THE INVIOLABILITY OF THE NON-MUSLIMS IN ISLAMIC LAW: A COMPARATIVE READING OF MODERN AND CLASSICAL DEBATES

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DOI: https://doi.org/10.22452/afkar.sp2020no1.4

Abstract

The question of the universality of the protection of rights has been an area of debate on different levels. This article will begin with a comparative reading of parallel debates on inclusion and universality in the scholarships of jurisprudence, Human Rights, and the Islamic legal tradition, represented by the classical positions of the major Sunni schools of law. By surveying examples of classical legal primary texts of Islamic law, the divergence on the inviolability of all human beings and the two different stands towards the legal protection of the non-Muslims is explored. Rationales will be classified for the inviolability of all human beings in Islamic law, a position represented by the Universalistic school. The article will arrive at the conclusion that the division within the Islamic legal tradition resonates with the other divergences. The inviolability of all human beings, a stand represented by major scholars of law, offers a Universalist lens for human rights that is well-situated within the Islamic tradition.

Keywords: Universalist; communalist, inviolability; human rights.

Khulasah

Persoalan berkenaan perlindungan hak asasi sejagat telah menjadi perdebatan di pelbagai peringkat. Makalah ini bermula dengan perbahasan perbandingan secara selari berkenaan kesejagatan

dalam kesarjanaan perundangan, hak asasi manusia dan tradisi hukum Islam seperti yang dibahaskan oleh mazhab fiqh Sunni klasik. Ia kemudiannya menjelaskan perbezaan pandangan berkenaan kedudukan setiap manusia dan dua pendirian berbeza berkenaan perlindungan perundangan terhadap non Muslim berdasarkan contoh hukum di dalam teks utama fiqh klasik. Makalah merumuskan bahawa perbezaan yang berlaku ini disebabkan kepelbagaian perbezaan yang lain. Pendirian para sarjana fiqh yang menjamin kedudukan setiap manusia telah menyediakan lensa sejagat berkenaan hak asasi manusia yang telah sedia diperakui dalam tradisi perundangan Islam.

Kata kunci: Universalis; komunalis; kedudukan; hak asasi manusia.

Introduction

The discourse by which some Islamist movements dealt with the question of the legal status of the adherents of other religious traditions has intensified the false popular view that Islam is a tradition of exclusion of the other. As a result of this discourse, many came to perceive the non-Muslim as a person whose life, wealth, or religious practices are violable in the viewpoint of Islam.

Further, as we repeatedly witness in our world today, some of these movements adopted militancy and violence against non-Muslim groups, building their extremism on what they wrongfully perceived as legal grounds in the Islamic tradition, and claiming that the affirmation and protection of the basic rights of human beings are restricted to Muslims or those who pay tribute to the Muslim authority, a claim which reflects elements of similar thought streams which are present in the debates around the rights of humans and their protection.

When discussing the protection of the rights of persons, one of the critical points is the question of universality and whether and how affirming and

protecting the basic rights of humans applies to different peoples. Scholars like Edward Said discussed the relationship between the question of the universality of what came to be known as human rights, and ideas such as Western colonialism.[1]

This stream of criticism for the Western-laid scholarship of human rights came from many different intellectual origins, three of which were introduced by the Canadian politician and academic Michael Ignatieff: the Marxist critique of the rights of man, the anthropological critique of the arrogance of late-nineteenth-century bourgeois imperialism, and the postmodernist critique of the universalizing pretentions of Enlightenment thought'.[2] As is clear from the identification of those currents, these examples show that divisions on the universality of human rights exist within the Western thought itself.

Yet Ignatieff identified 'resurgent Islam' as one of the main sources of the intellectual cultural attack on the Universalist position.[3] He viewed the Islamic political thought to be incompatible with the norms and freedoms that are articulated in the Universal Declaration of Human Rights[4]. This argument rises mainly from the premises that the set of human rights included in the Declaration reinforce norms of individualism and personal freedom and that they are not considered desirable by the Islamic thought.

In this essay, I will focus on the axiomatic human rights and demonstrate that there is legal evidence to support the conclusion that there are major streams in the Islamic legal tradition that maintain the universality of

[1] Edward Said, *Orientalism* (London: Penguin Books Ltd. 2003).
[2] Michael Ignatieff, "The Attack on Human Rights," *Foreign Affairs* 80, no.6 (2001), 104.
[3] *Ibid.*, 102.
[4] *Ibid.*, 103.

these rights and affirm their protection to the people of other religious beliefs.

In Islam, the divergence that exists in this arena is similar in nature to the universalist-relativist divergence in the scholarship of Human Rights. Each side of the debate on both levels differ on the matter of universality, whether or not the rights are applicable to each and every human, regardless of their religious belief and cultural background. In the context of human rights, the set in question is the set of rights agreed upon by an international assembly. In the context of Islamic legal thought, it is the set of the essential human rights which are derived from sacred texts that are considered the sources of Islamic law.

This essay will draw lines between the dichotomy of natural versus state-given human rights laws and the division of the Muslim legal scholars on the matter of human inviolability in the scholarship of Islamic law, *fiqh*. Scholars who represent all four major schools of law in Sunni Islam: Ḥanafī, Mālikī, Shāfi'ī, and Ḥanbalī scholars addressed the issue of the protection and inviolability of the live and property of people, yet they differed on the level of inclusiveness of this inviolability.

In the following pages, I will attempt to provide the theoretical discussions on the rights of non-Muslims and will demonstrate the difference of views that existed within the classical Islamic legal texts in that context. The aim is to expose the different opinions and the division that relate to the inviolability of non-Muslim communities and attempt to open discussions on the inclusion of non-Abrahamic religious groups which had been accepted in classical *fiqh* but are often commonly and sometimes intellectually thought to have been otherwise.

The Protection of the Rights of Humans: The Positivist - Naturalist Debate in Jurisprudence

The origins of the debate on the legal basis for the set of laws that affirm the basic human rights can be traced to a theoretical debate in the field of jurisprudence and the nature of law in general. Positivism, also known as empiricism, is a wide-spread philosophical method which seeks to understand fields of inquiry by empirical observation and verification, all the while being faithful to scientific methods for achieving this understanding.

