

The Authoritative Framework for Human Rights in Islamic Thought and Constitutional Jurisprudence

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One of the most famous political documents in our world is the Universal Declaration of Human Rights that was issued by the General Assembly of the United Nations on December 10, 1948.

This document was not issued in vacuum, for the Americans before the War of Independence that they launched against the British occupation of their country issued the Declaration of Independence in July 1776 that included the idea that all men are born equal and men have the right to life, liberty and equality.

When the French Revolution took place in August 1789, it issued a declaration for human rights that included the idea that men are born free and equal in rights. This declaration became so famous and wide spread and the roots of modern political thought in the modern age.

The Universal Declaration, written in 1948, was based on these two documents, and became an international document that spread into constitutions and national laws that were issues by most states. After its issuance, the United Nations tried to achieve a more difficult task, that is, to make the principles of the Declaration articles included in international treaties among

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the states that ratified these treaties and to legally commit themselves to their applications. The United Nations prepared two draft projects, the first, deals with civil and political rights, the second, deals with economic, social and cultural rights. On December 16, 1966, the General Assembly approved the two projects, but the implementation of each project required the approval of 35 states at least. This number was arrived at only after ten years. On January 3, 1976, the agreement on economic, social and cultural rights was approved, and on March 23, 1976, the agreement on civil and political rights was approved.

The civil and political agreement included the right of every human to life, freedom, security and privacy and the right to just trial and his protection from slavery and arrest. It also included the rights of thinking, conscience, religion, opinion, expression, movement, and assembly. The economic and social agreement contains guarantees for a good social life and the right to work, just wages, health and educational services and the formation and joining of associations . . .

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It is easy to say that Islam is prior to these documents in determining a set of principles that are used to protect the human right and allow living with dignity. This is the reality that historical facts testify to. The origin of the texts and principles that are cited in the documents that were mentioned before is the origin that was formulated by the Universal Declaration of Human Rights in its first article, where it said that all people are born free and equal in dignity and rights This text is derived from the saying of 'Umar bin al-Khattab to Umr bin al-'As, which school children have memorized for hundred of years, "When did you enslave people although they

were delivered by their mother free." When Ahmad 'Urabi also told us that we were born free, eventhough he had not seen the American declaration of independence or the French declaration of rights, he was only repeating 'Umar's saying.

God tells us in the chapter on al-Hujurat that people are born of males and females, which indicates the unity of origin. This discourse is directed to all of mankind and not only the believers. The Prophet recommended in his farewell speech people to remember that their God is one and their father is one and every human comes from Adam and returns to dust. Then he emphasizes the idea that an Arab is not superior to a Persian and the white race is not superior over the red race; superiority comes from righteousness.

Thus, the origin of equality among all people is determined out of their unified origin and its components. Superiority is determined by a conscious human action, that is righteousness, which is combination of work and belief. All of this has been stressed 1200 years ago before the American declaration.

It is easy also to compare this Islamic principle and other creeds at the time of Islamic revelation. Indian books determined the superiority of some people, depending on their origin and social status. The Romans viewed themselves as the chosen people, and others were inferior and were called the Barbarians. The Romans had a legal system and guarantees but did not think it was applicable to other nations. The Israelites believed that they were alone God's chosen people. The Arabs in the pre-Islamic period conceived human perfection in terms of Arabism and therefore others were inferior. They did not marry their daughters to non-Arabs.

This is an easy remark, since it is well known in history. But what has to be investigated is that human rights can be subsumed under two vital matters, the freedom of the will and the sanctity of human affairs. This is what

allows man to work according to his will; for his affairs are not transgressed against and his security against any aggression and interference should be maintained.

These rights are not due to man because of his nature only; that is, it is not only necessary to live a good life. But it is also a necessity to set up a fine social system, that is, rights are required so that a collective system can be coherent and well connected and can function active and efficiently. Any social structure will not become coherent unless it has certain qualities such as accepting tolerance and rejecting fragility. As an example of this we cannot say that a true parliamentary system will be established, regardless of all of the efficiency of the process, unless the individual feels secure about himself, his family, and his livelihood. For the lack of security will bring about the absence of true will.

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What also should be thought of is the source of the declarations of human rights, though they have driven some authority from the acceptance of the people who believe in their benefits. But this popular view is insufficient to give it the ultimate status of required respect and legitimacy. For human acceptance and conviction fall primarily in the frame of human choices that are always subject to change, as seen among different schools, groups and doctrines. These rights are governed by humans rather than governing humans-as should have been the case.

