

The London School of Economics and Political Science

**UNIVERSALISM WITH HUMILITY:
GROUNDING HUMAN RIGHTS IN A DIVERSE WORLD**

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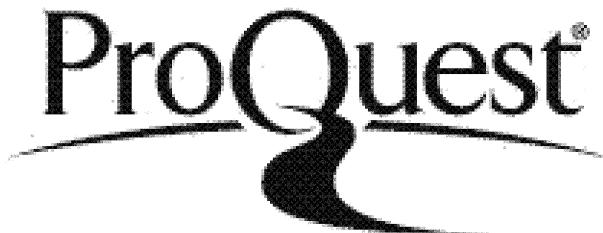
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Abstract

This is a study of how one can successfully justify the universality of human rights to people with a diversity of beliefs and values. I argue that intercultural dialogue is an essential part of working out an interpretation of human rights that is acceptable to a broad range of cultures. I develop this position through critical engagement with three recent philosophical approaches to the intercultural validity of human rights: John Rawls's Law of Peoples, Martha Nussbaum's Human Capabilities approach, and Abdullahi An-Na'im's cross-cultural dialogue approach. Inspired by Judith Shklar's political liberalism of fear and Iris Young's critical theory, I seek an account of human rights that has normative legitimacy from the perspectives of marginalized and victimized people. Cross-cultural dialogue in my scheme is a bottom-up approach from the victimized and powerless people that can avoid the problem of generality and provide multiple routes to reach agreement regarding universal human rights. In the end, I believe my approach will be descriptively more suitable to the moral reality of universal human rights, and provide a normative grounding of human rights in a way that is more compelling than other approaches

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Chapter One: The Quest for Universality

I don't know a single politician who doesn't mention ten times a day "the fight for human rights" or "violations of human rights." But because people in the West are not threatened by concentration camps and are free to say and write what they want, the more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone towards everything, a kind of energy that turns all human desires into rights. The world has become man's rights and everything in it has become a right: the desire for love the right to love, the desire for rest the right to rest, the desire for friendship the right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness, the desire to publish a book the right to publish a book, the desire to shout in the street in the middle of the night the right to shout in the street....

Milan Kundera, ----- *Immortality*¹

The Discrepancy between Human Rights Theory and Human Rights Practice

For half a century, the world has lived with the Universal Declaration of Human Rights (hereafter, UDHR), which the United Nations proclaimed a "common standard of achievement" for all people and all nations. Today, there are a number of normative texts setting out not only the fundamental rights that every individual ought to enjoy, but also, and correlative, the self-constraints that every state should adopt in order to guarantee these rights.

Although the idea of human rights has come to occupy a dominant position in current international political discourse, and "it is difficult to make any sense of international

¹ Kundera, Milan, 1991, *Immortality*, translated from the Czech by Peter Kussi, Quality Paperbacks Direct, London.

relations without giving proper attention to human rights,”² the call to reject both the UDHR and subsequent covenants as truly universal has been heard from different countries and taken many forms in the aftermath of World War II.³ What is more important philosophically is that the question of human rights justification constantly arises.⁴ In recent decades, many critics of Western rationalism have argued that claims concerning the universal validity of human rights are expressions of cultural imperialism or masks for illegitimate forms of power. Moreover, any attempt to ground human rights in “human nature,” “human reason,” “human agency,” or “divinely sanctioned spirituality” has serious drawbacks and masquerades as universal when, in effect, it is propagating “Western ethnocentrism.”⁵ They are a “Western construction of limited applicability.”⁶

The ethnocentric objection identifies human rights as specifically “Western” in origin or substance, either because they purportedly reflect only a particular set of moral philosophical ideas about the self and society originating from Western cultures⁷ or

² Mervyn Frost, *Constituting Human Rights: Global Civil Society and the Society of Democratic States* (London: Routledge, 2002), p 21.

³ For instance, Michael Ignatieff lists three sources that are negatively critical of the promoted conceptions of human rights universality: an Islamic resurgence negatively critical of human rights’ secular foundations; an East Asia assertion that community is more appropriate for “Asian cultures” than is human rights individualism; and a critique from Western academia that brings together a Marxist critique of rights with a postmodern rejection of the Enlightenment project. See Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001).

⁴ It is both a question of whether a universal set of rights is *conceptually* possible and *philosophically* justifiable, and whether such a standard can be *globally* implemented. See Kirsten Hastrup, “Introduction,” in Kirsten Hastrup (ed.), *Human Rights on Common Grounds: The Quest for Universality* (Kluwer Law International, 2001), p.1. I divide this question into two separate categories: the search for the *universality of validity* and the search for the *universality of applicability*. In the first sense, the claim is that the idea of human rights is held to be valid by all human societies, or within all major cultural, philosophical, and religious traditions. Alternatively, universality refers to the applicability of a given norm to *all* human beings *everywhere*. The two notions are often employed interchangeably and are often mutually inclusive and mutually supportive. The universality of validity can effectively support their universal applicability, and the universality of applicability can provide a convincing account of their universal validity.

⁵ Ann Cudd makes distinctions among four positions: (1) imperialism, which seeks to impose a universal standard that merely serves the interests of the imperial power; (2) Missionary work, whose function is to change the deepest spiritual commitment of the subjects of the work; (3) Eurocentrism, which imposes its aesthetic and cultural norms on others; and (4) humanism, which tries to help the oppressed find a path out of their oppression. In what follows, my analysis of ethnocentrism identifies three initial categories, and I propose an approach whose function is to help reach the ideal of humanism. See Ann Cudd, “Missionary Politics,” in *Hypatia*, Vol. 20(2005), pp. 164-82.

⁶ Adamantia Pollis and Peter Schwab, “Human Rights: A Western Construct with Limited Applicability,” in Adamantia Pollis and Peter Schwab (eds.) *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger Publishers Press, 1979).

⁷ Surely, the origin of an idea in one context—whether cultural, religious, or historical—does not entail the

because they represent only the West's faiths, interests, and provincial ways of thinking.

Behind this argument there is often the assumption that Westerners proposing universal human rights are imposing a "West is best" perspective on the rest of the world.⁸

Critics have stated that what we call "universal" human rights is, above all, an expression of Western values developed in the West and derived from the Enlightenment. The idea of human rights began in Europe and, then, spread to the American colonies and was eventually enshrined in two documents: the American "Declaration of Independence" and the French "Declaration of the Rights of Man and of the Citizen." Thus, the idea of human rights emerged within the context of particular social, economic, cultural, and political conditions. Moreover, in its original Western form, the idea of human rights is connected to the philosophical conception of the Western natural-law tradition.⁹ It emphasizes mainly the primacy of the individual as both the fundamental unit of concern and the fundamental measure of value, a conception of rights as political "trumps" against the demands of the state or the community. Therefore, the critics argue that to pursue human rights is to be intolerant of both non-Western practices and non-Western forms of life. The American Anthropological Association¹⁰ issued its well-known warning, authored by Melville Herskovits:

The problem of drawing up a Declaration of Human Rights was relatively simple in the eighteenth century, because it was not a matter of human rights, but of the right of men

assertion that it should never be adapted to another context. In other words, despite human rights' having their origins in the West, it does not follow that these rights therefore express Western values suitable and applicable only to the West. Accordingly, whether the notions of human rights should be accepted or rejected must depend on whether they are politically or culturally legitimate, not whether they originate from the West or the East. It is clear that the "genetic fallacy" surreptitiously resides in this argument. See Xiaorong, Li, "Asian Values" and the Universality of Human Rights, in Patrick Hayden (ed.), *The Philosophy of Human Rights* (Paragon House Press, 2001), pp. 397-408.

⁸ See Alison Jaggar, "'Saving Amina': Global Justice for Women and Intercultural Dialogue," in *Ethics and International Affairs*, Vol 19(3)(2005), pp. 55-75.

⁹ In chapter five, by examining the history of the *Universal Declaration of Human Rights*, I will argue that this orthodox view is misleading when it identifies the principles and the practices of international human rights with the rebirth of the Western natural-rights tradition. Also, all efforts to resolve the discrepancies between human rights theory and human rights practice would be fruitless if the efforts originated from this misguided premise.

¹⁰ See American Anthropological Association, "Statement on Human Rights," in *American Anthropologist* (1947), pp. 539-543; reprinted in Morton E. Winston (ed.) *The philosophy of Human Rights* (Belmont: Wadsworth, 1989), p. 116-120.

within the framework of the sanctions laid by a single society....

Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life.... Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.... The Rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. Such a document will lead to frustration, not realization of the personalities of vast members of human beings.¹¹

The other ethnocentric objection that identifies human rights as specifically “Western” is in regard to the content; the particular specifications of international human rights are Western in substance. For instance, Article 1 of the UDHR asserts that “All human beings are born free and equal in dignity and rights.” Article 2 asserts that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status,” and thus, Article 2 includes an assumption of the fundamental equality of persons. Moreover, Article 16 refers to the family as the “natural” unit in society and asserts that everyone is “entitled to equal rights as to marriage.” And Article 18 asserts that everyone “has the right to freedom of thought, conscience and religion,” an idea that is profoundly incompatible with Islam. During the drafting process, the Saudi delegation contended that the right to marriage and to the free choice of a partner to establish a family is a direct challenge to the authorities in Islamic societies. The list of enumerated rights functions either “to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world.”¹² On the basis of the objections to Articles 16 and 18, the Saudi delegation refused to ratify the Declaration.

Another reason for the charge of Western ethnocentrism is that the present system of international human rights has clearly evolved from Western cultural perspectives that were

¹¹ “Statement on Human Rights,” p. 539.

¹² Quoted from Michael Ignatieff, “The Attack on Human Rights,” in *Foreign Affairs*, November/December(2001), pp. 102-116.

universalized through colonial hegemonic processes. Owing to colonial rule and foreign domination, most African and Asian countries were unable to participate in the drafting or the adoption of the UDHR. The UDHR was adopted by the 48-member United Nations General Assembly, which can hardly be held as representative of the contemporary world community.¹³ Even though most non-Western countries achieved formal independence and were able to participate in the formulation of subsequent international human rights documents, these countries were deemed to be bound to the earlier documents. In this regard, the majority of non-Western countries were incorporated into the process that determined international human rights standards. It is very difficult to see how the non-Western countries' representatives could have genuinely represented their countries' respective traditions; indeed, it may have been unavoidable that these countries would initially accept Western philosophical assumptions regarding nature, society, and the notion of the good. Therefore, the standards articulated in international agreements and in various declarations are merely Western values being imposed—in an imperialist fashion—on all subjects.¹⁴ However, if human rights are in fact tied to certain modern Western liberal philosophical commitments that are not shared by the rest of the world, then the project of universalizing the rights would entail both a commitment to the superiority of Western ideas and a global imposition of the Western model of prompting social change. In this regard, to advocate that human rights are universal is to claim a “parochial universalism,” that is, “an attempt to put forward a universally valid theory of justice that draws only on

¹³ The General Assembly's members consisted of Europeans and North Americans, six members from Asia (China, India, Pakistan, Burma, the Philippines, and Siam), and nine Islamic nations (Afghanistan, Egypt, Iran, Iraq, Pakistan, Saudi Arabia, Syria, Turkey, Yemen). Three member countries had large Buddhist populations: Burma, China, and Siam. Four member countries were in Africa: Ethiopia, Liberia, Egypt, and South Africa. Six of the European members belonged to the Communist bloc. See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999), pp. 28-34.

¹⁴ We can find the same objections still hold against the subsequent covenants and the Vienna Declaration and Programme of Action that, in 1993, was accepted by the second UN World Conference on Human Rights, at whose forum 172 states and over 1,500 organizations from different countries were in attendance. They repeated commitment to international human rights and confirmed the principles of universality and indivisibility.

the moral aspirations and political practices found in liberal Western societies.”¹⁵ As long as we fail to justify the universality of human rights, critics would not be unreasonable to charge human rights as being either biased against non-Western cultures, or merely an instrument of Western political neocolonialism. Unless we are able to explain to one another why we think human rights are important, the world community will not be able to summon the consistent support necessary to prevent human rights abuses. Thus, we may consider ourselves to be living in an era where human rights are given paramount importance; ironically, we also are living in an era of human rights abuses. The success of human rights practices, indeed, “poses a problem for ethical reflections about them.”¹⁶

Accordingly, the central questions for this dissertation are thus: *How, in the absence of an uncontroversial source of moral guidance, can we make political and moral claims across cultural divides? Is there a way of understanding what we mean about human rights that is consistent with pluralistic institutions embedded in the divergent world cultures and yet that continues to reflect the universal applicability of this way of understanding?*

¹⁵ Daniel Bell, “The Limits of Liberal Justice,” in *Political Theory* 26(1998), pp. 557-582 at 568. In empirical terms, moreover, human rights scholars and advocates have long argued that since the 1945 UN charter and the UDHR, there has been emerging a worldwide human rights regime designed to identify and protect a growing number of basic human rights. States’ increasingly global legal commitments to protect human rights indeed signal a fundamental shift in the structure of international society, and international human rights laws initiate processes and dialogue whose function is to steer, through socialization, many abusive states toward an embrace of better behavior. However, evidence shows that human rights language may not always influence actual state behavior in expected ways. For instance, the findings of Hafner-Burton and Tsutsui’s study suggest that, for decades after abusive states’ ratification of human rights treaties, there was little or no effect over time. For them, states often ratify human rights treaties as a matter of “window dressing,” radically decoupling policy from practice and, at times, exacerbating human rights violations because the percentage of states reported to repress human rights has grown over time. In this regard, human rights talk is simply “cheap talk” and human rights treaties are simply not designed to hold ratifying governments accountable for their commitments. See Hafner-Burton, Emilie and Kiyoteru Tsutsui, “Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most,” in *Journal of Peace Research* 44(4) (2007), pp. 407-425, and Hafner-Burton, Emilie and Kiyoteru Tsutsui, “Human Rights Practices in a Globalizing World: The Paradox of Empty Promises,” in *American Journal of Sociology*, 110(5)(2005), pp. 1373-1411.

¹⁶ Joseph Raz, “Human Rights without Foundations,” in *Oxford Legal Studies Research Paper*, No. 14(2007), p. 1. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999874.

1.2 Rethinking Human Rights: Worldwide Acceptance and Two Minimalisms

In order to avoid the charge of ethnocentrism and cultural imperialism, in recent years, human rights theorists have proposed different approaches to showing how human rights really are acceptable across a wide range of cultures. For these theorists, if human rights norms are no longer treated as exclusively and essentially arising from and supported by Western traditions, then we should no longer view them as the sole property of the West. Therefore, we need to take seriously the perspectives of non-Western cultures if human rights are going to be appropriate as global normative standards for a multicultural world. Seen in this light, the point at issue for human rights justification is whether or not—and if yes, how—it is possible to affirm a “theory-thin” conception of human rights while respecting the myriad tradition-specific ways of regulating social order or of promoting human good. I call it “the minimalism approach” to human rights.

There are a number of attempts to justify the “minimalist,” or “thin,” conception of human rights on the basis of premises that are least controversial, and there are also attempts to demonstrate the non-ethnocentric character of human rights. We should begin by acknowledging that the minimalist conception of human rights can be understood in two separate ways: one way (justificatory minimalism) justifies human rights on the basis of premises that, according to common belief, are least controversial and least metaphysical; the other way (substantive minimalism) restricts the content and political application of human rights.

I propose that there is no causal correlation between these two kinds of minimalism, that is, substantive minimalism does not follow from justificatory minimalism, and *vice versa*. After all, there are many justificatory minimalists who attempt to make a much broader list of rights, such as the UDHR, acceptable to the members of different cultures around the

world;¹⁷ and there are substantive minimalists who attempt to narrow the content of human rights on the basis of a particular comprehensive doctrine.¹⁸

1.3 Justificatory Minimalisms: Multiple Foundations and *De Facto* Overlapping Consensus

Among those justificatory minimalisms, some may look back to the process of the UDHR's Draft Committee and argue (1) that pragmatic consensus for the list of human rights is sufficient to prove that, although we might agree on human rights norms, we might agree to disagree on their philosophical or metaphysical foundation, and that (2) one needs to refrain from searching for the underlying foundations of human rights because to refrain from this activity is, in effect, the key to the achievement of a pragmatic consensus.

Others may simply adjust John Rawls's notion of "overlapping consensus" for international application in respect of human rights justification. For them, the Rawlsian concept of overlapping consensus involves the idea that reasonable citizens of a modern democracy can affirm the same political conceptions of justice though the citizens remain divided in their comprehensive doctrines, and this idea can be applied to the universal validity of human rights, even in the absence of full agreement on all other philosophical, metaphysical, or religious doctrines.

Before proceeding, we should recognize that there are two meanings of "consensus" with respect to human rights justification. The first is the consensus that concerns the content and the meaning of international recognition for certain rights, namely, the consensus about which rights deserve to be recognized as human rights. The other meaning concerns the deeper consensus about the existence of proposed human rights *per se*, that is, why these rights ought to be given recognition as human rights. The former meaning may rest

¹⁷ Joshua Cohen, "Minimalism About Human Rights: the Best We Can Hope For?", in *Journal of Political Philosophy* 190(2004), pp. 190-213.

¹⁸ See Maurice Cranston, "Are There Any Human Rights?" *Daedalus* 112(4) (1983), pp. 1-17; and John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980)

on the assertion that (1) a pragmatic consensus about human rights norms is sufficient and should be the most we can hope for, and (2) we should eschew any discussion regarding contestable metaphysical and epistemological doctrines. By contrast, the latter meaning insists that (1) human rights will lose their very ability to stand in judgment of traditions if the human rights are grounded merely on a pragmatic consensus regarding the content and the nature of human rights norms. The latter meaning goes on to assert that, therefore, (2) a consensus should rest on a solid, immutable justification—a foundation of foundations, as it were. The consensus in human rights minimalism, discussed below, is mainly a variation of the first meaning.

1.3.1. Pragmatic Agreement: Jacques Maritain and Plural Foundations

The justificatory minimalisms of the consensus-based approach suggest that we might agree on human rights norms but that we might agree to disagree on their foundations. Upon recognizing the wisdom of integrating reasonable pluralism into the modern world's common practices, we should abandon the traditional ideal of a philosophical justification for human rights that derives the rights from a single authoritative source, and we should allow divergent justifications for doing so. I call it the “plural-foundations thesis.”

Actually, the plural-foundations thesis can be found in the drafting process of the UDHR, and undoubtedly it deeply reflects Jacques Maritain, a member on so-called Committee on the Theoretical Bases of Human Rights established by UNESCO. During the drafting process, some members argued whether it was possible to produce agreements about the content of rights among people from different nations. Literally, for Maritain, an agreement regarding the UDHR showed that people could agree on practical conclusions while disagreeing on either a theoretical framework or a means for justifying those conclusions.

In light of the extensive variety of the world's cultures and traditions, no deeper

metaphysical or philosophical agreement would be possible, so the drafters wisely chose to eschew the use of contestable metaphysical language and appeals.¹⁹ Maritain remarked on this very theme:

To understand this, it is only necessary to make the appropriate distinction between the rational justifications involved in the spiritual dynamism of philosophical doctrine or religious faith [that is to say, in culture], and the practical conclusions which, although justified in different ways by different persons, are principles of action with a common ground of similarity for everyone. I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality and fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, in its theoretical dynamism, is equally the only way founded upon truth.²⁰

Indeed, Maritain set out his philosophical foundation for human rights based on a version of natural-law theory, and he understood that the proponents of other religions or cultures would not agree with his own natural-law theory, which was based on the Catholic philosophy of St. Thomas Aquinas. However, he left the door open for discussion on practical issues. As he put it,

In the domain of practical assertion...an agreement on a common declaration is possible by means of an approach that is more pragmatic than theoretical, and by a collective effort of comparing, recasting, and perfecting the drafts in order to make them acceptable to all as points of *practical convergence*, regardless of the divergence in theoretical perspectives.²¹

Accordingly, responding to general and widespread skepticism and surprise that so many diverse perspectives could come to an agreement on human rights, Maritain argued that the agreement was grounded upon the condition that “we agree about the rights but on condition no one ask us why,” regarding the philosophical foundations of human rights.²² In this sense, human rights consensus is an agreement that is based on philosophical and theological disagreements. Moreover, the human rights consensus at this level becomes, at the same time, common ground for an ongoing argument or conversation about

¹⁹ Sumner Twiss, “History, Human Rights and Globalization,” in *Journal of Religious Ethics* 32(2004), pp. 139-70.

²⁰ Jacques Maritain, “Introduction,” in *Human Rights: Comments and Interpretation*, edited by UNESCO (Westport, CT: Greenwood Press Publishers, 1949), pp. 10-12 at 11.

²¹ Jacques Maritain, *Man and The State* (Chicago: University of Chicago Press, 1951), p. 79.

²² Jacques Maritain, “Introduction”, p. 9.

justification among interlocutors grounded respectively in various traditions. For Maritain, this pragmatic agreement on practical norms of human rights was self-sufficient; anything more would be, he deemed, superfluous and impractical because the task of achieving a deeper consensus about the underlying justification could not reasonably be expected to succeed.²³

Regarding the UNESCO discussion of and the UDHR drafting committee for human rights, some scholars have shed light on the participants' pragmatic understanding of the relationship between consensus and justification;²⁴ as a result, divergent interpretations have arisen.

For instance, Sumner Twiss,²⁵ a scholar in the field of comparative- religious ethics, conceives the task of justification with respect to human rights as divided into two "distinguishable levels." One is intercultural pragmatic negotiation and agreement in the international arena; and the other comprises "various forms of intra-cultural justifications

²³ This view was also reflected by Richard McKeon, another member of the "Committee on the Theoretical Bases of Human Rights." As he simply put it, "...Agreement can doubtless be secured concerning the list of human rights only if an ambiguity remains, both because of the absence of a uniform manner of administering them and because of the absence of a single basic philosophy, but that ambiguity is the frame within which men may move peacefully to a more uniform practice and to a universal understanding of fundamental human rights." Richard McKeon, "The Philosophic Bases and Material Circumstances of the Rights of Man," in UNESCO (ed.): *Human Rights: Comments and Interpretations*: (Columbia University Press, 1949), pp. 35-46 at 46.

²⁴ For example, see Charles Taylor, "Conditions of an Unforced Consensus on Human Rights" in *East Asian Challenge for Human Rights*, in Joanne Bauer and Daniel A. Bell (eds) *East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press, 1999), pp. 124-44; Abdullahi Ahmed An-Na'im, "Toward a Cross-cultural Approach," in Abdullahi Ahmed An-Na'im(ed) *Human Rights in Cross-cultural Perspectives: A Quest for Consensus*, Philadelphia: University of Pennsylvania Press, 1992), pp. 19-43; Tore Lindholm, "Prospects for Research on the Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism" in Abdullahi An-Na'im(ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. (Philadelphia: University of Pennsylvania Press), pp. 387-426; Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001); and Joshua Cohen, "Minimalism About Human Rights: the Best We Can Hope For?" in *Journal of Political Philosophy* 190(2004), pp. 190-213.

²⁵ See Sumner Twiss, "Comparative Ethics and International Human Rights Dialogues: A Pragmatic Inquiry" in Lisa Sowle and James Childress (eds.), *Christian Ethics: Problems and Prospects* (Cleveland, Ohio: Pilgrim Press,1996), pp. 357-378; Sumner Twiss, "A Constructive Framework for Discussing Confucianism and Human Rights" in De Bary and Tu Weiming (eds.), *Confucianism and Human Rights* (New York: Columbia University Press, 1998),pp. 27-53; Sumner Twiss, "Moral Grounds and Plural Cultures," in *Journal of Religious Ethics* 26(2)(1998), pp. 271-283; Sumner Twiss, "Religion and Human Rights: A Comparative Perspective" in Sumner Twiss and Bruce Grelle (eds.), *Explorations in Global Ethics: Comparative Religious Ethics and Inter-religious Dialogue*(Boulder, CO: Westview Press, 2001), pp. 155-175; and Sumner Twiss, "History, Human Rights and Globalization," in *Journal of Religious Ethics* 32(1)(2004), pp. 39-70

in more local arenas.”²⁶ For Twiss, the achievement of the international human rights movement is the historical product of particular WWII-related crises and of prospective world circumstances: Auschwitz, Hiroshima, and the possibility of similar future events. According to a common recognition of a particular historical situation, diverse peoples can acknowledge their mutual respect for certain values embraced by a human rights conception. The achievement is the product of diverse peoples’ recognition of a set of values. In the face of pluralism, the members of the drafting committee of the UDHR recognized that it is very difficult to find common ground for philosophical justification and that they should proceed without benefit of either a comprehensive or an uncontroversial theory of human rights. Following Maritain, Twiss argues that the UDHR was reached through a pragmatic process of negotiation between different national and cultural traditions, and that, in general, the success of the negotiation process of a human rights drafting is achieved according to a two-level justification. As Twiss points out,

...human rights are justified at two distinguishable levels, the first represented by intercultural consensus and negotiated public agreements in the international arena (a form of pragmatic justification) and the other represented by diverse intra-cultural justification, expressed in their own distinctive moral and philosophical idioms and warranting (internally) their agreement to abide by and participate in the international consensus.²⁷

In terms of the first level of justification, international justification depends on a practical moral consensus that operates among diverse traditions and that accounts for the importance of basic values encapsulated in the concept of human rights. Accordingly, the idea of human rights represents not a philosophy about the nature of individual persons but conditions perceived to be “necessary for personal (and social) development in diverse societies and cultures.”²⁸ In the second level of justification, each tradition may justify the consensus by appealing to the tradition’s own set of moral doctrines in culturally diverse ways. Furthermore, this pragmatic process got underway after World War II and has

²⁶ Sumner Twiss, “History, Human Rights and Globalization,” p. 45.

²⁷ Sumner Twiss, “Moral Grounds and Plural Cultures,” p. 273.

²⁸ Ibid., 273

continued up into the present, not only in drafting committees but also in the United Nations' adoption of subsequent covenants, conventions, and treaties. Therefore, human rights are commonly justified by a “practical moral consensus” at the international level as well as by distinct appeals to the “beliefs, norms, and ways of thinking contained within particular philosophical or religious visions of the world.²⁹ Twiss points out that Karel Vasak’s three-generations metaphor clearly explicates the development of human rights as expressions of a set of different cultures’ important expectations; and that the 1993 World Conference on Human Rights assembled by the United Nations, reaffirmed and further broadened all the standards contained in the UDHR. It is simplistic to claim that the achievement of human rights constitutes Western cultural hegemony.

In this regard, the historical-pragmatic justificatory process appears to be more a process than a destination. Human rights justification proceeds from what is held in common to an evolution in and through the justificatory dialogue. What is held in common among interlocutors in cross-cultural dialogue is both a commitment to the UDHR’s values and call for human solidarity based on this “living document.” This historical-pragmatic approach, Twiss claims, would not only accurately characterize the development of the international human rights movement, but also construct a convincing justificatory foundation for ongoing human rights discourse.³⁰

1.3.2. *De Facto* Overlapping Consensus and Justification of Human Rights

The core idea here—agreeing on basic principles, but not on a single set of reasons underlying those principles—has been developed systematically by John Rawls in his idea of an “overlapping consensus.” For Rawls, overlapping consensus indicates the idea that

²⁹ Sunmer Twiss, “Religion and Human Rights: A Comparative Perspective,” p.162.

³⁰ Twiss’s historical-pragmatic justification is a reasonable descriptive framework, but it needs to say more to prove that the consensus is based on the right reasons rather than on a *modus vivendi*. In chapter five, I will unfold a different historical-pragmatic conception of human rights.

the reasonable citizens of a democracy will affirm the same political conception of justice, though they may remain divided in their comprehensive views. In this sense, the political conception of justice is a free-standing idea—it remains accessible to and compatible with multiple comprehensive doctrines, though is neither conceptually tied to nor logically dependent upon any one of them. Rawls uses the metaphors of “embedding,” or “inserting as a module,” to describe the various ways in which a political conception of justice can correspond to any particular comprehensive doctrine. As Rawls puts it,

...from those who hold well-articulated, highly systematic, comprehensive doctrines, it is from within such a doctrine (that is, starting from its basic assumptions) that these citizens affirm the political conception of justice. The fundamental concepts, principles and virtues of the political conception are theorems, as it were, of their comprehensive views.³¹

Some human rights theorists borrow the idea of an overlapping consensus from Rawls to justify human rights and to make it possible for a wide range of peoples with very different religious or philosophical commitments to support a core set of rights that the peoples view as either grounded in, or at least not in conflict with, their own comprehensive belief systems.³²

For instance, invoking the Rawlsian notion of overlapping consensus, Amy Gutmann claims that human rights can be a matter of international agreement, even if a related argument relies on plural foundations. That is, there can be agreement about human rights even if the underlying justifications are inconsistent or even incompatible. As she clearly points out,

³¹ John Rawls, *Justice as Fairness: Restatement*, (ed) by Erin Kelly (Harvard University Press, 2001), p. 33.

³² See John Charvet, “The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights,” in *Millennium: Journal of International Studies*, Vol 27(3)(1998), pp. 523-541; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003); Joseph Chan, “A Confucian Perspective on Human Rights for Contemporary China,” in Joanne Bauer and Daniel A. Bell (eds) *East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press, 1999), p. 212; Charles Taylor, “Conditions of an Unforced Consensus on Human Rights” in *East Asian Challenge for Human Rights*, in Joanne Bauer and Daniel A. Bell (eds) *East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press, 1999), pp. 124-44; Amy Gutmann, “Introduction,” in *Human Rights as Politics and Idolatry* (Princeton University Press, 2001), pp. vii-xxviii; and Tore Lindholm, “Prospects for Research on the Cultural Legitimacy of Human Rights: The Cases of Liberalism and Marxism,” in Abdullahi An-Na’im(ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. (Philadelphia: University of Pennsylvania Press), pp. 387-426.

When international groups publicly respect a plurality of grounds, rather than insisting on only one or no ground, human rights are publicly defended for a plurality of reasons as a recognized part of what it means for a pluralistic world to support an international human rights regime. If there are many reasonable grounds of human rights, rather than just one (or none), then there is a good reason for political morality to recommend that official international documents eschew any assertion of “the” proper metaphysical foundation of human rights. At the same time, there is also good reason for a human rights regime to welcome a plurality of nonexclusive claims concerning the ways in which human rights can legitimately be grounded, in religious and secular claims of various sorts.³³

For Gutmann, reasonable pluralism means that no single grounding for human rights would be acceptable to all. Provided that people can “converge” on an agreed set of rights, they should accept the diversity of the supporting arguments.³⁴

Likewise, Charles Taylor³⁵ contends that it is possible to search for alternative underlying justifications that stand in contrast to the Western natural rights tradition because different cultures have different “social imaginaries.” For Taylor, much of the difference between Western societies and non-Western societies consists in different embodied understandings and social imaginaries. They are the driving forces that have brought about modernity. Because Western modernity is inseparable from a certain kind of social imaginary, then different cultures with different embodied understanding and social imaginaries will differ from one another in other important ways. Therefore, modernity is not a monolith. While modernizing, a culture can find resources in its traditional culture to take on modernist practices. That is, cultures creatively adapt by drawing on the cultural resources of their traditions. Each culture’s adaptations would differ from every other culture’s adaptations, and no non-Western culture would have to copy the West’s adaptations if the non-Western culture could find adaptations that are “functionally equivalent” to those of the West. Thus, different cultures come to modernity via different

³³ Amy Gutmann, “Introduction,” p. xxiii.

³⁴ Similarly, Joseph Chan encourages all cultures to “justify human rights in their own terms and perspectives, in the hope that an ‘overlapping consensus’ on their norms will emerge from “self-searching exercise and common dialogue.” See Joseph Chan, “A Confucian Perspective on Human Rights for Contemporary China,” p. 212.

³⁵ See Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2004); “Modernity and the Rise of the Public Sphere,” in Grethe Peterson (ed), *The Tanner Lectures on Human Values*, (University of Utah Press, 1993); and “Conditions of an Unforced Consensus on Human Rights” in Joanne Bauer and Daniel A Bell(eds) *East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press, 1999), pp. 124-44.

routes and via different background understandings and may be able to develop functional equivalents of modern institutions by creatively adapting their own traditions to existing modernities: these adaptations do not have to be—and, indeed, will not be—identical to one another across cultures.

This is a way of detaching the consensus on human rights *norms* from that of the particular legal *forms* and underlying *justification*. Taylor starts with the premise that “rights talk” originated in Western culture. From this premise, Taylor suggests that we can determine whether non-Western human-rights adaptations are functionally equivalent to Western human-rights adaptations. To make this determination, we should (according to Taylor) place a greater focus on functionally equivalent *practices* than on functionally equivalent *ideas*. On the other hand, it is supposed to accommodate diversity in human rights standards through flexibility. Thus, much of the world will agree on human-rights standards not by losing or denying cultural traditions but by creatively adapting cultural traditions to the standards. Taylor anticipates that the agreement will concern not a precisely defined set of Western standards but a loosely defined set of standards, otherwise known as “norms of conduct.”

Like Maritain, Taylor believes that we can easily find a set of norms of conduct to which all cultural traditions have already subscribed. For instance, he states that “we can presumably find in all cultures condemnations of genocide, murder, torture, and slavery, as well as of, say, disappearances and the shooting of innocent demonstrators.”³⁶ Therefore, by using Rawls’s idea of “overlapping consensus,” Taylor contends that we can reach an “unforced consensus” on these norms of conduct while disagreeing on the underlying reasons and detaching human rights from its legal form. In this regard, he makes the following remarks:

What would it mean to come to a genuine, unforced international consensus on human

³⁶ Taylor, “Conditions of an Unforced Consensus on Human Rights,” p. 125.

rights? I suppose it would be something like what John Rawls describes in his *Political Liberalism* as an overlapping consensus. That is, different groups, countries, religious communities, civilizations, while holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to agreement on certain norms that ought to govern human behavior. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms, while disagreeing on why they were the right norms. And we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.

For Taylor, philosophical justifications and legal mechanisms for human rights would have to exist in each society, but they would not necessarily be uniform. These particular justifications and mechanisms would build on the traditions of different societies.³⁷

In contrast to Rawls, whose comprehensive doctrine of overlapping consensus rests on a politically liberal conception of justice, Charles Taylor provides concrete examples of overlapping consensus that reflect traditions. A point in fact: Rawls integrates the idea of human rights into *The Law of Peoples* by referring to the appreciable shift in post-WWII international law, whereas Taylor makes a connection between human rights and modernity and outlines the possibility of “alternative modernities” that can serve as alternative foundations for a generally agreed-upon set of human rights. Exploring how an “unforced consensus” on human rights might take root, Taylor argues that, without sacrificing their traditions, non-Western thinkers have found alternative ways to justify human rights. Human rights, in other words, may rest on foundations different from the foundations that first secured these human rights.

³⁷ Taylor creates different possible clues for general agreement about human-rights matters. If the agreement is on certain norms of conduct, then the main task is to determine whether alternative legal forms or alternative justifications would still be compatible with the consensus or the enforcement regarding norms of conduct. That is, we may keep a norm of conduct, but allow for variations in the institutions and the practices concerning law and law enforcement, or we may keep a legal form but allow for disagreement regarding the justifications underlying the norms contained in the legal form. As he puts it, “Agreement on norms, yes, but a profound sense of difference, of unfamiliarity, in the ideals, the notion of human excellence, the rhetorical tropes and reference points by which these norms become objects of deep commitment for us. To the extent that we can only acknowledge agreement with people who share the whole package and are moved by the same heroes, the consensus will either never come or must be forced.” *Ibid.*, p. 136.

1.4 Substantive Minimalisms: Empirical Universality and Thin Morality

The substantive minimalism of the consensus-based approach suggests that the rationale of human rights should be neutral among divergent cultures so that they constitute the “lowest common denominator” or “thin morality” that can be found among divergent cultures and ideologies. I call them both the empirical-universality model, and thin-morality model.

1.4.1 Empirical Claims and Anthropological Universality

In drawing attention to the charge of ethnocentrism, some scholars try to construct cross-cultural anthropological universals by searching for institutions, rules, or traditions that can be linked to human rights, and affirm that a least common denominator can be found among divergent cultures. Scholars can investigate normative concepts by asking whether any moral norm operates within all cultures. In this context, people who promote universal values assume that a particular value is present in every society or culture. Accordingly, the general goal is the discovery of cross-cultural universals through empirical research. In this manner, promoters of universal values attribute to human rights some sort of objective existence. The values and, in particular, the rights are facts of the world to be discovered. Because the idea of human rights is incompatible with many cultural values, the scope of the least common denominator must be very limited.³⁸ For instance, Alison Renteln illustrates this approach by conducting an extended analysis of various cultures' respective principles of retribution. In order to avoid ethnocentrism, she proposes that the only acceptable human rights standards be those empirically shown to be universal cultural ideas. She hopes to establish universality by finding “universals” in the empirical sense of

³⁸ See Alison Renteln, *International Human Rights: Universalism Versus Relativism*. (Newbury Park, London, New Delhi: Sage Publications, 1990).

their being ubiquitous. Renteln holds that although there is no philosophical basis for asserting the moral primacy of human rights, it may turn out that there are empirical regularities across the world's moral cultures that permit us to argue that certain human rights are respected by all cultures. There may be what she calls "homeomorphic" equivalents to human rights in all moral cultures.³⁹ She argues that a principle of proportional retribution is a plausible candidate for such a cross-cultural universal, and this candidacy, she further argues, reflects a universal standard that prohibits such mass killings as genocide. By contrast, Renteln would have us abandon other rights in the name of cultural authenticity because anthropological research has discovered no cross-cultural ideals buttressing these rights.

1.4.2. Thick and Thin Morality

The second way in which minimalism is substantive is its argument that the values underlying human rights constitute the thin morality attributable to divergent cultures. For example, by borrowing from Walzer's metaphor of "thick" and "thin,"⁴⁰ Joseph Chan claims that there are two views of human rights. The first view represents human rights as a thin morality that is "a set of necessary minimum standards for everyone to lead a life of dignity" and that "attempts to capture those elements in a morality that has the greatest and broadest appeal to people at home *and* abroad."⁴¹ These elements often take a negative, or prohibitory, form: for instance, don't kill, don't torture, and don't abuse power. According to the second view, "human rights are not merely abstract moral principles standing on their own," but substantive issues of "political morality" which are

³⁹ Alison Renteln, "International Human Rights: Universalism Versus Relativism," p. 11.

⁴⁰ Walzer suggests that a comparison of the world's "thick" moral codes might yield a "thin" "set of standards to which all societies can be held...such as rules against murder, deceit, torture, oppression and tyranny" See Michael Walzer, *Thick and Thin: Moral Argument at home and Abroad*. (Notre Dame/ London, University of Notre Dame Press, 1994).

⁴¹ Joseph Chan, "Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate," in Michael Jacobsen and Ole Bruun Richmond (eds), *Human rights and Asian values : contesting national identities and cultural representations in Asia* (Surrey : Curzon,2000), pp.59-74.

“embedded and elaborated in a society with a particular set of circumstances.”⁴² From this view, both the determination of the scope and the prioritization of human rights require a detailed analysis and a detailed evaluation of the thick political morality of the particular societies.⁴³ Chan follows Walzer in situating thick views in internal discourse and thin views in international discourse. For Chan, a thin account of human rights is useful for situations where outsiders condemn human rights violations in a particular society and abroad to fight against human rights abuses by any government. “These people bring to public attention the paradigm cases of human rights violations that have occurred in that society, and condemn the government in minimal, universalistic human rights terms.”⁴⁴ In this context, government-advanced particularistic counter-arguments deserve little attention, as they are often just excuses for the governments’ human rights violations. However, in another situation, a thick view of human rights is needed. They would differ and argue among themselves, using “substantive arguments related to the political morality and concrete circumstances of their own society.”⁴⁵ Therefore, the thick view may allow for cultural interpretations of human rights foundations, scope, and priorities, and can culturally differ from one another.

The variation in thin morality rests on the premise that the content of human rights should command “common assent” in all cultures. Accordingly, a human right is “a tool kit” that individual agents must be free to use as they see fit within the broader frame of cultural and religious beliefs they live by.⁴⁶ International human rights can be meaningful only if they are limited because rights inflation tends to devalue the currency of human rights in contemporary political discourse. This idea of human rights as a tool kit can end up eroding the legitimacy of a defensible core of rights. Michael Ignatieff states the logic

⁴² Ibid, p. 62.

⁴³ Ibid, pp. 61-63.

⁴⁴ Ibid., p. 63

⁴⁵ Ibid., p. 63

⁴⁶ Michael Ignatieff, *Human Rights as Politics and Idolatry*, (ed) by Amy Gutmann (Princeton, Princeton University Press, 2001), p. 57.

of this position with clarity:

The universalist commitment implied by human rights can be compatible with a variety of ways of living only if the universalism implied is self-consciously minimalist. Human rights can command *universal assent* only as a decidedly “thin” theory of what is right, a definition of the minimal conditions for any kind of life at all.⁴⁷

Here is the typology of the human rights minimalism approach

Type of justification	The first level of consensus	The scope of human rights
Substantive	Thin morality	Limited set of “core” rights
minimalism(1)	(Ignatieff, Chan, Booth, Baxi ⁴⁸)	
Substantive	Anthropological universality	The least common denominator
minimalism(2)	(Renteln, Vincent)	
Justificatory	Pragmatic agreement	The UDHR
minimalism(1)	(Maritain, McKeon, Twiss ⁴⁹)	
Justificatory	<i>De facto</i> overlapping consensus	The UDHR
minimalism(2)	(Donnelly, Lindholm ⁵⁰)	

⁴⁷ Ibid., 56

⁴⁸ See Michael Ignatieff, *Human Rights as Politics and Idolatry*; Joseph Chan, “Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate;” Ken Booth, “Three Tyrannies” in T. Dunne and N. Wheeler (eds) *Human Rights in Global Politics* (Cambridge: Cambridge University press, 1999), pp. 31-70; Ken Booth, “Human Wrongs and International Relations,” in *International Affairs*. Vol(71)(1995) , pp. 103-126; Upendra Baxi, “Voices of Suffering, Fragmented Universality, and the Future of Human Rights,” in Burns. H. Weston & Stephen P. Marks (eds), *The Future of International Human Rights* (Inc, Ardsley, NY, Transnational Publishers, 1999), pp. 101-156; and John Vincent, *Human Rights and International Relations* (Cambridge University Press, 1986).

⁴⁹ Jacques Maritain, “Introduction,” in UNESCO (ed) *Human Rights: Comments and Interpretations* (Columbia University Press, 1949), pp. 9-17; Jacques, Maritain, “On the Philosophy of Human Rights,” in UNESCO (ed) *Human Rights: Comments and Interpretations* (Columbia University Press, 1949), pp. 72-77. Richard McKeon, “The Philosophic Bases and Material Circumstances of the Rights of Man,” in UNESCO (ed): *Human Rights: Comments and Interpretations* (Columbia University Press, 1949), pp. 35-46. Sumner Twiss, “Comparative Ethics and International Human Rights Dialogues: A Pragmatic Inquiry” in Lisa Sowle and James Childress, (eds.) *Christian Ethics: Problems and Prospects* (Cleveland, Ohio: Pilgrim Press, 1996), pp. 357-378; Sumner Twiss, “A Constructive Framework for Discussing Confucianism and Human Rights” in De Bary and Tu Weiming (eds.), *Confucianism and Human Rights*:pp.27-53; Sumner Twiss, “Moral Grounds and Plural Cultures,” in *Journal of Religious Ethics* 26(2)(1998), pp.271-283; Sumner Twiss, “Religion and Human Rights: A Comparative Perspective” in Sumner Twiss and Bruce Grelle eds: *Explorations in Global Ethics: Comparative Religious Ethics and Inter-religious Dialogue*(Boulder, CO: Westview Press, 2001), pp:155-175; and Sumner Twiss, “History, Human Rights and Globalization,” in *Journal of Religious Ethics* 32(1)(2004), pp.39-70.

⁵⁰ Donnelly, Jack, *Universal Human Rights in Theory and Practice* (Ithaca, London: Cornell, 2003). Tore Lindholm, “Prospects for Research on the Cultural Legitimacy of Human Rights: The Case of Liberalism and Marxism,” in Abdullahi An-Na’im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Philadelphia University Press, 1992), pp.387-426.

1.5 Consensus and Justification

Undoubtedly, the human rights minimalism approach has some important merits. The approach (1) permits divergent traditions to justify human rights in their own terms, (2) obtains widespread support for human rights from divergent cultures, and (3) can shake off the charge of ethnocentrism because human rights minimalism assumes that the principle of human rights is the neutral concern of all cultures and explicitly identifies the Western type of justification as but one of many possible types of justification.

However, the human rights minimalism approach cannot exhaustively justify human rights. Although something like human rights may receive mention in sacred texts and may acquire depth through religious ideas, the question of whether or not human rights consensus is equivalent to human rights justification remains unanswered.

First of all, the minimalism approach implies either that competing human-rights perspectives force philosophical justifications of human rights to be local or hold that they are entirely unnecessary once a pragmatically negotiated consensus on human rights can be established. However, making human rights justification contingent on pragmatic agreements or on a *de facto* overlapping consensus of conventional moralities is an insufficient foundation for human rights.

More specifically, making human rights justification contingent on only pragmatic agreements is ultimately too shaky a foundation for human rights, because the consensus may represent nothing more than “an accidental, selective, and temporary convergence.”⁵¹ There is no guarantee that the involved parties accept the principles for the right reason (the reason wherein all participants believe that they can accept the

⁵¹ David Little, “Rethinking Human Rights: A Review Essay on Religion, Relativism and Other Matters,” in *Journal of Religious Ethics* 27(1999), pp. 151–177 at 160.

principles as reasonable and fair). Furthermore, this argument, which equates consensus with justification, is an inaccurate description of our moral intuition. The fact that several different religious or philosophical positions converge in supporting a given behavioral prescription does not verify anything about rightness or wrongness, since consensus cannot determine moral standards but simply recognizes it. For instance, we recognize that “torture” or “genocide” violates human rights not because there is a global consensus regarding one or the other issue, but because we acknowledge the nature and the consequences of torture as wrong *per se*. As David Little contends,

...the fact that several different religious or philosophical positions converge in supporting...a prohibition on extra-judicial killing...does not prove anything about the rightness or wrongness of that prescription.... In order to move from “the *is* to the *ought*,” an additional argument would have to be supplied showing in what way shared beliefs are justified beliefs.⁵²

Thus, it is not convincing to suggest that any resolution to the issue of whether genocide is morally wrong or not depends on an international consensus, because this suggestion simply puts the cart before the horse.⁵³ It is not a fact that Christians, Muslims, Buddhists, and secular humanists recognize torture to be a violation of human rights. Each of these belief systems has unique reasons underlying its assertion that torture is wrong.⁵⁴ It is one thing to defend a conception of human rights by arguing that it should be the object of a global consensus; it is another thing to say that a global consensus constitutes the authoritative account of human rights. The assertion that a global consensus justifies the rightness of a set of human rights indeed requires additional argumentation. If we suppose that movement toward a stronger consensus on human rights is desirable, we need to explain why human rights should become a more truly common morality. Unless we provide the reasons on which the consensus is based, we will not know whether it is a

⁵² Ibid., p.159.

⁵³ Ibid., p. 157, 171. David Little contends, “It is unconvincing...to suggest that one must first consult an existing consensus, including an international consensus (however ‘overlapping’ it may be) in order to determine whether violations of the prohibitions against massacre are morally wrong or not!”

⁵⁴ In chapter five, I will propose an alternative to the grounding of human rights in the moral intuition of fear.

genuinely moral consensus or merely the result of lucky circumstances, or a *modus vivendi*, that is, a consensus that would likely evaporate if the circumstances and the interests of the parties were to change.

1.6 Misappropriation of Overlapping Consensus

Some scholars misappropriate the Rawlsian overlapping consensus for the purpose of human rights justification when they view human rights as fixed points located at the *de facto* intersection of conventional moralities.⁵⁵

More specifically, it appears that this approach argues that human rights are acceptable because all specific human rights norms derive from conventional moralities.⁵⁶ For instance, some proponents of this approach may argue that all specific human rights can be derived from a mother notion, to wit, the idea of human dignity, and that this mother notion can be accepted in all cultures. Or as Taylor has claimed, we can easily find norms of conduct among all cultures—norms such as a condemnation of genocide, slavery, or torture. Because the mother notion of these norms of conduct is universal, there can be no objection to the universal application of the related specific rights. Thus, the task of justification is to find a set of core moral principles that all cultures have already recognized. However, I argue that the assumptions in this approach are disputable.

First of all, in chapter two, I will argue that Rawls never claims that the political conception of justice will be compatible with or acceptable to all comprehensive doctrines. And I will argue that his works neither constitute nor reflect a search for *de facto* overlapping consensuses among divergent cultures or conventional moralities. Put in another way, my argument is that Rawls's works are not about basing principles of justice

⁵⁵ Joshua Cohen, "Minimalism About Human Rights: the Best We Can Hope For?" p. 200.

⁵⁶ Eva Brems, "Reconciling Universality and Diversity in International Human Rights Law," in Andras Sajo(ed) *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff Publishers. Leiden/Boston, 2004), pp. 213-230 at 215.

primarily on their compatibility with all reasonable comprehensive doctrines; rather, the works present a framework in which principles of justice exhibit stability in the context of reasonable pluralism and in which people holding comprehensive doctrines “view the political conception of justice as derived from, or congruent with, or at least not in conflict with, their other values.”⁵⁷ For Rawls, a political conception of justice would be “political in the wrong way” if it were to first examine “particular comprehensive doctrines presently existing in society and then tailor itself to win their allegiance.”⁵⁸ Moreover, scholars would dismiss an important fact if they argued that, for Rawls, any predication of an “overlapping consensus” on basic principles of justice is limited to contexts in which liberal democratic ideals are already held in common currency. As Rawls puts it,

What justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.⁵⁹

Furthermore, there is a kind of slipperiness in the move from this mother notion or from norms of conduct to the idea of human rights, and this argument misconceives the relation between values and rights.⁶⁰ Scholars have yet to examine whether or not the consensus that exists on the general level of the mother notion also exists on the more specific level of human rights. Most cultures in the past have systematically used torture and slavery, including European societies. Also, many cultures have widely practiced genocide against powerless peoples. In other words, one needs to present a more rigorous justification for the assertion that a substantive connection exists between such a mother notion and the idea of human rights. Even if there is a consensus on the general level of the mother notion, meanings differ from one another across cultures: the idea of human dignity means one thing in liberal society and can mean something very different in some

⁵⁷ John Rawls, *Political Liberalism*, p. 11.

⁵⁸ Ibid., p. 10.

⁵⁹ John Rawls, 1980, “Kantian Constructivism in Moral Theory,” in *Journal of Philosophy* (77)(1980), pp. 515-72 at 519.

⁶⁰ Joseph Raz, “Human Rights Without Foundations,” p. 4.

other type of society.⁶¹ This point of different meanings is critical: for example, a society that identifies a functionally equivalent human rights instrument on the basis of creative adaptation lends credence to the argument that the idea of human rights is superfluous. Hence, even if people respect the value of human dignity, their definitions of 'human dignity' may greatly differ from one another—to such an extent that some people could argue persuasively that a given definition of 'human rights' undermines respect for the value of human dignity.⁶² Besides, because different societies are differently constituted and entertain different conceptions of what is good, societies need to interpret and implement this mother notion or these norms of conduct according to the societies' respective ways of life. This interpret-and-implement issue raises two difficult questions: How we can ensure that they do not interpret this mother notion or these norms of conduct out of existence? And with what degree of flexibility should a society be able to interpret and implement it? I argue that both to affirm a core notion of human rights and to render the core notion manifest from context to context constitute a more complicated enterprise than the consensus-based advocates initially envisioned. In this regard, grounding human rights on a people's or peoples' acceptance of conventional moralities would place human rights justification on a theoretically and a practically precarious footing. To ground a doctrine of human rights only on the endorsement of conventional moralities is to undermine the doctrine's very ability to stand in judgment of the conventional moralities in question.⁶³ Charles Beitz has clearly critiqued this point:

Human rights are supposed to be universal in the sense that they apply to or may be

⁶¹ I am indebted to professor John Charvet for pointing out the fallacy underlying this predication of human rights on either a mother notion or norms of conduct.

⁶² Eva Brems, "Reconciling Universality and Diversity in International Human Rights Law," p. 215.

⁶³ Kwame Anthony Appiah also points out, "It is not to say that the legitimizing foundation of human rights is the consent of a majority of our species.... I don't think this is a coherent idea because our most fundamental rights restrain majorities, and their consent to the system that embodies those restraints does not entail their consent to the rights themselves—otherwise there would be no need of them" See Kwame Anthony Appiah, "Grounding Human Rights," in *Human Rights As Politics and Idolatry* by Michael Ignatieff with commentaries by K. Anthony Appiah, David Hollinger, Thomas W. Laqueur, and Diane F. Orentlicher, edited by Amy Gutmann. (Princeton: Princeton University Press, 2001), pp. 101-116.

claimed by everyone. To hold, also, that a substantive doctrine of human rights should be consistent with the moral beliefs and values found among the world's conventional moralities is to say something both more and different, potentially subversive, of the doctrine's critical aims.⁶⁴

1.7 Empirical and Normative Universality

To prove that an idea is empirically cross-cultural is to prove only empirical universality, not normative universality. In other words, a convincing demonstration that there is an empirical consensus on the rightness of a set of human rights cannot, itself, ground our belief in this rightness, and it is arguable that the relationship between normative validity and consensus should be reversed. In order to move from "the *is* to the *ought*," we need an additional compelling argument, of which there are two likely candidates: either prove that the idea of human rights evolved under special conditions granting it universal moral validity or present an independent reason proving that the empirically universal rights have prescriptive value. Therefore, rather than question whether or not a given set of human rights is present in each of the world's conventional moralities, we should question whether or not we can rigorously explain why a cultural tradition should support a given set of human rights and why those human rights might sometimes legitimately challenge the cultural tradition's principles⁶⁵. It seems that the human rights minimalism approach can neither rigorously answer this two-fold question nor sufficiently execute the task of justification.

1.8 Justification and Legitimacy: Three Perspectives

In contrast to the human rights minimalism approach mentioned above, in this dissertation I will explore three of the most compelling attempts made in contemporary

⁶⁴ Charles Beitz, "Human Rights as a Common Concern," in *American Political Science Review*, (95)(2001), pp. 269-282 at 274. See also Peter Jones, "Human Rights and Diverse Cultures: Continuity or Discontinuity?," in Simon Caney and Peter Jones, (eds.), *Human Rights and Global Diversity*. (London: Frank Cass, 2001), pp. 27-50.

⁶⁵ Peter Jones, "Human Rights and Diverse Cultures," p.36.

political thought to justify basic human rights. These attempts are to be found in the works of John Rawls, Martha Nussbaum, and Abdullah An-Na'im. Each of these attempts demonstrates the potential for addressing the tension between universal applicability of human rights and cultural diversity. The three approaches central to this study view human rights in legal and political terms and share a common aim in going beyond the natural rights tradition. Moreover, the three approaches argue that pragmatic consensus cannot satisfactorily realize the task of justification regarding the first level of human rights justification.

In chapter two, I will deal with the task of human rights justification from John Rawls's *The Law of Peoples*. In order to avoid the charge that his scheme is "peculiarly liberal or social to the Western tradition" or "politically parochial," Rawls proposes an entirely different grounding for human rights and insists that, after examining the actual role that human rights play in international affairs, we should justify and define any relevant stipulations accordingly. Starting from his political constructivism and harnessing his idea of public reason, Rawls situates his human rights doctrine within his idea of reasonableness (decency), which can function as a standard of legitimacy for international society. Moreover, Rawls argues that a human rights doctrine should be part of an international consensus, and he bases this part-whole organization on the international context's requirements of public reason, which give human rights a freestanding justification that privileges neither any particular comprehensive moral doctrine nor any philosophical conception of human nature. For Rawls, his scheme can eliminate the charge of ethnocentrism and can secure a consensus acceptable to culturally diverse parties seeking reasonable and mutually acceptable terms.

In chapter three, I will consider Martha Nussbaum's capabilities approach to human rights justification. Unlike Rawls's justificatory strategy, whose function is to ground human rights on a defined standard of justice, which every society must achieve if it is to

be minimally just, Nussbaum's capabilities approach takes up an essentialist account of human nature to ground human rights on the notion that all human beings are alike, and argues that we can reach a shared consensus that arises from among different comprehensive doctrines and that reflects on what is common to all human beings. Nussbaum's approach is similar to Rawls's approach in that, rather than rest on any metaphysical conception, Nussbaum's idea of shared consensus represents a type of political liberalism akin to that outlined by Rawls. Commonalities among human beings can constitute a standard of evaluation claiming validity across cultures and, indeed, constitute an alternative to the language of human rights that refers to people's basic entitlements. Responding to the accusation that human rights language is "Western output," Nussbaum proposes that the idea of human capability can take the place of human rights language because the idea of human capability is both independent of any cultural tradition and able to facilitate evaluations of possible human rights violations. Nussbaum's capabilities approach is worthy of consideration for its sensitivity to cultural traditions and its avoidance of metaphysical doctrines. Moreover, as we know, the capabilities approach is not simply a topic bandied about in ivory towers, but a tool widely used by the United Nations Development Program's Human Development Project. We should examine whether her account can provide a better solution than other schemes can and whether the language of capabilities has practical effects that are superior to those of human rights discourse.

In chapter four, I will analyze the cross-cultural dialogue approach of Muslim scholar Abdullah Ahmed An-Na'im. As we know, there is a prolonged debate regarding the relationships between human rights principles and religion. Some participants in this debate may argue that any religion is essentially incompatible with the principles of human rights because the idea of human rights is a secular one. Specifically, freedoms articulated in the UDHR are blasphemous from widely held perspectives of Islam.

However, An-Na'im emphasizes that Muslims can affirm human rights if they are in conformity with Islamic criteria. For him, if international human rights that win considerable support in non-Western countries can gain a global consensus, then the rights merit cultural legitimacy within each cultural context. Islamic societies, where religious beliefs strongly influence general beliefs and general behaviors, can accept the universality of human rights if the societies conclude that the rights are consistent with the prevailing religious beliefs. Accordingly, An-Na'im offers a hermeneutic method for the radical reform of Islamic tenets—a method that, he argues, would enable Muslims to retain their cultural authenticity while consistently adhering to international human rights standards. Moreover, he proposes a cross-cultural dialogue to improve diverse societies' mutual understanding and appreciation of different human-rights justifications. An-Na'im's scheme is a "sectarian" approach to human rights and, thus, does not fit within any type of minimalism, and his scheme differs from minimalist schemes that apply the idea of overlapping consensus to human-rights justification; nevertheless, Rawls characterized An-Na'im's work as a "perfect example of overlapping consensus." We would do well to examine the differences between An-Na'im's justificatory strategy and other consensus-based approaches. Moreover, if Rawls's and Nussbaum's human-rights schemes are to prove convincing to non-liberal societies, we should try to understand the justification and the content of non-liberal societies' relevant schemes.