Legal positivism is a school of thought in jurisprudence that derives principles from, and is similar in many ways to, philosophical positivism, as the name suggests. It is rightly described by legal scholars as the most influential school of thought in jurisprudence in our world[5]. This observation is especially true in Western-influenced legal systems, which includes most of the non-Western systems including Muslim majority countries[6].

A major intellectual characteristic of this school is that it defines law as what is in reality, dictated by the authorities, or as actually practiced by the courts. In other words, if the legal opinion is to be given according to the positivist school one must regard and understand the law as it is, as opposed to what the law ought to be. Law is seen according to this school as a 'social fact'[7], it is the human lawgiver that is placed at the centre of the legal system and it is the institutions of the society that the lawgiver creates, such as parliaments, courts and police forces, that practice and enforce that system.

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[5] Suri Ratnapala, *Jurisprudence* (Melbourne: Cambridge University Press, 2009), 21.

[6] Syed Sarfaraj Hamid, "Influence of Western Jurisprudence over Islamic Jurisprudence: A Comparative Study," *The Northern University Journal of Law* 4 (2013),16-18; Jean-Louis Halpérin, "The Concept of Law: A Western Transplant?" *Theoretical Inquiries in Law* 10, no. 2 (2009), 342-344.

[7] Ratnapala, *Jurisprudence*, 21.

Legal positivism places little or no regard to morality as a basis for dictating the law. Distinguishable from all other types of social norms and values, "law is law irrespective of its moral standing",[8] and the logical bases of the rules of law may as well be separated from those that moral or social rules of conduct could be based on. This school has gained momentum in modern times in many parts of the world.

As opposed to the positivist school, which believes that law has no necessary connection with morality, the natural law tradition holds that law and morality are inseparable. The naturalist school derives its name from the belief that such law exists independently of human will[9] and, as such, it is perceived as natural rather than institutionally or individually proposed by a human agent. This school regards law as a phenomenon that transcends the rulings and verdicts of the bodies and institutions of legislature in the society such as courts and parliaments.

In this paradigm, as proposed by the influential theologian Thomas Aquinas (d. 1274), the existent authority of different authoritative figures is limited, as the natural law transcends their authority. This school views law as a moral code that derives its legitimacy from being the medium to instate, and even the manifestation and embodiment of, moral values. This school assumes the existence of a higher law that is morally perfect and takes it as a benchmark to bring the human laws closer to in order to achieve morality and justice. Natural law in this sense relates to what ought or ought not to be done, deriving its considerations from moral values that transcend the human propositions for what should or should not be done.

According to this school, the governing law in any human society ought to embody moral rulings that may be

[8] *Ibid.*, 9.
[9] *Ibid.*, 119.

deemed by the positivist school as being 'laws improperly so called'. That is, the social norms and the religious teachings which place morality as a consideration above other social considerations are seen as what the 'law' ought to be, unlike the previously mentioned school, which holds no regard for morality in comparison to what the law is actually dictated by the lawgiver.

Another key concept in this side of the dichotomy is the concept of justice, itself being a highly regarded moral value and an aspiration that is almost readily assumed to be present in morally advanced human societies. Another important aspect of this school is that it bases its claims of the existence of natural rights for all human beings on life sustaining conditions that human existence, in its basic forms, depends on. This has led its philosophers to argue that humans are endowed with certain natural rights and liberties 'simply by virtue of being born'[10].

Despite differences in the starting point with this case, one may point that this argument has been held by grand schools in Islamic law, represented by prominent jurists and judges within the classical tradition of *fiqh*. This essay aims to present how this key idea links to the thought of some of the most influential schools in Islamic law.

The natural tradition, with moral law at its focus, is described in legal texts as the higher moral law. The use of the term 'high' in this context is not to indicate intellectual superiority of this school to the positivist school, but to indicate that the nature of this tradition is, in a way, connected to what human beings perceive as high values. Another aspect of the 'high' nature of this law lies within the perception that is evident in religious thought across various different religious doctrines and traditions in human history.

[10] *Ibid*., 121.

It is a general trait in religions to view morality as something that the deity wants and commands the adherents to uphold, and a manifestation of the human dignity that the law of religion seeks to protect. It is in this way that the moral law could be said to be given a 'high' and God-given status in religious thought. This is not only evident but is a central creed in the Judeo-Christian doctrines as seen in the writings of thinkers such as St. Augustine and Thomas Aquinas.

It also has a central place in the Islamic belief and jurisprudence, where one cannot fail to notice that the laws and codes that are applied in the society have a strong connection to morality. While the schools of Islamic law disagree on universality, as will be discussed later in the essay, their agreement on morality is evident and natural. All the major schools of law assume a connection between law and morality.

The *sharī'ah* is believed to be merciful, just and constructive in its entirety and without exception. It can be stated that the notion that the law in Islam is viewed as inseparable from morality assumes a natural stand since the source of the law is also the source of morality in the Islamic creed. God, the most benevolent and the manifestation of what is good and moral, is the creator of the law, and He calls upon humankind to adopt what is good, refrain from what is evil, and live their lives upon the rules of morality. The law is, according to Muslims, therefore, the way that morality can be achieved and protected.

In the literature of the natural law theory, one of the great questions that are imposed is this: how can the natural law be discovered?[11] This methodological question poses a problem and offers a solution at the same time; it clearly exposes the limit of human capability to arrive at universal, morally-perfect laws that could be regarded as

[11] Ratnapala, *Jurisprudence*, 122.

the ultimate benchmark towards which all other systems of law are ought to be pushed. Yet, the other side of this challenge is an opening for religious traditions to claim their superiority in this issue.

If natural law transcends the human agent's ability and is assumed to be of a 'higher' level, the religious narrative of a law decreed by the divine, who created the humans and gave them their intellect in the first place, is the most acceptable narrative according to the followers of those religious traditions. Religion adopts a degree within natural law that is undeniable and considerably effective, and it could be suggested that the jurists and legal thinkers of a religious tradition which acknowledges its connection with a divinely revealed scripture would find themselves considerably more aligned towards the naturalists' side of the debate.

