LIFE, LIBERTY, AND THE PURSUIT OF ISLAMIC HAPPINESS: ISLAM AND HUMAN RIGHTS

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Many books and articles have been written in the last generation on the relationship of Islam to human rights that one might rightfully wonder whether there is anything important left to be said. As a general matter, literature in this field could be broken down into two broad categories. The first takes an overtly triumphalist/conflict-of-civilizations stance in which the author identifies a particular tradition, e.g., Islam or human rights, as the source of all that is good in the world, and then seeks to describe the other tradition as being bereft of some or even all of the excellences associated with the valorized tradition. The second approach might be described as an apologetic approach in which the author defends the basic goodness of one tradition from the perspective of the valorized tradition, e.g., a human rights–based defense of Islam, or an Islamic defense of human rights.

This essay, however, will take a different tack. Instead of looking at the central issue between Islam and human rights as one of identifying commonalities and conflicts, and then attempting to find principled grounds for the resolution of those conflicts, it will explore why we cannot expect—nor should we desire—a complete reconciliation between Islam and human rights norms. Indeed, such an expectation misidentifies the proper role of human rights and religion in establishing the conditions for flourishing human societies.

One way to understand the at times paradoxical relationship between human rights and religion in general—and Islam in particular—is to think about two rival conceptions of freedom: negative freedom and positive freedom. Negative freedom is the ability of an individual to do and believe what he or she wishes without the interference of a third party. It is freedom that involves the absence of obstacles for an individual. Positive freedom, however, is the ability to actualize one's desires *about one's desires*. The emphasis is on the creation of the right conditions to act on one's own

ultimate ends without succumbing to actions that interfere in achieving those ultimate ends, even if those actions are freely chosen.

Both freedoms are valuable, but they are not always in harmony. Frank Lovett, in his entry on republicanism in the *Stanford Encyclopedia of Philosophy*, illustrates the distinction between negative freedom and positive freedom with various examples, beginning with a gambler. Insofar as a person desires to gamble, and to the extent he is neither coerced into gambling nor coercively precluded from gambling, he is *free* to act on that desire, and therefore, to that extent, he possesses negative liberty. But suppose he believes it is bad for him to gamble because he has young kids and knows they need his financial support, and so he desires that he not act upon his impulse to gamble. In this situation, if he acts on his desire to gamble, even though he is acting freely from the perspective of negative freedom, he can nevertheless be described as *unfree* in the positive sense because he is unable to make effective his desire to refrain from gambling and use that money for its true ultimate end, e.g., to buy food and clothes for his kids.[6]

 Lovett also argues that reducing freedom to "non-interference in a subject's desires," or negative freedom, can also result in certain paradoxes: imagine two slaves, one with a beneficent master and the second with a cruel and arbitrary one. The slave of the beneficent master is permitted to do whatever he wishes, while the slave of the cruel master is forced to perform grueling and tedious tasks with little to no respite all day, each day. From the perspective of negative freedom, the first slave might be described as enjoying significant freedom, especially as compared with the second slave who spends his days and nights doing his master's bidding. But would it be right to describe the first slave as more *free* than the second slave?

Finally, this paradox is reflected in the politics of communities as well: Imagine an empire that takes a hands-off approach to its conquered territories and, for the

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6   Frank Lovett, "Republicanism," Stanford Encyclopedia of Philosophy, Edward N. Zalta, ed., Spring 2017 Edition, https://plato.stanford.edu/archives/spr2017/entries/republicanism/.

period in which it rules its colonies, does not interfere in their customs, traditions, or way of life, such that the individuals living under colonial control are effectively free in the negative sense of having the ability to act as they wish. Now suppose that the former colony gains independence from its former imperial masters, and the post-colonial government adopts a series of policies intended to transform social relations through modernization, motivated in part by the desire to prevent a future episode of colonization. In this case, our intuition seems to tell us that to achieve the political goal of effective independence, i.e., *political freedom*, the citizens of the post-colonial state are *positively* obligated to behave in a particular way.

The political freedom of the post-colonial state therefore requires an interference in the negative freedom of its citizens, perhaps in a fashion that is much more heavy-handed than that of the colonial master, such as imposing income taxes or nationalizing certain industries, among other things. Does this make them less free? These examples illustrate the basic structural tension between religion generally, and Islam in particular, with human rights norms. The least controversial human rights, such as those set forth in the Universal Declaration of Human Rights adopted by the United Nations (UN), are largely matters of negative freedom such as freedom of speech, freedom from violence, and freedom of religion.[7]

Islam, as well as other religions, however, is principally concerned with regulating *what* we want, or what political philosophers might call "second-order" desires. A Muslim theologian or jurist, then, if he or she were to read the Universal Declaration's provisions regarding freedom of religion[8] might be very well concerned that it is in tension with the positive freedom to be a Muslim. Just like the presence of legalized casinos may undermine a person's positive freedom not to gamble, the possibility of converting to another religion or the option to have no religion at all, in each case *without any political consequences*, makes it more difficult, one might believe, for people to remain faithful to their previous commitment to be *Muslim*. They might also believe that a strong commitment to negative freedom in the context of religion also has an effect on second-order desires, namely, it may cause individuals to believe that religion is not a matter of great importance, for if it were, we would not be free to choose whatever religion we want. Theologians and jurists might also believe that the negative freedom of religion poses the risk of leading to religious indifferentism, a doctrine of the substantive equality of all religions, regardless of their particular theological and ethical teachings. Such a doctrine threatens the existence of all particular religions such as Islam insofar as it holds there is no relevant difference among religions, either because they are all equally false or all equally true.