1.9 Toward a Non-ideal Theory of Human Rights

Although the three approaches central to this study successfully dispose of several predicaments confronted by most conventional human-rights theories, in the current study, I critically examine the relationship between each of these approaches and efforts to ground human rights; moreover, I undertake the construction of a new historical-practical human rights scheme. I will argue that international human rights as a

historically formed international practice that emerged in response to the post WWI horrors.

My scheme draws on these three approaches and also reflects the considerable influence of Judith Shklar's liberalism of fear and Iris Young's critical theory. It should be noted that I offer my own account of human rights justification. Because human rights discourse takes place under politically charged conditions, which are to say the very least-non-ideal circumstances rather than an "ideal" discursive situation, my scheme addresses scenarios in which theory-making practices take place under non-ideal conditions.⁶⁶ In this regard, Jonathan Wolff clearly states that "ideal thinkers who want to have some impact on reality should pay more attention to issues of transition."⁶⁷ Considering in this light, I will provide a non-ideal theory of human rights that can bring us closer to realizing human rights ideals.

My own approach contains three important characteristics: (1) It starts from concrete situations rather than "by way of abstraction"⁶⁸ and, in this regard, follows Iris Young's critical theory.⁶⁹ Neither abstracting from any particularity nor imposing abstractions on

⁶⁶ In *A Theory of Justice*, Rawls makes an important distinction between ideal theory and non-ideal theory. Ideal theory is the project of determining the nature and the aims of the "perfectly just" "well-ordered" society in which "everyone is presumed to act justly and to do his part in upholding just institutions". Accordingly, the aim of ideal theory is to work out the principles of justice that should be met before we would consider a certain society just. It specifies a number of conditions that have to be met before we can rightly consider a certain state of affairs to be just. See John Rawls, *A Theory of Justice* (Harvard University Press, 1999), p. 8, 16,110. However, the ideal theory does not necessarily tell us anything about the route to take to reach the perfect just society. Thus, I will provide a non-ideal theory that identifies the theoretical foundations that, if accepted, can move us closer to the ideals of society.

⁶⁷ Jonathan Wolff, "Fairness, Respect and Egalitarian Ethos," in *Philosophy and Public Affairs* (27)(1998), pp.97-122 at 113. Also, see Michael Phillips, "Reflections on the Transition from Ideal to Non-Ideal Theory," in *Nous*, 19(4)(1985), pp. 551-570; Amartya Sen, "What Do We Want from a Theory of Justice" in *Journal of Philosophy*, 103(5)(2006), pp. 215- 38; Charles Mills, "Ideal Theory as Ideology," in *Hypatia*, 20(3)(2005), pp.165-184; and Ingrid Robeyns, 2007, "Ideal Theory in Theory and Practice," paper presented at the ECPR joint session on "Social Justice: Ideal Theory, Non-Ideal Circumstances," Helsinki, May 2007.

⁶⁸ Rawls argues that abstraction is "a way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots." See John Rawls, *Political Liberalism*, p. 46.

⁶⁹ In contrast to Rawls's methodology, Iris Young uses a method that is explicitly non-ideal and directly focus on what is actually valued by people who are struggling in unjust situations. See Iris Young, "Toward a Critical Theory of Justice," in *Social Theory and Practice*, Vol. 7(3)(1981), pp. 279- 302; *Justice and the Politics of Difference* (Princeton: Princeton University, 1990), Introduction, and Chapter 4; *Inclusion and Democracy* (Oxford University Press, 2000), p.14.

practical human-rights agreements, I promote the type of agreement that people make in concrete, particular situations. (2) Moreover, like Rawls, I argue that the idea of human rights is politically legitimate in a context of pluralism. However, in contrast to this study's three central approaches, in which shared understandings of the reasonableness of claims make a consensus possible, my project does not base consensus on assumptions we already share because such assumptions are unlikely to exist in a non-ideal context. The political legitimacy of human rights in my scheme is based on the norm of dissent in the context of deprivation and domination. I will present a theory of human rights that enables us to notice, assess, and address all of these rights violations.

(3) Like Nussbaum and An-Na'im, I argue that we should take seriously the perspective of non-Western cultures if human rights are going to be appropriate as global normative standards. I also defend the assertion that the best test of the legitimacy of human rights norms is dialogue that represents multiple needs, interests, and perspectives. However, in contrast to Nussbaum and An-Na'im, the cross-cultural dialogue in my scheme rests on the voices of victimized and powerless people. I hope that this bottom-up approach will enable my scheme to avoid the problem of generality and will reveal multiple routes on which debating parties can reach agreement regarding universal human rights. I believe that my approach is descriptively more suitable to the moral reality of universal human rights than are other approaches and presents a normative grounding of human rights that is more compelling than the corresponding groundings of other approaches.

Chapter Two

John Rawls on Human Rights

Political philosophers have long been aware that there is a kind of paradox at the very heart of liberalism. The paradox emerges most starkly if you imagine someone trying to argue in favor of instituting liberal policies in a nation whose culture and beliefs are not liberal. Anyone who wanted to argue that liberal policies should be instituted in such a society would face an intractable problem, for it is an essential tenet of liberalism that political policies should be acceptable in the eyes of the people who are governed by them. If liberalism is the doctrine that you cannot push people around in the name of what you think is right, then liberals themselves are committed to the view that *they* can't push people around in the name of the doctrine that you can't push people around in the name of what you think is right. To put the point more simply, we cannot tyrannize over others in the name of liberalism and still be consistent liberals.

Christine Korsgaard, *Realism and Constructivism in Twentieth-century Moral Philosophy*¹

Introduction

As we know, John Rawls developed a theory of justice that applies to domestic society and that has profoundly transformed the terrain of modern debates about justice since the 1970s. This theory is characterized by two principles of justice that require both respecting civil and political rights and limiting inequalities in the distribution of resources. Though Rawls presented a preliminary sketch about international justice in *A Theory of Justice*,² many advocates of his approach argued that his conception of justice could apply, at the global level, to managing the relations among individuals, states, international organizations, and so forth—provided that the world is a system of social cooperation in which the transnational economy and various institutions affect the fates of individuals everywhere.³ It seemed that the two principles of justice could aptly apply to this “global basic structure” in which the representatives of persons in the global original position would choose

¹ Christine Korsgaard, “Realism and Constructivism in Twentieth-century Moral Philosophy,” in *Journal of Philosophical Research* (2003), pp. 99-122.

² See *A Theory of Justice*, sec. 58, pp. 331-335.

³ For instance, see Charles Beitz, *Political Theory and International Relations* (Princeton University Press, 1979); and Thomas Pogge, *Realizing Rawls* (Cornell University Press, 1989).

principles as citizens would at the domestic level. However, Rawls disagreed that his theory should apply globally in this way. In his *The Law of Peoples*,⁴ he defends a more restrictive theory of international justice that requires respect for a minimal set of human rights but that requires neither constitutional democracy nor limits on socioeconomic inequality. Moreover, regarding such a minimal set of human rights, the scope and the content of his “human rights proper” is very limited and less expansive than the current international human rights convention initiated by the United Nations.

Many admirers of Rawls’s work on liberalism and social justice reject the conception of human rights that he presents in *The Law of Peoples*, and charge that (1) Rawls affirms a set of basic human rights without specifying their grounds, that (2) there is a methodological inconsistency⁵ in his conception of domestic justice, and that (3) his human rights scheme is too thin to reflect either the achievements or the substance of the politics pursued by many human rights movements in the aftermath of WWII.⁶ These critics go on

⁴ I will use the following abbreviations in referring to Rawls’s other writings: “Political Liberalism,” 1996, hereafter *PL*; “Justice as Fairness: A Restatement,” 2001, hereafter *JAFR*; “The Idea of Public Reason Revisited,” 1999, hereafter *TIPRR*.

⁵ See Simone Caney, 2002, “Cosmopolitanism and the Law of Peoples,” in *Journal of Political Philosophy* 10, pp. 95-123; and Thomas Pogge, 2006, “Do Rawls’s Two Theories of Justice Fit Together?” in David Reidy and Rex Martin (eds) *Rawls’s Law of Peoples: A Realistic Utopia?*, pp. 206-225.

⁶ For the critique of the 1993 article as published in *The Oxford Amnesty Lectures* see Darrel Moellendorf, “Constructing the Law of Peoples,” in *Pacific Philosophical Quarterly*, (77)(1996), pp.132-154; Chris Naticchia, “Human Rights, Liberalism and Rawls’s Law of Peoples, in *Social Theory and Practice* (24)(1998), pp. 345-374; Thomas McCarthy, “On the Idea of a Reasonable Law of Peoples” in James Bohman and Mattias Lutz-Bachmann(eds.), *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (The MIT Press, 1997), pp. 201-217; Peter Jones, “International Human Rights: Philosophical or Political,” in Simon Caney, David George and Peter Jones(eds) *National Rights, International Obligations* (Westview Press, 1996), pp.183-204; Thomas Pogge, , “An Egalitarian Law of Peoples,” *Philosophy and Public Affairs*, 23(3)(1994), pp. 195-224; Allen Buchanan, “Justice, Legitimacy, and Human Rights, in Victoria Wolf &, Clark Davion (eds.), *The Idea of a Political Liberalism. Essays on Rawls* (Rowman & Littlefield Publishers Inc, 2000), pp.73-89; Kok-Chor Tan, “Liberal Toleration in Rawls’s Law of Peoples,” in *Ethics*, (108)(1998), pp. 276-295; Fernando Tesón, “ The Rawlsian Theory of International Law,” in *Ethics and International Affairs* (9)(1995), pp.79-99. For the critique of 1999 book version, see, Charles Beitz, “Rawls’s Law of Peoples,” *Ethics*, v. 110(4)(2000), pp. 669-696, and “Human Rights as Common Concerns,” *American Political Science Review*, v. 95(2)(2001), pp.269-282; Allen Buchanan, “Rawls’s Law of Peoples: Rules for a Vanishing Westphalian World,” *Ethics*, v. 110(4)(2000), pp. 697-721; Simon Caney, “ Cosmopolitanism and the Law of Peoples” in *Journal of Political Philosophy* (9)(2001), pp.1-29; Andrew Kuper, “Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons,” *Political Theory*, v. 28(5)(2000), pp. 640-674; John Tasioulas, “From Utopia to Kazanistan: John Rawls and the Law of Peoples, in *Oxford Journal of Legal Studies* (22)(2002), pp. 367-396; Thomas Pogge, “The International Significance of Human Rights,” *Journal of Ethics*, v. 4(1)(2000), pp. 45-69; and “Critical Studies”: Rawls on International Justice” *The philosophical Quarterly* v51(2002), pp. 246-253; Kok-Chor Tan, *Toleration, Diversity and Global Justice* (Penn State University Press, 2000), esp. ch. 4; and “Critical Notice: John Rawls’s The Law of Peoples” *Canadian Journal of Philosophy* (31)(2001), pp.113-132; Cecile Fabre and Daivd Miller, “Justice and Culture: A

to argue that *The Law of Peoples* is, thus, a disappointing concession to cultural relativism and that the work's set of propositions "inflicts a serious blow to human rights activism by weakening the grounds on which nations can press each other."⁷ They argue that it is methodologically inconsistent with his conception of domestic justice. If his methodology had been consistent, then (1) Rawls would have developed a cosmopolitan conception requiring the redistribution of wealth and regulation of the global economy, and (2) a cosmopolitan conception requiring the recognition of a human right to democratic government. For Rawls, however, *The Law of Peoples* as a "realistic utopia" sufficiently expresses liberal toleration as the basic principle of international cooperation, and his theory of human rights is neither distinctive of Western political tradition nor prejudicial to other cultures, and can be the basis of a consensus among different cultures. Starting from his political constructivism and harnessing his idea of public reason, the human rights doctrine fits within his idea of reasonableness (decency) as a standard of legitimacy for international society. Therefore, the restrictions on both the content of human rights and the principle of international justice are determined. Moreover, because the human rights doctrine is part of an international consensus organized by the requirements of public

Review of Rawls, Sen, Nussbaum and O'Neill in *Political Studies Review* (1)(2003), pp. 4-17; Mathra Nussbaum, "Women and The Law of Peoples" *Politics, Philosophy and Economics* (1)(2002), pp. 283-307; Henry Shue, "Rawls and the Outlaws" *Politics, Philosophy and Economics*, (1)(2002), pp. 307-323; Amartya Sen, "Justice across Borders" in Ciaran Cronin and Pablo De Greiff(eds) *Global Justice and Transnational Politics* (The MIT Press, 2002), pp. 37-52. For favourable view, see Chris Brown, "The Construction of a "Realist Utopia:" John Rawls and International Political Theory," in *Review of International Studies*, (28)(2002), pp.5-21; Leif Wenar, "Constructivism and Global Economic Justice" in *Metaphilosophy* (32)(1)(2001), pp 79-94; and "The Legitimacy of Peoples" in Ciaran Cronin and Pablo De Greiff(eds), *Global Justice and Transnational Politics* (The MIT Press, 2002), pp.53-76; "Why Rawls Is Not a Cosmopolitan Egalitarian" in David Reidy and Rex Martin (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell Publishing, 2006), pp. 95-113; Alyssa Bernstein, "Democratization as an Aim of Intervention: Rawls's Law of Peoples on Just War, Human Rights, and Toleration," in ARSP (*Archiv für Rechts und Sozialphilosophie*) Beiheft Nr. 95 (Franz Steiner Verlag, 2003); "A Human Right to Democracy? Legitimacy and Intervention," in Rex Martin and David Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (London: Blackwell Publishing Company, 2006), pp. 278-298; Erin Kelly, "Human Rights as Foreign policy Imperatives," in Deen Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge University Press, 2004), pp.177-192; Stephen Macedo, "What Self-Government Peoples Owe to One Another: Universalism, Diversity and The Law of Peoples", in *Fordham Law Review*, V72(5)(2004), pp.1721-1783; and Joshua Cohen, "Minimalism about Human Rights: The Most We Can Hope For?" in *Journal of Political Philosophy*, (12)(2004), pp 190-213; Amartya Sen, "Open and Closed Impartiality," in Andrew Kuper(ed), *Global Responsibilities: Who Must Deliver on Human Rights?*(Routledge, 2005), pp 53-76; among others.

⁷ Fernando Tesón, 1995, "The Rawlsian Theory of International Law" in *Ethics and International Affairs* v. 9, p. 89.

reason in the international context, it could be said to have a freestanding justification that neither privileges any particular comprehensive moral doctrine nor any philosophical conception of human nature. For Rawls, the human rights principle not only can rid itself of the charge of ethnocentrism, but also can secure a consensus acceptable to parties from different cultures.

Obviously, Rawls's approach merits serious attention in my study, where I rethink human rights relative to a diverse world, because his theory deals mainly with the challenges posed by "the fact of reasonable pluralism." The sensitivity of his theory to the fact of reasonable pluralism surfaces in both the theory's style of justification and the content of the theory's human-rights scheme. In order to avoid the charge that his human rights scheme is "peculiarly liberal or social to the Western tradition" or "politically parochial," Rawls proposes a different justificatory strategy, and insists that we should examine the actual *role* that human rights play in international affairs and that we should then justify and define the rights' nature and content accordingly.

The aim of this chapter is to clarify Rawls's justification of human rights and to take up the critique of his project. Although *The Law of Peoples* covers many important topics related to global justice, I am interested primarily in the account of human rights.

There are three main parts in this chapter. The first part is about his method of justifying human rights. Because the principle of human rights is grounded in a political conception of justice, I begin with a brief sketch of his political conception of both domestic justice and political constructivism, and analyze how his constructive procedure works outward to the international stage and how the rationale of human rights developed from the procedure. The second part is about his justification of and the content of his human rights scheme. I will examine his justification of the human rights principles and clarify the content and the nature of his human rights minimalism. Finally, I will devote myself to an internal critique of Rawls's project. I will argue that although his argument is powerful and

his constructivist approach would be useful for my own approach, there are still some conceptions that merit modification for reasons that are internal to Rawls's constructivism. My argument falls specifically into a four-part categorization: (1) I agree with Rawls that it is necessary to develop a conception of human rights that is not simply Western or ethnocentric and that we should examine the actual *role* that human rights play in the international arena as the point of departure, but I will argue that Rawls's justificatory strategy fails to ground human rights successfully without a cosmopolitan moral ground, which he initially intended to avoid; (2) I argue that his methodology makes it very difficult to establish the universal applicability of human rights; (3) I argue that Rawls's constructivist approach, which he bases on the hypothetical agreement in the original position, places some substantive constraints on real engagement with non-Western perspectives; and (4) I argue that his justificatory minimalism can be preserved without the regressive implications concerning human rights, for reasons that are internal to his political constructivism.

2.1 Justice, Stability, and Legitimacy

Justice as fairness, as a particular conception of justice, is the main theme that penetrates Rawls's theory, despite its shifting focus among three decades. In *A Theory of Justice*, Rawls tried to justify principles of justice "on the basis of the best moral view available and to elaborate how to make it the best approximation to our considered judgments of justice, and what the circumstances are that allow its enforcement."⁸ However, a complete theory of justice cannot do without its stability, because justice and stability are tightly intertwined in his theory. For Rawls, stability refers to the capacity of a conception of justice to generate its own support. Justice is the first virtue of social institutions, but if a conception of justice is unlikely to generate its own support, or lacks

⁸ See TIPRR, p. 179.

stability, then we should confront this fact seriously and consider that “a different conception of justice might be preferred.”⁹ Accordingly, a third of *A Theory of Justice* addresses the problem of political stability, and it is Rawls’s dissatisfaction with his arguments there that led him to reconsider the problem of stability and that, hence, gave birth to the rest of his work.

The reason for Rawls’s dissatisfaction with the originally articulated argument rests on his recognition that “reasonable pluralism” exists, or should exist, in modern free societies.

There can be no comprehensive doctrine that can be the basis for the legitimate exercise of political power in a liberal society. If no comprehensive doctrine will be acceptable to all citizens, no liberal society can maintain stability on the basis of a comprehensive doctrine without the oppressive use of state power.¹⁰ “Justice as fairness,” as it was articulated in *A Theory of Justice*, relied on premises about human nature and about what is valuable. And Rawls drew the idea from a particular comprehensive doctrine, *inter alia*, a form of Kantian liberalism; which was clearly a comprehensive philosophical theory. However, drawn from a particular comprehensive doctrine, *A Theory of Justice* would not be able to provide a stable justification for a liberal society in a pluralistic world because we could not reasonably expect everyone to believe the truth of this comprehensive doctrine. This fact reflects what Rawls calls the “burdens of judgment.”¹¹ Accordingly, he proposes that we should abandon the search for principles whose truth all people can affirm, and should seek principles that all people can accept as providing a “reasonable” basis for ordering the institutions of a society that are shared by all citizens. “Reasonable” means that (1) people accept the burdens of judgment, (2) people are willing to live cooperatively with each other on terms

⁹ *TJ*, p. 145.

¹⁰ See *PL*, pp. 133-8; and *JAFR*, pp. 34-5.

¹¹ Specifically, Rawls argues that we recognize such burdens of judgment as (1) conflicting natures and complexities of evidence, (2) differences relative to the weighing of considerations, (3) both vagueness of concepts and borderline cases, (4) disparate experiences of diverse people, (5) different kinds and different degrees of normative considerations on various sides of an issue, and (6) a tendency of social institutions to force us to privilege some values and to marginalize others. See *PL*, pp. 54-58.

that no one may reasonably reject, and (3) people are willing to accept basic principles and basic institutions as legitimate even at the expense of the people's own interests, provided that others are willing to do so.¹² Therefore, deeply recognizing the shaky argument for stability he made in *A Theory of Justice*, in *Political Liberalism* and other later works, Rawls focused on the construction of the political conception of justice to provide a reasonable basis for a system of social cooperation, and to find the stable conditions that must be satisfied to secure compliance with the conception of justice. That is, Rawls attempts to show "how a conception of legitimacy can in part determine the content of principles of justice."¹³ Burton Dreben clearly critiques this subject:

The first book deals with justice, a much discussed topic; the second book deals with legitimacy, a topic that few contemporary philosophers in the liberal tradition have focused on.... The question of legitimacy ... is a central question for present-day society. And that is what Rawls is really considering.¹⁴

Because the conception of legitimacy¹⁵ is the principle that can determine the content of principles of justice, Rawls in *Political Liberalism* offers an alternative explanation for the stability of a regime:

The point, then, is that the problem of stability is not that of bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions, if necessary, as if the task were to find ways to impose that conception once we are convinced it is sound. Rather, justice as fairness is not reasonable in the first place unless in a suitable way it can win its support by addressing each citizen's reason, as explained within its own framework. Only so is it an account of the legitimacy of political authority as opposed to an account of how those who hold political power can satisfy themselves, and not citizens generally, that they are acting properly. *A conception of political legitimacy aims for a public basis of justification and appeals to public reason*, and hence to free and equal citizens viewed as reasonable and rational.¹⁶

Thus, when Rawls considers the construction of the political conception of justice, an

¹² *PL*, pp. 48-54.

¹³ Allen Buchanan, "Justice, Legitimacy, and Human Rights," in Victoria Davion and Clark Wolf (eds), *The Idea of a Political Liberalism: Essays on Rawls* (Rowman & Littlefield Publishers, 2000), p. 73.

¹⁴ Burton Dreben, "On Rawls and Political Liberalism," in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (Cambridge, Cambridge University Press, 2003), p. 317.

¹⁵ I was persuaded by Leif Wenar's instructive discussions about Rawls's theory of legitimacy. See Leif Wenar, "Constructivism and Global Economic Justice," in *Metaphilosophy* 32(1)(2001), pp. 79-94; "The Legitimacy of Peoples" in Ciaran Cronin and Pablo De Greiff (eds) *Global Justice and Transnational Politics* (The MIT Press, 2002), pp. 53-76, esp. p. 61, and its updated version "Why Rawls Is Not a Cosmopolitan Egalitarian" in David Reidy and Rex Martin (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell Publishing, 2006), pp. 95-113.

¹⁶ *PL*, pp. 143-44, *emphasis added*.

important relationship takes hold between legitimacy and political stability. A legitimate society's stability would be secured if the society's basic structure were effectively ordered by a reasonable political conception of justice that is *affirmed* by free and equal citizens holding different reasonable views. It is a society that reveals itself to be in accordance with citizens' own intuitions about justice, and can be stable for the right reasons. In this regard, *justice as fairness* becomes a theory concerned with the legitimate use of coercive power and with grounding stability for the right reasons. In other words, to show that a conception of justice is stable is to show citizens that the coercive power of the state needs to be justified in some way.¹⁷

The principle of legitimacy can be a fundamental criterion for the basic structure of a liberal society, or of a non-liberal decent society, or of the global basic structure, because coercive powers of enforcement always underlie the establishment of those institutions.¹⁸

The Law of Peoples, developed within *Political Liberalism* and being an extension of a liberal conception of domestic justice to international society, concerns mainly the legitimacy of global basic structure and how members of the basic structure may use coercive power (namely, how the constraints of legitimacy determine the content of principles of international justice). It is clear that we should start from the main ideas of legitimacy and of stability in *Political Liberalism* to look into Rawls's construction of *The Law of Peoples* and his human rights scheme.

2.2. The point of departure: “Justice as Fairness” as a Political Conception of Justice

In *Political Liberalism*, Rawls explicitly interprets three main features of his political conception of justice:¹⁹ First, it is limited in scope to the *basic structure* of a society. Second,

¹⁷ *JAFAR*, pp. 184-6.

¹⁸ Leif Wenar, “The Legitimacy of Peoples,” p. 60; and “Why Rawls Is Not a Cosmopolitan Egalitarian,” pp. 100-2.

¹⁹ *PL*, pp. 11-15, p. 175.

it is a *freestanding* conception, that is, it is presented without reliance on any comprehensive doctrine. Third, it stems from the fundamental conceptions implicit in the *public political culture* of a constitutional regime.

2.2.1 The Basic Structure as Subject

First, it is clear that “justice as fairness” takes the basic structure as the primary subject of political justice.²⁰ For Rawls, the basic structure comprises the major social institutions that “assign fundamental rights and duties and shape the division of advantages that arises through social cooperation.”²¹ The basic structure has a profound effect on all of its members because it includes coercive institutions within which the activities of associations and individuals take place, and citizens’ aspirations and their life plans reflect the profound effects of the basic structure, which—in Rawls’s view—themselves reflect both the “constitutional essentials” (i.e., the general form of government and the fundamental rights of citizens) and the basic matters of social and economic justice.²² Rawls puts the matter simply:

The basic structure of a society is the way in which the main political and social institutions of a society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time. The political constitution within an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production) as well as the family in some form, all belong to the basic structure. The basic structure is the background social framework within which the activities of associations and individuals take place. A just basic structure secures what we may call background justice.²³

Moreover, according to his moral psychology,²⁴ a situation in which citizens grow up under a just basic structure can effectively lead the citizens to acquire the appropriate sense of

²⁰ *JAFR*, p. 10.

²¹ *PL*, p. 258.

²² *PL*, pp. 227-230.

²³ *JAFR*, p. 10.

²⁴ For Rawls, stability involves two questions, one is whether citizens who grow up under just institutions acquire a sense of justice, and the other is whether the conception of justice can be the object of an overlapping consensus that satisfies the principle of legitimacy. See “The Idea of an Overlapping Consensus,”

justice and to be willing to take part in this arrangement; thus, this social cooperative system can assure political stability over time.²⁵ In other words, if just institutions can be well-ordered, the gravest forms of political injustice will eventually disappear.²⁶ Thus, Rawls tries to justify the idea of justice by describing it as the fair terms of social cooperation that people can reasonably apply to the basic structure, and Rawls tries to elaborate on the results that would follow a full realization of this idea. Here, Rawls states,

...we start with the organizing idea of society as a fair system of cooperation and then make it more determinate by spelling out what results when this idea is fully realized (a well-ordered society), and what this idea applies to (the basic structure). We then say how the fair terms of cooperation are specified (by the parties in the original position) and explain how the persons engaged in cooperation are to be regarded (as free and equal citizens).²⁷

Accordingly, the basic structure as the primary subject of political justice means that the structure is the subject that works out the idea of social cooperation. A fair system of social cooperation is a well-ordered society, and this assertion means that a well-ordered society is “effectively regulated and fully realized by a public conception of justice.”²⁸ In order to justify the political conception of justice, Rawls uses the tools of the social contract from *A Theory of Justice*. Rawls uses the original position, with its veil of ignorance, as a “model of representation” that models fair and reasonable conditions under which situated parties can select principles for regulating the basic structure.²⁹ Crucial to this conception is the distinction between social cooperation and “socially coordinated activity.”³⁰ The idea of social cooperation is different from coordination, because social cooperation is realized through rules and procedures that participants accept as appropriate for regulation of their conduct, provided that the rules conform to standards that the participants regard as reasonable and fair. Rawls describes it thus:

²⁵ in *PL*, p. 141.

²⁶ *JAFR*, p. 122, p. 148, p. 196.

²⁷ See *LPb*, pp. 6-7, p. 15, p. 44.

²⁸ *JAFR*, p. 25.

²⁹ *JAFR*, p. 8.

³⁰ For instance, the veil of ignorance does not allow the parties to know individuals’ comprehensive doctrines or individuals’ status in society.

³⁰ *JAFR*, p. 6.

Fair terms of cooperation specify an idea of reciprocity, or mutuality: all who do their part as the recognized rules require are to benefit as specified by a public and agreed-upon standard.³¹

According to this criterion, there can be different kinds of well-ordered societies functioning as systems of social cooperation, each ruled by a different kind of conception of justice. For instance, Rawls sketches a well-ordered society as a system of social cooperation that is unified by “the common-good idea of justice.”³² In this society, publicly accepted principles of social justice rest on a general comprehensive doctrine—moral, religious, or philosophical—to govern the political institutions and the other institutions of society. Moreover, the common-good conception of justice specifies both what is the best human life and how society should be structured to cultivate human flourishing. In contrast to a liberal society, the above-outlined society may not treat persons as free and equal because the rights and the obligations of individual persons derive mainly from the different roles that the persons should play for the accomplishment of the common good. The society is hierarchical but has a decent consultation institution to look after the interests of all members of the society. Moreover, persons can recognize their moral duties when they “accord with the people’s common good idea of justice.”³³ The system of social cooperation ruled by a liberal-democratic conception of justice is but one of many different kinds of well-ordered societies.

Accordingly, a society is well-ordered in the sense that it rests on a common understanding and a common acceptance of principles of justice³⁴ that are effectively realized in the society’s practices and institutions and that can serve as a framework for settling various disputes among citizens.

³¹ Ibid., p. 6.

³² See *LPb*, p. 71, p. 77.

³³ *LPb*, p. 71.

³⁴ Reciprocity or mutuality means not that people benefit equally, but that the standard of validity depends on whether the public accepts it.

2.2.2 Reciprocity, Reasonableness, and Duty of Civility

How are we to justify and to elaborate the public agreed-upon standard that derives from an idea of reciprocity? This issue refers to the second feature of the political conception of justice: the political conception of justice should be *freestanding* and not represent itself as relying on any comprehensive doctrine about the ends of life.

Apparently, the common-good idea of justice is not acceptable in a modern liberal-democratic society. For Rawls, if we recognize the fact of reasonable pluralism that fundamental disagreements in liberal societies are unbridgeable, coupled with the fact that, in a democratic regime, the basic political principles should be acceptable to the people who are obliged to obey the principles, then we will appreciate that only a limited form of liberalism, one that is both detached from its own comprehensive moral doctrine and restricted to the domain of politics, can present itself as a just form to all reasonable people. Hence, Rawls claims that the conception of justice should satisfy the following principle: “political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.”³⁵ This is what he called “the liberal principle of legitimacy.”³⁶

The principle of liberal legitimacy rests on the criterion of reciprocity, which expresses people’s commitment to live cooperatively with other people while acknowledging reasonable disagreement regarding the comprehensive doctrines.³⁷ For Rawls, notwithstanding the fact that diverse comprehensive doctrines circulate among citizens, the fact that stable democratic society can assuredly exist implies that democratic citizens holding different comprehensive doctrines may agree only on a *political* conception of

³⁵ See *JAFR*, p. 41; *PL*, p. 137.

³⁶ *Ibid.*

³⁷ *IPRR*, p. 137.

justice.³⁸ This political conception of justice provides a sufficient, as well as the most reasonable, basis for social cooperation available among citizens in a democratic society.

Thus, the aim of *Political Liberalism* is to provide a solution that restricts liberalism from being an overarching philosophy of life to a political outlook that governs only political life in a stable and just society. Accordingly, “justice as fairness” as a form of political liberalism applies only to the political and social institutions of the basic structure that deals with citizens’ “political relationship.” This is a relationship of persons within the basic structure of society, which is “a structure we enter only by birth and exit only by death.”³⁹ Thus, Rawls set reasoning about justice within the context of a bounded society,⁴⁰ and within “free and equal moral persons” who think of themselves as “citizens living a complete life in an ongoing society.”⁴¹ Rawls states that

...a democratic society, like any political society, is to be viewed as a complete and closed social system. It is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed...in that entry into it is only by birth and exit from it is only by death.... Thus, we are not seen as joining society at the age of reason, as we might join an association, but as being born into a society where we will lead a *complete life*.⁴²

When restricted to the political arena of a pluralistic liberal society, liberalism can be the object of an overlapping consensus among different comprehensive doctrines.

However, as I indicated in chapter one, securing a consensus alone is not sufficient means by which to constitute a *freestanding* justification. Nor is a set of agents’ unanimous acceptance of some set of principles a sufficient reason on which to justify those principles. There is no guarantee that the parties involved will accept the principles for the *right* reason—namely, on the grounds that the principles are reasonable and fair. Thus, an overlapping consensus needs to submit to the requirements of public reason that all members of the society could accept as reasonable and fair. If public reason bolsters an overlapping consensus, then it could be said to have a freestanding justification and to

³⁸ See Rawls *JAFR*, pp. 35-37.

³⁹ *JAFR*, p. 40; *PL*, p. 136.

⁴⁰ I will point out the inadequacy of this assumption in chapter six.

⁴¹ *JAFR*, p. 8, p. 27, p. 40.

⁴² *PL*, p. 41, *emphasis added*.

subsist on different doctrines in a liberal society.

Furthermore, when the members of a society who are playing public roles (such as officials, legislators, or just active citizens) offer justification to one another for their own positions on fundamental political questions,⁴³ then the citizens fulfill their duty of civility toward each other. When the members of the society fulfill their duty of civility, the resulting laws are morally binding on the citizens, and then “the legal enactment expressing the opinion of the majority is considered to be legitimate law.”⁴⁴

2.2.3 Public Political Culture

Because no comprehensive doctrine can provide the content of a legitimate political conception of justice, where do these standards come from? Because the common good idea of justice is not obviously feasible in a modern democratic society, Rawls claims that the fundamental ideas for the construction of a political conception of justice are *implicit* or *latent* in the public political culture of that society. Rawls believes that the appropriate political conceptions of justice should depend on contingent social facts about what he calls the “public political culture” of a society. The public political culture is “made up of the political institutions of a constitutional regime and the public traditions of their interpretations as well as historical texts and documents that have become part of common knowledge.”⁴⁵ From these members’ shared political beliefs, it is possible to constitute a political conception of justice. Rawls states,

...we start...by looking to the public culture itself as the shared fund of implicitly recognized basic ideas and principles. We hope to formulate those ideas and principles clearly enough to be combined into a political conception of justice congenial to our most firmly held convictions.⁴⁶

It is assumed that citizens in a democratic society have at least *implicit* shared

⁴³ See *LPb*, pp. 165-6.

⁴⁴ *TIPRR*, p. 137.

⁴⁵ See *PL*, p. 14; and *JAFR*, pp. 19-20.

⁴⁶ *PL*, p. 8.

understandings⁴⁷ of these ideas that surface in everyday political discussion and in debates about the meaning of constitutional rights. Public political culture is the only available source of doctrine⁴⁸ if we are not able to rely on any comprehensive doctrine. Democratic citizens can accept the political conception of justice drawn from these basic shared understandings. Rawls states,

Justice as fairness aims at uncovering a public basis of justification on questions of political justice given the fact of reasonable pluralism. Since justification is addressed to *others*, it proceeds from what is, or can be, held in common, and so we begin from shared fundamental ideas implicit in the public political culture in the hope of developing from them a political conception that can gain free and reasonable agreement in judgment, this argument being stable in virtue of its gaining the support of an overlapping consensus of reasonable comprehensive doctrines.⁴⁹

If a political conception of justice stands free from all comprehensive doctrines, it is possible for it to be acceptable to all reasonable citizens, and to serve as the basis for legitimate coercion. It is possible also for such principles to order society stably for the right reason, because they can be the focus of an overlapping consensus.⁵⁰

2.3 Methodology: Rawls's Constructive Approach

Insofar as Rawls profoundly recognizes the fact of reasonable pluralism, Rawls's constructivist procedure of the political conception of justice does not begin from "universal principles having authority in all cases," so that the constructivist procedure is not "suitable as fully general principles."⁵¹ Moreover, he seeks to avoid "claims to universal truth or about the essential nature and identity of persons" and stresses that the political characteristics of justice as fairness start from fundamental ideals implicit or latent in the public political culture within a liberal tradition. For a constructivist liberal theory to be

⁴⁷ Examples of these shared ideas include the propositions "persons are conceived as free and equal citizens," society is conceived as "a fair scheme of cooperation" and "well-ordered," etc. See *TIPRR*, p. 143.

⁴⁸ Leif Wenar's articles are the first to explain the importance of public culture in Rawls's *The Law of Peoples*. See Leif Wenar, "Constructivism and Global Economic Justice," "The Legitimacy of Peoples," and its updated version "Why Rawls Is Not a Cosmopolitan Egalitarian."

⁴⁹ *PL*, pp. 100-101, *emphasis added*.

⁵⁰ *PL*, pp. 38-40, pp. 132-49.

⁵¹ *LPa*, p. 46.

considered “universal in its reach,” Rawls claims that it must be able to extend itself in several ways.⁵² Departure from domestic justice, when it is completed, then “works *outward* to the law of peoples and *inward* to local justice.”⁵³ So Rawls argues that, to develop a complete theory of justice, including a set of international principles of justice, the constructivist procedure should adapt to the subject and should develop according to a reasonable procedure for each kind of subject.⁵⁴ Hence, his constructivist method must be applied a number of times to a number of different subjects beyond the basic structure of a single closed society. In this regard, Rawls notes,

Typically, a constructivist doctrine proceeds by taking up a series of subjects, starting, say, with principles of political justice for the basic structure of a closed and self-contained democratic society. That done, it then works forward to principles for the claims of future generations, outward to principles for the law of peoples, and inward to principles for special social questions. Each time the constructivist procedure is modified to fit the *subject* in question.⁵⁵

Therefore, a complete theory of justice must be constructed on the basis of *different* subjects—domestic, international, and local—so that representatives in similar, but distinct, original positions negotiate fair terms.⁵⁶ The flexibility of the design of the original position reveals itself at “each step of the procedure by its being modifiable to fit the subject in question.”⁵⁷ Thus the conception that justice is “universal in reach” means that it can yield principles for all politically relevant subjects. Rawls explores this point in some depth:

...thus, a constructivist liberal doctrine is universal in its reach once it is extended to give principles for all politically relevant subjects, including a law of peoples for the most comprehensive subject, the political society of peoples. Its authority rests on the principles and conceptions of practical reason, but always on these as suitably *adjusted* to apply to different subjects as they arise in sequence; and always assuming as well that these principles are endorsed on due reflection by the reasonable agents to whom the corresponding principles apply.⁵⁸

⁵² See *LPb*, p. 85.

⁵³ *JAFR*, p. 11.

⁵⁴ *LPa*, p. 46.

⁵⁵ *Ibid*, p. 46.

⁵⁶ Many critics have used different terms for this construction. For instance, for Allen Buchanan, it is “The Duality of Justice thesis;” for Simone Caney, it is a “domain restriction.”

⁵⁷ *LPb*, p. 86.

⁵⁸ *LP a*, p. 46; *emphasis added*.

In so doing, Rawls's constructive method illustrates the moral privilege of domestic justice over other levels of justice,⁵⁹ and Rawls must postpone the question of justice between peoples until he fully considers political justice for a closed and self-contained society.⁶⁰

If the above explanation of Rawls's idea is sound, then we can have a clearer background for understanding both Rawls's outlook on international justice and the rationale of human rights in his *The Law of Peoples*.

2.4 A Law of Peoples as a Result of the Outward Political Conception of Justice

According to political constructivism, the law of peoples stems from Rawls's extension of his political conception of justice to the international stage. In contrast with the constructivist procedure in domestic justice, the construction of a law of peoples needs to deal with the following questions: (1) What is the *subject* of international justice? (2) How can we justify the political conception that international justice has a *freestanding* status? And (3) what are the fundamental ideas that can be seen as *implicit* in the international political culture for the construction of international justice? This section explores questions 1 and 3, and presents a reason for which “a people,” not “a person,” is an agent of justice in Rawls’s scheme. The next section will analyze question 2, and will deal with the justification for the construction of a law of peoples.

2.4.1 The Legitimacy of Global Basic Structure

Following the constructive procedure, the basic structure of international society is the subject of justice when “justice as fairness” works its way *outward* to the international stage.

⁵⁹ Many cosmopolitans criticize Rawls for not aptly explaining the primacy of peoples and for wrongly assuming that the question of domestic justice has priority over the question of international justice. I think the possible answer for Rawls is that his political constructivism inevitably determines this moral priority.

⁶⁰ *PL*, p. 41.

But what does this basic structure look like? For Rawls, there are three ways of understanding the construction of global basic structure and moral agents in the global normative order: (1) the global society is a society of individuals (cosmopolitan view), (2) the global society is a society of states (classical realist view), and (3) the global society is a society of peoples. Rawls affirms the view that we should think of the global society as a society of peoples, not a society of individuals.⁶¹

Let us recall that the third feature of the political conception of justice is that it rests on certain fundamental ideas viewed as implicit in the public political culture. Analogously, if a law of peoples is a freestanding view without reliance on any comprehensive doctrine, Rawls needs to find ideas latent in the global public culture that can be reasonably acceptable to all. However, if we look for the shared ideas implicit in the global public political culture to find the content for a conception of international justice, there is no idea within global public political culture emphasizing that citizens of different countries ought to be treated as free and equal in a single worldwide scheme of social cooperation,⁶² but we clearly find that the global public political culture contains ideas concerning how *states*, not *persons*, ought to relate to one another.⁶³ Accordingly, there is no global basic structure that, functioning as a fair scheme of worldwide cooperation among “citizens of the world,” is regarded as free and equal, but indeed we find a state system in which international political institutions regard states (peoples), not individuals, as free and equal. That is, the agent of justice is not a person but an entire domestic society (a people) represented as a *basic structure*.⁶⁴ In this regard, Rawls cannot construct a global original position that, by veiling

⁶¹ *LPb*, p. 61.

⁶² See Leif Wenar, “The Legitimacy of Peoples,” pp. 62-65.

⁶³ Many critics disagree with this argument. For instance, Charles Beitz (2000) argues that institutions such as the European Union and the International Criminal Court tend to recognize individuals as fundamental units of international law. See Charles Beitz, “Rawls’s Law of Peoples,” in *Ethics*, 110 (4)(2000), pp. 669-696. See also Fernando Tesón, “The Rawlsian Theory of International Law” in *Ethics and International Affairs* 9(1995), pp. 79-99.

⁶⁴ See Donald Moon, “Rawls and Habermas on Public Reason: Human Rights and Global Justice,” in *Annual Review of Political Science* 6(2003), p. 265.

morally arbitrary features such as state boundaries, creates “world citizens.”⁶⁵

But why is the focus on peoples⁶⁶ rather than on states? Following the traditional view of the state, Rawls treats states as rational, self-interested collective agents that possess absolute internal autonomy and that aim mainly for the acquisition of military, economic, and political power over other states. The term ‘peoples’, then, is meant to emphasize three features that are not present in states as traditionally conceived, and to highlight peoples’ moral character.⁶⁷ Peoples respond not only to their prudent or rational interests, the so-called “reasons of state,”⁶⁸ but also to principled reasons for actions. Thus, the idea of limited internal autonomy belongs to Rawls’s concept of peoples. In accord with the recent shift in international law and practice, Rawls tries to distinguish his view from the traditional notion of sovereignty established in 1648 at the Peace of Westphalia, and tries to deny states the traditional rights to wage war and to maintain unrestricted internal autonomy. Rawls declares,

Since World War II international law has become stricter. It tends to limit a state’s right to wage war to instances of self-defense (also in the interests of collective security), and also tends to restrict a state’s right to internal sovereignty. The role of human rights connects most obviously with the latter changes as part of the effort to provide a suitable definition of, and limits on, a government’s internal sovereignty. At this point I leave aside the many difficulties of interpreting these rights and limits, and take their general meaning and tendency as clear enough. What is essential is that our elaboration of the *Law of Peoples* should fit these two basic changes, and give them a suitable rationale.⁶⁹

Moreover, an extension of political-justice principles to the international domain creates a law of peoples where a just, well-ordered society becomes a just society of well-ordered societies. That is, the extension is a move from the liberal conception of political justice about the basic structure of a well-ordered, closed, and self-contained society to the global

⁶⁵ See Leif Wenar, “Why Rawls Is Not a Cosmopolitan Egalitarian,” p. 103.

⁶⁶ In addition to liberal peoples, Rawls divides the world’s regimes into four other ideal-types: (1) non-liberal decent people who follow a common-good conception of justice, honor human rights, and have peaceful relations with their neighbors; (2) benevolent absolutists that observe basic human rights but do not permit their citizens a meaningful role in political processes; (3) societies that, burdened by unfavorable conditions, are neither expansive nor aggressive but cannot become well-ordered by their own efforts; and (4) outlaw states that wage wars of aggression and violate the human rights of their own subjects. *LPb*, p. 4.

⁶⁷ See *LPb*, pp. 23-7.

⁶⁸ *LPb*, p. 27.

⁶⁹ *Ibid.*, p. 27.

basic structure *among* well-ordered societies. In this move, the law of peoples applies mainly to the *mutual relations* among well-ordered peoples, specifies the rights and the duties of different societies, and provides principles for the regulation of interactions and the mediation of conflicts. In this regard, “maintaining mutual respect among peoples constitutes an essential part of the basic structure.”⁷⁰ Consequently, a just world order is best seen as a society of well-ordered peoples (a society of societies), and a law of peoples is a theory of just foreign policy *per se*, rather than a theory of global justice.⁷¹

2.4.2 Decency and the Common-good Idea of Justice

Let us now recall the second feature of the political conception of justice: the conception has a *freestanding* justification, and the function of political liberalism is to show that liberalism (1) is a deeply tolerant political outlook embraced by followers of different philosophies of life and (2) can be the focus of overlapping consensus by the requirement of public reason.

Analogously, in the construction of a law of peoples, the political conception of justice among peoples must rest on public reason’s conception of what is reasonable, to wit, stability for the right reason rather than a *modus vivendi*. Because a law of peoples is an *extension* of the liberal principle of justice outward to relations among societies, the construction of a law of peoples needs to show that different societies can embrace the law. Thus, the question is this: what principles are to govern the relations among different peoples around the world?

Rawls’s liberal principle of legitimacy specifies the proper functioning of coercive power within a liberal society. When extended outward, to international society, this principle of legitimacy needs to modify the use of coercive power because the constructivist procedure

⁷⁰ *LPb*, p. 62.

⁷¹ Rawls states, “I emphasize that, in developing the *Law of Peoples* within a liberal conception of justice, we work out the ideals and principles of the foreign policy of a reasonably just liberal people.” *LPb*, pp. 9-10.

changes so that it can “fit the subject in question.” The political conception of justice that rests on public reason is one that all members of a society or societies could accept as reasonable and fair. Thus, what the requirement of public reason implies regarding international justice is that societies aim to reach agreement with one another and then construct common standards of justice together. Standards of international justice should represent the terms of both a common concern over an issue and a common commitment among societies to find mutually acceptable terms of ordering their relations regarding the issue.

Because reasonable pluralism in the international realm is more obvious than ever, not all institutions can reasonably be liberal. Therefore, liberal peoples should constrain their aspirations for a universal liberalism, and should avoid coercively holding non-liberal peoples to liberal standards.

For Rawls, liberal domestic society ought to be governed justly, but a liberal just society ought to allow space for not just government elsewhere. Otherwise, a law of peoples will be hostile toward other societies.⁷² Non-liberal societies’ public orders are regarded as legitimate in the eyes of these societies’ citizens,⁷³ and the societies’ basic structure indeed reflects their own public political culture. If a law of peoples requires non-liberal societies to comply with the liberal principles of justice and insists on the idea that citizens are or should be free and equal (an idea that is anathema to non-liberal peoples), then the law of peoples would not only violate the liberal principle of legitimacy, but also fail to be a deeply tolerant political outlook.⁷⁴ But because it would be wrong to support a government that is too unjust, it is important to clarify the criterion of legitimacy in order to recognize which

⁷² According to Rawls, cosmopolitan theory wrongly assumes that only liberal democracies are acceptable and that all non-liberal societies are unacceptable. But, according to Rawls, this assumption will lead both directly to a foreign policy that seeks to shape all non-liberal societies into liberal societies and would contradict the liberal principle of legitimacy. See *LPb*, pp. 82-3.

⁷³ See *JAFR*, p.199.

⁷⁴ For Rawls, if we do not implement toleration and respect to non-liberal societies, we not only violate the liberal principle of legitimacy, but also “may wound the self-respect of decent non-liberal peoples as *peoples*, as well as their *individual members*, and may lead to great bitterness and resentment.” *LPb*, p. 61.

society is decent enough to be a well-ordered partner. Thus, two new questions arise: What coercive principles can legitimately support relations among members of a society of peoples? And how do we determine which peoples qualify as partners-in-good-standing in international society?

2.4.3 The Criterion of Legitimacy and the International Duty of Civility

Because not all members of a society of peoples are liberal, and because it is clear that a shared *liberal* political culture does not exist at the international level, liberal peoples must find some reasonable terms and justification that are acceptable to non-liberal peoples. In this regard, Rawls develops the normative concept of a “decent people,” which designates a type of society that meets a minimal standard of legitimacy but that does not meet the standards of the principles of justice for a liberal society. Rawls suggests that we should relax the idea of reasonableness and replace it with the idea of decency, which would henceforth function as the requirement of *membership* in international society. Only by doing so can we incorporate non-liberal societies into a society of peoples.⁷⁵ Rawls claims that a decent people satisfies the criteria of legitimacy because the people has a fair system of social cooperation in the sense that the system rests on a common-good conception of justice, which the non-liberal society effectively realizes in its practices and institutions, and which can serve as a framework in which the non-liberal society settles disputes among its citizens. By this idea of decency, Rawls attempts to portray a political structure of a society that lacks the liberal-democratic notion of citizenship but that is acceptable to a liberal people. Rawls invents a particular decent society—Kazanistan—as an example of a Muslim society that has no separation of church and state but that meets the criteria of decency. The idea of decency, set as a minimal idea of legitimacy, lays out three important criteria: (1)

⁷⁵ The normative idea of decency is central to a law of peoples in the same way in which the normative idea of reasonableness is central to political liberalism, notwithstanding the idea of decency’s relative weakness. See *LPb*, p. 67.

a decent society must honor human rights; (2) it must impose *bona fide* legal duties and obligations on all persons within the territory; (3) members who administer the legal system must believe that it is guided by a common-good idea of justice.⁷⁶

Because the assertion that a non-liberal society can be a fair system of social cooperation indeed fits within the criteria of legitimacy, there is no reason for a liberal people not to accept a non-liberal society as a member in good standing, though it is still unjust from a liberal point of view. So Rawls contends that non-liberal peoples have a *moral status* justifying their role in international society and that liberals must respect and tolerate them even though such peoples are illiberal and hierarchical. If liberal societies insist that all well-ordered partners be liberal and that a just global society must be among global citizens regarded as free and equal, then the construction of a law of peoples will exclude some reasonable non-liberal peoples who achieve the minimum of decency but whose comprehensive doctrines do not conceive of citizens as free and equal.

On the other hand, analogous to domestic justice, a political conception of justice by way of public reason is one that all members of the societies in question could accept as reasonable and fair; thus, standards of international justice should represent the terms of the common concern and commitment among societies to find mutually acceptable terms of ordering their relations. If the members of a society of peoples play public roles on the international stage and offer justification to one another on fundamental political questions, then the members fulfill their “constitutive relationship of civility” toward one another.⁷⁷

Following the constructivist approach with modifications that contrast with the construction of domestic justice, in the end, Rawls defends his claim that a law of peoples is acceptable to both liberal peoples and decent non-liberal peoples and that the law

⁷⁶ *LPb*, pp. 65-7.

⁷⁷ I am indebted to professor Alyssa Bernstein for pointing out this issue to me, and I was persuaded by her paper “Democratization as an Aim of Intervention: Rawls’s Law of Peoples on Just War, Human Rights, and Toleration,” presented at the Special Session on John Rawls’s The Law of Peoples in the Politics of Human Rights Workshop, World Congress of the IVR, Lund, Sweden, 2003.

comprises normative principles for international society.⁷⁸

2.5 Universal in Its Reach

Regarding methodology, there are two stages for the construction of a law of peoples. The first one is the construction of an ideal theory in which liberal and decent peoples assume a set of principles for the governance of international society. The principle of honoring human rights falls under this first stage. Moreover, there are two steps in this stage. One is the construction that applies to relations among liberal peoples. It needs to justify the international principles to which the representatives of liberal societies agree in the original position. At this stage, liberal peoples agree on the principles that all peoples should honor but that they do not yet agree on regarding the principles' specific substance. For instance, the peoples agree on the assertion that "people are to honor human rights" but do not agree on a specific scheme of human rights. Subsequently, liberal peoples specify the content of human rights only when they ascertain both the idea of decency and the qualification of a decent people. The other step in the first stage is to expand relations to include certain well-ordered non-liberal peoples. It aims to show how and why representatives of certain non-liberal but well-ordered societies would also endorse the same set of principles. That is to say, a law of peoples tries to achieve political stability for the right reason, and not stability as a *modus vivendi*. Thus, in the second part of the ideal theory, Rawls extends a law of peoples to include decent peoples and argues that they

⁷⁸ Those principles are as follows:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime. See *LPb*, p. 37.

would agree to the same law of peoples under fair and reasonable conditions. At this first stage, the scheme of human rights establishes itself. In order to include decent people, the scheme of human rights cannot include all of those rights typically found in liberal democracies; otherwise the scheme, as a whole, might be unacceptable to some non-liberal peoples. By contrast, the scheme can show that persons would recognize and enforce human rights within a decent non-liberal society and that human rights are not peculiar to the Western tradition.

Moreover, liberal and decent peoples would agree on a foreign policy toward outlaw states. Recall that the conception of justice is “universal in reach,” which means that it can extend principles to all politically relevant subjects. It means that the conception’s political (moral) force can extend to all societies whether or not they are accepted locally. On the one hand, because liberal and decent peoples—under fair and reasonable conditions—agree on a law of peoples as a set of principles for the governance of international society, liberal and decent peoples can justly exclude outlaw states, either by excluding them from membership in the society of peoples or even by excluding them from the original position.

Moreover, because outlaw states are aggressive and dangerous,⁷⁹ which mean that they cannot be part of an international system of social cooperation, liberal and decent peoples can justly intervene in such societies with the aim of bringing these societies up to the level of legitimacy.⁸⁰ Therefore, the Law of Peoples establishes the universal applicability of human rights to outlaw states. Rawls comments on this point:

As we have worked out the Law of Peoples for liberal and decent peoples, these peoples simply do not tolerate outlaws. This refusal to tolerate those states is a consequence of liberalism and decency. If the political conception of political liberalism is sound, and if the steps we have taken in developing the *Law of Peoples* are also sound, then liberal and decent peoples have the right, under the *Law of Peoples*, not to tolerate outlaw states.⁸¹

⁷⁹ See *LPb*, p. 81.

⁸⁰ I would argue that inadequacy plagues this argument. See below section 2.8.2.

⁸¹ *LPb*, p. 81.

Accordingly, in the second stage, the theory needs to deal with the non-ideal conditions of the world, with the world's great injustices and widespread social evils. Two instances of injustice are the problem of noncompliance, as where outlaw societies refuse to comply with a reasonable law of peoples, and the problem of unfavorable conditions, where burdened societies lack the basic resources to become well-ordered. Rawls treats these issues as the non-ideal part of his theory.

2.6 The Nature of Human Rights and the Idea of Social Cooperation

If the above interpretation is sound, then we have a clearer picture with regard to the nature and the content of human rights in a law of peoples. So understood, human rights are declared "intrinsic to the *Law of Peoples*" in three ways: (1) they are necessary to establish the decency of a people's institutional arrangements; (2) they are sufficient to "exclude justified and forceful intervention" by others, and (3) their political (moral) effect is retained everywhere whether they are bolstered locally or not.⁸²

To begin with, liberal peoples and decent peoples agree on a law of peoples as a set of principles for the governance of international society. Among these principles, is peoples' honoring of human rights. Human rights principles are embedded in an idea of well-ordering in which the fulfillment of human rights is a prerequisite of any system of social cooperation.⁸³ Any well-ordered society as a fair system of social cooperation must respect basic human rights, and any human-rights violation is "equally condemned by both reasonable liberal and decent hierarchical peoples."⁸⁴ Without the protection of these basic

⁸² *LPb*, pp. 79-81.

⁸³ Charles Beitz criticizes Rawls for specifying neither why institutions should be held to human-rights standards nor exactly how he arrives at the list he presents. I accept Beitz's critique and elaborate it in the next section, but, as I see it, Rawls's theory suggests that this list of rights specifies basic interests that must be protected for peoples as willing participants in a form of life. See Charles Beitz, "Rawls's Law of Peoples," p. 686.

⁸⁴ *LPb*, p. 79.

rights, the social practice of the society would not in any sense be cooperative but would depend on mere domination or force. In this regard, the respect for human rights is one of the conditions that a law of peoples imposes on any political regime if the law is to recognize the regime as a member in good standing of a just political society of peoples.⁸⁵ Persons can also appeal to the law in assessing the justice of the regime that governs their own society.

Moreover, in order to accommodate a reasonable range of disagreement across cultures and nations, a conception of minimum decency embracing human rights should be capable of securing an agreement among the followers of various conceptions of justice. Thus, peoples cannot correctly reject human rights as peculiarly liberal or special to the Western tradition, because the rights have a *freestanding* justification that eliminates the charge of ethnocentrism. And because peoples cannot agree on any underlying concept like human dignity or on principles of natural law as such, the best that the peoples can do is to agree on principles of fair social cooperation. Seen in this light, human rights acquire their justification only insofar as they result from a constructivist procedure of justification, rather than from human nature or God. Rawls states,

These rights do not depend upon any particular comprehensive religious doctrine or philosophical doctrine of human nature. *The Law of Peoples* does not say, for example, that human beings are moral persons and have equal worth in the eyes of God, or that they have certain moral and intellectual powers that entitle them to these rights. To argue in any of these ways would involve religious and philosophical doctrines that many decent hierarchical people might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures.⁸⁶

Because liberal societies and decent societies can justify a human-rights scheme for their own public reasons, there is no need for a single agreed-upon justification of human rights. On the one hand, they can be a proper subset of a broader class of rights that citizens possess in liberal democracies. On the other hand, a decent society would affirm the same

⁸⁵ *LPa*, p. 78.

⁸⁶ *LPb*, p. 68.

rights on the basis of a common-good conception of justice. Accordingly, a society's fulfillment of human rights is *sufficient* to exclude justified and forceful intervention by other peoples. Persons can appeal to these principles in reasoning about the moral justification of intervention regarding political affairs of another society. The more rights a country acknowledges for its citizens, the less interference is justified from abroad. A society's fulfillment of human rights suffices to give it immunity from outside interference even if the society is not liberal. Otherwise, just societies have reasons to interfere with unjust societies in order to protect basic human rights. In the extreme case, just societies may even go to war in order to protect people from their own governments. In this view, the justification for interference with the autonomy of states becomes the primary purpose for enforcing principles such as human rights.

