

## Interrelationship between Human Rights and Peace, Two Mistaken Conceptions of Human Rights in both Islam and the West

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### Abstract

The first mistaken conception is this. Some Muslim theorists argue that only God can proclaim what justice, right, and rights are; hence parliaments and other state institutions lack the sovereignty to create laws and to proclaim rights. They presume that Western states in their legislation and the UN in their Universal Declaration of Human Rights of 1948 claim sovereignty. Many Western theorists share their view, differing only in the evaluation. But human rights imply that states must follow them and lack the sovereignty for legislation incompatible with them. The German constitution is explicit on this lack of human sovereignty. It declares in Art.1: "The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law." Hence, the idea of human rights implies that human rights and basic principles of legislation are valid not because states have declared them but because of their inherent qualities. It also implies that states are legitimate only if they conform to such basic principles and excludes the idea that the principles are legitimate because states or mankind have accepted them. Therefore, Western and Islam conceptions of law and sovereignty are less different than they seem. Second, it is generally accepted in Islam and the West that there is a right and even the duty of every human being to fight for justice and the protection of human rights. But there are two conceptions of such a fight both in Islam and the West. The model of the fight for human rights in the centralist conception is a bureaucracy that imposes its rules on the cases it administers. The model in the autonomous conception is a scientific community that solves its differences by principles developed in the community itself.

**Keywords:** Justice; Intrinsic Concepts of Human Rights; Misconceptions; Non-Divine Legislation; Islam and the West.

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The idea of human rights has been used for justifying wars; wars thus justified have even been given the special name of human rights interventions. I do not deny that there can be and have been cases of human rights violation that justified the use violence, even a war, to stop the violation. But in the last decades, this justification has often been misused. Such misuse would be rarer if there was more clarity about the nature of human rights. More particularly, two errors concerning their nature and the way to protect them are held among both adherents and critics of human rights that favour their justificatory misuse. I'll call them the error of the eligibility and that of the one-way protection of human rights.

### **1. The error of eligibility of human rights, voluntarism and moral rationalism**

The error of eligibility is the idea that human rights are elected or made by consent, contract or the pure arbitrary will of mankind or a part of it. This error presupposes the voluntaristic idea that a moral or political norm is binding if it is established by will, either human or divine. The error of eligibility of human rights presupposes *human voluntarism* according to which human rights are valid because they have been agreed on by humans. It can be rejected by *divine voluntarism* according to which human rights are valid because they have been willed by God; in fact, Muslim thinkers did so.<sup>1</sup> But it can also be rejected by *moral rationalism*, according to which a norm is binding not because it is willed, whether by man or God, but because it conforms to human nature or essence.

Moral rationalism, though, is less easy to formulate than moral voluntarism. Its problem is how to conceive of its central idea of human nature or essence. If we understand it as the way people in fact are or behave or are inclined to act, then norms are binding only if they conform to what people want to do anyway. But in that case, we have to expect that norms are binding that conform to people's inclination of doing damage and destruction to each other. So, if we conceive of human nature in a descriptive way, it seems we can exclude such norms as illegitimate only if we believe

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1. According to Maulana Maududi, Sayyed Qutb, Ayatollah Khomeini and other Muslim thinkers, Western political philosophy differs from Islam by placing sovereignty in the state or man rather than in God. Belief that sovereignty rests only in God and therefore human rights must conform to the sharia has also motivated the Universal Islamic Declaration of Human Rights (UIDHR) as an alternative to the Universal Declaration of Human Rights (UDHR), initiated by Iran and stated at the 36th UN General Assembly session in 1981, and the "Cairo Declaration of Human Rights in Islam" (CDHRI) of 1990.

people do not incline to destruction. But this belief is contradicted by historical and everyday facts. On the other hand, if we conceive of human nature not in a normative way, that is, as the way people not are but ought to be, then we presuppose the morality that human nature was to justify.