From this assumption it follows that it is more the case that the Islamic jurisprudence and legal theory in Islam share with the naturalists their view of the law. Among all the schools in Islamic jurisprudence that have diverse opinions on many verdicts regarding issues, the general view is this: the law is, in its theoretical form, God's will, understood by the jurists. It is believed to be the decree of God (*ḥukm Allāh*) regarding all issues of the human life, brought out to the attention of the Muslim community by the *fuqahā'* (jurists/legal scholars).

Thus, it is clear that the human agent – whether in the individual sense or as legal institutions - does not assume the place of the 'lawgiver' as is the case in the positivist school, but rather as only the interpreter and as the subject of the law. The word *al-shāri'* literally translated as 'the lawgiver', is frequently used in *fiqh* to indicate God and the Prophet Muhammad, who are considered to be the lawgiver of the whole body of the Islamic law. Its proper understanding, proper implementation, or proper enforcement, however, is where the human institutions'

role comes into effect. There is undoubtedly a 'high' nature that is bestowed upon the law based on that belief.

The Universalist - Relativist Debate in Human Rights Disciplines

The second binary division – according to the framework of this essay – that relates to the Islamic cleavage regarding the status of the non-Muslims in the Islamic law is the debate between Universalists and the relativists in the field of Human Rights. The previously mentioned positivist – naturalist debate relates to the cleavage within Islamic law in a different fashion than this debate; the former is concerned with the intrinsic nature of the law while the latter highlights the cleavage itself through pointing to similarities in different attitudes adopted towards the question of the universality of human rights and the inviolability of human beings.[12]

[12] For the purposes of the International Relations discipline, as Jack Donnelly affirms (2011), the term 'human rights' tends to roughly mean the set of rights which have been elaborated by the principal international treaties of human rights: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights (1966), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Convention on the Rights of Persons with Disabilities (2006), International Convention for the Protection of All Persons from Enforced Disappearance (2006). The literature on 'human rights' in this framework is focused on these constitutionalized set of efforts that are all relatively modern in time. This is not to deny in any way that literature on the rights of human beings had existed in ancient history and the eras that followed before those declarations came into being, but it appears to be the case that the term has been accepted to be pointing out to these constitutional international efforts, especially at the levels of political scholarship and academia.

As the name suggests, Universalists believe that human rights are universal, essentially applicable to every individual regardless of any racial, religious, or other considerations. Their position stresses the foundational principle that one is entitled to a certain set of human rights by virtue of being born human. The 1948 Universal Declaration of Human Rights and the subsequent covenants[13] are seen according to this position as key documents that ought to apply to all humans without any national or cultural hindrance. In other words, the subject of the law in this case is the whole body of humanity which is wider than, and transcendent to, smaller entities such as local governments or nation-states, whose say in this matter should be of little or no value, especially when it comes to rights that are deemed basic for the sustenance and continuity of human life.

The other side of the debate, the relativist position, sees the matter of the rights and protection of humans relative to each particular cultural or national atmosphere. The advocates of this view stress the cultural considerations as a counterpart for universality and are referred to as particularists or cultural relativists for this reason. The ground on which this position stands may be preceded by the argument that the set of human rights that have been declared in the Universal Declaration are based on the system of rights acknowledged by the Western civilization and does not necessarily apply to other civilizations, this, however, stems from a deeper ground in which the definition of morality comes into play, linking this debate to the previously mentioned one.

Cultural relativism holds that culture is what validates a moral right or rule. This can be, according to

[13] Jack Donnelly, "Human Rights," in *The Globalization of World Politics*, ed. Baylis, J. Smith, S. and Owens, P. (New York: Oxford University Press, 2011), 496-497.

Donnelly[14], varied in intensity over a continuum that spreads between the two extremes: radical universalism and radical cultural relativism. According to this classification, different levels of cultural relativism can view the role of culture as varying between being the sole, principal or possibly an important source of validity for a moral right or rule[15].

Aside from the issue of validation of moral values, issues like individualism, which is deemed by many as a characteristic of Western societies, pose a point of divergence according to relativists. This is true as they question the possibility of the declared set of universal human rights being applicable to other societies that are not historically characterized by a culture of promoting liberal individualism as such, and, hence, those human rights cannot be labelled as 'universal'.

On another note, more radical streams of this side of the debate often view such declarations of human rights as a display of the Western powers' tendencies to propagate their influence and hegemony over other non-Western cultures and societies through the medium of advertising the protection of human dignity and freedom. Such declarations and covenants that back the universality of human rights are also seen by the relativists who are closer to the radical side of Donnelly's continuum as a way of meddling in the sovereignty of the nation-states using the notion of universal morality as a trojan horse. States which, as said above, could very much have different views to what consists a human right or not when it comes to their own citizens or members.

[14] Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6, no. 4 (1984), 401.
[15] *Ibid*., 401-402.

Which Groups are Entitled to Inviolability Under the Islamic Law?

The Universalistic – Communalistic Divide

A commonly shared belief among the Muslim jurists and scholars of Islamic law is that Islamic jurisprudence – both in theory and application - generally aims to preserve five necessary fundamentals of the human existence[16]. These fundamentals are part of what is known as *maqāṣid al-sharī'ah*, which can literally be translated into the 'intents' or the 'purposes' of Islamic law. They are also referred to as *al-uṣūl* (the fundamentals) or *al-ḍarūriyyāt al-khamsah* (the five necessities).

These fundamentals, as is generally evident through the Islamic classical *fiqh* scholarship, are viewed as the basic rights which are necessary for the sustainability and progression of the human life and which the Islamic law sees as impermissible to breach and necessary to maintain in order for the human life to progress and thrive. These *ḍarūriyyāt* are the life/soul (*al-nafs* – at times referred to as blood (*al-dam*)), the religion (*al-dīn*), the property (*al-māl*), the mind/intellect (*al-'aql*), and the procreation/family (*al-nasl*). Scholars and jurists instate that the entirety of the legal verdicts and opinions that belong to the scholarship of *fiqh* can, in a way, be traced back to at least one of these fundamentals as a basis and rationale, hence they are called *maqāṣid*.[17]

Undoubtedly, many more sub-categories of legal rights and inviolable necessities can be placed under those main fundamentals. In his comprehensive work *Human Rights in Islamic Law*, Ibrahim al-Marzouqi presents[18] a

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[16] Muḥammad Muṣṭafā al-Zuhailī, *al-Wajīz fī Uṣūl al-Fiqh al-Islāmī* (Damascus: Dar al-Khayr, 2006), 1: 113.