Finally, the human rights principle is part of the accepted standards within global political culture that constrain peoples in their relations with other peoples. The human rights principle can accommodate reasonable pluralism regarding principles of domestic justice without abandoning the idea that there could be some universally applicable normative principles of international justice. Moreover, the human rights principle sets up the threshold of toleration in a reasonable society of peoples. That is, respect for human rights is the standard for demarcating the scope of acceptable pluralism in international society. The conception of human rights functions as a minimum threshold below which an offending society would no longer have good standing in the international order of cooperating societies. In this regard, liberal and decent peoples can use a human rights doctrine, as part of a minimum of decency, to criticize the principles of domestic justice if those societies do not satisfy human rights. Because outlaw states have a system of institutions, and because all such systems are required to satisfy the minimum standards of well-orderedness, if outlaw states violate this minimal list of human rights, liberal and decent peoples should not tolerate the outlaw states and should subject the outlaw states to

condemnation, sanction, and even military intervention. Therefore, the political force of human rights extends to all societies, and is binding on all peoples and societies, including outlaw states. As Rawls points out,

Human rights honored by both liberal and decent hierarchical regimes should be understood as universal rights in the following sense: they are intrinsic to the law of the peoples and have a political (moral) effect whether or not they are supported locally. That is, their political (moral) force extends to all societies and they are binding on all peoples and societies, including outlaw states.⁸⁷

Thus, human rights in this sense are universal in reach, applying equally to people who live in societies that are not well-ordered, regardless of whether all states have legally committed themselves to respect and secure these rights.

2.7 The Content of Human Rights

In order to obtain the widest possible agreement among liberal and decent peoples on human rights, and to show that they are not “politically parochial,” Rawls narrows the content of human rights. For him, the content of human rights includes only those rights that (1) can be recognized by liberal and decent peoples, and (2) whose violations would call for intervention.⁸⁸ Therefore, Rawls designates “human rights proper” as a “special class of urgent rights,” and it is smaller in scope than the liberal-democratic notion of citizenship. In section 8.2.2.a, Rawls claims this schedule of rights includes,

The right to life (to the means of subsistence and security), to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property), and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).⁸⁹

Although Rawls does not explicate all of the human rights in his list and starts his list with

⁸⁷ *LPb*, pp. 80-1

⁸⁸ James Nickel claims that these two standards are (1) wide acceptability and (2) role-related importance testing. See James Nickel, “Are Human Rights Mainly Implemented by Intervention?” in Rex Martin and David A Reidy (eds.), *Rawls’s Law of Peoples: A Realistic Utopia?* (London: Blackwell Publishing Company, 2006), p. 266.

⁸⁹ *LPb*, p. 65.

the word “among human rights,”⁹⁰ it is clear that the list of human rights outlined above omits several rights identified in the UDHR and in the various covenants initiated by the UN. For instance, Rawls affirms only the content of human rights specified in Article 3-18 of the UDHR, and thus excludes the freedoms of opinion, expression, and the press (Article 19), the freedoms of assembly and association (Article 20), the right to political participation (Article 21), the right to education (Article 26), the right to health and social services (Article 25), and so forth.

Rawls rejects Article 1, which specifies that “human beings are born free and equal in dignity,” because Article 1 fully described “liberal aspirations.” Moreover, he rejects Article 2 regarding the right against discrimination by governments, because there is no shared idea of persons as free and equal in the international public political culture, and a decent hierarchical society’s conception of persons is not the same as the liberal idea that persons have equal basic rights.⁹¹ For Rawls, members of many non-liberal decent societies function in public life as responsible and cooperating members of different groups, and these societies are “associationist in form.”⁹² If a law of peoples included liberal principles for respecting persons as free and equal citizens, then decent peoples would certainly not accept “human rights proper”.

Furthermore, “human rights proper” forbids religious persecution, and liberty of conscience is relatively narrow by the common standard because he allows that a decent society may “deny full and equal liberty of conscience” and that “the established religion may have various privileges.”⁹³ Besides, “human rights proper” does not include the freedoms traditionally associated with political participation—speech, press, association,

⁹⁰ In section 10, Rawls affirms the content of “human rights proper” specified in Article 3-18 of the *Universal Declaration of Human Rights*. See Alyssa Bernstein, “A Human Right to Democracy? Legitimacy and Intervention,” in Rex Martin and David Reidy (eds), *Rawls’s Law of Peoples: A Realistic Utopia?* (London: Blackwell Publishing Company, 2006), pp. 278-298; and David Reidy, “Political Authority and Human Rights” in Rex Martin and David Reidy (eds), *Rawls’s Law of Peoples: A Realistic Utopia?* (London: Blackwell Publishing Company, 2006), pp. 169-189.

⁹¹ *LPb*, p. 66.

⁹² *LPb*, p. 64.

⁹³ *LPb*, p. 74.

and assembly—except the right to make one's voice known to sincere officials. This narrowness is because such rights may not be acceptable to members of societies whose public cultures do not already reflect the values of democracy. Moreover, following Thomas Scanlon, Rawls contends that we must not interpret the idea of basic human rights in a way that logically presupposes or requires democratic governmental institutions.⁹⁴ The list of human rights plays a special role in Rawls's conception of international justice by restricting “the justifying reason for war and its conduct” and by specifying “limits to a regime's internal autonomy,” so “human rights proper” excludes the voting right altogether. Finally, “human rights proper” excludes many of the social and economic rights specified in Articles 22-27, except the right to subsistence and to personal security, because the excluded rights “appear to presuppose specific kinds of institutions.”⁹⁵

In sum, beginning from a liberal domestic conception of justice, Rawls attempts to formulate a notion of minimum decency that is acceptable to persons in other societies as well. Rawls formulated human rights principles as part of the conception of decency and as an important aspect of the international extension of the domestic conception of liberal justice. On the one hand, this conception of decency is a standard for membership in a society of well-ordered peoples. It maintains the mutual relations among peoples for the right reason. In this way, the international community can be viewed, in ideal theory, as a society of well-ordered societies, with its own public political culture and its conception of public reason. On the other hand, because “human rights proper” was formulated from notions implicit in the public culture of international cooperation, it has a freestanding justification and can be an object of possible agreement among the world's political cultures. Human rights are norms that govern the conduct of governments and that anyone who belongs to one of these cultures can accept without renouncing other

⁹⁴ Thomas Scanlon, “Human Rights as a Neutral Concern.” In Peter G. Brown and Douglas MacLean (eds.), *Human Rights and U. S. Foreign Policy: Principles and Applications* (Lexington, MA & Toronto: Lexington Books, 1979), pp. 83-92.

⁹⁵ *LPb*, p. 80ff.

important political principles. Thus, the universality of human rights is to be grounded neither in metaphysical principle nor in any comprehensive doctrine. In this way, Rawls claims that his theory of human rights is not “in some way distinctive of the Western political tradition and prejudicial to other cultures” and that a wide range of cultures can endorse his theory.⁹⁶

Accordingly, the role of human rights in a conception of international justice emerges within a sort of ideal dialogue between societies, not all of which are liberal. The emergence conception of human rights functions as a minimum threshold below which an offending society would no longer have good standing in international society. Decent peoples can justify interventions to change other societies from illegitimacy to legitimacy.

2.8 Critique

If my interpretation is sound, we can find that Rawls provides a nonstandard view of human rights. For avoiding the charge that his scheme is “peculiarly liberal or social to the Western tradition,” Rawls proposes an entirely different justificatory strategy. Rawls’s approach is instructive in that human rights are a proper subset of the rights possessed by the members of a liberal democracy, or of the rights of the members of a decent hierarchical society.⁹⁷ Under this view, the role of a human rights doctrine should determine the content of the human rights doctrine, and the role is to serve as a “public basis of action for both liberal and decent societies committed to preserving a world in which such societies can prosper.” Thus, the roles that human rights play in international practice constrain the content of human rights.

Rawls’s instructive approach has its virtues. His novel suggestion is that a focus on the role of human rights, in contrast to traditional controversies surrounding competing views of

⁹⁶ *Ibid.*, p. 80.

⁹⁷ *LPb*, p. 81.

human nature, is a more appropriate point of departure to justify human rights in a diverse world. In chapter five, I will flesh out this point in my constructivist approach, and submit a different justificatory strategy.

However, in what follows in this chapter, I will argue that the task of justification in his scheme is not successful. My critique will focus mainly on the justification and the content of human rights in Rawls's approach.

2.8.1 Does a Human-rights Principle Have a Freestanding Status?

Traditionally, human rights have been understood as moral protection that extends to individuals and that rests on human dignity or moral status. But in *The Law of Peoples*, they are understood as principles governing relations among peoples. For Rawls, although the appeal to particular moral conceptions of the person might have the advantage of directly justifying universal human rights, it would be unacceptable insofar as the rights would be “in some way distinctive of the Western political tradition and prejudicial to other cultures.” Because people cannot agree on the respects in which all human beings are alike, the best they can do is to agree on principles of fair social cooperation. In this regard, Rawls's account of human rights in *The Law of Peoples* is primarily institutional in that it applies to the basic structure of a society of peoples. Peoples who agree to honor human rights acquire their information from the interests of *peoples*, not the interests of *persons*, because the latter would inject an individualistic element that would be unacceptable to decent peoples.⁹⁸ The primary reason for which well-ordered people should seek to enforce human rights is not an allegiance to the individuals who are the victims of human-rights violations, but a desire to encourage “all societies eventually to honor the *Law of Peoples* and to become full members in good standing of the society of well-ordered peoples.”⁹⁹ Leif

⁹⁸ See Thomas Pogge “An Egalitarian Law of Peoples,” in *Philosophy and Public Affairs*, 23(3)(1994), p. 211.

⁹⁹ See *LPb*, p. 93.

Wenar clearly puts it thus:

Because Rawls's global theory works exclusively in terms of peoples, it cannot show any direct concern for individuals. This is clear in Rawls's account of human rights and humanitarian intervention. When a Rawlsian people intervenes in another people's affairs, to stop human rights abuses or to provide food aid, the intervention is not for the sake of the well-being of the oppressed or the starving individuals in the other country. Rather, the intervenor aims at bringing the "outlaw" or "burdened" people up to the level of legitimacy, so that it can play its role in the society of peoples. It is as if societies were individuals, with their members being merely the cells of their bodies, and one society intervened to give medical treatment to another to enable it to enjoin the scheme of social cooperation. The fact that the conception of people cannot "trickle down" to become concerns for individuals gives Rawls's account of human rights and humanitarian intervention a bloodless, institutional character.¹⁰⁰

Moreover, if a people's efforts to honor and to enforce human rights stem merely from the assertion that respect for human rights enables a society to function smoothly; the scheme cannot offer full protection to stateless persons around the world. But it is not adequate at all if it still leaves out those who are not part of a system.

I think that (1) Rawls is quite wrong if he believes that human rights principles, based on his constructivist device, can get rid of the notion of individualism, and (2) indeed there is a cosmopolitan claim that Rawls cannot avoid in his idea of social cooperation.

Recall that the principle of liberal legitimacy is based on the criterion of reciprocity. A conception of justice applicable to the basic structure of a system of social cooperation is reasonable only if it satisfies the criterion of reciprocity. According to the criterion of reciprocity, people treat the terms of cooperation as reasonable and fair only if those proposing them have good reasons to regard them as acceptable to all of the participants.

In this regard, human rights are important instruments for individuals' political autonomy within a system of social cooperation. Rawls states,

What have come to be called human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind.¹⁰¹

However, why does respect for human rights constitute a necessary condition for any

¹⁰⁰ Leif Wenar, "The Legitimacy of Peoples," pp. 64-5; and "Why Rawls Is Not a Cosmopolitan Egalitarian," p. 104.

¹⁰¹ *LPb*, p. 68.

system of social cooperation? Why is “a slave system” an illegitimate form of social organization for human beings? If slaves, as Rawls points out, suffer social death,¹⁰² what does Rawls mean?

Following Charles Larmore, I think the reason is that the idea of reciprocity is based on a liberal commitment independent of the collective will of citizens, namely, *the idea of respect for persons*.¹⁰³ It is this moral commitment that requires political principles to be justifiable to those whom these principles bind. Political liberalism is grounded on the idea of respect for persons whose validity is external to the collective will of citizens. Therefore, the liberal principle of legitimacy itself cannot be justified only on the basis of its acceptability to reasonable citizens, and cannot be a freestanding view. Larmore clearly identifies the issue here:

We would be wrong to suppose that the moral principle of respect for persons has the political significance it does because reasonable people share a commitment to it. On the contrary, the idea of respect is what directs us to seek the principles of our political life in the area of reasonable agreement. Respect for persons lies at the heart of political liberalism, not because looking for common ground we find it there, but because it is what impels us to look for common ground at all.¹⁰⁴

Accordingly, political liberalism’s fundamental principle should be understood as the principle of respect for persons. The idea of reciprocity is an expression of the idea that the principles regulating the basic structure should be ones that respect the equal status of persons *qua* citizens.¹⁰⁵ If political liberalism is based on the moral principle of the idea of respect, political liberalism must assert its fundamental principle in both domestic and international domains. Therefore, consistently, the non-liberal society must not violate the equal status of all persons *qua* citizens, which should function as the fundamental principle governing the basic structure.

¹⁰² *JAFR*, p. 24.

¹⁰³ See Charles Larmore, “The Moral Basis of Political Liberalism,” in *The Journal of Philosophy*, 96(12)(1999), pp. 599–625. See also Jean Hampton ‘The Moral Commitments of Liberalism’ in David Copp, Jean Hampton, and John Roemer (eds), *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993), pp. 292–313.

¹⁰⁴ Larmore, “The Moral Basis of Political Liberalism,” p. 608.

¹⁰⁵ See Blain Neufeld, “Civic respect, political liberalism, and Non-Liberal Societies,” in *Politics, Philosophy & Economics*, 4(3)(2005), p. 283.

Seen in this light, it is difficult not to presuppose the idea of human agency in Rawls's human rights theory. Indeed, some scholars clearly argue that the idea of social cooperation presupposes a form of human agency in Rawls's human rights theory.¹⁰⁶ Hinsch and Stepanians state,

In his earlier work, Rawls conceives of basic rights and liberties—the rights and liberties incorporated in his first principle of justice and effectively guaranteed in well-ordered liberal democracies—as basic goods that all persons need in order to adequately develop and exercise the capacities constitutive for their moral agency, i.e., their capacity for rational action, fair cooperation and for the pursuit of the individual and the common good. Since Rawls considers the human rights of the Law of Peoples to be a subset of the rights identified by his first principle of justice, human rights clearly qualify as basic goods, too. There is no reason, then, to assume that their value basis is different from the value basis of those liberal basic rights and liberties that are part of the first principle of justice as fairness. And there is also no reason to assume that the rationale for the human rights of the Law of Peoples is basically different from the rationale for the basic rights and liberties of domestic justice in Rawls's earlier writing.¹⁰⁷

In other words, if the idea of social cooperation is not merely a command system of social coordination, it must presuppose a form of agency for the protection of individuals.

Buchanan points out,

If it is so important that every society be a scheme of cooperation, then surely this must be because of how the differences between being a scheme of cooperation and being a “command system based on force” affect human beings. Otherwise, we must attribute to Rawls the spooky, repugnant, and implausible view that protecting individuals’ human rights is only instrumentally important because it guarantees that societies will have a certain characteristic, namely, that they will be cooperative schemes. But if what is so important about cooperation is that it serves certain morally important interests—including the interest in freedom—that all human beings have, then the cooperation argument, if sound, tacitly appeals to just the sort of premises about basic human interests and the moral equality of persons Rawls says he avoids.¹⁰⁸

The idea of human rights grounded in the value of individual agency does not logically rely on any comprehensive doctrine and does not necessarily entail adopting any conception of the good. The members of social cooperation can reasonably expect that the principles of justice will appeal to all reflective persons and that human rights

¹⁰⁶ See Donald Moon, “Rawls and Habermas on Public Reason: Human Rights and Global Justice”; Wilfried Hinsch and Markus Stepanians, “Human Rights as Moral Claim” in David Reidy and Rex Martin (eds) *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell publishing, 2006), pp. 95-113; and Allen Buchanan, “Taking the Human out of Human Rights,” in Rex Martin and David A Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (London: Blackwell Publishing Company, 2006), pp. 156-168.

¹⁰⁷ See Hinch and Stepanians, “Human Rights as Moral Claim,” pp. 123-4.

¹⁰⁸ Allen Buchanan, “Taking the Human out of Human Rights,” p. 165.

principles can be compatible with diverse cultural or religious traditions.

Put concretely, representatives of peoples in the second-level original position are aware that they represent peoples that are made up of individuals. The representatives are also aware both of how individuals are thought of in their own society and that the idea of respect for the person, as elaborated in the representatives' respective society, is different from that in liberal society, which treats citizens as free and equal. Thus, peoples' concern for individual persons and their rights, does not influence Rawls's people-centered methodology. In other words, justice among peoples can include principles that have individuals as their objects. If members of the society of peoples should intervene in a situation on behalf of human rights, it is because bringing the worst persons up to a very basic standard of living is a moral priority.

Indeed, Erin Kelly, a student of Rawls and the editor of *Justice as Fairness: A Restatement*, accepts the view that Rawls's human rights scheme has cosmopolitan roots, namely, the equal moral status of persons. Because of this moral claim, we should think that (1) the principles that "guide our social interactions are compatible with the basic interests of all persons" and (2) the moral status of people derives from this moral claim.¹⁰⁹ For Kelly, Rawls explains human rights as stemming from negotiations among peoples rather than among individuals, because Rawls sincerely acknowledges that individuals may have different "cultural claims," and that "cosmopolitanism must leave room for the importance of cultural claims."¹¹⁰ Cultural claims can be understood to be compatible with the basic human rights of persons as such. Here, Kelly declares,

The content of human rights can be understood to be the subject of negotiation between societies that are supported by morally concerned individuals who affirm that the fundamental interests of all persons matter morally. Recall the moral intuition with which we started: the basic interests of all other people matter no less when we do not share their culture, ethnicity, religion, national identity or geographical region. This intuition is central to a cosmopolitan moral philosophy. Using this intuition to guide us helps to show how a conception of international justice that takes seriously the moral claims of peoples or

¹⁰⁹ Erin Kelly, "Human Rights as Foreign Policy Imperatives," in Deen Chatterjee (ed), *Ethics of Assistance* (Cambridge: Cambridge University Press, 2004), p. 178, p. 184.

¹¹⁰ Erin Kelly, "Human Rights as Foreign Policy Imperatives," pp. 184-5.

societies can be situated within a cosmopolitan moral conception—one in which shared ethical concern for human rights generates international pressure to ensure that all societies are decent.¹¹¹

In this regard, although Rawls says that a law of peoples is concerned mainly with the justice of societies, in contrast with cosmopolitanism, which is concerned mainly with the well-being of individuals, there is still a cosmopolitan moral ground that Rawls's human rights scheme purports to erase.

2.8.2 Universal Applicability of Human Rights: Political Stability or Humanity?

Rawls argues that basic human rights are rights that members of international society should legitimately enforce, regardless of whether all states have legally committed themselves to respect and secure these rights. This assertion means that a society is obliged to respect human rights regardless of whether it accepts the principles of the law of peoples that presents the principles, and regardless of whether the society's interests are considered within the second original position. If a society violates human rights principles, just societies have reasons to interfere in order to protect basic human rights. In extreme cases, just societies may even go to war to protect persons from the abusing governments. However, the justification with respect to the universal applicability for human rights is still unexamined. For instance, why does the fact that human rights are common to both liberal and decent peoples establish the rights' applicability to other societies? If human rights are defined as shared standards of the society of peoples, it is not clear why they apply to countries that are not part of the society of peoples as well. Because outlaw peoples and burdened societies do not have representation in the second original position, it is unjustifiable from that position to conclude that outlaw states and burdened societies should respect human rights.¹¹² Peter Jones and Charles Beitz explicitly argue that Rawls's

¹¹¹ Ibid, p. 184.

¹¹² See Peter Jones, "International Human Rights: Philosophical or Political?" in Simon Caney, David George,

two-stage original position is simply a model of interaction among just countries. Human rights principles are morally prior to the model, and the model asserts that human rights are common to the well-ordered peoples. Therefore, the model would fix the content of human rights—what well-ordered society guarantees—before defining well-ordered political institutions. Any “people” that guarantees these rights is, by definition, well-ordered and is a member of the society of peoples. Because human rights hinge on the members of liberal and decent peoples, all of whom guarantee the rights, this definition may show that intervention is prohibited among well-ordered peoples. However, it is not convincing as a justification of intervention in the domestic affairs of non-members of the society of peoples. Merely arguing that human rights are a necessary condition of any system of social cooperation and thus that human rights violators cannot be part of an international system of social cooperation, does not show that liberal and decent peoples have the right to intervene in outlaw states’ domestic affairs. Because badly ordered people have neither representation in the second original position nor an opportunity to argue for their own approach to human rights, there is no reason to think that badly ordered peoples should protect human rights. Holding them to members’ human rights standards would be an arbitrary use of power.¹¹³

One reasonable response for Rawls is that basic human rights constitute the minimum standard of legitimacy that any system would need in order to become part of the system of cooperation. Outlaw states, because they have a system of institutions, must satisfy the minimum standards of legitimacy as well. By virtue of the fact that outlaw states are aggressive and that their violation of basic human rights seriously threatens international peace, well-ordered societies must do something to stop governments’ abuse for the sake of international stability. In other words, violations of basic human rights pose a

and Peter Jones (eds), *National Rights, International Obligations* (Boulder: Westview Press, 1996), pp. 183-204. Charles Beitz, “Rawls’s Law of Peoples” *Ethics*, v. 110(4)(2000), pp. 669-696.

¹¹³ Beitz, “Rawls’s Law of Peoples,” pp. 683-6.

fundamental threat to peace and stability within the international order. In this regard, the justification of obliging a country to honor human rights relies not on a cosmopolitan understanding of the rights of individual persons but on an understanding that states that violate human rights are dangerous to other peoples.

However, there is no causal correlation between facts about internal repression on the one hand and aggression toward other peoples on the other. It is possible to see that some outlaw states violate the human rights of their own peoples without posing any serious threat to international stability.¹¹⁴ Therefore, to justify imposing an obligation to honor human rights on a state merely to strengthen international peace, not to counter human-rights violations *per se*, would justify human rights in a politically wrong way.¹¹⁵

2.8.3 The Limits of Public Reason

It is clear that Rawls treats the justification of human rights as distinct from the justification of the content of human rights. Human rights are justified from a constructivist procedure of justification and can be acceptable not only to liberal peoples, but also to non-liberal decent peoples who meet minimal requirements. Moreover, in order to obtain the widest possible agreement on rights, and to dispose of the charge that human rights are peculiarly liberal or a Western tradition, Rawls narrows the rights' content. Because a people's compliance with human rights largely determines the extent to which all other peoples' will respect the former people's institutional arrangements, technically, outsiders can use *any* human-rights violation to justify humanitarian intervention. This limited but serious role that human rights are to play in world politics thereby creates a powerful incentive to avoid the problem of human rights inflation.¹¹⁶

¹¹⁴ Henry Shue, "Rawls and the Outlaws" in *Politics, Philosophy and Economics* (2002), pp. 307-323.

¹¹⁵ Beitz, "Rawls's Law of Peoples," p. 686.

¹¹⁶ Cf Phillip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control," in *American Journal of International Law* (78)3(1984), pp. 607-621.

However, his justificatory minimalism accompanies no substantive minimalism in this way.

In this section, I argue that the restricted content of “human rights proper” rests mainly on a failure to distinguish between justification of human rights and the interpretation-implementation of them. In the next section, I argue that we could preserve Rawls’s constructivist approach without relying on the regressive implications concerning human rights.

In general, any conception of human rights must address two issues: (1) the justification as to why we should recognize these rights as human rights and (2) the justification as to which rights we should recognize as human rights.¹¹⁷ If we accept that Rawls furnishes grounds for resolving the first issue, we still lack sufficient means to deal with the second issue.

Recall that liberal peoples and decent peoples reach their agreement on a law of peoples in their respective original positions. They then find that they have agreed upon the same principles. Furthermore, Rawls refers to the second-level original position as not only a justificatory device for the principles, but also a justificatory device from which those principles are to be further interpreted. Rawls states,

The eight principles are open to different interpretations. It is these *interpretations*, of which there are many, that are to be debated in the second-level original position.... The problem of how to interpret these principles can always be raised and is to be debated from the point of view of the second-level original position.¹¹⁸

This passage identifies the importance of the original position as the justificatory device from which the principles ought to be interpreted—including the principle that people are to honor human rights. But it is not clear what principles or procedures would guide peoples within the original position in establishing a settled interpretation of human rights. Rawls simply offers *the* interpretation of what should and should not be expected

¹¹⁷ See Thomas Pogge, “The International Significance of Human Rights” and “World Poverty and Human Rights.”

¹¹⁸ *LPb*, p. 42.

of decent peoples, and asserts that decent people would agree on the same law, but offers no further reason.

The only reason I can find is that liberal and decent peoples reach the “human rights proper” by agreeing to the assertion requiring “peoples to honor human rights principles.” However, it is not clear that liberal and decent peoples sharing a common concern for human-rights principles *per se* would share the same interpretation of human rights as well.

It seems that Rawls ignores the fact that defining human rights must involve a degree of abstraction that is consistent with at least some variation in interpretation and implementation.¹¹⁹ Agreement on rights at the level of “principle” or “concept” is consistent with a certain range of dispute at the level of interpretation and at the level of implementation. A perfect agreement at the concept level does not preempt the interpretation and implementation.

Indeed, as Frank Michelman clearly points out, disagreement about interpreting human rights shows what he calls “*the fact of reasonable interpretative pluralism*,” which he defines as “the fact of irresolvable uncertainty and, in real political time, irreparable reasonable disagreement among inhabitants of a modern country about the set of entrenchments and interpretations of human rights.”¹²⁰ In spite of agreement on the law of peoples and on honoring human-rights principles, there is no dialogue between liberal and decent peoples regarding interpretations of human rights. There are internal dialogues among liberal peoples, but there is no framework for cross-cultural discussion of human rights between liberal and decent peoples. How can it be reassuring to a liberal simply to imagine a tolerable decent society that would agree with the liberal’s standards? Without a detailed account of the rights that decent peoples uphold, why should liberal peoples

¹¹⁹ See James Nickel, “Are Human Rights Mainly Implemented by Intervention?”

¹²⁰ See Frank Michelman, “Human Rights and the Limits of Constitutional Theory,” in *Ratio Juris* (13) (2000), p. 70.

tolerate the decent peoples? Without actual engagement in cross-cultural dialogue, we cannot clearly know how liberal and decent peoples can both ensure the same interpretation regarding human rights principles and reach agreement on the content of human rights.¹²¹ In this regard, the justification of “human rights proper” remains unexamined.

Moreover, I argue that Rawls is confused by an oversimplified conception of the relation between peoples and cultures. The non-liberal culture that Rawls describes seems homogeneous and static because decent peoples gain political legitimacy in the eyes of citizens. Rawls exaggerates the differences between liberal and non-liberal culture in that the distinction “over-plays differences while ignoring both similarities and assimilations between cultures.” In this regard, Amartya Sen clearly points out,

Since each civilization contains diverse elements, a non-Western civilization can then be characterized by referring to those tendencies that are most distant from the identified “Western” traditions and values. These selected elements are then taken to be more “authentic” or more “genuinely indigenous” than the elements that are relatively similar to what can be found also in the West.

.... Through selective emphases that point up differences with the West, other civilizations can, in this way, be redefined in alien terms, which can be exotic and charming, or else bizarre and terrifying, or simply strange and engaging. When identity is thus “defined by contrast,” divergence with the West becomes central.¹²²

Moreover, when cultures are presented as hermetic and sealed wholes, *unchanging continuities*, the internal contradictions and debates within cultures are dismissed; also, the different conceptual and normative options which are available to the participants of a given culture and society are ignored¹²³.

One reasonable response for Rawls is that because non-liberal peoples are as legitimate for their own members and reflect their own public political culture, non-liberal society can be a fair system of social cooperation, though it is still unjust from the liberal point of view.

However, Rawls neglects that there is an *internal* criterion for external respect by other

¹²¹ In terms of “actual engagement,” compare: Iris. M. Young, *Justice and Politics of Differences* (Princeton University Press), pp 101-102.

¹²² Amartya Sen, “East and West: The Reach of Reason” in *New York Review of Books*, July 20(2000), pp. 33-38.

¹²³ See Uma Narayan, “Undoing the ‘Packing Picture’ of Culture,” in *Sign: Journal of Women in Culture and Society* (25)(2000), pp: 1083-1086.

peoples: the internal acceptance of the society's political legitimacy by its members. Rainer Forst states,

...if one presupposes the culture's own self understanding, such a culture (or state) demands respect on the basis of its acceptance by its own members as an ethical source of the experience of their own lives as meaningful and "sublated" (*aufgehoben*). A society or culture may only demand that its "shared understandings" be accepted and respected as its internal morality if these understandings really are shared and are not forced upon any segment of the population.¹²⁴

Accordingly, the legitimate acceptance of the decent people based on the common good conception of justice presupposes that the members of the people understand the current practice as an appropriate expression of their own convictions. But I will argue that, without some core rights that Rawls has excluded, the principle of internal acceptance cannot be successfully proved, for reasons that are internal to the idea of decency.

2.8.4 Substantive or Justificatory Minimalism? An Internal Critique

While Rawls does not express clearly why Articles 19 and 20 should be rejected as basic human rights, it appears to show that Rawls thinks that the freedom of expression, the freedom of association, and the right to political participation presuppose specific kinds of typical democratic aspirations that decent societies could reasonably reject if their public cultures do not already reflect the values of democracy. Rawls wants to secure basic human rights by other institutional means. If diverse kinds of political structure are able to secure the basic human rights, liberal society has no reason to reject them. Because it is possible for a government as a decent consultation hierarchy that is not procedurally democratic to be legitimate, the political rights specific to procedural democracy (one person, one vote) do not necessarily belong on the list of basic human rights.¹²⁵

If we follow Rawls's methodology and accept human rights as belonging to the conception

¹²⁴ Rainer Forst, "The Basic Right to Justification: Towards a Constructivist Conception of Human Rights," in *Constellations*, (6)(1999), p. 38.

¹²⁵ Alyssa Bernstein argues that these rights cannot be internationally enforceable basic human rights, but that the rights can be regarded as *derivative* human rights. See Alyssa Bernstein, "A Human Right to Democracy?" pp. 278-298.

of decency that is a standard for membership in a society of well-ordered peoples, Rawls is right to reject the duty of every decent society to implement equal political participation and universal suffrage if democracy is not an institution available to the societies. In chapter five, I will flesh out this point in my own approach. However, I contend that Rawls cannot reject Articles 19 and 20 regarding political rights in his human rights scheme for reasons that are internal to the idea of decency.

First of all, Rawls insists that the liberal principle of toleration requires us to admit hierarchical societies as members in good standing, provided that they meet the required minimum conditions of decency and respect for human rights. Insofar as there is no conception of persons as free and equal in a non-liberal decent society, liberal peoples following the liberal principle of legitimacy should relax the standard to make human rights principles acceptable to non-liberal societies; in this way, human rights can have a freestanding status, independent of any particular comprehensive doctrine.

As many critics have charged, by allowing decent people to be *bona fide* members of a society of peoples, Rawls has paid a heavy price for tolerating inequality within decent societies. Rawls also dismisses the fact that the interests of persons and of peoples do not necessarily correspond, and the fact that there are many serious conflicts within peoples with internal plurality.¹²⁶ The possible response from Rawls is that, a decent well-ordered society grounded by “the common good idea of justice” indeed is regarded as *legitimate* in the eyes of its own people. It specifies a decent scheme of social cooperation, and deserves the respect of other peoples. If most members accept a particular idea of the common-good conception of justice, members do not have to treat their citizens as equals, so long as a decent consultation hierarchy provides all members an opportunity to choose and govern their own institutions. Liberal peoples can then allow this decent people to be a member of

¹²⁶ See Andrew Kuper, “Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons” in *Political Theory* (28)(2000), p. 646; Martha Nussbaum, “Women and the Law of Peoples,” p. 294; *FOJ*, p. 252; and Allen Buchanan, “Rawls’s Law of Peoples: Rules for a Vanishing Westphalian World,” pp. 697-721.

a society of peoples.

Furthermore, for Rawls, securing the basic human rights of all members is part of the criterion of political legitimacy. The criterion of political legitimacy requires that a common-good idea of justice guide a well-ordered society's system of law. This idea leads to two further stipulations for well-ordering. First, the society's system of law must impose *bona fide* moral duties and obligations on all members of the society—here, members recognize the society's system of law “as fitting with their common good idea of justice,” and not as “mere commands imposed by force.” Second, officials and judges administering the system of law must ensure that “the law is indeed guided by a common good idea of justice.”¹²⁷ The important point to notice here is that the system of law, as guided by the common-good idea of justice, not only specifies duties and obligations distinct from basic human rights, but also specifies rights distinct from basic human rights—this is the case when Rawls insists that “the legal system of a decent hierarchical system must contain a decent consultation hierarchy.”¹²⁸ That is, there are some political rights that are corollaries of the right to freedom from mental and physical abuse. Indeed, a consultation hierarchy is a society having the minimal standards of participation, representation, and accountability, standards that do not suffice for the designation of democracy.

The following items are examples of the minimal standards:

(1) Participation: a decent society guarantees all citizens a right to participate in the consultation hierarchy to a substantial degree. They must have substantial influence on setting the agenda of important public issues and endorsing policies, and citizens are to “... play a substantial role, say through association and groups, in making political decisions.”¹²⁹ In this regard, Rawls cannot count societies of “benevolent absolutism” as

¹²⁷ *LPb*, pp. 65-66.

¹²⁸ *LPb*, p. 71.

¹²⁹ *LPb*, 3n2.

decent societies because “their members are denied a meaningful role in making political decisions.”¹³⁰

(2) Representation: The government must truly represent citizens’ views and interests. The basic structure of decent society must include “a family of representative bodies to take part in an established procedure of consultation,”¹³¹ and “persons as members of associations, corporations and estates have the right at some point in the procedure of consultation (often at the stage of selecting a group’s representatives) to express political dissent.”¹³² But every person need not have equal influence or representation over the government, as long as the least powerful have substantial influence over government, including representation.¹³³

(3) Accountability: Every citizen has the right to dissent; the appropriate authorities must address any questions or objections if the dissent is expressed within “the basic framework of the common good idea of justice.”¹³⁴ Government must sincerely consider the interests of all the people. That is why a decent hierarchical regime is different from a paternalistic regime. Rawls states,

...the dissenters are not required to accept the answer given to them, they may renew their protest, provided they explain why they are still dissatisfied, and their explanation in turn ought to receive a further and fuller reply. Dissent expresses a form of public protest and is permissible provided it stays within the basic framework of the common good idea of justice.¹³⁵

It seems that, for Rawls, the idea of self-determination means that people are collectively ruling over themselves, that is, self-governing. Therefore, decent society is one that provides the minimal conditions within which a government can be said to sincerely act for its people. It should include the minimal criterion of legitimacy, which contains the requirements of participation, representation, and accountability.

¹³⁰ *LPb*, p. 4.

¹³¹ *LPb*, p. 71.

¹³² *LPb*, p. 72.

¹³³ *LPb*, p. 75.

¹³⁴ *LPb*, p. 72.

¹³⁵ *Ibid.*

However, without the rights contained within Articles 19 and 20, we simply have no reason to think that the common-good idea of justice is *freely* supported and judged legitimate by the reasonable members of the decent society in question.

First of all, in terms of condition (1), though a decent hierarchical government allows people to play a substantial role in the procedure of consultation, it is the “group” that is represented in the consultation hierarchy and not individual persons because Rawls envisions a hierarchical society to be *associationist* in form. Thus, the right to dissent is individually expressed, but ultimately individual persons have a say only through their groups or associations.

However, it is true that a group may hold a fixed belief but that different individuals within the group may interpret that belief differently, because even groups appearing to be culturally homogeneous are likely to contain *internal* diversity; therefore, we should know whether persons can truly have a say through their groups. Nevertheless, without the freedoms of speech and press, it is difficult to know whether or not individuals can substantially participate in the consultation process without fear. If individual persons can express opinion only through their associations or groups, we should face the truth that the relations of power exist in groups regarding the interpretation of cultures or comprehensive doctrines.¹³⁶ Without freedom of speech, leaders of groups or associations can possibly prohibit demonstration or peaceful protest to create an uneasy or chilling effect on political discussions. The officers can ban the dissemination of literature that is deemed dangerous or blasphemous. Moreover, without freedom of speech and press, it is difficult to ensure that persons can sincerely express their opinion “at the stage of selecting a group’s representatives” without fear. In liberal societies, persons can advocate non-liberal comprehensive doctrines or ways of living without fear because that comprehensive

¹³⁶ See Ken Booth, “Three Tyrannies” in Tim Dunne and Nicholas J. Wheeler (eds) *Human Rights in Global Politics* (Cambridge, Cambridge University Press, 1999), pp. 31-70.

doctrine is operating within a liberal *basic structure*. By contrast, in a decent hierarchical society, there is no institutional opportunity for people holding diverse opinions against the dominant comprehensive doctrines to express the opinions without fear.

Moreover, in terms of condition (2), Rawls stresses that each member of society must belong to a group and that each group has a representative in the consultation table; however, it is not clear whether or not the consultation hierarchy should take into account the interests of *every* group during the consultation procedure. For example, a minority group such as a homosexual group, whose identity is forbidden by the comprehensive doctrine, will certainly not form part of the consultation hierarchy in a “decent society” like Kazakhstan. Without the freedoms of speech and press, it is also difficult to know whether or not minority groups within the decent hierarchical society can openly challenge an existing decision and can openly express their views without fear, and hence it is difficult to know whether or not the common good conception of justice is genuinely common to all persons within a given community.¹³⁷

Finally, in terms of condition (3), Rawls claims that the appropriate authorities must address any questions and objections that persons express within “the basic framework of the common good idea of justice.” But as I stated, liberal peoples should respect the shared understandings of a common-good idea of justice only if the society’s members really share and willingly accept these understandings; that is, external respect presupposes genuine internal acceptance. There is an internal criterion of legitimacy built into the defense of people’s self-determination.¹³⁸ However, without the freedom of press, government can control citizens’ access to the mass media and interrupt much useful information in circulation, so that citizens can receive only information that the state power permits or propaganda. Furthermore, because decent peoples prohibit dissent expressed *against* the

¹³⁷ See Cécile Fabre and David Miller, “Justice and Culture: Rawls, Sen, Nussbaum and O’Neill,” in *Political Studies Review* (1)(2003), pp. 10-11.

¹³⁸ Rainer Frost, “The Basic Right to Justification: Towards a Constructivist Conception of Human Rights,” p. 171.

common-good idea of justice itself, the officers may legitimately jail dissenters if their actions go beyond “the framework of the common good idea of justice.”¹³⁹ Although Rawls insists that citizens of such societies have a right of emigration, this right is not matched by any corresponding duty on the part of other societies or peoples to accept immigration from these societies. Citizens of liberal societies have the right to exit and to reject non-liberal doctrine, should they choose to do so, whereas citizens of decent societies have no such right.

Accordingly, when members of decent peoples lack the protection of these political rights contained in Articles 19 and 20, conformity to the basic rules of a society would neither reflect the willing cooperation of its members nor express the will of its people. A government that maintains its authority by violating these political rights cannot express the *public political culture* of its society. Accordingly, the conception of human rights that Rawls defends should be expanded to include the political rights outlined above.

Conclusion

In this chapter, I have analyzed Rawls’s justificatory strategy for grounding human rights in a pluralistic world. Rawls rightly aims to develop a political conception of human rights that is not simply Western or ethnocentric. But I contend that his attempt is not successful. I argue that, on the one hand, Rawls wants to avoid familiar human-rights justifications that appeal to a philosophical account of the moral status of persons; however, this is exactly the cosmopolitan claim that Rawls’s theory cannot avoid. I argue that, on the other hand, his methodology lacks critical engagement with the actual claims of cultures and ultimately provides little reason for accepting the limited scope of human rights.

¹³⁹ See Eric Cavallero, “Popular Sovereignty and the Law of Peoples,” in *Legal Theory* (2003), p. 191. See also Chris Brown “The Construction of a ‘Realistic Utopia’: John Rawls and International Political Theory,” *Review of International Studies* 28, no. 1 (2002), pp. 5-21.

Is there any alternative to grounding human rights —an alternative that rests on cosmopolitan roots and that will enable us to find a consensus with regard to justifying human rights norms? In the next chapter, I will analyze Martha Nussbaum's capabilities approach to explore this alternative. I will examine whether or not her approach allows us to identify not only shared human-rights *norms*, but also shared *reasons* for accepting those norms, and whether or not her approach can go beyond the shortcomings of Rawls's theory.

Chapter 3:

Capabilities Approach to Human Rights

Modern human rights core theories seem to be settling for concepts of natural necessity, that is, necessity in the sense of prescribing a minimum definition of what it means to be human in any morally tolerable form of society. Put another way, some modes of treatment of human beings are so fundamental to the existence of anything we would be willing to call a society that it makes better sense to treat an acceptance of them as constitutive of man and woman as social beings rather than as artificial conventions.

Jerome Shestack, *The Philosophic Foundations of Human Rights*¹

3.1 Bringing “Human Nature” Back In

The constructive approach of grounding human rights that I will consider in this chapter is Martha Nussbaum’s capabilities approach. In contrast to Rawls’s justificatory strategy, which aims both to ground human rights on the idea of decency and to eschew the language of human nature or human dignity, the capabilities approach takes up an essentialist account of grounding human rights on the notion that all human beings are alike, and argues that we can reach a deeply shared consensus by asking ourselves to focus on what is common to all human beings and what is truly indispensable to a human form of life. By using those commonalities, we can argue that all individuals must have at least some capabilities necessary for human functioning, and therefore, every society should aim to raise all of its members above the threshold level of each of these capabilities and to promote the establishment of a constitutionally guaranteed social minimum based on the

¹ Jerome Shestack, *The Philosophic Foundations of Human Rights*, in *Human Rights Quarterly* 20(2) (1998), pp. 201-234.

threshold level. These commonalities can be a standard of evaluation that can claim validity across cultures. With a view to the international provision of a singular account of moral norms that all nations of the world must respect and implement, Nussbaum argues that the capabilities approach can be an alternative to the language of human rights as people's basic entitlements, and can provide the support for constitutional principles that citizens have a right to demand from their government.²

As I stated in the first chapter, most political theorists today are suspicious of any appeal to the notion of human nature or human dignity as the common ground of human rights among divergent cultures and traditions in the modern world.³ However, Nussbaum believes that her capabilities approach not only would allow us to understand why diverse cultures accept human rights, but also would ensure that international human rights standards would become more deeply informed by social reality. By looking at our own human life and other people's lives, and by asking ourselves what are the grounding experiences that all human beings share, Nussbaum constructs a list of human capabilities. The list can be seen as a limited moral *Esperanto* that can furnish grounds for agreement on the universality of human rights.

Some would judge that any essentialist strategy both must be a form of fundamentalism and cannot be justified because of the fact of reasonable pluralism. However, Nussbaum argues five critical points: (1) The list of central capabilities, rather than be grounded on any metaphysical conception, clearly represents a type of political

² I will use the following abbreviations in referring to Nussbaum's writings: "Aristotelian social democracy" (1990), hereafter **ASD**; "Human functioning and social justice" (1992), hereafter **HFSJ**; "Non-relative virtues: an Aristotelian approach" (1993), hereafter **NRV**; "Human Capabilities, Female Human Beings" (1995), hereafter **HCF**; "Capabilities and Human Rights" (1997), hereafter **CHR**; "Political Animals: Luck, Love and Dignity" (1998), hereafter **PA**; "Capabilities, Human Rights and the Universal Declaration" (1999a), hereafter **CHRU**; "A Plea for Difficulty" (1999b), hereafter **APD**; "Women and Human Development: a Study in Human Capabilities" (2000a), hereafter **WHD**; "Aristotle, Politics and Human Capabilities: A Response to Antony, Arneson, Charlesworth and Mulgan" (2000b), hereafter **APHC**; "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003a), hereafter **CFE**; "Political Liberalism and Respect: A Response to Linda Barclay" (2003b), hereafter **PLR**; *Frontiers of justice: Disability, Nationality, Species Membership* (2006), hereafter **FOJ**.

³ See Richard Rorty, "Human Rights, Rationality, and Sentimentality," in Stephen Shute and Susan Hurley (eds) *On Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books, 1993), pp. 111-134.

liberalism in Rawls's sense.⁴ (2) Despite explicitly relying upon an essentialist account of human nature, she defends her approach as still being "justification minimalism" in its avoidance of metaphysics. That is, the capability list is a freestanding view without reliance on any metaphysical doctrines, and can be the object of an overlapping consensus among citizens with different comprehensive views. (3) The role and function of capability is similar to Rawls's "human rights proper," though broader than Rawls's, and can be the threshold of toleration to judge who is part of the society of peoples and who is not. (4) Though closely related to human rights language, Nussbaum contends that the language of capabilities indeed presents a better understanding of what it means to lead a truly human life than the language of rights. Analyzing rights in terms of capabilities, as Nussbaum claims, allows us not only to declare a right but indeed to see more clearly what is involved in securing a right. In the end, (5) we can go beyond the aim of reaching a consensus on human rights norms while offering divergent justifications, and we can take one step ahead to explore the deeply *shared reasons* that diverse cultures are able to accept as a grounding for human rights.

Although Nussbaum's capabilities approach to human rights is less direct than the other consensus-based approaches, her scheme is worthy of consideration for its sensitivity to cultural diversity and for its critical examination of their practices. Moreover, as she claims that her account is a member of the family of political liberalism in its intentional avoidance of metaphysical doctrines, it is interesting to see whether or not her account can provide a better solution than Rawls's scheme, as she herself proclaims.

This chapter is organized into four parts. In the first, I will provide an overview of the capabilities approach. Because Nussbaum's approach employs much of the conceptual scheme and the mechanism from Amartya Sen's capability approach, it is important to look at Sen's theory before turning to Nussbaum's. Accordingly, the explanation of Sen's theory

⁴ *FOJ*, p. 70.

would be a departure point of my analysis.⁵ In the second part, I will deal mainly with Nussbaum's justification and her methodology, which are to address the challenges from cultural relativism and pluralism. I will look into mainly the transformation of her justificatory strategy from Aristotelian social democracy to Rawlsian political liberalism. In the third section, I will provide a critical focus on the relationships between capabilities and human rights, the way to ground human rights on the idea of capabilities, and her method of adjudicating between conflicts among human rights claims whenever they are in conflict with each other. In my concluding section, I will critically assess Nussbaum's capabilities approach in the light of her justificatory strategy and her human rights scheme. My argument is four-fold: (1) Despite its attempts to favor many Rawlsian-inspired conceptions and manners of reasoning and despite its being at pains to prove that it is a member of the family of political liberalism, her capabilities approach is indeed a comprehensive approach rather than a political liberalism in Rawls's sense. (2) The list of capabilities cannot be the object of an overlapping consensus among divergent comprehensive views in a pluralistic world. (3) Nussbaum's list of capabilities indeed provides good guidance for us to interpret the list of abstract rights that are to be implemented in laws and public policies; however, capabilities are not rights *per se*, but the content or object of rights. Also, there are some institutional rights that do not translate well into the language of capabilities. (4) I will criticize her methodology, which privileges her own moral view as the basis for political justification. Following this, I will argue that

⁵ It is important to note that Amartya Sen takes up his own theory of human rights, which is different from Nussbaum's in some substantial ways. However, in this chapter, I will deal mainly with Nussbaum's theory to look into the contrast between Rawls's and Nussbaum's human rights schemes. In terms of Sen's human rights theory, see Amartya Sen, 'Rights and Agency', *Philosophy and Public Affairs* 11(1) (1982), pp.3-39; 'Rights and Capabilities', in Amartya Sen (ed), *Resources, Values and Development*. (Oxford: Blackwell, 1984); 'Well-being, Agency and Freedom: The Dewey Lectures 1984', *The Journal of Philosophy* 82(4) (1985), pp.169-221; 'Rights as Goals (Austin Lecture)', in S. Guest and A. Milne (eds.), *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart: Franz Steiner Verlag, Wiesbaden GMBH, 1985); 'Legal Rights and Moral Rights: Old Questions and New Problems', *Ratio Juris* 9(2) (1996), pp. 153-167; 'Human Rights and Asian Values', *The New Republic* 33 July 14 and 21, (1997), pp.33-41; *Development as Freedom*. Oxford: Oxford University Press, (1999), and 'Elements of a Theory of Human Rights', *Philosophy and Public Affairs* 32(4) (2004), pp. 315-356.

we should reevaluate the adequacy of grounding human rights via human capabilities.

3.2 What Is the Capabilities Approach: A Theoretical Sketch

The most illuminating way of understanding the capabilities approach is to consider it an account of the *space* within which we make comparisons between individuals and across nations about how well they are doing. In relation to the Human Development Report initiated by the United Nations Development Programme over several decades, Amartya Sen and Martha Nussbaum develop concepts that focus attention on people's capabilities to do things. For these two scholars, human flourishing should be conceptualized in terms of an individual ability "to do" valuable acts and to achieve valuable states of beings.

Evaluations of development should be attentive to a policy's influence on a person's condition or state of enablement, which, as a way to build what people really value, is more accurate than other perspectives that emerge from looking at a person's subjective preferences or resources. Thus, in assessing a policy's impact on individual well-being, rather than ask questions about what satisfies people's preferences, the capabilities approach argues that public policy should be guided by the question of "what allows people to flourish?" Specifically, unlike current theories of justice that focus on achieving equality of income, resources, utility, primary goods, and so on, the capabilities approach argues that we should evaluate equality in the "space" of an individual's capability.⁶

For Sen, human development is correlated with the idea of human flourishing. Insofar as the world is deprived of development, the world is deprived of the basis for any type of human flourishing. Furthermore, development is closely correlated with freedom, and we have to analyze freedom itself so as to be able to understand at what level individuals in a society have the instrumental rights, opportunities, and entitlements that are indicative of their freedom. Thus, development cannot be seen merely as an enhancement of GNP (or

⁶ Amartya Sen, "Inequality Reexamined," pp. 12-38.

of personal incomes), industrialization, or technological advance. These are valuable accomplishments, but their value must depend on what they do to the lives and the freedoms of the people involved. All valuable accomplishments have contingent importance, but they are not the defining characteristics of development.⁷ Indeed, development must be understood as arising from human freedom, from the ability to have substantive freedom to achieve human flourishing from a variety of activities. Sen states,

The instrumental role of freedom includes several distinct but interrelated components, such as economic facilities, political freedoms, social opportunities, transparency guarantees and protective security. These instrumental rights, opportunities and entitlements have strong interlinkages which can go in different directions. The process of development is crucially influenced by these interconnections.⁸

The ability to develop will be gauged by a person's ability to attain those instrumental freedoms, because those freedoms will allow him or her to achieve the goals necessary for the expression of human dignity. Accordingly, the ends and means of development call for placing individual freedom at the center of the stage.⁹ Sen observes,

The expansion of freedom is viewed as both (1) the *primary end* and (2) the *principal means* of development. They can be called respectively the "constitutional role" and the "instrumental role" of freedom in development. The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The importance of substantive freedom includes elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on.... Development, in this view, is the process of expanding human freedoms, and the assessment of development has to be informed by this consideration.¹⁰

Seen in this light, development will have to be assessed by which freedoms are denied or secured. Lack of freedom, that is, deprivation of either the "constitutional role" or the "instrumental role" of freedom, would indicate a deprivation of development.

Subsequently, Sen explains freedom in terms of functionings and capabilities available and

⁷ Amartya Sen, *Development as Freedom*, p. 285.

⁸ Ibid., p. 53.

⁹ Ibid., p. 53. It seems that Sen attempts to make the idea of freedom an all-purpose normative value. In terms of critiques of his idea of freedom, see Joshua Cohen, "Review of Sen's Inequality Re-examined," in *Journal of Philosophy*, Vol 92(1994), pp. 275-88; G. A. Cohen, "Review: Amartya Sen's Unequal World," in *New Left Review* (1995), pp. 117-29; and Susan Okin, "Poverty, Well-Being and Gender: What Counts, Who's Heard?" in *Philosophy and Public Affairs* Vol 31(2003), pp. 280-316.

¹⁰ Ibid., p. 36.

necessary for human flourishing. Sen's approach focuses attention on understanding how an individual is free on the basis of his or her functionings, which are executable on the basis of his or her capabilities (or freedoms). This point means that, if individuals are not deprived of the capability to do "A," neither their functionings nor their freedoms will have been deprived.

Functionings, according to Sen, are the valuable activities that make up people's well-being and that include a healthy body, an educated mind, avoidable disease, safe and clean shelter, and adequate nourishment. Usually, functionings are related to income and goods but focus on what a person is able to do or to be. When A's basic need for food is satisfied, for instance, A enjoys the functioning of being well-nourished. Therefore, A enjoys functioning means that A is able to put his or her desires or preferences in a particular order, and is able to realize his or her desires and preferences.

Correspondingly, capabilities are "the alternative combinations of functioning that are feasible for an agent to achieve."¹¹ In other words, functionings are *actualized capabilities*, and "capability" is a kind of substantive freedom to pursue various functionings that are actually possible for people.¹² Accordingly, it is plain that the distinction between achieved functionings and capabilities is between actual achievements and the freedoms from which people can choose. Whereas the combination of functionings reflects a person's actual achievements, capability represents the freedom to achieve something, or "the alternative functioning combinations from which this person can choose."¹³

While two persons may have the same functioning vector, their capabilities may differ. For instance, a person who is fasting is in a state of under-nutrition, which may seem very similar to the state of a starving person. But the fasting person can eat and chooses not to, whereas the starving person would eat if she could but cannot. So Sen contends (1) that

¹¹ Ibid., p. 87.

¹² Ibid., p. 75.

¹³ Ibid., p. 75.

current theories of development follow from a conception of well-being valuing either the “resources” people have, like income or even Rawls’s primary goods; and (2) that the theories are actually distorted and unable to correctly grasp people’s well-being, because individuals with the same resources vary greatly in their abilities to convert resources into valuable functionings.

Moreover, subjective welfarism’s measures of development that rely on meeting people’s expressed preferences are no better than resource-based approaches. Sen contends that mental states of satisfaction cannot be an adequate measure of well-being because the choice of what is valuable can be the product of structures of exploitation and discrimination. Exploited people may simply adjust their aspirations according to what they can realistically achieve by their “adaptive preferences.”¹⁴ Therefore, persons’ stated preferences do not always accurately reflect the person’s real needs, and the reports of individual satisfaction are not always reliable indicators of real quality of life. The measure of development that one determines simply by scrutinizing subjective preferences would fail to accurately grasp the well-being of people.

Accordingly, if we are to look at a political-economic comparison among peoples, the comparison can be made not on a simple preference scale or functioning scale, but on a capability scale, which shows how much freedom a person has to achieve in relation to his or her feasible functionings. In other words, capability deprivation means the lack of a substantive freedom to achieve a necessary functioning. A person’s overall ability to do and achieve different things reflects the person’s overall capability to realize value or to function in valuable ways. Accordingly, assessing changes in people’s capabilities will allow us to ascertain whether a country’s development is actually increasing people’s options and

¹⁴ For instance, in a study about how widows assess their health and well-being, Sen found that women, especially poor women, have long been habituated to the absence of good health and adapted to their deprivation. Thus, they neither report dissatisfaction nor realistically expect their health will change in the future. See Amartya Sen, “Gender Inequality and Theories of Justice,” in Martha Nussbaum and Jonathan Glover (eds), *Women, Culture and Development: A study of Human Capabilities*. (Oxford University Press, 1995), pp. 259-273.

opportunities to achieve actual valuable achievements. Thus, in assessing a policy's impact on individual well-being, evaluation should be attentive to the policy's influence on a person's condition or state of enablement. If just social arrangements aim to equalize *something*, Sen argues, they should try to equalize people's capabilities, diminishing differences in people's real freedom to achieve valuable objectives.

3.3 Nussbaum's Central Human Capabilities

Inspired by Sen's capabilities approach,¹⁵ Martha Nussbaum takes up the argument that what is of primary moral importance for development is the promotion of capability for human flourishing. A person's overall ability to do and achieve different things reflects the person's overall capability to realize value or to function in valuable ways. Therefore, the deprivation of capabilities essentially diminishes the ability of a human being to be free, to develop, and to flourish.

However, Nussbaum's capabilities approach made some departures from Sen's approach. If Sen has focused on the role of capabilities in demarcating the "space" within which quality of life assessments are made, Nussbaum tries to go beyond the merely comparative use of the capability space, and tries to articulate an account of how capabilities can provide a basis for "central constitutional principles that citizens have a right to demand from their governments."¹⁶ In this regard, Nussbaum states,

The aim of this project as a whole is to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.¹⁷

Moreover, if Sen provides examples of what could be thought of as capabilities, basic or

¹⁵ Nussbaum originally developed her ideas on human capabilities independently from Sen, though their project became fused when they were working together in 1986 at the *World Institute for Development Economics Research* (WIDER). They noticed that certain aspects of Nussbaum's Aristotelian thinking had a striking resemblance to Sen's approach in development economics.

¹⁶ *FOJ*, p. 71.

¹⁷ *FOJ*, p. 70.

non-basic, Nussbaum provides us with an actual list that can be understood in terms of a social minimum. By reformulating the view of Aristotelian and Marxist interpretations of human flourishing together with the idea of a *threshold level of each capability*, she proposes a list of human capabilities that constitutes what she calls the central capabilities of each and every person, and argues that those capabilities should be “respected and implemented by governments of all nations.”¹⁸

For her, there are certain functionings that are particularly vital in a truly human life. Their presence or absence is understood as a sign of the presence or absence of human life.