Because of this difficulty of moral rationalism, Plato, the philosopher who did most to develop moral rationalism, opposed to human voluntarism a thesis that seems to imply divine voluntarism rather than moral rationalism. For Protagoras, the philosopher who was most influential to formulate and propagate human voluntarism had compressed his ideas to the thesis that “man is the measure of all things”.<sup>1</sup> Against this thesis, Plato maintains: “In our eyes God will be the ‘measure of all things’ in the highest degree – a degree much higher than any ‘man’ they talk of.” (Plato, 1988: 716c)

But as we can deduce from his arguments in his *Euthyphro*,<sup>2</sup> Plato did not want to say that legitimate laws are legitimate *because* God arbitrarily chose them but that God chose them because they are the right laws for men. If we go on asking why they are right for men, the first step to an answer is: because they prevent destruction and contribute to preservation. As Plato makes Socrates say in the *Republic*, “the bad is entirely coterminous with what destroys and corrupts, and the good is what preserves and benefits.” (Plato, 1975: 608e) The second step is to infer that what is to be protected from destruction is the nature or essence of a thing; that human nature is the set of human capabilities; hence that what the good protects is human capabilities. Now, the same capability, say to act intelligently, can be used both destructively and constructively, and capabilities are of course not protected by the admission of destructive acts. So if we consider human essence as something conformity to which is to make a norm valid, we can regard capabilities as human essence only if their use is not destructive. The difficulty of moral rationalism to explain what human essence is can be solved only if we conceive of human nature as the sum of capabilities from whose use destructive acts are excluded. Norms are valid only if they protect or promote a non-destructive use of capabilities.

1. Diels-Kranz, *Fragmente der Vorsokratiker* B1; cp. Plato, *Cratylus* 386a-e and *Theaetetus* 151e-72c (“Man is the measure of all things, of the thing that are that they are, and of the things that are not, that they are not”).

2. In this dialogue, Socrates argues that the pious is not pious just because the gods love it and implies that it is because it has characters for which the gods love it.

Despite the exclusion of destructive capabilities, human nature in moral rationalism is not defined in a normative way. For the concept of capabilities and their realisation is a descriptive concept. Capabilities of man as of any other animal exist or do not. Similarly, we need not rely on norms to distinguish constructive from destructive acts. Of course, the principle to protect capabilities and to forbid destruction is normative, but the concepts used in formulating the principle are not.

The result of our discussion of moral rationalism is this. Human voluntarism, the basis of the error of eligibility, can be rejected in two ways, by divine voluntarism and by moral rationalism. Divine voluntarism is the more popular form of its rejection; it even seems to be implied by Plato's anti-Protagorean thesis that not man but God is the measure of all things. But it suffers from the same weakness that human voluntarism suffers from. If a norm does not somehow conform to man's nature, it is as arbitrary if it is willed by a god as if it is willed by a man. God can be appealed to as the authority to justify a norm only if we presuppose he is good and rational. But we can presuppose this only if we have ideas of goodness and rationality that are given to us independently of the stories that are told of gods.

True, among Muslim, Christian and Jewish theologians and philosophers there have been fierce fights over the question whether something is good because God has decided it to be so or because reasons obliged him to his decisions. Despite such fights, what distinguishes the Abrahamic religions from other religions is precisely that the divine is conceived as a person who can give reasons for his decisions, whether the reasons necessitates him or not. (In fact, reasons never necessitate, neither man nor God.)<sup>1</sup> Because of the rationalistic conception of the divine in the Abrahamic religions, moral rationalism is more consistent with them than divine voluntarism. Hence, we best understand the use of divine voluntarism in the Abrahamic tradition as a popular form of moral rationalism.

## **2. Is the idea of democracy necessarily voluntaristic?**

Now, human voluntarism or Protagoreanism has been no less influential in the West than moral rationalism. In particular in legal theory, under the title of legal positivism it became the prevailing theory up to World War II. Moreover, in moral theory, the contractalist idea that a norm is

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1. This is a thesis I defend in my book. See: Steinworth: 2009.

valid because it is consented to or willed by everyone affected by it is prevailing still today, and contractualism is a form of voluntarism. True, most contractualists understand “everyone” who must consent to a norm to make it valid as “every rational being”<sup>1</sup> and thus condition their voluntarism on rationalism. Nevertheless, they view the contract as the source of legitimacy. Such a view is indeed necessary to support the idea of democracy, according to which it is the will of the people or their majority that legitimates the laws of a society. Democracy, however, is thought to be an idea the West is committed to. It implies the idea that a society is free and has the right to give itself the laws that, after rational deliberation, it decides to accept. This idea is known under the title of the sovereignty of the people or of the state that is to represent the people.

