Islamic legal tradition, that is often overlooked in contemporary scholarship. The jurist of Islam from very early on developed conception of rights. These ideas became formalized in the genres of *fiqh* and *uṣūl al-fiqh* during the formation of the classical schools of Islamic law. As early as the tenth century, we see elaborate discussions amongst the Muslim jurists about ideas of moral responsibility (*taklīf*), legal personality (*dhimma*) and legal capacity (*ahliyya*). This conceptual framework forms the basis for the rights hermeneutic of Islamic private and public rights (*ḥuqūq Allāh wa ḥuqūq al-‘ibād*). In Islamic legal scholarship all human beings are considered “rights-holders” and able to make claims on other people. In contradistinction to the Western legal tradition, Islamic law allotted legal personality to all human beings, including, women, children, slaves, and religious minorities. The discourse of Islamic human rights (*ḥuqūq al-ādamiyyīn*) in classical Islamic jurisprudence thus forms rich resource for “rights talk” regarding inalienable rights and human dignity. Hence, the Islamic rights discourse was recognized as “proto-human rights” by some scholars.

While the Islamic legal tradition was by-and-large consistent and continuous throughout the pre-modern period, notwithstanding some cultural variations according to geography and legal school – this drastically changed during the advent of modernity after 1800 and beyond. With the rise of the hegemonic West and global colonization, Muslim legal systems and legal education was slowly but steadily dismantled. Modern incarnations of Islamic law in Muslim-majority countries are often limited to family law as part of a mixed legal system with mostly elements of European civil law.

## CHAPTER V

### FUNDAMENTAL RIGHTS IN PREMODERN WESTERN LAW: LIFE, LIBERTY AND PROPERTY

“No one ought to harm another in his life, health, liberty, or possessions.”

*John Locke*<sup>537</sup>

“So God created man in his own image, in the image of God created He him.”

*Genesis 1:27*

In this chapter we explore fundamental rights in early modern natural rights theories, with a special focus on the works of Grotius, Hobbes, Pufendorf, and Locke. These four natural rights theorists belong to what has been called the “era of classical natural rights texts”. After having explored the medieval and early modern rights discourses in Chapter III, here we further explore what the rights theories of the natural rights theorists entail and which justifications they had for their ideas.

In Section 5.1, we elaborate upon the idea of fundamental rights as “basic goods”. In the Western legal tradition, we encounter the question of common goods often, such as in the works of Aquinas. The underlying question is one of the basic concerns for human dignity and life. In contemporary times, the neo-Thomist philosopher John Finnis has written about common goods. In Section 5.2., we explore the ideas of Grotius, Hobbes, and Pufendorf from the perspective of being precursors to John Locke, who – it is argued by many – is the first one in the Western legal tradition to formulate a coherent and mature theory of natural rights. Section 5.3. deals with the Lockean rights theory, and the final section summarizes the findings and draws conclusions relevant to the key concerns of this study.

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<sup>537</sup> John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis and Cambridge: Hackett Publishing Company, 1980, originally published in 1690), 9.

## 5.1. Fundamental Rights as Basic Goods

Theories of rights identify a multitude of different rights for human persons. However, not all rights are equal. Some rights are more fundamental than others in terms of how they support and enable basic human dignity and societal flourishing. Rights function, so to speak, in a hierarchy of rights in which some rights are primary, while others are less so. Other rights might be secondary – or even tertiary – to fundamental rights. They are not absolutely essential to human life and dignity. They are, rather, additional “embellishments” or “adornments” to fundamental rights. Even in the modern human rights discourse not all rights are equal. There is an observable hierarchy in which some rights are seen as more fundamental than others. We speak in this regard for example of the notion of “rights triage”, the practice of human rights organizations to prioritize certain rights over others based on a variety of rationales.<sup>538</sup>

In the Western legal tradition – and there are equivalents in the Islamic legal tradition as well<sup>539</sup> – various scholars have proposed “basic sets” of rights. In medieval times, for example, Thomas Aquinas (d. 1274) spoke of his “basic goods”. These were life, reproduction, education, worship, social life, avoiding offence and shunning ignorance.<sup>540</sup> The contemporary natural law philosopher John Finnis, on the other hand, enumerates the basic goods of practical reflection, life, knowledge, play, aesthetic experience, sociability (i.e., friendship), practical reasonableness, and religion.<sup>541</sup> Arguably, human beings are always concerned with these basic necessities of life, even though different perspectives exist in terms of which goods are “basic goods”, i.e., which goods are basic to human dignity and societal flourishing. And many – if not all – of these basic goods work in conjunction with one another. The basic goods of sociability or religion cannot exist without the basic goods of life and knowledge. Hence, Finnis argued, all these goods are “equally fundamental”.<sup>542</sup> Fundamental rights, understood as such, could be seen as “basic goods”.

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<sup>538</sup> Hurst Hamnum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge: Cambridge University Press, 2019), 161.

<sup>539</sup> See Chapter VI.

<sup>540</sup> For an elaborate discussion of basic goods, see Jean Porter, “Basic Goods and the Human Good in Recent Catholic Moral Theology”, *The Thomist: A Speculative Quarterly Review* 57, No. 1 (1993): 27-49.

<sup>541</sup> John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 2011), 81-96.

<sup>542</sup> Finnis, *Natural Law and Natural Rights*, 92-95.

## 5.2. Precursors to the Lockean Rights Scheme: From Self-Preservation to Human Worth

Many consider that Locke developed the first “mature” theory of natural rights, with his espousal of the basic rights to life, liberty, and estate (or property). His predecessors do not always yet have full-fledged rights theories. But they contribute important building blocks to natural rights thinking, such as the separation between law (*lex*) and right (*ius*), which gave Locke the opportunity to use a richer and more elaborate rights language. They also all had in common the emergence of the modern state in Europe. In many ways their theories can be seen as a response to political developments, rather than any intrinsic moral or religious world view, as was the case for Islam.

In addition, there seems to be a tension in early modern rights language. On the one side is a universalizing trend, that wants to include “all mankind”. On the other hand, natural rights theories have been used (including by Locke) to promote slavery, the usurpation and colonization of the lands indigenous peoples in the American, and arguable the subjugation of women and minorities in society. That being said, the impact of early modern natural rights theory on the Enlightenment, the various declarations of the “rights of man” in the eighteenth century, and – notwithstanding their secularizing tendency – modern human rights as well.

### 5.2.1. Grotius and the Law of Nations

The right to the protection of life may take many forms and it is interpreted differently by many authors. Narrowly defined it refers to the right “not to be killed” but in a broader sense it also refers to the right “to live decently”.<sup>543</sup> What is considered as decent and respectable (productive, fruitful, comfortable, meaningful, etc.) is of course relative to different cultures and religions. It can refer to such things as decent working conditions, a right to food, clothing, housing, education, and so forth. The right to life in that sense is actually a “comprehensive package of rights”.<sup>544</sup> In modern legal terminology we often speak of a

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<sup>543</sup> Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life”, *Philosophy and Public Affairs* 7, No. 2 (1978): 94.

<sup>544</sup> Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 94.

“bundle of rights” in this regard. Here, we focus mostly on the fundamental right to the protection of life in a narrower sense, as the right “not to be killed”.<sup>545</sup>

For our early modern natural rights theorists – the likes of Grotius, Hobbes, Pufendorf and Locke – the classical meaning of the right to live would have indeed pertained to notions of the effective termination of life, be it through suicide, homicide, capital punishment or in the context of armed struggle and warfare.<sup>546</sup> It as a “claim-right” in the sense that if X has a right to life, then Y has a duty not to kill him or let him die when he could be saved without being endangered themselves.<sup>547</sup> In penal law it may pertain to the crime of murder of a fellow citizen. But in modern international human rights law, more often than not, it pertains to the protection of the lives of non-combatants and prisoners. These concerns were also reflected in historical notions of the early modern law of warfare (*jus in bello*) and theories of a just war (*bellum justum*), of which Grotius and other early modern natural rights theorists were a major part.<sup>548</sup>

Grotius, of course, would become famous for espousing his idea of the “right to self-defense” in his elaboration of the “international” law of nations. Grotius would argue – in his elaboration of a natural rights theory – for the right to self-preservation as the only real right human beings have (a notion Hobbes would share with him). Certainly, in a state of war, be it on sea or land – the right to self-defense was primary. His conception of self-defense, however, was also malleable since his natural rights theory has also been used justify colonialism and “just war”.<sup>549</sup> Grotius’ law of nations seems to have made great strides in

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<sup>545</sup> An exploration of the broader sense of the right to life would be far too extensive to attempt here. To give but one example, the right to life according to French Human Rights League (a modern incarnation of the French Declaration of the Right of Men and of the Citizen) includes: the rights of care for mothers, the rights of children, the rights of women of freedom from exploitation and domination, the rights of the elderly, the rights of the sick, the rights of invalids, the rights to work, the rights to leisure, the rights to fair pay, the rights to medical care, the right to intellectual and artistic expression, the rights of maintenance for those who cannot work, and so forth. Cited in Hugo Bedau, “The Right to Life”, *The Monist* 52, No. 4 (1968): 551.

<sup>546</sup> Bedau, *The Right to Life*, 550. According to Bedau, not these natural law theorists, but actually the English jurist Sir William Blackstone (d. 1780) wrote most extensively on the right to life in his *Commentaries on the Laws of England*. Interestingly, it was the same Blackstone that would become the main target of critique of modern legal positivists, such as John Austin. See I. G. Doolittle, “Sir William Blackstone and His ‘Commentaries on the Laws of England’”, *Oxford Journal of Legal Studies* 3, No. 1 (1983): 99-112.

<sup>547</sup> Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 95.

<sup>548</sup> Ove Bring, “Hugo Grotius and the Roots of Human Rights Law”, in *Human Rights Law: From Dissemination to Application: Essays in Honour of Göran Melander*, eds. Jonas Grimheden and Rolf Ring (Leiden and Boston, Martinus Nijhof Publishers, 2006), 131.

<sup>549</sup> Mikki Stelder, “The Colonial Difference in Hugo Grotius: Rational Man, Slavery and Indigenous Dispossession”, *Postcolonial Studies* 25, No. 4 (2022): 564-583.

terms rights for peoples. It included, for example, the prohibition of killing prisoners, hostages, or innocent civilians, including woman and children. But European economy being, certainly in large part, build upon colonialism and transatlantic slave trade, seems to have been unable to extend his natural rights thinking indigenous peoples or those who ended up slaves.

Grotius made no specific mention of right to the protection of life, as John Locke for example would have done later.<sup>550</sup> However, in his *De jure belli ac pacis* [On The Law of War and Peace], in the chapter on *Of Things Which Belong in Common to All Men*, Grotius speaks of the “rights common to all men”, which he distinguished from a “particular right” a person may have.<sup>551</sup> In this context, he Grotius speak about the preservation and protection of life, almost in terms of the “basic goods” we discussed above. In one section Grotius mentions the rights that a required by human life. He says:

We are not talking here of what is superfluous, and what serves only for pleasure, but of such things as there is no living without, such as food, and cloaths, and medicines.<sup>552</sup>

He is talking about the basic necessities of life (i.e., the right to life as defined in a broader sense).<sup>553</sup> These are rights that are owed *common to all men*, according to Grotius. Hence, we should not withhold these rights from each other. Withholding human beings from these “fruits of the earth that grow for all”, Grotius argues, is “contrary to the nature of human society”.<sup>554</sup> Since these are rights that are “common to all men”, they should also be extended to those who are not citizens of the nation. This even counts in times of famine and shortage of food supplies. Even in these times, Grotius says, “we cannot expel those foreigners we have once admitted, but must [...] be sharers in a common calamity”.<sup>555</sup> While self-preservation seems to be the core value of Grotius natural rights theory – and for that matter that of Hobbes as well – he does seem to argue for a degree of sociability. In this sense, Grotius seems to be a precursor to Pufendorf, who made sociability – contra Hobbes – the

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<sup>550</sup> Bring, *Hugo Grotius and the Roots of Human Rights Law*, 136-137.

<sup>551</sup> Hugo Grotius, *The Rights of War and Peace*, Vol. II, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), 420.

<sup>552</sup> Grotius, *The Rights of War and Peace*, Vol. II, 449

<sup>553</sup> See Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 94.

<sup>554</sup> Grotius, *The Rights of War and Peace*, Vol. II, 449-450.

<sup>555</sup> Grotius, *The Rights of War and Peace*, Vol. II, 450.

core idea of his natural rights theory. However, inherent human dignity was never the motivating factor behind Grotius' deliberations.<sup>556</sup>

### 5.2.2. Hobbes and the Right to Self-Preservation

For Hobbes the right to life is not a claim-right, as in the state of nature there are no corresponding duties. It is after all, the “war of all against all” (*bellum omnium contra omnes*). Instead, he considers the right to defend one's life as a “natural liberty”.<sup>557</sup> In other words, it is a liberty-right or a “privilege” in Hohfeldian terms.<sup>558</sup> The basic right to self-preservation is of course at the root of Hobbes' legal and political philosophy. Hobbes explains in his *Leviathan* what he perceives to be the most fundamental and basic natural right of human beings. He writes that the most basic natural right (*jus naturale*) every human being has, is to use force to protect himself and preserve his own life. In doing so, Hobbes argues, human individuals can basically use any means necessary to protect their own beings.<sup>559</sup>

Thus, in the Hobbesian understanding, having the natural liberty-right to self-preservation entails others are not at liberty to kill you.<sup>560</sup> Hobbes is not as much concerned with the rights to the protection of the lives of others. In Hobbes' highly individualistic natural rights theory, he prioritizes what in his view is the deeply imbedded psychological motive of human beings to pursue their own self-interests and passions. One of the strongest passions and self-interest human beings can experience, according to Hobbes, is fear of a *violent death*. It is fear of a violent death that “activates” in individual human beings the natural right to do anything necessary for the preservation of their own lives.<sup>561</sup> It is in this context Hobbes talks about the state of nature in which “every man is enemy to every man”. It is a life without security and of “continual fear”. Worst of all, Hobbes states, is the “danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short”.<sup>562</sup>

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<sup>556</sup> Bring, *Hugo Grotius and the Roots of Human Rights Law*, 141.

<sup>557</sup> Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 95.

<sup>558</sup> For the Hohfeldian rights scheme, see Chapter III.

<sup>559</sup> Thomas Hobbes, *Leviathan*, ed. J. C. A. Gaskin (New York: Oxford University Press, 1996, originally published 1651), 86.

<sup>560</sup> Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 96.

<sup>561</sup> Gary Herbert, “Fear of Death and the Foundations of Natural Right in the Philosophy of Thomas Hobbes”, *Hobbes Studies* 7 (1994): 57.

<sup>562</sup> Hobbes, *Leviathan*, 84.

However bleak Hobbes initial outlook for man, the natural state of human beings as the “war of all against all” need not – *should* not – be perpetual, according to Hobbes. Because fear of death is also the ‘passions that incline men to peace’.<sup>563</sup> While in the state of war of all against all, human beings have the right to all things to defend their lives by any means necessary, even if that means killing another human being. As such there can never be any security for men. Every should therefore, argues Hobbes, strive for peace. From this derives his second rule of nature. This second rule entails that when other people are inclined to peace (and hence lay down arms), so too a person should be willing to give up his basic right to self-preservation for the greater good of all: which is peace, safety and stability. For the purpose of the ultimate good, this second rule then seems to trump the first, as perpetual war cannot be the eternal state of mankind.<sup>564</sup>

It is best, Hobbes argues, to strive for peace and enter a social contract with society and the state, thereby exiting the state of nature. Even if this entails to give up (some of) your rights to other people or to the state that governs you. In doing so, he cites the Biblical axiom “whatsoever you require that others should do to you, that do ye to them”.<sup>565</sup> The law of nature – be it before or after entering the social contract – eventually has the same aim; that of the preservation of life. But renouncing the state of nature – which inevitably leads to the war of all upon all – and submitting to state sovereignty accomplished that goal better in Hobbes’ view.<sup>566</sup>

But all being said and done, Hobbes’ theory is vastly different from the inalienable right to the protection of life, as is would later be espoused by John Locke. Let alone, by Immanuel Kant in the Age of Enlightenment or by Thomas Jefferson in the American Declaration of Independence. What *is* present in the rights thinking of Hobbes is the explicit recognition of a distinct human nature in mankind which is the ground upon which they can receive basic personal rights. This idea is much more pronounced in Hobbes than it was in the canon law

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<sup>563</sup> Hobbes, *Leviathan*, 86.

<sup>564</sup> Hobbes, *Leviathan*, 87.