This is the crisis that confronts secular positive thought, when it seeks the source of legitimacy of the principles that are required for organizing human society and its affairs. For example, the source of law is the will of the people that is embodied in their elected representatives. The law is based on

interest and it is abrogated or adjusted whenever there is benefit. Still secular positive thought has a problem, for there is a need for the stability of laws and to not subject the laws to rapid changes. For thought is effected by passing events that influence the balance between the majority and minority in the parliament. The secular positive thought confronted this problem by determining that there are constitutional laws that are superior to the regular law and are distinguished by stability and permanence that cannot be abrogated or amended except by special procedures as well as the absolute majority or a referendum so that people can have the ultimate say.

However, this was not sufficient, for there were ordinances that constituted the main underpinnings of the political and social system that the constitution is built upon. It would not be logical to destroy these underpinnings by the constitution itself. Thus, questions of the form of the state, whether it is royal or republican, or independence of the state, or its borders are examples. This problem was resolved by preventing any amendment to such issues because they relate to the basis of the state and its coherence. However, changes to such issues may come from outside the legitimate structure such as wars and revolutions.

Nonetheless, one problem remains. If the positive law is created by human who can change and abrogate it, and if the constitution is like the law which is determined by human will, and its source of legitimacy is the popular approval, what governs the human will? It is possible to say that what governs it is the interest of the community according to the circumstances of the time and that it follows the course of human benefit that is changeable according to place and time. The question however remains: what is the criterion that determines benefit and reform and the good and evil?

This question is a philosophical one that is concerned with the criterion that directs human will and human reason to attain the good and to avoid

evil. The thinkers of positive legal thought reached this question and stopped there. They are positivist seculars who prefer the rule of the earth over the divine legislation and exclude the unseen from any effects on earthly legislations. The practical and logical need force them to seek a standard for the higher values in society that is the source of ultimate legitimacy that distinguished between the good and the evil and the correct and incorrect. The positive thinking created a philosophical fiction called the law of nature, which is a set of eternal and original principles. It has been defined as those principles, bases, and values that govern the ultimate legitimacy of the community as well as its laws and constitution. It also governs behaviors and interactions when there are no laws or constitutions.

Here we should observe what the positive thinking has done. It has rejected the unseen, and therefore created a new unseen, an earthly unseen that is called the law of nature or the rules of justice or the higher constitutional principles. To this new unseen the source of human rights is attributed.

These fundamental rights of human life and good governance of society are stronger than international documents and constitutional texts or any attribution to the law of nature. In reality, they are sacred rights that are originally derived from the divine legislation and from the unseen. Consequently, their eternity and authenticity are to be sought not in the positive thinking and away from religion; for such an action has led to the rise of a new religion called the law of nature.

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The stipulation of human rights in Islam is derived from the sources of Islamic law as stated in the Qur'an and the Sunna. The rights are then derived from the sacredness of the texts that legislated and established it as a

criterion between good and evil. This is why the observation of these rights and the duties that are derived from them is some kind of divine worship, although it is need for regulating social behavior and guiding human interactions and guaranteeing justice and equality among mankind.

Here, rights and duties are connected by the fundamentals of Islam; they are part of the belief system that connects man with God and man to the Muslim community. It is totally aiming at serving justice since equality among people is stipulated; and superiority is an act of the will that is determined by man who is responsible for his action. And piety is also a responsible human act and connected to the basis of good social behavior and obedience to God's commandments, that is adherence to the values of justice and equality that are divinely commanded the avoidance of the values that are contrary.

Here also equality as a value for achieving justice is assured since the legislator, God, is the one who is worshipped without any other, and therefore mankind is equal in that respect. This constitutes the highest legitimacy and source of law, and therefore human rights are linked to worshipping God from which human derive their sovereignty. This is the general intellectual framework for the development of human rights in Islam.

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The other thought does not view human rights as individual rights only, and it did not fall into the individualistic tendency in the realization of the rights, but sets its vision up in the framework of social structure. These rights are not restricted to the privileges that are enjoyed by the individual but are part of a legal system and social functions. Right in Islam is a social function in addition to being an individual privilege and furthermore an ele-

ment in the construction of bodies and institutions of society.

The thought that is derived from Islam is built, in my opinion, on the basis of the collective composition of society, and not on the individual, because it views the individual within his collective existence and thereafter on the basis of institutional structures of the community.