Now, this idea is fiercely criticised by many Muslim scholars, and they often consider it the most important difference between the West and Islam. They argue that only God has sovereignty and can legitimate laws.<sup>2</sup> They are right in their presupposition that the idea of democracy and people’s sovereignty has predominantly been interpreted in conformity with human voluntarism, and they are also right in their presupposition that human voluntarism implies the error of eligibility of human rights. But they are wrong in two further presuppositions, namely, first, that the West has interpreted and can interpret the idea of democracy and people’s sovereignty only by presupposing human voluntarism and, second, that the only way to reject human voluntarism is divine rationalism. For the more consistent way to reject it is moral rationalism,

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1. For instance, See: Scanlon, 1998: 153, defines contractualism as the theory that claims: “An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could *reasonably* reject as a basis for informed, unforced, general agreement.” (Italics mine.) Similarly, See: Habermas, 1983: 76, defines his discourse ethics by a “discourse principle”, according to which “a norm can claim validity only if everyone who possibly are affected by it would agree, as participants of a practical discourse, that it is valid” (my translation). Both authors base the validity of a norm or the rightness of an act on the consent of those affected by it but condition the consent on an agreement that is explicitly or implicitly qualified as rational.
  2. According to Maulana Maududi, Sayyed Qutb, Ayatollah Khomeini and other Muslim thinkers, Western political philosophy differs from Islam by placing sovereignty in the state or man rather than in God. Belief that sovereignty rests only in God and therefore human rights must conform to the sharia has also motivated the Universal Islamic Declaration of Human Rights (UIDHR) as an alternative to the Universal Declaration of Human Rights (UDHR), initiated by Iran and stated at the 36th UN General Assembly session in 1981, and the “Cairo Declaration of Human Rights in Islam” (CDHRI) of 1990.

and moral rationalism has been defended not only by Plato in ancient Greece but also by modern Western liberals.

Moral rationalism is implied by the liberal John Locke's theory of the state of nature and by the liberal Immanuel Kant's categorical imperative. According to them, a moral order is legitimate if and only if it conforms either to the two defining characters of Locke's state of nature, the liberty and equality of every rational being, or to what the categorical imperative demands, the compatibility of anyone's action with anyone else's action in a way that allows everyone the greatest possible liberty. Both ideas set the same limit to the arbitrariness of will. It is the condition that everyone must have the same chance of freedom. The freedom that legitimises an action or norm is not only equal freedom from subordination to other people but also equal opportunity to use one's capabilities, as long as their use is not destructive.

This means that Locke's and Kant's condition for an action to be legitimate does not only restrict arbitrariness. Rather, by referring to everyone's equal opportunity to use their capabilities it also defines the positive aim that legitimates a moral or political order. Hence, though both Locke and Kant appeal to the idea of a contract to legitimate a state and its legislation, it is not the will or the consent of the people that legitimates a moral order but its conformity to the objective aim of securing everyone equal opportunity to use their capabilities. By referring to this aim they confirm the traditional idea of a natural law, according to which positive laws are legitimate if and only if they conform to the objective conditions set by natural law. So, they have rightly been called modern natural law philosophers.

But why then do they still appeal to the idea of a contract and defend the idea of people's sovereignty? The reason is that they do because they consider consent and democracy not the first source of legitimacy, but the most suitable way to adapt natural law to the specific historical conditions of a society. Democracy and consent do give legitimacy, but not to the eternal and unchangeable principles of a moral or political order but to their historical adaptation to given historical circumstances.

Belief in natural law as the source of the legitimacy of eternal moral principles has been endangered by legal positivism, but curiously enough in the last century it has been reaffirmed by the idea of human rights. Though human rights differ from natural law by a character I'll point to

in a second, according to their adherents they express the unchangeable moral principles that democracy and people's sovereignty cannot change but only adapt to historical conditions. This conception has become influential not only in theory but also in political practice, as is shown by the German constitution, the *Grundgesetz*.