<sup>565</sup> Hobbes, *Leviathan*, 87. Also see 111, where Hobbes mentions “doing to others, as we would be done to” as the summary of natural laws of ‘justice, equity, modesty, mercy’.

<sup>566</sup> Renato Janine Ribeiro, ““Men of Feminine Courage”: Thomas Hobbes and Life as a Right”, *Hobbes Studies* 24 (2011): 46.

jurists and theologians of the Middle Ages, such as John of Paris or Thomas Aquinas, as we have seen in Chapter III.<sup>567</sup>

### 5.2.3. Pufendorf's Theory of Sociability

Samuel Pufendorf is in many ways an inheritor of the natural rights theories stated by Grotius and Hobbes in their respective works. Although he further developed and synthesized their ideas and fundamentally disagreed on important points, especially with regards to Hobbes' cynical evaluation of the state of nature as *bellum omnium contra omnes*. At the same time, Pufendorf's work is often recognized in modern scholarship as anticipating the modern conception of human rights. For example, his idea of natural equality, it has been argued, has been seen as affirming the idea of universal humanity and as a precursor to universal human rights.<sup>568</sup> This view is probably an overstatement. Pufendorf's main concern was, as political historian Heikki Haara mentions, to offer a "theory that would explain and justify why individuals should obey sovereign state authority in order to maintain sociability and political stability".<sup>569</sup>

A close reading of some of his main legal and political works does show Pufendorf has a rudimentary conception of subjective natural rights for human beings. But that does not seem to be his main concern. Pufendorf argues that all human beings have the natural right to life, body, chastity and liberty.<sup>570</sup> In his *De Jure Naturae et Gentium* [On the Law of Nature and of Nations], Pufendorf says:

This precept protects and orders us to hold sacrosanct, as it were, not only those things that nature itself has immediately granted us, such as *life, body, limbs, chastity, simple esteem, and freedom*; but its force is also understood to diffuse itself

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<sup>567</sup> See Gerson Moreno-Riaño, "John of Paris, Private Property, and the Study of Medieval Political Thought", *John of Paris: Beyond Royal and Papal Power*, ed. Chris Jones (Turnhout, Belgium Brepols Publishers, 2015), 225-238; Jean Porter, "From Natural Law to Human Rights: Or, Why Rights Talk Matters", *Journal of Law and Religion* 14, No. 1 (1999-2000): 77-96.

<sup>568</sup> See for example, Kari Saastamoinen, "Hobbes and Pufendorf on Natural Equality and Civil Sovereignty", in *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought* eds. Ian Hunter and David Saunders (2002), 189.

<sup>569</sup> Heikki Haara, "Inclination to Self-Preservation and Rights to Life and Body", in *Rights at the Margins: Historical, Legal and Philosophical Perspectives*, eds. Virpi Mäkinen, Jonathan Robinson, Pamela Slotte, and Heikki Haara (Leiden and Boston: Brill, 2020), 87.

<sup>570</sup> Korkman, *Life, Liberty, and the Pursuit of Happiness*, 259.

throughout all the institutions and agreements by means of which a man acquires something, as if they would be plainly useless without it.<sup>571</sup>

Pufendorf's usage of the term right as *ius* is classified into four categories. These are the power over one's own actions (*libertas*), the power over someone else's actions (*imperium*), the power over one's property (*dominium*) and the power over someone else's property (*servitus*).<sup>572</sup> However, it was only the first category, that of *libertas*, that Pufendorf truly saw as an innate right that exists in human by nature. The other three categories – *dominium*, *imperium*, and *servitus* – only come into existence through contractual arrangements.<sup>573</sup> In the sense of a subjective right (*ius*), Pufendorf thus sees *libertas* as an innate natural right, because it does not entail a subjugation of a human beings "physical and moral personality". These entail his life, actions, honor, and reputation.<sup>574</sup>

But Pufendorf also argued there must be a "natural prima facie right to violent self-defense".<sup>575</sup> In that sense he seems very similar to Grotius and Hobbes. In his *De officio hominis et civis iuxta legem naturalem* [On the Duty of Man and Citizen According to Natural Law] he states that human beings possess natural reason. And this reason dictates that he has certain natural freedoms and is not dependable upon others to justify his actions. This human reason he possesses would also dictate – something that is commonly shared amongst all human beings – that he must "strive to preserve his body and life and to repel all that threatens to destroy them", and do so by any means necessary.<sup>576</sup>

However, Pufendorf fundamentally disagrees with Hobbes' conception on the state of nature. Not the war of all against all is the basic state of nature, as Hobbes would have it, but peace is actually the basic state of nature. In this regard, the most fundamental concept in Pufendorf's natural law theory is the idea of "sociability". It refers to his idea that a life of loneliness is not befitting for human beings as God endowed them with a nature that

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<sup>571</sup> Craig L. Carr (ed.), *The Political Writings of Samuel Pufendorf*, trans. Michael J. Seidler (New York: Oxford University Press, 1994), 158. (Emphasis mine.)

<sup>572</sup> Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), 40.

<sup>573</sup> Knud, *Natural Law and Moral Philosophy*, 40

<sup>574</sup> Knud, *Natural Law and Moral Philosophy*, 40.

<sup>575</sup> Korkman, *Life, Liberty, and the Pursuit of Happiness*, 260.

<sup>576</sup> Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. James Tully, trans. Michael Silverthorne (Cambridge: Cambridge University Press, 1991), 117.

promotes a safe and fruitful social life.<sup>577</sup> Instead of war being the essential to social relations in the state of nature, thus, Pufendorf argues that these essential social relations are actually characterized by sociability; the fundamental human need for people to live and work together in a state of safety and prosperity. In doing so, Pufendorf synthesizes Hobbes' idea of the essential need for self-preservation *and* Grotius' idea of the inherent social nature of human beings as the dual grounds for the idea of the natural law.<sup>578</sup> However, for Pufendorf, sociability is also a divinely imposed reality. He argues that human beings were created with the "necessity" for leading a peaceful social life.<sup>579</sup>

However, the question remains how far Pufendorf's plea for innate natural rights extend. At the backdrop of his idea of sociability, Pufendorf argues that to be a political animal, to be a "good citizen" people should give their natural rights in favor of broader society. In his *On the Duty of Man and Citizen*, he states about the civil life:

In becoming a citizen, a man *loses his natural liberty* and subjects himself to an authority whose powers include the right of life and death. At its command he must do much he would otherwise avoid; and he must not do much that he would otherwise powerfully desire to do. Again, in most of his actions he must take into account the *good of society*, which often seems to conflict with the *good of individuals*. [...] By a truly political animal, i.e., a good citizen, we mean one who *promptly obeys the orders of those in power*; one who strives with all his strength for the public good, and gladly puts his own private good second - one, in fact, who believes nothing to be good for him unless it is also good for the state; one, finally, who is well disposed to his fellow-citizens.<sup>580</sup>

In this passage Pufendorf argues that to be able to become a full citizen, one needs to wholly give up one's natural rights. Not the "good of the individual" counts anymore but the "good of society". To become as "political animal", as Pufendorf has it, one needs to completely submit to the authority of the state. This evaluation seems a far cry from Locke, who would argue for civil disobedience of even rebellion, if the state would not honor the law of nature and promote natural rights of human beings. In the final analysis, the "natural rights" Pufendorf espouses emerge from the duties imposed by the natural law, rather than the duties

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<sup>577</sup> Petter Korkman, "Life, Liberty, and the Pursuit of Happiness: Human Rights in Barbeyrac and Burlamaqui", *Transformations in Medieval and Early-Modern Rights Discourse*, eds. V. Mäkinen and P. Korkman (Dordrecht: Springer, 2006), 259.

<sup>578</sup> Knud, *Natural Law and Moral Philosophy*, 42.

<sup>579</sup> Haara, *Inclination to Self-Preservation and Rights to Life and Body*, 89.

<sup>580</sup> Pufendorf, *On the Duty of Man and Citizen*, 132-133. (Emphasis mine.)

that other people may have towards each other. For Pufendorf, rights are not yet a universal moral ground from which stem natural rights that inhere in the human being. His theory is still very much encapsulated in social conventions and authority relations (especially regarding the state).<sup>581</sup>

### 5.3. Locke and the Rights to Life, Liberty, and Property

Locke further developed his ideas on the right to life based on the works of Grotius and Hobbes. In doing so he extends the right to life not only to the preservation of the self, but also to the preservation of the lives of others. In Grotius and Hobbes, we see that the right to self-preservation is fundamental to their system of thought. In that sense, early modern natural rights theory has a very minimalist morality. Still, they too were part of a larger intellectual project of expanding and differentiating a natural rights discourse that sought to distance itself from the earlier natural law scholars of the Middle Ages, a task in which they would only partly succeed.<sup>582</sup>

In comparison to the earlier natural rights theorists, Locke's rights language is both much more explicit and much more universalizing. For example, Locke explicitly states "though the earth, and all inferior creatures, be common to all men, yet every man has a property *in his own person*", leaving no doubt he is talking about natural subjective rights.<sup>583</sup> He explicitly states human beings have certain natural individual rights, independent of a legislating state or engagement in the social contract. Where Grotius and Hobbes would, first and foremost, talk about the right of self-preservation – and that language is certainly not fully absent in Locke – Locke would much more often talk about fundamental rights for "all of mankind". For example, in his *Second Treatise of Government* Locke mentions that everyone must preserve and protect his own life, according to natural reason. But when his own life is not reasonably under direct threat, human beings should endeavor to protect and preserve the lives of other human beings as well. In fact, Locke states, he must "preserve the rest of mankind". On the other hand, a person may not infringe upon the right to life of others or harm them in any way. Furthermore, he explicitly mentions regarding the rights of other

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<sup>581</sup> Haara, *Inclination to Self-Preservation and Rights to Life and Body*, 89 and 97.

<sup>582</sup> See Chapter III.

<sup>583</sup> John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven and London: Yale University Press, 2003), 111. (Emphasis mine.)

human beings “the preservation of the life, the liberty, health, limb, or goods of another”.<sup>584</sup> Hence, we see that for Locke, no longer the focus is the right to self-preservation. One ought to help preserve (protect, sustain, etc.) the whole of humanity, as much as one is capable to do so.

Dissimilar to Hobbes – who believed human beings in the state of nature lived in the constant flux of war and were devoid of any natural rights at all – Locke *did* believe humans in the state of nature had certain fundamental and inalienable natural rights, such as liberty. According to Locke, all human beings are born naturally free, and they are also born rational.<sup>585</sup> Locke defines liberty as freedom from other human beings in determining his thought and actions. That is, to be able to govern himself, with the intervening of others in any way. There is, however, the prerequisite of being able to use reason, as unguided reason leads to “unrestrained liberty”. It is to “thrust him out amongst brutes, and abandon him to a state as wretched”.<sup>586</sup>

In this passage, Locke stipulates that rationality is the basis for liberty. Because reason – gifted to him by God – allows him to know and follow the natural law. Liberty, in Locke’s conception, was however not unrestricted.<sup>587</sup> To be free – or at liberty to do something – is to be free of the earthly authority and superiority of other men. When there is no rule but the rule of nature. What he means by that, however, is not what one of his advisories sir Robert Filmer alludes to for everyone to simply do as he pleases. This, Locke argues, will only lead to unlawfulness. Instead, men should freely rally under a government, in which there is a commonly shared rule and legislative powers are in place with the consent of the people.<sup>588</sup>

Locke’s ideas on property rights are perhaps the most influential of his whole natural rights theory. Locke actually uses the term “estate” much more frequently than “property”. For Locke, property is not only what one can possess but also that which inheres in yourself. In Locke’s understanding we acquire “ownership” over something by “mixing our labor with them”.<sup>589</sup> Locke argues, on theological terms, that God had “given the earth to the children

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<sup>584</sup> Locke, *Two Treatises of Government*, 102.

<sup>585</sup> Locke, *Two Treatises of Government*, 125.

<sup>586</sup> Locke, *Two Treatises of Government*, 126.

<sup>587</sup> Locke, *Two Treatises of Government*, 102.

<sup>588</sup> Locke, *Two Treatises of Government*, 109-110.

<sup>589</sup> Lance K. Stell, “Dueling and the Right to Life”, *Ethics* 90 (1979): 15.

of men”, that is to “mankind in common”.<sup>590</sup> So everyone may freely use of its substance. But for man to truly have possession over it, one must have added something to nature. As an example, he mentions picking up acorns under an oak tree or picking apples from an apple tree. By doing so, a person had “appropriated” them. That mere labor made them his. He explains: “That labour put a distinction between them and common: that *added something to them more than nature*, the common mother of all, had done; and so *they became his private right*.”<sup>591</sup>

In other words, something of a person’s own labor must be included in acquiring an object. If this happens, that person acquires possession of this object.

The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.<sup>592</sup>

Locke’s theory of property rights was also used, including by himself, to justify European imperialism and colonialism. In addition, his attitude towards slavery was ambiguous, to say the least. Locke had promoted the natural right of all human beings to have liberty. For him, this was a fundamental right, as were the rights to life and property. And indeed, he did not seem to condone the Aristotelian idea of natural slavery, in which the belief was that some people by birth were intended to be slaves.<sup>593</sup> But he did argue that those who resisted the rights of European colonial settlers to cultivate the land – and thus acquire it as property – did not short of conducting an “unjust war” against the Europeans and hence could be subject to enslavement.<sup>594</sup> In addition, Locke himself was heavily involved in slavery. For instance, he was the co-author of the Constitution of Carolina, which explicitly condoned slavery. He argues, for example, that all freemen should have “absolute power and authority of his negro

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<sup>590</sup> Locke, *Two Treatises of Government*, 111.

<sup>591</sup> Locke, *Two Treatises of Government*, 112.

<sup>592</sup> Locke, *Two Treatises of Government*, 111-112.

<sup>593</sup> See Nicholas D. Smith, “Aristotle’s Theory of Natural Slavery”, *Phoenix* 37, No. 2 (1983): 109-122.

<sup>594</sup> Michael Freeman, *Human Rights* (Cambridge and Malden, MA: Polity Press, 2017), 26.

slaves”.<sup>595</sup> In doing so Locke flat-out contradict statements he made categorically denouncing slavery.<sup>596</sup> In addition, Locke had no conception of minority rights.<sup>597</sup>

#### 5.4. Conclusion

In this chapter we explored the four fundamental rights theories of Grotius, Hobbes, Pufendorf, and Locke. Before delving into these four natural law theorists, we discussed the recurring issue of “basic goods” in the Western legal tradition. Rights stand in a hierarchy with each other and not every right is equal to others. Some are more fundamental to human dignity and societal flourishing. The most basic human concerns were often discussed under the rubric “basic goods”. For Aquinas these were life, reproduction, education, worship, social life, avoiding offence and shunning ignorance, while for Finnis these are practical reflection, life, knowledge, play, aesthetic experience, sociability (i.e., friendship), practical reasonableness, and religion. These “basic goods” work in conjunction. One cannot do with the other. Fundamental rights could be seen as basic goods.

Grotius, Hobbes, Pufendorf, and Locke belong to the era of “classical rights texts” and are often seen as precursors to modern human rights. Of these four, only Locke seems to have a more developed theory of rights. Those of Grotius, Hobbes, and Pufendorf remain rudimentary and minimalistic. These three natural rights thinkers could be best understood, arguably, as precursors to the ideas of Locke, who reworks and builds upon their ideas. But the others make important contributions as intellectual predecessors, such as the separation of law (*lex*) and right (*ius*), which allowed Locke the opportunity to use richer rights language. Natural rights theories were often developed as a response to political development. And not so much as an inherent development from within a religious or moral framework, as is the case with Islam.

Also, there seems to be a tension in the “new” natural rights language. On the one hand, it seems to emphasize a universalizing language, often addressing “all mankind”. On the other

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<sup>595</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York and London: W. W. Norton & Company, 2007), 119.

<sup>596</sup> In his answer to Filmer, Locke says for example: “Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that it is hardly to be conceived that an Englishman, much less a gentleman, should plead for it”, See Locke, *Two Treatises of Government*, 7.

<sup>597</sup> Freeman, *Human Rights*, 133.

hand, natural rights theories were used to justify slavery, land usurpation and colonization of indigenous peoples in the Americas. That being said, the influence of early modern natural rights theories on the later Enlightenment and eighteenth-century rights declarations seems to be evident. Despite the secularizing tendency of modern human rights, natural rights theories still have had their impact.