These concerns are not to suggest that it is impossible for a committed Muslim to embrace freedom of religion as a principle of negative freedom; however, it does mean that Muslims who do embrace it will be careful to circumscribe it in a manner that does not undermine the Islamic theological claims as to Islam's truth and its universality. Accordingly, from the internal perspective of Islam, recognition of the freedom of religion as a negative liberty will necessarily be viewed as a matter of finding good reasons to exercise restraint with respect to nonbelievers, rather than affirmatively endorsing the substantive religious choices of non-Muslims as such. Indeed, it may be that in circumstances where Islam coexists with other religions and nonreligious commitments under a robust regime of negative freedom of religion that Muslim religious leaders might become more strident than they otherwise might be in explicitly demarcating theological and ethical differences between Muslims and non-Muslims.[9]

Once we recognize that the tension between human rights and Islam is a special case of tension between negative and positive freedom, we are also in a better position to make another observation about the nature of rights in Islamic law: Islamic law formulates rights instrumentally to further its own substantive conception of the good. For example, Islamic family law formulates a set of rights and duties with respect to the family, not from the perspective of maximizing individual autonomy or individual well-being as such, but rather from the perspective of establishing households that are likely to produce the outcomes that Islam sees as religiously desirable: a reasonably stable household that reproduces and nurtures a new generation of Muslims. Actions that do not further these ends will naturally be rejected as illegitimate from an Islamic perspective. Accordingly, while it may be a reasonable political demand for states to recognize the legitimacy of a Muslim woman's marriage to a non-Muslim man, it is unreasonable to expect

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7   United Nations General Assembly Resolution 217 A, *Universal Declaration of Human Rights* (Paris, December 10, 1948), http://www. un.org/en/universal-declaration-human-rights/.

8   UN General Assembly, *Universal Declaration*, Art. 18.

9   This may take place through a willingness to revise what Islam understands to be secondary or tertiary doctrines, but as a result there is a renewed emphasis on what are considered to be primary doctrines.

Muslim religious figures to endorse such marriages from a religious perspective because they would contradict the religious function of marriage.

The foregoing analysis points to an irresolvable tension between Islam—or any other religion or philosophy that seeks to promote a particular way of living as the right or best way to live—and human rights: each system recognizes internal limits on rights that derive from the goals each system is seeking to promote. Because Islam seeks to promote an Islamic way of living, rights are construed in a fashion consistent with those ends, and the use of rights in a fashion that would undermine those ends is necessarily condemned as illegitimate. The same structure is found in the Universal Declaration of Human Rights. Article 29(3), for example, states that "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."[10] Likewise, Article 30 states "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[11]

Just as religions such as Islam must adopt a posture of restraint with respect to the political enforcement of their doctrines to secure the kind of international order envisaged by the UN, so too must human rights advocates adopt a restrained understanding of the scope of human rights so that it is clear that it is not an attempt to regulate directly the content of Islam or of any other religious doctrine. Otherwise, freedom of religion could be eviscerated to nothing more than the freedom to hold a particular belief, with no (or an extremely narrow) right to act on those beliefs, a trend we see gaining momentum in Europe, particularly with respect to Islam.

However, this does not mean that Islam is concerned only with positive freedom. Many of its doctrines vindicate the negative freedom of individuals, both against the state and against other members of the community. Where Islamic law recognizes the existence of a right, it is very keen on preserving the right-holder's exclusive authority to exercise that right, except in cases where the right-holder is deemed to lack sufficient capacity to do so, or some pressing social necessity justifies

interfering in that right.[12] Any source of tension with conceptions of negative liberty associated with international human rights law, therefore, is not because Islam does not recognize individual freedom and is concerned only with duties (as is sometimes claimed), but only because Islam defines the scope of the right differently from international human rights law insofar as it does so from the perspective of the instrumental goals Islam seeks to achieve, both positively and negatively.

In this case, however, one might object that even if Islam recognizes individual rights, it does so only in connection with attempting to achieve the happiness of Muslims as a community, and without concern, or with insufficient concern, for the well-being of individual Muslims. One of the functions of Islamic legal theory, however, was to work out why following divine commands was rationally consistent with human welfare. According to one especially prominent theorist, God's commands must be rationally compatible with human perceptions of their own welfare, not only so that they would *want* to comply with the law, but because God's intent is that human beings *choose* to follow God's law.