[17] Abū Ḥāmid Muḥammad al-Ghazālī, *al-Mustaṣfā* (Beirut: Dār al-Kutub al-'Ilmiyah, 1993), 287.

[18] Ibrahim Abdulla Marzouqi, *Human Rights in Islamic Law* (Abu Dhabi, 2000), 142-153.

classification of the 'Fundamental Human Rights' in the Islamic jurisprudence in three levels. Surely, this classification has its roots in previous works of scholars from different formative and classical periods. Still, Marzouqi's classification offers a comprehensive and adaptive framework to study the levels of *maqāṣid al-sharī'ah*.

The first level is the five fundamentals which were mentioned before, with extensive detail pertaining to each necessity. The second level is the category of 'the fundamental needs' (*al-ḥawā'ij al-aṣliyyah*), which stem from the five necessities and are considered vital for achieving those necessities. They are seen as rights by which a person's life can be deemed agreeable and meaningful and not merely liveable or sustainable in terms of existence. This category includes the rights for foraging and obtaining food and shelter, which are based in the *ḥadīth* that, "all Muslims are partners in three: in water, herbage and fire"[19].

The author sees that, in the Islamic law, this *ḥadīth* applies to all the people as well and not exclusively the Muslims[20], as guaranteeing access to food and shelter is a necessity for the preservation of life, which is a conclusion that applies to all human beings. The third level of rights that al-Marzouqi presents is what is called The Right to Common Benefit and Luxury (*al-taḥsīnāt*). These are the set of rights that are not essential for the sustainability of the human existence but are advantages aimed to develop the life experience to a level that is higher than that of a basic life based on necessities alone, an aspiration which – he states - almost every person tries to achieve.

These include the rights to better food, dress, education, and other elements that the jurists have shown

[19] Abū Dāwūd, *Sunan Abī Dāwūd* (Beirut and Saida: al-Maktabah al-'Aṣriyyah, n.d.), 3: 278.

[20] Marzouqi, *Human Rights in Islamic Law*, 146.

to be supportive of a decent quality of life. Verses in the Qur'ān that direct the believers to enjoy the blessings of life (foods, clothes, and accessories) are seen as the bases upon which the justification for instating this level of rights rests.

The rights that are the subject of the inter-Islamic divide are the necessary rights. It is a matter of unanimous agreement among the jurists that the preservation of all the five necessary fundamentals applies to all Muslims in the normal circumstances. That is, these necessities are preserved for any Muslim unless they commit a crime that is punishable by Islamic law and, therefore, be caused to lose their inviolability of one or more of these fundamentals. A Muslim who commits intentional homicide, for example, can be sentenced to death and, hence, their own inviolability of life is exceptionally nullified based on their violation of another person's life. The inviolability of these five fundamentals stands as the typically 'natural state of things' for a Muslim, and the whole legal – and not solely the penal - system is looked upon to uphold these fundamentals and is seen to be designed to maintain them for the preservation of the human life[21].

On the other hand, scholars of Islamic law adopted different positions on the application of these fundamentals to non-Muslims. Questions arose whether or not the 'natural state of things' for non-Muslims is the protection and inviolability of these necessities, whether there is a difference between those among non-Muslims who reside within the abode of Islam and those who live in territories ruled by other than the Muslims, and whether some sort of approval in the form of a given covenant or arrangement should be made to affirm or legalize their inviolability in the eyes of the Muslims. Other questions could be proposed for research and investigation as well.

[21] Al-Ghazali, *al-Mustaṣfā*, 286.

Questions that, despite being discussed in classical and formation periods of Islamic law, still matter to this day in arenas like religious freedoms, rights, and diversity management in different communities.

The Universalistic School

Recep Şentürk explores this division on the inviolability, the *'iṣmah*, of non-Muslims in classical Islamic jurisprudence.[22] He demonstrates that there have been two divided positions on this matter.[23] The first position is represented by what he calls the Universalistic school, led by the Ḥanafī scholars, but also including scholars who belonged to other schools, such as the Mālikī school. This school represents the position that inviolability is attainable by virtue of humanity, *ādamiyyah*.

The other position is represented by what he calls the Communalistic school, led by the Shāfi'ī scholars, whose point of view was that inviolability can only be attained by virtue of Islamic faith, *īmān*, or by virtue of a covenant of security with the Muslims, *amān*, a term which is literally translated as: 'security'. The formation of the universalistic position, as he shows, begins with Abū Ḥanīfah, the founder of the Ḥanafī school of *fiqh*, himself. This inclusive legacy continues down through the works of notable Ḥanafī scholars, jurists, and theologians.

Şentürk links this school with the theory of law by stating that in this Universalistic school, the subject of human rights law is humanity.[24] All humans are covered by the inviolability of the basic fundamental, necessary rights according to this school, and this naturally includes people from all religious affiliations; Muslims, adherents

[22] Recep Şentürk, "Sociology of Rights: Inviolability of the Other in Islam between Universalism and Communalism," in *Contemporary Islam*, ed. Abdul Aziz Said, Mohammed Abu-Nimer, and Meena Sharify-Funk (New York: Routledge, 2006), 24-49.
[23] *Ibid*., 34.
[24] *Ibid*., 35.

of Abrahamic religions, adherents of non-Abrahamic religions, and even the people with no religious affiliation at all. Basic rights such as the inviolability of human life, property, religious belief, and other necessities are axiomatic, natural, and justifiable only by belonging to the circle of humanity.