Concerns for the fundamental right of life were reflected mostly in early modern law of warfare (*jus in bello*) and just war theories (*bellum justum*). In the law of nations, Grotius played a major role. It was Grotius' belief that the singular right human beings have, was the right to self-defense and self-preservation. His law of nations made great strides in development. For example, it helped forbid the killing of prisoners, hostages, and innocent civilians (including women and children). However, his malleable conception of natural rights theory was also used to justify colonialism and "just war".

Grotius does not specifically mention the right to life explicitly but does talk about "rights common to all" that include care for basic livelihood, such as food, clothing, and medicine. "Foreigners", once admitted, could not be withheld basic care. Even in times of famine. It is at these times, Grotius argues, we need to share in "common calamity". Be that as it may, inherent human dignity does not seem to have been the motivating factor for Grotius' natural law theory.

For Hobbes, the main state of nature was one of the "war of all against all" (*bellum omnium contra omnes*). Hobbes only espoused the liberty-right for self-preservation. Hobbes' natural rights theory is not concerned with the rights of others. His theory is therefore rather individualistic. Hobbes prioritizes psychological motives, such as self-interest and passions. The strongest passion of them all he argued, was the fear of violent death. This, he argued, could not be a perpetual state, hence human beings must work towards peace. While Hobbes did not explicitly elaborate upon subjective rights, he *does* acknowledge a distinct human nature which is the ground upon which people can receive basic personal rights. This idea is much clearer in Hobbes than his medieval predecessors.

Pufendorf inherits and synthesizes the natural law theories of Hobbes and Grotius, but he disagrees on important points. He rejects the idea of the state of nature being *bellum omnium contra omnes*. Pufendorf is often seen as a precursor to modern human rights. His idea of

“natural equality” is seen as an idea that is affirming universal humanity. This might be somewhat of an overstatement. Pufendorf’s main concern seems to have been to articulate a theory that could explain and justify why individuals should obey a sovereign state authority. On a close reading of his work, Pufendorf does seem to have a rudimentary conception of subjective rights. He divides *ius* in *libertas*, *imperium*, *dominium*, and *servitus*. But only the latter actually counts as an innate natural right. These entail the natural right to life, actions, honor, and reputation. In addition, Pufendorf introduces the idea of “sociability” as an alternative to Hobbes. This is the idea that a life of loneliness is not befitting for human beings as God endowed them with a nature that promotes a safe and fruitful social life.

Locke further developed his ideas on the right to life based on the works of Grotius and Hobbes. In doing so he extends the right to life not only to the preservation of the self, but also to the preservation of the lives of others. In comparison the earlier natural rights theorists, Locke’s rights language is both much more explicit and much more universalizing. He often refers to “all mankind”. In addition, he makes it very explicit that human beings have individual subjective rights. His attention also moved away from the idea of “self-preservation” – although he does not desert it – to the preservation of other people. Opposite to Hobbes, Locke *did* believe all people has natural rights in the state of nature. These are the rights to life, liberty, and estate (or property). Human beings, according to Locke are born free and rational, so that they can discover and obey the natural law. But liberty is not unconditional. Locke’s right to property is a labor-based right. If someone’s labor mixes with something (for example working the land) it becomes their property.

Locke does have several problems and tensions as a natural rights theorist. He himself justified European imperialism and colonialism. Also, his attitude towards slavery was ambiguous. He promoted the idea of universal natural freedom, but argued in some cases that slavery was condoned. He also condoned the taking on indigenous lands using his labor-based theory of property rights. Lastly, Locke had no conception of minorities.

## CHAPTER VI

### FUNDAMENTAL RIGHTS IN PREMODERN ISLAMIC LAW: *‘IṢMA’*, *ḤURRIYYA* AND *MĀLIKIYYA*

“These rights of inviolability, liberty, and property are inborn.”

*Muḥammad Abū Bakr al-Sarakhsī*<sup>598</sup>

“Surely, We have honored the children of Adam.”

*Qur’ān, 17:70*

In this chapter we explore various fundamental rights in the Islamic legal tradition. First we look two distinct ways in which the jurists of Islam grounded rights: the theory of public benefit (*maṣlaḥa*) and the theory of human dignity (*karāma*). Then we explore several examples of fundamental rights in Islam, particularly the inviolability of life (*‘iṣma’ al-nafs*), the right to freedom or liberty (*ḥurriyya*), and the right to ownership and property (*milkiyya*). These are by no means all rights, but they are *fundamental*. Also, they are equally emphasized in both Islamic rights theories. Finally, they compare well with similar fundamental rights in the Western natural rights tradition, which lacks the Islamic “right to honor”, to give but one example.

#### 6.1. Grounding *Ḥuqūq* in Public Benefit and Human Dignity

Rights are grounded in various ways in the Islamic legal tradition. These grounds can be based on religious and rational arguments. Hence, it has been said that “knowledge of the law in Islam is what was seen as a happy synthesis between human reason and the divine word”.<sup>599</sup> Before the formalization of Islamic law with the formation of the classical legal schools in Islam in the tenth century, Muslim scholars had extensive discussions about the relation between reason and revelation. During the late eighth and ninth centuries two distinct intellectual movements championed either reason or revelation. These were the

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<sup>598</sup> Abū Bakr al-Sarakhsī, *Uṣūl al-Sarakhsī*, Vol. 2, ed. Abū al-Wafā’ al-Afghānī (Beirut: Dār al-Kutub al-‘Ilmiyya 2015), 334.

<sup>599</sup> Wael B. Hallaq, *Shari‘a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 83.

traditionalist movement (*ahl al-ḥadīth*) and the rationalist movement (*ahl al-rā'ī*). The first movement had argued for a sole dependence on religious scriptural sources, the Qur'ān and prophetic narrations (*ḥadīth*, pl. *aḥadīth*) and strict limitation of any form of rational reasoning. The rationalist school, on the other hand, advocated for the use of discretionary reason. While it also depended on the Islamic scriptural sources, it allowed for more flexibility for the use of the intellect.<sup>600</sup> By the end of the ninth century, however, the most contentious issues were settled, and Islamic jurists generally combined both approaches in some shape or form. This ended around the middle of the tenth century in is what could be called the Great Synthesis between the traditionalist and rationalist approaches.<sup>601</sup>

From this Great Synthesis sprang two intellectual trends in Islamic legal thinking that could be considered as “theories of rights”, in that they can give an account of claims and entitlements based on the moral-legal framework of the Islamic *Weltanschauung*.<sup>602</sup> In addition, these rights theories provide criteria for the concept of a right and explain the ultimate purpose that they serve.<sup>603</sup> These are the rights theories of public benefit (*maṣlaḥa*) and human dignity (*karāma*), respectively.<sup>604</sup> The first public benefit-based theory seems to be especially dominant in the Shāfi'ī, Mālikī, and Ḥanbalī schools of law, having been developed by great scholars of these schools, such as Abū Ḥāmid al-Ghazālī (d. 1111), Abū Ishāq al-Shātibī (d. 1388), Shihāb al-Dīn al-Qarāfī (d. 1285), and Najm al-Dīn al-Ṭūfī (d. 1316). The second human dignity-based theory seems to be dominant amongst exponents of the Ḥanafī school of law, who developed an elaborate theory of inviolability (*iṣma*).<sup>605</sup>

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<sup>600</sup> The rationalist school should, however, not be misunderstood as “liberal” in the sense of unlimited use of reason. It also had internal principles bases of religious guidelines.

<sup>601</sup> Hallaq, *Sharī'a*, 55-60 and 72.

<sup>602</sup> Alon Harel, “Theories of Rights”, in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, eds. Martin P. Golding and William A. Edmundson (Malden, MA: Blackwell Publishing, 2005), 191-206.

<sup>603</sup> David Frydrych, “The Theories of Rights Debate”, *Jurisprudence* 9, No. 3 (2018): 566-588.

<sup>604</sup> Scholars Recep Şentürk and Muhammed Said Bilal offer more candidates that could be considered rights theories in the Islamic legal tradition, such as the rights theory based on beauty (*ḥusn*) and ugliness (*qubḥ*), proposed by the Ottoman statesman of Greek-Orthodox Christian background Sava Paşa (d. 1904), in his French work *Etude sur la Théorie du Droit Musulman*. Another one is the rights theory based on juristic discretion (*iḥtişān*) proposed, among others, by the Ottoman legal scholar and politician Seyyid Bey (d. 1925). Both of these theories, however interesting, are modern in nature and hence fall beyond the scope of this thesis. Future research into post-1800 modern Islamic rights theories is certainly merited. See Recep Şentürk and Muhammed Said Bilal, *Human Rights in the Ottoman Reform: Foundations, Motivations and Formations* (Istanbul: Ibn Haldun University Press, 2020), 103-122.

<sup>605</sup> Baber Johansen, “Der *iṣma*-Begriff im hanafitischen Recht”, in *Actes du 8 Congrès de l'Union Européenne des Arabisants et Islamisants, Aix-en-Provence, septembre 1976* (Aix-en-Provence: Edisud, 1978), 89-108, republished in *Contingency in Sacred Law*, 238-262; Recep Şentürk, ‘İsmet’, *TDV İslām Ansiklopedisi*, Vol. 23 (Istanbul: Türkiye Diyanet Vakfı, 2006), 137-138.

Examples of scholars who wrote on this theory are Abū Zayd al-Dabūsī (d. 1039) and Abū Bakr al-Sarakhsī (d. 1090).

### 6.1.1. The Rights Theory of *Maṣlaḥa*

The early history of the theory of *maṣlaḥa* is not yet quite clear in scholarship on the topic.<sup>606</sup> But generally accepted is that al-Ghazālī was the first legal scholar to have developed a systematic articulation of the theory of *maṣlaḥa*.<sup>607</sup> For al-Ghazālī, the issue of public benefit was very much connected to the ultimate objectives of the Sharī‘a (*maqāṣid al-sharī‘a*). Public interest (*maṣlaḥa*) had to be protected in accordance with the basic objectives of the law, according to al-Ghazālī. In general, the theory of public benefit was applied in those areas where the religious scriptural sources of Islam were silent. The *ratio legis* of the law is determined based on (principled) rational reasoning and does not strictly deal with the textual sources. Although it always had to be done in the “spirit” of the law.<sup>608</sup> One of the basic premises of the law is avoiding harm and promoting benefit, for both human life and society as a whole.

The basic objectives of Islamic law, according to al-Ghazālī are the protection of life (*al-nafs*), religion (*al-dīn*), intellect (*al-‘aql*), lineage (*al-nasl*), and property (*al-māl*).<sup>609</sup> These fundamental rights are essential for basic human dignity and societal flourishing. Hence, they should be protected. They have come to be known as the five fundamental rights (*al-darūriyyāt al-khamsa*). They were seen as the indispensable necessities of human life and societal flourishing. These five basic rights came to be accepted as the most fundamental principles and objectives of the Islamic law, and hence would enjoy great acceptance amongst all the schools of Islamic jurisprudence. However, the scholar al-Qarāfī – a major jurist of the Mālikī legal school – argued that there was a sixth basic right, namely “the right to honor” (*al-‘ird*). The right of the protection of honor was originally subsumed under the

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<sup>606</sup> Felicitas Opwis, “Islamic Law and Legal Change: The Concept of *Maṣlaḥa* in Classical and Contemporary Islamic Legal Theory”, in *Shari‘a: Islamic Law in the Contemporary Context*, ed. Abbas Amanat and Frank Griffel (Stanford, California: Stanford University Press, 2007), 65.

<sup>607</sup> We see some earlier expression of the *maqāṣid* theory in al-Ghazālī’s famous teacher, Imam al-Ḥaramayn al-Juwaynī (d. 1085), see Mohammed Hashim Kamali, *Shari‘ah Law: An Introduction* (Oxford: Oneworld, 2008), 125.

<sup>608</sup> Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (New York: Cambridge University Press, 1997), 89.

<sup>609</sup> Abū Ḥamid al-Ghazālī, *al-Mustasfā min ‘ilm al-uṣūl*, Vol. 1 (Cairo: al-Maktaba al-Tijāriyya, 1937), 287.

already existing basic right of lineage (*al-nasl*). However, al-Qarāfī argued that because there was a different *sharʿī* punishment for slanderous accusations (*al-qadhf*) in Islamic law, honor should be treated as a separate fundamental right that needs to be protected.<sup>610</sup> Aside from the five fundamental rights, al-Ghazālī also developed two additional levels of rights. We could call these “secondary” and “tertiary” rights. These are the necessities (*hājjiyyāt*) and improvements (*taḥsīniyyāt*).<sup>611</sup> These two levels of rights were not seen as fundamental to human life and dignity, but they were important additional rights.

It seems that historically, al-Ghazālī’s model of *maṣlaḥa* was the most widespread amongst Islamic legal scholars, while the models al-Shāṭibī and al-Ṭūfī failed to gain a large following. While it is not yet completely clear why this is the case, one reason could be that the models differ in terms of implementation. While *maṣlaḥa* plays a rather humble role in the theory of al-Ghazālī, its role is much more substantial in the case of al-Shāṭibī, for whom *maṣlaḥa* is almost a goal in and of itself. For al-Ghazālī *maṣlaḥa* is but a subset in legal reasoning of other, more established legal instruments, such as legal analogy (*qiyās*). In his implementation he stayed very closed to the revealed scripture. While for al-Shāṭibī, for example, *maṣlaḥa* was a self-standing legal hermeneutical tool. For him, *maṣlaḥa* was a source of law itself (and not just a subsidiary legal method) that could in some cases even overrule textual sources.<sup>612</sup> Al-Ghazālī’s model was thus somewhat more conservative, in that it allowed for only slow and gradual legal change, while al-Shāṭibī’s model was in a sense much more radical. In modern times, it seems that the theory of *maṣlaḥa* has gained new ground and interest among Muslim scholars, especially those from the reformist school. However, these *maṣlaḥa* theories differ quite radically from the earlier classical elaboration, such as that of al-Ghazālī. Modern day *maṣlaḥa* approaches, for example, do not limit the number of basic objectives of the law.<sup>613</sup>

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<sup>610</sup> Kamali, *Shari‘ah Law*, 126.

<sup>611</sup> The classification of the *maqāṣid* into the three levels of *darūriyyāt*, *hājjiyyāt*, and *taḥsīniyyāt* is attributed to al-Juwaynī, see Kamali, *Shari‘ah Law*, 125.

<sup>612</sup> Opwis, *Islamic Law and Legal Change*, 68-71.

<sup>613</sup> One modern interpretation of the approach of *maqāṣid al-sharī‘a* is that of the Tunisian reform-minded scholar Ibn ‘Ashūr (d. 1973). See Muḥammad al-Ṭāhir ibn ‘Ashūr, *Ibn Ashur: Treatise on Maqāṣid al-Sharī‘ah* (London and Washington: The International Institute of Islamic Thought, 2006). For an overview of modern applications of theory, especially with regards to modern human rights, see David L. Johnston, “*Maqāṣid al-Sharī‘a*: Epistemology and Hermeneutics of Muslim Theologies of Human Rights”, *Die Welt des Islams* 47, No. 2 (2007): 149-189.

### 6.1.1. The Rights Theory of *Karāma*

The second rights theory has been largely elaborated by the jurists of the Ḥanafī school. According to scholarship the Ḥanafī scholars had a more developed set of legal concepts pertaining to the idea of legal personality (*dhimma*) and inviolability (‘*iṣma*’) than the other schools.<sup>614</sup> Hence, the rights theory of the Ḥanafī school tends to evolve around these concepts. Ultimately, this rights theory is based on the idea of inherent human dignity and worth (*karāma*). It was in fact, most probably, the eleventh century Ḥanafī jurist and legal theorist Abū Zayd al-Dabūsī (d. 1039) who first elaborated the *karāma*-based theory of rights.<sup>615</sup> Al-Dabūsī, a central figure in the Ḥanafī school of law, in his highly sophisticated and influential legal-philosophical treatise called *Taqwīm al-adilla fī uṣūl al-fiqh* [The Evaluation of Evidences in Legal Philosophy], argues for the existence of fundamental rights in Islam for all human beings by virtue of their humanity. In his work he mentions:

When God Almighty created man in order to enable him to bear His trust (*amāna*), He dignified him with reason (‘*aql*) and legal personality (*dhimma*), so that he would become capable of fulfilling the rights and obligations incumbent upon him, and He endowed him with the rights of inviolability (‘*iṣma*), liberty (*hurriyya*) and property (*mālikiyya*). [...] The human is not created but a free person (*hurr*) and in possession of the rights ascribed to him. He established for him these honors (*karamāt*) and legal personality (*dhimma*) in order to enable him to fulfill the divine rights.<sup>616</sup>

In this early classical text of Islamic jurisprudence, al-Dabūsī argues for the protection of fundamental human rights, the term which he uses for this is *ḥuqūq al-nās*.<sup>617</sup> These fundamental rights, as we can grasp from this passage, are the rights to life, liberty and property.<sup>618</sup> Any contemporary scholar of the history of the modern human rights discourse, perhaps in surprise, will be struck by some sense of recognition, as John Locke (d. 1704), the renowned sixteenth-century philosopher and political theorist of the European Enlightenment, famously argued for these very same three fundamental rights in his *Two*

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<sup>614</sup> Eyyüp Said Kaya and Hasan Hacak, “Zimmet”, in *TDV İslâm Ansiklopedisi* (Istanbul: Türkiye Diyanet Vakfı, 2013), 427.