Unlike Sen’s reluctance to endorse any account of central capabilities, Nussbaum insists that there would be no operational tool for the evaluation of development if there were no objective criterion for judgment.¹⁹ Because not all human freedoms are equally valuable, and some freedoms limit others, we need a criterion for their evaluation. If a theory of justice lacks an evaluative account of central capabilities to justify that some content must be given to the capabilities that people have reason to choose and value, the theory cannot say whether the society in question is just or unjust. Nussbaum reflects on this matter:

...any political project that is going to protect the equal worth of certain basic liberties for the poor, and to improve their living conditions, needs to say forthrightly that some freedoms are central for political purposes, and some are distinctly not. Some freedoms involve basic social entitlements, and others do not. Some lie at the heart of a view of political justice, and others do not. Among the ones that do not lie at the core, some are simply less important, but others may be positively bad.²⁰

Moreover, Nussbaum agrees with Sen that the measure of development would be distorted by adaptive preference, because people “can be taught not to value certain functionings as constituents of their good living.”²¹ But she suggests that the elaboration of an objective list of capabilities is a solution to the question of whether “adaptive selves” are adapting their preferences to an unjust status quo.

¹⁸ *FOJ*, p. 70.

¹⁹ *CFE*, p. 44.

²⁰ *CFE*, p. 44.

²¹ *PA*, p. 175.

As a result, her list of capabilities clearly unfolds a kind of threshold²² that divides the line between merely human lives and truly human lives—a line along which governments should be examined. The idea of a threshold means that the people in the nation state have to receive aid to achieve their capabilities. It is an objective set of necessary conditions for a human being to be able to lead a complete life. In this regard, it can be understood as a social minimum for each society. People who have fallen below this threshold lack the social minimum required for their leading a complete life. Therefore, every nation-state has an obligation to provide capabilities for each person, and above-the-threshold people around the world have responsibilities to aid people who have fallen below this threshold.

The list contains the ten following capabilities:

1. Life

Being able to live to the end of a human life of normal length, not dying prematurely, or before one's life is so reduced as to be not worth living

2. Bodily health

Being able to have good health, including reproductive health, to be adequately nourished, to have adequate shelter

3. Bodily integrity

Being able to move freely from place to place, to be secure against violent assault, including sexual assault and domestic violence, and having opportunities for sexual satisfaction and for choice in matters of reproduction

4. Senses, imagination, and thought

Being able to use the senses; being able to imagine, to think, and to reason, and to do these things in a "truly human way," a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing expressive works and events of one's own choice regarding religion, literature, music, and so forth. Being able to use one's mind in ways protected by guarantees for freedom of expression with respect to both political and artistic speech and freedom of religious exercise. Being able to experience pleasure and to avoid non-beneficial pain.

5. Emotions

Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, and to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this

²² In terms of the idea of threshold, it should be noted that there are two levels of threshold in her approach. One is the threshold of capability to function, below which a life will not be human at all; the other is a higher threshold, below which those characteristic functions are available. In a sense, we may judge this life as a life but not a "good" human life. For her, the latter threshold is the more important one when we turn to public policy.

capability means supporting forms of human association that can be shown to be crucial in their development.)

6. Practical reason

Being able to form a conception of the good and to engage in critical reflection about the planning of one's life (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation

A: Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction, to be able to imagine the situation of another.²³ (Protecting this capability means protecting institutions that constitute such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation, being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, ethnicity, caste, religion, and national origin.

8. Other species

Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play

Being able to laugh, to play, and to enjoy recreational activities

10. Control over one's environment

A. **Political:** Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

B. **Material:** Being able to hold property (both land and movable goods); and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.²⁴

Specifically, Nussbaum insists that the list does contain irreducibly “separate and indispensable components.” No one item on the list can be substituted for a large portion of another, because all are to be treated as equally valuable. Just as human rights are commonly implemented at the national level, the list is represented as a universal cross-cultural norm of human capabilities. But what forms it takes will be heavily dependent upon the local and particular context. Therefore, the list of capabilities is vague so as to allow multiple realizations in different contexts.²⁵ Furthermore, Nussbaum makes a

²³ The updated version does not contain the passage “and to have compassion for that situation, to have the capability for both justice and friendship.”

²⁴ Updated from *FOJ*, pp. 77-78.

²⁵ For instance, Nussbaum argues that (1) the list is open-ended and subject to ongoing revision; (2) the list is

threefold distinction among these capabilities to depict the characteristics of the list of capabilities, and points out why it should be the focus of public policy. *Basic capabilities* are those that each person is born with, namely, the “innate equipment of individuals that is the necessary basis for developing the moral advanced capabilities, and a ground of concern.”²⁶ The *internal capabilities* are those that a person who has them can develop into functionings if he or she desires to develop them in this way. For instance, the capability for sexual pleasure is one such capability since its development depends mainly on the maturity of the person. A person who has not been deprived of this internal capability is free to develop this capability for his or her own pleasure. Correspondingly, a woman who has not suffered genital mutilation would have the internal capability for sexual pleasure.²⁷ Finally, *combined capabilities* are those capabilities that are “internal capabilities *combined with* suitable external conditions for the exercise of the function.”²⁸ A person who has an internal capability of free speech, but lives in a society in which freedom of speech is forbidden, does not have the combined capability for self-expression.

For Nussbaum, the “central human capabilities” list is a list of combined capabilities. Not only is it necessary that a person have the internal capabilities, but also the person’s social-political environment must allow for the free development of those internal capabilities.

3.3.1 Why Capabilities, not Functioning

Following Sen’s lead, Nussbaum makes it clear that if we are to make policy on the basis of the capabilities approach, the aim of the policy must be based on capability, not on

specified in a very abstract and general way, and allows for specifying in local contexts; (3) the list is a freestanding “partial moral conception” without any grounding in metaphysical ideas; (4) the list protects capability not functionings; (5) the list includes the major liberties that protect pluralism; and (6) the list follows the separation between justification and implementation. See *PLR*, p. 34.

²⁶ See *WHD*, p. 85. It is plain that Sen’s use of “basic capabilities” is different from Nussbaum’s. Whereas Sen uses the terminology of basic capabilities to mean those most important capabilities necessary for leading a human life, Nussbaum’s basic capabilities are those capabilities that everyone is born with and that will become the basis for a person’s internal or combined capabilities. Accordingly, Sen’s basic capabilities are most closely related to Nussbaum’s combined capabilities, not to what she calls the basic capabilities.

²⁷ *Ibid.*

²⁸ *Ibid.*

functioning. In other words, it is not on the actualization of a given life style that we are to fix the social minimum, but on the choices people have in making their own lifestyles.

People may choose different functioning vectors, and there is no correct functioning vector that must be imposed on people as a whole in a diverse world. Accordingly, it is the actual ability to choose those functionings that is the focus of her capabilities approach.

Nussbaum states,

Where adult citizens are concerned, capability, not functioning, is the appropriate political goal. This is because of the very great importance the approach attaches to practical reason, as a good that both suffuses all the other functions, making them human rather than animal, and figures itself as a central function on the list.²⁹

As does Sen, Nussbaum argues that her approach, rather than support functioning satisfaction, opposes capability deprivation. The fact that a person fasts is a sign that the person could do otherwise. By contrast, it is silly to say that starving people under a stressful situation are choosing to fast. Therefore, the focus is on the freedom to choose a particular kind of life, rather than the life itself. Nussbaum points out,

We are aiming to make people able to live and act in certain concrete ways. Such an approach does not ignore the value of choice, since what we aim at is to make them capable of choosing to act in these ways, not simply to push them into so acting. This means (1) that we will define our goal in terms of capabilities, not actual functionings, and (2) that one of the capabilities we must most centrally consider in each area of life is the *capability of choosing*.³⁰

However, regarding self-respect and human dignity, Nussbaum would agree to license, on some occasions, the state to force functioning upon people and thereby to prevent them from doing things that jeopardize the people's own capabilities. For instance, the state is entitled to force children to attend primary and second school even if they would rather not. Parents are entitled to force their children to eat nutritious food in order to foster the development of their capabilities, because "functioning in childhood is necessary for capability in adulthood."³¹ Besides, government can apply the coercion of functionings to

²⁹ WHD, p. 87.

³⁰ NFC, p. 153.

³¹ See WHD, p. 90; FOJ, p. 172.

an adult, at least in cases where either “we force functionings to protect capabilities” or we seek to “protect equal worth of capabilities.”³² Herein, the point is this: “the more crucial a function is to attaining and maintaining other capabilities, the more entitled we may be to promote actual functioning in some cases, within limits set by an appropriate respect for citizens’ choices.”³³ Then, suicide is prohibited since life is a prerequisite of any functioning. Law requiring automobile users to wear seat-belts and motorcyclists to wear helmets is justified because governments should not allow individuals to bear the cost of momentary carelessness.³⁴ Moreover, Nussbaum insists that even *voluntary* female genital mutilation (FGM) might be banned without any exception because it involves a permanent removal of the capability for sexual pleasure. She argues,

It seems plausible for governments to ban female genital mutilation, even when practiced without coercion: for, in addition to long term health risk, the practice involves the permanent removal of the capability for most sexual pleasure, although individuals should of course be free to choose not to have sexual pleasure if they prefer not to.³⁵

Some would charge that focusing on functioning rather than on capabilities *per se* contradicts the aim of the capabilities approach to protect substantive freedoms and is a kind of paternalism. Nussbaum is clear that her approach would raise legitimate concerns about paternalism, but she insists that health and bodily integrity are extremely important in relation to all the other capabilities.³⁶ Therefore, there are some choices that she considers wrong, and sometimes, we need to set the value of choice not so much in the choice itself but in the “goodness of the object of choice.”³⁷ In this regard, paternalism can be plausible in regard to functionings, provided that they are deemed too important to allow people, even voluntarily, to give up. Nussbaum responds to this point:

³² *WHD*, p. 91

³³ *Ibid*, p. 92

³⁴ *WHD*, pp. 92-94.

³⁵ *WHD*, p. 94

³⁶ It seems that Nussbaum allows the restricting of people’s freedoms to function according to people’s choice, thus going beyond John Stuart Mill’s non-harm principle.

³⁷ See Séverine Deneulin, “Perfectionism, Paternalism and Liberalism in Sen and Nussbaum’s Capability Approach,” in *Review of Political Economy*, (14)(2002), pp. 497-518 at 510.

...in that way, any bill of rights is “paternalistic,” vis-a-vis families, or groups, or practices, or even pieces of legislation, that treat people with insufficient or unequal respect, if paternalism means simply telling people that they cannot behave in some way that they have traditionally behaved and want to behave. The Indian Constitution is in that sense “paternalistic,” when it tells people that it is from now on illegal to treat women as unequal in matters of property and civil capacity, or to discriminate against people on grounds of caste or sex. More generally, any system of law is “paternalistic,” keeping some people from doing some things that they want to do.³⁸

Because some basic functionings are so important in relation to all other capabilities, there are some legitimate areas of interference in a person’s capabilities. But there will rightly be disagreement about where that point is in each case, and Nussbaum suggests that deciding where the permitted interferences lie should be left to each nation.³⁹

3.3.2 Methodology (I): the Aristotelian and Marxist Conceptions of the Person

Because the capabilities approach is to safeguard every possible human capability if the safeguard is to be normative, the first problem that the capabilities approach encounters is how to determine which set of capabilities will be morally relevant and important. In spite of the transformation of her framework and method of justification in many substantial ways, we can divide Nussbaum’s justificatory strategy into three steps for identifying the list of ten central capabilities: (1) She reaches the *substantive* account of the capabilities by applying an “evaluative inquiry” modeled on Aristotelian practical reasoning. Nussbaum is especially drawn to Aristotle’s defense of “non-relative virtues” and his procedural combination of “theoretical power with sensitivity to the actual circumstances of human life and choice in all their multiplicity, variety and mutability.”⁴⁰ (2) The task of *political* justification involves applying a “framing method”⁴¹ initiated by John Rawls’s idea of political justification, and searching for a universal standard by comparing the capabilities

³⁸ WHD, pp. 2-53.

³⁹ Ibid, p. 95.

⁴⁰ See NRV, p. 243.

⁴¹ WHD, p. 148.

approach to other available approaches. And (3) Nussbaum tests her view against the views of others by critically examining subjective preferences and by seeking *empirically* universal acceptability.⁴²

To start with, let us recall that Nussbaum represents the ten central human capabilities as “the characteristic activities of the human being” both essential to our humanity and thereby ethically relevant for political purposes. The intuitive assumption of the capabilities approach is to elaborate a set of criteria for a fulfilling human life on the basis of the intuitive idea that “there are certain basic human needs and capacities that must be realized to a minimum degree if human beings are to live a decent life consonant with the idea of a life worthy of human dignity.”⁴³ For her, the features of a truly human life to be discovered are “neither ahistorical nor *a priori*,” but are self-consciously representative of “a very general record of broadly shared experiences of human beings within history.”⁴⁴

Nussbaum combines Aristotle’s internal essentialism,⁴⁵ which is “a historically grounded empirical essentialism taking its stand within human experience,”⁴⁶ with Marx’s conception of human life, which means a life has available in it “truly human functioning.” Using this combination, Nussbaum derives fundamental experiences that all humans share and that can be regarded as the activities common to every human being.⁴⁷

Subsequently, the Aristotelian-Marxist conception of the person is based on both identifying the basic characteristics of a human life, and from them, determining what

⁴² By contrast, Alison Jaggar divided her methodology into four parts: (1) The Aristotelian Approach, (2) The Narrative Approach, (3) The Morally Constrained Proceduralist, or Informed-Desire, Approach, and (4) The Non-Platonist Substantive-Good Approach. See Alison Jaggar, “Reasoning about Well-Being: Nussbaum’s Methods of Justifying the Capabilities,” in *Journal of Political Philosophy*, Vol 14 (2006), pp. 301-322.

⁴³ See *FOJ*, p. 181.

⁴⁴ See *HCFHB*, p. 74

⁴⁵ Nussbaum uses different terms to refer to this methodology. Among these is her approach “internal essentialism” in *HFSJ*, p. 208; her “Aristotelian approach” in *NRV*; and her “Aristotelian Procedure,” or “Internal Criticism,” in Martha Nussbaum and Amartya Sen’s “Internal Criticism and Indian Rationalist Traditions,” in Michael Krauss (ed.) *Relativism: Interpretation and Confrontation* (Notre Dame, IN: University of Notre Dame Press, 1989), pp. 299-325. In terms of the critique of her Aristotelian methodology, see Brooke Ackerly, *Political Theory and Feminist Social Criticism* (Cambridge University Press, 2000).

⁴⁶ *HFSJ*, p. 208.

⁴⁷ She observes, “The experience of the body is culturally influenced, but the body itself, prior to such experience, provides limits and parameters that ensure a great deal of overlap in what is going to be experienced.” See *NRV*, p. 263.

functioning is prerequisite for the life one would call a good human life. Nussbaum declares,

...among the many actual features of a characteristic fundamental form of life, we select some that seem so normatively fundamental that a life without any possibility at all of exercising one of them, at any level, is not a fully human life, *a life worthy of human dignity*, even if others are present. If enough of them are impossible (as in the case of a person in a persistent vegetative state), we may judge that the life is not a human life at all, any more. Then, having identified that (extreme) threshold, we seek a higher threshold, the level above which not just mere human life, but *good life*, become possible.⁴⁸

Accordingly, by looking at our own human life and others' human life, and by asking ourselves what are the grounding experiences that all human beings share, Nussbaum establishes a list of human experiences on which we all agree; thus, Nussbaum ascertains that the list is indispensable. Each of the central human capabilities is conceived as fundamental to each human life, that is, a life that is lacking any one of those capabilities will fall short of being a "good" human life.

Moreover, unlike Kant's philosophy, Nussbaum's embraces a concept of human dignity that is not based on rationality alone. Following Kant, she asserts that all human beings are ends in themselves, whose well-being should not be sacrificed for the sake of an aggregated well-being. From Aristotle, however, she adopts a view of humans whose dignity is a kind of animal dignity. Therefore, one should give up the Kantian assumption that rationality alone is the basis of people's entitlement to moral treatment. In this regard, Nussbaum points out,

The capabilities approach, by contrast, sees rationality and animality as thoroughly unified. Taking its cue from Aristotle's notion of the human being as a political animal, and from Marx's idea that the human being is a creature "in need of a plurality of life-activities," it sees the rational as simply one aspect of the animal, and, at that, not the only one that is pertinent to a notion of truly human functioning.... The specifically human kind is indeed characterized, usually, by a kind of rationality, but rationality is not idealized and set in opposition to animality, it is just garden-variety practical reasoning, which is one way animals have of functioning.⁴⁹

Thus, while determining what is truly indispensable to a *human* form of life, we need to

⁴⁸ *FOJ*, p. 181.

⁴⁹ *FOJ*, p. 159.

examine our self-understanding about questions of personal identity (e.g., what changes could I endure and still be me?) and those of inclusion (e.g., what features must any creature have in order to be truly human?).⁵⁰ In other words, we must be able to identify who or what a human being really *is* according to some criteria, though the criteria itself will be based on “forms of activity” that are specifically those of human creatures.

3.3.3 Methodology (II): From Aristotelian Democracy to Rawlsian Political Liberalism

Before proceeding to a description of the justificatory strategy of her capabilities approach, it is necessary to stress the transformation, in Nussbaum’s work, of the nature of the capabilities list into a conception of the good. In her earlier work, Nussbaum draws on Aristotle’s understanding of the relationship between politics and human potentials to develop a conception of *Aristotelian social democracy*, and the list of human capabilities can provide the basis for a “thick vague theory of the good.” She insists that it can be an account of the “objective proper goal” of government to bring all citizens up to a certain basic minimum level of capability.⁵¹ In the late 1990s, however, Nussbaum adopted a procedure akin to Rawls’s “reflective equilibrium” to justify the list of capabilities in a political way, and she placed these capabilities in the framework of Rawlsian political liberalism.⁵²

The reason for the justificatory strategy in the Rawlsian sense is to show respect for persons, to show respect for their comprehensive conceptions of the good, and to ensure

⁵⁰ In her own words, “it matters a great deal what we ourselves think about our selfhood and our possibilities.” See *AHN*, p. 121.

⁵¹ *ASD*, p. 203.

⁵² This shift is first mentioned in “The Good as Discipline, The Good as Freedom”, in D. Crocker & T. Linden (Eds), *Ethics of Consumption: the good life, justice and global stewardship* (Rowman & Little. Eld, 1998), pp. 312–341. In terms of this transformation, and the comparison between her Aristotelian social democracy and her Rawlsian political liberalism, see Séverine Deneulin, “Perfectionism, Paternalism and Liberalism in Sen and Nussbaum’s Capability Approach,” and Alison Jaggar, “Reasoning about Well-Being: Nussbaum’s Methods of justifying the Capabilities,” in *Journal of Political philosophy* Vol 14(2006), pp. 301-22.

that “our considered convictions actually accord with the agreement on the list of capabilities we make in the political domain.” Following Rawls, Nussbaum argues that the completion of the justification cannot do without its stability, and stability refers to the capacity of a conception to generate its own support. The fact of reasonable pluralism makes it clear that no comprehensive doctrines will be acceptable to all citizens. Thus, to show that a conception is stable, the capabilities approach needs to show that it was justified and acceptable in some way to citizens. Nussbaum points out,

.... it is part of what justifies the conception: that it can over time be justified to people who hold different comprehensive conceptions of the good life. Justification thus involves an idea of acceptability to all, or at least to the major conceptions of values. Acceptability is relevant to justification both for reason of stability—a conception that is acceptable to all can be stable over time—and for reason of respect.⁵³

In this regard, the task of justification is “to put forward something that people from many different traditions, with many different fuller conceptions of the good, can agree on, as the necessary basis for pursuing their good life,”⁵⁴ and “can be endorsed for political purposes, ... by people who otherwise have very different views of what a complete good life for a human being would be.”⁵⁵

Therefore, the list of capabilities can no longer be a single, though vague, conception of the good human life as “universal in the sense of articulating a timeless ideal of well-being,” but must be a list of constitutional guarantees that is grounded in Rawlsian political liberalism upon which people who have different conceptions of the good life could agree. Nevertheless, Nussbaum states, in spite of the roots of a capability-based conception of well-being in Aristotelian ideals of human flourishing, there is no necessary link between a government’s protection of individual capabilities and comprehensive liberalism. Rather, Nussbaum shows that a list of human capabilities can provide the basis for “fundamental political principles” or “specifically political goals” that remain independent of any

⁵³ *FOJ*, p. 163.

⁵⁴ *SSJ*, p. 40.

⁵⁵ *WHD*, p. 74.

“metaphysical grounding.”⁵⁶

Subsequently, Nussbaum models the justification of her political principles on a Rawlsian method of “reflective equilibrium” by involving a deliberative process in which individuals reason back and forth among (1) their considered judgments about particular instances, (2) the principles or rules that, they believe, govern these considered judgments, and (3) the theoretical considerations that they bear in accepting these judgments, principles, or rules, while revising these elements in an effort to achieve coherence among them. She states,

How do I argue for the ten capabilities? Like Rawls, I view my argument as essentially Socratic in character: I appeal to the interlocutor to ponder what is implicit in the notion of human dignity and of a life in accordance with it. I ask the interlocutor to consider that certain ways of life that human beings are forced to lead are not fully human, in the sense of their not being worthy of the dignity of the human being. I believe that this intuitive *starting point* offers definite, albeit highly general, guidance. Marx’s vivid descriptions of forms of labor that allow continued life, but not a fully human life, resonates the world over. The notion of a life in accordance with human dignity is one of the most fertile ideas used in worldwide constitutional jurisprudence. So, I argue in a very general and intuitive way, moving through various areas of life influenced by public policy, that the protection of these ten entitlements is an essential requirement of life with human dignity.⁵⁷

Following the framing method of the good by Rawlsian “reflective equilibrium,” we lay out the arguments for a given theoretical position (the capabilities approach), and hold it up against the “fixed point” in our moral intuitions to see how these intuitions are tested by the conception under examination. The procedure asks us to “cling to that which we can rationally defend, [and to] be willing to discover that this may or may not be identical with the view we held when we began the inquiry.”⁵⁸ We should modify or reject the theoretical conception when it has failed to fit within our moral intuitions, and in the end we can achieve “consistency and fit in our judgments taken as a whole.”⁵⁹ Because the search for “reflective equilibrium” is to be considered in the political domain, we must not only consider the views of our fellow citizens, but also lay out rival conceptions and alternative

⁵⁶ *WHD*, p. 5, p. 76.

⁵⁷ *OHVV*, p. 197.

⁵⁸ *CH*, p. 33.

⁵⁹ *WHD*, p. 101.

models to demonstrate “on what grounds ours might merge as more worthy of choice.”⁶⁰

Despite stressing the similarity between Rawls’s political liberalism and hers, Nussbaum rejects Rawls’s methodology of political constructivism in two substantial ways: (1) his methodology insists that the conception should be derived from ideas that are implicit in current political public culture,⁶¹ and (2) his methodology has a procedural-oriented claim that fair outcomes follow from a fair and impartial procedure.⁶²

The reason for rejecting political liberalism’s dependence on ideas implicit in the public political culture, Nussbaum argues, is that Rawls wrongly states that the ideas of mutual respect and the inviolability of persons are peculiarly Western. However, Nussbaum argues that many non-Western societies indeed have understandings of dignity and equality that are more advanced than those of Western societies, and “there seems no reason to think that any of the primary goods is particularly Western, nor that the power of forming and revising a plan of life expresses a distinctively Western sense of what is important.”⁶³ Since this presupposition is proved to be wrong, people need only to draw on the ideas inherent in the global culture, whether their own culture currently exhibits the ideas or not, because, she believes, the convergence can be found in that global culture.⁶⁴ On the other hand, Nussbaum argues that political liberalism’s emphasis on ideas implicit in current public political culture is not the main characteristic of political liberalism, but simply the derivative clue for us to ensure that such a conception can be stable for the right reasons. If the idea functions as a “module” that attaches itself to different comprehensive doctrines, a conception of justice can gain stability over time for the right reason. For Nussbaum, therefore, the core idea of Rawlsian political liberalism is thus:

If such a liberal (a) eschews reference to controversial metaphysical and epistemological doctrine in the context of articulating the basic principles of justice themselves [and] (b)

⁶⁰ See *WHD*, p. 102.

⁶¹ See *PLR*, p. 27; *FOJ*, pp. 301-5.

⁶² *FOJ*, p. 82.

⁶³ *WHD*, p. 67.

⁶⁴ *FOJ*, p. 304.

does so for reason of mutual respect, in the light of the fact of reasonable disagreement, then the liberal is a political liberal.⁶⁵

Accordingly, unlike the consensus-based approaches that simply appeal to the *de facto* overlapping consensus, her claim at this stage seems to be that there is a branch of liberal thinking that exists within most of the important cultural and religious traditions and that can endorse all the central capabilities in the future, even though neither it, nor the values it embodies, are the objects of consensus *now*. This claim is very different from the claim that there is such an *actual* consensus already.⁶⁶ She notes in this regard,

The capabilities approach is a form of political liberalism: it relies on the idea that an overlapping consensus of the reasonable comprehensive doctrines can emerge over time to support and sustain the political conception. To show this, and thus to justify the conception, we do not have to show that the consensus exists at present, but we do need to show that there is sufficient basis for it in the existing views of liberal constitutional democracies [and] that it is reasonable to think that over time such a consensus may emerge.⁶⁷

Moreover, unlike Rawls's constructivism in designing a procedure "that models certain key features of fairness and impartiality, and relies on these procedures to generate an adequate just outcome,"⁶⁸ Nussbaum's theory depends not on procedural justification for its principles but on an intuitive Aristotelian approach to outcomes—an account of human entitlements acceptable in a minimally decent and just society—and on defining the political procedures in accordance with what promotes those outcomes.⁶⁹ She clearly states,

The capabilities approach is like the criminal trial. That is, it starts from the outcome: with an intuitive grasp of a particular content, as having a necessary connection to a life worthy of human dignity. It then seeks political procedures (a constitution, various allocations of powers, a certain type of economic system) that will achieve those results as nearly as possible, although it seems likely that such procedures will change over time and may also vary with the circumstances and history of different nations. Justice is in the outcome, and the procedure is a good one to the extent that it promotes this outcome.⁷⁰

⁶⁵ *PLR*, p. 39.

⁶⁶ Surely, in her *Aristotelian social democracy*, the list is presented as universally accepted, but now she argues that it still needs to gain acceptance from people because "no wide reflective equilibrium in the full Rawlsian sense has as yet been found." See *WHD*, pp. 102-3.

⁶⁷ *FOJ*, p. 388.

⁶⁸ *FOJ*, p. 81.

⁶⁹ *FOJ*, p. 275.

⁷⁰ *FOJ*, p. 82.

Rawlsian constructivism aims to design a procedure that models conditions of fairness, and relies on the procedures to generate a just outcome; in contrast, Nussbaum argues that we should identify a correct outcome in advance, and then design a procedure that will achieve this result as closely as possible, or simply reject any procedure if it does not result in a correct outcome. In this regard, proceduralism in general and Rawls's constructivism in particular simply put the cart before the horse. Moreover, any procedure may produce unjust outcomes due to the "adaptive selves" who, when participating in the process, simply adapt their desire to the unjust social circumstances. So it is odd to say "there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."⁷¹

Nevertheless, Nussbaum recognizes that the capabilities approach as a type of political liberalism requires respect for the preferences of others, and refutes any suspicion that the capabilities approach would be "imposing something on people who surely have their own ideas of what is right and proper." She provides a modified version of preference-based procedural reasoning, which is what she calls the "informed-desire approach."⁷² It is a procedural approach with normative constraints for critically examining preferences and for eliminating those that are wrong. Nussbaum's approach was initiated by Jean Hampton's Kantian contractarianism, which is a procedure constrained by a Kantian conception of human worth and a conception of a person's legitimate interests.

Nussbaum argues that an informed-desire approach is necessary to ensure the stability of her capability list.⁷³ However, Nussbaum warns that proceduralism is a fragile foundation for us to justify the list of basic entitlements because existing preferences may be mistaken when they are adapted to an unjust status quo. Thus, it can provide only

⁷¹ See John Rawls, *TJ*, p. 86.

⁷² Nussbaum called it an "informed-desire" or "a sensible informed-desire" approach. See *WHD*, p. 158, p. 161. See Also Jean Hampton, Feminist Contractarianism, in Jean Hampton *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy*, edited by Daniel Farnham (Cambridge University Press, 2007), pp. 1-38.

⁷³ *WHD*, p. 152.

some “heuristic and ancillary” support for the substantive account of the good, and she expects that only “in the long term [can] consensus between informed desire and the substantive good” be achieved. However, she insists that, when the two approaches reach divergent conclusions, the substantive account of the good should always trump proceduralism.⁷⁴ Herein, she points out,

First of all, we may and should give desire a *heuristic* role, allowing people’s actual preferences to guide us in determining on which issues we might focus as salient.... Second, we may give desire a modest *ancillary* role in political justification, consulting informed desire as a cross-check on our independent moral argument. This role, in turn, is twofold. One aspect concerns the issue of political stability: we cannot satisfy a conception without showing that it can be reasonably stable over time. Convergence between the best informed-desire accounts (which include moral elements) and my own purely moral conception would help justify that conception by giving us assurance that it can be stable. Second, we also look for this convergence for reason of respect for persons: to be concerned about the possibility of convergence between our moral conception and the best informed-desire conception (again, those whose procedures incorporate moral elements) shows that our conception is one that respects persons and their own ability to reach out for the good.⁷⁵

Seen in this light, her list of central capabilities is a non-Platonist substantive-good account. That is, it is neither a Platonism that gives preferences no part in the process of political justification but validates moral claims by simply appealing to some independent standard of value, nor a subjective welfarism that validates moral claims by simply appealing to existing desires. However, given that even the best informed-desire approaches do not remove adaptive preferences, the substantive account of the good should always trump the informed-desire approach.⁷⁶

In spite of these differences over the justificatory strategy, Nussbaum argues that her list of capabilities has a similar role to Rawls’s primary goods, which enable an individual to make any choice of a way of life possible, and can be endorsed for political purposes by people with very divergent comprehensive views. It is clear that Nussbaum includes on the list some of what Rawls calls “natural goods,” which are excluded as primary goods,

⁷⁴ *WHD*, p. 165.

⁷⁵ *OHVV*, p. 200.

⁷⁶ *OHVV*, p. 201; and Alison Jaggar, “Reasoning about Well-Being: Nussbaum’s Methods of Justifying the Capabilities”, p. 308.

because it is very difficult to make society responsible for their distribution. Health, for instance, is a natural good, and Rawls argued that it is not reasonable to assume that government should be responsible for the health of its citizens because the determinants of the positive status are usually “luck-governed.”⁷⁷ However, for Nussbaum, differences in health status are often socially caused, and governments can affect people’s health by distributing healthcare, which can influence who has good or bad health. Therefore, society can hope to guarantee the social basis of these natural goods, not the goods themselves. In other words, putting them on the capabilities list as a political goal can be very useful for the aspiration to the protection and achievement of capabilities.

3.3.4 Methodology (III): Emerging Consensus by Cross-cultural Dialogue

As a practical political project, the capabilities approach is not only a search for universal validation, but also a search for universal applicability. Therefore, in the third stage, Nussbaum tests her view in dialogue with non-Western activists or scholars, and she asks how the list fits within the context of those peoples’ goals. Nussbaum indicates that this kind of consensus is necessary both for epistemological and for political reasons:

It seems to me very important that people from a wide variety of cultures, coming together in conditions conducive to reflective criticism of tradition, and free from intimidation and hierarchy, should agree that this list is a good one, one that they would choose. Finding such areas of informed agreement is epistemically valuable in two ways: first, it points us to areas of human expression that we might have neglected or underestimated. Second, it tells us that our intuitions about what would make a political consensus possible are on the right track.⁷⁸

The task of justification on this view, therefore, is to provide convincing evidence that people across the world would eventually agree on her list of capabilities. She uses the “narrative method,”⁷⁹ and many statistics, historical and sociological materials, and

⁷⁷ *WHD*, p. 81.

⁷⁸ *WHD*, p. 151.

⁷⁹ Susan Okin has charged that the narrative method does not exemplify a sincere dialogue with poor women and that it, indeed, allows Nussbaum to project and impose her own view. In terms of the critiques of her narrative method, see Susan Okin, “Poverty, Well-Being, and Gender: What Counts, Who’s Heard?,” in

examples from reports of NGOs, to assert that her list of capabilities is based “both on the result of cross-cultural academic discussion and on discussions in women’s groups themselves designed to exemplify certain values of equal dignity, non-hierarchy, and non-intimidation.”⁸⁰ She would like to show that the list represents the result of cross-cultural discussion, and to show that the input of other voices has shaped its content in many ways. After dialogue with many Indian feminist activists, for instance, in the updated account of capabilities in *Women and Human Development*, she includes sexual orientation as a basis on which one could expect protection against discrimination. She states,

In earlier versions of the list I did not include it, judging that there was so little consensus on this item, especially in India, that its inclusion might seem premature.... This year, however, the controversy over the dispute of the feminist film *Fire* has led to much more discussion of sexual orientation in the India media, and to the public recognition by feminists and other liberal thinkers of the important links between these issues and women’s full equality. I therefore think it is no longer premature to add this item to a cross-cultural list that is expected to command an overlapping consensus.⁸¹

Thus, at this stage, she tries to justify her moral conception with empirical evidence, and to present the possibility of searching for a *de facto* overlapping consensus on the part of people with very different views of human life.

3.4 Capability and Human Rights

Nussbaum argues that the capabilities approach can ground a human rights view. The capabilities approach includes many “fundamental entitlements” that can be used as the underpinning for constitutional guarantees within a nation upon which these entitlements can be seen as side-constraints on what government may do.⁸² These entitlements can also be used as the underpinning for thinking about international justice, which is also stressed

Philosophy and Public Affairs, 31(2003), pp. 280-316. Nussbaum responds that the narrative method is only a heuristic device rather than an independent approach with which to justify the capabilities. In terms of Nussbaum’s response, see “On Hearing Women’s Voices: A Reply to Susan Okin,” in *Philosophy and Public Affairs* Vol 32 (2004), pp. 193-205.

⁸⁰ *WHD*, p. 151.

⁸¹ *WHD*, p. 80.

⁸² *CHR*, p. 300.

in international human rights movements.⁸³

For Nussbaum, human rights can be understood as capabilities in two different ways: (1) rights as “basic capabilities,” and (2) rights as “combined capabilities.” Nussbaum suggests that the best way of thinking about rights is to conceptualize human rights as combined capabilities that function in various ways. In terms of the first way, we use the term ‘human rights’ in this sense when we say that “A has a right to X” even when A’s society does not secure such a right to A. Human rights in this sense are the “especially urgent and morally justified claims” that every person has or could make “simply by virtue of being human.”⁸⁴ They “are thought to derive from some actual features of human persons, some untrained power in them that demands or calls for support from the world.”⁸⁵ Thus, to declare a human right is to assert that A has a morally justified claim to have certain capabilities to function for the reason that A is a human being. By contrast, human rights as “combined capabilities” mean that they “are the *goals* of public planning” in the sense that governments should provide and protect its citizens’ human rights by enabling citizens to have combined capabilities.⁸⁶ In this sense, the combined capabilities are understood as the object of the human rights.

For instance, a right to life can be a basic capability in respect of being born a human being, or a combined capability in respect of what is provided by government for the capability of life to function.⁸⁷ Furthermore, the right to shelter can be understood as a basic capability in virtue of being born a person that has a capability to shelter, or a combined capability in virtue of what is provided by the government for the capability to shelter to function.⁸⁸

Conceptualizing the meaning of rights in terms of capabilities, Nussbaum defends her

⁸³ *FOJ*, p. 284.

⁸⁴ *CHR*, p. 292.

⁸⁵ *CHR*, p. 293.

⁸⁶ *CHR*, p. 293.

⁸⁷ *CHRU*, p. 96.

⁸⁸ *Ibid.*, p. 97.

assertion that the capabilities approach both is better than human rights discourse in solving many troublesome issues and can present a better understanding of what it means to lead a truly human life than can the language of human rights.

First of all, rights talk is vague and abstract, lacking “theoretical and conceptual clarity.”⁸⁹ Nussbaum argues, “Rights have been understood in many different ways, and difficult theoretical questions are frequently obscured by the use of rights language, which can give the illusion of agreement where there is deep philosophical disagreement.”⁹⁰ By thinking about rights in terms of capabilities, we can grasp a clear meaning regarding the protection and implementation of human rights. For instance, women in many nations have the “nominal right of political participation” without having this right in terms of capability, “for they are scheduled and threatened with violence should they leave the home.”⁹¹ In this regard, women have only *de jure* but not *de facto* rights of participation. Conceptualizing the meaning of rights in terms of capabilities to function in various ways, regardless of whether or not women have a right to political participation, depends on whether or not relevant capabilities to function are fully present. Moreover, securing a right to a person does not require only the absence of negative state action. A right protected depends on whether or not the “relevant capabilities to function are presented by right-holders,” rather than on whether or not state action is absent and on whether or not it is legally recognized.⁹²

Nussbaum argues,

Moreover, a focus on capabilities, although closely allied with the human rights approach, adds an important clarification to the idea of human rights, for it informs us that our goal is not merely “negative liberty” or absence of interfering state action—one very common understanding of the notion of rights—but, instead, the full ability of people to be and to choose these very important things. Thus all capabilities have an economic aspect: even the freedom of speech requires education, adequate nutrition, and so forth.⁹³

⁸⁹ *CHR*, p. 273.

⁹⁰ *FOJ*, p. 285.

⁹¹ *FOJ*, p. 287.

⁹² *FOJ*, p. 287.

⁹³ *CHR*, p. 138.

By measuring human rights protection in reference to capabilities and functionings, we can better understand and use the concept of the obligation to respect, to protect, and to fulfill human rights, especially when individuals' human rights are, in effect, protected only on paper.⁹⁴ Also, because the capabilities approach directs attention to what people actually are able to do and to be, people are unable to function in accordance with the political rights without any economic and social guarantee; thus the interdependency between civil-political rights and economic rights is undoubtedly salient. Accordingly, the capabilities approach can go beyond the prolonged decades-long debate regarding the priority of first-generation and second-generation human rights.

Moreover, Nussbaum contends that the language of human rights has been entangled in the charge of both being linked to one particular culture and yet masquerading as universal values. She contends that capabilities language can easily sweep away this charge because the capabilities language is not linked to any particular culture or tradition and because the capabilities language does not give the "appearance of privileging a Western idea." Thus, the capabilities approach can take a better position among philosophical disagreements and unburden itself of the charge of cultural imperialism.

In a nutshell, Nussbaum believes the analysis of people's capabilities can help us conceive and receive international human rights standards as more than formal rights.

It is interesting here to compare Nussbaum's and Rawls's human rights schemes with each other. (1) While human rights are the minimal rights individuals must have if they are to engage in genuine social cooperation in Rawls's *The Law of Peoples*, Nussbaum conceives human rights as those required for individuals who are to live a dignified life. Accordingly, it seems that the two scholars address different questions so that the nature and the scope of human rights differ from one theory to the other. Rawls is dealing mainly with the

⁹⁴ In this way, Nussbaum argues, we can also get beyond the traditional liberal thinking in terms of the private-public distinction through which people ignore the actual inequality or capabilities deprivation within private spheres. See *FOJ*, pp. 290-291.

problem regarding the rights that a well-ordered society must include and that enable all decent peoples to honor human rights; moreover, Rawls argues that the main role of human rights is to specify the justification for intervention regarding states' responses to grave violations of human rights. Nussbaum, in contrast, is answering another question: what are the central human capabilities with which every society should establish a constitutionally guaranteed social minimum based on the threshold of each of these capabilities?⁹⁵ (2) Like Rawls's idea of decency, a list of the ten central capabilities provides an account of the necessary conditions every society must afford if it is to be minimally just. Domestically, the job of a decent society is to give all citizens the capabilities to reach an appropriate threshold level. Internationally, we all have a collective duty to assist the people of the world with what they need. (3) In terms of the content of human rights, Nussbaum does not accept the distinction between human rights and liberal rights that Rawls makes. She contends that Rawls is too cautious in his account of human rights, and her capabilities approach is able to reach a global overlapping consensus among many cultural and religious traditions.⁹⁶

3.5 Critique

If my interpretation is sound, we realize that Nussbaum defends a list of universal capabilities without metaphysical foundation, and appeals to an overlapping consensus among different traditions and cultures that can support stability for the right reason. In what follows, I will critically assess her capabilities approach. Although the capabilities approach was developed in considerable consultation with many peoples in multiple

⁹⁵ Alyssa Bernstein therefore argues that the two approaches do not conflict with each other, and can be complementary for securing human rights, especially women's rights. I will leave aside this issue for the moment, since the correlation between rights and capabilities is still unexamined. See Alyssa Bernstein, "Nussbaum vs. Rawls: Should Feminist Human Rights Advocates Reject the Law of Peoples and Endorse the Capabilities Approach?" in Peggy DesAutels and Rebecca Whisnant (eds) *Global Concerns: Feminist Ethics and Social Theory* (New York: Rowman and Littlefield, 2007).

⁹⁶ FOJ, pp. 298-305.

contexts, and although the UNDP has been comparing the quality of life across countries through a focus on human capabilities, it is still an empirical question as to whether or not her list of capabilities really has reached universal acceptability. However, I will leave aside this issue for the moment, and focus attention on her justification of capabilities and on the relationship between capabilities and human rights.

3.5.1 Liberalism: Political or Comprehensive?

According to Nussbaum, the framework of Rawlsian political liberalism can be a possible way of settling disputes over different objects of value that concern the justification of the list of capabilities. People can arrive at this “freestanding moral core of a political conception relevant for political purposes,” without accepting any particular metaphysical view of the world or of human nature. Such an overlapping consensus displays respect for diversity and for individual choice, because no one is being asked either to sacrifice his or her own comprehensive doctrine or to accept the political conception of basic capabilities. In this regard, it is a type of political liberalism, not a comprehensive liberalism.

Recall that Rawlsian political liberalism has three features: First, it is limited in scope to the *basic structure* of a society, that is, limited in a society’s main political, social, and economic institutions. It is different from other moral conceptions that are more comprehensive and that include “conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships.”⁹⁷

Second, it is a *freestanding* view, namely, it is presented without reliance on any comprehensive doctrine. Third, it is worked out from the fundamental ideas that can be seen as implicit in the *public political culture* of a democratic society. Thus, the capabilities approach—if it is a type of political liberalism—needs to affirm that its function is to apply to the basic structure of a society for “political purposes only”: that its function is

⁹⁷ *PL*, p. 13.

not to apply to churches, families, and universities outside the basic structure. Furthermore, the capabilities approach should be a freestanding moral view presented independently of any comprehensive doctrine, and can be the object of an overlapping consensus. Finally, the capabilities approach is worked out from the fundamental ideas that can be found as implicit in the public political culture of a constitutional democracy. Nussbaum has clearly rejected the third feature as the core definition of Rawlsian political liberalism; nevertheless, we should look into whether or not her reason can be justified.

To begin with, Nussbaum contrasts her political liberalism with the comprehensive liberalism of Joseph Raz, Jürgen Habermas, and Susan Okin, among others. Nussbaum rejects comprehensive liberalism, because it fails to respect the plurality of the conceptions of the good life and thus fails to sufficiently respect individual choices about values. For comprehensive liberalism, what is valuable about persons is that they can reflect on and revise their commitment and attachments. Thus, “autonomy” is a general good for all humans. For Nussbaum, however, the liberal view of autonomy is explicitly a secular comprehensive view of what is valuable about persons, which would definitely not be accepted by many religious believers. However, political principles should not be built on any metaphysical or epistemological ethical foundation that divides citizens along lines of religion or philosophy. By contrast, a politically liberal state would respect “people who prefer a life within authoritarian religion, so long as certain basic opportunities and exit options are firmly guaranteed.”⁹⁸ In other words, a political liberal would protect a non-autonomous life *if* that life has been chosen autonomously. Thus, “respect for choice” in Nussbaum’s political-liberal position is not in terms of a comprehensive-liberal idea of autonomy, but in terms of an idea of “respect for diversity of persons and their comprehensive conceptions.”⁹⁹ That is what she calls a *political* conception of autonomy,

⁹⁸ *APHC*, p. 129.

⁹⁹ *APHC*, p. 129.

namely, “the idea of practical reason as a capability of persons for political purposes.”¹⁰⁰ Therefore, she carefully refrains from asserting either that non-autonomous lives are not worth living or even that autonomy is a key element in the best comprehensive view of human flourishing, and she carefully protects the spaces within which Calvinists and other non-Milleans can plan lives according to their own lights.¹⁰¹ In this regard, her political-liberal position allows people to live non-autonomous lives *if and only if* that life has been chosen autonomously.

For instance, in the case of the conflict between female non-discrimination laws and freedom of religion, a comprehensive liberalism would say that a religion and its activities will be restricted if it is imposed on people against their will. Thus, the point at issue is whether the liberal government should intervene wherever there is discriminatory practice. However, for political-liberals like Nussbaum, this intervention relies on a particular comprehensive and metaphysical doctrine, and insists “that religions be feminist or liberal in all respects.” It would not only impose a particular way of life on religious communities, but also violate the principle of respect for persons. By contrast, a political liberal would not force anybody to adhere to a particular comprehensive doctrine, and would tolerate religious practice because it lies outside the political domain—the only domain to which the capabilities approach can apply.

However, Nussbaum presents an explicitly contradictory case evidently showing that the capabilities approach applies to domains beyond the basic structure of the society, and there seems to be no difference between comprehensive liberalism and her political-liberal position. Nussbaum contends that we should not accept that the rector of Notre Dame University be a single man only, because this criterion discriminates against women and is not necessary to the “normal operation of the enterprise.” Nussbaum states,

¹⁰⁰ Nussbaum states, “I do not use the word ‘autonomy’ much; indeed I deliberatively avoid it. Instead, I speak of ‘practical reason’ and define the relevant capability as ‘Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life.’” See *PLR*, p. 39.

¹⁰¹ *APD*, p. 110.

One can argue that the priesthood lies within the core of worship and should be protected on that account; the presidency of a university seems hard to defend on this basis, especially when it has been granted that female faculty and administrators are a valued part of the institution.¹⁰²

For Nussbaum, because universities practicing racial discrimination no longer enjoy tax-exemption, such gender discrimination should lead to the withdrawal of a university's tax-exemption, as well; otherwise the federal government would unwittingly endorse sex inequality.¹⁰³ However, if universities indeed lie outside the basic structure of society, we should respect and recognize their religious life; thus, gender discrimination should not be a problem. If government should not grant any exceptions in institutions ranging from law to religious universities, there seems to be no distinction between comprehensive liberalism and political liberalism.

Moreover, in the case of the prohibition of FGM, the shaky foundation of Nussbaum's political liberalism is more obvious. In terms of the practice of FGM, her political-liberal position should leave it optional for those women who desire to practice it as part of their conception of the good, provided that it has been chosen autonomously. Politically-liberal governments should ensure that the conditions of capabilities are provided, but the choice is up to women themselves, even if the practice is harmful to those women who make this choice. Recall that Nussbaum requires state intervention regardless of whether they have been chosen autonomously, because the practice involves the permanent removal of the capability for most sexual pleasure. However, the permanent removal of capabilities alone would not justify a ban of FGM; otherwise, it would also require a ban on sterilization, which Nussbaum herself believes states should permit.¹⁰⁴ She must provide further reasons to make a distinction between the two. The other reason for defending the assertion that even voluntary FGM should be banned¹⁰⁵ is the desirability of establishing that FGM is

¹⁰² *SSJ*, p. 111.

¹⁰³ *WHD*, pp. 228-229.

¹⁰⁴ See *WHD*, p. 95.

¹⁰⁵ In *Sex and Social Justice*, she gives eight reasons for her view: (1) FGM is carried out by force; (2) FGM is

unjust. FGM threatens either “the equality or the well-being of the choosing individual” or “by contributing to social norms, they threaten the equality of a wider group of individuals.”¹⁰⁶ Nussbaum cautions that those women who desire to practice FGM may be “adaptive selves” unwittingly adjusting their preferences to unjust social norms. If FGM is a harmful social norm that really undermines gender equality, then political liberalism will ban it for reasons of justice. Accordingly, there is a significant difference between FGM and sterilization. In this regard, she points out,

Female genital mutilation is unambiguously linked to *customs of male domination*. Even its official rationales, in terms of purity and propriety, point to aspects of sex hierarchy.... Sex relations constructed by the practice are relations in which intercourse becomes a vehicle for one-sided male pleasure rather than mutuality of pleasure. By contrast, the ideal female body image purveyed in the American media has multiple and complex resonances, including those of male domination, but also including those of physical fitness, independence and boyish nonmaternity. These differences help explain why there is no serious campaign to make ads for diet programs, or the pictures of emaciated women in *Vogue*, illegal, whereas FGM is illegal in most of the countries in which it occurs.¹⁰⁷

However, if political liberalism is limited in scope to the basic structure of a society, and does not apply directly to the internal life of churches, universities, and families, and so on, then we should not ban FGM for the reason of respect for persons. By contrast, if unjust practices are to be prohibited, then Nussbaum would favor society’s intervention in FGM, as she should also in other practices linked to male domination that involve Western beauty norms. In this regard, states can make paternalistic judgments about the value of people’s way of life in terms of gender equality. Thus, way of life is no longer a choice up to individuals. However, as Clare Chambers persuasively points out, Nussbaum is facing a dilemma here: either she must extend paternalistic judgments to many other cases and

carried out on children below the age of consent. (3) Women who undergo FGM are more likely than Western women to be uneducated and thus to lack conditions for autonomous choice. (4) FGM is often carried out in conditions that are dangerous to health. (5) FGM is irreversible. (6) FGM causes lifelong health problems. (7) FGM causes the loss of a certain type of sexual functioning that many women would value highly. (8) FGM is unambiguously linked to customs of male domination. See *SSJ*, pp. 123-4.

¹⁰⁶ See Clare Chambers, “Are breast implants better than female genital mutilation? Autonomy, Gender Equality and Nussbaum’s political liberalism,” in *Critical Review of International Social and Political Philosophy* Vol. 7 No. 3(2004), p. 16.

¹⁰⁷ *SSJ*, p. 124.

reject her idea of respect for the capability of practical reason, or she must renounce the critique of FGM and accept a view of complete state neutrality in maintaining her political-liberal position.¹⁰⁸

In terms of the second feature of political liberalism, despite favoring Rawlsian-inspired conceptions and reasoning, it is plain that Nussbaum's justification is actually more metaphysical than political. While Rawls defends his political conception of justice on political grounds alone, and permits the question of truth to enter at the level of comprehensive doctrines, Nussbaum defends her list on the essentialist grounds, since her defense presupposes a universal human essence. It is quite difficult to argue that the justification of these human capabilities is both independent of any comprehensive doctrine and silent about how people should lead their lives. Fabre and Miller comment on this point:

Nussbaum tells us that we should all have “opportunities for sexual satisfaction and for choice in matters of reproduction” … in the context of her book, this particularly applies to women. Whether or not that claim is true, it is clear that it must involve denying, contrary to what many people think, that God has allocated women the task of reproduction. To take the issue even further, if (as one might reasonably surmise) having reproductive choice means, for Nussbaum, having access to reliable contraception (perhaps, even, to abortion), this particular capability presupposes a certain relationship between mind and body (and, in the case of abortion, confers a status on the embryo) with which many people would take issue. More generally and fundamentally still, her account rests on the central assumption that individuals are autonomous beings, capable of shaping their own destiny. This in turn rests on a set of metaphysical presuppositions about what a person is, whether or not a person has free will, whether or not there is a God who determines the course of her life, etc.¹⁰⁹

Moreover, Nussbaum claims that the list, rather than suppose a single type of flourishing for the human being, specifies a single set of fundamental constitutional entitlements that provide the underpinning for many different ways of life.¹¹⁰ However, the nature of the list of capabilities is still ambiguous. For instance, we have seen that the capabilities approach is not neutral on how people should live and allows state interference “with a choice up to

¹⁰⁸ Clare Chamber, “Are breast implants better than female genital mutilation”, p. 12.

¹⁰⁹ Cécile Fabre and David Miller, “Justice and Culture: A Review of Rawls, Sen, Nussbaum, and O’Neill,” p. 8.

¹¹⁰ *FOJ*, p. 182.

a point.” While Rawls’s primary goods are to provide the necessary means for the development of citizens in the well-ordered society, it seems that these capabilities both are essential to *any* good human life and, thus, constitute the fundamental basis of any human life. Moreover, the substitution of one item for a larger portion of another is not permitted because each item is equally valuable. Does it mean that a life that is lacking any one of those capabilities is not a “good” human life? Or does it mean that a life that is lacking any one of those capabilities beneath the threshold level will fall short of being a “human” life? Although she emphasizes the distinction between the justification and the implementation of the same norms for all nations,¹¹¹ and although she suggests that the implementation of these capabilities must be left to the “internal politics” of each nation, she does not give an account of the process of cross-national comparison, which provides a procedural justification for deciding the appropriate level of specification of a given capability in the local context. In this regard, the assertion that every society should subscribe to a *single* conception of the human good, even an abstract one, is arbitrary and implausible. Sabina Alkire comments herein:

If indeed the “local and particular” are to be given ongoing priority, then the capability approach would seem to require a sketch of the *process* by which the national “normative conception of the human” is to be developed in local form, rather than a sketch of the normative human conception (and its associated political institutions), such as she gives.¹¹²

Furthermore, the fact that we all have nutritional needs does not logically lead to the conclusion that we are *equally* entitled to develop a certain threshold level of capabilities with respect to them. If Nussbaum insists on the equality of all persons, of the sexes or even of the species, then the idea of respect for person that she unfolds here will have to rely upon some comprehensive doctrine, and she will have to give up her commitment to political liberalism.

¹¹¹ *FOJ*, p. 260.

¹¹² See Sabina Alkire, “*Valuing Freedoms: Sen’s Capability Approach and Poverty Reduction*” (Oxford: Oxford University Press, 2002), p. 38.

Last but not least, Nussbaum has clearly rejected the third feature of political liberalism regarding the ideas implicit in the public political culture, and argues that it is not the core idea of Rawlsian political liberalism but simply a derivative clue. I agree that the third feature is not the core idea, and I accept her definition;¹¹³ however, it seems to me that Nussbaum neglects what Rawls means when he says that “political liberalism applies the principle of toleration to philosophy itself,” and Nussbaum does not sincerely take into account the issue of stability when she develops the idea of overlapping consensus outward to the global context.

Recall that the idea of overlapping consensus works only within a framework of constitutional democracy. While working outward to the international stage, Rawls recognized that different well-ordered societies have their own *basic structure*, which reflects their own “public political culture,” and do not necessarily treat members of a given society as free and equal. If Rawls insisted on the idea of citizens as free and equal, it would definitely contradict the liberal principle of legitimacy.

Nussbaum contends that Rawls wrongly believed that the idea of mutual respect is peculiarly Western so that he was reluctant to apply the idea of a liberal overlapping consensus outward to the international arena. By contrast, in support of the claim that her list of ten central capabilities can be an object of a global overlapping consensus, Nussbaum appeals to the aspirations and ideals of India, the views of women struggling against injustice, and the fact that many different artworks and dramas around the world appeal to a shared sense of the tragic.¹¹⁴ I think that Rawls would agree with her argument that the idea of overlapping consensus can be organized by way of different public reasons

¹¹³ Indeed, if we look into two other political liberals Rawls has identified (Judith Shklar and Charles Larmore), we will find that Nussbaum is right that the commonalities among their theories include the first two features without the third. But both of those theories are elaborated mainly in the context of Western society. When the capabilities approach works outward to the global context, the point at issue, therefore, is how to justify the ideal of *international* political liberalism, and whether the idea of overlapping consensus can be applicable to the global context.

¹¹⁴ *WHD*, pp. 67-76.

in other societies,¹¹⁵ however, it is quite irrelevant here because the ideas of mutual respect are not *currently* shared in the global political culture.¹¹⁶ Nussbaum simply appeals to a branch of liberal thinking within most of the important moral and religious traditions that can endorse all the central capabilities in the future, but she does not explain why they should be accepted, or whether it is not a *modus vivendi*. Without a constructive procedure by way of the idea of public reason, it is difficult to ensure stability for the right reason.

Fabre and Miller clearly state the point thus:

Suffice it to say that [Nussbaum and Sen] show, powerfully, that those traditions are not as homogenous as they are often taken to be by those who represent them as wholly alien to Western liberalism; but they [Nussbaum and Sen] fail to explain why the liberal strands that they discover are more representative of those traditions than their illiberal components, or why illiberal protagonists of such traditions should move towards a moral liberal position.¹¹⁷

3.5.2 Capabilities: Rights or Goal?

For Nussbaum, the capabilities approach presents a better understanding of what it means to lead a truly human life than the language of rights. Having a right means we have a justified claim to a certain level of capabilities to function.

However, the correlation between rights and capabilities is still ambiguous. While Nussbaum criticizes the resources-based approach as being unable to accurately grasp the well-being of people, because individuals with the same resources may vary greatly in their abilities to convert resources into valuable functionings; she does not explain whether the protection of equal capabilities requires equal rights. For instance, do we need to protect equal capabilities or equal rights of women for securing women's *de facto* rights of political participation? Does it mean that the protection of the equal right to vote for a candidate requires the guarantee of equal influence on the legislative process?

¹¹⁵ In "The Idea of Public Reason Revisited," Rawls highlights Muslim scholar Abdullahi An-Na'im's work as a "perfect example of overlapping consensus" within Islamic societies. I will take up An-Na'im's work in chapter four.

¹¹⁶ See Linda Barclay, "What Kind of Liberal Is Martha Nussbaum?" In *Sats-Nordic Journal of Philosophy* Vol 4, No 2(2003), pp. 5-24.

¹¹⁷ See Cécile Fabre and David Miller, "Justice and Culture: A Review of Rawls, Sen, Nussbaum, and O'Neill," p. 13.

Moreover, it would be misleading to assert the equivalence of rights and capabilities. As stated above, capabilities, either basic or combined, are the content or object of the rights.¹¹⁸ However, in item 7 on her list, Nussbaum argues that the protection of the capability of affiliation entails the provision of non-discrimination on the basis of race, sex, ethnicity, caste, religion, and national origin. But non-discrimination is a goal, not a capability, because it depends upon what many people *actually* choose to do, rather than on what they merely are free to choose to do. Living in a non-discriminatory society is not a matter under any one person's control, but depends on the voluntary action of other citizens. Therefore, non-discrimination is not something that can be treated as a capability of choosing; rather, it is a social condition on which a constitutional framework can provide institutional guarantees. In this regard, while we claim that the right against being treated discriminatorily is indeed individual, the capability of proceeding without being discriminated against refers mainly to social conditions at large, not rights *per se*.¹¹⁹ Furthermore, the protection of the capability of affiliation does not entail the provisions of non-discrimination on the basis of race, sex, ethnicity, caste, religion, or national origin, because not every society treats its own members as free and equal. As stated in chapter two, the abstract idea of equal respect for persons can be elaborated in different societies.¹²⁰ If equal respect for persons entails equality of all of the above-mentioned categories, again, Nussbaum will have to rely upon some comprehensive doctrine and give up her commitment to political liberalism.