A prominent example of a Muslim scholar whose ideas belongs to and support this school was Abū Bakr Muḥammad Ibn Aḥmad al-Sarakhsī (d.1090). He was a jurist and a scholar of *fiqh* and jurisprudence who belonged to the Ḥanafī school and whose contributions to the field were so enormous that he became traditionally known as *Shams al-A'immah* (the sun of the imams). In his *Uṣūl*, one of the most cited books in Islamic legal theory and jurisprudence, Sarakhṣī defends the fundamental belief that inviolability for the children of Adam is the natural, original case (*al-'iṣmah li al-ādamī aṣl*).[25]

This is the case *de facto* unless a valid cause leads it to cease to be active. He likens the state of inviolability for humans to the state of health, which is the natural case unless sickness occurs, or the state of life, which precedes as the natural state until death occurs. This clearly shows that the state of inviolability is the original state of all human beings, unless other circumstances determine the suspension of this inviolability, such as a case of waging war against the Muslims (*al-ḥirābah*).[26]

Sarakhṣī addresses the issue of the legal personhood of human beings, without specifying a necessity for a certain religious affiliation or cultural heritage for them to adhere or belong to their personhood to be recognized. He affirms that the legal personhood, which allows human

[25] Abū Bakr Muḥammad Ibn Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī* (Beirut: Dār al-Ma'rifah, 2004), 2: 344.

[26] Kamāl al-Dīn Ibn al-Humam, *Fatḥ al-Qadīr* (Beirut: Dār al-Fikr, n.d), 10: 204.

beings to receive their rights and be requested to perform the rights upon them, is linked to rationality.

Following that he states that, in order for the humans to be capable of performing those rights, God has affirmed their inviolability (*al-'iṣmah*), freedom (*al-ḥurriyyah*), and property (*al-mālikiyyah*), which are guaranteed to humans from the moment, they are born, and which stay with them regardless of their sanity or age[27]. These affirmations are necessary for the humans to exist and thrive so that they could fulfil the purpose that is to be able to successfully perform the duties that are placed upon them, which it is assumable that they include the rights of God and the rights of other human beings. The three previous pillars that Sarakhṣī mentioned (inviolability, freedom, and property) are attained by birth, and by virtue of being human. Therefore, it is safe to argue that Sarakhṣī's ideas are well situated within the assertion that basic human rights are axiomatic, natural, and God-given.

In his analysis of the thought of Burhān al-Dīn al-Marghīnānī (d. 1197), Şentürk points out the types of inviolability that are mentioned in Marghīnānī's work[28]. Marghīnānī is one of the most prominent Ḥanafī scholars and is the author of *al-Hidāyah*, which is 'the most frequently used and referenced canonical textbook of the Ḥanafī School of law'[29] and has numerous commentaries by many other scholars and jurists. Marghīnānī points out the distinction between two types of inviolability: the one the violation of which causes sin (*al-'iṣmah al-mu'aththimah*), and the one the violation of which calls for penalty (*al-'iṣmah al-muqawwimah*).

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[27] Sarakhṣi, *Uṣūl al-Sarakhṣī*, 2: 334.

[28] Recep Şentürk, "Human Rights in Islamic Jurisprudence: Why Should All Human Beings be Inviolable?" in *The Future of Religious Freedom: Global Challenges*, ed. Allen D. Hertzke (Oxford: Oxford University Press, 2013), 300.

[29] *Ibid.*, 299.

It is noticeable that this distinction is grounded on what the violation of the *'iṣmah* would, or should, result in. The *'iṣmah al-mu'aththimah* is the type of inviolability that cannot be punished by law due to reasons pertaining to their nature or due to the impossibility of enforcing the punishment required by the law in territories that are not governed by Muslims. Violations such as backbiting or speaking ill of a human are almost always difficult to prove and punish by a measured procedure. Yet the humans still have this inviolability and, therefore, even if the law cannot enforce a legal measure, the violator will be responsible for their violation in front of God in the form of a sin.

The same applies to violations such as killing and stealing outside the territories where Islamic jurisdiction applies. Both are violations of the *'iṣmah* of life and of property and are punishable by God as major sins. The second type of inviolability, *al-muqawwimah*, is one that can be both implemented – as it occurs in the territories which the Islamic jurisdiction can be implemented in – and has a measured penalty for the damage that was caused.

Marghīnānī states that the inviolability which causes sin is a right for all humankind (*al-'iṣmah al-mu'aththima bi al-ādamiyyah*)[30]. The reason he provides for that is that the children of Adam have all been created with the responsibility to fulfill the obligations which God commanded them to fulfill, which can be done only if their life and property are in the circle of prohibition for others, a protection that is known among the jurists as '*ḥurmat al-ta'arruḍ*'. While this type of inviolability applies to all humans, Marghīnānī states that the other kind, *al-'iṣmah al-muqawwimah*, does only apply within

[30] Burhān al-Dīn al-Marghīnānī, *al-Hidāyah fī Sharḥ Bidāyah al-Mubtadī'* (4 vols.) (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1970), 2: 398.

the abode of Islam, because that is where the laws of Islam can be enforced and implemented.

Hence, while the legal ground base by which a non-Muslim attains their *mu'aththimah* (inviolability) rests on their humanity, the legal basis by which a non-Muslim attains their *muqawwimah* (inviolability) rests on their presence in the abode of Islam, which the jurists refer to using the phrase *al-iḥrāz bi al-dār*. Moreover, because property can generally be measured and countable, it can be amounted to a certain amount if violated, and it therefore is the main element in the *muqawwimah*, and the inviolability of life follows in this matter. However, because life is not measurable and, however punished, the violator will not be able to compensate for it, it is the main inviolability in the *mu'aththimah* type, and in that regard, it is the inviolability of property that follows.

According to Ibn Humam's (d. 1457) *Fatḥ al-Qadīr*, his respected commentary on Marghīnānī's *al-Hidāyah*, the highest form of inviolability is an inviolability that is both *muqawwimah* and *mu'aththimah*[31]. This is a status of protection that calls for both penalty and sin if being violated. This is the inviolability that the Muslims and the non-Muslims who reside inside the abode of Islam equally have the right to. As was previously mentioned, the idea that all humans in the world are inviolable as in the *mu'aththimah* inviolability does not deny those who live in the abode of Islam from attaining the other kind of inviolability as well.