<sup>615</sup> Kaya and Hacak, *Zimmet*, 424-423.

<sup>616</sup> Abū Zayd al-Dabūsī, *Taqwīm al-adilla fī uṣūl al-fiqh* (Beirut: Dār al-Kutub al-‘Ilmiyya, 2001), 417. (Unless otherwise stated, the translations from Arabic in this article are mine.)

<sup>617</sup> Which is an equivalent for human rights (*ḥuqūq al-ādamiyyīn*), mentioned in Chapter IV.

<sup>618</sup> Inviolability (‘*iṣma*’) in the context of Islamic legal terminology refers to the inviolability of both life and property. Şentürk, *İsmet*, 137-138.

*Treatises of Government*, albeit speaking of “estate” rather than property.<sup>619</sup> This prompted human rights scholar Michael Freeman to designate Locke’s work as the “first systematic human-rights theory”, even though al-Dabūsī wrote more than six centuries earlier.<sup>620</sup> Some have therefore argued that Locke might have been indirectly influenced by al-Dabūsī, and similar Islamic legal theorists, through the canon lawyers of the medieval Christian natural law (*ius naturale*) tradition.<sup>621</sup> While the intellectual and cultural influence of Islamic civilization on medieval Latin Europe is beyond question, the specific claim of a possible link between classical Islamic legal thought and Locke’s theory of rights needs to be further substantiated with historical evidence. This, however, lays beyond the proper scope of this thesis.<sup>622</sup>

In the passage cited here, al-Dabūsī argues that every single created human being is endowed with intellect and legal personality. These are given to her or him in order to receive and take responsibility for their inborn and God-given fundamental rights (i.e., the rights to life, liberty and property) and their corresponding duties (i.e., not to infringe upon these same rights in relation to other human beings). Human beings are all created free (*hurr*) in order to be able to fulfill their responsibilities on earth. Without freedom and fundamental rights, full human potential and flourishing cannot be reached. These fundamental rights are the basis of human dignity and hence are called “honoring gifts” (*karamāt*) bestowed upon human beings by God.<sup>623</sup> The Ḥanafī jurist Abū Bakr al-Sarakhsī (d. 1090), who writes more than half a century later and builds upon the works of al-Dabūsī, further corroborates the three fundamental rights of life, liberty and property, spoken of by his predecessor. He elaborates that these rights are inborn in every human being:

These rights of inviolability, liberty and property are inborn. No distinction is made between those that are able to discern (i.e., adults) or not yet discern (i.e., children).

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<sup>619</sup> See the treatment of Locke’s natural rights theory in Chapter V.

<sup>620</sup> Michael Freeman, *Human Rights* (Cambridge and Malden, MA: Polity Press, 2017), 11.

<sup>621</sup> See Asım Cüneyd Köksal, “İnsan Haklarının Felsefî Krizi: İslâmî Bir Perspektif”, *Marmara Üniversitesi İlahiyat Fakültesi Dergisi* 58 (2020): 25-67.

<sup>622</sup> For Islamic influences on the Western legal tradition, see Chapter III.

<sup>623</sup> Very little research has been done on this important Ḥanafī legal philosopher, even though he is copiously cited in subsequent Ḥanafī legal works. In fact, many later Ḥanafī scholars build upon his work. See Murteza Bedir, *Early Developments of Ḥanafī Uşûl al-Fiqh* (unpublished PhD dissertation, University of Manchester, 1999).

Therefore, the legal personality that enables humans to receive fundamental rights are established by birth.<sup>624</sup>

To demonstrate the universalist *karāma*-based Ḥanafī perspective on rights and human inviolability, which is grounded upon the concept of *ādamiyya* (humanity), the example of al-Marghīnānī, who’s legal treatise was to become the most central reference for legal verdicts (*fatwa*) in the Ḥanafī school of jurisprudence warrants attention.<sup>625</sup> In this passage he critiques the position of al-Shāfi‘ī, who is the eponym of another of the four Sunnī schools of Islamic law, who argues that inviolability is grounded upon being a Muslim, and not by virtue of humanity.<sup>626</sup> Al-Marghīnānī rejects al-Shāfi‘ī’s position and rather affirms that inviolability is not attached to Islam but to the human person, as he argues:

Man is created with an intent that he should bear the burdens imposed by the law, which men would be unable to do unless the molestation or slaying of them were prohibited, since if the slaying of the person were not illegal, he would be incapable of performing the duties required of him. *The person* therefore is the original subject of protection, and property follows as a dependent thereof, since property is, in its original state, neutral, and created for the use of mankind, and is protected only on account of the right of the proprietor, to the end that each may be enabled to enjoy that which is his own.<sup>627</sup>

The universalist *karāma*-based approach to an Islamic conception of human rights, expressed by al-Dabūsī and others during the High Middle Ages, carried right into modern times.<sup>628</sup> To mention but a few examples, the nineteenth-century Damascene jurist ‘Abd al-Ghanī al-Maydānī (d. 1881), famous for his detailed commentary (*sharḥ*, pl. *shurūḥ*) on one of the major legal primers (*matn*, pl. *mutūn*) of the Ḥanafī school of legal thought, *al-Lubāb*

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<sup>624</sup> Abū Bakr al-Sarakhsī, *Uṣūl al-Sarakhsī*, Vol. 2, ed. Abū al-Wafā’ al-Afghānī (Beirut: Dār al-Kutub al-‘Ilmiyya, 2015), 334.

<sup>625</sup> See Sohail Hanif, *A Theory of Early Classical Ḥanafism: Authority, Rationality and Tradition in the Hidāyah of Burhān al-Dīn ‘Alī ibn Abī Bakr al-Marghīnānī (d. 593/1197)* (unpublished PhD thesis, University of Oxford, 2017).

<sup>626</sup> For an overview of the four Sunnī schools of law, see Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Leiden and Boston: Brill, 1997).

<sup>627</sup> Cited in Recep Şentürk, “Ādamiyya and ‘Ismah: The Contested Relationship between Humanity and Human Rights in Classical Islamic Law”, *İslâm Araştırmaları Dergisi* 8 (2002), 47.

<sup>628</sup> Here, I use the term “High Middle Ages” out of scholarly convention. The common periodization of history into Antiquity, Middle Ages and (Early) Modernity, however, is an invention of sixteenth-century European Renaissance scholars, mostly unsuitable for world historical purposes. In the context of Islamic history, al-Dabūsī’s time would more accurately be called the “Earlier Middle Period”, in order to better reflect the historical flow of time indigenous to Islamic civilization. See Marshall G. S. Hodgson, *The Venture of Islam: Conscience and History in a World Civilization*, 3 vols. (Chicago: The University of Chicago Press 1974).

*fī Sharḥ al- Kitāb*, mentions that human beings possess sanctity merely by virtue of their existence (*al-ḥurr ma ‘ṣūm bi nafsihi*).<sup>629</sup> Another late scholar and jurist, Ibn ‘Ābidīn (d. 1836), in his marginal gloss (*ḥāshiya*) called *Radd al-Muḥtār ‘alā Durr al-Mukhtār*, which became the most authoritative legal text for the issuing of legal verdicts (*fatwa*) in the late Ḥanafī school, in a similar spirit, mentioned that all human beings enjoy the inviolability and protection of their basic rights, be they Muslim or non-Muslim (*al- adamī mukarram shar‘an wa law kāfīran*).<sup>630</sup> It has also been suggested that major modern Islamic legal reforms, such as the championing of equal rights for all citizens in the Ottoman Empire, Muslims and non-Muslims, in the so-called *Gülhane Hatt-ı Şerif* [Edict of Gülhane] of 1839, were inspired by the same trend of Islamic legal universalism.<sup>631</sup> In line with al-Dabūsī, the edict affirms fundamental rights for all human beings based on Islamic legal principles, such as the rights of life, property, freedom of religion, protection of honor, education, employment and due process. It writes: “All Muslim or non-Muslim subjects shall benefit from these rights. Everyone’s life, chastity, honor and property is under the guarantee of the state according to the *Sharī‘a* laws”.<sup>632</sup>

## 6.2. Exploring Fundamental Rights in Islamic Law

In order to have an idea of how fundamental rights are substantiated, we explore several fundamental rights in Islam from the perspective of classical Islamic jurisprudence. With a special focus on the right to the inviolability of life (*‘iṣma’ al-nafs*), the right to freedom or liberty (*hurriyya*), and the right to ownership and property (*milkiyya*). These are by no means all of the rights that are Islamically considered as fundamental to human dignity and societal flourishing. Indeed, the Islamic legal tradition is imbued with rights thinking.<sup>633</sup> But these rights are by consensus of the Muslim jurists *fundamental*, and they have been mentioned as such by several prominent Islamic jurists as being particularly conditional for human worldly

<sup>629</sup> ‘Abd al-Ghanī al-Maydānī, *al-Lubāb fī Sharḥ al-Kitāb*, Vol. 4, ed. Muḥammad Muḥyī al-Dīn ‘Abd al-Ḥamīd (Cairo, 1963), 128.

<sup>630</sup> Muḥammad Amīn b. ‘Ābidīn, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Absār*, Vol. 5 (Beirut: Dār al-Kutub al-‘Ilmiyya, 1994), 58.

<sup>631</sup> See Recep Şentürk, “Sociology of Rights: ‘I Am Therefore I Have Rights’: Human Rights in Islam between Universalistic and Communalistic Perspectives”, *Muslim World Journal of Human Rights* 2, No.1 (2005) <https://doi.org/10.2202/1554-4419.1030> (accessed December 25, 2022).

<sup>632</sup> Cited in Şentürk, *Sociology of Rights*.

<sup>633</sup> Anver M. Emon, “*Huqūq Allah* and *Huqūq al-‘Ibād*: A Legal Heuristic for a Natural Rights Regime” *Islamic Law and Society* 13, No. 3 (2006) 13(3): 325-391; Wael B Hallaq, “‘God Cannot Be Harmed’: On *Huqūq Allah/Huqūq al-‘Ibād* Continuum”, in *Routledge Handbook of Islamic Law*, ed. Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (London and New York: Routledge, 2019), 67-81.

life and ultimately eternal salvation.<sup>634</sup> Additionally, it fits particularly well the comparative legal framework that is envisioned in this thesis, in particular with regards to Lockean theories of rights.<sup>635</sup>

### 6.2.1. The Right to Life

The right to life is central in both the *maṣlaḥa* and *karāma* theories of rights. It is stated by al-Ghazālī as one of the basic objectives of the Sharī‘a (*maqāṣid al-sharī‘a*) that should be protected as a fundamental right.<sup>636</sup> In addition, both al-Dabūsī and al-Sarakhsī state that the basic inviolability of life (*iṣmat al-naḥs*) which should be protected.<sup>637</sup> The right to the protection of life is so central in the Islamic legal-ethical framework that killing a human being (*qatl al-naḥs*) is listed as one of the major sins (*kabā‘ir*) a human being could commit, for which one is to be punished in this life and the hereafter. In the Qur’ānic *Weltanschauung*, after all, human beings were created to live on earth as the ultimate testing ground. Killing a human beings would be in severe contradiction to the divine purpose of human life on earth.<sup>638</sup>

The Shāfi‘ī scholar Shams al-Dīn al-Dhahabī (d. 1348), who wrote one of the most important works on enormities (i.e., major sins) in Islamic law, cited several scriptural sources that prohibit the killing of human beings. For example, in *sūra* 4:93 it is mentioned:

If anyone kills a believer (*mu‘min*) deliberately, the punishment for him is Hell, and there he will remain: God is angry (*ghaḍiba Allāh*) with him, and rejects him, and has prepared a tremendous torment (*adhāban aẓima*) for him.

If someone does kill another person by mistake, they must free a slave in addition to paying for compensation for the relatives of the victim in question. That is, unless the victim’s family is charitable in the matter and forgives the perpetrator.<sup>639</sup> This Qur’ānic injunction also extends to non-believers, as God warns to believers who they fight “in the way of God”

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<sup>634</sup> See footnote 581.

<sup>635</sup> See the methodology section in the Introduction of this thesis.

<sup>636</sup> Al-Ghazālī, *al-Muṣṭaṣḍā min ‘ilm al-uṣūl*, 287.

<sup>637</sup> Al-Dabūsī, *Taqwīm al-adilla fī uṣūl al-ḥaqīq*, 417; Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 334.

<sup>638</sup> See Wael B. Hallaq, “Groundwork of the Moral Law: A New Look at the Qur’ān and the Genesis of the Sharī‘a”, *Islamic Law and Society* 16 (2009): 263.

<sup>639</sup> The *sūra* mentions other ways of compensations for different groups of people, such as people with whom the perpetrator is at war or in a peace treaty with. See Qur’ān 4:92.

(*fī sabīl Allāh*). If their enemies offer them greetings of peace (*salām*) the believer should not say “You are not a believer” (*lasta mu’minan*). Instead, the Muslims are expected to commit to peace.

Al-Dhahabī also cited as a major scriptural proof that the right to life should be protected the verse from *sūra* 5:32, which mentions:

If anyone kills a person – unless in retribution for murder or spreading corruption in the land – it is as if he kills all mankind.

This *sūra* related the famous story of Cain and Able, also mentions in Christian scriptural sources, in which one of the brothers kills the other brother, after which the murdering brother becomes remorseful.<sup>640</sup> Al-Dhahabī did not cite the remainder of the verse, which entails that the opposite is also true: “While if any saves a life it is as if he saves the lives of all mankind”. The verse also mentions an exception for ‘those who sow corruption on the earth’ in order to achieve social strife (*fitna*). According to al-Ghazālī, based on *maṣlaḥa* reasoning, there is no need to punish this person by killing him, even if there might be a public benefit in doing so. In that regard, al-Ghazālī shows a type of “rights triage” in which the right to protect human life and need to limit government violence outweigh public benefit.<sup>641</sup>

Ibn Ḥajar al-Haythamī (d. 1566) similarly lists the killing of human beings, be they Muslim or a non-Muslim subject of the Islamic state (*dhimmī*). And not only does the author mention the killing of another person as sinful, but also the aiding of killing others (*al-i’āna ‘alā al-qatl*) of others in killing, or even the striking (*ḍarb*) or frightening (*tarwī’*) of others as forms of physical or psychological violence.<sup>642</sup> Regarding non-Muslims living under protection of a Muslim state al-Haythamī mentions it is forbidden to “kill him, rob him, rape his wife, terrorize or frighten him”.<sup>643</sup> The Ḥanafī scholar Ibn ‘Ābidīn similarly extends the protection of the right to life to both Muslim and non-Muslim.<sup>644</sup>

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<sup>640</sup> For the Biblical equivalent, see Ellen van Wolde, “The Story of Cain and Able: A Narrative Study”, *Journal for the Study of the Old Testament* 16, No. 52 (1991): 25-41.

<sup>641</sup> See Anver M. Emon, “Natural Law and Natural Rights in Islamic Law”, *Journal of Law and Religion* 20, No. 2 (2004-2005): 375.

<sup>642</sup> Cited in Aḥmad ibn Naqīb al-Miṣrī, *Umdat al-sālik*, trans. Nuh Ha Mim Keller (Beltsville, Maryland: Amanat Publications, 1994), 984.

<sup>643</sup> Al-Miṣrī, *Umdat al-sālik*, 986.

<sup>644</sup> Ibn ‘Ābidīn, *Radd al-Muḥtār*, 58.