The *Grundgesetz* declares in its first article: "The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law." (Basic Law for the Federal Republic of Germany, Art. 1 (3))

The basic rights here mentioned coincide with the principles of human rights that are appealed to immediately before the paragraph quoted: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." (Basic Law for the Federal Republic of Germany, Art. 1 (1) and (2))

These statements use the basic rights as limits to any legislation, hence also to democracy, since they are said to "bind" legislature, executive and judiciary. But they also use them as the source of legitimacy; for "the duty of all state authority" is declared to consist of the protection of human dignity; and the acknowledgment of human rights is understood to belong to such protection. At the same time such acknowledgment is declared to be "therefore", that is, because protection of human dignity is the duty of all state authority and, moreover, "the basis of every community, of peace and of justice in the world". So the basis of justice is not the arbitrary act of acknowledging human or any other rights. Rather, the basis and source of legitimacy is human dignity that state authority and rights are to protect.

The German constitution does not explain human dignity, but it must certainly be understood as a quality arising from having capabilities that include reason and from the exclusion of their destructive use. We can infer that violations of it are described when violations of basic rights are described. The violations that the basic rights are to prevent are violations of the equal liberty or compatibility of an action with any other action so as to allow everyone their greatest liberty, the very conditions that Locke and Kant require any legitimate legislation to meet. Hence, the *Grundgesetz* considers the protection of human and basic rights and by it the protection of human capabilities under the condition of their non-

destructive use, the first source of all legitimacy. It downgrades consent and the people's sovereignty to a legitimacy condition for adapting the principles to historical circumstances. Though its basic rights cannot be identified with the human rights formulated only some months before in the Universal Declaration of Human Rights of 1948 by the UN,<sup>1</sup> the authors of the *Grundgesetz* believed the principles of the human rights of the Universal Declaration to be the same principles they appealed to when they formulated the basic rights of the *Grundgesetz*.

However, there is a difference between the 20<sup>th</sup> century ideas of human or basic rights and Locke's and Kant's ideas of natural law. The only condition to accept human or basic rights is the insight that everyone has an equal right to decide on their private life and to equally participate in deciding on their shared life. This condition is not negligible at all. It excludes racism and enmity of liberty. But it does not require any form of explicit metaphysics or religion, while natural law was often understood as a law commanded by God. So, the idea of human rights is a more consistent form of moral rationalism than that of natural law.

### **3. The error of the one-way protection of human rights**

Despite the difference just mentioned between modern natural law and human rights, human rights can be considered their heir. They share its implication that it is the duty of the state or any other institution that claims to enforce justice to protect the non-destructive use and development of human capabilities. But they also share a conception of human capabilities by which modern natural law differs from ancient natural law. In Cicero and the Stoics, natural law is the law that is dictated to men by their reason.<sup>2</sup> The same is true of modern natural law, but in modernity, reason is understood as a faculty that demands not just the preservation of the given but the unremitting development of human capabilities that may be inexhaustible. As Kant said.<sup>3</sup>

This property requires a conception of human rights that is incompatible with the predominant conception of how to protect human rights. The predominant conception is the second error I criticise, that of

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1. The *Grundgesetz* was promulgated 23 March 1949, the Universal Declaration proclaimed 10 January 1948.

2. See: Cicero, 1991: I 34ff, 102; III 69.

3. See: Immanuel Kant, *Idea for a Universal History from a Cosmopolitan Point of View*, in: Kant, 1963, transl.



the one-way protection of human rights. It consists of the idea that their protection, the world-wide fight for justice, is a venture led by an avant-garde of individuals who have won the insight, by reason or revelation, what justice or human rights are, and hence are justified, in order to establish conditions that exclude any future injustice, to fight by all means against human rights violations or injustice, even by means ordinary people consider immoral. The avant-garde can consider itself united in a revolutionary party, as did Marx and Lenin, in a religious group, as Seyyid Qutb believed,<sup>1</sup> in the government of a chosen country, as not a few state rulers fancy, in an international organisation of states such as the UN, in non-governmental organisations or other institutions. People outside such institutions are downgraded to applauding the avant-garde.

The idea of the one-way protection of human rights can combine with both moral rationalism and voluntarism, as it can imply that the avant-garde represents human reason or the will of mankind or God. If we think of the aim of human rights to protect the non-destructive use and development of capabilities and stick to the modern idea of the inexhaustibility of human capabilities, the one-way conception is obviously an error. It presupposes that knowledge of human capabilities can be centralised in the avant-garde and decisions on how to realise justice can be adequately made by the decision procedures of its institutions. But this idea cannot even take account of the diversity of human capabilities, not to mention their inexhaustibility. Their diversity excludes that a set of decision procedures can decide how best to protect and promote them. If an institution or party claims it represents them, this can only result in stunting people's capabilities. This happened in the communist and religious states that claimed to have the exclusive knowledge of how to protect and promote human capabilities.