For this school, it is either Islam or *al-iḥrāz bi al-dār* that guarantees both kinds of inviolability. Ibn Humam, adhering to the position of his school of *fiqh*, saw that the original case for people is that they naturally enjoy the *mu'aththimah* unless a specific reason causes its suspension, or transformation into a higher degree of inviolability. That is because, he confirms, *'iṣmah*

[31] Ibn al-Humam, *Fatḥ al-Qadīr*, 6: 28.

mu'aththimah is originally guaranteed by *ādamiyyah*, and not by being a Muslim. 'Perfecting' the *'iṣmah*, however, is what requires something other than merely being a human[32].

Rationales for the Universalist Position

Of course, no argument in Islamic law can be considered legitimate unless it justifies itself through the sources of *sharī'ah*, at the forefront of which is the Qur'an and the Sunnah – the prophetic tradition and collections. In addition to that, propositions of Islamic legal opinions have usually been formulated and presented in the context of logical and intellectual arguments by the jurists and scholars.

By surveying classical sources of law adhering to the universalistic school, this essay suggests that the justification for considering humanity as the basis of inviolability can be put in two main approaches. The first approach has theological and spiritual connotations and the justification lies within notions of human dignity. The second approach has legal and missionary connotations and the justification lies within the notions of *da'wah*, the missionary call of non-Muslims to accept Islam.

The first approach stems from the Muslim belief that all human beings, or 'the children of Adam' as often referred to in the Qur'an, the *ḥadīth* collections, and other textual sources in Islam, are creatures that are endowed with dignity and that the source of this dignity is their Creator. The Qur'an clearly states that God has honoured the children of Adam, endowed them with many blessings, sustained them, and favoured them over most of the creation[33].

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[32] *Ibid*., 6: 29.

[33] *The Holy Qur'an: Text, Translation and Commentary by Abdullah Yusuf Ali* (New York: Hafner Publishing Company, 1946), 17: 70.

In Islamic terms, the term *karāmah* is used by the scholars to denote this dignifying aspect that all human beings are bestowed with. This *karāmah* is both divine – in the sense that it originates from God's creation of humans, and shared between all human beings, because it originates from the sole basis of being human. The theological connotations in this regard include, aside from the honoured creation of the human race by God, the belief that the human race has a mission on earth as decreed by God: to fulfil the position of *khalīfah* - succession and viceregency on earth[34].

As this viceregency was given to Adam and his descendants according to the Islamic belief, it becomes natural to assume that all the human beings' lives should be naturally inviolable in order to respect this God-given dignity and not disrupt the God-commissioned viceregency. In other words, the human beings' *karāmah* and *khalīfah* require and mandate their inviolability. This notion is commonly taken by the scholars of law to strengthen the argument of the universalistic school.

Spiritual connotations support and assist the theological connotations of the first approach. As is seen from the concept of human *karāmah*, God favoured human race and bestowed qualities upon it that reflect His own Greatness and Grace. Seeing this divine reflection in every human is a trait that the Muslim Sufis repeatedly encouraged and spoke of. It is noticed historically that a Muslim presence in a given geographical and political system is generally more prone to be accepting of the other if the predominant nature of that said Muslim presence is one of Sufism and spirituality.

In such cases, the spiritual connotations of the human support the inclusion of non-Muslims in the circle of inviolability. As for non-Abrahamic communities, the historical examples in Islamic rule of different territories

[34] Al-Sarakhsī, *Uṣūl al-Sarakhsī*, 333.

demonstrate that, not only according to the Sufis or scholars, but also according to the general populations, the acceptance and inclusion of non-Abrahamic communities – namely communities other than Jews or Christians - was more easily facilitated in environments which could be described as spiritual in nature.

The Muslim presence in the Indian subcontinent is a major example of the correlation between the Sufi nature and affirming the inviolability of the non-Muslim, non-Abrahamic communities. In the subcontinent, the Hindu and Buddhist populations were famously affirmed their inviolability of life, property and religious practices under the Muslim rule which spanned from the 8th till the 18th centuries in different parts of the continent. What is remarkable is that, apart from the fact that the Ḥanafī school was, for the most part the predominant school of law on the governing and public levels, the nature of the Muslim presence in the subcontinent was spiritual. As Annemarie Schimmel introduces *Islam in India and Pakistan*, it was not the jurists and theologians who played the biggest part in the spread of Islam in the subcontinent, it was the Sufi saints and spiritual masters.[35]

The second approach to justify the inclusion of all human beings into being inviolable is grounded on the obligation to carry out *da'wah*, the missionary work of the Muslims which is an important practical aspect of the Islamic faith. This approach has – as mentioned before – legal connotations pertaining to the inherent Islamic duty of conveying the message of Islam and spreading its teachings. *Da'wah* is a fundamental concept in Islam and is considered by most scholars to be a duty that has to be carried out by at least some groups in the Muslim community. One practical application of this concept is what is referred to in Islamic sources as *al-amr bi al-*

[35] Annemarie Schimmel, *Islam in India and Pakistan* (Leiden: E.J. Brill, 1982), 1.

ma'rūf wa al-nahy 'an al-munkar, (advocating what is good and advising against what is evil), which is applicable to both Muslims and non-Muslims.

Another application of the *da'wah* - which is of particular interest in this area - is the calling for the non-Muslims to learning and accepting the message of Islam. The classical jurists belonging to the universalistic school found evidence for their position on the grounds that spreading the message of Islam and performing one's duties towards God can only be possible when the natural state of human life is inviolability[36].

The rationale of this approach arises from the belief that God has commissioned human beings with adhering to what is good and refraining from what is evil. This commissioning (*taklīf*) cannot be fulfilled if the life of the person is not at least protected from violation. Since it is the duty of Muslims to do their best to ensure the message of Islam is conveyed to the other, this duty has to be ensured and held doable by the availability of the subject humans and the guarantee that their lives are protected in the eye of the Islamic law. According to this school, viewing the other as a potential adherent to the truth of Islam and as a violable being at the same time constitutes an obvious contradiction.