### 6.2.2. The Right to Freedom

The right to freedom is approached from several angles. We limit ourselves here to the issue of freedom as “natural freedom”. The bare fact that human beings are created free. Islam knows no concept of being born into slavery, as Aristotle for example did.<sup>645</sup> Aristotle defended the idea of natural slavery. In his *Politics*, he mentions that there are some human beings who are from birth marked out by nature as slaves.<sup>646</sup> The natural state of human beings in Islam is that they are born free. Hence, the Ḥanafī scholar al-Dabūsī mentioned that human beings are not created “but a free person” (*ḥurr*). In addition, he mentioned liberty or freedom (*ḥurriyya*) as one of the fundamental rights human beings have. These rights are fundamental and necessary, argues al-Dabūsī, so that human beings can fulfil their covenant, their “trust” (*amāna*), with God. This freedom is one of the honors (*karamāt*) God has given to mankind by virtue of his human dignity and worth.<sup>647</sup>

Also, while slavery was prevalent in the late antique world, Islam had all its legal mechanisms in place to emancipate slaves. Islamic law provided with unprecedented – some would revolutionary – emancipatory incentives to free slaves. For example, the use of alms for freeing slaves, the requirement of freeing slaves as expiation for committed sins, or the encouragement of the contract of manumission (*mukātaba*), through which slaves could buy their own freedom.<sup>648</sup> In contradistinction to the conception of slavery in Western natural law theory, slaves were not perceived as “property” but as human beings who also had legal capacity (and thus rights). As Mona Siddiqui mentioned:

The fundamental basis of slavery is that slaves could not be *mukallaḥ* or legally competent as they lacked the criterion of freedom. But this legal deficiency which determined their social and personal status disqualified the slaves from certain rights; absence of freedom did not however deny them fundamental human rights.<sup>649</sup>

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<sup>645</sup> Nicholas D. Smith, “Aristotle’s Theory of Natural Slavery”, *Phoenix* 37, No. 2 (1983): 109-122.

<sup>646</sup> Smith, *Aristotle’s Theory of Natural Slavery*, 110.

<sup>647</sup> Al-Dabūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh*, 417.

<sup>648</sup> Jonathan A. C. Brown, *Slavery and Islam* (London: Oneworld Publications, 2019), 82-84.

<sup>649</sup> Mona Siddiqui, *The Good Muslim: Reflections on Classical Islamic Law and Theology* (New York: Cambridge University Press, 2012), 65-66.

Some of these rights entailed rights to religious practice. Muslim slaves had the right to perform all of their religious duties. And non-Muslim slaves could not be forced by their slave masters to convert to Islam. Also, slaves had the right to marry, the right to life and physical protection, and the right to property.<sup>650</sup> This is in contradistinction to, again, Aristotle, who argued that slaves have no rights. In fact, they are according to him “rightly considered a part of his master’s body”. Also, there seems to be no emancipating mechanism in the Aristotelian theory of slavery. A natural slave benefits from being a slave of a “proper master”. Freeing a slave would “deny him such benefits”.<sup>651</sup>

### 6.2.3. The Rights to Property and Ownership

Property and ownership rights play an important role in the Islamic *ḥuqūq* hermeneutic and are by consensus of the scholars of Islam seen as fundamental to basic human dignity and societal flourishing. Both the rights theory based on public interest (*maṣlaḥa*) and the rights theory based on human dignity (*karāma*) mention the protection of property (*māl*, pl. *amwāl*) as a fundamental right. The Ḥanafī legal theorist Abū Zayd al-Dabūsī, for example, mentions the right to property as enjoying inviolability (*‘iṣma*) for all human beings.<sup>652</sup> The Shafī‘ī and Mālikī scholars Abū Ḥāmid al-Ghazālī and Abū Ishāq al-Shāṭibī, respectively, mention property as one of the five fundamental rights (*al-ḍarūriyyāt al-khamsa*) in their theory on public interest.<sup>653</sup>

Al-Shāṭibī’s definition of *al-māl* is that thing which is the subject matter of ownership, and which is solely enjoyed by the owner (*al-mālik*), to the exclusion of others, and that was legally acquired.<sup>654</sup> The Shāfi‘ī scholar Abū al-Ḥasan al-Māwardī (d. 1058), in his compendium of comparative *fiqh* from a Shāfi‘ī perspective *al-Ḥāwī al-Kabīr*, notes that property is an individual human right (*al-amwāl min ḥuqūq al-ādamiyyīn*) that is integral to the person (along with physical well-being and human dignity).<sup>655</sup> The Ḥanafī jurist al-

<sup>650</sup> Brown, *Slavery and Islam*, 93-98. There are some variations regarding these rights according to the differences of opinion amongst the schools of law.

<sup>651</sup> Smith, *Aristotle’s Theory of Natural Slavery*, 110-111.

<sup>652</sup> Al-Dabūsī, *Taqwīm al-adilla fī uṣūl al-fiqh*, 417.

<sup>653</sup> See, for example, al-Ghazālī, *al-Mustasfā min ‘ilm al-uṣūl*, 287.

<sup>654</sup> Al-Shāṭibī, *al-Muwāfāqāt*, 14.

<sup>655</sup> Abū al-Ḥasan ‘Alī ibn Muḥammad al-Māwardī, *al-Ḥāwī al-kabīr fī fiqh madhhab al-imām al-Shāfi‘ī (sharḥ mukhtaṣar al-Muznī)*, Vol. 11, ed. ‘Alī Muḥammad Mu‘awwad and ‘Adil Aḥmad ‘Abd al-Mawjūd (Dār al-Kutub al-‘Ilmiyya, 1994), 10; Cited in Emon (2004), *Natural Law and Natural Rights*, 338.

Āqhisārī similarly notes that the right to property is a human right.<sup>656</sup> Ownership (*milk*) is defined in Islamic law as the legal relation (*ittiṣāl sharī*) between a person and a thing, which allows that person to freely use that thing and prevents others from using it.<sup>657</sup> As expressed in the *fiqh*-literature property as *milk* refers to so-called “real rights” or rights *in rem*, as we know it from the Roman and modern civil law tradition.<sup>658</sup>

The *fuquhā*’ also differentiated that which is *not* to be considered as property (*māl*) in the sense of something that can be the object of legal transactions and to which, hence, no rights could be attached. A similar division was made classical Roman law and contemporary civil law in terms of *res in commercio* versus *res extra commercium*, i.e., the capability or incapability of being subject to private juridical relations.<sup>659</sup> Rather than a single category of that which is “non-marketable” (i.e., that which is excluded from *commercium*) Islamic law subdivides non-marketable property into a further classification, some of the most important of which are things of which the sale is void (*bāṭil*), such as blood and animals that are not slaughtered according to *sharī’a* principles; things which are public property (*milk al-‘amma*), such as air, water, public roads or charitable foundations (*awqāf*); and things that have been lost, usurped or confiscated in some way and which cannot be expected to be recovered, i.e., dead assets (*māl al-ḍimār*).<sup>660</sup>

The Qur’ānic revelation ultimately offers the moral-legal framework for property rights in Islam. It is, as Wael B. Hallaq aptly mentioned, the *groundwork* of the moral law.<sup>661</sup> The ethics of property thus is ultimately grounded in Qur’ānic ethics. In the Qur’ānic *Weltanschauung* God is “the Creator of the Heavens and the Earth” (*Fāṭir al-Samāwāt wa-l-Arḍ*) who owns *all* that there is in the Heavens and Earth.<sup>662</sup> He is the Sovereign Lord who controls *everything* there is in creation, as stated in the following verse:

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<sup>656</sup> Al-Āqhisārī, *Sharh Samt al-wuṣūl ilā ‘ilm al-uṣūl*, 332.

<sup>657</sup> Okuyucu (2019), *Fıkıh İlmine Giriş*, 388.

<sup>658</sup> Hasan Hacak, “Milk”, *TDV İslâm Ansiklopedisi*, Vol. (Istanbul: Türkiye Diyanet Vakfı, ), ; For the concept of ‘rights in rem’, see Carl Wellman, *Real Rights* (New York: Oxford University Press, 1995).

<sup>659</sup> Antonino Milazzo, “Res in Commercio and Res Extra Commercium: Reflections of Roman Jurists and Categories of Modern Law”, *İnönü Üniversitesi Hukuk Fakültesi Dergisi Özel Sayı 1* (2015): 257.

<sup>660</sup> Joseph Schacht, *In Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 134.

<sup>661</sup> Wael B. Hallaq, “Groundwork of the Moral Law: A New Look at the Qur’ān and the Genesis of the Sharī’a”, *Islamic Law and Society* 16 (2009): 239-279.

<sup>662</sup> Qur’ān, 5:17, 6:12-14, 42:49. Also compare 57:5, in which the Qur’ān mentions that the “kingdom of the heavens and the earth” belong to God (*lahu mulk al-samāwāt wa-l-arḍ*). The idea all property belonging to God is also central in Christian canon law tradition, such as in the works of Thomas Aquinas, see Yığit Sayın et al., “Land Law and the Limits on the Right to Property: Historical, Comparative and International Analysis”, *European Property Law Journal* 6, No. 1 (2017): 11.

God, holder of all control (*Mālik al-Mulk*), You give control (*al-mulk*) to whoever You will and remove it (i.e., *al-mulk*) from whoever You will; You elevate whoever You will and humble whoever You will. All that is good lies in your hand: You have power over everything.<sup>663</sup>

While in the Islamic *Weltanschauung* property ultimately belongs to God, He is also described in the Qur'ān as having decreed upon himself mercy (*kataba 'alā nafsīhi rahma*) and who has given of his bounties (*faḍl*) and provisions (*rizq*) from what He has created for human beings to enjoy on earth.<sup>664</sup> He is, according to the Qur'ān, the “Lord of infinite bounty” (*dhū al-faḍl al-aẓīm*).<sup>665</sup> In giving to mankind from what He has created, God calls human beings “those who own” or “those who have control of things” (*mālikūn*).<sup>666</sup> God, in other words, has given of His dominion to mankind, in the form of property and wealth, albeit that men's ownership is ultimately limited, indirect, and temporary.<sup>667</sup> It is no wonder then, that God speaks in the Qur'ān about mankind in terms of being “vicegerents” on earth (*khalīfa*) and as “trustees” (*mustakhlifīn*).<sup>668</sup> It is in this context, that we should understand the remarks made by jurists of Islam, such as al-Dabūsī and al-Sarakhsī, that God has bestowed upon humankind the rights to inviolability (*iṣma'*), freedom (*ḥuriyya*) and property (*mālikiyya*).<sup>669</sup>

God also set the ethical boundaries for using the property and wealth that was given to humankind. The Qur'ān warns, for example, not to consume the wealth of orphans (*amwāl al-yatīm*), nor to entrust their wealth to those who are incapable (*al-sufahā'*).<sup>670</sup> It warns against stinginess on the one side and wastefulness on the other (in encourages moderation,

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<sup>663</sup> Qur'ān, 3:26. The term *mulk* here refers to *all* that exists in the universe and over which God has dominion. God has given of His dominion to mankind, in the form of property and wealth, although men's ownership is ultimately limited, temporary and indirect, as stated in verse 40:16 in which God declares His ultimate authority. See M. Sait Özvarlı, “Mülk”, in *TDV İslām Ansiklopedisi*, Vol. 21 (Istanbul: Türkiye Diyanet Vakfı, 2020), 538-539. Abū Ḥāmid al-Ghazālī, in his famous treatise on the Beautiful Names of God, tells us that the “mulk” in *Mālik al-Mulk* refers to “kingdom” (*al-mamlaka*) while “al-mālik” here refers to the “powerful one with complete and perfect power” (*al-qādir al-tām al-qudra*). He further elaborates that “all things in existence” (*al-mawjūdāt kulluhā*) form “one kingdom” (*mamlaka waḥida*) and God is the one who is king over it (*mālik*) and has power over it (*qādir*). See Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *al-Maqṣad al-asnā fī sharh al-ma'anī asmā Allāh al-ḥusnā*, ed. Bassām 'Abd al-Wahhab al-Jābī (Beirut: Dār Ibn Ḥazm, 2003), 140-141.

<sup>664</sup> Qur'ān, 6:12, 17:30, 10:107, 36:33.

<sup>665</sup> Qur'ān, 3:74, 62:4.

<sup>666</sup> Qur'ān, 36:71.

<sup>667</sup> See Özvarlı (2020), *Mülk*, 539. Cf. Qur'ān 40:16.

<sup>668</sup> Qur'ān, 2:30,

<sup>669</sup> Al-Dabūsī, *Taqwīm al-adilla fī uṣūl al-fiqh*, 417; Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 334.

<sup>670</sup> Qur'ān 4:10, 17:34, 5:4.

in other words).<sup>671</sup> It also encourages human beings take good care of close relatives (*al-qurbā*), the poor (*al-masākīn*), emigrants (*al-muhājirūn*), and travelers in need (*ibn al-sabīl*).<sup>672</sup> The Qur'ān exhorts the believers to be mindful of God while doing their trade and acquiring wealth and to prioritize piety over wealth.<sup>673</sup> It forbids any engagement in bribery or interest (*al-ribā*) and obligate the alms-tax (*al-zakā*), and encourages to give in charity (*al-ṣadaqa*).<sup>674</sup> It prescribes men to take care of their parents and immediate family after death by way of inheritance.<sup>675</sup> It also lays down elaborate rules for contracts, loans, and much as concerning wealth and property law.<sup>676</sup> It is this moral-legal framework that would be the paradigm from which the *fuqahā'* would develop their legal reasoning. And the *sharī'a* cannot be understood without its moral bearings.<sup>677</sup>

Women's property rights were also recognized in Islamic law. The rights of ownership and property are not only accorded to Muslim men in Islamic law. Women are equal to men with regards to the law of property and obligations.<sup>678</sup> The property rights of women were acknowledged in the religious sources of the Qur'ān and Sunna. Also, there were various ways in which women could become owners of property, such as through inheritance, dower, and gifts. In contrast to prevalent practices in late antiquity, there were no legal restrictions on a Muslim woman's right to own or manage property. Muslim women had the right to hold property in their own names and were not expected to contribute to the support of the household, as men were. In Islamic law woman had important economic rights and could come to court to enforce economic and marital rights. Men did have some legal norms that were seemingly more advantageous to them. However, these were often tempered by economic and social realities.<sup>679</sup> In fact, women enjoyed economic rights and powers that allowed them to participate and the social and economic world and through which they gained a certain amount of independence and mobility.<sup>680</sup>

#### 6.2.4. The Interconnectedness of Fundamental Rights

<sup>671</sup> Qur'ān, 9:75-76, 17:29, 17:27, 7:31, 25:67.

<sup>672</sup> Qur'ān, 24:22, 70:24-25, 51:19.

<sup>673</sup> Qur'ān, 62:10, 9:24.

<sup>674</sup> Qur'ān, 2:188, 2:278-279, 2:277, 2:280, 57:7.

<sup>675</sup> Qur'ān, 2:180.

<sup>676</sup> See, for example, Qur'ān, 2:282.

<sup>677</sup> Hallaq (2009), *Sharī'a*, 85 and 226.

<sup>678</sup> Joseph Schacht, *In Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 126-127.

<sup>679</sup> Lapidus, 184 and 189

<sup>680</sup> Lapidus, 271.

The jurists of Islam also mentioned that fundamental rights are hierarchically interrelated. One cannot do without the other. Hence, they are *fundamental* (*ḍarūrī*). Al-Shāṭibī, for example, mentions in his treatise on legal philosophy *al-Muwāfāqāt* that when deprived of property (in the sense of wealth), human life cannot be sustained (*law 'udima al-māl lam yabqa 'aysh*).<sup>681</sup> This, obviously also works vice versa, since without the sustenance and protection of human life nothing else can come to pass. Al-Shāṭibī's statement, however, shows the centrality of property rights in the framework of *ḥuqūq* hermeneutics. On a similar note, the Qur'ān also often mentions the protection of property rights in the same context as the protection of life, such as in sūra 4:29:

You who believe, do not wrongfully consume each other's wealth (*lā ta'kulū amwālukum*) but trade by mutual consent. Do not kill each other (*lā taqtulū anfusakum*), for God is merciful to you.

In verse 17:31, in reference to the pre-Islamic custom of killing female children out of fear of poverty, the Qur'ān states: “Do not kill your children for fear of poverty (*imlāq*) – we shall provide for them (*narzuquhum*) and you – killing them is a great sin (*khiṭ'an kabīran*)”. When describing the desired characteristics of the “servants of the Lord of Mercy” (*ibād al-Raḥmān*), such as being pious, peaceful and humble (*hawnan*), the Qur'ān also mentions “They are those who are neither wasteful (*lam yusrifū*) nor niggardly (*lam yaqturū*) when they spend, but keep to a just balance (*qawāman*)”, nor do they “take a life (*lā yaqtulū*), which God has made sacred (*allatī ḥarram Allāh*)” (25:67-68). Similar examples can be found in the various collections of prophetic narrations (*ḥadīth*, pl. *aḥādīth*), such as the narration on the Farewell Pilgrimage (*ḥajjat al-wadā'*) in which the Prophet said “Verily, your lives, property and honor are sacred to one another” (*fa'inna dimā'akum wa amwālukum wa a'rāḍukum baynakum ḥarām*). These examples, again, stress the interconnectedness of fundamental rights in the context of basic human dignity.<sup>682</sup>

<sup>681</sup> Abū Ishāq al-Shāṭibī, *al-Muwāfāqāt fī uṣūl al-sharī'a*, ed. 'Abd Allāh Darrāz and 'Abd al-Salām 'Abd al-Shāfi Muḥammad (2014), 14.