Therefore, the one-way or centralist conception of realising justice must be replaced by a conception that respects the diversity and inexhaustibility of human capabilities and views on how best to use and develop them. Such a conception would not exclude universal principles, such as are implied by natural law and the idea of human and basic rights. On the contrary, it must presuppose universal principles, because it presupposes the idea of human rights. But it would accord individuals

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1. Most expressly formulated in his *Milestones*, Damascus (Dar al-Ilm), no date given (orig. 1965).

and groups autonomy in their decisions on how to apply them. It would follow the restricted idea of people's sovereignty as we know it from Locke and Kant. It would accord the people who are affected by a norm the autonomy to apply it to the historical conditions they happen to live in. According to such an alternative to the one-way or centralist conception, the fight for human rights cannot be separated from solving the concrete historical problems and conflicts that divide people. It would accord people autonomy to apply principles to the situation they live in and know better than any avant-garde. This is why I call the alternative the autonomous conception.<sup>1</sup>

We can describe the difference between the centralist and the autonomous conception of the protection of human rights by the difference between the ways a bureaucracy and a scientific community solve problems. A bureaucracy solves them by applying its fixed rules on the cases it administers. A scientific community solves them by applying principles in a way all its members can codetermine and participate in. Like the centralist conception, the autonomous conception allows for avant-gardes, as there may be particularly able scientists. But the rules scientists apply can be developed only in their community and require for their application not the applause but the judgment of every of its members. Therefore, we must conceive of human rights as principles detected not by elites but by everyone who recognises that conflicts cannot be justly solved unless the conflicting parties mutually respect each others interests and capabilities.

#### **4. Problems of the autonomous conception**

Replacing the centralist by the autonomous conception would reduce misuse of appeal to human rights for justifying war between states and suppression within states, as it forbids a party to impose its understanding of human rights on another party. At the same time, the autonomous conception runs the risk of diluting and in the end abolishing universal principles of justice. It might allow governments to justify obvious cases of human rights violations as autonomous applications of justice principles. Actually, appeal to specific Asian or Muslim human rights by governments has often enough served this end. So, can such misuse of the autonomous conception of human rights be prevented?

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1. Article 56 of Iran's constitution that guarantees the "God-given right of self-government of the people" seems perfectly to correspond to the autonomous conception.

It cannot be prevented by appeal to rules or principles only. Such rules may clarify the content of the idea of human rights, but any rule can again be misapplied. It rights can be clarified by the rule that equal capabilities give equal rights, but this rule can again be misapplied. To distinguish in concrete cases between what is just and unjust common sense or ordinary judgment are always necessary. If, for instance, individuals who dissent from an opinion held by the government and publicly state their dissent without harming anyone are imprisoned or in another way punished by the government, this is an obvious case of a human rights violation, and no appeal to the autonomous conception can prove its justice. Similarly, if legislation discriminates part of the population by forbidding them what the rest has a right to or in another way treating them unequally, this is again a human rights violation, unless the unequal treatment can be justified by a relevant reason. So the question is: what are relevant reasons? Most theorists agree that reference to skin colour or race, religion, and sex are not relevant. But some Muslims say that religion and sex can be relevant. Can we rationally decide on this consequential opinion difference?

Let's consider actual cases. Some Muslim states have introduced laws that command women to wear a veil or cover their hair in public, arguing that this is what Islam commands and that the commands of Islam are the commands of justice. I cannot decide what Islam commands, but justice claims are universal, as they demand everyone's consent regardless of their religion and education. Now the mere fact that women are differently treated from men is not yet a violation of the idea of equality implied by human rights. It is true, as some Muslim thinkers argue, because the physical constitution of women is different from that of men, different legislation for men and women is justified as far as it takes account of the physical difference.<sup>1</sup> Also in the West it is not considered unjust that women are expected to cover the bosom when men are allowed to bare it. So the question is whether the uncovered hair or face or body outline of women can give a similar offence in a society as their uncovered bosom.