Likewise, in terms of her item 6 regarding "practical reason," Nussbaum argues that the capacity to form and to pursue a conception of the good entails protection for the liberty of conscience. However, as stated in chapter two, living in a non-liberal decent society like

¹¹⁸ See Henry Richardson, "Some Limitations of Nussbaum's Capabilities," in *Quinnipiac Law Review* Vol. 19 (2000), pp. 309-332; and Alyssa Bernstein, "Nussbaum vs. Rawls: Should Feminist Human Rights Advocates Reject the Law of Peoples and Endorse the Capabilities Approach?"

¹¹⁹ Richardson, "Some Limitations of Nussbaum's Capabilities," p. 312.

¹²⁰ For instance, a decent hierarchical society does not treat its own members reasonably or justly as free and equal citizens.

Kazanistan involves a system of social cooperation based upon a common-good conception of justice. In this society, what constitutes the best human life and how society should be structured are specified by the common-good conception of justice, and it is normal that people would sincerely follow the guidance of others to pursue the common-good conception of the good; therefore, protection for the liberty of conscience is not an entailment either.

3.5.3 Whose Intuition? Which Capabilities?

In spite of responding to many critiques, and making some substantial changes in her justificatory framework, I think perhaps the weakest part of Nussbaum's capabilities approach is her methodology. Nussbaum cannot provide a convincing argument in answer to the following question: How do we know about what capabilities people and society prefer and would choose?

Recall that Nussbaum deploys three steps for identifying the list of ten central capabilities:

- (1) Use Aristotelian practical reasoning to reach the substantive account of the capabilities.
- (2) Use Rawls's "reflective equilibrium" to take up the task of political justification, and use an informed-desire procedural approach to critically examine subjective preferences.
- (3)

Test the view against the views of others, and search for an empirically universal acceptability.

In terms of her Aristotelian reasoning, Nussbaum asserts that by looking at our own human life and at others', and by trying to identify the experiences that all human beings share, the list of human capabilities *determined by her* is both what we all agree on and what we ascertain to be indispensable. However, it is questionable whether we really do have common moral intuitions to support the list of capabilities grounded by shared human experiences. Richard Rorty, for instance, contends that we do not see any evidence that people treat the other humanely, and he believes that historical legacies demonstrate instead

that our “deep beliefs” do not recognize the other properly at all.¹²¹ Moreover, how do we know that all basic human functionings were included? Who decides which capabilities would count? Which criteria? The situation in which Indian feminist activists defend a film that positively portrays lesbianism is enough for Nussbaum to justify her assertion regarding protection against discrimination on the basis of sexual orientation; in this case, it is clear that her Aristotelian reasoning privileges her own judgment. Susan Okin contends,

She [Nussbaum] wants and claims to take an approach that is respectful of each person’s struggle for flourishing, that treats each person as an end and as a source of agency and worth in her own right. But her highly intellectualized conception of a fully human life and some of the capacities central to living it seem to derive far more from an Aristotelian ideal than from any deep or broad familiarity with the lives of women in the less developed world. As for the more sophisticated, even fanciful, items on her list, they seem to draw more from the life of a highly educated, artistically inclined, self-consciously and voluntarily religious Western woman than from the lives of the women to whom she spoke in India.¹²²

Moreover, in the case of the prohibition of FGM, Nussbaum contends that existing preferences may be corrupted when those women adapt to unjust social norms, and argues that those women who desire to practice FGM suffer from adaptive preferences. However, this argument may not only mute the voice of those women who desire to practice FGM, but even suggest both that they are incapable of speaking for themselves and that only others “are capable of naming and challenging patriarchal atrocities committed against Third World women.”¹²³ But we need to distinguish between “taking the perspective of other people into account,” on the one hand, and “imaginatively taking their position, on the other.”¹²⁴ We should not assume that the supporters of FGM are simply passive victims of their cultures in a way that justifies outside intervention. Moreover, we should not assume that we are already aware of the most important problems and are experts on how

¹²¹ See Richard Rorty, “Human rights, Rationality, and Sentimentality” in S. Shute & S. Hurley (Eds.) *On human rights: The Oxford Amnesty lectures* (New York: Basic Books, 1993) pp. 111-134.

¹²² Susan Okin, “Poverty, Well-Being, and Gender: What Counts, Who’s Heard?” In *Philosophy and Public Affairs* 31(2003), p. 296.

¹²³ Alison Jaggar, “‘Saving Amina’: Global Justice for Women and Intercultural Dialogue,” in *Ethics & International Affairs*, Vol 19(3)(2005), p. 69.

¹²⁴ Iris Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought,” in *Intersecting Voices* (Princeton University Press 1997), pp. 38-59.

those problems should be solved and who should be saved. The substantive account of goods is best tested by *actual* dialogue in which peoples' needs, interests, and perspectives are clearly represented, and we should allow people to speak for themselves. They may be adaptive selves who are unwittingly adapting to an unjust *status quo*; however, we need to listen receptively to their claims in order to understand their perspectives before criticizing them. Commenting on this topic, Seyla Benhabib declares,

Neither the concreteness nor the otherness of the concrete other can be known in the absence of the voice of the other. The viewpoint of the concrete other emerges as distinct only as a result of self-definition. It is the other who makes us aware of both her concreteness and her otherness. Without engagement, confrontation, dialogue and even a struggle for recognition, in the Hegelian sense, we tend to constitute the otherness of the other by projection and fantasy or ignore it in indifference.¹²⁵

In this regard, it seems that actual dialogue is necessary to understand the concrete other in that we are forced to confront and listen to others directly.¹²⁶ Without actual dialogue for the justification of her substantive account of the goods, we are unable to ensure whether Nussbaum is not projecting her own ideas but simply rationalizing her own values.¹²⁷ Furthermore, Nussbaum employs the process of reflective equilibrium to compare the capabilities approach with other available approaches. In *Women and Human Development*, she considers three ways of comparing the quality of life across nations: GNP per capita, total utility or preference-satisfaction, and the distribution of resources within each locality. In *Frontiers of Justice*, the search for "reflective equilibrium" is an effort to compare the capabilities approach to Rawls's and other philosophers' social contractualisms. However, unless we can assert that the process of reflective equilibrium is inclusive, the dissenting or anomalous voice would simply be disregarded during the reflective process. Alison Jaggar fleshes out this idea:

Establishing a set of intuitions or preferences ... shows only that the set is internally coherent. Unless the individual or groups creating the set has considered all available intuitions, it remains possible that anomalous intuitions may have been excluded or that

¹²⁵ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), p. 168.

¹²⁶ Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton University, 1990), p. 116.

¹²⁷ Alison Jaggar, "Reasoning about Well-Being: Nussbaum's Methods of Justifying the Capabilities," p. 317.

other equilibria, expressing alternative moral perspective, may exist. Since the reflective equilibrium approach offers no guidelines for preferring one of these possible alternative equilibria to the others, it does not dispel the specters of subjectivism, if the coherent set of intuitions is held by an individual, or of relativism, if the set is held by a community.¹²⁸

For instance, once we decide that a capability framework is the best as compared with other alternatives, can we choose again which capability framework is better, and delete or add in other items? If A employs her own Aristotelian reasoning but disagrees with Nussbaum's list, how do we determine whether A's findings were compelling or whether her disagreement was mainly dependent upon her adaptive preference? Should it be rejected simply as wrong or as corrupt?

Seen in this light, without a procedural justification, her non-Platonist substantive-good account indeed privileges her own moral conception. It is true that even the best procedural justification does not remove adaptive preferences. However, without a procedural approach to bracket her substantive account of the good, it is difficult to avoid the criticism that she selects only intuitions with which she agrees and that she projects her prior prejudices on the other, especially those poor women in the developing world.¹²⁹

Conclusion

Despite favoring many Rawlsian-inspired conceptions and reasoning, I argue that Nussbaum's capabilities approach is indeed a comprehensive liberalism rather than a political liberalism, and that the list of capabilities cannot be the object of an overlapping consensus among divergent comprehensive views in a diverse world. She rejects contractarianism as procedural design for political justification; however, without a

¹²⁸ Ibid., p. 315.

¹²⁹ Okin, "Poverty, Well-Being, and Gender: What Counts, Who's Heard?" p. 297.

procedural justification, not only does her methodology privilege her own moral view, but also it is disputable whether or not her list of capabilities really represents a broader cross-cultural consensus.

By contrast, Muslim scholar Abdullah An-Na'im advocates a global process of internal discourse and cross-cultural dialogue to promote the legitimacy of human rights. An-Na'im tries to demonstrate that, following his cross-cultural dialogue approach, it would confirm the view that non-liberal societies would agree on a set of rights similar to those found in the UDHR. I will deal with An-Na'im's cross-cultural dialogue approach in the fourth chapter, and examine whether or not his scheme can go beyond the shortcomings of Nussbaum's essentialist approach.

Chapter 4:

“Cross-cultural Dialogue” Approach to Human Rights

Traditional ideas are not “roots” or “sources” that harbor the potential of modern human rights, a potential gradually ripened in history. It is the other way around in that the modern idea of human rights characterizes that standpoint from which we can retrospectively discover humanitarian motives that facilitate a critical reconstruction of aspects of continuity between the present and the past.

Heiner Bielefeldt--- “Western” versus “Islamic” Human Rights Conceptions?¹

Introduction

In contrast to Nussbaum’s capabilities approach grounding human rights on the respects in which all human beings are alike, the final strategy of justification that I shall consider is Muslim scholar Abdullahi An-Na’im’s “cross-cultural dialogue” approach, which aspires to ground the universal validity of human rights through intra- and cross-cultural dialogue.

As stated in chapter one, some scholars develop different kinds of consensus-based approaches to grounding the universal validity of human rights and, simultaneously, to respecting cultural diversity. However, An-Na’im proposes a hermeneutic methodology and argues the following points: (1) The premise implicit in these approaches is wrong, and his approach can avoid their defects. An-Na’im describes his project as “an attempt to promote the cultural legitimacy of human rights within the Muslim context,”² and proposes a “cross-cultural dialogue” approach to improve mutual understanding and appreciation so that the differences in underlying justification can be bridged. (2) The

¹ Heiner Bielefeldt, “‘Western’ Versus ‘Islamic’ Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion of Human Rights,” in *Political Theory* Vol 28 (2000), pp. 90-121.

² An-Na’im, Abdullahi Ahmed, “Conclusion” in Abdullahi Ahmed An-Na’im (ed), *Human Rights in Cross-cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992), p. 427.

tension between human rights and religion can be solved by his hermeneutic methodology. Some may argue that religion is essentially incompatible with human rights owing to the claim that the human rights idea is a secular view. However, for An-Na'im, there is no intrinsic contradiction between Islam and human rights, provided that the two are reconciled by his constructive methodology. (3) An-Na'im is convinced of the legitimacy of the “universal human rights” project initiated by the UN, but believes that it would be undermined if the project were forced to compete with a society’s value system. For him, religious views should not be pressed upon secular molds before they are granted legitimacy. Legitimacy can be achieved only through a sincere internal cultural dialogue of a society’s members. That is, the human rights principle needs *Islamic* legitimacy in an Islamic society.³ In so doing, An-Na'im offers a hermeneutic method for the radical reform of *Sharia*. An-Na'im believes that his method can allow Muslims to retain their cultural authenticity and, simultaneously, to adhere to international human rights standards.

The other reason for considering An-Na'im's approach is that, if Rawls's human rights scheme in his *The Law of Peoples* is to be convincing in liberal and non-liberal societies alike, we should understand the justification and the content of the human rights scheme articulated from “non-liberal” societies, and should be able to sketch whether or not the human rights confirm the proposition that “something like Kazakhstan is the best we can realistically and coherently hope for.”⁴ Rawls highlights An-Na'im's work as a “perfect example of overlapping consensus” around constitutional democracy,⁵ though there are some explicit differences between Rawls and An-Na'im regarding the scope and rationale of human rights. Specifically, An-Na'im expects that the principle of equal treatment before the law can be endorsed after the reinterpretation of *Sharia* by his reformed

³ Michael Freeman, “The Problem of Secularism in Human Rights Theory,” in *Human Rights Quarterly*, Vol (26)(2004), pp. 375–400 at 378.

⁴ *LPb*, p. 78.

⁵ John Rawls, “The Idea of Public Reason Revisited” in *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 151.

methodology, and it is interesting to see how An-Na'im substantially refutes Rawls's contention that Kazakhstan is the best that we can hope for.

In this chapter, I will examine the “cross-cultural dialogue” approach proposed by An-Na'im. In the first section, I will take up the construction of the “cross-cultural dialogue” approach, and evaluate whether or not it can go beyond the problems that most consensus-based approaches encounter. In the second section, I will explain An-Na'im's hermeneutic methodology, and explore areas of contention between Islam and human rights, especially addressing the legal status of women, the legal status of non-Muslims, and the role of criminal justice. In the end, I will critically examine his approach. My argument is thus: (1) An-Na'im indeed provides a critical methodology in his account of cross-cultural dialogue, and rightly expands the analysis to encompass considerations about non-Western cultures. In virtue of the languages and principles of human rights that need to be contextualized, interpreted or translated for every particular circumstance, An-Na'im's critical methodology is better than other consensus-based approaches in many substantial ways. However, (2) An-Na'im's cross-cultural dialogue is exclusive in that it requires a certain *form and content* of participation in internal discourse and cross-cultural dialogue, and in that it fails to provide a sufficient analysis of cultural members, especially of the victim's voice. In the end, his dialogue perspective does not involve a true cross-cultural exchange and, in fact, promotes a uni-directional approach to intellectual efforts rather than a multi-directional approach that might establish common ground.

4.1 An-Na'im's Cross-cultural Dialogue⁶

4.1.1 The "Why" of Human Rights

An-Na'im accepts Maritain's practical-consensus argument that agreement on human rights is a body of beliefs for *guiding action*, rather than for *justifying* those beliefs; nevertheless, An-Na'im warns us that disagreement over the justification might translate into disagreements regarding the form, content, enforcement, and implementation of human rights.⁷ In other words, if the justification of human rights is not valid within all major cultural and religious traditions, the occasional invalidity would deeply affect the applicability of human rights norms to all human beings everywhere. In spite of this early attempt to bracket the rationale for human rights in the drafting committee of the UDHR, it seems that this practice of ignoring the underlying justification has brought about a number of questions.

Indeed, from An-Na'im's point of view, accepting this practical consensus on international human rights without paying attention to its underlying justification has harmed human rights implementation and enforcement. The harm is due to the lack of cultural legitimacy⁸ in their respective cultures as the reason for the discrepancy between the formal acceptance of human rights principles and actual non-compliance with them. Therefore, the universal legitimacy of international human rights laws in the cultures of the world is still unexamined.

Cultural legitimacy, according to An-Na'im, is "the quality or state of being in conformity

⁶ I will use the following abbreviations in referring to An-Na'im's writings: "Problems of Universal Cultural Legitimacy for Human Rights" (1990), hereafter **PCL**; "Toward a Cross-cultural Approach" (1992a), hereafter **TCIA**; "Islam, Islamic law and the Dilemma of Cultural Legitimacy for Universal Human Rights" (1992b), hereafter **IDCL**; "Conclusion" (1992c), hereafter **HRIC**; "Toward an Islamic Hermeneutics for Human Rights" (1995), hereafter **TIHHR**; "The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia" (1999), hereafter **CMHR**; "Islam and Human Rights: Beyond the Universality Debate" (2000), hereafter **BU**; "The best of Times and the Worst of Times: Human Agency and Human Rights in Islamic Societies" (2004), hereafter **HA**.

⁷ **IDCL**, p. 29.

⁸ Thus, regarding international human rights norms, the more they coincide with recognized principles or rules, the more people will sincerely submit themselves to them.

with recognized principles or accepted rules and standards of a given culture.”⁹ Thus, the cultural legitimacy of human rights means that human rights both are more or less in conformity with recognized principles and hence would enjoy internal cultural validity. People are more likely to observe norms if the people believe the norms to be sanctioned by their own cultural tradition. The more successful demonstration that a particular human right rests on rules or norms accepted by a wide range of cultural traditions, the more successful demonstration of cultural legitimacy will be.

In historical terms, the cultural legitimacy of human rights is lacking in various cultures because, An-Na’im contends, there is a lack of articulation of non-Western perspectives accessible to UN officials. The absence of non-Western representatives led to the exclusion of those perspectives at the earliest stages of the conceptualization of human rights. As a result, the present system of international human rights has been shaped largely by the values of the Western natural rights tradition, which has been “universalized” through colonial hegemonic processes and which has not yet adequately incorporated into itself non-Western views. Owing to colonial rule and foreign domination, most non-Western countries were unable to participate in the drafting processes and the adoption of the UDHR. The UDHR adopted by the General Assembly, which consisted only of 48 UN members, was hardly representative of the contemporary world community. Although some of the non-Western representatives were involved, most of them had been trained in Western countries and represented more intensively the Western cultural perspective than their own.¹⁰ Also, even though most non-Western countries achieved formal independence and were able to participate in the formulation of subsequent international human rights, the emerging countries of Africa and Asia were already deemed to be bound by those earlier documents in addition to the subsequent instruments in which they participated

⁹ *PCL*, p. 336.

¹⁰ *PCL*, p. 350.

from the very start. Thus, the majority of non-Western countries were incorporated into the process by which international human rights standards were determined and formulated.¹¹ It is very difficult to see how non-Western representatives could have genuinely represented their respective cultural traditions. Given the historical context within which the present standards have been formulated, it was unavoidable that they were initially based on Western philosophical assumptions regarding human nature, society, and the notion of the good. Accordingly, An-Na'im cautions us that the normative universality of human rights should not be taken for granted. Rather, we may applaud and encourage the idea of the justification of human rights through multiple foundations; still, we need to comprehend both how diverse cultures justify them and what acceptable moral doctrines can be the common ground of universal human rights.

4.1.2 Why Cultural Legitimacy Matters?

Specifically, from An-Na'im's point of view, culture is a primary force in the socialization of individuals and a major cause of the consciousness of the community. It "stipulates the norms and values that contribute to people's perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies."¹² In so doing, people are more likely to comply with normative propositions if they suppose them to be observed by their own cultural traditions.¹³ Because the current human rights framework is constructed by Western culture and is expressively incompatible with other non-Western cultures, if people in non-Western societies accept the particular formulation of this concept, it might turn out to be a Trojan horse, introducing other

¹¹ *IDCL*, p. 35; *PCL*, p. 349.

¹² *TCCA*, p. 23.

¹³ Likewise, Joseph Chan provides a uniquely Confucian defense of the conviction that the Chinese will prefer and be more apt to comply with international human rights if they can be grounded in less alien sources. See Joseph Chan "A Confucian Perspective on Human Rights for Contemporary China" in Joanne Bauer and Daniel A. Bell (eds) *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 212-237.

civilizations by stealth, and binding the non-Western people to an acceptance of those Western ways of thinking and feeling. More often than not, those in power could easily use this argument as an excuse to argue that national sovereignty is demeaned by compliance with standards that are based on an alien value system.¹⁴ If Western people view their own conceptions and beliefs as universal, and attempt to internationally enforce them irrespective of local justifications, it is in effect a case of ethnocentrism.¹⁵ By contrast, the more the human rights project initiated by the UN can show that a particular human right is based on a value or norm accepted by a wide range of cultural traditions, the less that right will be open to the charge of ethnocentricity or cultural imperialism; and then, the discrepancy between theory and practice can be overcome.¹⁶

4.2 Neither Substantive Minimalism Nor *De Facto* Overlapping Consensus

As stated in chapter one, in drawing attention to the charge of ethnocentrism, some scholars may try to construct cross-cultural anthropological universals by searching for institutions, rules, or traditions that can be linked to human rights and by affirming the least common denominator that can be *found* among divergent cultures.¹⁷

However, An-Na'im disagrees with this approach. The reasons for the inadequacy of this approach concern two premises implicit in this approach: that culture is fixed and given and that all members within a cultural or religious community hold identical views on the meanings and the implications of cultural norms and traditions.¹⁸ For An-Na'im, culture is

¹⁴ *PCL*, p. 332.

¹⁵ *PCL*, p. 350; *IDCL*, p. 24.

¹⁶ *PCL*, p. 343.

¹⁷ Alison Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park, London, New Delhi: Sage Publications, 1990).

¹⁸ Specifically, An-Na'im argues that this approach is inadequate, since “restricting international human rights to those accepted by prevailing perceptions of the values and norms of the major cultural traditions of the world would not only limit these rights and reduce their scope, but also exclude extremely vital rights.” See *TCCA*, p. 21.

not permanently fixed but remains open to ongoing narrative development. All cultures have an element of ambivalence and contestability in the sense that prevailing practices and institutions are open to constant challenge and change. Thus, people in a community often hold different perceptions of the norms of their community. Other perspectives challenge dominant interpretations and propose alternative views of the culture on particular issues. Furthermore, just quoting and citing selected general scriptural statements or cultural sources that are presented as compatible or incompatible with human rights norms in isolation from their current social reality is totally a-historical. Given that cultural norms are changeable and have evolved over time in order to provide for the changing needs and circumstances of the people, An-Na'im argues that we should analyze and discuss the cultural norms in terms of their manifestations and significance in *current practice*. Merely pointing out that particular teachings or texts are compatible or incompatible with the idea of human rights, would make little sense and dismiss what is really happening in the societies *here and now*, and what cultures and religions are actually doing in peoples' lives.¹⁹ It also precludes the opportunity to "broaden and deepen cross-cultural consensus on a common core of human rights."²⁰ In other words, the focus on the texts rather than on the context puts the justification of human rights in the wrong place. An-Na'im states,

The question is always about people's understanding and practice of their religion, not the religion itself as an abstract notion, and about human rights as a living and evolving body of principles and rules, not as a theoretical concept.... Whether institutions and organizations are religious, political or diplomatic, the question about their relationship to human rights is always about how people negotiate power, justice and pragmatic self-interest, at home and abroad. Such negotiations always take place in specific historical contexts, and in response to the particular experiences of believers and unbelievers living together. Each religion or ideology is relevant to those who believe in it, but only in the specific meaning and context of their daily lives and not in an abstract, decontextualized sense.²¹

In this regard, it is important to appreciate the potential for internal change within all

¹⁹ Cf. Onuma Yasuaki, "Towards an Inter-Civilizational Approach to Human Rights," in Joanne Bauer & Daniel Bell (ed), *The East Asia Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 103-123 at 121.

²⁰ *IDCL*, p. 22.

²¹ *HA*, p. 3.

cultures and living traditions, which are always constituted by the conflicts over interpretations. While living within each particular religious tradition, believers would share a *first-order* language of commitments and beliefs about the sacred texts, but there are striking divergent interpretations within a tradition regarding the meanings of those beliefs and commitments that those sacred commitments involve. Depending on the internal diversity of religion itself, thus, it can be a potential advantage for believers to develop a *second-order* model of discourse (*human rights discourse*) that conveys the primary beliefs and commitments in a language accessible to outsiders. Therefore, human rights would become more plausible when it can be shown that local religious tradition contains elements that support the rights.

Accordingly, the internal pluralism of a tradition or a religion provides the context within which divergent religious communities can bring their *first-order* traditions of belief and commitment into dialogue with the norms and practices of international human rights. The insiders' task is to retrieve, articulate and apply the first-order religious concepts and norms in order to promote human rights. Therefore, human rights neither are norms and values *found* in all human societies, nor derive from conventional moralities within societies: human rights are and derive from a *constructive reconciliation*. That is to say, the first and foremost task of dialogue is to reconcile convictions about a religious tradition's sacred creed with a commitment to human rights—it is not the first and foremost task simply to find the *compatibility* between current divergent religious beliefs and international human rights norms. Therefore, it is clear that An-Na'im disagrees with the argument about the consensus-based approach mentioned above: the argument that the consensus over human rights is “the area of overlap already present or latent among” divergent cultures. After all, even if there were an agreement on human rights norms, whether or not there would be agreement on the precise interpretations and forms of human rights would still be contentious. An-Na'im states in this regard,

When looking into specific cultural traditions, one may well find that a culture supports this concept as a human right, in the sense of a right to which each person is entitled by virtue of being human. Nevertheless, this “consensus” on the right as a matter of principle does not extend to the precise content of the right or provide criteria for determining whether a particular form of treatment or punishment violates the right.²²

Thus, in contrast to Rawls, who ignores the fact that defining human rights must involve a degree of abstraction that is consistent with some variations in interpretation and implementation, and in contrast to Nussbaum, who worries that “adaptive preferences” would limit the usefulness of actual dialogical approaches, An-Na’im argues that internal and cross-cultural dialogue should play a positive role in grounding the intercultural validity of human rights and in broadening the cross-cultural consensus on an interpretation of human rights.

4.2.1 Methodology²³ (I): Two Presumptions

Before describing An-Na’im’s cross-cultural dialogue approach, it should be mentioned that there are two presumptions behind his methodology.

First of all, An-Na’im assumes that the best starting point for the cultural dialogue on human rights is the recognition that underlying values of human rights are valid in different cultural patterns. Some cultures may lack an explicit conceptual scheme of human rights, but they still have internal moral resources to justify human rights norms on internal moral grounds.²⁴ Therefore, the first thing for this constructive approach is to extrapolate the underlying values of the concept of human rights through a hermeneutic reading of existing international standards.²⁵ Although the consensus on the content of international

²² *PCL*, p. 355.

²³ The methodology that An-Na’im proposes is based on his mentor Mahmoud Mohamed Taha, a founder of the Republican Brothers in Sudan. Taha was executed as an apostate on January 18, 1985, because he opposed the Islamization program of President Nimeiri. Taha’s ideas concern legal matters but are more a comprehensive vision of the message of Islam. It was after An-Na’im’s work that a legal objective was infused in them. See Mahmoud Mohamed Taha, *The Second Message of Islam*, trans. Abdullahi An-Na’im (Syracuse: Syracuse University Press, 1987), pp. 2-19.

²⁴ *HRIC*, p. 227.

²⁵ *TCCA*, p. 432.

human rights is still controversial and needs to be solved, An-Na'im suggests that the content of human rights articulated in the UDHR is *a point of reference*²⁶ for dialogue. Furthermore, through the interpretative reading of existing international standards, An-Na'im claims that the core value and the core implication of the UDHR and of subsequent covenants refer to "*the notion of the inherent dignity and integrity of every human being.*" An-Na'im states,

The fundamental value underlying the Universal Declaration and covenants is the notion of the inherent dignity and integrity of every human being. All the civil and political rights as well as the economic, social and cultural rights recognized by the Universal Declaration and elaborated on in the covenants are the necessary implications or practical manifestations of the inherent dignity and integrity of the human person.... Equality is another implication of the inherent dignity and integrity of the human being, which, in turn, requires nondiscrimination on grounds such as race, sex, religion, and national or social origin. Both notions are explicitly affirmed in the Universal Declaration and the two covenants.²⁷

Obviously, it still begs the question regarding when the justification moves from a universal notion of inherent dignity to a universal human rights norm. Thus, An-Na'im argues that we should not only identify traditional cultural support for the underlying values in the conception of human rights, but also "make the connection."²⁸ He provides the historical and sociopolitical reasons that underlie this connection and that I will deal with in the next section.

Second, An-Na'im assumes that there is a common ground for any inter-cultural and cross-cultural dialogue, so to speak, *the idea of reciprocity*. This principle is clearly the reformulation of the Golden Rule,²⁹ that is, the principle that one should treat other

²⁶ He points out three reasons for which the current international human rights instrument is the point of reference for dialogue: "it is not advisable to discard the existing international human rights standards for three reasons: we may never recover the gains so far achieved through these standards; they are needed as a framework for discourse; and they provide necessary protection to activists and scholars." See *TTC4*, p 434.

²⁷ *PCL*, p. 356.

²⁸ *CMHR*, p. 158.

²⁹ An-Na'im argued that "there is a common normative principle shared by all the major cultural traditions, which if constructed in an enlightened manner, is capable of sustaining universal standards. That is the principle that one should treat other people as he or she wishes to be treated by them. This golden rule, referred to earlier as the principle of reciprocity, is shared by all the major religious traditions of the world." See Abdullahi An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child," in *International Journal of Law and the Family*, vol. 8 (1994), pp. 62-81. Also published in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights*. (Oxford: UNICEF, Clarendon Press,

people as he or she wishes to be treated by them.³⁰ An-Na'im states,

...one should not tolerate for another person any treatment that one would not accept for oneself. *Placing oneself in the position of the other person*, one is able to see if he or she would find the treatment to which the other person is subjected inhumane or seriously objectionable.³¹

Here, the idea of reciprocity assumes that moral respect as a symmetric relation between self and other, and the idea entails that the perspectives of self and other are reversible. During the dialogical process, each of us should take the perspectives of all the others in making our moral judgment. An-Na'im believes that people with different perspectives can abstract themselves from the particulars of their lives and can, through dialogue, come to an agreement on the universality of human rights. Therefore, dialogue with respect to the universality of human rights proceeds by means of a practical test of the idea of reciprocity; in this way, we can examine cultural resources and can then reach authentic human rights that “a cultural tradition would claim for its own members and must therefore concede to members of other traditions if it is to expect reciprocal treatment from those others.”³²

This principle in summary declares that, at the end of cross-cultural dialogue, “human rights are those that a person would claim for herself or himself and must therefore be conceded to all other human beings.”³³

4.2.2 Methodology (II): Internal Discourse and Enlightened Interpretation

An-Na'im highlights the two-way dialogue to search for its justification. On the one hand, he encourages internal dialogue to establish enlightened interpretation of cultural norms by

1994), pp. 62-81.

³⁰ There is a different way of reformulating the Golden rule. For instance, Michael Ignatieff seeks to derive rights from the reality of human suffering and justify a notion of moral reciprocity: “that we possess the faculty of imagining the pain and degradation done to other human beings as if it were our own.. is simply a natural fact about us as a species....Such a natural fact about human beings provides the grounds for an entitlement to protection....and right.” See Michael Ignatieff, *Human Rights as Politics and Idolatry*, pp. 60-61.

³¹ *PCL*, p. 345.

³² *WMU*, p. 225.

³³ *PCL*, p. 366.

appealing to contemporary circumstances of the society *here and now*. On the other hand, once adequate cultural legitimacy of human rights has been achieved within *each* culture, An-Na'im encourages cross-cultural dialogue so that people of different cultures exchange arguments on the justification, scope, and implementation of human rights. In the end, through both the process of internal dialogue to reach enlightened reinterpretations of cultural norms and the cross-cultural dialogue to exchange the meaning of international human rights among cultures, the cultural legitimacy of human rights will be enhanced in every culture.³⁴

More specifically, in terms of the internal dialogue, the first step is that each person is to work from within his or her culture to bridge the gap between the present international human rights standards and the norms of the culture.³⁵ That a particular interpretation of certain cultural norms may appear to be in fundamental conflict with existing international human rights standards does not mean that there is no way to articulate an alternative interpretation on which it may resolve the conflict.

For example, it is clear that many general Islamic tenets seem to emphasize the inherent dignity and integrity of the human person, and to stress the equality of all human beings in the sight of God. Simultaneously, there are many other specific texts establishing strict limitations on who is a human being, who is entitled to full dignity and integrity within the context of the Islamic society. Although there are *prima-facie* incompatible views, if we assume that different cultures recognize the validity of the notion of every human being's inherent dignity, we should start an internal dialogue to establish enlightened interpretations of cultural norms by appealing to contemporary circumstances of the society.

Furthermore, as An-Na'im clearly points out, this enlightened interpretation is neither

³⁴ Like Rawls, An-Na'im uses a method that illustrates the moral privilege of the inter-cultural dialogical process over the cross-cultural dialogical process.

³⁵ *TCCA*, p. 432.

completely unrestrained nor does it occur in just any way. He does stress that we should follow the culturally approved norms and institutions of that culture to trace the resources for enlightened interpretations, namely, the *framework of interpretation*.³⁶ Otherwise, the interpretation will lose the coherence of a culture.

Moreover, while correctly grasping the framework of interpretation, interpreters should explain what the *cultural orientation* is through which believers understand the religious doctrine in the current context, and then should reformulate and verify religious sources for the promotion of human rights. For An-Na'im, any interpretation should be premised upon a certain cultural orientation, which means “*the conditioning of the existential or material circumstances of the person reading (or hearing) the Qur'an or another textual source*.”³⁷ Therefore, the task is to try to understand the orientation through which Muslims should understand the *Qur'an* in the modern context, and the orientation's connection to the idea of human rights.

An-Na'im puts it thus:

... there is not only one possible or valid understanding of the *Qur'an*, or conception of Islam, since each is informed by individual or collective orientation of Muslims as they address themselves to the *Qur'an* with a view to deriving normative implications for human behavior. Consequently, a change in orientation of Muslims will contribute to a transformation of their understanding of it, and hence of their conception of Islam itself.³⁸

4.2.3 The Reality of the Nation-state

An-Na'im tries to convince us that the cultural orientation, through which Muslims should understand the *Qur'an* in the modern context, is conducive to the active support of human rights principles. This conduciveness is because Muslims are living in a globally interdependent network. According to An-Na'im,

It is obvious that the orientation of modern Muslims should be different from that of earlier generations because of the radical transformation of the existential and material circumstances of their life today in contrast to those of the past. For better or for worse, Muslims now live in a globalized world of political, economic and security inter-

³⁶ *IHHR*, p. 233.

³⁷ *Ibid.*

³⁸ *IHHR*, p. 233.

dependence, and mutual social/cultural influence. Their conception of Islam, and efforts to live by its percepts, must be conditioned by modern perceptions of individual and collective self-interests in the context of this radically transformed world. Whatever vision Muslims may have for change or improvement in the present realities of the world today must also be grounded in the circumstances and conditions of this world. That is, their perceptions of the range of options available to them must take into account the facts of interdependence and mutual influence.³⁹

But why must Muslims accept not only the idea of human rights but also the international human rights paradigm? An-Na'im argues that this acceptance should take root because the nation-state model is now a global reality and because the post-WWII human rights paradigm has presented itself as a vital component in protecting people against oppression by the nation state. For An-Na'im, there exists in the contemporary world a single structure that is spread across all cultures.⁴⁰ This is the common structure of modernity, which has touched all societies, and the spread of the idea of human rights can be seen as the normative response to this social process. Accordingly, human rights are to be grounded not in metaphysical principles but in sociological facts, namely, the sociological fact of modernity. Herein, An-Na'im declares,

A particularly compelling concern in this regard...is the reality of the state and its extensive power which profoundly affects every aspect of people's private as well as public lives. Since those powers are supposed to be limited and regulated through a rights paradigm according to the European models of the post-colonial state in Africa, it follows that such paradigms should be applied to the independent African state as well.⁴¹

Seen in this light, An-Na'im's theory is unlike Taylor's, which places a greater focus on functionally equivalent *practices* than on functionally equivalent *ideas*. An-Na'im argues that, given the concrete reality of the nation state, which is inescapably linked to the complex web of international relations, Muslims should recognize the nation-state model as the

³⁹ *TIHHR*, p. 237.

⁴⁰ Jack Donnelly also points out that the idea and the practice of human rights are rooted in two specific changes of modernity: the rise of modern markets and modern states, and the rise of political claims of equality and toleration. See Jack Donnelly, "The Social Construction of International Human Rights," in Dunne, Tim and Nicholas. J. Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press, 1999), pp. 71-102. See also J. Habermas, "Remarks on Legitimation Through Human Rights," in *Philosophy and Social Criticism* 24 (3) (1998), pp. 157-171.

⁴¹ See Abdullahi An-Na'im, "Introduction" in Abdullahi An-Na'im (ed.) *Cultural Transformation and Human Rights in Africa* (Zed Books, 2002), p. 7.

sociological fact of modernity, and should realize their cultural orientation in this context.⁴²

If cultural orientation in the modern context should accept the human rights paradigm, then the problem lies in finding the resources to achieve Islamic legitimacy for the human rights, rather than in displaying full-on hostility toward them. So the internal-discourse approach would function to enhance supportive elements and to redress opposing elements so that the interpretation of human rights would be consistent with the integrity of Muslims' cultural tradition. So long as such efforts are consistent with the fundamental faith of Islam and Islamic *authenticity*, there is no reason to adopt norms and ideas that originated from other cultural traditions.⁴³

Case Studies: Women and Non-Muslims:

All of the features of discrimination against Muslim women, discrimination against non-Muslims as well as the prohibition of torture in connection with *hudud* punishment are in *Sharia*⁴⁴ and have strongly influenced Muslim attitudes and policies even where *Sharia* is not the formal legal system.

According to conventional interpretation, the idea of moral reciprocity under *Sharia* applies neither to women nor to non-Muslims to the same extent as it applies to Muslim men. However, so long as Muslims hold these aspects of *Sharia* to be part of Islamic tradition, we cannot expect any positive consequence for human rights in predominantly Muslim countries.⁴⁵ In this regard, an interlocutor has to reinterpret the basic sources of the *Qur'an* and *Sunna*, in a way that would enable Muslims to remove the basis of discrimination against women and against non-Muslims from *Sharia*. An-Na'im points out,

...the only effective approach to achieve sufficient reform of *Shari'a* in relation to

⁴² However, his reasoning is somewhat ambivalent as to whether the search for a human-rights consensus in "An-Na'im's cross-cultural dialogue" approach is a common effort for humanity or just an international pressure.

⁴³ *PCL*, p. 360.

⁴⁴ *TCCA*, p. 35.

⁴⁵ *Ibid.*, p. 39.

universal human rights is to cite sources in the *Qur'an* and *Sunna* which are consistent and supportive of human rights as the basis of the legally applicable principles and rules of Islamic law today.⁴⁶

For An-Na'im, any sacred source of Islam has no meaning in the daily lives of believers except through human understanding and behavior. Because the historical context of the community and the personal experience of individual believers deeply influence human perception and behavior, it was inevitable that the views expressed in *Shari'a* would be contingent on the realities that existed in the *Medina* of the seventh and eighth centuries, and would disregard some fundamental and eternal apocalyptic beliefs that existed in *Mecca*. Therefore, the view must emphasize certain texts in these original sources in a way that both conforms the interpretation to the historical circumstances and simultaneously de-emphasizes other texts. However, drastic changes in the cultural orientation regarding the modern conditions of individual and communal life should lead to a reconsideration of the meaning and the significance of divine messages. Accordingly, one must appreciate the differential impact of these factors on the cultural orientation of the Muslim community today. That is to say, if *Sharia* said something that related to the particular socioeconomic conditions of its time, then it might have to be formulated differently in today's socioeconomic environment in order to meet its original intent. Specifically, if *Sharia* was justified in holding Muslim women and non-Muslims in a subordinate status because that was the norm at that time, then modern Islamic law would not be so justified in keeping that position today and would find a different interpretation adapted to contemporary social and political circumstances.⁴⁷ Therefore, certain aspects of *Sharia* should be seen as *transitional*, namely, having been the Islamic response to the concrete realities of life in the seventh- and eighth-century Muslim

⁴⁶ CTNS, p. 228.

⁴⁷ For a similar view, see Norani Otham, "Grounding Human Rights Arguments in Non-Western Culture: *Shari'a* and the Citizenship Rights of Women in a Modern Islamic State," in Joanne R. Bauer, and Daniel Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 169-192 at 173-177.

community in *Medina*, and Muslims can transform the meaning of Sharia according to modern times, provided that the transformation rests on the same fundamental sources of Islam⁴⁸ (namely, the *Qur'an* and *Sunna*). In this regard, the internal pluralism of a tradition or a religion provides the context within which divergent religious communities can bring their *first-order* traditions of belief and practice into dialogue with the norms of international human rights. For him, if we are to articulate human rights norms within cultural and religious doctrine, then we can expect to endorse a universal regime of human rights while affirming the values of respect for religious integrity.

This internal dialogue can, An-Na'im argues, strengthen local commitment to values and practices that are embraced in the concept of human rights. The dialogue can help cultural members to discover the content and the implications of the inherent dignity of the human being within the cultural discourse in question. Also, one should avoid imposing external standards on cultural members. An-Na'im insists that one must specify human rights in terms that are *internal* to cultural orientation; otherwise, human rights would be rejected by societies that find them alien or in variance with the value system of a people. Thus, the struggle to establish enlightened perceptions and interpretations of cultural value should emphasize a society's internal values rather than the society's external ones. At this level of dialogue, outsiders cannot settle the internal struggle but can support internal dissent, "provided they do so with sufficient sensitivity and due consideration for the legitimacy of the objectives and methods of the struggle within the framework of the particular culture."⁴⁹ Like Rawls, An-Na'im argues that the task will be counterproductive and unlikely to succeed in attaining change if the interpretation of human rights is an external imposition of foreign values and moral standards.⁵⁰ Insiders can understand the

⁴⁸ For An-Na'im, the task of interpretation should distinguish the chapters of the *Qur'an* revealed in Mecca from those revealed in Medina. He argues that the Mecca teachings are the universal message of Islam, but that the later Medina teachings reflect only the particular social and cultural circumstances of the time.

⁴⁹ *TCCA*, p. 37.

⁵⁰ *PCCL*, p. 361.

cultural meaning of their own society's practices, can express an idea in ways that are accessible to the insiders' community, and possess undisputed standing for engaging in social criticism. In other words, reconciliation is available *if and only if* the proposed construction has to be valid and credible from the *insider* point of view.⁵¹

There is an interesting contrast here between Rawls's overlapping consensus and An-Na'im's approach. Like Rawls, An-Na'im clearly pays attention to the practical role that human rights norms play at the international level, and he starts his constructive approach from this premise. Moreover, it seems that An-Na'im shares with Rawls (i.e., the Rawls of *The Law of Peoples*) the view that a major cause of human rights violations is both the lack of *legitimacy* of international standards within the given political culture and the lack of conformity between standards and cultural norms. Moreover, recall that in chapter two, Rawls argues that each citizen can accept "justice as fairness" as reasonable through a process of "inserting it as a module into her own conception of the good."

Similarly, An-Na'im argues that Muslims can accept a human-rights principle from their own religious tradition, provided that it can be reformulated into their own religious reason. In this regard, An-Na'im clearly explicates this justificatory strategy which Rawls applauds and characterizes it as a "perfect example of overlapping consensus":⁵²

The *Qur'an* does not mention constitutionalism, but human rational thinking and experience have shown that constitutionalism is necessary for realizing the just and good society prescribed by the *Qur'an*. An Islamic justification and support for constitutionalism is important and relevant for Muslims. Non-Muslims may have their own secular or other justifications. As long as all are agreed on the principle and specific rules of constitutionalism, including complete equality and non-discrimination on grounds of

⁵¹ This parallels Michael Walzer's concept of connected critics, who try to hermeneutically reformulate their traditions in the direction of human rights while maintaining their integrity. See Michael Walzer, *Interpretation and Social Criticism* (Harvard University Press, 1989).

⁵² See TIPRR, p. 151. It should be noted that An-Na'im never claims that his approach is similar to Rawls's overlapping consensus, but in two edited volumes, "Human Rights in Africa: Cross-cultural Perspectives" (1990) and "Human Rights in Cross-cultural Perspectives: A Quest for Consensus" (1992), he indeed mentioned that "the idea [overlapping consensus] is applied to the justification of universal human rights in different cultures by several authors from different perspectives." Moreover, in "The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia," An-Na'im states, "In view of the inescapable local and cultural context of the practical protection of human rights, such an approach to developing and sustaining an overlapping consensus on a human set of social values as the basis of agreement on a conception and content of human rights is the only way to achieve universality." See An-Na'im, "The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia," in Bauer, Joanne R. and Daniel Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 147-168.

gender or religion, each may have his or her own reasons for coming to that agreement.⁵³

Moreover, let us recall that Rawls does not specify any right against discrimination by governments, because there is no shared idea of a person as free and equal in the global public political culture, and a decent hierarchical society's conception of the person does not entail ideas similar to the liberal idea that persons have equal basic rights.⁵⁴ Thus, if *The Law of Peoples* included principles for respecting persons as free and equal citizens, then decent peoples would certainly not accept the principles. However, An-Na'im expects that, after Muslims reinterpret the *Sharia*, they can endorse the idea of equal treatment before the law in a way that privileges neither men nor Muslims. Thus, it is interesting to see that An-Na'im endorses the notion of equal treatment before the law and substantially refutes Rawls's argument that something like Kazakhstan is the best we can hope for.⁵⁵ Correspondingly, starting from a non-liberal society in Rawls's sense, there is no distinction between public political culture and background culture in An-Na'im's approach. Any kind of dialogical consensus requires the engagement of comprehensive doctrines, and any consensus would no longer be a freestanding view. An-Na'im comments on this point:

It is not possible, or desirable, in my view to identify a set of neutrally formulated human rights. Any normative regime, which justifies a set of rights and provides or informs their content, must necessarily represent a commitment to a specific value system.⁵⁶

In other words, any consensus on a list of human rights cannot be freestanding because the content of the list's items depends entirely on what all cultures can live with. In spite of accepting human rights as rights that are due to all human beings by virtue of their inherent dignity and integrity, and are independent of any specific tradition; however, in the end, An-Na'im suggests that it is neither possible nor desirable to justify human rights in a

⁵³ *PCL*, p. 100.

⁵⁴ *LPb*, p. 66.

⁵⁵ *LPb*, p. 78.

⁵⁶ *PCCL*, p. 360.

“neutral” way or through a freestanding view, as Rawls envisions. By contextualizing human rights principles within a more complex metaphysical and religious framework, the idea of human rights is believed to be unavoidably sectarian.⁵⁷

4.2.4 Methodology (III): Cross-cultural Dialogue

In terms of cross-cultural dialogue, once peoples establish adequate cultural legitimacy for human rights standards within each tradition, the legitimacy encourages cross-cultural dialogue where peoples exchange insights and strategies of internal discourse. In other words, different cultures and religious traditions must undertake a similar process of enlightened construction to resolve the conflicts between their respective culture and universal human rights, and must sincerely appreciate and understand different justifications and interpretations of human rights. This practice should take place with mutual respect and with the understanding that all cultures have something to learn from others. Any interlocutor must both recognize that any normative tradition is not hermetically sealed from another and appreciate different or incompatible interpretations. Thus, in the dialogical process, interlocutors should both argue their position and open their perspectives regarding normative traditions to possible change. Although the consensus is difficult to achieve, interlocutors should keep listening until they have reached a sufficient level of basic sympathetic understandings. The aim of this level of dialogue, therefore, is to enhance mutual understanding and appreciation, not to reach the same justification. Interlocutors should reexamine their own terms in light of the perspectives produced by interlocutors of other cultures, and should recognize the limits and the biases of their own assumptions.

⁵⁷ In terms of this sectarian approach of human rights, see—among others—Michael Perry, *The idea of Human Rights: Four Inquiries* (Oxford University Press, 1998); and Max Stackhouse, *Creeds, Society and Human Rights: A study in Three Cultures* (Grand Rapids: Eerdmans, 1984).

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As was stated above, An-Na'im warns us that disagreement regarding the justification might translate into disagreement regarding the form, the content, and the implementation of human rights. Even if people within respective cultures accept the idea of the inherent dignity of human being *and* the idea of human rights, whether there is a global consensus on human rights remains an open question. For instance, people would accept the right to be free from cruel, inhuman, or degrading treatment or punishment, as articulated by Article 5 of the UDHR; however, they may propose a completely different interpretation of this human right. For instance, it is still controversial as to whether or not corporal punishment and the death penalty are cruel forms of punishment. In this regard, there is still disagreement on the question of how to identify common criteria by which these sanctions can be said to violate human rights.

Specifically, in the context of Muslim society, most Western human rights activists charge that the *lawful sanction* of *Hudud* punishments (e.g., the practice of amputation of the right hand for theft) constitutes torture or ill-treatment according to Article 5. This charge reflects some Western secular interpretations of human rights that rest on a particular conception of the person and society (e.g., the separation between Church and State) and that insists on the public domain's disregard of religious law. This secular interpretation may even argue that the *Hudud* punishments are indicative of the comprehensive backwardness of Islamic societies. However, for An-Na'im, it is always much easier to discuss others' blind spots and wrongdoings than our own. But we need to think more carefully before we conceive the injustice of non-Western cultural practices. For An-Na'im, religious belief is a rational argument for all Muslims in the public domain, and it is not possible for Muslims to claim that these punishments could constitute torture or ill-treatment, even though they may seem so from a secular point of view. From the point of view of a Muslim, humans should neither question the appropriateness attributable to a

God-decreed punishment, nor reconcile themselves to such questioning through internal or cross-cultural dialogue. In this regard, An-Na'im states,

From the religious point of view, human life does not end at death, but extends beyond that to the next life. In fact, religious sources strongly emphasize that the next life is the true and ultimate reality, to which this life is merely a prelude. In the next *eternal* life, every human being will stand judgment and suffer the consequences of his or her actions in this life. A religiously sanctioned punishment, however, will absolve an offender from punishment in the next life because God does not punish twice for the same offense. Accordingly, a thief who suffers the religiously sanctioned punishment of amputation of the right hand in this life will not be liable to the much harsher punishment in the next life. To people who hold this belief, however severe the *Qur'anic* punishment may appear to be, it is in fact extremely lenient and merciful in comparison to what the offender will suffer in the next life should the religious punishment not be enforced in this life.⁵⁸

Here is an obvious example in which disagreements at the level of justification would translate into disagreements regarding the meanings of human rights. Therefore, neither Islamic reinterpretations nor external pressures are likely to lead to the abolition of these punishments as a matter of Islamic law. The only possible claim to make is that, by learning from other traditions (e.g., Jewish tradition) during the process of cross-cultural dialogue, Muslims might limit the application of *Hudud* punishments by emphasizing strict procedural safeguards, and by restricting the application of these religious punishments to Muslim offenders.⁵⁹

In this regard, it appears that An-Na'im's "cross-cultural dialogue" approach can be recognized as a middle-ground discourse that neither rests content with a pragmatic consensus of human rights norms, nor makes futile attempts to reach consensus on an underlying justification. On the one hand, An-Na'im accepts the plural-foundations thesis, namely, agreement on the list of international human rights norms but disagreement on its justification, but he warns us that it is a shaky foundation if we eschew any discussion regarding the norms' underlying justification because the disagreement on the underlying justification may likely translate into disagreements on the form and the content of human rights. On the other hand, he never attempts to search for a consensus on the underlying

⁵⁸ *TCCA*, p. 35.

⁵⁹ *Ibid.*, p. 34.

justification of human rights. Rather, An-Na'im argues that a consensus regarding the justification of human rights is possible only in a global process of cross-cultural dialogue that promotes the universal legitimacy of human rights. Interlocutors should sensitively appreciate and respect the divergent interpretations of human rights within different cultures by appreciating and respecting the interpretations' underlying justifications, and should avoid forcing their own standards onto other cultures. In an Islamic society, human rights norms need *Islamic* legitimacy by appealing to Islamic texts and principles of interpretation; in a Confucian society, the norms need *Confucian* legitimacy; and in Catholic society, the norms need *Catholic* legitimacy; and so on.

In a nutshell, his method is one both for improving the cultural legitimacy of human rights and a method for broadening and deepening universal consensus on the formulation and public implementation of those rights.⁶⁰ In the end, the justification and rationale of human rights should be the product of internal and cross-cultural dialogue.

4.3 Critique

Through internal discourse and cross-cultural dialogue inspired by An-Na'im's reformed methodology, it is acceptable for divergent traditions to justify human rights in their own terms and perspectives, and it is shown that the Western way of justification is but one of many possibilities. Furthermore, the methodology can also obtain widespread support for human rights from divergent cultures by means of intercultural dialogue. Such dialogue shows not only that human rights principles reshape cultural norms and practices, but also that cultural norms and practices reshape the meaning and practice of human rights. However, An-Na'im's cross-cultural dialogue for the universal validity of human rights generates some conceptual tensions that should be addressed, and the exclusion of his dialogical form makes sincere inter- and cross-cultural dialogue hardly achievable. In what

⁶⁰ *HRIC*, p. 432.

follows, I will take up the critique of his approach and argue how the conceptual tensions raise difficulties for An-Na'im's approach to human rights.

Before proceeding, we should know that it is an empirical question as to whether or not the greatest obstacles to the enforcement of human rights are due to a lack of cultural legitimacy, because we often find representatives of *different* cultures adopting the *same* apology for human rights violations; moreover, we can find *similar* material or social causes for those violations in very different societies. However, I will leave this empirical question aside for the moment, and focus my critique on the method and justification of An-Na'im's "cross-cultural dialogue" approach. My critique starts from his methodology because, while relating to the issues surrounding the interpretation and the application of human rights principles, we need to take into account how different cultures confront the question of "how these cultures and circumstances are themselves to be interpreted, and by whom."⁶¹ Therefore, my critique will focus on the questions regarding the forms, the procedures, and the outcomes of cross-cultural dialogue, especially the method of interpretation (how) and the qualification of the interpreter (who).

4.3.1 What Culture, Whose Authenticity?

Clearly, the foremost task of the "cross-cultural dialogue" perspective is (1) to reinterpret the sacred texts and doctrines in a way that achieves the goal of an "enlightened construction" within Islamic authenticity, and (2) to point out the reconciliation between those enlightened interpretations and the international human rights standards.

However, what is "authentic" in a culture? An-Na'im points out that, given a complex and changing culture, no individual and no social group can be an authoritative spokesperson for the culture. Although there is the real danger that people might misuse human rights by selectively applying them as, for example, an instrument for ethnocentrism, people can use

⁶¹ Michael Freeman, "The Problem of Secularism in Human Rights Theory," p. 46.

culture to defend or rationalize oppression. Accordingly, in order to put culture at the center of inquiries, “we need to ask whose culture is being evoked, what the status of the interpreter is, in whose name the argument is advanced, and who the primary beneficiaries of the invocation of culture are.”⁶²

Recall the internal and cross-cultural dialogue that An-Na’im proposes with respect to the universality of human rights: the dialogue proceeds by means of the practical test of “the idea of reciprocity.” The dialogue assumes that justifications of specific normative claims must be reciprocally non-rejectable. It requires people not only to adopt a standpoint of impartiality toward all particular experiences, but also to assent only to those principles and judgments that are consistent with that impartial standpoint. Moreover, sincere cultural dialogue based on the idea of reciprocity is possible only if the participants interact under conditions that they can accept as fair. They must eschew any coercion and manipulation, and they must trust that the dialogue itself will be fair and open-minded. Furthermore, during the dialogical process, no one can exercise power over another, regardless of whether the power comes in the form of physical coercion, economic threats, or cultural violence that may effectively silence one’s voice.⁶³ Therefore, people cannot ignore the role of power while trying to justify human rights.

In this regard, it seems that An-Na’im overlooks the political and social context of interpretation. The debate about cultural authenticity takes place at the level of texts and

⁶² Hilary Charlesworth, “Martha Nussbaum’s Feminist Internationalism,” in *Ethics*, Vol 111(2000), pp. 64 –78 at 68.

⁶³ For instance, in Iris Young’s communicative model of democracy, citizens try to understand through a more broadly defined process of communication, a process that includes greeting, rhetoric, storytelling as well as rational arguments. By incorporating greeting, rhetoric and storytelling into her account of political communication, she aims to eliminate the cultural and gender biases implicit in deliberative norms of speech. She also aims to eliminate the requirement that citizens reason with each other in a way that abstracts from the differences in their social positions. See Iris Young, “Communication and the other: Beyond Deliberative Democracy,” in Seyla Benhabib(ed.), *Democracy and Difference: Contesting the Bounds of the Political*(N.J. Princeton University Press, 1996), pp.120-136; *Inclusion and Democracy* (Oxford University Press, 2000), Ch 3; “Activist Challenges to Deliberative Democracy,” in *Political Theory* 29(5)(2001), pp.670-690; Lynn Sanders, *Against Deliberation*, in *Political Theory* 25(3)(1997), pp.347-76; and Cheryl Hall, “Recognizing the Passion in Deliberation: Toward a More Democratic Theory of Deliberative Democracy,” in *Hypatia* 22(4)(2007), pp.81-95.

interpretations, but it is also about the distribution of political and cultural power.⁶⁴ Whether human rights are seen as rights or can become rights is important in the evolution attributable to the social practices that support “the discourses ascendancy of those values.”⁶⁵ Such practices are intrinsically related to power and authority. In other words, it is crucial to know that developing a way of adjudicating human rights norms will always be a struggle for power. Xu offers several pertinent remarks on this subject:

Discourse has/is power. And discourse takes place in the context of complex interplay between group interests and public interests, between social groups and the state, and between the government and foreign powers, all underpinned by varying power relations among them and relative power resources available to them under particular historical circumstances. Power can be political, economic, military, cultural, or a combination thereof. Discourse interacts with such power relations and power resources by way of reinforcing or co-opting or resisting them.⁶⁶

In this regard, cross-cultural dialogue proceeding by means of the practical test of “the idea of reciprocity” is not operating in a power vacuum, and discussants accept arguments not simply by reason of “the force of the better argument,” but also by reason of the force with which one argues. Whether or not the discourse of human rights gains acceptance in Muslim cultures hinges on whether or not Muslim cultures and other cultures interact with one another. When An-Na’im attempts to determine the criteria that Muslims may or may not accept into the discourse of human rights, An-Na’im cannot reasonably hope to do so by simply trying to identify the frameworks of either interpretations or cultural orientations that apparently underlie cultural perceptions. Rather, the ongoing practices of the existing discourse determine the criteria, and the criteria can do so by obtaining a consensus in the process of political struggle. In other words, the success of a liberal interpretation of Islamic tradition, as An-Na’im would have us believe, depends mainly on whether or not that interpretation would obtain support in the process of political struggle. In a sense, it

⁶⁴ See Ken Booth, “Human Wrongs and International Relations,” in *International Affairs*, Vol 71 (1995), pp. 103-126 at 114.

⁶⁵ Michael Freeman, “Universal Rights and Particular Cultures,” in Michael Jacobsen and Ole Bruun (eds) *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Surrey: Curzon, 2000), pp. 43-58.