Theoretically, this call becomes even more compelling to perform if the subject humans were even further away from the circle of Islam and belonged to the non-Abrahamic religious groups. Also, the trust of viceregency which God has entrusted to humanity cannot be fulfilled if the protection of life and wealth is not guaranteed. Therefore, the inviolability of a person is seen as a prerequisite for both conveying the message of Islam to that person, and for the person to be able to carry the

[36] Şentürk, "Human Rights in Islamic Jurisprudence," 296.

trust of Islam and fulfil their duties towards God, as indicated by the Ḥanafī and other scholars.[37]

This position sees that if the lives of the other are not inviolable, then the *da'wah* cannot be carried out the way it should be. The *da'wah* will not actualize if the safety, wealth, or the lives itself of the subject human to which the missionary work is directed are prone to be terminated. A vital requirement of the missionary work of Islam towards the other is free will. Surely, it is inherent in the very literal concept of *da'wah* that it is a calling to embrace the teachings of Islam, and not a compulsion to adhere to or believe in them. In the absence of free will the adherents of other religions will be either forced to join a religion they did not willingly choose, or have their lives violated, none of which is acceptable, be they Abrahamic or non-Abrahamic religious faiths. This leads to the assumption that the mind and the choices made by it, including the choice of religious affiliation, must also be inviolable for all human beings regardless of their religious orientation[38].

Since this school does not differentiate between humans on the basis of religious affiliation with regards to inviolability, we can assume that, in matters of the inviolability of the five axiomatic rights, there is no distinction between Abrahamic and non-Abrahamic communities. Both communities are within the circle of *ādamiyyah* and it follows that inviolability is the natural case for them. The description 'universal' for this school notes this meaning. Subsequently, we can assume that the literature of this school which deals with the rights and status of non-Muslims can be extended to include the adherents of non-Abrahamic religions.

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[37] Marghīnānī, *al-Hidāyah fī Sharḥ Bidāyah al-Mubtadī'*; al-Sarakhsī, *Uṣūl al-Sarakhsī*, 333.

[38] Şentürk, "Sociology of Rights," 37.

The Communalistic School

The other school is what Şentürk calls the Communalistic school, which is the school that is led by mainly the Shāfi'ī scholars as well as scholars from other schools of Islamic law. In this essay I argue that this school is analogous to the previously mentioned particularist position in the division on Human Rights and – in matters of universality - is aligned with the positivist school of jurisprudence.

The communalists believe that the matter of inviolability is primarily a matter of 'citizenry'. Unlike the Universalistic school that affirms inviolability by virtue of humanity, inviolability is granted, according to the law as viewed by this school, by virtue of belief (in Islam), or by a covenant of security with the Muslims (*al-'iṣmah bi al-īmān aw bi al-amān*)[39]. Humans must gain the right to inviolability and be granted this right by the law of the Muslim state, contrary to being entitled to the right of inviolability by birth.

According to this understanding, inviolability is not the natural status of humans but has to be 'earned' with virtues other than simply being human. The most prominent qualifier is the virtue of being Muslim. Abu al-Ma'ālī al-Juwaynī (d. 1085), a prominent Shāfi'ī jurist and theologian, and known as the Imam of the two holy cities, – meaning Makkah and Medina, states this accepted view among the Shāfi'ī scholars[40]. The position that belonging in the circle of Islam (in particular as a belief system) is the natural qualifier of inviolability has led Shāfi'ī scholars such as the prominent jurist 'Abd al-Karīm al-Rafi'ī al-Qazwīnī (d. 1226) to include in their works the

[39] Şentürk, "Sociology of Rights," 39.

[40] 'Abd al-Mālik Ibn 'Abd 'Allāh Juwaynī, *Nihāyah al-Maṭlab fī Dirāyah al-Madhhab* (Jeddah: Dār al-Minhaj, 2007), 12: 248.

statement that the inviolability of life and property is by virtue of Islam (*'iṣmah al-dam wa al-māl bi al-Islām*).[41]

According to this side of the division, it is when a person accepts Islam that they are given the full extent of inviolability, which is comparable to be given both the *'iṣmah mu'aththimah* and the *'iṣmah muqawwimah* in the sense of the Universalistic position. The same is given by law to the non-Muslims who reside in the abode of Islam by a covenant of *dhimmah*, which is a contract by which a non-Muslim can attain the rights of abode and protection, as well as other rights, in the territories that are governed by the Muslims.

A *dhimmī*, a person included under the *dhimmah* covenant, is given inviolability, according to the Communalists, by virtue of their presence in the abode of Islam while declaring their submission to the Islamic law and rule. In this case, Islam cautions from violating their rights. The violation of said rights is an offense that is punishable by the law, making the inviolability of the *dhimmīs* – who could in a sense be referred to as citizens in comparison to today's nation-state setting – one that entails both types of *'iṣmah*. A non-Muslim who does not reside in the abode of Islam has neither *muqawwimah* nor *mu'aththimah* inviolability according to this approach.

In his magnum opus, *al-Mabsūṭ*, Sarakhsī addresses the issue of fighting non-Muslims in the case of military action[42]. He states the obligation of calling the warring opponent to Islam before resorting to military action and argues that, if the Muslims executed the attack before doing so, no compensation is mandatory upon the Muslims for any caused damage, with the confirmation that this remains a big sin upon the Muslim army.

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[41] Abū al-Karīm al-Rafī'ī al-Qazwīnī, *al-'Azīz Sharḥ al-Wajīz* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), 11: 122.

[42] Abū Bakr Muḥammad Ibn Aḥmad al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Ma'rifah, 1993), 10: 30.

He includes the view of Shāfi'ī on this matter, which is that Muslims should compensate for the damages caused because, in that same case, the inviolability of the opposing side is nullified by their refusal of the call of Islam. The permission to fight them only becomes evident after their rejection. As mentioned before, the *'iṣmah* that these opponents have, according to the Universalistic perspective, is the *mu'aththimah*, which is the *de facto* state of the opponents and all other humans. This means that no compensation can be enforced by the state upon the Muslim army if they attacked the opponents in that way.