Again I think it cannot be excluded a priori that this may be the case. But if the society that by its state commands women to hide their hair or their body outline also gives them a different treatment in other respects

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1. See: Qutb, 2000: 75ff.

that cannot be justified by their physical difference, then the command to hide must be understood as a discrimination of women and a human rights violation. This is the case if a husband can divorce his wife against her will but a wife cannot divorce her husband against his will. The discrimination is still more obvious if the age of criminal responsibility is nine for girls and fifteen for boys, or if the punishment of stoning consists in burying men by stones up to the waist and in burying women up to their chest, giving men a greater chance to survive; or if the blood money payable to the family of the victim for the death of a man is twice that for a woman and if the family of a murdered woman is even required by law to pay a substantial sum to the murderer before he can be punished.<sup>1</sup>

I do not say that such violations are due to Islam, nor do I want to refute authors who agree with “Muslim women who claim that it is Islam, rather than the West, that has given them a high status, humanity and the undisputed right to participate fully and democratically in the affairs of their country”.<sup>2</sup> It may be said in favour of veiling rules that they can give women a greater chance of emancipation<sup>3</sup> or express an endogenous attitude to gender that must be respected by human rights conceptions.<sup>4</sup> However, if veiling rules are surrounded by obvious discriminations, they become elements of an attempt at subjecting women to men and human rights violations. Therefore, the autonomous conception of the protection of human rights, though it can be misused as any other conception can, can be prevented from undermining the idea of human rights itself. The problems that its use entails point to the fact that, whenever we are distinguishing between good and bad and just and unjust, in the end everyone must rely on their own moral judgment. Yet this is a fact that again shows that the autonomous conception is preferable to the one-way conception, since the latter conception implies that only the judgment of the avant-garde is relevant.

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1. I take the examples from See: Moghissi, 1999: 107-111. She cites statements of a practicing divorce lawyer for the first example and Articles 639, 102f, 258 and 209 of the Iranian Law of Retribution (*Qisas*) for the others. As the Iranian term for criminal responsibility she gives *masouliat jazaii* and for blood money *diyh*.

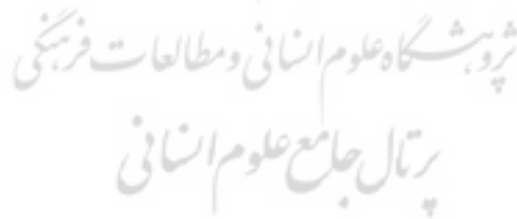
2. See: Afshar, 1998: 6; Mernissi, 1991: ix.

3. This is an argument put forward, often with good reasons, by many contributions to See: Ask and Tjomsland, 1998; and by See: Cooke, 2001.

4. This is implied by some postmodernist authors. See: McLennan, *The Enlightenment Project Revisited*, in: Hall, Held, Hubert & Thompson, 1996: 645-7.

## 5. Conclusion

If we accept the autonomous conception of human rights, we keep our capability to discern human rights violations and win a means to reject attempts at imposing ideas of justice on an unwilling population, whether such attempts appeal to religious or secular ideas, to piety and paradise or liberty and happiness. If we had to reject the autonomous conception, we would have to abandon a core idea shared by all Abrahamic religions, namely, that every individual is responsible for their own judgments and actions.<sup>1</sup> Moreover, we would have to stick with the centralist conception that implies the error of the one-way protection of human rights, and this would discredit moral rationalism that is the most consistent form to reject the error of eligibility of human rights. But moral rationalism implies that human rights are valid not because states or people have declared them but because they protect the non-destructive use and development of human capabilities. It also implies that states are legitimate only if they conform to such basic principles and excludes the idea that the principles are legitimate because states or mankind have accepted them. So, basic principles of Western and Islam conceptions of law and sovereignty are less different than they may seem.<sup>2</sup>



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1. This idea is succinctly expressed in Quran, Soreyeh Nesa, Ayeh 83: "You are accountable for none but yourself.
  2. See: Moghissi, 1999: 107-111. She cites statements of a practicing divorce lawyer for the first example and Articles 639, 102f, 258 and 209 of the Iranian Law of Retribution (*Qisas*) for the others. As the Iranian term for criminal responsibility she gives *masouliat jazaii* and for blood money *dieh*.

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