Human Rights: Meaning and Concept
(A Comparative Study of Shariah and Law)

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The term human right has gained much importance in our age. It has become common currency to the extent that, everyone speaks about it. However, in spite of its importance and common use, it is a fact that it is rarely known what the term stands for. Jurists and legal experts have used it in a different sense compared to the lay public. It has been rightly stated by Roscoe Pound that ‘there is no more ambiguous word in legal and juristic literature than the word right’. (1)

Right means justice, ethical correctness, or consonance with the rules of law or the principles of morals. It is the opposite of wrong, unjust and illegal. It can also be defined as a power, privilege or immunity guaranteed under a Constitution, statute, decisional law or claimed as a result of long usage. (2)

Eugene Kamenka perceives the term as ‘Rights are claims that have achieved a special kind of endorsement or success, by a legal system, widespread sentiment or an international order’. (3) The definition of right expressed by Salmond has been recognized by Pakistani courts in various decisions as in a case of Capt. Naqibullah vs. Chairman State Engineering Corporation. (4)

Privilege and remedy are forms of right. It can be either moral or legal. A moral or natural dignity is an interest recognized and protected by a rule of morality. It is an interest the violation of which would be a legal wrong and respect for which is a moral duty. For such duties a person is morally bound, without any legal sanction. (5)

A legal right, on the other hand, is an interest recognized and protected by a rule of law, an interest, the violation of which would be a legal wrong, and respect for which is a legal duty, and the law imposes a duty on the person who violates it and gives remedy to the person whose right has been infringed. (6)

Right has four essential elements on the basis of which it can be awarded to a person. The four elements are:
i) The subject of right i.e. the right holder.
ii) The object of a right i.e. the substance on which the right holder is having his claim.
iii) The right to assert or demand, or enjoy or enforce it.

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iv) The bearer of the correlative duty which a person has to bear as a result of some right and he may be an individual or a group. The bearer of the correlative duty may be an individual or a group. In Western terminology, the term right is often confusing. Firstly, it is used in different ways with different objectives. Secondly, many rights come into conflict. Thirdly, some accept the moral significance attached to rights (e.g. the Naturalists) while most of the positivists, especially Bentham deny its significance. Fourthly, in the western perspective the status of moral rights is just ethical and legal rights on the other hand, enjoy legal protection. An expert says; ‘some rights are intended as immediately binding commitments and others merely as specifying future patterns of behavior’.

The terms which are frequently and interchangeably used to describe the concept of right are duty, claim, right, liberty, power and immunity. There is no system without the concept of rights and duties. A system of law, itself, is said to comprise of a body of rules conferring rights and imposing duties. Rights and duties are generally correlative. “It is the characteristic of correlative relationship. Right and duty are different names for the same relationship. Encyclopedia of Democratic Thought holds correlativity as one of the four essential elements of rights which are:

i) The subject or bearer of rights.
ii) The object or scope of right.
iii) The correlative duty of others in respect of rights.
iv) The reason for, or grounds of rights.

According to Austin, duties are of two kinds: absolute duties and relative duties. Relative duties correspond to a right and are to be fulfilled towards a determinate superior whereas absolute duties are enforced criminally. Lahore High Court observes “even fundamental rights may not be a ‘right’ in a strict sense as, rights to acquire or own property, to carry on a profession, and to move about freely etc; do not impose any corresponding duty on any person”.

In another definition, rights are legally protected liberties.

Power is another class of legal rights. The separation of powers from liberty was developed in the British literature. Power is said to be an ability conferred by law and determined by a person’s own will. Law assists in carrying out our powers without imposing corresponding duties upon other persons.

Power may be public or private. Public powers are those which are exercised by officers or representatives of the state in their official capacity,
such as legislative, judiciary or executive powers. Private Powers, called capacities, are vested in individuals who exercise them for their own purposes, e. g. capacity to make a contract or a will. (15)

Immunities and privileges are sometimes used to reflect dignity of a person but they are really infringements of general rights.

Dignity of a person is regarded as fundamental and inalienable right, which is universal and essential for life. It has evolved and been subject to change with the changing times and generations. They are grounded in different cultural, ideological and philosophic world views resulting in differences in the substance of human rights and meaning and interpretation of agreed-upon rights. Even within the same society, perception of human dignity may vary from state to state. Laws under different national legal systems vary, but human dignity and human rights are part of international Law. These rights are, thus, rights inherent in our nature without which life as human beings is impossible (16-26).