<sup>682</sup> Narrated in various collections, such as *al-Jāmi' al-ṣaḥīḥ* of Muḥammad ibn Ismā'īl al-Bukhārī (d. 870), see Abū al-Faḍl Shihāb al-Dīn Aḥmad ibn 'Alī ibn Muḥammad al-'Asqalānī, *Fath al-bārī bi-sharḥ ṣaḥīḥ al-Bukhārī*, Vol. 1, ed. Shu'ayb al-Arnā'ūt and 'Ādil Murshid (Beirut: al-Risāla al-'Ālimiyya, 2013), 334. The commentator al-'Asqalānī further explains that what is meant here is the “shedding of blood” (*saḥk dimā'akum*), the “taking of property” (*akhdh amwālukum*), and “the slandering of honor” (*thalb a'rāḍukum*), 337.

### 6.3. Conclusion

In this chapter we have explored two rights theories in the Islamic legal tradition. These rights theories are grounded in both reason and revelation, based on the so-called ‘Great Synthesis’ in the tenth century. This gave rise to a new Sunnī consensus, which entailed that – despite minor variations – the schools agreed to harmonize the use of both scripture and reason. The rights theory of *Maṣlaḥa*, exemplified by al-Ghazālī, taken public interest as its basic ground. It is concerned with protecting the basic objectives of the law (*maqāṣid al-sharī‘a*). It is also concerned with avoiding harm and promoting benefit for all humans and for the whole of society. The basic right proposed by this theory are the protection of life (*al-naḥs*), religion (*al-dīn*), intellect (*al-‘aql*), lineage (*al-nasl*), and property (*al-māl*). These are the so-called ‘five fundamental rights’ (*al-ḍarūriyyāt al-khamsa*). The scholars of this paradigm also developed “secondary” and “tertiary” rights. These are the necessities (*hājīyyāt*) and improvements (*taḥsīniyyāt*).

The rights theory grounded in human dignity and worth (*karāma*) seems to have been especially prevalent amongst scholars of the Ḥanafī. From early on, in the tenth century, this theory developed an elaborate right language surrounding the legal concepts of legal personality (*dhimma*) and inviolability (*‘iṣma*). It assumes that God bestowed human beings with certain capacities and rights, so that they would be able to fulfill their “trust” with God (*amāna*). In order to achieve that, human beings have been created by God with freedom, human intellect, and legal personality. These are “honoring gifts” from God (*dhimma*). The fundamental right proposed by this paradigm are the rights of inviolability (*‘iṣma*), liberty (*ḥurriyya*) and property (*mālīkiyya*). These rights are “inborn” and established by birth. I.e., they are natural rights, and not acquired rights. In addition, these rights are based in common humanity (*ādamiyya*). They thus include Muslims *and* non-Muslims. This theory seems to have persisted throughout early modernity. Inspired by medieval Ḥanafī jurist, certain modern age scholars from that school have affirmed the fundamental right inhering in the person, be they Muslim or non-Muslim. The rights are thus possessed by human beings due to their mere humanity. Some have claimed that modern Islamic reforms – such as the 1839 Edict of Gülhane – were (at least in part) inspired by this “universalizing” rights theory, as it espoused similar rights to life, property, freedom, honor, education, employment, and due process for all Muslim and non-Muslim subjects.

The right to life is central in both the *maṣlaḥa* and *karāma*-based rights theories. The killing of human beings (*qatl al-nafs*) is seen in Islamic law as an “enormity” or “major sin” (*kabā’ir*). Hence, human beings have inviolability of life (*’iṣmat al-nafs*). Life on earth is seen as the ultimate “testing ground” in which humans might be able to fulfill their full potential. The killing of human life goes against that divine purpose. Several Qur’ānic verses explicitly forbid the taking of other’s lives (Q. 4:93). In addition, to killing Muslims or non-Muslims under the protection to an Islamic state, aiding in killing, striking someone, or frightening them are similarly disallowed.

The right to freedom is multilayered. One dimension is the issues of natural freedom. Islamic knows no conception of “natural slavery”, as Aristotle for example espoused. The natural human state in Islam is being born free (*ḥurr*). In addition, the right to liberty or freedom (*ḥurriyya*) is one of the basic rights adopted and promoted in both Islamic rights theories. Freedom is necessary, among other things, to be able to fulfill the covenant with God (*amāna*). These freedoms were given to human beings as “honors” (*karamāt*), as a sign of their inherent human dignity and worth. Slavery was prevalent in the antique world of Islam. However, Islam introduced several revolutionary emancipatory mechanisms. Among these are using alms for freeing slaves, freeing slaves as expiation for committed sins, and the encouragement of the contract of manumission (*mukātaba*) to buy freedom. Slaves in Islam are not property but can own property. Despite the deficient state of absence of freedom, slaves were not denied basic human rights, for example to practice religion, to marry, and to have their life and physical bodies protected.

The rights to property (*māl*) and ownership take up a central space in the Islamic *ḥuqūq* scheme. They are often mentioned together with other rights, such as the right to live. Scholars of both Islamic rights theories emphasize the right to property and that human beings should enjoy full inviolability (*’iṣma*) of property. Islamic jurists from different schools consider the right to property a human right (i.e., a private right). The right to property is deeply imbued in the moral-legal framework of the Qur’ān. God is the *Mālik al-Mulk* but also the “Lord of infinite bounty” (*dhū al-faḍl al-aẓīm*). Hence, God bestowed human beings of his dominion of the world in the form of property and wealth. He calls them *mālikūn*. Human beings are also considered vicegerents (*khalīfa*) and trustees (*mustakhlifīn*) on earth. Therefore, human beings have the responsibility of consider the rights of the weak, such as orphans, the mentally incapable, close relatives, the poor, emigrants, and travelers

in need. Furthermore, Islamic law is full of stipulations and guidelines regarding wealth and property, for example regarding honoring contracts, abstaining from interest, paying the alms-tax, and giving in charity. Special mention is made of women having property rights.

This chapter concluded with the issues of the interconnectedness of fundamental rights. One often cannot go without the other. Scholars mention, for example, that if the right to property is not respected, human life can also not be sustained. And the opposite is also true. In addition, these fundamental rights are often mentioned in conjunction in the Islamic religious sources. In other words, the fundamental rights seem to work in harmony towards the establishment of human dignity and societal flourishing.



## CONCLUSION

This thesis addressed the conundrum of the contested philosophical grounds of modern human rights. While we live in an era in which human rights are at the center of our global moral discussions, human rights have been challenged in at least two regards. Firstly, it has been challenged for its claim to universality, while depending in large part on Eurocentric ethics and anthropologies. In the face of the world's cultural and religious diversity, calls have increasingly been made to rethink modern human rights from a decolonial and cross-cultural perspective. This becomes imperative if human rights are to remain a viable ethical discourse to address global justice, equality, and human dignity. It becomes even more poignant with the recognition that the discourse of human rights has been used (and abused) in the past to justify violent "humanitarian" interventions and oppression towards the non-West, as Moyn and others have elaborately documented in their respective works.

Secondly, modern human rights have been challenged for being philosophically "ungrounded". From the eighteenth century onwards, human rights – at least in the West – were secularized and divorced from their historical theological underpinnings, without being supplanted by any viable philosophical alternative. The engineers of the modern human rights discourse in the twentieth century – such as the drafters of the UDHR – evaded any debate on philosophical grounds in order to not endanger consensus, driven in part – perhaps – by universalist ideals of cosmopolitan peace in the wake of the atrocities of World War II. This has left modern human rights philosophically "ungrounded" and hence subject to denial and rebuttal. MacIntyre and others have for this very reason denied the existence of human rights, as Bentham had done almost two centuries before. Modern human rights are thus in need of a "theory of justification". Without philosophical grounds, modern human rights may not withstand the analogy of some of its critics: as something which is akin to belief in witches or unicorns, or – indeed – nonsense upon stilts.

The current "crisis of human rights" has instigated fresh scholarship on the philosophical grounds of human rights, drawing mainly on insights from historical and contemporary Christian and Jewish ethics, as we have seen in the works of

Woltersdorff and others. However, the Islamic legal and ethical tradition has been markedly absent from this debate. Instead, Orientalists and human rights lawyers have tended to focus on the “(in)compatibility question” of Islam and human rights. Instead of approaching the Islamic legal tradition as a philosophically rich tradition, that might have something interesting and worthwhile to offer in the debate on the philosophical grounds of human rights, the debate is dominated by a “narrative of conflict”. The field is cumbered by stubborn and reductionist stereotypes, instigated by early Orientalists, such as Siegman and Schacht, and uncritically perpetuated in modern scholarship, such as in the recent work of comparative legal scholar Doe. Such as that Islamic law has no conception of individual human rights but is merely a “system of duties”. Or that Islamic legal culture – to speak with Mayer and others – is necessarily at odds with the conception of human rights. That it represents a legal tradition that is stale, monolithic, intellectually bankrupt, and wholly incapable of addressing modern concerns about human dignity and global justice.

Moving beyond such reductionist legal Orientalism, this thesis engages newly emerging scholarship on the contested philosophical grounds of human rights, which explores premodern rights theories in the context of religious ethics, law and moral philosophy. Two main concerns guide these endeavors: (1) the growing realization that the modern international human rights regime did not emerge *ex nihilo* in the wake of World War II but is in part the product of (contested) historical genealogies in premodern rights traditions, and (2) the exploration of premodern religious and legal traditions in search of fresh perspectives on human rights justifications in the face of the crisis of ungrounded modern human rights. This thesis pursued the debate on the grounds of human rights (also known as fundamental or basic rights) along the axis of three lines of questioning: (I) what are fundamental rights conceptually? (II) how are fundamental rights theoretically justified? (III) who is practically included in the scope of fundamental rights?

### **Beyond Mauritian’s *Thin Consensus*: Reopening the Dialogue on Grounds**

To set the stage for this comparative study, we were obliged to analyze two sets of discourses. The current debate on the philosophical grounds of human rights and the debate on Islam and human rights. These two discourses are notably – and surprisingly perhaps – disconnected in the current state-of-the-art of Islam and human rights scholarship. In the “crisis of human rights” genre we find that the modern human rights discourse is replete with political paradoxes, not the least of which are violent humanitarian “interventions” in the name of human rights. But the deeper question is philosophical in nature. If we are to have any human rights at all, how then can we theoretically justify them? The drafters of the UDHR and intellectuals surrounding them, such as Maritain, had tended to avoid this question. It would endanger a much-needed consensus towards cosmopolitan peace in the aftermath of Nazi violence. Maritain was very much aware of the impossibility of reaching agreement on philosophical grounds. Instead, he promoted a *thin consensus* that consisted of enumerating lists of human rights people of different worldviews could hold dear, avoiding the discussion on philosophical grounds altogether.<sup>683</sup> We can conclude from our historical analysis in chapter two that Maritain’s *thin consensus* was unable to hold on the long run. Ultimately, human rights as positive legal rights imply an underlying moral blueprint that is imbedded in certain ethical concerns and convictions about the world and what good and evil is. If not, they are nothing more than a “consensus of moral platitudes”, as one scholar aptly put it. Avoiding a discussion on the moral standards underpinning human rights, is avoiding the very matter that guides human action. It is thus no wonder philosophers and theologians who eventually see the exigency of paying attention to the philosophical grounds of human rights.

We can distinguish four main currents in grounding human rights scholarship. The first current argues human rights have no grounds and cannot be theoretically justified. Human rights are, according to this current, metaphysical abstractions with no clear epistemological or ontological basis. Hence, they should be abandoned altogether in favor of other ethical or moral conceptions (MacIntyre, Rorty). The second current is

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<sup>683</sup> It is an interesting fact, that for all his intellectual diplomacy, Maritain had in fact very firm convictions about what grounds would be best fitted to undergird this new twentieth-century generation of human rights. For him, these convictions lay in the Christian natural law tradition, especially as espoused by Aquinas. Throughout his life, Maritain would come back to this question in various of his written works. A thoroughgoing scrutiny of these writings and how they may have impacted the modern human rights discourse fall beyond the proper scope of this thesis and will have to be conducted in future research.

the argument that only religious or theological foundations are warranted to justify human rights. Using the vehicle of reformed epistemology, this current examines – and ultimately rejects – secular conceptions of human capacity and rational agency as viable grounds. Human dignity, this current argues, is rather grounded in the idea of unconditional divine love for all human beings, who are created in the *imago Dei* (Woltersdorff). The third current is the position that secular justifications may be found to ground human rights (Kohen). This current very closely follows the Rawlsian idea of a cross-cultural overlapping consensus as a justificatory ground for human dignity. Taking the UDHR drafting process as an example, this overlapping consensus is achieved through a Habermasian democratic deliberative process. If this process is inclusive and persuasive enough, it can achieve “justificatory status”. The fourth and final current is a mid-way position that holds that both secular and religious groundings are possible and can be held concurrently (Harries, Nørager). While the previous two currents argue rather forcefully for either secular or religious groundings, the fourth current stresses the complementarity of secular and religious foundations. Albeit under the condition of metaphysical openness towards the ideas of transcendence and ultimate meaning.

Given the sustained critique of the first current, it seems hard to hold any conception of human rights if one believes they cannot be philosophically justified in some way. Scholars like Tasioulas have rightly called out MacIntyre for his all-too-easy dismissal of human rights, without engaging in any serious philosophical discussion about their grounds. In fact, even relativists such as Rorty and Donnelly hold – albeit in distinct ways – that human rights need some kind of justification. Kohen’s case for secular grounds in “cross-cultural overlapping consensus” seems difficult to sustain, given the similarities it bears with Maritain’s idea of a “thin consensus”. Kohen’s argument is thus subject to the same objections. A mid-way position of justifying human rights in both theological and rational grounds appears to be the most promising approach. The Islamic *ḥuqūq* hermeneutic arguably provides such an approach, as it is grounded in both rationality and scripture. This approach hence seems congruent with what Hallaq has called the “happy synthesis between human reason and the divine word”. This alludes to the tenth century Great Synthesis between traditionalist and rationalist approaches in Islamic civilization, which also runs through the discourse of *ḥuqūq* in Islamic law and legal philosophy.

## Islamic Human Rights Studies: An Emerging Field?

The current scholarly debate on Islam and human rights tends to focus on a “narrative of conflict”. It excessively stresses the question of (in)compatibility, at the expense of other – philosophically more interesting – questions, such as what the Islamic legal and intellectual tradition could potentially offer in terms of the justificatory grounding of modern human rights. A lot of research on this topic focusses on contemporary human rights practices (or malpractices) in Muslim majority countries. As such, this type of research looks at Islam as a lived and embodied religion – to speak in anthropological terms – and not at the normative classical Islamic legal tradition. Other studies look at Muslim responses to the modern human rights regime, for example through the promulgation of Islamic rights declarations (such as the Cairo Declaration). These too tend to not focus on the classical legal tradition as a body of interpretative scholarship. These topics seem to be more properly addressed through the discipline of anthropology and other social sciences, and not necessarily through comparative legal history and philosophy. Scholars that do attempt to engage “Islamic law”, such as Mayer, tends to focus on modernist Muslim thinkers such as al-Mawdūdī (who was not a classically trained Islamic jurist in the traditional sense) or directly engage Islamic sacred scripture (Qur’ān and ḥadīth), almost always through English translations. This engagement necessarily remains superficial, since it does not address the rich hermeneutical tradition of Islamic jurisprudence (*fiqh*) and legal philosophy (*uṣūl al-fiqh*). Not in English, nor in its original classical Arabic. This thesis thus contributes to an important lacuna in current Islam and human rights research.