⁶⁶ Xiaoqun Xu, “Human Rights and the Discourse on Universality: A Chinese Historical Perspective,” in Lynda Bell, Andrew Nathan, and Ilan Peleg (eds) *Negotiating Culture and Human Rights* (NY: Columbia University Press, 2001), pp. 217-241 at 232.

would be economic and political factors (rather than cultural factors) that have much to do with the determination of *Sharia*. Put in another way, the conflict between human rights and Islam is political rather than scriptural.⁶⁷

An-Na'im clearly understood the fact of power struggle herein and realized that Islamic elites have mobilized a conservative reading of the *Qur'an* for political purposes. He states,

...dominant groups or classes within a society normally maintained perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture, thus there is an *internal* struggle for control over the cultural sources and symbols of power within that society.⁶⁸

However, apart from stressing that outsiders should not settle this internal struggle,⁶⁹ An-Na'im did not analyze "how" this internal struggle happens and "who" resolves it.⁷⁰ It may be easy to leave the right of definition to those who are in power, and the interpretation is easily open to abuse by power elites⁷¹.

4.3.2 Cultural Authenticity and The Right to Claim One's Right

The second point of criticism refers to the distinction that An-Na'im made between internal discourse and external influences. An-Na'im insists that discussants should hear only insiders' voices during internal cultural discourse. No doubt, it is true that the greater the degree of the contributor's sensitivity to the internal logic and frame of reference of a culture, the greater the efficacy of the contributor's participation in a dialogue. However, the distinction between internal and external dialogue is more difficult to sustain when we recognize the possibility of disagreement within as well as among moral communities.

⁶⁷ Michael Freeman, "The Problem of Secularism in Human Rights Theory," p. 380.

⁶⁸ *TCCA*, p. 36.

⁶⁹ *Ibid.*, p. 36.

⁷⁰ Moreover, it is clear that the socio-political contexts of *Sharia* implementation are various among different Islamic countries. However, like Rawls, it seems that An-Na'im conflates the concept of culture with that of state. From An-Na'im's approach, under the simplistic umbrella of scriptural imperatives, *Hudud* punishment is essential to *Sharia*, and *Sharia* is represented as essential to every country where the majority perceives itself as Muslim, regardless of whether or not the country in question is an *Islamic* state.

⁷¹ That is the problem of what Uma Narayan called "selective labeling," which "allows changes approved by socially dominant groups to appear consonant with the preservation of essential values or core practices of a culture, while depicting changes that challenge the status quo as threats to that culture." See Uma Narayan, "Undoing the 'Packing Picture' of Culture," in *Sign: Journal of Women in Culture and Society* (25)(2000), pp: 1083-1086. See also Zehra. Fabasakl Arat, "Forging A Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights", in *Human Rights Quarterly*, Vol 28(2006), pp 416- 437.

The main argument with which An-Na'im opposes external criticism is that it will be perceived as cultural imperialism and will thus be fruitless. Because many past interventions that have invoked the name of human rights protection have been insulting and even disastrous, An-Na'im rightly argues that we should defend human rights discourse against charges of imperialism because the charge threatens the very soul of the enterprise.

However, the distinction between insider and outsider, which in a way derives merely from the ideals of cultural authenticity and cultural legitimacy, is too obscure and dangerous, because insiders who raise the same argument may well be attacked as heretics or be perceived as agents of an alien culture, as he himself has experienced.⁷² Hence, again, the distinction between internal and external dialogue in this way is open to abuse by established elites. The powerful elites could easily define the culture according to their understanding and suppress the cultural change (that An-Na'im hopes to foster) by proclaiming that all dissenters cannot be part of the culture and that they, therefore, cannot validly contribute to internal reform with undisputed standing.

Moreover, according to An-Na'im's cultural-legitimacy project, the reconciliation between human rights and Islam cannot be acceptable to Muslims if the interpretations do not satisfy Islamic religious criteria. Any sacred source of Islam has no meaning in the daily lives of believers except through human understanding and behavior *here and now*. This proposition means that no claim of cultural authenticity can be justified if it fails to correspond to the current cultural orientation and is not shared by the majority of the cultural members.

As stated in chapter two, however, the claim of cultural authenticity is premised upon the criterion of internal acceptance: namely, the members of the society must consider the

⁷² An-Na'im mentioned that he was denounced as a heretic in Mauritius when he advocated "that the formulation of *Sharia* should not be enacted by the state since *Sharia* discriminates against women," and was named a *persona non grata*, since he was alleged to be an agent of American imperialism owing to his research project's receipt of the Ford Foundation's support. See An-Na'im, "Islam and Human Rights: Beyond the Universality Debate," in *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 2000, p. 100.

present communal practices to be appropriate expressions of the members' own convictions. Accordingly, the argument for external respect presupposes internal acceptance.⁷³ The more strongly a culture gains internal cultural coherence, the stronger the culture's claim to external respect if it is unforced. Given that the claim of cultural authenticity depends on the internal acceptance of cultural members, it follows that most people who call into question the claim to cultural authenticity are not outsiders; rather, most of these critics are insiders: members of the culture.⁷⁴ In other words, whenever there is a conflict of interpretation that occurs within the culture and that challenges the claim of cultural authenticity, the dissent and the confrontation are always the *immanent critique* from within the culture. Accordingly, the dissenters can be "authentic insiders." Uma Narayan comments on this matter:

We arouse nervousness and resistance because we hold up to the culture the shame of what its traditions and cultural practices have so often done to its women, the deaths, the brutalities, and the more mundane and quotidian sufferings of women within "our" culture, that "our" culture is complicit with.... We all need to recognize that critical postures do not necessarily render one an "outsider" to what one criticizes, and that it is often precisely one's status as one "inside" the culture one criticizes, and deeply affected by it, that gives one's criticisms their motivation and urgency. We need to move away from a picture of cultural contexts as sealed rooms, with a homogenous space "inside" them, inhabited by "authentic insiders."⁷⁵

Seen in this light, we can say that, the claim to human rights is a kind of claim usually made in the context of social conflicts in which a justification of cultural authenticity is being called for. Whenever there is dissent and conflict that is internal to a culture, it is the actual context in which the claim to human rights may arise. It means that the claim to human rights is one way of reconciliation in which the culture can regain internal acceptance and legitimacy.⁷⁶ Every claim of cultural authenticity must take this kind of dissent into account, and should ask whether or which specific rights can be justified in a particular way.

⁷³ Rainer Forst, "The Basic Right to Justification: Towards a Constructivist Conception of Human Rights," p. 38.

⁷⁴ Ibid., p. 39.

⁷⁵ Uma Narayan, "Contesting Culture: Westernization, Respect for Cultures, and Third-World Feminists," in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (NY: Taylor & Francis, Inc, 1997), pp. 396-414 at 401.

⁷⁶ Forst, "The Basic Right to Justification: Towards a Constructivist Conception of Human Rights," p. 39.

Moreover, since cultural authenticity depends on internal acceptance's proceeding by means of the test of reciprocity, it means that all claims for concrete human rights during internal discourse are premised upon the basic right: "the right to claim one's right."⁷⁷ That is, during dialogical processes, we must presuppose the communicative freedom of our dialogical partner to claim his or her rights, and to accept or oppose our claims. The right to claim one's rights, thus, makes normative justification possible. It is not a specific, established and recognized right, but the foundation of the justification of concrete rights.⁷⁸ Therefore, any claim of human rights arises not in the context of shared understandings about cultural orientations, but in the context of dissent. Only in this way can we do justice to the idea of human rights as a tool of social criticism. Because many of the people who make human-rights claims are serious dissenters within their own cultures, these claims constitute an *immanent critique*; and also, therefore, the practices of human rights—within and across cultures—merit consideration neither solely in terms of the distinction between insider and outsider, nor in terms of whether the claims fit within the framework of interpretation, but in terms of the struggles and situations of conflict in which human rights claims are raised.

Thus, the ideal of the cultural-dialogue approach must account for the internal-discourse process that enables cultural members to challenge the dominant discourse. When the dialogue proceeds by means of the test of the idea of reciprocity, the insider-outsider distinction would hinder internal diversity and exclude many voices from public life.

⁷⁷ Judith Shklar, "Positive Liberty, Negative Liberty in the United States," in Stanley Hoffmann and Dennis F. Thompson (eds) *Redeeming American Political Thought* (University of Chicago Press, 1998), pp. 111-126.

⁷⁸ Rainer Forst proposes "the right to justification," which is similar to my argument here, and I was persuaded by his instructive argument. However, in the next chapter, I will construct a fear-based scheme of human rights that draws much of its substance from Judith Shklar's ideas in which the nature and the rationale of human rights differ from the corresponding ideas in Forst's scheme. See Rainer Forst, "The Basic Right to Justification: Towards a Constructivist Conception of Human Rights," pp. 35-60. Similarly, inspired by Hannah Arendt, Seyla Benhabib defends the view that there is one fundamental moral right: the right to have rights, which is the enabling condition of exercise of communicative freedom. See Seyla Benhabib, "Another Universalism: On the Unity and Diversity of Human Rights," the Presidential Address at the 130th meeting of the American Philosophical Association, 2006, pp.1-43.

4.3.3 The Inadequacy of the Dialogical Premise

While An-Nai'm suggests that we should follow the *framework of interpretation* to secure cultural authenticity and stability, the cultural orientation that interlocutors already share bounds the scope of criticism. But as Iris Young clearly indicates, the effort to shape arguments according to shared premises within a shared discursive framework would exclude the expression of disadvantaged persons' needs, because interlocutors cannot easily hear disadvantaged persons' voices. As we know, there are many invisible human rights violations. They may be invisible mainly owing to their cultural context, which treats these norms as culturally important or appropriate. These norms often make some people aberrant. And the norm-induced disadvantages from which they suffer affect their lives deeply and frequently. Moreover, the assumptions undertaken by many institutional rules and social practices tend to enforce these norms in a way that harms some people unluckily.⁷⁹ For instance, some people fail to fit within cultural norms simply because of "their bodily capacities, group-specific socialized habits and comports, or way of life."⁸⁰ In this regard, those cultural norms indeed make most disadvantaged persons more vulnerable than others. The chief origin of this unjust treatment is neither particular individuals' prepossession nor public policies' explicit exclusion of disadvantaged persons from privileged spaces. Rather, the chief origin comprises the "widespread but relatively unnoticed assumptions embedded in institutional rules, the material infrastructure of social action, and everyday habits of comportment."⁸¹ In this regard, unfairly marginalized people are victims of individual actions and of structural injustice. Young states,

⁷⁹ Iris Young, "Responsibility and Global Justice: A Social-connection Model," in *Social Philosophy and Policy*, 23(2006), pp. 102–130 at 95.

⁸⁰ See Iris Young, "Taking the Basic Structure Seriously," in *Perspectives on Politics* (4)(2006), pp.91-97

⁸¹ Ibid.,96. For instance, racism usually consists in structural processes that "normalize body aesthetic, determine that physical, dirty or servile work is most appropriate for members of certain groups, produces and reproduces segregation of members of these racialized groups, and renders deviant the comports and habits of these segregated persons in relation to dominant norms of respectability." See Iris Young, "Structural Injustice and the Politics of Difference," in Anthony Simon Laden and David Owen(eds), *Multiculturalism and Political Theory*(Oxford University Press, 2007), p 67

Structural injustice exists when social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising capacities.⁸²

Therefore, it should be noted that society cannot undo unfair treatment without paying more attention to structural process. Thus, we should examine “hegemonic discourses, relations of power, and the distribution of benefits which assume a particular and restricted set of ruling norms,”⁸³ even though cultural members would usually represent them as impartial. Accordingly, people who aim to redress human-rights violations should notice the structural process of “normalization”⁸⁴ before undertaking the redress. To correct human-rights violations, we need to expose structural social processes “which differently *position* people along social axes that generate status, power and opportunity for the development of capacities or the acquisition of goods.”⁸⁵

A society that seeks cultural authenticity and stability and that relies largely on the framework of interpretation will perhaps unintentionally privilege mainstream perspectives and unintentionally ignore people who perceive themselves victims of structural injustice. Human-rights violations may be invisible to cultural members, especially to people who possess certain forms of privilege here and now. Furthermore, if we treat shared

⁸² See Iris Young, “Responsibility and Global Justice: A Social-connection Model,” p. 83. Seen in this light, race, class, sexuality and other categories can be seen as one such structure, and thinking of race and gender as social structures is conducive to explain the operation and reproduction of structural injustice. Fleshing out the idea of gender as a social structure, for instance, Young argued that there are three axes of gender structures: a sexual division of labor, normative heterosexuality, and gender hierarchical of powers. See Iris Young, “Lived body vs. Gender: Reflections on Social Structure and Subjectivity,” in Iris Young, *On Female Body Experience: Throwing like a Girl and Other Essays*(Oxford University Press), pp. 12-27

⁸³ Iris Young, “Ruling Norms and the Politics of Difference: A Comment on Seyla Benhabib,” in *The Yale Journal of Criticism*, Vol 12 (1999), pp. 415-421.

⁸⁴ For Young, normalization “consists in a set of social processes that elevate the experience and capacities of some social segments into standards used to judge everyone.” See Young, “Taking Basic Structure Seriously,” p.95.

⁸⁵ Young, “Responsibility and Global Justice: A Social Connection Model,” p. 83; “Taking the Basic Structure Seriously,” pp. 94-96. For Young, there are at least two versions of a politics of difference, which she calls a politics of cultural difference and a politics of positional differences, and she claims that her theory belongs to the latter version. The aim of a political of positional difference is to notice existing “relations and processes of exploitation, marginalization and normalization that keep many people in subordinate position.” In terms of the distinction between the politics of cultural difference and her politics of positional difference, see Iris Young, “Structural Injustice and the Politics of Difference,” in Anthony Simon Laden and David Owen(eds), *Multiculturalism and Political Theory*(Oxford University Press, 2007), pp.60-89

understandings as the dialogical premise, we could unwittingly dismiss structural injustice that is the cause of human-rights violations and unwittingly make the violations invisible through habituation and normalization in people's daily practices of cultural life. Therefore, to expose human-rights violations, we need to make marginalized people and a marginalized structure visible, and to allow the invisible voices to be heard directly.⁸⁶ We need to make ourselves attentive to the marginalized and to the patterns of exclusion and oppression within the culture in question.⁸⁷ Seen in this light, deprivation and domination,⁸⁸ not shared understandings, should be the focus of attention in a sincere human rights dialogue.⁸⁹ The main function of the internal dialogue is not to search for consensus, but "is to expose and examine how the rules, relations, and their material consequences produce privileges for some people, and...limit the option of the other."⁹⁰ In other words, when we evaluate cultures, we should carefully attend to the heterogeneous interpretations within societies. We should pay attention to forms and processes of exploitation and normalization that result in many people who consequently occupy inferior positions. When An-Na'im suggests that the scope of criticism is bounded by the cultural orientation that interlocutors already share, structural causes of resistance are invisible to his reformed methodology.

4.3.4 The Exclusion of the Epistemological Assumption

As I stated, the claim for cultural authenticity depends on the plausibility that members of

⁸⁶ Iris Young, *Inclusion and Democracy* (Oxford University Press, 2000), p. 50.

⁸⁷ For instance, Indian Feminist Uma Narayan describes a traditional upbringing in which her mother told her never to question adult male authority and always to follow norms of female submissiveness, silence, and innocence. But she responds to her mother by declaring that "the shape your 'silence' took...is in part what has incited me to speech." See Uma Narayan, "Contesting Culture: Westernization, Respect for Cultures, and Third-World Feminists," p. 7.

⁸⁸ Iris Young sets out a challenge to the discussion of justice as influenced by current theories of distributive justice, and argues that we should be attuned to forms of oppression. She identifies five faces of oppression: exploitation, marginalization, powerlessness, systematic violence, and cultural imperialism. See Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton University, 1990). Ch. 2.

⁸⁹ *Ibid.*, p. 258.

⁹⁰ Young, "Responsibility and Global Justice: A Social Connection Model", p. 84.

a culture willingly—not unwillingly—support the culture. There is an internal criterion of acceptance built into this defense of cultural authenticity, and all cultural claims should be premised on “the right to claim one’s right.” Within such a culture, while a claim for cultural authenticity arises, cultural members cannot justify a particular form of cultural authenticity except by persuasion and argumentation in that context. Because cross-cultural dialogue is not a task for a single person within a single culture, the dialogue requires different kinds of knowledge and, indeed, different kinds of knowledge-creation processes. The dialogue requires a production of knowledge that “must be collective, interactive, inter-subjective and networked.”⁹¹ Each cultural context should encourage its members to try to identify cultural components that the culture should preserve and those components that merit challenges. Cultural members must open up these questions to public deliberation and debate. An-Na’im’s suggestion that culturally savvy people should reinterpret Islamic tenets undoubtedly privileges the knowledge claims of the religious elites and cannot satisfactorily reflect the people’s thoughts and actions. An-Na’im argues that the non-Western delegates who participated in the formulation and adoption of international human rights cannot be a genuine representation of popular perceptions and attitudes;⁹² I think that religious elites’ task of reinterpreting Islamic tenets is insufficient. In this regard, the “cross-cultural dialogue” approach can adequately express neither dynamic cultural changes nor a genuine consensus of the people *here and now*. Furthermore, we cannot assume that a culture has met its aim of cultural respect unless we have reliable knowledge concerning the character of that culture, and “we cannot have reliable knowledge of cultures unless the voice of the people is clearly heard.”⁹³ Seen in this light, if cross-cultural dialogue requires a process of knowledge creation that goes beyond the apocalyptic beliefs of religious elites, then we must try to identify who participates in

⁹¹ Michael Freeman, “Universal Rights and Particular Cultures,” p. 49.

⁹² *BU*, p. 428.

⁹³ Freeman, “Universal Rights and Particular Cultures,” p. 49.

this process and who speaks for the Islamic people, especially when a disagreement exists between a culture and an individual who has grown up in it. For me, because one cannot reach sincere dialogue until one truly understands the opinions of the people, it is necessary that intercultural understandings develop through actual dialogical encounters, not through cultural interpretations by religious elites. Thus, a better “cross-cultural dialogue” approach consists in listening attentively to the voice of the people. Because it is difficult to avoid the religious elite’s prior prejudices, which would fundamentally close off any genuine dialogue,⁹⁴ dialogical understanding demands that members of different cultures actively engage each other in real dialogue. Even though elites’ enlightened interpretations of religious texts aim at improving the conditions of the least advantaged groups in society, a focus exclusively on these interpretations would necessarily exclude many unattainable insights regarding other important interpretations of human-rights violations. Hence, a rigorous cross-cultural approach to human rights requires that the interpretations of a culture stem not exclusively from elites but from the people themselves. In this regard, if the aim of An-Na’im’s cross-cultural dialogue is to reach a reconciliation only with religious elites’ interpretation of a culture, then An-Na’im’s focus concerns not the influence that cultural context should have on human rights justification, but on a methodology that best facilitates the search for a Muslim society’s best possible acceptance of international human rights law. In the end, his dialogue perspective does not involve a true cross-cultural exchange and, in fact, promotes a uni-directional approach to intellectual efforts rather than a multi-directional approach that might establish common ground.

⁹⁴ Young amplifies a case: an opinion poll in Oregon shows that able-bodied people felt that being disabled was worse than death. But it is clear that disabled people would not agree, because able-bodied people imaginatively project their own prior prejudices about the disabled onto the disabled. See Iris Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought,” in *Constellations*, (3)(1997), pp. 343-44.

Conclusion

For the purpose of enhancing the cultural legitimacy of human rights, An-Na'im's "cross-cultural dialogue" seeks to demonstrate that through internal cultural reconciliation and cross-cultural dialogue, we can find common ground on which to support human rights that are embodied in international human rights treaties and laws. However, if my interpretation is sound, An-Na'im's cross-cultural dialogue is exclusive in that it (1) requires a certain form and content of participation in internal and cross-cultural dialogue, and (2) neither qualifies the dialogical process with the above-mentioned conditions nor provides a sufficient analysis of plural voices.

By contrast, I argue that a sincere cultural dialogue based on the idea of reciprocity⁹⁵ requires at least three conditions:

- (1) Participants within internal or cross-cultural dialogue should not exercise power over each other, whatever manner of power manifests itself.
- (2) The scope of criticism should not be limited by the framework of interpretation or the cultural orientation that cultural members already share. Deprivation and domination, not shared understandings, should be the focus of attention in a sincere human rights dialogue.
- (3) Marginalized groups should have opportunities to have their perspectives heard, and these opportunities should run neither through the dominant cultures nor through the qualifications of the insider-outsider distinction.

On the basis of these conditions, chapter six defends a bottom-up cross-cultural dialogical approach that makes room for victimized and powerless people's contributions to the crafting of both human-rights justifications and human rights interpretations.

⁹⁵ Furthermore, based on these three conditions, in chapter six, I will justify and flesh out Iris Young's idea of asymmetrical reciprocity.

Chapter 5

The Historical-Practical Conception of International Human Rights and its Ground in the Liberalism of Fear

To designate a hell is not, of course, to tell us anything about how to extract people from that hell, how to moderate hell's flames. Still, it seems a good in itself to acknowledge, to have enlarged, one's sense of how much suffering is caused by human wickedness there is in the world we share with others. Someone who is perennially surprised that depravity exists, who continues to feel disillusioned (even incredulous) when confronted with evidence of what humans are capable of inflicting in the way of gruesome, hands-on cruelties upon other humans, has not reached moral or psychological adulthood. No one after a certain age has the right to this kind of innocence, of superficiality, to this degree of ignorance, or amnesia.

Susan Sontag, *Regarding the Pain of Others*¹

We say 'never again,' but somewhere someone is being tortured right now, and acute fear has again become the most common form of social control. To this the horror of modern warfare must be added as a reminder.

Judith Shklar, "The Liberalism of Fear"²

Introduction

If my interpretations of the approaches of John Rawls, Martha Nussbaum, and Abdullahi An-Na'im are compelling, then we can find that, though their efforts indeed successfully dispose of several predicaments confronted by most conventional human rights theories, each approach contains different deficiencies. In chapter two, I argued that in order to avoid recourse to any metaphysical or religious doctrines for his justification, Rawls introduced the idea of a political conception of human rights that appeals to the idea of decency as a reasonable standard that liberal and decent societies can share. Although it can include multiple foundations for a justification of human rights, Rawls's

¹ Susan Sontag, *Regarding the Pain of Others* (Farrar, Straus and Giroux, 2003)

² Judith Shklar, "The Liberalism of Fear", in Stanley Hoffmann(ed), *Political Thought and Political Thinkers* (University of Chicago Press, 1998).

approach to grounding human rights in a diverse world will lack adequate justification unless it presupposes a cosmopolitan moral ground, which Rawls initially intended to avoid. Moreover, his institutional conception of human rights cannot acknowledge the suffering of marginalized foreigners whose persecution cannot be recognized or redressed within a national boundary. In chapter three, I argued that Nussbaum used her capabilities approach to ground human rights in a minimal conception of human flourishing attached to any substantive conception of good and that she endeavored to prove the list of capabilities can be an object of overlapping consensus regarding human rights principles in a pluralistic world. I argued that Nussbaum's capabilities approach is a comprehensive liberalism rather than a political liberalism in Rawls's sense and that the capabilities list cannot be an object of overlapping consensus regarding human rights principles. In chapter four, I argued that An-Na'im indeed provides an essential hermeneutic methodology with his account of cross-cultural dialogue, and rightly expands the analysis to encompass considerations about Non-Western cultures. However, An-Na'im fails to provide a sufficient analysis of plural voices in relation to the cross-cultural dialogical process. In the end, his dialogue perspective does not involve a true cross-cultural exchange and, in fact, promotes a unidirectional approach to intellectual efforts rather than a multi-directional approach that might establish common ground.

In spite of the theoretical incompleteness, there remain some important theoretical insights and justificatory strategies that deserve to be fleshed out and critically reformulated from their perspectives. In what follows, I start to take up the construction of my own approach developed from their insights. I will try to preserve the important values contained in each of these approaches, while avoiding their defects.

Because human rights discourse takes place under politically charged conditions, which are, to say the very least, non-ideal discursive circumstances, my scheme addresses scenarios in which theory-making practices take place under this type of circumstance. Inspired by

Judith Shklar's liberalism of fear and Iris Young's critical theory, I will theorize two points: the conception of human rights is taking (1) human beings as they are based on assumptions about the worst they can do; and (2) institutions as they might be with special regard to the prevention of the abuse of power.

Basically, my approach involves the following stages:

(1) To begin with, the foremost job in rethinking human rights is to detach the idea of human rights from the natural rights tradition. I will expose the misconception that the idea of contemporary human rights is the rebirth or recurrence of the Western natural rights tradition, and will argue that we should take the actual practices of human rights as the basis for theorizing in relation to the conception. It would be foolish to deny a connection between the natural rights tradition and the modern idea of human rights. But it is one thing to acknowledge that the tradition of human rights *originated* within Western philosophy, and it is quite another to equate the two. However, many human rights theorists treat human rights as simply a contemporary version of natural rights, which then burdens the contemporary debate with many of the controversial notions associated with natural rights. Moreover, simply identifying the contemporary idea of human rights with natural rights is not helpful in dealing with the discrepancies between the underlying philosophical account and the international practice of human rights. Accordingly, that view is a misleading description, and I should examine it before proceeding to my historical-practical conception of human rights. I will argue that treating the international bill of human rights as merely the rebirth of the Western natural rights tradition, independent of either peoples' expression of those rights or peoples' practice of those rights in international politics, inevitably results in the creation of serious obstacles to a sincere cultural-dialogue that might enhance human rights. Consequently, it leads to some unavoidably skeptical conclusions about the implementation and the enforcement of human rights. Seen in this light, the first and foremost step is to correct this misleading

view. Furthermore, I will argue that the idea of human rights is not the modern version of the Western natural rights tradition, but an invention resulting from humanity's common tragic-historical experiences of the twentieth century. It means that the aim of a human rights theory is to develop an international political theory rather than a theory about the rebirth of natural rights in the contemporary era. Following my extended reflection on this subject, I will defend my assertion that human rights are to be grounded neither in metaphysical principles nor in traditional cultural values but in history. And it seems that a brief look at the origins of the Universal Declaration of Human Rights would be instructive.

(2) The second stage reflects my hypothesis that, if we clarify the misunderstandings and accept the historical-practical conception of human rights, then we can work out the nature, scope, and justification of human rights only by considering how the international arena would interpret and conceptualize human rights. It is the insight of Rawls that needs more elaboration here. Recall that Rawls indicated not only that the role of human rights in international practice rests on a shared public basis of action, but also that peoples' violation of these rights is "equally condemned by both reasonable liberal peoples and decent hierarchical peoples." Rawls treats the role of human rights in international practice as determining the definitive nature of the idea of human rights, and the question of human rights justification is separable from the question of the nature and the content of these rights. People may agree about the roles of these principles and, yet, disagree about the content. Moreover, members of liberal or decent societies would still justify human rights for their own reasons, without a commonly agreed-upon basis for their reasons. However, by analyzing the relationship between sovereignty and human rights after World War II, I will argue that respect for human rights principles should be deemed the *premise* for rather than the *content* of the Law of Peoples. The respect-as-premise argument would provide a reasonable explanation as to why human rights principles can apply to outlaw

states even though they are not part of the society of peoples. And this argument would mean that only after the contemplation of international practice can we proceed to illuminate how human rights are to be conceived. Following Rawls's insight, I will flesh out the important role of human rights in international politics as both defining standards of legitimate political actions and setting up the criteria for outside interference, and will stress the importance of the role of human rights as a basis for theorizing a reasonable conception of human rights.

(3) In the third stage, I argue that, if we theorize the conception of human rights by first accepting human rights' role in international practice, we need to justify human rights by establishing adequate grounds on which people can believe in the existence and the importance of human rights. At this stage, like Nussbaum, I will argue that some deep intuitions play a fundamental role in the theory. However, unlike Nussbaum, I will lay much stress on the negative potential and the opaqueness of personal dispositions. Inspired by the late Judith Shklar's liberalism of fear, I will defend the view that the nature and the function of human rights in international practice can be grounded on her moral psychology of personhood. Moral intuition of fear can be a cosmopolitan moral ground, and this point is where the Rawlsian scheme falls short. The dispersion and the predictability of cruelty render the experience of fear so innermost that it constitutes a moral intuition upon which a human rights culture can be built. Accordingly, the reason for the remarkable role that human rights has played in the aftermath of World War II is the universality of fear, the fact that fear touches all people around the world. The ideal of human rights after World War II is one of the achievements of the liberalism of fear. In this regard, human rights are not timeless principles, but a construct that responds to the exigencies of a particular type of social formation emerging on the world stage during a particular historical epoch. Although Shklar was primarily concerned with domestic cruelty and evils, and did not extensively apply her conception of liberalism to international society;

in the following, I will try to flesh out her political liberalism of fear to provide a psychological underpinning of the idea of human rights in international practice, and will examine the form and the scope of the political liberalism of fear when this liberalism works *outward* to the international sphere, however sketchily.

(4) In the fourth and final stage, I argue that although human rights can be grounded in the liberalism of fear, agreement on rights at this level is consistent with a certain range of dispute at the level of interpretation and at the level of implementation. Recall that there are two levels of human rights justifications in question. One explains why any right ought to be recognized as a human right. The other explains which rights deserve to be recognized as human rights. We may furnish grounds for agreement and solve the latter question of justification, but these will not be sufficient to deal with the former question regarding the content and the interpretation of human rights principles. To address the former question rigorously, we need to take seriously the perspectives of non-Western cultures; only in this way can human rights be appropriate as global normative standards for a diverse world. Therefore, we need a sincere cross-cultural dialogue to provide a public basis for settling the problem of interpretation and implementation. In the next chapter, I will defend an approach ascribable to people who have no voice that is easily represented at the center of political theorizing. Namely, I will create a bottom-up approach for the justification of human rights at the level of interpretation and implementation. I will seek an account of human rights that has normative legitimacy from the perspectives of those marginalized and victimized people. I believe that my approach is descriptively more suitable to the moral reality of universal human rights than are other approaches and presents a normative grounding of human rights that is more compelling than are the corresponding groundings of other approaches.

5.1 Taking Human Rights Practice Seriously

We found that the main problem by far of the different approaches explored in my inquiry was the attempted reconciliation between the universality of human rights and cultural diversity. The problem arises in conjunction with a common accusation: the international human rights regime exhibits a spirit of ethnocentrism by imposing, successfully or not, a particular cultural view on others. For some critics, what we call universal human rights is essentially connected to the philosophical conception of the Western natural rights tradition. Because the idea of human rights first emerged in the Western natural rights tradition, any unreflective application of the rights to non-Western societies is at least suspicious. Furthermore, such critics argue that the internationalization of the human rights regime in the aftermath of WWII was really a cover for Western interventionism in the affairs of the developing world; that the institutionalization has been a form of coercion by intellectual means, the use of “soft power” par excellence.³

As I noted in chapter one, in order to avoid the charge of ethnocentrism and cultural imperialism, theorists try to show that human rights are acceptable across a wide range of cultures. For these theorists, if human rights norms are no longer treated as exclusively and essentially arising from and supported by Western traditions, then we should no longer view them as the sole property of the West. As a result, the implementation and the enforcement of human rights would no longer be the output of cultural imperialism. However, before we accept this view and go on to evaluate the international consensus of human rights, we should think twice about the accuracy of this interpretation. For me, not only is this orthodox view misleading when it identifies the principle and the practice of international human rights with a rebirth of the Western natural rights tradition, but also all efforts to solve the discrepancies would be fruitless if originating from this misguided

³ Lynda S. Bell, Andrew J. Nathan, and Iian Peleg(eds.)*Negotiating Culture and Human Rights* (New York, NY: Columbia University Press, 2001), p. 5.

premise. If we fail to grasp the real meanings of human rights in international practice, we are not on the right track toward correcting these discrepancies. Therefore, we should look carefully at the accuracy of the orthodox view of human rights from the very beginning.

The orthodox account of human rights⁴ deems contemporary human rights “the twentieth-century name for what has been traditionally known as natural rights.”⁵ Like the American “Declaration of Independence,” which holds that people are “endowed by their creator” with certain rights, or like the French “Declaration of the Rights of Man and of the Citizen,” which in similar terms defines rights as “natural” and “sacred,” the twentieth-century versions are general rights that one would have in a pre-political “state of nature” and that belong to people “naturally,” simply in virtue of their humanity at all times and places.⁶ As Charles Beitz clearly points out,

Typically, they are thought to reside at a deep, perhaps even a fundamental, level of our moral beliefs and to be discoverable by reason or rational intuition. Thus, human rights are sometimes said to be “natural” or to belong to persons “as such” or “simply in virtue of their humanity.” On such views, international human rights—that is, the right of the declarations and covenants—derive their authority, to whatever extent they have authority, from these underlying values that constitute their foundation. The task of the theorist of international human rights doctrine is to describe or discover the objects properly called “human rights” and then to say which of the entitlements alleged to be human rights in international doctrine pass muster.⁷

In this regard, once we understand the nature of human rights, we would understand the

⁴ See Charles Beitz, “Human Rights as Common Concern,” in *American Political Science Review*, 95.2(2001), 269-282; What Human Rights Mean, in *Daedalus*, 132(2003), 36-46; “Human Rights and the Law of Peoples,” in Deen Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge, Cambridge University Press, 2004), pp.193-214. I integrate the arguments from these articles in order to analyze Beitz’s critique of natural-rights theory.

⁵ See Maurice Cranston, “Are There Any Human Rights?” *Daedalus* 112(4) (Fall 1983), 1-17; Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Cornell University Press, 2003); Charles Taylor, “Human Rights: The Legal Culture,” in Paul Ricoeur (ed), *Philosophical Foundations of Human Rights* (Paris, UNESCO 1986), 49-57; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 198, 210-213, and Peter Jones, *Rights*, (Basingstoke: Macmillan, 1994).

⁶ Beitz points out four noteworthy features in relation to this orthodox view of human rights. (1) Human rights are *pre-institutional*: they are rights one would have in a pre-political “state of nature.” (2) Human rights belong to people in virtue of their *common humanity*: the rights are grounded on characteristics that people might be said to possess when they are considered in *abstraction* from any social institution. (3) Human rights are *timeless*: all human beings at all times and places would be justified in claiming them. And (4), in contrast to specific rights, human rights are *general rights*. See Charles Beitz, “What Human Rights Mean,” 41. Rather, for Joseph Raz, this “traditional approach of human rights” is characterized by another four features: (1) the approach aims to derive human rights from basic features of human beings that are valuable in human life; (2) human rights are the most important moral rights; (3) it pays scant attention to the difference between something’s being valuable and somebody’s having a right to the thing; and (4) human rights tend to be individualistic rather than social. See Raz, 2007, *Human Rights without Foundations*, p. 3-4.

⁷ Beitz, “Human Rights and the Law of Peoples,” pp. 196.

justification for the content of international doctrines in that the *justification* of human rights is internal to the *conception* of human rights, which has its origin in the natural-rights tradition⁸. Moreover, the problem of human rights inflation can be solved if the content of human rights does not fit within the nature of human rights. For instance, in contrast to substantive minimalisms defending a limited scope of human rights, Maurice Cranston argued that the realm of genuine human rights is narrower than what the international doctrine maintains because some rights of the UDHR do not pass the test for justification.⁹

However, to identify human rights with the natural rights tradition represents “a kind of unwitting philosophical dogmatism.”¹⁰ The nature of the Declaration is to express a list of constitutional standards against the threats by power.¹¹ Changing social conditions give rise to new needs and new awareness about actual violations of human rights, and different power structures, struggles, and negotiations give rise to a new formulation of rights. Moreover, human rights belong to human beings not simply because human beings possess a common humanity but because human rights principles identify conditions that should be met by any social institution hoping to establish and to preserve its legitimacy in the eyes of people. In this scenario, people may still disagree about the relative priority of rights and whether or not the international community should intervene when an institution fails to meet the conditions. Seen in this light, the idea of human rights is *not* a property of persons

⁸ Beitz, “Human Rights and the Law of Peoples,” pp. 197.

⁹ Cranston, “Are There Any Human Rights?”, p. 1.

¹⁰ See Beitz, “What Human Rights Mean,” 38. Beitz points out three features that explain why the development of international human rights does not fit the mold of natural rights: (1) natural rights are supposed to be pre-institutional, but many rights enumerated in human rights documents cannot be so conceived; (2) natural rights are supposed to belong to people “naturally”; however, human rights can be conceived as a category of special rights that arises out of people’s relationships as participants in a global political economy, not necessarily to be treated as *general* rights in L.A. Hart’s sense; and (3) natural rights are supposed to be timeless; however, few of the human rights listed in the UDHR pass the test. Human rights are derived from societies that have at least some of the features of modernization, for instance, modern legal systems, industries, economies, or bureaucracies.

¹¹ Norberto Bobbio, *The Age of Rights* (Cambridge: Polity, 1996).

but “*a reason to treat persons in certain ways.*”¹² The orthodox view of human rights has not only concealed an accurate understanding of the idea of human rights in the contemporary world¹³ but also crafted related justifications in the wrong theoretical places.¹⁴ More often than not, the popular understanding of the history of the UDHR reinforces the image that the concept of human rights is grounded in the Western natural-rights tradition and is incompatible with different cultures but masquerades as a universal concept. Because the concept is alien to many non-Western societies, the advocates of human rights become nothing but the ambassadors of the Western natural-rights tradition, and the politics of human rights is a favored project of Western hegemony.¹⁵ It seems that the main reason for this illusion is the fact that: most people, regardless of whether they are advocates or opponents of human rights, demonstrate a lack of understanding of the history of the drafting process and the development of human rights after WWII.¹⁶ The disregard of the historical development of human rights not only misrepresents the real meaning of human rights in international politics, but also maintains the unwarranted accusation of ethnocentrism and cultural imperialism. Accordingly, the best strategy by which we can correct this misguided perception is to re-examine the history of the UDHR¹⁷ and to clarify what kinds of claims are made by the UDHR.

¹² Brian Orend, *Human Rights: Concept and Context* (Broadview, 2002), p. 67. See also John Charvet, “The Possibility of a Cosmopolitan Ethical Order,” p.530.

¹³ In addition to the public role of international human rights, the important NGO-initiated functions of human rights, including education, advocacy, standard-setting, monitoring, and enforcement, have done very important work in popularizing the idea of human rights and in drawing international attention to various violations.

¹⁴ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999); Joshua Cohen, “Minimalism About Human Rights: The Best We Can Hope For?” in *Journal of Political Philosophy* 190 (2004), 190-213; Leif Wenar, 2005, The Nature of Human Rights, in *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* eds. Andreas Follesdal and Thomas Pogge (Springer-Verlag New York, LLC), 285-294; and Joseph Raz, 2007, *Human Rights without Foundations*, pp. 3-4.

¹⁵ Tony Evans, “If Democracy, Then Human Rights?” in *Third World Quarterly* 22(4) (2001), 623-642.

¹⁶ Johannes Morsink clearly identifies the issue: “The lingering allegation of ethnocentrism is in part caused by the fact that very few people seem to know what was said and done during the drafting process. This ignorance has led to numerous misconceptions about how the document was written and what it and its various parts mean.... The two-year-long process of drafting the Declaration was a very inclusive one.” See Morsink, *The Universal Declaration of Human Rights*, xiii.

¹⁷ Recently, there have appeared several reinterpretations of the history of the UDHR, including Paul Gordon Lauren, *The Evolution of International Human Rights: Visions* (University of Pennsylvania Press, 1998);

Had only a few developing states and only a few non-state actors led the way in the promotion of the idea of human rights, the project of the declaration could not have succeeded, specifically after the resistance of the Great Powers derailed an attempt to entrench a strong human rights document in the UN charter.¹⁸

Though few in number,¹⁹ many developing states played a striking role in the drafting of both the UDHR and the two International Covenants.²⁰ There is no evidence to prove that the states reached a consensus on a philosophical justification of human rights originating from the natural-rights tradition, but the states agreed that the enormity of the holocaust provided the main impetus for the remarkable position that human rights should play in the international arena.²¹ In other words, the atrocities of the Nazi regime shocked the world's conscience and provided political impetus, though the pressure to promote, and the blueprint for, an international bill of rights were well developed long before the Nazi horrors were fully known.²² Consequently, it was the tragic memory of

Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999), Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001); Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, 2004); Zehra. Kabasakal Arat, "Forging A Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights" in *Human Rights Quarterly*, Vol. 28(2), 2006, pp. 416-437; and Susan Waltz, 2001, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights," *Human Rights Quarterly*, 23 (2002), 44-72; "Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights," *Third World Quarterly*, vol. 23(3)(2002), 437-448; and "Universal Human Rights: The Contribution of Muslim States," in *Human Rights Quarterly*, Vol. 26(4) (2004), pp. 799-844.

¹⁸ Paul G. Lauren points out that, at the international conference in San Francisco in 1945, NGOs played critical roles in advocating the incorporation of human rights principles into the UN Charter. NGO consultants ranged from religious groups to international organizations. There were 300 official delegates and 2,500 advisors present. "Never before in the history of the world had so many nations of such various sizes been so widely represented at such a high-level international conference." See Paul Gordon Lauren, *The Evolution of International Human Rights: Visions*, pp. 178-89.

¹⁹ At the time of the establishment of the United Nations, a number of developing countries and NGOs made an important attempt to entrench a strong human rights document in the UN Charter, though that attempt failed by the resistance of the great powers. See Susan Waltz, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights," 45.

²⁰ The participants included India, Pakistan, Brazil, the Philippines, Chile, and Colombia. They represented an important force in the alliance with several Western states that successfully thwarted attempts by South Africa and the Soviet-bloc countries to derail international human rights initiatives. See Christian Reus-Smit, "Human Rights and the Social Construction of Sovereignty," in *Review of International Studies*, 27(2001), p. 532.

²¹ It is not to say that people around the world were aware of the horror of the Holocaust, but that there were many collective memories of tragedy reminding people around the world of the need to protect human rights.

²² Susan Waltz, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights," p. 438.

WWII that let “so many delegations from so many different nations and cultural traditions come to an agreement about a universal moral code.”²³ Normative universality of human rights in this way is understood as a function of societies and people everywhere coming to share *the same history*.

Specifically, the UDHR was adopted by the UN General Assembly on December 10, 1948, by a vote of 48-0 with eight abstentions.

Eleanor Roosevelt, the American representative on the Commission on Human Rights, played a leading role in the drafting of the UDHR. The principal drafters were John P. Humphrey (Canadian) and Rene Cassin (French). Other important contributors to the drafts included Peng-Chun Chang (China), Charles Malik (Lebanon), Hernan Santa Cruz (Chile), and Alexei Pavlov (Russia).²⁴

During the drafting process, heated discussions arose concerning the philosophy of human rights. And it is reasonable to say that if people are going to agree on a certain set of rights, they must think first about what rights are, and about why rights exist in the first place. They may also ask whether rights come from God or from nature. For instance, Peng-Chun Chang, the Chinese delegate and a believer in Confucianism, proposed the importance of duty in the Confucian tradition, which prioritizes harmony, social order, and

²³ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, p. 36.

²⁴ Morsink identifies a preparatory phase followed by seven further drafting “stages.” In the preparatory phase, a “nuclear” committee received contributions from many NGOs on the question of human rights, as well as some drafts of human rights bills from a number of Latin American states. The nuclear committee recommended that the Economic and Social Council “should at all time pay due regard to equitable geographical distribution,” and this principle was reflected in the appointments to the Commission on Human Rights responsible for developing the UDHR (the appointments included Australia, Belgium, Byelorussian Soviet Socialist Republic (B.S.S.R), Chile, China, Egypt, France, India, Iran, Lebanon, Panama, the Philippines Republic, the United Kingdom, the U.S.A., the U.S.S.R., Uruguay, and Yugoslavia). “Western” states made up only about a third of the votes for the universal Declaration, and Muslim states provided half as many votes to the final total as Western states (20 Latin American states and 13 non-Western countries voted for the UDHR). Moreover, as Morsink points out, “the members of the Third Committee, who discussed every line of the draft over two months in the fall of 1948, represented a wide variety of cultures.” Besides Europeans and North Americans, there were six members from Asia (China, India, Pakistan, Burma, the Philippines, and Siam). Islamic culture was predominant in nine nations (Afghanistan, Egypt, Iran, Iraq, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen). Three countries had large Buddhist populations (Burma, China, and Siam). Four were from Africa (Ethiopia, Liberia, Egypt, and South Africa). Six of the European members belonged to the Communist bloc. See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, pp. 28-34.

security above individual rights. Charles Malik, a follower of the philosophy of Thomas Aquinas, argued that we should agree on the nature of the person before discussing human rights.²⁵ Valentin Tepliakov, the official representative of the Soviet Union, argued that the rights of individuals must be seen in relation to each individual's obligations to the community because the individual cannot be divided from society.²⁶ These and other people, from different traditions and nations, had considerable difficulty in agreeing on issues of this kind. The more detail there was in a human rights view, the greater the opposition from people who held philosophical or religious views different from the expressed view.

In this situation, it was the French delegate Rene Cassin's skill that made the Declaration eventually successful. As the editing writer of the second draft,²⁷ Rene Cassin committed himself to grounding human rights in a way that was substantive but also acceptable to all of the philosophical and religious views that were represented around the table. For Cassin, the main challenge was to develop a document "that did not require the Commission to take sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights."²⁸

Furthermore, Cassin's task was supported by the Committee on the Theoretical Bases of Human Rights, which had been established by UNESCO. Essentially a committee of philosophers, it was chaired by E.H. Carr of Cambridge and included among its members

²⁵ For instance, Charles Malik summarized their difficulties when he noted that "we are raising the fundamental question, what is man? 'Is man merely an animal?', 'Is he merely an economic being?'" See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, p. 39.

²⁶ *Ibid.*, pp. 39-40.

²⁷ There are some controversies about the role of Cassin within the drafting process. It is plain that Cassin introduced a number of new elements to John Humphrey's draft: a new preamble and a new categorization of the various rights. However, it is not correct to say that he authored a whole new document. Morsink remarks that "Humphrey was right when he went public in his memoirs with something he had known all along, namely that 'Cassin's new text reproduced my own in most of its essentials and style'." Because so much of Cassin's revised draft came directly from the original Humphrey draft, it makes no sense to say that Cassin ever made an independent draft of the UDHR.

²⁸ Mary Ann Glendon, *A World Made New*: p. 68

Richard McKeon of the University of Chicago, the prominent British political philosopher Harold Laski, and the French philosopher Jacques Maritain, whom I have already mentioned in the previous chapters. The main concern of this committee was to consider how an agreement might be possible “among men who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought.”²⁹ A central finding of the committee was that many non-Western respondents affirmed their support of human rights principles after it circulated a questionnaire to prominent scholars and cultural figures worldwide. The questionnaire functioned to identify their views on the extent, nature, and theoretical grounds of human rights. And eventually, the Committee came to the conclusion that, despite having neither a common justification nor a common expression of the sources of human rights, different cultures’ human rights sources had a common substance. In its final report, the Committee concluded that people could achieve agreement across cultures concerning certain rights, even though the agreement would be “stated in terms of different philosophical principles and on the background of divergent political and economic systems.”³⁰ The report asserted,

Varied in cultures and built upon different institutions, the members of the United Nations have, nevertheless, certain great principles in common. They believe that men and women all over the world have the right to live a life that is free from the haunting fear of poverty and insecurity. They believe that they should have a more complete access to the heritage, in all its aspects and dimensions, of the civilization so painfully built by human efforts. They believe that science and the arts should combine to serve alike peace and the well-being, spiritual as well as material, of all men and women without discrimination of any kind.³¹

Undoubtedly, many drafters were inspired by the Western natural rights tradition, and the language of the UDHR looks very much like the assertion that human beings have natural rights. Article 1 of the UDHR, for instance, says that all human beings “are born

²⁹ Jacques Maritain, “Introduction” in *Human Rights: Comments and Interpretation*. Ed. UNESCO (Westport, CT: Greenwood Press Publishers, 1949), pp. 10-12.

³⁰ Ibid., p. 259.

³¹ Ibid., p. 77.

free and equal in dignity and rights.” However, it seems that many drafters intentionally eschewed the expression of their views in terms of natural rights, and tried to deny that the draft was an updated version of the Western natural-rights doctrine.

Specifically, during the drafting process, a disagreement took place during a discussion of the phrase “by nature” in Article 1. The Belgian delegation suggested that they eliminate it, while the Brazilian amendment would have added that “all human beings are created in the image and likeness of God.”³² Peng-Chun Chang reminded all delegations that the UDHR was designed to be universally applicable and that it might be best to permit each culture to supply its own account of the philosophical underpinnings of human rights. He stressed that Chinese culture indeed comprised a large proportion of humanity and that Chinese people had traditions and ideas sharply different from those of the Christian West.³³

However, as the Chinese representative on the Human Rights Commission, he “had refrained from proposing those ideals for inclusion in the declaration.”³⁴ Glendon comments on this issue regarding Chang:

His own country, he pointed out, comprised a large proportion of humanity, and its people had ideals and traditions different from those of the Christian West. Chinese ideals included good manners, decorum, propriety, and consideration for others. Yet he, as the Chinese representative on the Human Rights Commission, had refrained from proposing those ideals for inclusion in the Declaration...Article 1 as it stood, Chang said, struck just the right note by calling upon all men to act toward one another in a spirit of brotherhood. That was consistent with the Chinese belief in the importance of considerate treatment of others and also with the ideals of eighteenth-century Western thought. The first line of the article, therefore, should refer neither to nature nor to God. Those who believed in God, he suggested, could still find the idea of God in the strong assertions that all human beings are born free and equal and endowed with reason and conscience.³⁵

In this regard, the “deliberative silence” at the debate on philosophical justification was precisely a key factor that helped sustain the drafters’ universal belief in the document’s

³² Mary Ann Glendon, *A World Made New*, p. 145.

³³ Tore Lindholm, Article 1, in A. Eide and G. Alfredsson (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*. (The Hague: Kluwer International Press, 1999), p. 57.

³⁴ Mary Ann Glendon, *A World Made New*, p. 146.

³⁵ Ibid. , p. 146.

core claims.³⁶ In order to avoid the deadlock over the nature-or-God disagreement in Article 1, the draft claims only that all men ought to act toward one another “in a spirit of brotherhood,” which is consistent not only with Chinese belief but with Western thought, as well.³⁷ Thus, through the deliberative silence, drafters successfully converged their beliefs regarding abstract principles and successfully left unresolved various metaphysical issues. Such agreements enable people who cannot reach agreements on metaphysical views to reach agreement on particular outcomes. And people who reject a particular agreement can accept the overall agreement-making process without having to renounce their most foundational ideals: “they lose a decision but not the world.”³⁸

According to the Preamble of the UDHR and the discussion of the Third Committee of the General Assembly in 1948, the system of human rights was a response to humanity’s painful collective experiences of WWII and to the subsequent world crises that, unfolding at that time, made mandatory a global consensus regarding the identification of and the subsequent implementation of universally applicable human rights. The Preamble of the UDHR refers to the two world wars as evidence of the need for global norms and affirms human rights as the “foundation of freedom, justice and peace in the world.” The practical rationale sketched in the Preamble also reflects the fact that it was not philosophical argumentation that led to the drafting of the UDHR; rather, it was the negative experience of war that gave rise to a hope to identify practical standards to which all nations could be held accountable.

³⁶ As Cass Sunstein clearly points out, one of the important social and legal phenomena during a process of legal judgment is “the constructive use of silence.” The constructive use of silence about certain issues is a device for producing convergence between people in the face of conflicting principles. See Cass Sunstein, “Agreements Without Theory,” in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999), pp. 123-150, and Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001).

³⁷ Interestingly, Lindholm draws attention to the fact that “conscience” in Article 1 was included in accordance with a proposal from Chang. The Chinese equivalent of the word implied “two-mindedness” (仁), or “mindfulness of the other person.” This implied meaning expresses the idea of reciprocity and requires us to respect, or show concern for, other people. See Tom Lindholm, Article 1, p. 43.

³⁸ Cass Sunstein, *Designing Democracy*, p. 60.

By following an exchange of ideas in this fashion, people can nourish a basis for “an agreement between minds”—in this case, concerning “beliefs for guidance in action” and not “the affirmation of one and the same conception of the world of man and knowledge.” Let us consider these quotes from Maritain in their fuller context:

“How” I asked, “can we imagine an agreement of minds between men who are gathered together precisely in order to accomplish a common intellectual task, men who come from the four corners of the globe and who not only belong to different cultures and civilizations, but are of antagonistic spiritual associations and schools of thought?... Because, as I said at the beginning of my speech, the goal of UNESCO is a *practical* goal, agreement between minds can be reached spontaneously, not on the basis of *common speculative ideas, but on common practical ideas*, not on the *affirmation of one and the same conception of the world, of man and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action*. No doubt, this is little enough, but it is the last resort to intellectual agreement. It is, nevertheless, enough to enable a great task to be undertaken, and it would do much to crystallize this body of *common practical convictions*.³⁹

Likewise, by drawing from the drafting process for Article 1 of the UDHR, Tore Lindholm⁴⁰ asserts that, the agreement on the UDHR rested on both a *normative* premise and a *descriptive* premise for the ongoing dialogue concerning human-rights justification. On the one hand, there was a proximate normative premise to justify universal rights: the principle that each “human being as human being is entitled to freedom and to equal dignity,” though the concepts of freedom and equal dignity remain unelaborated and “are left open to various interpretations and specifications, which may conflict among themselves, without affront to the Universal Declaration.”⁴¹ Also unelaborated was the reason for which such an entitlement to freedom and dignity helps ground a system of rights. On the other hand, there was a consensus that a prescribed system of human rights regarding equal dignity should rest not on an agreement about God, human nature, or reason, but on agreed-upon descriptions of the post-WWII world. Both normative premises and descriptive premises constitute the justification of human rights. In this

³⁹ Jacques Maritain, “Introduction,” p. 10, *emphasis added*.

⁴⁰ See Tore Lindholm, “Prospects for Research on the Cultural Legitimacy of Human Rights: The Case of Liberalism and Marxism,” in Abdullahi An-Na’im (ed) *Human Rights in Cross-Cultural Dialogue Perspectives: A Quest for Consensus?* (Philadelphia: University of Philadelphia University Press, 1992), pp. 387-426.

⁴¹ Tore Lindholm, “Prospects for Research on the Cultural Legitimacy of Human Rights,” 395-6. Likewise, Eleanor Roosevelt explained that “Article 1 did not refer to specific rights because it was meant to explain why human beings have rights to begin with.” See Mary Ann Glendon, *A World Made New*, p. 146.

regard, Lindholm's comments are helpful:

Only from the normative principle of inherent freedom and equal dignity *in conjunction with* the interpretation of the contemporary and prospective world situation does a binding commitment to a global human rights system follow.⁴²

Accordingly, based on the UDHR's normative premise, any cultural tradition could support universal human rights, provided that the tradition not only supports the ideas of humans' inherent freedom and human's inherent dignity but appreciate the pertinent situation of the "global circumstance of rights," as well.⁴³

In this regard, human rights principles, as a practical guide in action, were a political construction for certain political purposes and operated as the standard in the specific international circumstances that held in the aftermath of WWII. Because the advancement of universal human rights depends on widespread support from a number of states, organizations, and individuals around the world, one cannot claim that the draft was merely an updated version of natural-rights theory. The rights are not pre-institutional and timeless as the proponents of natural rights claim, but the rights constitute a particular choice that the post-WWII world made in reference to its collective memory of recent tragedies.

The choice was not an overlapping consensus as many consensus-based theories had envisioned, but it looks like a constitutional consensus in Rawls's sense, because the choice did not "reach down to a political conception covering principles for the whole of the basic structure."⁴⁴ Rawls comments further on this distinction:

How constitutional consensus comes about: Suppose that at a certain time, because of various historical events and contingencies, certain liberal principles of justice are accepted as a mere *modus vivendi*, and are incorporated into existing political institutions. This acceptance has come about, let us say, in much the same way as the acceptance of the principle of toleration came about as a *modus vivendi* following the Reformation: at first reluctantly, but nevertheless as providing the only workable alternative to endless

⁴² Tore Lindholm, "Prospects for Research on the Cultural Legitimacy of Human Rights," p. 397, *emphasis added*.

⁴³ Ibid., p. 399.

⁴⁴ *PL*, p.158

and destructive civil strife.⁴⁵

.....
It is possible for citizens first to appreciate the good those principles accomplish both for themselves and those they care for, as well as for society at large, and then to affirm them on this basis. Should incompatibility later be recognized between the principles of justice and their wider doctrines, then they might very well *adjust or revise* these doctrines rather than reject those principles.⁴⁶

In this regard, the UDHR, as a constitutional consensus, is accepted simply as principles and as the agreement in which different societies resolve disputes and make decisions—as “a general willingness to cooperate with others with a sense of fairness and openness.”⁴⁷

Thus, the consensus of the UDHR was realizable within richly diverse philosophical, religious, economic, social, and political contexts. Myriad cultural systems granted the UDHR a great deal of support, which nevertheless included no determinate philosophical justifications of human rights. It is a misrepresentation, therefore, to characterize the UDHR as a faithful mirror of the Western natural-rights tradition. The UDHR bases its proclamation of human rights norms on the practical experiences of their violation. It is not accurate and certainly not fair to interpret international human rights doctrines as efforts merely to fill a conceptual space with natural rights in the Western political tradition. We should consider the *role* of human rights in international practice substantively, and we should create the content of international doctrine by considering how the doctrine would best function in light of this role.⁴⁸ We should take the practice of human rights as a guide that can help us consider justification of human rights and the scope of human rights.⁴⁹ In doing so, we should focus on the role that human rights play in contemporary political practice, rather than on the role that natural rights play in the development of Western political thought. This is not to say that contemporary practice is beyond reproach because

⁴⁵ PL, p.159

⁴⁶ Ibid., p.160

⁴⁷ Ibid., p. 160.

⁴⁸ Charles Beitz, *Human Rights and the Law of Peoples*, p. 202.