The acceptance of inherent dignity and of equal and inalienable rights of all members of human family is the very foundation of freedom, justice and peace in the world. Human rights manifest in human nature and embrace the standard of life, liberty, equality and dignity of an individual. (27)

The right of Human Dignity overcomes when it is determined that: all people have it; it is held by all people equally, and, it is not affected by the status of a person. Such a right can be used as the basis to invoke claims against the actions of people and institutions. Right is only one end of a social relation while the other end is the duty because one’s right to do something can only be guaranteed in a society if one accepts to allow the same amount of freedom of action to others. Rights and liabilities are co-existence i.e., where there is right there is a corresponding duty.

Modern Concept of Human Right:

The modern concept of human rights is considered to be an innovation of the 20th Century. It was first coined in 1945 and used in the UN Charter, when it spoke of fostering respect for a persons’ dignity. Article 55C of U.N. Charter says: ‘Nations shall promote universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex; language, or religion’ (28) Post World War II institutions for the international protection of human rights were responsible for the concept that human rights are moral guarantees which people have in all countries and cultures simply because they are people. (29)

Human Right is an internationally agreed value, standard or rule which regulates the conduct of states both towards its own citizens and non-citizens. (30) Human right is often expressed and guaranteed by law, in the form of treaties, customary international law, general principals and other sources of
international law. International human rights law lays down obligations on
Governments to act in certain ways or to refrain from certain acts, in order to
promote and protect human rights and fundamental freedoms of individuals or
groups. (31-33)

Human rights are particular claims listed in international instruments
and other major covenants and conventions and are considered essential for
human well-being and dignity [42]. Tunkin wrote that the content of the
principle of respect for human rights in international law may be expressed in
tree propositions:
(1) All states have a duty to respect fundamental rights and freedom of all
persons within their territories;
(2) States have a duty not to permit discrimination by reason of sex, race,
religion or language; and
(3) States have a duty to promote universal respect for human rights and to
co-operate with each other to achieve this objective. (34)

Human Right is the right of not only individuals but groups is also
included as its beneficiaries. Western countries lay stress on individuals only.
It is reflected in the major international instruments that individuals are the
beneficiaries of human rights and it is true even of minority rights, which are
articulated as the right of individuals to pursue their own peculiar culture, or
speak their language, or engage in worship. The sole exception arises in
relation to the right to self-determination, which stands in a separate part of
each of the covenants, and is a right of all peoples. From the western
perspective, the emphasis on the individual as the beneficiary of rights is a
necessary antithesis to the power of the state, and also to the power of groups
that serve the purposes of the state. (35)

The concept of human rights derive its essence from different sources.
Religion is considered as an ancient source, not only of human rights but also
of the world at large. All basic principles of human rights are derived from
major religions. Natural Law constitutes another old and essential basis of
human rights. These are principles of logic which still govern the conscience of
society and man. Individual thinking also constitutes a major source. Modern
human rights at present are derived from the Positive laws. Sometimes,
governmental orders, circulars, individual orders and executive actions play a
vital role in the field of human rights. Marxist thinking and communism also
provide a source for human rights in many parts of the world such as Russia
and China. Sociological Approach has been called a method of social
engineering. The law is meant to help progress of society by social actions. It
is only possible if all human rights are observed by the society. (36)

International law is the main source of human rights, as these are most
clearly set out in a remarkable system of international treaties, all developed
since the mid-1960s. The two International Covenants on Human Rights, 1966
cover between them all the major civil and political, and economic, social and
cultural rights. They are open to all states. (37)

Human rights covers all kinds of rights including civil and political
rights, such as the right to life and liberty, freedom of expression (intellectual
freedom), belief (religious freedom), conscience, expression (speech and
press), and movement. Property or private ownership of land and possessions
are often included in human rights as is equality before the law; and social,
cultural and economic rights such as the right to participate in culture, the right
to food, the right to work, and the right to education.

The concept of natural right holds that there is a certain list of rights
enshrined by nature in the self which cannot be legitimately modified by
human power. On the other hand, the theory of legal rights holds that rights are
created by society, enforced by governments and, therefore, subject to change.

Views adopted by western world tend to emphasize the basic civil and
political rights of individual, or rights that take the form of claims limiting the
power of government over the governed. The approach of the late Soviet
Union was to note the importance of basic rights and freedom for international
peace and security, rather than to emphasis the role of the state. (38)

English philosophers argued that “The ‘State of Nature’ has a ‘Law of
Nature’ to govern it. American revolutionaries proclaimed in the Declaration
of Independence of the US (1976) that all men are created equal and they are
endowed by their Creator with certain inalienable rights. Among these are Life,
Liberty and the pursuit of Happiness.

French National Assembly under the influence of the Declaration of the
Rights of Man and of the Citizen (1789) said: “Men are born and remain free
and equal in rights and that the aim of all political associations is the
conservation of these rights” (39)

Supreme Court of Pakistan describe Fundamental rights as ‘No right
can be properly describe as fundamental if the legislature can take it away by a
law not involving an amendment ,or unless its suspension or surrender in a
national emergency is specifically provided by the constitution itself (40) Such
rights are also ascribed as supra positive or elementary rights.