If this is the concept of human rights, its mode of action manifests in duties. For the rights of women in the family are the duties of the husband, and the rights of the child in education is the father's duty to educate him. And the right to free expression is the duty for commanding the good and the truth, and the right to assembly and propagation is derived from the doctrine to command the good and forbid evil.

This method of the formation of the right of the individual is the duty of the community towards him is in agreement with the institutional composition of the bodies of society, which indicates that duties and rights are the two faces of the same coin. We notice that the majority of rights that are formed by Western thought as political rights are in Islam necessary duties that society should perform in general, and not only individuals. These rights are great since they tie together the public right with the public duty and tie the individual responsibility with the collective responsibility. While the Western jurisprudence of transactions is based on the individual and recognizing the relations between social commitment and right, however it did not recognize that the public right is a collective duty at the same time.

The Western liberal formation of legal thinking in its original form views the individual as if he is independent from society, as if there were only individuals who entered into society, giving up their rights to community that should protect them in terms of their rights. The idea of right emerged in the conception of the individual, which is formal because the individual has never been outside the community, since his birth when God created the

earth and Adam descended to earth. The individual will never be outside the community till his death. Man's entrance into society does not take away his rights but rather he will not gain his right except in the community that protects him and provides him with his humanity and teaches him the meaning of right. For a right is a relation that can only be carried out among members and institutions of the community.

The positioning of the legal idea in the liberal concept, which emphasizes that a right has arisen in opposition to others, created the idea that one's right ends when the right of the other starts and the freedom of the individual ends when the freedom of the starts. Thus, the other constituted the limit to the right, and thus, the Western liberal concept of the other is built on the concept of conflict.

This is different in the Islamic thought, which formulated the right in terms of the duty of the other, or his duty towards his community. And this is a formulation brings in the individual the tendency to give and not only to take.

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Equality among the members of mankind is stipulated and urged by Islam. For there is no superiority among races, peoples, and tribes except by piety. For people are distinguished by the acts that are derived from the will and interactions with people. Piety, and consequently punishment and reward, is not related to worship and work but also in the choices that humans make about all walks of life.

If equality is stipulated in Islam in this fashion, the Islamic regulators of social organization does not stop only at that but transcend it to guarantee justice as the main basis of equality.

Equality means preventing discrimination among people because of involuntary characteristics or acts that cannot be change or transcended. Such characteristics are related usually to collectivities such as sex, race, language and similar issues. Equality is in this sense a negative description, which is the required minimum to what human conditions should be about.

Equality means that the community views the individuals that belong to it as mere individuals without distinction among them unless there are acquired qualities of education and experience. Or at least there might be a distinction based on other qualities other than individuality such as old age, which is though not acquired is still a distinguishing factor for appointment in a specific position and which applies to all humans.

Equality creates an abstract man who has no qualities that naturally distinguish him from other members of the community but this is insufficient alone to guarantee an equal social attribution equal to others in reality. The reason for this is that if you assume that people are equal theoretically, this equality does not guarantee equal burden with the others since conditions vary for each. For instance, there is the rich and the poor the sick and the healthy, which practically does not allow for equality in all actions. So although the doctrine of equality of utmost importance, it could not lead to what we seek from true equality, and this is why we need another doctrine that we should achieve in order to arrive at true equality, that is justice.

The rightly-guided caliph Abu Bakr announced that he will give the weak more than the strong so that the first is given his right and the latter does not seize the right of the other. This was determined by the caliph in order to show that treatment of people depends on circumstances in order to achieve realistic equality. Here we find equality as a positive value, for we are ordered by the Qur'an to establish justice on earth.

Islam has directed most of its commandments to establish justice and

spread it, for the Qur'an commands justice and honesty. For the administration of justice with honesty means that justice is the right of the wronged, a trust that we all have to perform.

Justice, according to the Qur'an, must be spread among people, for it is their right regardless of who they are, their race, color, creed, religion, or doctrine. Shaykh Muhammad Sadik 'Arjun mentions that the Qur'an entrusts spreading justice to whoever can carry it as well as the rulers or judges, whether in terms of public trust or political mandate or adjudication or fatwa or unofficial chiefs such as heads of family or workforce. Al-Qurtubi said that the verse about justice is a categorical stipulation that includes religion and legislation and it is common among to all people, ruler and otherwise.