⁴⁹ See Mervyn Frost, *Constituting Human Rights: Global Civil Society and the Society of Democratic States*(London: Routledge, 2002).

we can see the suspicion that current human rights trends are products of cultural imperialism. But the political role of human rights in contemporary practice provides a guide for thinking about the meaning of human rights today. We can consider this role-as-guide an opportunity for—not an obstacle to—theoretical construction.⁵⁰ And we should follow An-Na'im's lead in acknowledging that politicians' and philosophers' *actual* agreement regarding human rights laws or documents is not the same as a *reasonable* agreement in this same regard; after all, in order for the justification of human rights to be reasonable, there must be additional argumentation. Moreover, we should carefully distinguish between empirical claims of universality, in which a consensus on human rights could serve as supporting evidence for such a claim, and normative notions of universal validity, in which the same consensus would be of no justificatory significance. My point here is simply to show the misconception regarding human rights justification from the orthodox view and to urge people who care about this matter to leave this issue aside and to accept a practical conception of human rights. The experience of reaching a consensus on the UDHR indeed provides a pragmatic grounding for the practical conception of human rights. It can allow us more space “to extrapolate from what political leaders have *actually accepted* to what all individuals could *reasonably accept*.⁵¹ Moreover, we would do well to accept Maritain's insight regarding the benefits and the drawbacks of discerning seemingly inconsequential metaphysical or ideological alliances among delegates to a drafting committee: in the end, it is possible to provide a shared basis of justification that is cross-culturally verifiable. In the next section, I will defend the view that the grounding of human rights can find strength from the moral intuition of fear provided by Shklar's political liberalism.

It seems that, to solve the discrepancies between the philosophical account of human

⁵⁰ Leif Wenar, “The Nature of Human Rights,” in Andreas Follesdal and Thomas Pogge (eds) *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions*. (Springer-Verlag New York, LLC, 2005), pp. 285-294.

⁵¹ Ibid., 291.

rights and the international practice of human rights, one needs an accurate grasp of the ethical and political significance of human rights in the contemporary world from the very start. We should take the right steps to correct this discrepancy. In this regard, like Rawls, we might first look at the *public role* implicit in the global public culture in order to determine the role that human rights play in the world of politics, and we might second “treat it as definitive of the idea of human rights.”⁵² We can work out the nature, the content, and the justification of human rights only by reflecting on international actors’ practical interpretations of the doctrine. Beitz sheds light on the topic:

Theory has to begin *somewhere*. We begin with the observation that there is an international *practice* of human rights, and we ask some distinctively theoretical questions: what kinds of things are these human rights, why should we believe in them, and what follows if we do?⁵³

Here, I will begin examining political human-rights documents such as the UDHR and the various conventions that, therein, have widely served as *a point of reference*. By undertaking this examination, I intend to flesh out the historical-practical conceptions of human rights.

5.2 Human Rights, Political Legitimacy, and Membership in International Society

Rethinking human rights in a way that distances them from the natural-rights tradition makes them more consistent with the contemporary discourse and practice of human rights. If we search for the idea of human rights implicit in public political culture by making use of ideas present in global political institutions and in the public tradition of their interpretations, we can say that there are two prominent roles that human rights have played in international practice.⁵⁴ One role is “to deny that government or individuals have

⁵² Charles Beitz, “Human Rights and the Law of Peoples,” p. 197.

⁵³ Charles Beitz, “What Human Rights Means,” p. 45.

⁵⁴ Human rights principles have played more than these two roles in international society. James Nickel ascribes at least fourteen political roles to the principles, including monitoring, enforcement, education, and intervention. However, I will argue that these two roles shape human rights norms into a powerful set of

the authority to act in certain ways,” and the other role is “to assert that they have an affirmative duty to act in certain other ways.”⁵⁵

First of all, *the principle of human rights is the criterion of political legitimacy in international society*. Human rights identify the most basic conditions that any society’s institutions should meet if we are to consider them legitimate. Human rights are effective constraints on the power of states. It would constrain the action or the inaction of institutional political actors within a universal ethical framework. In this regard, they operate in both domestic politics and international politics. Domestically, human rights are standards of practical guidance for the assessment of all political societies in the treatment of their members. It is a necessary condition of the institutions in all societies. Persons can appeal to these principles in assessing the regime that governs their territory. Internationally, human rights principles condition the membership of sovereign states within international society, regardless of whether the states have legally committed themselves to respect and secure these rights. That is, they would be applicable to all societies whether or not they are supported locally.

In this regard, I accept Rawls’s insights when he argued that respect for human rights is the toleration threshold for judging who is a part of the Society of Peoples and who is not. Rawls is also correct to argue that there is no global basic structure functioning as a fair scheme of worldwide cooperation among citizens of the world. There is a state system in which peoples (states), not individuals, are regarded as free and equal. Apparently, the installation of the UN is thoroughly dependent on the basic political and social organizations in the respective national states. Also, the UN human rights instruments that

international ethics, in that these norms can and should serve as the basis of international society. If we can justify these two roles, we can derive other roles from the two. See James, Nickel, “Are Human Rights Mainly Implemented by Intervention?” in Rex Martin and David A. Reidy (eds.), *Rawls’s Law of Peoples: A Realistic Utopia?* (London: Blackwell Publishing Company, 2006), p. 270.

⁵⁵ Thomas Scanlon, “Human Rights as a Neutral Concern,” in Peter G. Brown and Douglas MacLean, (eds), *Human Rights and U.S. Foreign Policy: Principles and Applications* (Lexington, MA & Toronto: Lexington Books 1979), p. 85.

are designed to protect individual rights still identify the state as the agent when human-rights violations occur.⁵⁶ There is plenty of evidence to affirm that the state is capable of providing more protection to the people than is available in a failed and disintegrated state.⁵⁷ Furthermore, even if transnational advocacy networks have been emerging around the world since WWII, their strategies have, for the most part,⁵⁸ remained focused on national controversies and have targeted chiefly the state.⁵⁹ The strategies still operate under the assumption that the ultimate locus of decision-making is the state, and the aspiration of transnational activism is to push governments to reconsider some of their decisions' harmful or unjust effects.

However, Rawls would be wrong if he treated human rights principles and state sovereignty as separate, mutually contradictory regimes that obscure the justificatory role of human rights principles in the constitution of the modern international order.

Specifically, the idea of sovereignty,⁶⁰ defined as *supreme legitimate authority within a territory*,⁶¹ is an inter-subjective organizing norm, a norm that licenses the arrangement of power and

⁵⁶See also Onora O'Neill, "Agents of justice," in Thomas Pogge (ed), *Global Justice*. (Malden, MA: Blackwell, 2001), pp. 188-203.

⁵⁷ See Michael Ignatieff, 2001 by Amy Gutmann (ed) *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press). Likewise, Brian Turner argues that human rights abuse is characteristically a product of state tyranny, dictatorship, and state failure as illustrated by civil war and anarchy. Accordingly, a viable state is an important guarantor of rights. See Brian Turner, *Vulnerability and Human Rights* (University Park, PA: The Penn State University Press, 2006), Ch. 1.

⁵⁸ Of course, there are some new threats to human rights that come from other sources, for instance, many multi-national corporations. See Alison Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Routledge, 2005).

⁵⁹ For instance, Thomas Risse and his colleagues created "the boomerang theory" to show how international human rights norms substantially affect domestic state practices. See Thomas Risse, Ropp, and Sikkink (eds), *The Power of Human Rights* (Cambridge, Cambridge University press, 1999). See also Jenson, Jane and Martin Papillon "Challenging the Citizenship Regime: The James Bay Cree and Transnational Action," *Politics and Society* (2000), 28(2), pp. 245-64; and Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, Cornell University Press, 1998).

⁶⁰ We should note that the debate over the relationship between human rights and sovereignty is very complicated, and my analysis here is too simple to support an in-depth examination of the debate. But my point here is simply to refute Rawls's argument regarding the relationship, and I am persuaded herein by the analysis of Daniel Philpott and will adopt the definitions of his argument. See Daniel Philpott, "Sovereignty: An Introduction and Brief History," *Journal of International Affairs*, Vol. 48, No. 2 (1995), pp. 353-69; Daniel Philpott, "Westphalia and Authority in International Society," *Political Studies*, Vol. 47, No. 3 (1999), pp. 566-89; and Daniel Philpott, "Sovereignty," in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring Edition, 2003), URL=<http://plato.stanford.edu/archives/fall1999/entries/sovereignty>

⁶¹ See Daniel Philpott, "Westphalia and Authority in International Society," p. 567.

authority into territorially-demarcated, autonomous political units. As a social norm,⁶² the idea of sovereignty emerged not in a moral vacuum, but out of a complex process of dialogical action and consent, and required a certain relationship between the state and the constituency—a relationship wherein the state is seen as governing, whether the constituency is territorial or societal.⁶³ Accordingly, sovereignty is a system of mutual recognition among states in which there are a set of shared norms that define the basic, constitutional authority of member polities. It is what Reus-Smit called “constitutional structure,” or it is Daniel Philpott’s constitution of international society⁶⁴ that is enabling of state action or inaction. As Daniel Philpott explicitly puts it,

A constitution of international society is a set of norms, mutually agreed upon by polities who are members of the society, that define the holders of authority and their prerogatives, specifically in answer to three questions: who are the legitimate polities? What are the rules for becoming one of these polities? And, what are the basic prerogatives of these polities?⁶⁵

Here, the norm of sovereignty has never been “absolute”⁶⁶ in the sense that it would allow abstract states to do whatever they want. Conversely, it has always been subject to

⁶² A norm is a standard of appropriate behavior for actors with a given identity. Regulative norms order and constrain behavior. Constitutive norms create new actors, interests, or categories of action and limit the range of choice and constrain actors. For instance, Kenneth Abbott argues, “Norms and understandings are generated, disseminated and internalized through the efforts and discourse of diverse actors. Even as states and other actors create norms and institutions to further their interests and values, those norms and institutions are redefining those interests and values, perhaps even the identities of the actors themselves.” See Kenneth, Abbott, “International Relation Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts,” in *American Journal of International Law*, No. 2 (1999), p. 368.

⁶³ Samuel, Barkin, “The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms,” in *Millennium: Journal of International Studies* Vol 27, No 2 (1998), p. 230.

⁶⁴ Following Bull, the definition of international society here is “a group of states (or more generally, a group of independent political communities) which...has established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interests in maintaining these arrangements. See H. Bull and A. Watson, 1984, *The Expansion of International Society* (Oxford, Oxford University Press, 1984). See also H. Bull, *The Anarchical Society: A study of Order in World Politics*, and Chris Brown, “International Theory and International Society: The Viability of the Middle Way,” in *Review of International Studies*, 21(1995), pp. 183-96.

⁶⁵ Daniel Philpott, “Westphalia and Authority in International Society,” p. 567.

⁶⁶ For Bodin and Hobbes, sovereignty means unconditional human authority over all matters. Moreover, it seems that it is contradictory to say that sovereignty is non-absolute if it is also supreme. However, the argument here is not that the character or extent of sovereignty *must always be supreme*, but that because sovereign authority consists, at least in part, of mutual recognition, one cannot practice sovereign powers unless one is surrounded by a community of states that recognizes these powers. Therefore, the scope of matters over which a holder of authority is sovereign is always constrained by a set of shared norms in that it constitutes polities and endows them with their basic prerogatives. See Alexander Wendt, “Collective Identity Formation and the International State,” in *American Political Science Review*, 88 (1994), pp. 384-96.

normative constraints. It can function only when granted some basis of legitimacy, though the understanding of the legitimate basis of sovereignty changes over time. In other words, sovereignty as an operational norm always follows some form of legitimacy of sovereignty as a principle, and it was organized by different conceptions of legitimate statehood and rightful state action in different historical contexts. It is only in the post-WWII era that legitimate statehood has been tied mainly to the protection of inalienable human rights.⁶⁷ Hence, the protection of international human rights can be seen as an evolution of the constitution of sovereignty in the contemporary era.⁶⁸ It is useful to consider Reus-Smit's observations regarding this matter:

Treating these [human rights and sovereignty] as separate, mutually contradictory regimes obscures the justificatory role that human rights principles have performed in the constitution of the modern sovereign order.... In the twentieth century, sovereignty has been increasingly justified in terms of the state's role as guarantor of certain basic human rights and freedoms, supplanting the politically impotent legitimating principle of divine rights.⁶⁹

We can say that, since WWII, sovereignty has been increasingly justified in terms of the state's role as a guarantor of certain human rights and that legitimate statehood has been more explicitly tied to the protection of basic human rights.⁷⁰ The way in which a state

⁶⁷ See Tim Dunne, "The Rules of games are Changing: Fundamental Human Rights in Crisis After 9/11", in *International Politics*, Vol. 44, (2007), pp. 269-286 at 271.

⁶⁸ See Samuel, Barkin, "The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms," p. 229.

⁶⁹ Christian Reus-Smit, "Human Rights and the Social Construction of Sovereignty," p. 520.

⁷⁰ Recently, the realist-liberalist-constructivist debate about transnational norms and about their effect on domestic policy has become fierce, if not acrimonious, in international-relations theory. From a realist's position, states are the principal actors in international politics. International rules and institutions have little independent effect on state behavior; they are mere artifacts of underlying interests and power relationships. The national interest is to maximize power or security. Moral principles are espoused merely to justify decisions already taken on the basis of interest-maximizing criteria. Therefore, states' dominant strategy is to maximize their own power capabilities. Whether a state will comply with international law or not depends on the state's calculation regarding the effects of compliance on national interests. Hence, international human-rights norms emerge only when they are embraced and espoused by hegemonic powers. Alternatively, liberalists argue that the domestic sources of state preferences are the determinants of outcomes in international politics, and liberalists stress the "two-level games." For instance, Andrew Moravcsik asserts that, upon the definition that states are self-interested and rational actors, the primary factor that results in states' commitment to international human-rights norms is neither power (i.e., the realists' claim) nor transnational socialization deriving from the transformative power of normative discourse (i.e., the constructivists' "logic of appropriateness"). By estimating sovereignty costs, states usually treat international human-rights regimes as means by which the states can "lock in" their preferred domestic politics in the face of future political uncertainty. In other words, any decision by an individual government to support a binding international human-rights enforcement regime depends on whether or not, from the perspective of the state, the benefits

behaves toward its own citizens became, in R.J. Vincent's words, "a legitimate subject of international scrutiny and censure."⁷¹ Human rights norms have become a part of the international institutional structure, and this structure compels states to respect the norms.

The human rights regime is not *replacing* sovereignty; rather, human rights norms and sovereignty are "two normative elements of a single, distinctly modern discourse about legitimate statehood and rightful state action," a discourse that "seeks to justify territorial particularism on the grounds of ethical universalism."⁷²

Moreover, since WWII, human-rights principles have constituted a *condition* for the membership of sovereign states within international society. Particularly during the collapse of colonialism, the efforts of developing states skillfully promoted the right to self-determination as the basic human right that would successfully undermine and de-legitimize European colonial powers and that would, consequently, result in the proliferation of post-colonial states in Asia and Africa. Members of international society presented the right to self-determination as "a prerequisite to the full enjoyment of all fundamental human rights."⁷³ In a sense, human-rights norms have been a basic feature of the politics of membership in international society. The performance of human rights is

of reduced domestic political uncertainty outweigh the benefits of reduced sovereignty. However, constructivists would disagree with both of the positions and would highlight the independent role of norms and of non-governmental organizations in influencing domestic and international policy outcomes. Furthermore, they would stress the importance of the norms and the ideals. For constructivists, realists can neither account for *how* normative change occurs within the hegemony, nor understand that international norm formation is necessarily "hegemonic socialization." Besides, beliefs about appropriate behavior give the world structure. In terms of this debate, I accept the constructivist position that any explanation of the rise of human rights regimes must take into account the political power of *norms* and *ideas* and the increasingly transnational way in which those ideas are carried and diffused. See Kathryn Sikkink, "Transnational Politics, International Relation Theory and Human Rights," in *PS* (1998), pp. 517-521; Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," in Risse, Ropp and Sikkink (eds) *The Power of Human Rights* (Cambridge, Cambridge University press, 1999), pp. 1-38; Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, in *International Organizations* 54 (2) (2000), pp. 217-252; M. Finnemore and K. Sikkink, Norms and International Relations Theory. In *International Organization* 52(4)(1998), pp. 887-917; and Kenneth Abbott, International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts, in *American Journal of International Law*, April No. 2 (1999), pp. 361-378.

⁷¹ R.J. Vincent, *Human Rights and International Relations* (Cambridge University Press, 1986), p. 152.

⁷² Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, p. 520.

⁷³ Reus-Smit points out that Afghanistan and Saudi Arabia in the UN were the first (1950) states to articulate the connection between human rights and the right to self-determination. The two states eventually pushed other UN members to pass General Assembly Resolution 637, stating "the right of peoples and nations to self-determination...is a prerequisite to the full enjoyment of all fundamental human rights. See *ibid.*, p. 535.

constitutive of the right to self-determination. When states gain membership in the club of sovereign states, they acquire enhanced social agency, along with new political and legal entitlements. Conversely, denial of membership is an unambiguous type of disempowerment. In this regard, if membership is a necessary condition for power in international relations, then there is an intrinsic connection between the struggle for membership and the struggle for political legitimacy. The progressive development of human rights instruments have evolved into the standards of political legitimacy, and have conditioned the membership of sovereign states in international society.⁷⁴ It is clear from reading the UN charter that there is no necessary conflict between the cardinal rules of sovereignty and non-intervention in Article 2 and the human rights standards set out in Articles 55 and 56.

Thus, we should not consider human rights and sovereignty to be simply separate, incompatible regimes in international society, because the structure of international society is not simply what *preexisting* states construct for their own purposes. Indeed, “it is the institutional structure of international society that constitutes the actors.”⁷⁵ In this regard, Philpott states,

Most international constitutions define polities with internal realms, where the inhabitants, or at least some of them, in turn define the character of their constitutional authority—e.g., monarchical, communist, social democratic, and so on. The modern state, as it emerged after Westphalia, is such a polity. But it is the international constitution which first defines this polity as an entity with the authority to determine further its own constitutional authority. It is the international constitution which defines the very meaning of internal and external realms. An international constitution is more than simply a derivative of the collected constitutions of its individual polities. It is the framework that makes them individual polities. This is what emerged at Westphalia.⁷⁶

⁷⁴ There have been many terrible violations of human rights by countries whose right to self-determination has not been called into question, and it may challenge the argument here that the fulfillment of human rights is constitutive of the right to self-determination. But the principle that the fulfillment of human rights is constitutive of the right to self-determination is compatible with conflict, competition and anomaly of the principle itself. “They do not eliminate conflict, but structure who fights it, and on what terms.” See Daniel Philpott, “Westphalia and Authority in International Society,” p. 577. I am indebted to professor John Charvet for pointing out the discrepancy between this norm and practice.

⁷⁵ Andrew Hurrell, “Global Inequality and International Institutions,” in *Metaphilosophy*, vol (32)(2001), p. 38.

⁷⁶ See Daniel Philpott, “Westphalia and Authority in International Society,” p. 567.

Here, unlike Rawls, we should deem respect for human rights principles the *premise* for rather than the *content* of the construction of a law of peoples. Only by constructing shared international rules can we determine the criteria for identifying a “people” and the rules for governing the relationship between a people and individuals. This is the case even if a given society treats individuals as members of a decent hierarchical society rather than as free and equal citizens in a constitutional liberal society. When Rawls highlights the importance of bounded political communities and self-determination in practice, he is already committed to the idea of an international society that he seems to assume.⁷⁷ Contributing to this argument, Thomas Pogge states that, while a society or world can contain divergent conceptions of the good, its basic political structure “can be structured... in only one way.”⁷⁸ While Rawls wants to leave room for certain kinds of non-liberal societies structured in a variety of ways, the constitution of international society cannot itself be structured in a variety of ways. It must constrain the actions of political agents within a universal ethical framework. Thus, considerable restrictions characterize the room that Rawls wants to preserve by his constructive approach “for the people’s self-determination and for some kind of loose or confederative form of a Society of Peoples.”⁷⁹ Certain forms of resistance to the universal human rights principle seem to constitute not resistance to a universal ethical framework of a normatively governed international society but competing notions concerning the content of rights.⁸⁰ Furthermore, human rights principles, because they would constrain the actions of political agents within a universal ethical framework, can equally apply to outlaw states, even though they are not part of the

⁷⁷ See Andrew Hurrell, “Global Inequality and International Institutions,” p. 39.

⁷⁸ Thomas Pogge, “An Egalitarian Law of Peoples,” *Philosophy and Public Affairs*, Vol. 23, No. 3(1994), pp. 195-224. See also Thomas McCarthy On the Idea of a Reasonable Law of Peoples, in James Bohman and Matthias Lutz-Bachmann (eds) *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (Cambridge, MA: MIT Press, 1997), pp. 201-217 at 215, Tan Kok-Chor, “Liberal Toleration in Rawls’s Law of Peoples,” in *Ethics* v 108, (1998), pp. 276-295 at 283, and Andrew Kuper, “Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons,” in *Political Theory* Vol 28(2000), pp. 640-674 at 649.

⁷⁹ *LPb*, p. 61.

⁸⁰ See Jeremy Waldron, “How to Argue for a Universal Claim,” in *Columbia Human Rights Review* 30 (1999): 305-314 at 311-312.

Society of Peoples.

Second, *human rights serve as the standard by which outside agents can justify their interference in the internal affairs of states, but the forms of interference can vary.* According to Charles Beitz, “to say something is a human right is to say that social institutions that fail to protect the right are defective,” the implication being that “international efforts to aid or promote reform are legitimate and in some cases may be morally required.”⁸¹ The ideal of human rights as “a common standard of achievement for all peoples and all nations” applies to all societies and permits outside agents to try to bring a non-complying state into conformity with these common standards.

Thus, human rights violations may serve to justify interference in the internal affairs of other states. It means that the concern of the implementation of human rights can justify interferences of some kind.⁸² By contrast, the fulfillment of human rights is sufficient to exclude justified and forceful interventions by other peoples. Where, then, should we draw the line between respect for the self-determination of peoples and respect for the inviolability of global human-rights norms? When should a country act to protect another country’s citizens from their government, and when should this type of action be forbidden?

Following Rawls’s criterion of decency, I argue that sovereignty is not a necessary property of government, but a consequence of a government’s being well-ordered. Well-orderedness means that: (1) a country does not aggress against others or its own people; and (2) a government represents and is accountable to its citizens. If any society conforms to these two conditions, then it is immune to interference even if the society is not liberal: we should respect its right to self-determination. If each society governs itself, it should be treated as a member in good standing in the society of peoples as long as it does not

⁸¹ See Charles Beitz, “Human Rights and the Law of Peoples,” p. 210; and Zehra Arat, “Forging A Global Culture of Human Rights” p. 428.

⁸² See Joseph Raz, “Human Rights without Foundations,” p. 9.

oppress its own people. This proposition means that a society seeking to avoid outside interference must guarantee some basic human rights and must satisfy the basic needs of everyone. These basic human rights are guarantees of subsistence and personal security. Furthermore, as I indicated in chapter two, some political rights are a corollary of the basic human rights to freedom from mental and physical abuse.⁸³ Each well-ordered society must guarantee many other political rights that, being peculiar to the society, will flesh out the basic rights. In this regard, a decent society protects not only basic human rights to subsistence and personal security, but the right of the society's members to choose, change, and govern public institutions, even though not in the same ways as is practiced in a given liberal democracy. Therefore, a decent society is the one that provides the minimal conditions within which a government acts on behalf of its people. It includes the minimal criterion of legitimacy, which contains participation, representation, and accountability. Conversely, if a society systematically violates basic human rights, and if some citizens have too little power to influence or to engage with their government, then this society is neither well-ordered nor immune to interference: other states have reason to interfere therein to protect basic human rights. Therefore, the more rights a country acknowledges for its citizens, the less interference is justified from abroad. More often than not, persons can appeal to these principles when formulating a moral justification of intervention in the political affairs of other countries. The argument may pivot on various external agents' commitment of resources required for effective interference. The resources usually constitute peaceful means; in extreme circumstances, military intervention may be the last resort to securing basic human rights.⁸⁴ In this regard, violations of human rights can

⁸³ In terms of the content of basic human rights, in chapter six, I will argue that the justification and the interpretation of the content shall be left to the members of specific cultures, even if we accept Rawls's criterion of decency here.

⁸⁴ In December 2001, the UN-appointed International Commission on Intervention and State Sovereignty (ICISS) issued "The Responsibility to Protect," a report examining the "right of humanitarian intervention." According to the report, there are five conditions under which intervention is not only justified but also required. (1) there must be a *just cause*, which is the state's inability or unwillingness to protect its people from

justify not only diplomatic and economic sanctions, but military interventions, as well.⁸⁵

However, I disagree with Rawls's very narrow interpretation of interference. Rawls insists that liberal societies should *never* interfere with decent societies if they respect human rights, follow the rule of law, and grant citizens enough evidence that their government is legitimate and follows a common-good idea of justice. A problem with this line of thought is that Rawls linked the respect for human rights principles to the use of force and treated human rights as though their main role was to specify the justification for intervention regarding states' responses to grave violations of human rights. Rawls faces problems that, although interpretation and implementation of human rights are at the level of national or regional policy; nevertheless, we should ponder whether external agents should never interfere with some non-liberal societies regarding such matters, even if we accept Rawls's idea of decency as the minimal standard for international legitimacy. We should promote cross-cultural dialogue that helps resolve conflicts between liberal societies and non-liberal societies regarding their respective justifications and interpretations of human rights. Each state has a moral duty to guarantee the rights and statuses of its citizens and to ensure that other states comply with their own duty of guarantee. Rather than push other states to

mass terror, genocide, ethnic cleansing, mass rape, or forced expulsion. (2) the intervening military force must have the *right intention*, in particular, to prevent those forms of violent oppression. (3) military intervention has to be the *last resort*, undertaken only after other means have been attempted to prevent catastrophe. (4) the force used is to be the *minimal force necessary* to secure human protection. (5) there has to be a *reasonable chance of halting* the oppression, and the expected ill consequences of the military action have to be less than that of not intervening militarily.

⁸⁵ Besides, concerns about human rights abuses have motivated and shaped the work of a growing number of NGOs devoted to standard-setting and monitoring of domestic governments' performance, to advocacy of political change, and so forth. Since 1945, many NGOs and transnational advocacy networks have played a key role in the establishment of international human rights norms. They are the pioneers of the protection and promotion of international human rights. For example, Risse and Sikkink point out that, during the 1970s, the apartheid of South Africa bolstered the international human rights network and the activist orientation of international organizations. See Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, p. 21. Furthermore, the Soviet Union signed the human rights provisions in the 1975 Helsinki Final Act and interpreted them as empty rhetorical commitments; but the provisions became important weapons in the struggle of human rights activists in Czechoslovakia, Poland, Hungary, and the German Democratic Republic. Human-rights activism inside and outside these states indeed played a key role in robbing the communist regimes of their legitimacy and in, eventually, making the revolution of 1989 possible. See Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton University Press, 2001); and Mary Kaldor, "Transnational Civil Society," in T. Dunne and N.J. Wheeler (eds), *Human Rights in Global Politics* (Cambridge, Cambridge University Press, 1999).

accept the same package of *liberal* rights, each state has a moral duty to ensure other states comply with their duties to provide these *basic* human rights. Accordingly, we should adopt a broad interpretation of interference and explain that, *if not linked to the use of force*, basic human rights are suitable guideposts for the foreign policy of liberal states, and to encourage and persuade governments to comply with human rights norms.⁸⁶ This foreign policy would not violate people's right to self-determination. Furthermore, there is some reason to think that foreign involvement in a violating state could be a more effective influence on the state's public opinion than the struggles of the state's weak citizens. The least powerful citizens in a state have the least direct political access and the most indirect representation in a consultation hierarchy. Even with the best intentions, such a system will not as effectively or as efficiently transmit the complaints of marginalized citizens as it would the complaints of privileged citizens. Foreign diplomats or transnational actors may well have more access to the top levels of the hierarchy, and more opportunity to explain the complaints.

Last but not least, it is clear that Rawls's model with closed and well-guarded borders is unable to deal with many problems in the current situation, and would not, in itself, be an adequate foundation for our approach to international relations, though Rawls believes that "cooperative institutions that have unjustified distributional effects" would need to be corrected.⁸⁷ If we take the idea of a global basic structure seriously, it is clear that globalization involves dramatic increases in economic, ecological, and social interdependence, which deeply affects the ways in which societies are organized domestically and which can powerfully constrain their ability to determine the distribution of what they produce.⁸⁸ Thus, our practical interactions across borders often involve norms

⁸⁶ James Nickel, "Are Human Rights Mainly Implemented by Intervention?" p. 271.

⁸⁷ See *LPb*, p. 115.

⁸⁸ For instance, consider the destabilizing activities of transnational corporations, the capricious movement of financial capital, the dismantling of the social welfare state, environmental degradation, refugee crises, the global sex trade, and transnational organized crime. See Andrew Linklater, "The Evolving Spheres of

and rules that do not derive from relations among nations; and many structural injustices, by involving people widely dispersed across the globe, are not limited to processes within a given nation-state. In contrast to Rawls's position, our position should have a broad explanation of interference. Because human rights principles are part of the universal ethical framework for international society, in the next chapter, I will defend the assertion that political responsibility for human rights requires us to heed the cries of victims and to do our best to prevent and alleviate cruelty wherever it may be found.

5.3 Another Political Liberalism: Human Rights and the Liberalism of Fear⁸⁹

In contrast to the orthodox view of human rights deeming the task of justification to be one internal to the conception of human rights *per se*, a view starting from the role of human rights in international practices will enable us to theorize a conception of human rights only if we account for human-rights practices, justify the resulting abstraction, and delineate its scope. In the following, I will use my constructive approach to deal with the issue of human rights justification. In addition to the above-mentioned historical justification of the UDHR, the universality of fear has contributed greatly to the remarkable role that human rights has played in the post-WWII era, appealing to people around the world and serving as a firm grounding for universal human rights. It is a moral intuition of fear that mediates between human rights and political legitimacy and that provides a cosmopolitan moral ground for the justification of human rights.

The late Judith Shklar⁹⁰ is another scholar whose work is that of a “political liberal.”⁹¹ Like

International Justice,” in *International Affairs*, 75 (3)(1999), pp. 473–482.

⁸⁹ Jan-Werner Muller refers to the liberalism of fear as “cold war liberalism” and portrays Isaiah Berlin’s, Raymond Aron’s, and Karl Popper’s versions of liberalism as examples of the liberalism of fear, because they all prioritize the avoidance of cruelty. See Jan-Werner Muller, “Fear and Freedom: On Cold War Liberalism,” in *European Journal of Political Theory*, 7(1) (2007), pp. 45–64.

⁹⁰ I will use the following abbreviations in referring to Shklar’s writings: “Liberalism of Fear,” 1989, hereafter **LFa**; “Liberalism of Fear,” 1998, hereafter **LFb**; “Political Theory and the Rule of Law”, 1998, hereafter **PT**;

Rawls, she contends that liberalism should be deemed not “a philosophy of life such as has traditionally been provided by various forms of revealed religion and other comprehensive *Weltanschauung*,”⁹² but a political conception that provides the most effective protection against the greatest threat to individual freedom, namely, the cruelty and fear produced by the intentional abuse of political power. Likewise, and in contrast to other versions of liberalism that either provide a positive doctrine about how people are to conduct their lives or focus on the possible achievement of human perfection,⁹³ Shklar contends that the overriding aim of liberalism is to secure the political conditions that are necessary for the exercise of personal freedom. Aside from this general doctrine, liberalism has no particular positive doctrine. Shklar states,

No form of liberalism has any business telling the citizenry to pursue happiness or even to define that wholly elusive condition. It is for each one of us to seek it or reject it in favor of duty or salvation or passivity, for example. Liberalism must restrict itself to politics and to proposals to restrain potential abuses of power in order to lift the burden of fear and favor from the shoulders of adult women and men, who can then conduct their lives in accordance with their own beliefs and preferences, as long as they do not prevent others from doing so as well.⁹⁴

However, unlike Rawls’s political liberalism, Shklar’s liberalism is not about searching either for abstract principles acceptable to all or for an overlapping consensus of all reasonable individuals that would regulate the basic structure of society. Rather, Shklar’s liberalism rests on the concepts of emotion and memory. Furthermore, unlike Nussbaum, Shklar does not begin with a utopian vision of what can be achieved that reflects either a belief in the potential of human nature or the necessity of moral progress. Shklar bases her rejection of these visions on the premise that the world cannot solve the discrepancy

“Ordinary Vice,” 1984, hereafter *OV*; “Face of Injustice,” 1990, hereafter *FOI*; “Injustice, Injury and Inequality: An Introduction,” 1986, hereafter *III*; “Squaring the Hermeneutic Circle,” 1998, hereafter *SHC*; “Positive Liberty, Negative Liberty in the United States, 1998,” hereafter, *PLNL*.

⁹¹ Indeed, Rawls himself has identified Judith Shklar and Charles Larmore as political liberals, though he identifies many substantial differences between his theory and their theories. See *PLb*: 133.

⁹² *LFb*: 3.

⁹³ For instance, Shklar mentioned both the liberalism of natural rights and the liberalism of personal development. However, as John Dunn observed, differences between the liberalism of fear and other varieties of liberalism are in the “grounds which lend force to” one common goal and “the means which can be trusted for reaching it.” It would be wrong to assume that the liberalism of fear radically challenges other forms of liberalism. John Dunn, “Hope Over Fear,” in Bernard Yack (ed) *Liberalism Without Illusion*(Chicago, The University of Chicago Press, 1996), pp. 45-54 at 46.

⁹⁴ *LFb*, p. 13.

between liberal political theory and liberal political practice by simply looking at an account of “what we ought to be and do.”⁹⁵ Following Montaigne’s line of reason, she begins “with what is to be avoided.”⁹⁶ “What liberalism requires,” she wrote, “is the possibility of making the evil of cruelty and fear the basic norm of its political practices and prescriptions.”⁹⁷ And the liberalism of fear entails “a ramble through a moral minefield, not a march toward a destination.”⁹⁸ Thus, in contrast to Nussbaum’s corresponding ideas, the political liberalism of fear focuses mainly on avoidance rather than on fulfillment, on evil rather than on good, on injustice rather than on justice.

Rawls’s political liberalism functions to provide a solution to the problem of stability generated by reasonable pluralism; Shklar’s political liberalism has no quarrel with the truth of value pluralism: focusing on the avoidance of evils rather than on the pursuit of goods, the problem of value incompatibility —according to Shklar—has no relevance for the liberalism of fear. Specifically, Shklar identifies with what Isaiah Berlin calls a plurality of values and with what she calls “the permanent possibility of inescapable conflict between values.”⁹⁹ However, Shklar does endorse the idea that it is highly intolerant and unrealistic to expect people to agree on a certain *summum bonum* toward which they should all strive. In fact, such a society would be inevitably illiberal, since a recognized common end would justify coercion to make everybody attain that end. Therefore, a liberal society must—by definition as well as on the practical grounds of accommodating varied beliefs—operate without any expressed or assumed *summum bonum*. By contrast, political liberalism shall put first the *summum malum*, “which all of us know and would avoid if only we could.” Shklar comments further on this point:

... the liberalism of fear in fact does not rest on a theory of moral pluralism. It does not, to

⁹⁵ *FOI*, p. 16.

⁹⁶ *OV*, p. 5.

⁹⁷ *LF*, p. 30.

⁹⁸ *OV*, pp. 6, 9

⁹⁹ See Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, edited by Henry Hardy (London, John Murray, 1990), p. 80.

be sure, offer a *summum bonum* toward which all political agents should strive, but it certainly does begin with a *summum malum*, which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires, and the *very fear of fear* itself. To that extent the liberalism of fear makes a universal and especially a cosmopolitan claim, as it historically always has done.¹⁰⁰

For Shklar, the whole idea of fear as the fundamental starting point of liberalism reflects the view that liberalism, as a political doctrine, cannot rest on a universally accepted positive idea because we are inherently diverse. It is not only unrealistic to expect that a diverse society would agree on a positive idea (e.g., a common lifestyle), but also reasonable to assume that, if a large segment of society aspires to a positive idea, the society will be more likely to accept public oppression against people who do not have the same aspiration. In this regard, the political liberalism of fear rests on neither the incommensurability of our notions of the good nor the irreducible diversity of our understandings of social reality. Being physiological, the experience of fear is omnipresent¹⁰¹ and, consequently, can serve as a universal grounding for liberal thought. That human beings possess a natural fear of suffering is not a proposition that everyone needs to agree upon in order for it to be true: it is simply a *social fact* that exists everywhere.¹⁰² Shklar suggests that, once one not only acknowledges the continued “prevalence of racism, xenophobia, and systematic governmental brutality” in all areas of

¹⁰⁰ *LFb*, pp. 10-11.

¹⁰¹ *LFb*, p. 11.

¹⁰² Some theorists make similar arguments. As Barrington Moore has indicated, although traditions differ considerably in their account of what ends people should pursue and in their account of good, there are things that all cultures rank as “miserable.” For example, no culture welcomes on itself poverty, starvation, flooding, or lack of adequate shelter, and no one wants to be tortured, abused, and segregated. That is to say, there are some human sufferings that all cultures deem to be bad. Ken Booth makes a similar claim when he argues, “People find it easier to agree upon what constitute wrongs elsewhere than they do rights” Similarly, Mary Midgley argues that “whatever doubts there may be about minor moral questions and whatever respect each culture may owe its neighbors, there are some things that should not be done to anybody anywhere.” See Barrington Moore, 1972, *Reflections on the Causes of Human Misery and Upon Certain Proposals to Eliminate Them*, Boston, Beacon Press; Ken Booth, 1999, *Three Tyrannies*, in T. Dunne and N. Wheeler (eds) *Human Rights in Global Politics*. 31-70, Cambridge, Cambridge University Press. Mary Midgley, Towards an ethic of global responsibility, in T. Dunne and N. Wheeler (eds) *Human Rights in Global Politics* (Cambridge, Cambridge University Press 1999), pp. 160-174. Avishai Margalit, too, argues that it is easier to identify humiliating behavior than to identify respectful behavior, just as it is easier to identify illness than health. Both health and honor are concepts involving defense. Disease and humiliation are concepts involving attack. It is easier to identify attack situations than defense situations, since the former are based on a clear contrast between the attacker and the attacked, while the latter can exist even without an identifiable attacker. See Avishai Margalit, *The Decent Society* (Cambridge, Harvard University Press, 1996), p. 5. See also Alan Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York: Basic Books, 2004), and Richard Rorty, *Contingency, Irony, Solidarity* (Cambridge, Cambridge University Press, 1989), pp. 192, 198.

the globe but also tries to prevent and reduce such cruelty, one becomes a supporter of the liberalism of fear.¹⁰³ In this regard, Shklar's universal foundation for liberalism rests not on an abstract moral principle, but on historical experiences.

For Shklar, fear is a universal state of mind that all human beings want to avoid; all human beings naturally seek a political order that would eliminate or mitigate the perceived causes of the fear. Therefore, fear has been and will continue to be our chief informant when we think about the most suitable governance of men and women. Shklar adds,

It is a mental as well as a physical reaction, and it is common to animals as well as to human beings. To be alive is to be afraid, and much to our advantage in many cases, since alarm often preserves us from danger. The fear we fear is of pain inflicted by others to kill and maim us, not the natural and healthy fear that merely warns us of avoidable pain. And, when we think politically, we are afraid not only for ourselves but for our fellow citizens as well. *We fear a society of fearful people.*¹⁰⁴

In this regard, fear is an emotion that can be an *epistemological foundation*¹⁰⁵ on which we can conceive the foundations and the limits of the political world. Informed by cruelty and the fear it inspires, we then seek to advance a *conception of political action* that centers on future dangers to be feared and on avoidance, namely, on damage control.¹⁰⁶

Shklar urges us to identify cruelty as the greatest evil.¹⁰⁷ To make this identification is, first, to understand the main task of political liberalism as one of avoiding public cruelty, most of all because it creates fear. People pay attention to human insecurity and suffering because cruelty remains the fundamental threat to freedom and because human beings perceive cruelty to be the paramount human vice.¹⁰⁸

Specifically, the reason for putting cruelty at the head of the list of greatest evil concerns the perception that cruelty destroys freedom while being “at odds not only with religion

¹⁰³ *LFa*, p. 37.

¹⁰⁴ See *LFb*, p. 11, *emphasis added*.

¹⁰⁵ It means that “fear” gives us the intuitive knowledge that which is the greatest evil and so provides an epistemological foundation for liberalism. I am indebted to professor John Charvet for pointing out the distinction between epistemological and emotional foundation of liberalism.

¹⁰⁶ See Jan-Werner Muller, “Fear and Freedom: On Cold War liberalism,” p. 48.

¹⁰⁷ Cruelty, according to Shklar, is “deliberate infliction of physical and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible, of the latter.”

OV, p. 29.

¹⁰⁸ *OV*, p. 2.

but with normal politics as well.”¹⁰⁹ Cruelty, for Shklar, is a psychic impulse that finds an outlet in concentrations of state power and in substantial social inequality. Societies’ acceptance of these outcomes reflects societies’ belief that cruelty is the “underlying psychological and moral medium that makes vice all but unavoidable.”¹¹⁰ Moreover, cruelty is an ordinary vice, one that “we can live neither with nor without.”¹¹¹ But “ordinary” does not necessarily mean “innate,” since Shklar refrains from identifying what human “nature” is. If “ordinary” means socially conditioned, then some social actions might enhance it, but others might diminish it. One critical actor herein is the government. Because humanity has never eliminated, and will never eliminate, fear, and because history shows that sources of power over and again tend to invoke fear; thus, fear is the factor that encourages people not only to agree on having a government, but also to limit this government.¹¹² Following Montaigne, Shklar abhors the Machiavellian project and argues that the subjects are the true victims because they are the ones who suffer cruelty. Moreover, Hobbes’s Leviathan is in a way no better. Though Hobbes recognizes one particular act of cruelty, “violent death,” as the worst evil in the natural state, his sovereign does not seem to be under constraint to avoid other cruel acts directed at people who enter the social contract and who, thereby, cede their power to him. In other words, whereas Hobbes bases peace on society’s commitment to a social contract that requires society’s submission to the state, Shklar argues that the state, itself, is a potential threat to peace. Accordingly, further checks have to be made on the sovereign, whether through the separation of powers into two parts, as advocated by Locke, or into three parts, as advocated by Montesquieu, who—along with Montaigne—is the other hero of Shklar’s political theory. People can grow fearful of and resentful toward a government that either acts arbitrarily or fails to fulfill

¹⁰⁹ By “normal politics,” Shklar means unchecked exercise of power over other people, a Machiavellian prince seeking what is best for the preservation of his power while persuading the people of the necessity of decisions taken for this end. See *LFb*, p. 9.

¹¹⁰ *OV*, p. 242.

¹¹¹ *OV*, p. 3.

¹¹² *PT*, 22-23.

agreed-upon expectations of it. A government that voids one of its commitments curtails the reasons for the people's trust that the government will stay true to its other commitments. The greater the governmental misuse of trust, the more fearful people might feel. And a government that recognizes this relationship is more likely to accept a moral obligation to avoid fear-inflicting acts. Therefore, the Hobbesian fear-inducing war of everybody against everybody makes people seek a protective government: in turn, a protective government—despite its capacity to wield great power—might impose on itself limits regarding government acts of fear-inducing cruelty. Seen in this light, the prioritization of cruelty justifies a conception of the origins of liberal government and helps curtail governments' misuse of power. Government must submit to constant checks that help weaken its tendencies toward misuse of power. Only through these checks can a society hope to generate the conditions necessary for the realization of true individual freedom. Shklar's precise remarks on this theme are insightful:

The liberalism of fear...worries about the excesses of official agents at every level of government, and it assumes that these are apt to burden the poor and weak most heavily. The history of the poor compared to that of the various elites makes that obvious enough. The assumption, amply justified by every page of political history, is that some agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so.¹¹³

Furthermore, cruelty has a second face, one that appears in the public domains. As people struggle with their own fears, they inevitably inflict pain on the weaker. The line between the weak and the powerful, the victims and the victimizers, never stops shifting: each party can, at certain times, occupy the position of the victimizer and, at other times, occupy the position of the victim. In this sense, Shklar is skeptical about any possibility of ruling out cruelty if power relations endure. Fear thus is an emotion linked with the presence of power. It stems from the cruelty created by power.

Accordingly, the cruelty with which the liberalism of fear is principally concerned is *public*

¹¹³ *LFb*, p. 10.

cruelty, which refers to “arbitrary, unexpected, unnecessary, and unlicensed acts of force and...habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime.”¹¹⁴ Because efforts to allay fears have often chipped away at individuals’ formerly government-protected freedoms, the political liberalism of fear is the best means by which society can protect personal freedom from the tyranny of abusive governments and from the injustice of gross inequality. In this sense, cruelty both invokes fear and is a reaction to fear.¹¹⁵ As Shklar points out,

Liberalism’s deepest grounding is...in the conviction..., born in horror, that cruelty is an absolute evil, an offense against God or humanity. It is out of that tradition that the political liberalism of fear arose and continues amid the terror of our time to have relevance.¹¹⁶

Like Rawls in relation to his theory, Shklar claims that her political liberalism of fear demands a separation between the “personal and the public.” The prevention of cruelty requires a distinction between public and private. It also requires specific capacities among citizens. The impetus for this claim is the desire to ensure that, by means of struggle and protest, formal mechanisms of accountability are in fact recognized, practiced and made better. Therefore, only by ensuring such a separation can a conception of justice “remove the fear of burden and favor from the shoulders of adult men and women” and “compel political power not to overstep its intended authority and invade the private realm.” Again, let us turn to Shklar’s own words:

The important point for liberalism is not so much where the line is drawn, as that it be drawn, and that it must under no circumstances be ignored or forgotten. The limits of coercion begin, though they do not end, with a prohibition upon invading the private realm, which originally was a matter of religious faith, but which has changed and will go on changing as objects of beliefs and the sense of privacy alter in response to the technological and military character of governments and the productive relationships that prevail. It is a shifting line, but not an erasable one, and it leaves liberals free to espouse a very large range of philosophical and religious beliefs.¹¹⁷

¹¹⁴ *LFb*: p. 11.

¹¹⁵ It means a circle of vice: namely, cruelty causes physical pain, which causes fear, and fear causes cruelty whenever struggle with their own fears, people inevitably inflict pain on the weaker. See Corey Robin, *Fear*, p. 149.

¹¹⁶ *LFb*, p. 5.

¹¹⁷ *LFb*, p6-7

In contrast to Rawls's political liberalism, Shklar does not premise the start of her theory on ideals regarding, for instance, the conception of moral person or social cooperation. Rather, as a non-utopian outlook, her liberalism of fear is sensitive to political realities and takes the distinction *between the weak and the powerful* as the basic social fact and therefore sets for itself the task of guarding against invasions of freedom and the intimidation of the defenseless. Herein, Shklar makes the following remarks:

For this liberalism the basic units of political life are not discursive and reflecting persons, nor friends and enemies, nor patriotic soldier-citizens, nor energetic litigants, but *the weak and the powerful*. And the freedom it wishes to secure is freedom from the abuse of power and intimidation of the defenseless that this difference invites. This apprehension should not be mistaken for the obsessive ideologies which concentrate solely on the notion of totalitarianism. This is a shorthand for only the extremity of institutionalized violence and almost implies that anything less radically destructive need not concern us at all. The liberalism of fear, on the contrary, regards abuses of public power in all regimes with equal trepidation.¹¹⁸

For Shklar, state violence undermines the personal capacities of a victim or the targeted population to resist. Therefore, sense of injustice is the key to understand these phenomena. "Unless we really know what the motives of social agents are," we cannot hope to develop effective protections against undesirable results.¹¹⁹ Thus, the political liberalism of fear is "more a recipe for survival than a project for the perfectibility of mankind."¹²⁰ It is a "liberalism without illusions" that is fearful of ambitious programs advanced by people who feel absolutely certain in their convictions, and that focuses on establishing and defending "limits on all kinds of suffering that come from political wickedness and wrongdoing."¹²¹ Thus, the liberalism of fear is a way of ranking humanity's negative inclination or vices rather than a celebration of progress and rationality, and the purpose of a political conception of justice is to protect citizens from the negative potential of humankind—that is, "the ineradicable willingness of humans to inflict

¹¹⁸ Ibid., p. 9 *emphasis added*.

¹¹⁹ *SHC*, p. 89.

¹²⁰ *OV*, p. 4.

¹²¹ George Kateb, "Foreword," in Stanley Hoffmann (ed), *Political Thought and Political Thinkers* (Chicago, University of Chicago Press 1998), p. xvi.

unspeakable pain and misery upon one another.”¹²² In this regard, she belongs to the party of memory rather than the party of hope,¹²³ because the political liberalism of fear is a negative political morality, its task focuses mainly on “damage control.”¹²⁴

Accordingly, the task of avoiding cruelty is necessarily political. When cruelty becomes systematic, the resulting fear makes political institutions necessary. The lives of the oppressed do not matter under a regime predicated upon the violent suppression of political opposition. The necessary constitution consists of formal institutional mechanisms that secure the accountability of the state. Without these, the tremendous resources of the state can strengthen abuse targeting weaker constituents.

Seen in this light, it is the reason for avoidance of cruelty that makes “rights” instruments necessary. For Shklar, the call for rights is both a response to dangers in specific political situations and a plea for “institutions of correction” to “protect the most feeble from abuses.”¹²⁵ When governments or other political actors are prone to commit violations, it becomes the business of any political society to protect rights.¹²⁶

A direct result of the first principle of avoiding cruelty is the idea of rights, in that rights are useful instruments for persons who struggle against abuses of power. Shklar elucidates this point:

Rights are demands first and foremost out of fear of cruelty and injury from agents of governments, but also from private magnates. The former must always inspire the

¹²² Ibid.

¹²³ Shklar borrows this category from Emerson’s essay “The Conservative” to name John Adams a member of the party of memory and to name Thomas Jefferson a member of the party of hope. See Judith Shklar, “Politics and Intellect,” in Stanley Hoffmann (ed), *Political Thought and Political Thinkers*, (Chicago, University of Chicago Press, 1998), pp. 94-104.

¹²⁴ Ibid., p. 9.

¹²⁵ *III*, p. 25; *PT*, p. 25

¹²⁶ Likewise, Thomas Scanlon explicitly argues that individuals are being harmed either for *political* reasons or by government agents. As Scanlon puts it, “To condemn torture as a gross violation of human rights is not simply to deplore pain, suffering, cruelty and degradation. These things are great evils but the condemnation of torture involves the invocation of human rights because torture...is a *political* act—political in being carried out by agents of the state and political in its aims, which are typically to crush opposition through the spread of fear. The recognition of human rights against the use of torture reflects the judgment that the temptation to rule in this manner is a recurrent threat and that the power to use torture is a power whose real potential for misuse is so clear as to render it indefensible.” As I have indicated in chapter two, Scanlon’s paper inspired Rawls’s human rights theory. See Thomas Scanlon, “Human Rights as a Neutral Concern,” p. 86.

greatest fears because of their actual or possible military competence, but fear attaches itself to other threatening persons as well. In either case, rights are asserted against power abused.¹²⁷

In other words, the concept of rights becomes accepted as a response to governmental cruelty, and something which is experienced as a rights-violation is much more likely to be experienced as cruel or humiliating. We can clearly find the symbiotic relationship between the liberalism of fear and the liberalism of natural rights. However, in contrast to the liberalism of natural rights, which relies on “historical ignorance,” Shklar’s scheme of fear-inspired rights here is based on “a strongly developed historical memory,”¹²⁸ because history always tells us that the function of rights is, in part, a response to different kinds of cruelty and suffering and that we should guard against abuses of power.¹²⁹ We call them “rights” because they express “the fear of actual or threatened danger to all, but especially to the most feeble and helpless among us.”¹³⁰ Rather than be grounded in a self-evident premise dictated by God or by Nature, “right” is grounded in a social and political reality in which individuals call for protection against abuses of power.¹³¹ Described in another way, rights are not natural or divine truths but useful weapons directed against failures of justice:

If we take the failure of justice as our starting point, rights will not seem quite so destructive and atomistic. The stories and histories that remind us of injustice may throw some persuasive light on *rights* as the appeals of the injured and outraged to their all too indifferent fellow citizens or even to humanity in general.¹³²

By representing a means of diminishing *public* cruelty and the fear it inspires, the rights of *individuals* represent an ongoing process.¹³³ Shklar comments on the absence of linear finality in this regard:

The fear of fear does not require any further justification, because it is irreducible. It can be both *the beginning and an end* of political institutions such as rights. The first right is to be protected against the fear of cruelty. People have rights as a shield against this greatest of

¹²⁷ *III*, p. 25.

¹²⁸ *LFb*, p. 9.

¹²⁹ *III*, p. 25.

¹³⁰ *Ibid.*, p. 25.

¹³¹ *LFb*: 9.

¹³² *III*, p. 25

¹³³ *LFb*, p. 19.

public vices. This is the evil, the threat to be avoided at all costs.... This is not the liberalism of natural rights, but it underwrites rights as the politically indispensable dispersion of power, which alone can check the reign of fear and cruelty.¹³⁴

In Shklar's fear-oriented notion of rights, rights have to be understood as "primarily freely expressed protests and refusals, not as received shares."¹³⁵ Demands for rights are not individual appeals of rational beings for one's own fair share of whatever is available, but as expressions of compassion for and by people who suffer. Not only can it defend the claim for right against the critique of atomism since it is grounded in social and political reality, but also remind us of the way rights have been historically developed.

5.4 The Liberalism of Fear and the Epistemological Foundation of the UDHR

If my interpretation regarding Shklar's theory is sound, the argument from Shklar's liberalism of fear (1) can suitably provide the epistemological foundation for a theory of human rights, (2) can be the basic rationale of the UDHR, (3) and can be the basic rationale of the sequential development of an international human rights regime. To move from "is" to "ought" can be grounded in the moral intuition of fear insofar as it can be an epistemological grounding for human rights justification. Moreover, in line with Lindholm's ideas, I assert that the UDHR is based on both a *normative* premise and a *descriptive* premise for the justification. However, in contrast to Lindholm's ideas, I assert that the normative premise in the UDHR can be grounded in *the idea of respect for persons*, understood as requiring basic rights for all as the necessary condition of the dignity of persons in face of cruelty and fear. Also, I assert that the idea of respect for persons does not entail a comprehensive moral philosophy that might vary in relation to diverse cultures. The idea

¹³⁴ *OV*, pp. 237-8 *emphasis added*

¹³⁵ See *III*, p. 32.

of respect neither leads to nor derives from a metaphysical idea of a fixed, universal good or any comprehensive doctrine. I argue that universal agreement regarding the UDHR derives chiefly from humanity's memory of the World Wars and from the Holocaust, in particular. Acting as a practical obstacle to any repetition of these government-led horrors, agreed-upon human rights would provide individuals protection against government oppression. Before 1945, international law regulated mainly the relations between states, confirming the parameters of the Westphalian order. After 1945, the fear of anarchy and the fear of war contributed to the establishment of the United Nations.¹³⁶ Furthermore, the memory of the enormity of the Holocaust has come to provide the main impetus for the privileged position that the human rights regime currently enjoys in the international arena. In this climate, it was possible to link constraints on war with prevention of human rights violations. The Preamble of the UDHR claims that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind," and the UDHR drafters' "moral outrage" at the Nazi regime and the Holocaust lay "behind the acceptance of the entire range of rights" in the UDHR.¹³⁷ By viscerally negating so many widely accepted but disparate human rights views, the Nazi system and the Holocaust strengthened the world's ability to apply to all humanity a set of human rights. Nariman comments on the historical roots of the document's human rights:¹³⁸

The ruthless trampling on human rights by the Axis Powers, the holocaust in the gas chambers of Auschwitz and Dachau, and the use of the Atom Bomb on the defenseless [cities] of Hiroshima [and Nagasaki] helped hasten a consensus on the universality of human rights and the need for their international declaration, recognition and protection.¹³⁹

¹³⁶ See Stanley Hoffmann, "Thoughts on Fear in Global Society," in *Social Research*, 71(4)(2004), pp. 1-14.

¹³⁷ Ignatieff states, "The Universal Declaration of Human Rights is written in full awareness of Auschwitz and dawning awareness of Kolyma. A consciousness of European barbarism is built into the very language of the Declaration's preamble: 'whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind...'" See Michael Ignatieff, "Human Rights as Politics and Idolatry," p. 65.

¹³⁸ Moreover, John Glover has given an illuminating account of the Nazi's strategies of distancing and depersonalizing victims, the ways in which Nazis used "hostile stereotypes" of their victims and humiliated them: "This stripping of protective dignity breached a moral barrier, making it easier to go the whole way in atrocity." See John Glover, *Humanity: A Moral History of the Twentieth Century* (Yale University Press, 1999), p. 327.

¹³⁹ See Fali Nariman, "The Universality of Human Rights," in *The Review of the International Commission of Jurists*

Facing terrifying tragedies, the framers of the UDHR articulated a set of enforceable codes of conduct: prohibitions against slavery, genocide, torture, arbitrary imprisonment, and deprivation and demands for aid for victims, and so on. The drafters with different comprehensive doctrines likely devoted themselves to different conceptions of the good, but perhaps by acknowledging that cruelty could devastate all these goods, the drafters united in their condemnation of the greatest evil. Though the practice of human rights cannot form the content of a way of life, they are time-tested means to protect every individual against the *summum malum*. The threats to humanity reside in modern structures of power, ranging from states and international regulatory bodies to financial institutions and multinational corporations; these threats have combined with historical memories to create the conditions that make for widespread recognition of shared human vulnerability and of a shared reason for adopting a human rights regime. In this regard, freedom from fear is a desirable goal that is shared globally. In other words, people share the trait of fearfulness and respond to this problem by searching for a shared solution—the solution of human rights. The rights are not norms that can be found in all cultural traditions or religious doctrines, but are a *choice* that people make: the choice of identifying these norms and of assigning to them universal applicability.¹⁴⁰ Moreover, the justification of this choice rests neither on clear-cut philosophical or religious world-views nor on a view from nowhere, but on *historical experiences*, especially those of catastrophes. The experiences, being so horrifying, have given rise to two perhaps inextricable assertions: “This particular individual has the right to be free from this violence” and “All individuals have the right to be free from this violence.”

50(1993), pp. 8-22 at 12.

¹⁴⁰ Sissela Bok points out that, “as the media disseminate images worldwide of atrocities from places such as Tiananmen Square, Kurdistan, Burma, Croatia, or Somalia, it becomes ever more difficult to maintain that the victims are somehow so culturally different from the viewing public that their plight cannot be evaluated from the outside.” See Sissela Bok, *Common Values* (University of Missouri Press, 2002), p. 61.