Through the analysis of the current scholarly discourse on Islam and human rights, we were able to develop a taxonomy of approaches to the question in Western academia.<sup>684</sup> The debate on Islam and human rights can be categorized into three main standpoints: the Conflictual Perspective, the Apologetic Perspective and the Discursive Perspective. (I) The Conflictual Perspective argues that Islam is inherently

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<sup>684</sup> For reasons of scope and delineation, this study has limited itself in chapter two to scholarly output in English. The main point here is to address certain lacunae in current scholarship on Islam and human rights in Western academia. We are aware of excellent research in Arabic and Turkish on the topic. It is hoped these will be addressed in future studies.

opposite to modern human rights. It includes versions of the argument that Islamic values inherently contradicts Western values, assuming the latter undergirds the modern human rights discourse (Mayer). It also includes versions of the argument that the idea of individual human rights is wholly absent from the Islamic legal tradition. Instead, it is perceived as merely a system of duties (Siegman, Schacht, Doe). This approach is presentist and legal Orientalist in nature, as it judges the premodern Islamic legal tradition through the vantage point of modern liberal-secular ethics and uses international human rights formulations as a “measuring rod”. It also fails to grasp Islamic law in its historical complexity and reduces it to a monolithic and static legal tradition. (II) The Apologetic Perspective, on the other hand, is defensive in nature and argues that human rights have always existed in Islam, even before they emerged in Western modernity (al-Mawdūdī). It lambasts the supposed Eurocentrism and imperialism of the modern human rights project and exhibits a rather crude form of simplistic triumphalism. This approach can be highly selective in nature, stressing only those points that can easily provide support for this perspective, while avoiding those aspects of Islamic law that would require a more thoroughgoing discussion (such as polygamy, corporal punishment, or inheritance law). In addition, this approach at times caricaturizes and denigrates Western notions of human rights in order to assert Islamic superiority. Interestingly, this approach often also merely refers directly to Islamic sacred scripture (Qur’ān and ḥadīth), without engaging the hermeneutical tradition of classical Islamic jurisprudence and legal philosophy.

Arguably, both approaches are unhelpful to productively enhance the scholarly conversation between Islamic law and modern interpretations of human rights. Both approaches seem to lack a thorough engagement with classical Islamic legal tradition on its own terms, taking into consideration both its historical context and its internal diversity and complexity. As an alternative, we propose (III) a Discursive Perspective that seeks to go beyond the reductionism and presentism of the Conflictual Perspective and the defensive triumphalism of the Apologetic Perspective. It argues that it might be more productive to treat the Islamic legal tradition as a lived discursive tradition, which takes into consideration both its historical context *and* its internal diversity, continuity, dynamism and potential for change. As such, it is guided by the principle of intellectual openness. Such an approach could arguably help us move away from a rather disconnected engagement with Islam and human rights as somewhat separate

entities to what might be called *Islamic human rights research*. By necessity, such an approach would also have to adhere to the principles of interdisciplinarity, which considers the prerequisites of acquiring the fundamental hermeneutical tools to seriously engage the classical Islamic legal tradition (including classical Arabic) and international human rights law.

### **From Whence Human Rights? Disentangling a Contested Concept**

Human rights as a legal concept, we have seen, is far from straightforward. As recognized in both legal historical scholarship and modern analytical jurisprudence, the concept of rights is ambiguous, malleable and multilayered. Part of the confusion has to do with the uncritical conflation of terms such as human rights, natural rights and natural law. These might be connected in various ways but are not exactly the same. In its very basic meaning, rights are entitlements or claims upon that entail duties upon others. Utilizing the Hohfeldian scheme to our advantage, we can realize that rights are not unitary but bundle of jural relations. It would be an oversimplification to reduce jural relations to the ubiquitous right-duties bifurcation. Sometimes people speak of rights while they in fact mean liberties (or privileges) that do not entail any duties. They can also mean legal powers or immunities. In Hohfeldian terms, rights are only “proper” rights if they have corresponding duties. Much has also been said over human rights as moral or legal rights, which ties into debates of legal positivism and its critics. Denying the existence of natural moral rights has been scrutinized over past the years. A better way of thinking about the moral-legal dichotomy is to see legal rights as having a non-legal foundation in morality. Legal rights are hence an expression of moral rights. Ultimately, natural moral rights – such as human rights – are necessary to protect citizen rights and limit the authority of governments.

A case has been made that legal concepts should be understood in their natural habitat. Hence, we have looked at premodern rights discourses in the Western legal tradition, some of which have been claimed to be directly linked to – or even the same as – modern human rights. This is problematic in various ways, not the least of which are historical and conceptual inaccuracy and the pitfall of Eurocentrism. In studying and comparing various “human rights histories”, we conclude that most of them are

Eurocentric in nature and sometimes have historical-methodological deficiencies. Some scholars (Porter, Tierney) do not bother to give a historical account of human rights. They simply use the terms human rights and natural rights – and explicitly so – interchangeably. Tierney claims furthermore human rights are a singularly Western invention that ought to be assimilated into non-Western cultures; a claim that we might very well designate as a form of legal imperialism. Another problematic is the idea of historical continuity of rights discourses between the Greco-Roman and medieval European legal traditions. Maintaining such a stance seems to be a clear example of “inventing Europe”. We can only speak of a unified Western legal tradition after the Papal Revolution in the twelfth century. Roman law had completely dwindled after the fall of the Western Roman Empire in the fifth century. Until the twelfth century Europe was dominated by Germanic tribal legal traditions (*Volksrecht*). It had no legal system in place, no legal professional class, no *corpus juris*, no legal textbooks and no “science of the law”. It was not until Europe’s “rediscovery” of the Greco-Roman legal heritage – instigated for a large part by Arabic-Latin translations of Muslim works – that Europe developed its own tradition of canon and civil law (*ius commune*).<sup>685</sup>

Despite claims otherwise, we argue that human rights, natural rights and natural law are not as similar as presumed by some. As we have seen in our analysis, Roman jurist referred to rights (*ius*) as something that is good or fair (*ius naturale*) or what is best for all or most in society (*ius civile*). The Roman usage thus does not resemble the idea of claim-rights or entitlements that entail duties upon others, as in our contemporary understanding. Nor does the usage of *ius* in Christian scripture refer to rights that are “possessed” by individual human beings (such as the use of *ius* as “statutes” of God in Psalm 119). What we do see are proto-rights discourses surrounding the debates of Church property and property in general, in which the laity are allotted certain subjective rights. But the discussion between *ius* and *dominium* is far from settled. In addition, Aquinas – often mentioned as a predecessor to human rights thinking (Finnis, Alford) – makes no mention of *ius* in the sense of subjective claim-rights and appears instead to be committed to an objective theory of natural law (*lex naturalis*).

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<sup>685</sup> This thesis did not focus on possible influences of Islamic civilization on the development of medieval European legal thinking. Although some progress has been made in this regard by scholars such as Makdisi and others, we are convinced there is a lot more to be explored here. This too might be subject to further scrutiny in future research.

A far more distinct shift in rights language we see in the early modern period, with natural rights theorists such as Grotius (d. 1645), Hobbes (d. 1679), Pufendorf (d. 1694), and especially Locke (1704). Of these four, Locke is mostly seen as the scholar that for the first time developed a “mature” theory of natural rights. In most accounts, Grotius is presented as the first to have applied modern rational-secular modes of thinking about rights. This seems to be an exaggeration, as his rights language is imbued with religious undertones. But his thought experiment in which he claimed that even “without God” the natural law would still exist and be discovered, has inspired subsequent generations of natural rights theorists to look for secular grounds. A big difference with the modern drafters of the UDHR, is that early modern rights theorists did not seek to supplant the religious underpinnings of natural rights. Both existed parallel to each other. They were used, rather, to universalize natural rights and make them more acceptable to humankind. Pufendorf has played a major role in this development, who was a great synthesizer and popularizer of Grotius and Hobbes. Hobbes seems to be a better candidate as a starting point for the secularizing and rationalizing trend in natural rights theory-making. He is also the first one to have made a strict distinction between law as “lex” and right as “jus” (or *ius*), a distinction that was adopted by Pufendorf and Locke.

Of all four natural law theorists, Locke seems to have a much more elaborate rights discourse. He also clearly stresses individuality and subjective rights that human beings possess. His main claim is that all human beings are free in the state of nature and are created as rational beings so they can fulfill their obligations. This stress on autonomy and freedom would inspire later Enlightenment thinkers. But this freedom is not unrestricted: you cannot harm yourself or others (in life, health, liberty, possessions). Also, there seems to be a tension in his individualism and his attention for the “collective good of society”. Rational beings, Locke argued, would agree to live under a government that honors the law of nature and promotes public good. We can thus conclude that a distinct fundamental rights discourse developed with Locke in late seventeenth and early eighteenth century. To what extent Locke’s theory of rights resembled the inclusiveness and scope of modern human rights is another matter altogether. To this question, we return to towards the end of this conclusion.

## Islamic Rights Discourses: Giving the Islamic Legal Tradition Its Due

Before analyzing the *huqūq* discourse in the Islamic legal tradition we have addressed the challenges of doing a conceptual history of Islamic rights schemes in the context of comparative legal studies. We have concluded that scholarship in Western languages – be it English, German, French, or otherwise – linguistically delimits the Islamic *Sharī‘a* discourse in serious ways. In this context, we have alluded to the problem of (un)translatability of a legal tradition that is by-and-large expressed in medieval texts written in classical Arabic. Western scholarship on Islam has often been tainted by legal Orientalism in which the Islamic legal tradition has been reduced to stereotypes and Islam and Muslims have been Otherized as the “legal Other”. And more significant perhaps, the Orientalist study of the Islamic legal tradition straightjacketed the *Sharī‘a* into a constructed mold of “Islamic law” that divorced it from its moral underpinnings. As a case study, we have analyzed the reductionism of legal Orientalism in English scholarship on “Islamic law” in the Hart-Dworkin framework used by Reinhart to evaluate the “law” in Islamic law.

Instead of applying legal positivism to Islamic law, we have shown how classical Muslim jurists (*fuqahā’*) themselves defined Islamic legal terminology in various genres of Islamic juridical literature. We have concluded that the classical Muslim jurists were acutely aware of the intricacies and technicalities of language and even utilized a kind of conceptual history (as we have shown through the example of the term *fiqh* in the work of al-Āqhiṣārī). Classical Muslim jurists spoke of the *Sharī‘a* as a body of categorizations regarding human action (*al-aḥkām fī-l-af‘āl* or *al-aḥkām al-‘amaliyya*), or in other words “*Sharī‘a* categorizations” (*al-aḥkām al-shar‘iyya*). Islamic substantive law (*fiqh*) is variously defined as “knowing the rulings (*aḥkām*) of the *Sharī‘a* that are the way to legal reasoning (*al-ijtihād*)” or “to understand the subtle meanings (*al-ma‘nā al-khafī*) that relate to legal rulings (*al-ḥukm*)”. A more elaborate definition of *fiqh* is: “the science of the legal rulings of the *Sharī‘a* with regards to human actions (*al-aḥkām al-shar‘iyya al-‘amaliyya*) as they are derived from their detailed proofs (*adillatihā al-taḥqīqiyya*)”. The philosophy of the law (*uṣūl al-fiqh*) is defined as “the science of the principles (*qawā‘id*) through which one can reach the rulings of the law (i.e., *al-aḥkām al-shar‘iyya*) with a method of careful examination (*‘alā wajhi al-taḥqīq*)”. These discourses are firmly embedded in the Qur’ānic moral-

legal framework. Hence, in the Islamic worldview, the legal dimension is not divorced from the moral dimension.

Surveying the classical Islamic juridical literature, we have also seen that the Islamic legal tradition has an elaborate indigenous rights discourse that is deserving of much more scholarly attention, especially in the context of *Islamic human rights research*. Very different from the Western legal tradition, Islamic law from its inception allotted legal personality (*dhimma*) and legal capacity (*ahliyya*) to all human beings, including women, children, religious minorities, and slaves. The jurists of Islam defined legal personality as a quality that enables the capacity in human beings for having rights and duties (*ahlan lil-ijāb lahu wa 'alayhi*). Based on the primordial covenant (*mīthāq*) with humanity, God allotted certain fundamental human rights to all humans, in order to facilitate fulfilling the covenant and the rights and duties it entails. Human beings are responsible under the law (*mukallif*), except for certain conditions (such as not having reach the age of majority or being mentally impaired). Hence, human beings a subject to the law and its stipulations but they are also them bearers of rights and duties (*huqūq*) and as such have the legal capacity (*ahliyya*) to be subject to legal relations. For this reason, very early on in Islamic legal history, we see Muslim legal philosophers such as al-Dabūsī (d. 1039) and others stating that God “dignified human beings” with reason (*'aql*) and legal personality (*dhimma*), so that he would become capable of fulfilling the rights and obligations incumbent upon him.

In our analysis, we have further shown – based on the classical Islamic juridical literature – that the Islamic *huqūq* discourse was further elaborated into the rights hermeneutic of the so-called “rights of God” (*huqūq Allāh*) and “rights of human beings” (*huqūq al-ibād*), which could be compared in some ways to the distinction of public and private rights in the Western legal tradition. While the term *ḥaqq* and its plural *huqūq* has refers to various things, in the legal sense it has always refers to the idea of rights. The “rights of man” or “human rights” – also called *huqūq al-ādamiyyīn* or *huqūq al-nās* in the usage of classical Muslim jurists– in the legal sense, refer to claim-rights and entitlements that entail duties upon other people (“proper” rights in the Hohfeldian sense) that are bestowed on individual human beings. These rights can be seen as natural rights that are inalienable and inborn in every human being. In some schools of Islamic law – most notably the Ḥanafī school of law – the fundamental

rights to life, liberty and property are among these rights. These rights fall under human inviolability (*ʿiṣma*) and inhere in all individual human beings. The “rights of God” or “divine rights” (*ḥuqūq Allāh*), are claims the Creator can make upon his creation. God in the Islamic worldview, however, is not in need of any rights. He is after all omnipotent and self-sufficient. The rights of God, rather, refer to certain public interests that cannot be claimed by an individual and hence must be ministered by the state. These are catered towards the preservation and benefit of human society, such as public order and safety, infrastructure, markets and the administering of taxes.

Based on our analysis of the classical work on Islamic legal philosophy by al-Āqhisārī (d. 1615) we have furthermore seen detailed elaborations of the Islamic *ḥuqūq* scheme into various categories and subcategories, such as the special rights of human beings (*ḥuqūq al-ʿibād khāliṣa*). These types of right do not relate to public benefit but to specific interests (*maṣlaḥa khāṣa*) of human beings and hence involve the infringement upon private rights, such as the inviolability of the property of other people (*ḥurmat māl al-ghayr*). The special rights of God (*ḥuqūq Allāh khāliṣa*), on the other hand, do not concern private rights but are related to public benefit (*al-naḥʿ al-ʿām*), as stated above. Examples have also been given of so-called “mixed rights”, which involve both human rights *and* divine rights, such as in the case of slanderous accusations of sexual conduct (*ḥadd al-qadhf*). These types of rights are “mixed rights” because they involve the deflection of a public harm but also a private interest, which is the right to the protection of the honor of the victim.

These findings counter the claim by Orientalists, such as Siegman and Schacht, or modern comparative legal scholars, such as Doe, that Islam has no conception of human rights and is merely a “duty-based system”. It also puts modern scholarship on Islam and human rights from the perspective of international human rights law in a wholly different perspective. Prominent scholars, such as Mayer, have made major generalizing claims about the relation between human rights and the Islamic legal tradition in their writings over the past decades. They have done so without any serious engagement with the classical Islamic legal tradition, relying instead on English translations of modernist thinkers, such as al-Mawdūdī.

Based on our analysis of the classical Islamic legal tradition, we can conclude that from its inception the Islamic legal tradition allotted basic human rights to all human beings, facilitated through their legal personality (*dhimma*) and legal capacity (*ahliyya*). These concepts were further theorized in classical juridical texts in Islamic jurisprudence and legal philosophy from the tenth century onwards. The Islamic legal tradition and its *ḥuqūq* discourse thus recognized an all-embracing *dhimma* that incorporates the whole of humanity and affirms notions of inalienable and enforceable human rights that are endowed in all human beings. This *ḥuqūq* discourse was embedded in a legal tradition that emerged in the seventh century, formalized in the tenth century, and remained more or less homogenous throughout pre-modernity. Despite obvious cultural variety in the various geographies to which Islamic civilization spread, it exemplified what Hallaq called a “structural and systemic unity”, which was maintained by a developed *corpus juris*, a class of legal scholars, and developed curricula of legal education throughout the Muslim world. It was only with the advent of modernity, with the rise of the hegemonic West and global colonization, Muslim legal systems and legal education was slowly but steadily dismantled. Modern incarnations of Islamic law in Muslim-majority countries are often limited to family law as part of a mixed legal system with mostly elements of European civil law.