A famous Jurist Theodoor Van Boven is of the opinion that the validity
of these laws does-not depend on the acceptance by the subjects of law but it
lies at the foundation of the international community

Human dignity and freedoms are inherent in all kinds of legal systems
throughout the world and in all the international human rights instruments. The
dignity of a person and other rights that every one equally has by virtue of their
humanity and also by virtue of their being grounded in an appeal to our human
nature [ 24]
The very essence of a fundamental right is that it is enforceable either through court or other tribunal against the public authority contravening it. In a representative form of government where power is in the hands of the majority, fundamental rights are intended to protect, and are justified on the ground of their safeguarding the interests of the minority. (41)

The rights impose restrictions on legislative powers of a government; they don’t exist where the legislature is supreme and not subject to limitations. The United Kingdom does not recognize these rights and they have not been incorporated in its constitution. (42)

It is viewed by some of the eminent English judges that the British Parliament, which is a fully sovereign legislature, was subject to some common law restriction. (43)

Human Right is said to be the primordial right necessary for the development and expression of human personality. It enables to chalk out one’s own life in the manner one likes best. (44) In the setting of political, economic and cultural developments, the higher consciousness of the human family is reflected in the enrichment of human rights and their codification (45)

The ultimate objective is their incorporation into constitutions worldwide. This occurred in the 19th and 20th centuries in the constitutions of various States. Sweden adopted it in 1809, Spain in 1812, Norway in 1814, Belgium in 1831, King of Sardinia in 1848, Denmark in 1849 and Switzerland in 1874. The French Constitution of 1848 specifically recognized rights and duties anterior and superior to positive laws. Germany and many new European States adopted fundamental rights only after the horrors of World War. A Declaration of Rights was included in the Russian Constitution in 1918. Provisional Constitution of China proclaimed the rights and duties of a person in 1931. In January 1941, President Roosevelt of the United States supported four freedoms for common citizen: freedom of speech, freedom of religion, freedom from want and freedom from fear. After World War II France in the preamble to the Constitution of 1946 reaffirmed the importance of human rights. The 1946 Constitution of Japan laid down that the “people shall not be prevented from enjoying any of the fundamental rights”. The Italian Constitution of 1947 also guaranteed the inviolable rights of man. (46)

The provisions of the English Magna Carta were incorporated into Bills of Rights which acted as limitations upon all the powers of Government legislative executive and judicial. The English courts have no power of judicial review of Parliamentary Legislation. (47)

Human right is regarded as an integral part of faith. A person cannot be considered religious in the true sense if one does not grant the rights of the fellows. (48) Human rights are concerned with the dignity of the individual, the level of self esteem that secures personal identity and promotes human
community. While the pursuit of human dignity is universal, its forms are designed by the cultures of people. (49)

**Human Rights in the Theological Perspective:**

The concept of human right is usually assumed to be a secular notion. The concept emerged in the philosophies of the late 7th century, culminating in the French Revolution in the 8th century as a secular movement. The American declaration of Independence in 1776 declared ‘All human are created equal’ or endowed by their creator, with certain unalienable rights’. From a consciously Christian point of view rights are grounded, first of all in the value. (50)

Rousseau, in the 18th century supported the democracy based on the general will of the masses, which meant that there can be no government without the expressed consent of the governed. The Americans were the first to prosecute a war of independence against their English masters.

Germans in the 19th century fired the imagination of man to launch a crusade against oppression and cruelty of every type. Shelley and Byron were the foremost amongst those who condemned the age-old institutions of monarchy, religion and tyranny.

An imprecise notion of natural rights was transferred to the Americans by European immigrants, where they were refined and articulated in the American constitution and its subsequent amendments. American judges continued to expound upon and refine them. Their work then influenced the constitutions of various European states and Japan after both the First and the Second World War. In 1948, the General Assembly of the United Nations approved a list of about thirty human rights, which included the more important fundamental rights and liberties. (51)

The expression “human rights” is relatively new, having come into parlance only since World War II and the founding of United Nations in 1945. It replaces the phrase “natural rights” which fell into this favor in part because the concept of natural law. Human right is a twentieth-century name for what has been traditionally known as Natural Rights & the Rights of Man. Human right is a twentieth-century name for what was traditionally known as Natural Rights & the Rights of Man. (52)

The Holy Prophet Muhammad (peace be upon him) for the first time bestowed all those fundamental rights which were necessary to elevate a person’s dignity on the highest pedestal of humanity. He granted humanity Charter of liberty, fraternity equality, justice, and peace, which lent grace, politeness and beauty to the life of person. (53)

A vague idea of the right of a person and one’s real place in society has always engaged the attention and fired the imagination of man, of every age under situation. When Socrates tried for the charges of corrupting the youth and abusing the officially worshipped gods, he asserted his right to say freely
what he deemed right to think, feel and say and he gulped the hemlock as a protect for disallowing him his right to free expression. With the death of Socrates, the Sage and Seer of Greece began a crusade in the realization of human rights which was supplemented, augmented and strengthened by many illuminated philosophers, politicians and teachers, and the latest contribution is that of Einstein and Bertrand Russell in the vindication of right and the condemnation of wrong.