The line of disagreement in this point reveals an interesting observation in the Communalistic school's view of the status of the adherents of other religions. According to the school that Shāfi'ī represents, *'iṣmah* is nullified by apostasy/disbelief, while according to the Universalistic approach, it is nullified by *muḥārabah* (warring, antagonism, and militancy).[43] However, in the view of Shāfi'ī himself, the founder of the Shāfi'ī school of Islamic law, the absence of the element of Islam in the opponent does not automatically represent a permission for the Muslims to engage in war with them or violate their lives. The absence of *'iṣmah* in their case does not mean that fighting them before they openly reject Islam is permissible. As Sarakhṣī states[44]:

> Shāfi'ī – may Allah bestow His mercy upon him – said that they [the army] should compensate [the damage] because the inviolability and abstinence from blood remains until refusal is shown from the enemy's part, and this does not actualize until the call to Islam reaches them. But we say: the *muqawwimah* inviolability is attained by

[43] Al-Sarakhṣī, *al-Mabsūṭ*.
[44] *Ibid*., 10: 30-31 [own translation].

> *'iḥrāz*, and that does not apply to them [the military opponents (because they do not reside in the abode of Islam)]. If inviolability was due to religion, as the other party claims, then this, also, does not exist in the enemy's case. Fighting is either due to antagonism, as our scholars argue, or to apostasy, as the opponent argues, which exists in their case, but is restricted by the condition of permissibility, which is offering *da'wah* to them.

This point opens a critical question about the legally correct conduct of the Muslims during their interaction with other non-Muslims who, according to this approach, are not unconditionally inviolable. On a practical level, a quick conclusion might be that, since the 'other' is not unconditionally inviolable, then the natural state that the Islamic law dictates would be a state of enmity and violent interaction between them and the Muslims. This is a perception that is evidently and commonly held by the Muslims today in many parts of the Muslim world. Yet, analysing the aforementioned position of Shāfi'ī reveals a view that is altogether different from that commonly held perception. Namely that the absence of an unconditional inviolability that is attainable by birth does not necessarily mean the complete absence of any form of protection for the lives of the non-Muslims in the natural state.

The position of Shāfi'ī discernibly distinguishes between the existence of inviolability of human beings in general, and the permission to engage in fighting against them. This leads to the conclusion that, although the *de facto* status for non-Muslims is not inviolability according to this position, it still does not mean violability. The absence of *'iṣmah* does not suggest that a Muslim armed force has an unconditional permission to engage in military action even against an opposing army of non-Muslims of any Abrahamic or non-Abrahamic affiliation.

There remains a restriction to breach the inviolability of life of the other side until they are properly offered *da'wah*, and then reject it. Only in said case does fighting become permissible. An example in this regard, and one which is commonly cited by the school's jurists, is the case of the women and children of the non-Muslims, who are typically not fighting forces and, therefore, should not be violated by the Muslim army as a general rule. This, however, does not mean that they enjoy inviolability according to the Communalistic school as they do according to the Universalistic school, but rather an impermissibility to be violated.

The missionary call for Islam, *da'wah*, is also present in the debates related to the rulings of the Communalistic school. We find many referrals and usage of this concept in the course of discussing the inviolability of the person or the conditions under which the inviolability is affirmed. For instance, the previously mentioned distinction in the point of view of Shāfi'ī does not mean that the position of this school is identical with the *mu'aththimah* type of inviolability within the position of the Universalists. The Muslim army – as Shāfi'ī states – is not allowed to violate neither the lives nor property of the non-Muslims residing outside the abode of Islam, but this verdict applies as long as they have not been offered the *da'wah*.

Therefore, there are two cases that apply to the non-Muslims who reside outside the abode of Islam according to the Communalists,[45] if the call to Islam has somehow reached a non-Muslim community then their lives and property are not considered inviolable. If the call has not reached them then it is not permissible to violate their lives or take their property until *da'wah* is offered to them. In the case of acceptance of the call to Islam by the

[45] Muḥammad Ibn Idrīs al-Shāfi'ī, *Al-'Umm* (Beirut: Dār al-Ma'rifah, 1990), 1: 301.

opposing party, the inviolability is confirmed as permanent, as they become Muslims or, in the case of Abrahamic communities, residents under the Islamic rule.

However, on the assumption that the *da'wah* is rejected, then what can be called their 'temporary inviolability' is terminated, and a permissibility of fighting takes place replacing this status. This point can lead us to suggest that, according to this school, in addition to inviolability being attained by virtue of faith or by a covenant of *amān*, another kind of inviolability of the life and property applies in the case of non-Muslims who have not been called to Islam. This inviolability is, however, conditional and temporal; it is conditional upon the reach of the *da'wah* to the non-Muslim community, and it is only maintained as long as it takes for the *da'wah* to be offered to that community in the case of war.

Conclusion

Apart from the resemblance that the communalists' position exhibit with the Universalists, the two positions are – in essence - plainly different. The universalistic approach guarantees inviolability to non-Muslim communities by virtue of humanity alone as the natural state, and only suspends it in the case of hostility and militaristic action against the Muslims. The communalistic position – mainly consisting of Shāfi'ī school jurists - can indeed be described as the less inclusive position among the two within this debate, as it does not believe in the extension of inviolability to all humankind as a natural, *de facto* state, which makes its point of view more comparable to that of the relativists' point of view when it comes to the universality of human rights.

Yet, at the same time, this does not mean that by adhering to this position this school encourage the Muslims to perceive the lives and property of non-Muslims as free and available to be violated in any way. In fact, it does not only encourage, but also clearly

obligates the propagation and proper deliverance of *da'wah* before resorting to that action against any community. Again, the vitality of the missionary work in Islam is manifested within both approaches, at times regarding it as a critical condition that determines the permissibility to engage in military action or to confirm inviolability.

Looking at the discussions of the universality of the inviolability of the humans between the major schools of Islamic law, we find that there is no point of difference between the two previously discussed positions on the questions of the lawgiver and morality, two of the central divergence points between the legal positivists and the naturalists.

All schools of Islamic law regard God as the principal lawgiver, and it is commonly understood that the use of the word *shāri'* in the textbooks of *fiqh* denotes God and the Prophet. Both discussed positions, as is apparent from the grounds of their arguments and their view on *da'wah*, regard morality as an essential consideration for the entire body of the law. The divergence is more lined, however, with the universalist – relativist dichotomy in human rights, and is particularly concerned with the universality of the inviolability of human beings.

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