Therefore, the universal applicability of human rights stems not from our ability to find a universal philosophical foundation for the rights, but from moral force and practical resonance among people from all types of human societies around the world.¹⁴¹ The rights are specific manifestations of these people's shared tragic experiences and of the people's search for a solution to their own political and social problems. Booth acknowledges these roots to the current human rights regime:

Universality of human rights is supposed to be invalid because there is no universal ethical community. But there is: the ethical community of oppressed women, the ethical community of the under-class; the ethical community of the hungry...and on and on. Universal human rights are solidly embedded in multiple networks of cross-cutting universal ethical communities.¹⁴²

Because cruelty and fear are ubiquitous, all societies find it easier to recognize and to agree upon what constitutes *summum malum* elsewhere, and human rights offer societies a recognized vocabulary in which they can frame political and social wrongs.¹⁴³ It is not a simple result of Westernization or cultural imperialism. Rather, it is due in large measure to the grave violations of human rights that have occurred in remarkably similar forms all over the world, generating rights-awareness in the affected people.¹⁴⁴ Human rights have "gone global" not because they serve the interests of the powerful, but because they "go local," where they embed themselves in the "soil of cultures and worldviews independent of the West" and provide people with a useful weapon against unjust states and oppressive

¹⁴¹ See Radhika Coomaraswamy, "Reinventing International Law: Women's Rights as Human Rights in the International Community," in Peter Van Ness (ed) *Debating Human Rights* (Routledge Press 1999), pp. 167-183.

¹⁴² Ken Booth, "Three Tyrannies," in Dunne, Tim and Nicholas J. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge, Cambridge University press, 1999), pp. 31-70.

¹⁴³ Coomaraswamy, "Reinventing International Law," p. 170. Likewise, Alan Dershowitz argues, "It is more realistic to try to build a theory of rights on the agreed-upon wrongs of the past that we want to avoid repeating, than to try to build a theory of rights on idealized conceptions of the perfect society about which we will never agree." See Alan Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York: Basic Books, 2004).

¹⁴⁴ Indian Feminist Uma Narayan powerfully refutes the accusation of "Westernization," when she states that at issue is "a pain that was earlier than school and Westernization, a call to rebellion that has a different and more primary root, that was not conceptual or English, but in the mother-tongue." If there seems to be a resemblance between the issues addressed by Third World feminists and those addressed by Western feminists, it is a result, she asserted, "not of faddish mimicry, but of the fact that women's inequality and mistreatment are, unfortunately, ubiquitous features of many 'Western' and 'Nonwestern' cultural contexts, even as their manifestations in specific contexts display important differences of detail." See Uma Narayan, "Contesting Cultures: "Westernization," Respect for Cultures, and Third-World Feminists," in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (NY: Routledge, 1997), pp. 396-414, at 399,401.

social practices.¹⁴⁵ The political legitimacy of human rights norms is reinforced by the fact that the people who make them are not foreign human rights activists but the victims themselves *from within* their cultures. In their own struggles against oppression, deprivation, marginalization, and injustice, people have recognized human rights as an instrument of empowerment.¹⁴⁶ It can be universally applicable, since the fear of cruelty is universal.

According to Bernard Williams,

The liberalism of fear can be taken as having a different and much wider set of listeners: roughly, everybody. Indeed, its relations to its listeners and its audience are the reverse of the other traditional options. Its listeners, unusually, form a much larger group than its expected audience. It speaks to humanity. And it has a right to do this, a unique right, I think, because its materials are the only certainly universal materials of politics: power, powerlessness, fear, cruelty, a universalism of negative capacities.¹⁴⁷

For Williams, since the liberalism of fear operates with the “only certainly universal materials of politics,” it recognizes a set of human rights that stand against cruelties and that require no further philosophical justification. Seen in this light, it can avoid the criticism that human rights merely reflect the preferences of Western culture.

The recognition of a common human vulnerability makes human rights instruments necessary and desirable, and we ensure our own future by demanding *the rights of others*, since the possibility of violation is universal.¹⁴⁸ “If we do not remember that anyone can be a victim, and if we allow hatred for torture, or pity for pain, to blind us, we will unwittingly aid the tortures of tomorrow by overrating the victims of today.”¹⁴⁹ As long as we remind ourselves that human rights empower the weak and powerless against abuses of power, we can distinguish this issue from the soft-power discourse strengthening Western hegemony and from non-Western politicians’ appeals for cultural authenticity. Although the conception of human rights must respect variance in local conceptions of justice, it can

¹⁴⁵ Michael Ignatieff, “Human Rights as Politics and Idolatry” p. 7.

¹⁴⁶ In so doing, we can say that the evolution of the concept of human rights (e.g. three generations of human rights) actually responds to new threats to human life. See Philip Alston, “Conjuring Up New Human Rights: A Proposal for Quality Control,” in *American Journal of International Law* Vol 78(3) (1984), pp. 607-621.

¹⁴⁷ Bernard Williams, “The liberalism of Fear,” in Geoffrey Hawthorn (ed) *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005) pp. 52-61 at 59.

¹⁴⁸ *III*, p. 26.

¹⁴⁹ *LFb*, p. 19.

point to the criteria for political legitimacy in world politics and can transform them into tools for social criticism.

5.5 Substantive or Justificatory Minimalism?

Some may argue that if we accept Shklar's political liberalism of fear, then the fear-inspired rights scheme must be very thin—after all, the aim of human rights is to protect individuals' freedom from abuses of power. And it seems that Shklar's negative liberalism has a logical affinity to Isaiah Berlin's notion of negative liberty (i.e., freedom from interference). Ostensibly parallel with the aim of negative liberty, the aim of the liberalism of fear is to protect human beings against cruelty; thus human rights in this scheme must be restricted to the protection of negative liberty, which by itself neither requires nor, indeed, allows the state to directly promote positive liberty.

Michael Ignatieff, for example, inspired by Shklar's political liberalism of fear, argues that the universal commitment to human rights, when grounded in the liberalism of fear, would contain a systematic agenda regarding only “negative liberty,” a minimal institutional safeguard.¹⁵⁰ Human rights would constitute a “tool kit” that individuals could access in response to any political oppression, and could be compatible with different religious and cultural views. Ignatieff invokes Shklar's ideas to clarify his assertion:

...what should our goals as believers in human rights be? Here my slogan would be the title of the justly famous essay by my old teacher, Judith Shklar, “Putting Cruelty First.” We may not be able to create democracies or constitutions. Liberal freedom may be some way off. But we could do more than we do to stop unmerited suffering and gross physical cruelty. That I take to be the elemental priority of all human rights activism: to stop torture, beating, killings, rape, and assault and to improve, as best we can, the security of ordinary people. My minimalism is not strategic at all. It is the most we can hope for.¹⁵¹

Must the scope of human rights be restricted to the protection of negative freedom if we ground human rights in the liberalism of fear? I don't think so, and it is not what Shklar

¹⁵⁰ Michael Ignatieff, “Human Rights as Politics and Idolatry” p. 56.

¹⁵¹ Michael Ignatieff, “Human Rights as Politics and Idolatry” p 173.

stated either. Indeed, she notes that in its concern with freedom from interference, the liberalism of fear resembles Berlin's notion of negative liberty. However, she explicitly argues that the two differ in very important ways.

To begin with, Shklar contends that Berlin's notion is conceptually pure and distinct from "the condition of liberty." Like Rawls, Shklar believes that an effective notion of liberty must incorporate such conditions of liberty. Negative liberty, if it is to have any political significance at all, must specify at least some of the *institutional characteristics* of a relatively free regime. Therefore, protecting individuals against oppression is not the same as negative liberty. Government should protect people from cruelty, whatever the source. Moreover, Shklar presents an "egalitarian liberalism" that is "an obvious corollary of putting cruelty first,"¹⁵² though the purpose of Shklar's liberalism is to reach egalitarianism on the basis not of affirming people's equal moral worth, but of subjecting significant inequalities to skeptical scrutiny. For Shklar, inequalities make cruelty tempting in that inequality increases the "social distance" between victim and victimizer and, consequently, strengthens and creates opportunities for cruelty. First of all, inequality separates the victim, emotionally and cognitively, from his or her victimizer, making it *possible* for the latter to exercise an internal impulse toward cruelty¹⁵³. Second, because inequality provides the powerful a "vacuum that separates him from his subject," it is *easy* for the powerful to abuse the weak and social inferiors.¹⁵⁴

Thus, if the powerful operate in a climate conducive to cruelty, then equality may be a remedy for the weak. One should not mistake the liberal's fear of government with indifference to the sad plight of society's disadvantaged citizens. The fear includes the pessimistic realization that the excesses of official agents "are apt to burden the poor and

¹⁵² OV:29

¹⁵³ Corey Robin, "Fear", p. 19.

¹⁵⁴ Corey Robin, "Fear", p. 2.

weak most heavily.”¹⁵⁵ That is why it is important to bind those agents with legal constraints and to disperse power to people capable of defending their own interests. When we pay attention to how the world looks to those who have been injured by the functioning of the social distances and institutions surrounding them, we would defend the idea of equality as the condition we must accept once we listen to the voice of the marginalized. It would show why achieving negative liberty entails a positive commitment to “the elimination of such forms and degrees of social inequality as expose people to oppressive practices.” Therefore, it is a “negative egalitarianism” which is “really a fear of the consequences of inequality.”¹⁵⁶

Shklar argues that the contrast between negative liberty and positive liberty might be conceptually possible but not universally applicable in all political situations. From her point of view, this contrast has much less relevance in the history of the United States, for instance. Regarding the peculiar history of slavery, its legal institutions, and its tradition of litigation, the function of rights instruments in the United States is not merely to protect freedom from interference so that people can realize their own goals, but also to promote people’s demands that government “act positively in order to protect the freedom of minorities, of blacks, of the weak, and of all those who are second-class citizens.”¹⁵⁷ In this light, rights are two things: (1) the “open door” that would allow people to reach their own goals without hindrance; and (2) useful instruments that would allow people to realize their goals against others.¹⁵⁸ Shklar states,

Given the brutalities, randomness, and systematic intimidation of daily life for most people, it cannot claim that its distributions are just at all without the strictest standard of legality. “I have a right” speaks not only for “me,” but for all who would protest and enjoin. It is when we look at gross injustice that rights reveal both their negative character and their far from egotistical social meaning—and their importance.¹⁵⁹

¹⁵⁵ *OV*:28.

¹⁵⁶ *OV*:28, 29.

¹⁵⁷ *PLNL*, p. 112.

¹⁵⁸ *PLNL*, p. 111.

¹⁵⁹ *III*, p. 26.

Furthermore, when we look back at the history of abolitionism in the United States, Shklar argues, we can find that negative and positive liberties are mutually supportive.

At a glance, it seems that the conflict between the black slaves and the white masters was a conflict between two negative liberties. Black slaves wanted to be free to do what white citizens could do without suffering from pronounced racial discrimination. White slaveholders wanted to be free to do whatever they wanted concerning black slaves, whom slaveholders regarded as their own property. But the real conflict was not between two negative liberties but between two kinds of competing “rights.” For the two sides, the pursuit of negative liberty remained the pursuit of rights.¹⁶⁰ When they claimed their own right in court, the court had to choose between the two rights. The courts’ choice to recognize blacks as citizens equal to all other citizens entailed specific political constraints defined by law and protected by the government. In other words, it was not the inalienable rights of the Declaration of Independence but a new sense of the suffering of slaves that brought about the abolition of slavery in the South and that helped protect them through the legal realization of this idea of rights. Shklar states,

But the change in behavior which decisions require afterward, and which they will require for a long time still, mean that *the right to claim one's right* will remain the first of all rights. When all liberties are positive liberties, the right to fight for one's own rights and for other specific rights is the most important of all freedoms. It is an endless process.¹⁶¹

Rights instruments are not an open door through which one can strengthen the freedom-from-interference pursuit; rather, they are a useful instrument with which people can “address institutions of correction” and can, in this way, try to strengthen states’ positive protection of freedom. Rather than entail passive enjoyment of freedom, negative freedom requires permanent political action.¹⁶² Again, let us consider Shklar’s comments:

However, to say that the right to take part in political life and the fact of being an active

¹⁶⁰ For the abolitionist, “equal protection of the law” was not merely a request for an equality that could limit the negative liberty of the masters, but also “the political and legal realization of the idea of rights.” See *PLNL*, p. 113, 121.

¹⁶¹ *PLNL*, p. 125.

¹⁶² *PLNL*, p. 112.

citizen are no more than statutes and conditions of freedom, but not freedom itself, amounts to reducing negative liberty to a psychological state that is passive and empty of political content. Finally, what can the expression “being master in one’s own domain” mean if not the right to act politically in an effective way?¹⁶³

The historical example cited here is an American story with its particularities. My point here merely responds to the argument that substantive minimalism, which narrows the content of human rights to negative liberties, is the corollary of the liberalism of fear. While protecting individuals from cruelty, whatever the source, human rights instruments help us “take into account the actual *political conditions* under which people live, in order to act *here and now* to prevent known and real dangers,” and help compel states to act positively in protecting the practical uses of freedom.¹⁶⁴

¹⁶³ *PLNL*, p. 116.

¹⁶⁴ *LFb*, p. 17.

Chapter Six: Sense of Injustice and the Voices of Victims

I believe some human rights standards can be arrived at and ought to be upheld everywhere in the world. But...we are not entitled to assume the right to enforce whatever tentative conclusions happen to have emerged from our particular inbred set of debates about free speech, the division of church and state, or individual autonomy. Until those debates are enriched, in a cosmopolitan way, with an awareness of what is to be said about them and around them and against them, from all the variety of cultural and religious and ethical perspectives that there are in the world, they remain parochial.

— Jeremy Waldron, *How to Argue for a Universal Claim*¹

6.1 Asymmetrical Reciprocity and the Voices of Victims

If the liberalism of fear can appropriately provide an epistemological foundation for human rights principles, then we can say that human rights are important means for protecting human beings against cruelty, whatever the source. The call for rights is a response to very real dangers in a violent world. In this way, we give a firm moral grounding to the idea of human rights.

However, the task of justification has not been completed yet. Recall that there are two levels of human rights justification in question. One concerns the justification as to why societies should recognize these rights as human rights. The other concerns the justification as to which rights deserve societies' recognition of them as human rights. We may furnish grounds for agreement and solve the first-level of justification; however, this success would not be sufficiently encompassing to deal with the second level of justification regarding the content and the interpretation of human rights principles.

In chapter five, I suggested that we follow my revised Rawlsian “human rights proper” if

¹ Jeremy Waldron, “How to Argue for a Universal Claim,” in *Columbia Human Rights Law Review*, 30(1999), pp. 305-314.

we accept the idea of decency as the justification for interference with the autonomy of states. For Rawls, human rights principles as part of the conception of decency constitute a standard for the membership of a society of well-ordered peoples in a world society. Human rights principles maintain mutual relations among peoples for the right reason and provide societies with sufficient ground for taking action against human rights violations. These principles function as a minimum threshold below which an offending society would no longer have good standing in international society. The principles are the reasons that ultimately justify intervention whose purpose is to shift societies from illegitimacy to legitimacy.

Accordingly, like Rawls's human rights proper, it is plain that the content of human rights from my scheme, despite omitting several rights identified in the UDHR, is more expansive than Ignatieff's version, which contains mainly negative liberties. However, this relative expansiveness does not mean that we should give up the items that do not belong in human rights proper. These items can constitute the rights of citizens, and members of specific societies would flesh the rights out and write them into a constitution. Moreover, we should encourage cross-cultural dialogue to enable the members of liberal and non-liberal societies to resolve the conflicts between their respective treatments of human rights proper, even if we accept Rawls's idea of decency as the minimal standard for international legitimacy.

However, some scholars may contend that, in spite of Shklar's expectation that people will agree on the *summum malum*, the difficulty of reaching agreement on *summum malum* is no less daunting than the difficulty of reaching agreement on the *summum bonum* because there is a variety of social evils just as there is a variety of social goods. Accordingly, to pick out one vice and to privilege it over others might have an effect similar to that of identifying a highest good. In political terms, the former process might bring about a regime that would

aspire to make people better so long as the people try to eliminate the vice that they consider to be the worst. It seems that one can hardly expect people to agree on the greatest ill when there are myriad ills just as there are myriad goods. A greatest ill is nothing less than a negative reflection of a greatest good.

John Kekes, for instance, articulates the question and doubts not only the assertion that cruelty is the worst evil but also the effort to find the greatest ill as such. He contends,

Just as there is no *summum bonum*, so there is no *summum malum* either. There is no doubt that cruelty is very bad, but it is not the worst thing. The worst thing is what causes the most evil. In different circumstances different things will do that. There always is a worst thing, but there is nothing that is always the worst thing.²

Likewise, Richard Posner argues that there is no extra-cultural authoritative source for our moral judgment about right or wrong. He states,

There are tautological ones, such as 'murder is wrong' where 'murder' means 'wrongful killing', or 'bribery is wrong', where bribery means 'wrongful paying'. But what counts as murder, or as bribery, varies enormously from society to society. There are a handful of rudimentary principles of social cooperation—such as don't lie all the time or don't break promises without any reason or kill your relatives or neighbors indiscriminately—that may be common to all human societies, and if one wants to call these rudimentary principles the universal moral law, that is fine with me. But they are too abstract to be criterial.³

Thus, it appears that the idea of putting cruelty first is too abstract to provide any useful standard in particular and concrete human rights violations. One can undoubtedly accept the notion of *summum malum*, but disagree over the content of *summum malum*. One can undoubtedly accept the notion of putting cruelty first, but disagree with the content of the cruelty and its connection to the language of human rights. There are reasonable disagreements about the interpretations if we consider Article 5 of the UDHR: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Is there a consensus over the meaning of terms such as 'cruel'? Is the death penalty cruel? If one society supports female circumcision and treats it as representing central values to

² John Kekes, *Cruelty and Liberalism*, in *Ethics*, Vol 106(1996), pp. 834-844 at 843.

³ Richard Posner, *The Problematics of Moral and Legal Theory*, (MA, Cambridge: Harvard University Press, 1999), p. 6.

the society's way of life, can we clearly find the consensus to treat the practice as torture?

When does discrimination, when based on gender, class, or caste, assume the form of torture proscribed by international human rights standards? Is it torture to scar children's cheeks or other parts of the body, a ceremonial practice that is common in some African communities? Is corporal punishment which is popular in Asia inhuman or degrading treatment?

I assert that, although giving rise to the justification issue, the endeavor to find a *summum malum* is not only feasible but also necessary.⁴

Inevitably, there has to be a qualitative difference not only between the category of the greatest good and the greatest ill, but also between ills that aspire to the status of greatest ill. Every society must have its own criteria to distinguish tolerable evils from intolerable evils or cruelties. This distinction must be contextual, and we should understand and appreciate the significance of each particular evil in a way of life.⁵ Such criteria involve highly complex notions of harm, cannot be adequately conceptualized and elaborated in the simplistic language of cruelty or evil. Therefore, we should try to understand how cruelties are experienced and understood within the framework of a particular moral outlook. If human rights are a useful means to compel states to act positively to protect freedom from fear, then the success of political liberalism of fear "depends on the kinds of cruelty and the history of political wrongs which are responded to."⁶ Although the liberalism of fear carries a cosmopolitan claim that every person has basic *moral* rights to be free from cruelty and fear, the liberalism of fear does not necessarily carry the same interpretation about cruelties so that the treatment of *legal* rights can vary from one society

⁴ Indeed, Shklar views with caution the effort to find a *summum malum*. She claims that "as a matter of liberal policy we must learn to endure enormous differences in the relative importance that various individuals and groups attach to the vices," as even the moral spectrum consists of "layer upon layer of ancient religious and class rituals, ethnic inheritances of sensibility and manners, and ideological residues whose original purpose has by now been utterly forgotten." See *OV*, p. 4.

⁵ Jonathan Allen, "The Place of Negative Political Morality in Political Theory," in *Political Theory* Vol 29 (3)(2001), pp. 337-363 at 351.

⁶ Jacob Levy, *Multiculturalism of Fear* (Oxford University Press 2001), p.23.

to another.⁷

However, when we accept the contextual argument about the criteria, we should be careful that we are not on a slippery slope toward cultural relativism. In this stage, we need to take seriously the perspectives of different cultures if human rights are going to be appropriate as global normative standards for a multicultural world. Therefore, we need sincere cultural dialogues that help provide a given society with a basis for settling related interpretation problems and implementation problems and that help us learn how societies can finally accept a single interpretation regarding human rights principles that, when honored by a society, constitute a sufficient condition for the society's immunity from outside interference. Amartya Sen points out,

The universality of human rights relates to the idea of survivability in unobstructed discussion—open to participation by persons across national boundaries. Partisanship is avoided not so much by taking either a conjunction, or an intersection, of the views respectively held by dominant voices in different societies across the world (including very repressive ones), but through an interactive process, in particular by examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view.⁸

But to find a reasonable and public test of the interpretation of human rights, we should not search for the solution from the angle of what was visible at the center of public life either starting from ideas implicit in the public political culture by Rawls's political constructivism, from Nussbaum's Aristotelian practical reasoning and Rawlsian "reflective equilibrium," or from An-Na'im's cultural orientation within a given framework of interpretation. To accomplish a public test of the political legitimacy of human rights, we should start from the standpoint of the margins and look at many injustices in our everyday life: we should consider people who cannot easily represent themselves in

⁷ Anna Elisabetta Galeotti argues that the application of human rights principles is controversial as it depends on three kinds of interpretation, that is, the interpretation of (1) the principles, (2) the case; and (3) potential conflicts among principles. In this regard, whether the practices are tolerable cannot be settled simply by judging whether the practice can be inferred directly and univocally from the fundamental principles. See Anna Elisabetta Galeotti, "Relativism, Universalism, and Applied Ethics: The Case of Female Circumcision," in *Constellations*, Vol 14(1)(2007), pp.91-111.

⁸ Amartya Sen, "Elements of a Theory of Human Rights," in *Philosophy and Public Affairs*, no4 (2004), pp. 315-356.

societies' centers of power.

Recall that, in chapter four, I argue that the claim of cultural authenticity is premised upon the criterion of internal acceptance. Moreover, all cultural claims should be premised on "the right to claim one's right," and a sincere cultural dialogue based on the idea of reciprocity requires at least three conditions: (1) Participants within internal or cross-cultural dialogue should not exercise power over each other, in whatever manner power is manifested. (2) The scope of criticism should not be limited by the framework of interpretation that cultural members already shared. Deprivation and domination, not shared understandings, should be the focus of attention in a sincere human rights dialogue. And (3) marginalized groups should have opportunities to have their perspectives heard directly, neither through the dominant cultures nor through the qualifications of the insider-outsider distinction. In the following, I will argue that, during dialogue, marginalized groups should have opportunities not only to voice their perspectives directly to society, but also to do so before privileged groups voice their perspectives. Iris Young's idea of "asymmetrical reciprocity" and Shklar's "negative liberalism" throw some light on this matter.

In contrast to An-Na'im's idea of reciprocity, Iris Young's idea of asymmetrical reciprocity proposes that the victim should speak for himself or herself. As I state in chapter four, An-Na'im asserts that (1) people who differ from one another regarding their perspectives can, by assuming the positions of other people, perceive themselves from the perspectives of these other people, and that (2) mutual dialogue in this context can help people come to an agreement on general ethical matters. An-Na'im enjoins members of a moral community to switch their perspectives and to judge one another from the perspectives of others. The viability of this switching rests on the assumption that people can, through imagination, assume the place of another person and can judge themselves from the other person's

perspective. However, as Young persuasively argues,⁹ in making moral judgments, the idea of symmetrical reciprocity needs each of us to take the perspectives of all others, and suggests “that we are able to understand one another because we are able to see ourselves reflected in the other people and find that they see themselves reflected in us.”¹⁰ Not only would it ultimately reduce the complexity of relationships between the self and the other, but also fail to ensure that the voice of the marginal other is effectively represented. When we try to put ourselves in the situation of another, we may deploy our own particular experiences and “privileges to imaginatively inhabit the site of the other,” thereby “unknowingly misrepresenting the other’s situation.”¹¹ Young points out,

The reciprocal recognition by which I know that I am other for you just as you are other for me cannot entail a reversibility of perspectives, precisely because our positions are partly constituted by the perspectives each of us has on the others. Who we are is constituted to a considerable extent by the relations in which we stand to others, along with our past experience of our relations with others. Thus the standpoint of each of us in a particular situation is partly a result of our experience of the other people’s perspectives on us. It is hard to see how any of us could suspend our perspective mediated by our relations to others, in order to adopt their perspectives mediated by their relations to us. The infinity of the dialectical process of selves in relation to others both makes it impossible to suspend our own positioning, and leaves an excess of experiences when I try to put myself in the other person’s place.¹²

It is neither possible nor desirable to imagine what the other might want or might consent to without “the other” speaking for himself or herself, because our standpoints are asymmetrical and irreversible. Each person has his or her own life story. Also, each social position is framed by the structure of relationships among positions, and positions cannot be taken from one context and substituted by another. For instance, when privileged people try to “put themselves in the position of people who are less privileged,”¹³ the assumptions that the privileged people derive from their privilege often allow them

⁹ Young argues that the idea of symmetrical reciprocity has three flaws: (1) the idea of symmetrical reciprocity obscures difference; (2) it is based on the supposed possibility of reversing positions; and (3) it is politically suspect. See Iris Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought,” in *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy* (Princeton, Princeton University Press, 1997), pp. 44-49.

¹⁰ Ibid., p.44

¹¹ Ibid., p. 48.

¹² Ibid., p. 48.

¹³ Ibid., p. 48.

unwittingly to misrepresent the other's situation. On the other hand, "asking the oppressed to reverse perspectives with the privileged in adjudicating a conflict may itself be an injustice and an insult."¹⁴

Thus, by virtue of recognizing the asymmetry of subjects, we need a different account of what understanding is and what makes it possible. Because each interlocutor in a communication situation is distinguished by the particular history and social position that makes their relation asymmetrical, Young believes that "the other" as a member of an oppressed group must speak for himself or herself and must represent his or her needs and desires. Young suggests that one starts with the assumption that one cannot see things from the other person's perspective, and "attends with respectful distance" to their expressions of interests and needs. As Young explains,

...the ethical relation of asymmetrical reciprocity looks like this. We meet and communicate. We mutually recognize one another, and aim to understand one another. Each is open to such understanding by recognizing our asymmetry. A condition of our communication is that we acknowledge difference, interval, that others drag behind them shadows and histories, scars and traces that do not become present in our communication. Thus we each must be open to learning about the other person's perspective, since we cannot take the other person's standpoint and imagine that perspective as our own. This implies that we have the moral humility to acknowledge that even though there may be much I do understand about the other person's perspective through her communication to me and through the constructions we have made common between us, *there is also always a remainder*, much that I do not understand about the other person's experience and perspective.¹⁵

For Young, if you think you already know how other people feel simply because "you have imaginatively represented their perspectives to yourself," then you may not "listen to their expression of their perspectives very openly."¹⁶ In so doing, seeking to understand others entails patiently and respectfully taking in all of the information that the other gives us about his or her experience. To follow the idea of asymmetrical reciprocity in this way, we should try to understand the other not by simply trying to substitute the other's perspective for our own perspective but by respectfully engaging with the actual other.

¹⁴ Ibid., p. 48

¹⁵ Ibid., p. 53.

¹⁶ Ibid., p. 48

Likewise, Shklar proposes that we should listen to the victim's voice because the complaints from victims provide us with a valuable source of moral insight. In *The Faces of Injustice*, Shklar challenges the general belief about the nature and the origins of injustice. According to the normal model of justice, justice is a body of rules and basic principles governing the distribution of benefits and burdens within a community, coexisting with the establishment of effective and impartial institutions to guarantee the enforcement of these basic rules and principles. On this normal model, injustice occurs whenever we depart from any of these rules or principles. Moreover, according to the normal model of justice, there is a clear standard to distinguish injustice from misfortune. That is, only when the victim's complaints match the rule-governed prohibition has he/she suffered an injustice. "If there is no fit, it is only a matter of the victim's subjective reactions, a misfortune, and not *really* unjust."¹⁷

Shklar contends that the normal model of justice ignores many complaints by people who consider themselves as victims of injustice but their sense of injustice cannot be described simply as violations of recognizable rules and principles. This model of engagement would also implicitly marginalize those who diverge from the established rules and principles. Furthermore, this model of engagement misconceives the fact that the distinction between misfortune and injustice is not a social fact that we can discover; rather, it is a *political judgment* that we should make.¹⁸

To begin with, treating injustice as merely the violations of recognizable rules and principles, obscures "the full, complex and enduring character of injustice as a social phenomenon."¹⁹ The normal model of justice, which connects all injustice to established standards of justice, reflects what Shklar called "legalism."²⁰ According to "legalism,"

¹⁷ *FOI*, p.7

¹⁸ See Bernard Yack, "Injustice and the Victim's Voice," in *Michigan Law Review* 89 (May 1991), pp. 1,346-1,349 at pp. 1,341-2.

¹⁹ *FOI*, p. 9.

²⁰ See Judith Shklar, *Legalism: An Essay on Law, Morals, and Politics* (Cambridge, MA: Harvard University Press,

judgments concerning law-related cases should rest on general rules. Thus, legalism is an ethic of rule following and can enable us to distinguish injustice from misfortune.²¹ However, Shklar contends that we should not treat claims about misfortune or about injustice as claims about facts. Rather, the line separating misfortune from injustice is a political judgment about “what we may expect and demand of each other.”²² Such judgments are political rather than legal because, insofar as we lack omniscience, we cannot be confident about the accuracy of our distinction between misfortune and injustice, even if we carefully apply established general rules to particular cases. Thus, our judgments regarding misfortune and injustice, being political, are always tentative and revisable in compliance with new information and perspectives²³. Misfortunes of the past are the injustices of today, since “what is treated as unavoidable and natural, and what is regarded as controllable and social, is often a matter of technology and of ideology or interpretation.”²⁴

Furthermore, the distinction between misfortune and injustice is more complex when we consider the complaints from victims about what Shklar called “passive injustice.”²⁵ Active injustice involves acts that violate the rules of justice. The normal model of justice responds mainly to these kinds of acts. However, the harm that inspires the indignation of victims does not always take the form of the violation of recognized rules and principles. The normal model of justice is blind to passive injustice, which involves a failure to “prevent or oppose wrong when we have the power and occasion to do so.”²⁶ Moreover, the normal model of justice would leave citizens insensitive to avoidable injuries even if

1964)

²¹ Bernard Yack, “Injustice and the Victim’s Voice,” p. 1,345.

²² Ibid., p. 1,341.

²³ FOI, p. 5.

²⁴ FOI, p. 9.

²⁵ Shklar creates this distinction by drawing from the ideas that Cicero presents in his *The Offices*. Following the distinction between passive injustice and active injustice, Yack creates two forms of justice, the so-called “active and passive justice.” See “Injustice and the Victim’s Voice” and “Active and Passive Justice,” in Bernard Yack (ed), *Liberalism Without Illusions* (Chicago, The University of Chicago Press, 1996), pp. 191-204.

²⁶ See FOI: p. 6.

these wrongs are not yet counted as injustice from the legalistic model of justice. Specifically, the New Orleans victims suffering from the Katrina hurricane experienced misfortune because the hurricane, itself, was an unavoidable natural disaster. However, the victims definitely suffered injustice because public officials could and should have prevented or mitigated much of the victims' suffering. Many people who died might have been saved because of the inefficiencies of the emergency services. Many buildings collapsed simply because levies violated construction codes and because inspectors had been bribed to overlook these code violations. Few inhabitants received full warning of the jeopardy in advance, which technologically sophisticated devices can often predict. Moreover, public authorities hesitated to make any serious preparations for the eventuality. Katrina exemplifies the fact that passiveness can transform a natural misfortune into a failure of justice.

We cannot treat the line between misfortune and injustice simply as a natural given. It is inexcusable if we do nothing when we indeed can do something to alleviate the cause of suffering.

In this regard, the normal model of justice offers an inadequate account of passive injustice, because the model cannot account for the full sense of injustice from victims when it does not match the form of the violation of established standards. Shklar suggests that the best remedy to the problematic normal model is to embrace the version of the victims in our understanding of injustice so that we can more successfully prevent suffering in others. For Shklar, "victimhood has an irreducibly *subjective component* that the normal model of justice cannot easily absorb."²⁷ Victim's voice is a necessary, but not a sufficient, condition for the construction of an adequate normative theory of justice.²⁸ By criticizing the inadequacy of the invisible-hand doctrine, for instance, Shklar writes,

It seems to me that this is a poor argument because it is evident that when we can

²⁷ *FOI*, p. 37.

²⁸ See Jonathan Allen, "The Place of Negative Political Morality in Political Theory," p. 348.

alleviate suffering, whatever its cause, it is passively unjust to stand by and do nothing. It is not the origin of injury, but the possibility of preventing and reducing its costs, that allows us to judge whether there was or was not unjustifiable passivity in the face of such disaster. Nor is the sense of injustice irrelevant. The voice of the victims must also be heard first, not only to find out whether officially recognized social expectations have been denied, but also to attend to their *interpretations* of the situation. Are changes in the order of publicly accepted claims called for? Are the rules such that the victim could have consented to them had she been asked? If the victim's suffering is due to accident or misfortune but could be remedied by public agents, then it is unjust if nothing is done to help. A valid expectation has been ignored and her sense of injustice should assert itself and we should all protest.²⁹

In challenge to Shklar's assertions, some people might argue that privileging victims' voices would violate the idea of impartiality during the dialogical process. However, because we lack determinate and accepted impartial standards, and the legalist model masks the passive injustice, the idea of impartiality from this legalist model may unwittingly mask the ways that "the particular perspectives of dominant groups claim universality."³⁰ Moreover, in contrast to victim's voices, public officials' perspectives about misfortune and injustice are already widely represented in the public domain. As Bernard Yack responds,

Privileging the victim's perspective may seem to violate the norms of impartiality that we tend to associate very closely with the idea of justice. But fidelity to established standards and impartiality in applying them—virtues that serve legal justice very well—remain virtues only so long as we possess relatively clear, determinate, and widely accepted standards to apply to particular situations. Whenever we lack access to such standards, as we almost always do in our judgments about passive injustice and the justice of legislation, an emphasis upon the faithful and impartial application of whatever standards we do come up with tends to blind us to the political character of the judgments we have made. Such an emphasis blinds us, in particular, to the ways in which we both privilege some voices and stifle others when making these judgments.³¹

The argument here is not to say that the claims made by victims are always legitimate or that their sense of injustice is morally justified³². Their sense of being victimized might be the result of resentment or misunderstanding so that their claims must be proved. However, since there is no clear answer to the question of who determines whether their complaint is

²⁹ *FOI*, p. 82.

³⁰ Bernard Yack, "Injustice and the Victim's Voice," p. 1343. See also, Iris Young, "The Ideal of Impartiality and the Civic Public," in *Justice and the Politics of Differences*, ch 4.

³¹ *Ibid.*, 1343.

³² *FOI*, p. 3.

legitimate, “the claims of sensed injustice always deserve a hearing.”³³ These complaints would open our eyes to other things that the impartial perspective of the defender of a normal model of justice cannot see.

In contrast with An-Na’im’s perspective on cross-cultural dialogue, the approach here takes the voice of the victims seriously and stresses that victims should be placed at the center of political theorizing. “We will learn about these harmful consequences only if we *listen* to the voices of the individuals who feel victimized by our words and actions.” As Shklar put it,

Actually, the most reliable test for what cruelties are to be endured at any place and any time is to ask the likeliest victims, the least powerful persons, at any given moment and under controlled conditions. Until that is done there is no reason not to assume that the liberalism of fear has much to offer to the victims of political tyranny.³⁴

Moreover, as I stated in chapter four, the claim to have rights is usually made in social conflicts in which a justification of cultural authenticity is being called for. Therefore, the claim to human rights arises in the context not of shared understandings, but of dissent, protest and resistance. Criticizing the argument that while measuring our judgments about justice, we should appeal to the shared understandings embedded in our practices and institutions, Shklar contends that:

...These intimations of shared meanings, as divined by prophetic or traditionalist avatars of the spirit of the people, are never checked against actual opinion, least of all those of the most disadvantaged and frightened people.... In the absence of a clear and free account of their feelings, we should assume that the least advantaged members of a society resent their situation, even though—like many a black slave—they smile and sing in a show of contentment.³⁵

According to these comments, we should make marginalized people and marginalized structures visible and should listen directly to victims’ voices. Deprivation and domination, not shared understandings, should be the focus of attention in a sincere human rights dialogue. During the dialogical process, if the victims express clearly that they don’t want to remain discriminated against and oppressed in regard to any cultural claim, we should attend to their *interpretations* of the situation. There is no intelligible

³³ *FOI*, p. 90.

³⁴ *LFb*, p. 17.

³⁵ See *FOI*: 114-5.

reason to say that this is unreasonable simply on the ground of its incompatibility with cultural tradition or lack of cultural legitimacy.

In contrast to An-Na'im, I believe that, during the dialogical process, outside observers have the right to criticize any traditional cultural practice that they deem harmful to persons. People dealing with claims of human rights violations should adopt the viewpoint of the *actual* subject of human rights, the insider perspective of the victim of human rights violations, rather than the insider perspective implicit in the public political cultures or the insider perspective reconciled between human rights and tradition which fits within mainstream cultural orientation. Because the legalist understanding masks the passive injustice that the victims suffer, “the adjudication of rights is not the end of the politics.”³⁶ Fear-inspired rights scheme provided here do not expect to dispense with politics³⁷.

Some may accept Nussbaum’s capabilities approach but note that it is very risky to listen to possible victims’ voices directly, since victims may rationalize their abuse. Therefore, my approach should be sensitive to these compelling objections that the voice of the supposed victim is the final authority, since the individual may subject herself to non-autonomously formed beliefs and desires. However, as I stated in chapter three, we should be careful not to assume that we always know better than people directly involved and that we can accurately speak on behalf of them. We should also be cautious not to stereotype or essentialize victimhood, and then carry the projection and fantasies of our image with our good intention, and take actions in the name of their wishes. For instance, we should not decide that certain women are intrinsically *nothing but victims* of oppression. We should be careful about depicting “Third World women” as a homogeneously powerless group possessing the characteristics of “starvation, sexual constraint, ignorance, poverty,” and

³⁶ See Bernard Yack, “Liberalism Without Illusions: An Introduction to Judith Shklar’s Political Thought,” in Bernard Yack (ed), *Liberalism Without Illusions* (Chicago, The University of Chicago 1996), p. 3.

³⁷ *PT*, 36

membership in backward societies.³⁸ We must also acknowledge that there are substantial divergences in social location between speakers and those spoken for, and those divergences would constitute a significant influence on the content of what is said.³⁹ Iris Young underscores the importance of receptive-listening skills:

It is more appropriate to approach a situation of communicative interaction for the purpose of arriving at a moral or political judgment with a stance of moral humility. In moral humility one starts with the assumption that one cannot see things from the other person's perspective, and waits to learn by listening to the other person to what extent they have similar experiences. If I assume that there are aspects of where the other person is coming from that I do not understand, I will be more likely to be open to listening to the specific expression of their experience, interests, and claims. Indeed, one might say that this is what listening to a person means.⁴⁰

In this regard, rather than simply treat purported victims as nothing other than victims of false consciousness or adaptive preferences, interlocutors should separate claims that FGM, for instance, is a harmful practice from claims that it is a violation of human rights.⁴¹ They need to engage with defenders of FGM about the practices' actual and possible harms, and not simply to argue FGM is an unjust practice, and condemn those who defend it as irrational.⁴² They should not treat those involved in this disputed practice as simply suffering from adaptive preferences or false consciousness whenever those women disagree about the ideal proposed by them.⁴³ The only way to show the commitment of equal

³⁸ Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics," in *Harvard Human Rights Journal*, Vol(15)(2002), see <http://www.law.harvard.edu/students/orgs/hrj/iss15/kapur.shtml>. In terms of the critique of gender essentialism and cultural essentialism, see Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism," in Uma Narayan and Sandra Harding (eds), *Decentering the Center: Philosophy for a Multicultural, Postcolonial, and Feminist World* (Indiana University Press, 2000), pp. 80-100; and "Undoing the 'Packing Picture' of Culture," in *Sign: Journal of Women in Culture and Society* (25)(2000), pp: 1083-1086.

³⁹ See Linda Alcoff, "The Problem of Speaking for Others," in *Cultural Studies* (20)(1991), pp. 5-32. Gayatri Spivak also cautions against discourse that either implicitly or explicitly treats "white men" as saving "brown women" from "brown men." See Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Urbana: University of Illinois Press, 1988), pp. 271-313.

⁴⁰ Iris Young, "Asymmetrical Reciprocity," p. 350.

⁴¹ Richard Shweder, "What About 'Female Genital Mutilation'? And Why Understanding Culture Matters in the First Place." in Richard A. Shweder, Martha Minow and Hazel Rose Markus (eds), *Engaging cultural differences: the multicultural challenge in liberal democracies* (New York, New York, Russell Sage Foundation, 2002), pp. 216-251.

⁴² Ibid., p. 220.

⁴³ See Michele M. Moody-Adams, "Reclaiming the Ideal of Equality," in Barbara Andrew, Jean Claire Keller and Lisa Schwartzman (eds.) *Feminist Interventions in Ethics and Politics: Feminist Ethics and Social Theory* (Rowman

respect for person is to stand ready to engage them in rational discussion. How can we be careful—even moral—when, acting on our good intentions, we criticize other cultures? I argue that we can do so by listening directly and initially to marginalized groups and, subsequently, to members of the society in question.⁴⁴

6.2 Universal in Its Reach

If a fear-inspired human rights scheme obliges us to do our best to prevent and alleviate human suffering wherever we may find it, then we should carefully listen to and think about the voices of victims.

In the contemporary world, globalization connects diverse peoples to one another, and these relations are often unequal in power and material resources. In this context, the rights of individuals have come to depend on national and international actors.⁴⁵

Accordingly, it is plain that the degree of interconnectedness among states constitutes a “context of justice.”⁴⁶ In this regard, Rawls’ ideas suffer from two major difficulties: first, it is difficult for *Law of Peoples* to sustain the fundamental idea of basic structure defined in terms of self-sufficient scheme of cooperation; and second, it is difficult for *Law of Peoples* to exhaust the fair terms of international justice. These difficulties suggest that we should conceive the global basic structure as one of a complex system in which a variety of actors vie for power. In the system, the distribution of power occurs according to fixed patterns of domination. Thus, the system does not constitute fair terms of cooperation, as Rawls

and Littlefield, 2005), p. 178.

⁴⁴ See Alison Jaggar, “‘Saving Amina’: Global Justice for Women and Intercultural Dialogue,” in *Ethics & International Affairs*, Vol 19(3)(2005), pp. 55-75 at 70.

⁴⁵ For ideas about justice in the age of globalism, see Andrew Linklater, “The Evolving Spheres of International Justice,” in *International Affairs*, Vol 75(3) (1999), pp. 473-482.

⁴⁶ Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*. Translated by John M. M. Farrell (Berkley, Los Angeles: University of California Press, 2002).

notes.⁴⁷ Therefore, we should pay attention to these relations of power, which marginalize many people. Rainer Forst clearly articulates what a rigorous theory of justice must ask:

At the global level, it (a theory of global justice) must ask who benefits in the global market in what way, what are the terms of “cooperation,” how are they fixed, and so on. At the micro-level, [we should] ask how these global structures support more local (or even traditional) structures of domination and exploitation. The various contexts of justice—local, national, international and global—are connected through the kind of injustice they produce, and a theory of justice must not remain blind to this interconnectedness.⁴⁸

In the context of multiple dominations in global politics, therefore, it is difficult to make a distinction between misfortune and injustice so that the distinction applies simply within a national boundary.⁴⁹ Moreover, as I state in chapter two, Rawls’s *Law of Peoples* does not present a plan for offering full protection to persons captured in these global power struggles. The problem for Rawls is that the *Law of Peoples* aims to elaborate a global conception of political justice which all well-ordered people can endorse, in a sense that persons who have no people (state) would have no protection. However, it is not adequate at all as it still leaves out those who are not part of a system of institutions anywhere.

In this regard, I assert that Iris Young’s social-connection model of political responsibility is better than Rawls’s scheme. The social-connection model of responsibility can strengthen our ability to examine the distinctions between misfortune and injustice because the model obliges all people who, in whatever way, promote structural injustice to work to correct these injustices.

In line with Shklar’s critique of legalism, Young contends that the current legalistic model of global justice is insufficient because it approaches justice on the basis only of liability. In the legalistic model, there is liability only if the law describes the action in question as a

⁴⁷ See Iris Young, “Responsibility and Global Justice: A Social Connection Model,” in *Social Philosophy and Policy*(23)(2006), pp. 102-130 at 114.

⁴⁸ See Rainer Forst, “Towards a Critical Theory of Transnational Justice,” in *Metaphilosophy*, Vol 32 (2001), pp. 160-179 at 167.

⁴⁹ Traditionally, the suffering of individuals and of groups tended to be discounted as misfortunes at the international level, and “claims of justice and injustice could only be admitted within a state or between states”. See Catherine Lu, “The One and Many Faces of Cosmopolitanism,” in *Journal of Political philosophy*, Vol 8(2) (2000), pp. 244-267.

violation of the law. Here, what one should or should not do rests entirely on what the law states.

Young contends that if the injustice has causes rooted in social structure, those who participate in producing and reproducing the structures are implicated in that responsibility.

Young states,

The social connection model of responsibility says that individuals bear responsibility for structural injustice because they contribute by their actions to the processes that produce unjust outcomes. Therefore, our responsibility derives from belonging together with others in a system of interdependent processes of cooperation and competition through which we seek benefits and aim to realize projects. Even though we cannot trace the outcome we may regret our own particular actions in a direct causal chain, and we bear responsibility because we are part of the process.⁵⁰

Through her analysis of the anti-sweatshop movement, Young provides a clear picture of the production-and-distribution chain that links the apparel industry's manufacturers (most of which are located in the developing world) to the consumers of the apparel (most of whom are located in the developed world). Young argues that within a global system of complex dominations, workers at the bottom of the product system suffer structural injustice.⁵¹ In the context of complex domination, workers at the bottom of the product system do not merely suffer misfortune, but it is unjust because that suffering is socially caused. In this regard, the responsibility in relation to injustice derives from "participation in the diverse institutional processes that produce structural injustice."⁵² Moreover, when conceiving the idea of political responsibility in relation to structural injustice, "we are concerned with an ongoing set of processes that we understand is likely to continue producing harm unless there are interventions in it."⁵³

If we accept the argument from the social-connection model, and recognize marginalized people use human rights to fight injustice, then we acknowledge that international responsibility for human rights is grounded in the fact that some structural

⁵⁰ Iris Young, *Global Challenges: War, Self-Determination and Responsibility for justice* (Polity Press 2007), p.175.

⁵¹ Ibid., pp. 168-170.

⁵² Ibid., p. 176.

⁵³ Ibid., p. 178.

processes connect people across the world without regard to political boundaries. Young discusses this responsibility clearly:

The social relations that connect us to others are not restricted to nation-state borders. Our actions are conditioned by and contribute to institutions that affect distant others, and their actions contribute to the operation of institutions that affect us. Because our actions assume these others as a condition for our own actions, we have made practical moral commitments to them by virtue of our actions.⁵⁴

In contrast to Rawls, we should recognize that powerful solutions to problems of injustice cannot always be found within a national boundary, and the sufferings of the exiles, refugees and strangers whose persecutions cannot simply treat as misfortune by the distinction between international and domestic spheres. In the context of multiple domination and deprivation in international politics, the exiles, refugees and strangers do not merely suffer misfortune, but their sufferings are socially caused by the institutions and practices that produce unjust results. We bear responsibility if we all participate in the ongoing schemes of cooperation that result from these unjust outcomes. Thus, following the fear-inspired human rights scheme, we should discharge political responsibility to engage in public actions directed at transforming those structures. If we are aware of injustice but fail to address it, then our passivity contributes to injustice in Shklar's sense. There is an important difference between legal responsibility and political responsibility: legal responsibility is backward-looking because it is directed primarily towards blaming and punishing; whereas political responsibility is forward-looking because it requires public debate and political action to change unjust institutions.⁵⁵ Among those political actions, the effort to establish and enforce a global human rights regime is an important goal for discharging this political responsibility, because the protection and enforcement of human rights is not only the task of "officials in formal institutions," but also of "ordinary people

⁵⁴ Ibid., p.163.

⁵⁵ In addition to point out that the political responsibility in the social connection model is forward-looking, Young argues that there are other four features of the social connection model: (1) it is not isolating, (2) while evaluating possible harm, it should judge background conditions, (3) it is shared responsibility, and (4) it is discharged only through collective action. See Young, "Responsibility, Social Connection, Labor Justice", pp.176-81.

around the world.”⁵⁶ In this regard, political responsibility for human rights requires us to heed the cries of victims and to do our best to prevent and alleviate cruelty wherever it may be found.

Conclusion

Inspired by Shklar’s liberalism of fear and Young’s social-connection model of political responsibility, I assert that my fear-inspired human rights scheme here presents a better description of the moral reality of universal human rights than do the other schemes and that my scheme’s normative grounding of human rights is more compelling than other schemes’ approaches to grounding. First, my scheme is immune from the challenges of ethnocentrism because, rather than serve Western political neocolonialism, my scheme addresses threats of injustice that all people face, especially the most helpless people around the world. Moreover, my scheme can help refute the criticism that human rights principles lack cultural legitimacy: the universality of fear encourages people around the world to define and to protect their human dignity on the basis of human rights ideas.

My scheme is a liberal response to abuses of power, not a totalitarian, monarchical, or other regime-style response. A society and, indeed, the world can, does, and will contain divergent conceptions of the good; however, the “global basic structure” can be structured in only one way. Since WWII, the universal conception has rested on peoples’ *choice* to transform conceptions of human right into universally applicable norms. By using these norms to eliminate or to mitigate the fear that people suffer from, the world community has strengthened the grounding—the legitimacy—of these norms. The practical successes of these norms highlight Shklar’s assertion that the most important goal of liberal politics

⁵⁶ See Alison Jaggar, “Iris Marion Young’s Conception of Political Responsibility: Comments on Iris M. Young’s “Responsibility and Global Labor Justice,” in *Symposia on Gender, Race and Philosophy*, at <http://web.mit.edu/sgrp/2007/no1/Jaggar0107.pdf>.

is to lessen cruelty.⁵⁷

Regarding universal human-rights norms, perhaps the most daunting task is to make sure that the common conviction in human rights is compatible with diverging conceptions of the good. Because peoples consider fear as one of the worst human conditions, peoples around the world have a common intuition that the good includes struggles against oppression, arbitrariness, or intrusion, especially when the powerful are responsible for this injustice, whether in the public sphere or the private sphere. This bottom-up approach, from the marginalized to the privileged, provides us multiple routes from which we can reach agreements regarding the universal applicability of human rights.

⁵⁷ See Michael Walzer, On Negative Politics, in Bernard Yack (ed), *Liberalism Without Illusions* (Chicago, The University of Chicago Press, 1996), pp. 17-24 at 22.

Chapter Seven:

Universalism with Humility

We require more than political theory or intellectual histories of fear. To assess and affect future possibilities, we will need investigations of enlarged scope, working at levels from the intimate to the monumental that can galvanize the full range of the discipline's modes of study, including the practical tools we have acquired from philosophy and economics, sociology and history, mathematics and literary criticism. What we need is an effort to bring together, once again, hard-headed studies of stateness with the full range of scholarship on power, all the while motivated to probe how institutions and policies within the ambit of the liberal tradition might help us find our way to a more decent politics and society under dangerous and difficult conditions.

Ira Katznelson – At the Court of Chaos: Political Science in an Age of Perpetual Fear¹

7.1 Rethinking Human Rights in a Diverse World

In this project, I undertake the construction of my fear-inspired, historical, and practical human rights scheme by engaging with three recent philosophical approaches to human rights: John Rawls's *The Law of Peoples*; Martha Nussbaum's capabilities approach, and An-Na'im's "cross-cultural dialogue" approach.

Inspired by Shklar's political liberalism, I worked out a theory of human rights to flesh out her political liberalism of fear, to provide an epistemological underpinning of the conception of human rights, and to examine the form and the scope of the political liberalism of fear when this liberalism works outward to the international sphere. Moreover, I fleshed out Rawls's justificatory strategy in my constructive approach, and gave an account—different from Rawls's account—how to ground human rights. In contrast to traditional controversies over competing religious or cultural perspectives of human nature, I agree with Rawls's novel suggestion (1) that we should examine human rights' actual role

¹ Ira Katznelson, "At the Court of Chaos: Political Science in an Age of Perpetual Fear. APSA Presidential Address" in *Perspectives on Politics*, (5)(2007), pp. 3-15.

in the international arena and (2) that the justification for interference in states' autonomy is the main purpose of human rights. It is a more appropriate point of departure to justify human rights in a pluralistic world. However, I argued that Rawls's institutional conception of human rights suffers from substantial problems that my fear-inspired scheme can solve.

Firstly, I argued that *The Law of Peoples* aims to elaborate a global conception of political justice that all well-ordered people can reasonably be expected to endorse. However, his justificatory strategy cannot ground human rights successfully without a cosmopolitan moral ground that Rawls initially avoids. I defended the view that the nature and the function of human rights in international practice can be grounded on Shklar's moral psychology of personhood. It is a moral intuition of fear that mediates between human rights and political legitimacy and that provides a cosmopolitan moral ground for the justification of human rights. The Rawlsian scheme falls short of presenting a sound argument in this regard.

Second, I argue that Rawlsian methodology makes it very difficult—for two reasons—to establish the universal applicability of human rights: first, Rawls's method fails to convincingly explain why human rights can apply equally to outlaw states (after all, they are not part of the Society of Peoples); and second, Rawls's institutional conception of human rights cannot acknowledge the sufferings attributable to exiles and refugees whose persecutions cannot be recognized or redressed within a national boundary. By analyzing the relationship between sovereignty and human rights after WWII, I argued that respect for the human rights principle should be the *premise* for rather than the *content* of a law of peoples. Each state would not push other states to accept the same package of rights, but all of states have distinct moral duties to ensure that other states comply with their own duties to provide these rights. It would be a reasonable explanation as to why human rights principles can apply to outlaw states even though they are not part of the Society of Peoples. Moreover, inspired by the late Iris Young's social-connection model of

responsibility, I argued that within the international-politics context of multiple dominations and deprivations, the misery of exiles and refugees results not merely from misfortune but from institutions and practices that produce unjust results, as well. We bear responsibility if we all participate in the ongoing schemes of cooperation that result in these unjust outcomes. In line with this fear-inspired human-rights scheme, the victims of structural injustice appeal to us to discharge political responsibility and to engage in actions directed at transforming those structures. These practices can alter our perceptions regarding the line that separates global injustice from mere personal misfortune—an alteration that must take place if victims' voices are to be heard from the very beginning.

Third, I argued that we need to take seriously the perspectives of non-Western cultures if human rights are going to be appropriate as global normative standards for a multicultural world, but Rawls's constructivist approach and Nussbaum's capabilities approach place some substantive constraints on real engagement with non-Western perspectives. Therefore, we need sincere cultural dialogues to provide a public basis for settling the problems of interpretation and implementation. Moreover, I argued that An-Na'im's "cross-cultural dialogue" approach indeed provides a good account of how to take into consideration the views of non-Western cultures. However, owing to the exclusive form of participation in internal and cross-cultural dialogue, his dialogue perspective does not involve a true cross-cultural exchange and, in fact, promotes a uni-directional approach to intellectual efforts rather than a multi-directional approach that might establish common ground. I argued that an approach should open itself wholly to the voices from people who lack strong representation at the center of political theorizing. From my bottom-up approach, we need to make marginalized people and marginalized structures visible, and victims' voices should be heard first during cultural dialogue. Thus, the reasonable test of the political legitimacy of human rights is whether or not the human rights begin with the powerless: a human-rights scheme that privileges powerful elites fails the test.

Finally, I argue that Rawl's human rights proper can be expansive for reasons that are internal to his political constructivism. A decent society not only protects basic human rights to subsistence and personal security, but also secures for all of its members the opportunity to choose, change, and govern their own institutions, although not all decent societies will necessarily fulfill these conditions within the framework of liberal democracy. Therefore, a decent society is one that fulfills the minimal conditions within which a government can be said to be sincerely acting on behalf of its people. A decent society fulfills the minimal condition of legitimacy, which contains the requirements of participation, representation and accountability. In this regard, well-ordered societies must guarantee many *specific* political rights that are peculiar to a given society and that will flesh out the *basic* rights. A society that, being a member in good standing in the Society of Peoples, thus treats its people well, protects both universal basic rights and specific rights peculiar to that society, and is sovereign in the sense of being immune from outside interference.

7.2 Universalism with Humility

According to my fear-based human-rights scheme, the UDHR is a practical assertion of specific responses to the most terrifying tragedy of this century and, thus, protects rights that were under great threat during the immediate post-WWII period. The UDHR expresses an aversion to the greatest evils of human experience. Facing terrifying tragedies, the language of human rights has most powerfully symbolized changes that would amplify the voices of the weak. Human rights are not the norms that characterize all cultural traditions or all religious doctrines, but it is our choice to endow them with universal applicability. The legitimacy of human rights norms acquires additional strength when the people who craft these norms are victims themselves from within their own cultures. These victims have recognized that human rights are important instruments of empowerment in

the victims' own—and, therefore, in all persons' and all peoples'—struggles against oppression.

However, there remains no global consensus on the universality of human rights. The charge of ethnocentrism and of cultural imperialism arises all the time. If a truly global consensus on human rights norms cannot come to pass, the enforcement of the existing international human-rights system would suffer grievously, and as a consequence, more and more peoples around the world would increasingly call into question the political legitimacy of human-rights talk, human-rights covenants, and human-rights movements.

In this regard, we need to engage in a cross-cultural dialogue. Making the matter of human rights a *public* matter can yield a universal test for human rights norms by opening up those norms to the critical scrutiny of the international community. Any human-rights orientation that all human beings do not genuinely support is likely to provoke widespread skepticism. Publicity, by exposing violations, can play a manifest role in compliance. However, we should know that even good intentions can result in bad outcomes. We need to acknowledge that both the study of and the advocacy for the oppressed must derive chiefly from the oppressed themselves. Thus, we should be careful not to assume that we—the elites of society—always know better than those people who are direct victims of the bulk of societies' oppression. In order to avoid taking up a potentially counter-productive civilizing mission in the name of victims, we need to help make marginalized peoples and marginalized structures visible, and to allow victims' voices to be heard directly. Accordingly, we need to listen receptively to each other from “a stance of moral humility” in order to understand other perspectives before criticizing them or taking actions. As I see it, this approach is the best way to understand human rights that are consistent with pluralistic institutions embedded in divergent cultures and that, at the same time, possess universal applicability.

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