The idea here is that we rationally decide to restrain ourselves because we understand that doing so furthers our own well-being: by restricting our immediate freedom or happiness, we increase the likelihood of enjoying the freedom to achieve what will make us truly free or happy in the future. This provides an important conceptual bridge between Islamic conceptions of negative freedom and positive freedom: we can achieve our positive freedom—our second-order desires, such as our effective ability to act on our knowledge that gambling is wrong, for example—only if we effectively restrain ourselves in the present from acting on what may be a very real, visceral desire to gamble.

We achieve this through our rational apprehension of the harmful nature of our visceral desire, and how it is inconsistent with our rational understanding of our long-term, real happiness. Politically, this manifests itself in an attempt to make laws that assist people in achieving what are rationally recognized either as positive long-term advantages necessary for their happiness or minimizing what are rationally recognized as obstacles preventing them from achieving happiness.

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10   UN General Assembly, Universal Declaration.

11   6 Ibid.

12   7 A twelfth-century Egyptian-Syrian jurist, for example, noted that interference in a person's right to pursue his private interests is a legal injury (mafsada), the effects of which are not usually recognized in the law. In the case of the marriages of minor girls, however, an exception was made out of necessity. This reasoning recognizes the exceptional, and therefore disfavored, nature of minor marriage, and provides a strong Islamic basis for limiting or eliminating minor marriage, but by focusing on improvement of the background social conditions that create the necessity in the first place, rather than the moral depravity of the societies in which these practices take place.

Rules that restrict our freedoms in the present can therefore be understood as necessary pre-commitment devices to maximize the likelihood that we will achieve our long-term goals that we reasonably hope will provide us the happiness we seek.

This points to the paradox of the negative freedom secured by human rights: negative freedom is valuable because it allows us to pursue goals that are valuable to us, but we can achieve those goals only if we restrict our short-term freedom from pursuing other ends, which, although perhaps legitimate in themselves, undermine achievement of our long-term objectives. In other words, negative freedom is not pursued for its own sake. When it is rationally connected to the pursuit of a substantive good that can be achieved only over the long term, it is therefore entitled to the highest degree of respect. When it lacks such a connection, however, there are fewer reasons to honor it.

In the specific context of Islam and human rights, conflicts between negative and positive freedoms center largely around three areas: freedom of expression, and in particular, "blasphemy" (usually expressed in the form of insults to Islam's prophet); freedom of religion, particularly the right of a Muslim to renounce Islam and adopt another religion (apostasy); and family law. Much of the crude speech directed against the Prophet Muhammad cannot reasonably be understood to have any connection with establishing a substantive good other than expressing the wish that Islam, and by extension Muslims, did not exist. For that reason, such speech is not properly understood as blasphemy;[13] rather, it is actually hate speech, and as such may reasonably be regulated consistently with the terms of the Universal Declaration, which prohibits assertion of a right whose goal is "the destruction of any of the rights and freedoms set forth herein."[14]

There can be no doubt that genuine and sincere renunciations of Islam, whether by someone born a Muslim or a convert, must be honored under human rights law. Freedom of religion, including the right to abandon Islam for another religion, does not preclude a state, however, from inquiring into the bona fides of the decision to ascertain that the individual is not seeking solely some legal advantage, either from renouncing Islam or converting to another religion, or from establishing Islam as the state's religion and providing public instruction in its tenets. Finally, with respect to Islamic family law, while it does not satisfy a formal conception of equality, it certainly aims for a fair distribution of rights and obligations within the family, and it seeks to secure the best interests of children within the family.[15] This does not mean that many historical rules of Islamic family law do not require reform; rather, it is to argue that such reform can be undertaken from the internal perspective of Islamic law rather than its wholesale rejection and replacement on the grounds that it is facially an illegitimate source of law as some would suggest.

Islamic law can be reconciled to human rights law only to the extent that Muslims believe their desire to live as Muslims—and not just "believe in" Islam—individually and as communities will be honored by human rights law. Conversely, human rights law will be comfortable with Islamic law only when it is convinced that Muslims genuinely respect the rights of non-Muslims to equal religious freedom and those of nominal Muslims to reject Islam, and take seriously the cause of gender equality, rather than using Islam as an excuse to defend the status quo. Even so, it is impossible to expect a complete convergence between human rights norms and Islamic norms: human rights norms are almost entirely concerned with securing the autonomy of individuals to make choices for themselves, while Islam is largely about influencing individuals' choices about how to live their lives. From an Islamic perspective, negative freedom is needed to make compliance with Islam morally meaningful, but securing negative freedom can never be more than a means to the end of pursuing an Islamic conception of happiness.

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13   A blasphemous statement would be one that asserts a theological proposition that is not only erroneous, but is degrading to a proper conception of the divinity, such as a claim that God exists in the form of a human body.

14   UN General Assembly, *Universal Declaration*, Art. 30.

15   Many verses in the Quran make explicit appeals to notions of fairness and reciprocity between the spouses. See, for example, *al-Baqara*, 2:228: "The rights of divorced women are substantially equivalent to their obligations" (*wa la-hunna mithu alladhī alayhinna bi'l-marūf*)"; and, *al-Baqara*, 2:233 (establishing general principle that rights and obligations of rearing infants should be distributed between the father and mother equitably).