### **Comparing the grounds and scope of human rights in Islam and the West**

In two separate chapters we have analyzed classical texts on rights discourses in the premodern Islamic and Western legal traditions, through the lens of three fundamental human rights that are recognized by both traditions: expressed in Lockean terms as rights to life, liberty and property (or “estate” rather) and in Islamic legal terms as the inviolability of life (*‘iṣma’ al-naḥs*), the right to freedom or liberty (*ḥurriyya*), and the right to ownership and property (*milkiyya*). We can conclude that both traditions have a conception of what is called in modern legal scholarship “basic goods”. These are the fundamental prerequisites needed for human dignity and societal flourishing. They might be further divided into rights that are less fundamental. These are additional “embellishments” or “adornments” to basic human rights. In the legal reasoning of both traditions, we can observe the phenomenon of “rights triage”, the practice of negotiating and prioritizing certain rights over others based on a variety of rationales.

We find this in early medieval Western natural law thinkers, such as Aquinas (d. 1274). Aquinas, about whom we have concluded that he lacks a theory of individual human rights, did elaborate a list of basic good, namely life, reproduction, education, worship, social life, avoiding offence and shunning ignorance. Contemporary natural law philosophers, such as Finnis, tend to enumerate similar list, albeit formulated in the language of modern human rights. For Finnis these are practical reflection, life, knowledge, play, aesthetic experience, sociability (i.e., friendship), practical reasonableness, and religion.

These “basic goods” in the Islamic legal tradition are framed in terms of the objectives of the Sharī‘a (*maqāṣid al-sharī‘a*), the basic premise of which is the avoidance of harm and the promotion benefit, for both individual human beings and society as a whole. The basic objectives of Islamic law, according to Muslim jurists such as al-Ghazālī (d. 1111) are the protection of life (*al-naḥs*), religion (*al-dīn*), intellect (*al-‘aql*), lineage (*al-nasl*), and property (*al-māl*). A main difference between the Islamic and Western legal conceptions of “basic goods” – at least through the lens of scholars such as Aquinas and al-Ghazālī – is that Aquinas did not yet frame them in a theory of individual and subjective human rights and its cognate legal concepts, such as legal personality and legal capacity. This is interesting, since both wrote in medieval times, Aquinas being slightly more towards the high end of the High Middle Ages. In al-Dabūsī (d. 1034), we of course find an even earlier example of a fully articulated theory of rights.

We have studied and compared several historical genealogies of human rights in the Western legal tradition, only to find that Locke (d. 1704) is the first political and legal philosopher that develops the language of a mature theory of rights, based in a clear idea about the subjective nature of natural rights as being endowed in all human beings. These are grounded in the law of nature and are – at least in principle – available for the whole of humanity. The rights theories of earlier “proto-rights thinkers”, such as Grotius (d. 1645), Hobbes (d. 1679) and Pufendorf (d. 1694), remain rather rudimentary and minimalistic. These three natural rights thinkers could be best understood, arguably, as precursors to the ideas of Locke, who reworks and builds upon their ideas. But the others make important contributions as intellectual

predecessors, such as the separation of law (*lex*) and right (*ius*), which allowed Locke the opportunity to use richer rights language.

Concerns by Grotius and Hobbes regarding the fundamental right of life reflected mostly early modern considerations in the law of warfare (*jus in bello*) and just war theories (*bellum justum*). Both Grotius and Hobbes believed the right to self-defense and self-preservation were the only human right that really mattered. In addition, Grotius does not mention an individual right to life explicitly, but in terms of rights that are “common to all”. Grotius natural law theory thus does seem to be grounded in the idea of inherent human dignity, as we can observe with the jurists of Islam, but in the idea of self-preservation.

The same can be said for Hobbes, for whom after all the main state of nature was one of the “war of all against all” (*bellum omnium contra omnes*). In Hohfeldian terms, Hobbes furthermore did not espouse a claim-right but a liberty right for self-preservation. Hobbes natural rights theory is not concerned with the rights of other human beings. Instead, his theory is deeply informed by psychological motives, such as self-interests and passions. Only the strongest passion of them all – the fear of a violent death – could inspire human beings to give up their natural right to self-preservation and establish peaceful relations in an orderly society. Hobbes did however, much clearly than his medieval predecessors, acknowledge a distinct human nature as a ground upon which human beings can possess basic personal rights.

Pufendorf, another of Locke’s predecessors, inherits and synthesizes the natural law theories of Hobbes and Grotius, while also disagreeing on some major issues, such as the state of nature being *bellum omnium contra omnes*. Instead, he introduced the idea of “sociability”, the idea a life of loneliness is not befitting for human beings as God endowed them with a nature that promotes a safe and fruitful social life. While the claim that Pufendorf’s idea of “natural equality” somehow anticipate human rights conceptions of universal humanity seems somewhat overstated, he does seem to have a rudimentary conception of subjective rights, among which are the natural right to life, actions, honor, and reputation.

Locke, who worked based on these earlier proto-rights theorist, innovated rights thinking in the West by extending the idea of the right to life, not only to the preservation of the self, but also to the preservation of the lives of others. In addition, Locke's rights language is much more explicit and universalizing. Not only does he constantly refer to the natural rights of "all mankind", but he also makes very explicit that human beings have individual subjective rights. In addition, Locke enlarges the group of basic rights to the right to life, liberty and property. Human beings, according to Locke are born free and rational, so that they can discover and obey the natural law. But liberty is not unconditional. Locke's right to property is a labor-based right. If someone's labor mixes with something (for example working the land) it becomes their property.

The Islamic legal tradition, on the other hand, seems to have a much more elaborate language for addressing the natural rights of human beings. Especially in the period from the Middle Ages to the of modernity in 1800. This starts with the recognition of the legal personality and legal capacity of all human beings, including women, children, religious minorities, and slaves in early Islamic law. Very early on, at least from the tenth century onwards, Muslim jurists developed mature theories of basic human rights. These were grounded in various ways, but always balancing rationality and sacred scripture. Especially after the end of the ninth century, when most debates between the traditionalist movement (*ahl al-ḥadīth*) and the rationalist movement (*ahl al-rā'ī*) had settled, and most Muslim scholars opted for a combination of both approaches in some shape or form. This has also been referred to as the Great Synthesis between the traditionalist and rationalist approaches.

Two main early theories of rights were based on the idea of public benefit (*maṣlaḥa*) and human dignity (*karāma*), respectively. The rights theory of public benefit seems to have been especially dominant in the Shāfi'ī, Mālikī, and Ḥanbalī schools of law, having been developed by great scholars of these schools, such as al-Ghazālī (d. 1111), al-Shāṭibī (d. 1388), al-Qarāfī (d. 1285), and al-Ṭūfī (d. 1316). The second human dignity-based theory seems to be dominant amongst exponents of the Ḥanafī school of law, such as al-Dabūsī (d. 1093) and al-Sarakhsī (d. 1090), who developed an elaborate theory of inviolability (*ʿiṣma*). Of the two theories, the theory based on human dignity seems to have developed slightly earlier.

The rights theory of *Maṣlaḥa* is grounded in public interest and concerned with the basic objectives of the law (*maqāṣid al-sharīʿa*). It aims to avoid harm and promotes benefit for all humans in society. In its most-used expression, the basic human rights proposed by this theory are the protection of life (*al-nafs*), religion (*al-dīn*), intellect (*al-ʿaql*), lineage (*al-nasl*), and property (*al-māl*). These are the so-called ‘five fundamental rights’ (*al-ḍarūriyyāt al-khamsa*). The scholars of this paradigm also developed “secondary” and “tertiary” rights. These are the necessities (*hājiyyāt*) and improvements (*taḥsīniyyāt*).

The rights theory grounded in human dignity and worth (*karāma*) developed an elaborate rights language surrounding legal personality (*dhimma*) and inviolability (*ʿiṣma*). As expressed by al-Dabūsī and al-Sarakhsī after him, this theory is based on the idea that God has honored and dignified human beings, by bestowing upon them human reason and the capacity to have rights and duties, so they may fulfil their “trust” with God (*amāna*). These scholars explicitly mention the fundamental human rights to the inviolability of life, freedom, and property, which are inborn and established by birth, not acquired or endowed by the state, such as positive legal rights.

The right to life is central in both the *maṣlaḥa* and *karāma*-based rights theories, as the killing of human beings (*qatl al-nafs*) is seen in Islamic law as an “enormity” or “major sin” (*kabāʿir*). Hence, human beings have inviolability of life (*ʿiṣmat al-nafs*). Several Qurʾānic verses explicitly forbid the taking of other’s lives (Q. 4:93). In addition, to killing Muslims or non-Muslims under the protection of an Islamic state, aiding in killing, striking someone, or frightening them are similarly disallowed. Islamic law knows no conception of “natural slavery”, as Aristotle for example espoused. The natural human state in Islam is being born free (*ḥurr*). In addition, the right to liberty or freedom (*ḥurriyya*) is one of the basic rights adopted and promoted in both Islamic rights theories. Freedom is necessary, among other things, to be able to fulfil the covenant with God (*amāna*). These freedoms were given to human beings as “honors” (*karamāt*), as a sign of their inherent human dignity and worth. Scholars of both Islamic rights theories emphasize the right to property and that human beings should enjoy full inviolability (*ʿiṣma*) of property. Islamic jurists from different schools consider the right to property a human right (i.e., a private right).

In our analysis we have seen that human rights have been grounded and justified in various ways, both in the Islamic and Western legal traditions. We conclude from this that many Eurocentric contemporary “histories of human rights” seem to uncritically conflate different rights discourses, especially when it comes to modern human rights and medieval and early modern natural rights. The claims of historical genealogies of modern human rights in medieval natural law philosophers and Catholic canon lawyers seem to be severely lacking. Especially when compared to the rich medieval *ḥuqūq* discourses in Islamic juridical literature we have analyzed in this thesis, similar discussions in medieval canon law and natural law philosophy – though intellectually rich and philosophically interesting in many other ways – seem to be rather rudimentary and minimalist when it comes to theories of human rights and their justifications.

Additionally, there are major differences when it comes to the scope of rights. Who is included in the “human” of human rights? Here we see a few major paradoxes. In early modern natural rights theory, especially in the works of Locke, we can surely find a “universalizing” trend towards a broadening of the conception of human rights and a move away from the idea of individual self-preservation exemplified by his predecessors Grotius and Hobbes. And the influence of early modern natural rights theories on the later Enlightenment and eighteenth-century rights declarations seems to be evident. Despite the secularizing tendency of modern human rights, natural rights theories still have had their impact.

But there also seems to be a tension in the “new” natural rights language of the seventeenth century. On the one hand, it emphasizes a universalizing language, often addressing “all mankind”. On the other hand, natural rights theories were used to justify slavery, land usurpation and European colonization of indigenous peoples in the Americas. As argued by Peters, even eighteenth-century rights declarations proclaimed in the West, such as France and America, were severely compromised as they “applied essentially only to white free men, and not to women and black people” and “slavery was still lawful”. Natural rights theorists, like Locke, were often personally involved in slavery (or condoning slavery). Grotius’ law of nations made great strides in development. For example, it helped forbid the killing of prisoners, hostages, and innocent civilians (including women and children). However, his

malleable conception of natural rights theory was similarly used to justify colonialism and “just war”. There thus seems to be a major tension between the universalizing message of early modern natural rights theories and their limited scope regarding slaves, women, minorities, and indigenous peoples.

In contradistinction to the Western legal tradition, Islamic law allotted legal personality to all human beings, including, women, children, slaves, and religious minorities. For example, while slavery was prevalent in the antique world of Islam, it introduced several revolutionary emancipatory mechanisms. Among these are using alms for freeing slaves, freeing slaves as expiation for committed sins, and the encouragement of the contract of manumission (*mukātaba*) to buy freedom. Slaves in Islam are not property but can own property. Despite the deficient state of absence of freedom, slaves were not denied basic human rights, for example to practice religion, to marry, and to have their life and physical bodies protected.

The discourse of Islamic human rights (*ḥuqūq al-ādamiyyīn*) in classical Islamic jurisprudence thus forms rich resource for “rights talk” regarding inalienable rights and human dignity. Hence, the Islamic rights discourse was recognized as “proto-human rights” by some scholars. These rights are inborn and established by birth. I.e., they are natural rights, and not acquired rights. In addition, these rights are based in common humanity (*ādamiyya*). They thus include Muslims *and* non-Muslims. This theory seems to have persisted throughout early modernity. Some scholars have argued that modern Islamic reforms – such as the 1839 Edict of Gülhane – were (at least in part) inspired by this “universalizing” rights theory, as it espoused similar rights to life, property, freedom, honor, education, employment, and due process for all Muslim and non-Muslim subjects.

## **Final Remarks**

In this thesis we have attempted to address the contemporary debates on the philosophical grounds of human rights from the perspective of comparative legal studies and conceptual history (*Begriffsgeschichte*), bringing the rich Islamic legal tradition into the conversation. In doing so, it has endeavored to move beyond the

reductionist stereotypes of legal Orientalism and the “narrative of conflict” by taking the Islamic legal tradition on its own terms, as consisting of its own legal language, legal epistemology, legal norms and legal anthropology. Scholars working in the fields of Islamic legal history and modern human rights lawyers have often been talking past each other. Modern human rights lawyers frequently do not (or cannot) engage the classical corpus of Islamic jurisprudence (*fiqh*) and legal philosophy (*uṣūl al-fiqh*), due to a lack of the hermeneutical tools needed to engage this tradition. A tradition which is mostly written in technical – sometimes impenetrable – medieval classical Arabic. Islamic legal historians, on the other hand, often lack the juridical training in modern law needed to address the modern human rights discourse. As such, current scholarship is lacking the required sustained interdisciplinary cross-pollination needed to be able to seriously and creatively engage the bodies of knowledge surrounding the philosophy of human rights on the one hand, and Islamic jurisprudence and legal philosophy on the other. This thesis cannot – of course – begin to claim to resolve such a vast intellectual challenge. Instead, its aim has been infinitely humbler, which is to point out some blind spots and shortcomings in current scholarship on Islam and human rights. And too – perhaps – to open some potential pathways and possible strategies to start reimagining such scholarship into the future. It is thus our hope that *Islamic human rights studies* will flourish as a continued interdisciplinary scholarly dialogue that is imbedded in the rich heritage of the Islamic intellectual tradition and can genuinely and constructively contribute to contemporary pursuits of human dignity and global justice.

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#### **I. Journal Articles**

Vlug, Jeroen, 'Global Islam, Human Rights and Cold War Rhetoric: A Recent Intellectual History of Islamic Rights Declarations' (in progress).

Vlug, Jeroen, 'Life, Liberty and Property: A Comparison of the Fundamental Rights Theories of John Locke and Abū Zayd al-Dabūsī' (in progress).

Vlug, Jeroen, 'Hikmet-i Hukûk or La Philosophie du Droit? Debates on Natural Law and Legal Reform among Late Ottoman Intellectuals' (in progress).

Vlug, Jeroen, 'Global History, Civilizational Analysis and the Concept of Confluence: Case Studies of Greco-Arabic Logic and Byzantine Iconoclasm', *International Journal of the Asian Philosophical Association* (forthcoming in 2023).

Vlug, Jeroen, 'The Islamic Pursuit of Human Dignity: Revisiting Fundamental Rights Theories in Islamic Law and Legal Theory', *Cross-cultural Human Rights Review* 2, no. 1 (2020): 23-48.

Vlug, Jeroen, 'Approaching the Study of Civilization: Norbert Elias's View', *International Journal of the Asian Philosophical Association* 11, no. 1 (2019): 179-194.

## II. Book Chapters

Vlug, Jeroen and Arnold Mol, 'Human Rights and Islamic Reform', in *Oxford Handbook on Islamic Reform*, eds. Emad Hamdeh and Natana DeLong-Bas (Oxford: Oxford University Press, forthcoming in 2023).

## III. Book Reviews

Vlug, Jeroen, review of *Islamic Law and International Law: Peaceful Resolution of Disputes*, by Emilia Justyna Powell, *Journal of Islamic Studies* (forthcoming in 2023).

Vlug, Jeroen, review of *Comparative Religious Law: Judaism, Christianity, Islam*, by Norman Doe, *The Maydan* (forthcoming in 2023).

Vlug, Jeroen, review of *Bid, vecht en heers: Regeren in overeenstemming met Allahs wet ter hervorming van de herder en de kudde*, by Machteld Allan, *Tijdschrift voor recht en religie* (forthcoming in 2023).

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Vlug, Jeroen, review of *The Idea of the Muslim World: A Global Intellectual History*, by Cemil Aydin, *Religious Studies Review* 46, no. 1 (2020): 104.