Classical Muslim scholars use right in general as well as particular sense, particularly, to denote certain varieties of rights. The division of right into the two main categories of the right of God the right of man is quite indicative of the influence of the literal meaning of right on its legal usage. The notion of human right represents a set of abstract values whose concretization is considered essential for ensuring a life of dignity and respect.

According to Islam the concept of human right is as old as man himself. Just as the Creator of man had supplied air, water, food, light and other necessities of life, He had also given a code of conduct for his life right from the beginning of his life. The Quran furnishes a definite evidence of the fact that long before sending man on earth and honoring him with the envied position of vicegerency on earth, he had been given consciousness of rights and obligations, and with the bestowal of the means of life he had been taught the manner and behavior in life. The first man coming to this world had started his life not in the darkness of ignorance but in the light of knowledge.

A formal distinction between fundamental and other rights in the Shariah can be made by referring to the Quran itself. Rights are founded on clear Quranic injunctions i.e., life, property, privacy, movement, justice, personal dignity, honor, equality before the law, and of parents over children. However, the Quran does not provide a list of basic rights and liberties or formally distinguish such categories as fundamental and ordinary rights.

To designate a right as fundamental often means that the court views it as politically essential to the existence of society or essential to individuals and their sense of dignity and self-respect.

Islam takes into consideration the basic elements of human nature, and does not, at the same time, disregard human abilities. It aims at striking a balance between rights and duties in such a way to promote the dignity of a person and at the same time ensure that liberty of one is not detrimental to the interests of the community as a whole. However, Islam does not approve of a political or economic organization which aims at merging the identity of the individual into that of the community and depriving a person of the freedom essential for the proper development of personality and talent.

Life of an individual is a matter of co-operation and mutual responsibility and not a constant warfare to be lived in a spirit of struggle and hostility. Likewise, it stands for the Dignity of individual and collective abilities, and not for repression, deprivation and imprisonment.
The distorted version of Christianity looks at a person’s spiritual aspirations, and attempts to crush the bodily desires in order to give the reins to aspirations. On the other hand, Communism stresses individual’s material needs; it looks not only at humanity but also at the whole creation and the universe. Islam forms a unity in individual whose spiritual aspirations cannot be separated from the bodily desires, and whose spiritual needs cannot be divorced from the material needs. It looks at the universe and at life with no separation or division.

In the Islamic view, life consists of established, well defined forms of mutual love and respect, co-operation and responsibility between Muslims in particular, and between all human beings in general. The same view of life is held by Christianity, but it is not based on codified, well-defined explicit laws. Communists hold the view that life is a continual struggle between classes which ends in one class overcoming the other. This manifests that Communism is hatred of mankind harbored by people. Christianity is the dream of an abstract world of ideas and imagination, and that Islam is the perpetual dream of humanity, embodied in a reality which exists on earth.\(^{(58)}\)

Human rights in Islam are bestowed by Allah in the holy Quran. These rights are divine, eternal, universal and absolute and are guaranteed and protected through Shariah. Rights in Islam are not man-made, nor prepared by a parliament and therefore are not subject to change. They are applied equally to all regardless or weakness, caste, language, or religion.\(^{(59-60)}\)

From Allah’s commandments in the Quran, Muslim jurists deduced five fundamental principles belonging to the field of law. The aim of legislation in Islam is to secure compliance with these principles. These principles called “kulyat-i-khams are the protection of life, property, religion, descent, and reason.\(^{(61)}\)

Human Right is the right of all human beings. It is something which is necessary for life and develops a personality and without it one can’t be at his best. Dignity forms the basis of good society and cements the corporate life of a person. Consequently fundamental rights and obligations regarding character are no less important than the same regarding life. It is the dignity which distinguishes a person from beast. Life without dignity is worse than death, and it would be far better to die a noble death than live an immoral life.

The chief mission of every religion worth the name is to inculcate the sense of morality and dignity in the mind of man. The religion of Islam, in particular, lays great emphasis on the development of character, as is said: ‘and there must spring from you a nation who invite to goodness and enjoin right conduct and forbid indecency. Such are they who are successful.\(^{(62)}\)
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