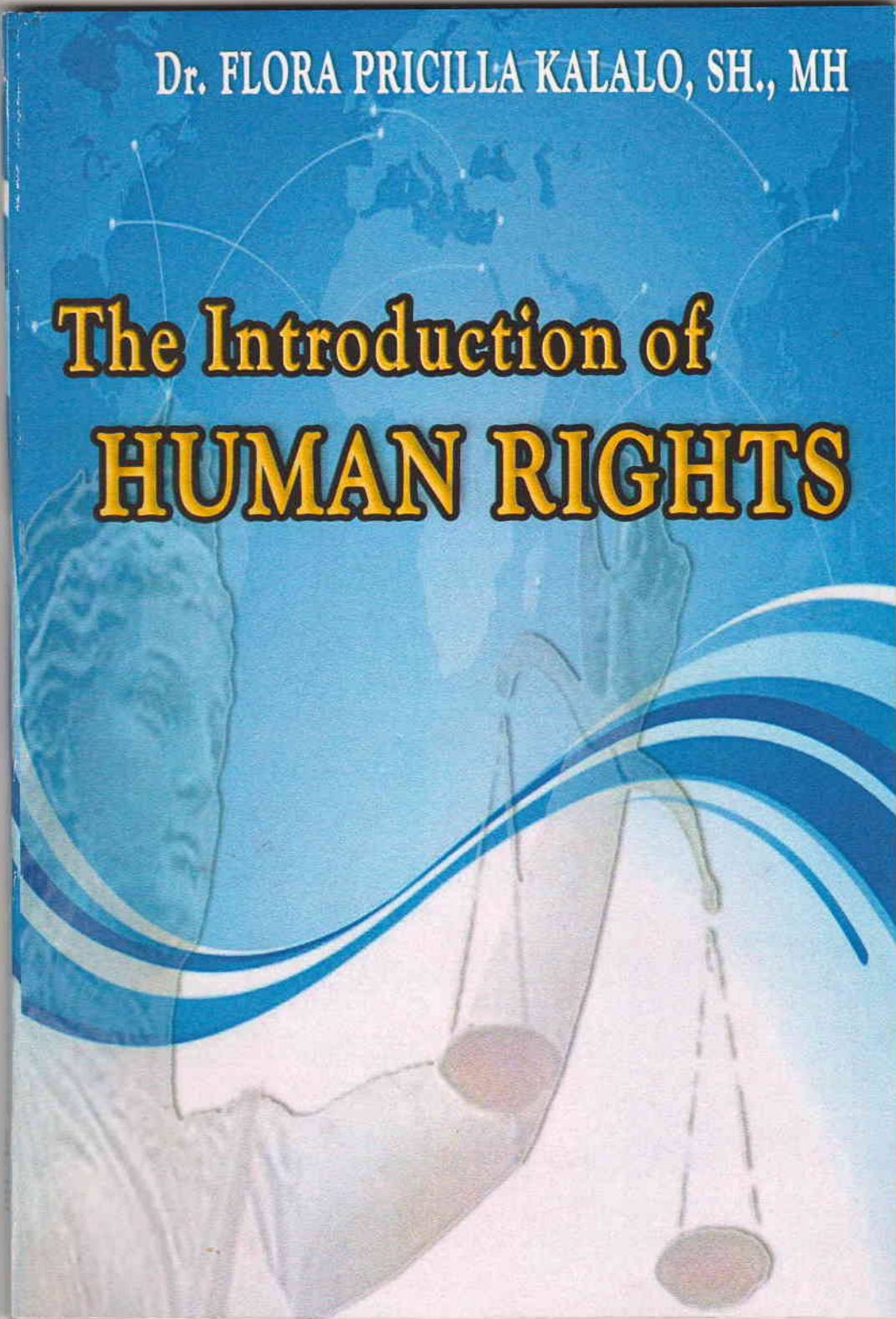


Dr. FLORA PRICILLA KALALO, SH., MH

**The Introduction of
HUMAN RIGHTS**





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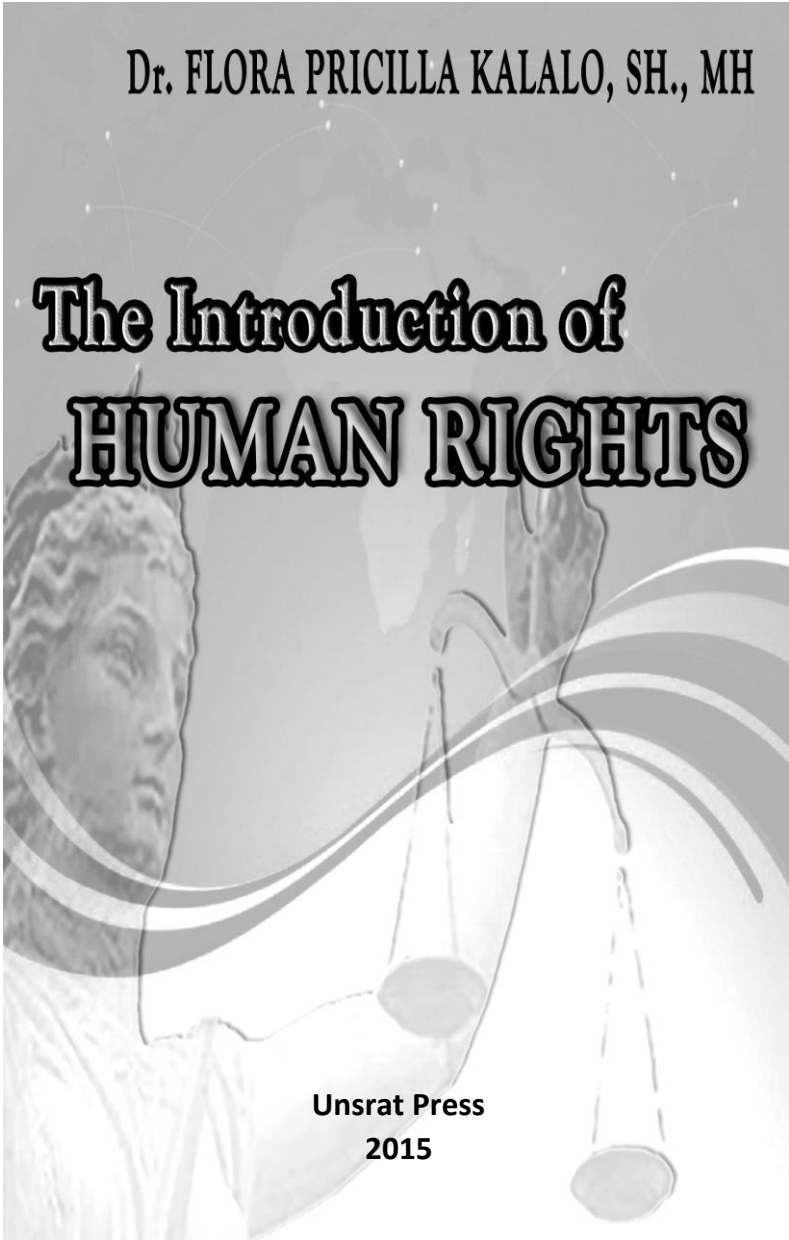
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PREFACE

How many knowledge concerning about Human Right that earned to give some knowledge especially in Law area? To the number of information through book which have published however only have the character of the just partial to study and deepen the Law in placing base of Human Right as knowledge base.

Therefore this book have initiative to realize some articles for concerning of Human Rights to be good for upon which reference as well as guidance to comprehend and deepen the science study Law.

Praise and thank to Almighty God for finishing this knowledge in the form of book. To the number of insufficiency in good compilation through language, editing and also formation fill of the book, this matter represent our insufficiency as writer. I will dedicate to my colleagues in Faculty of Law and to my husband Michiel Pangemanan, my children Alventura Bernard Pangemanan, Arcelinocent Emile Pangemanan, Astikahilda Maria Pangemanan, Feibry Lumunon and my grandson Alveyro Xaverius Maldini Pangemanan.

Hopefully this book can become the complement and to develop the knowledge in the field of Law. Criticism and Suggestion are needed for us to be repairable in derivative edition here in after.

Manado, December2015

Dr. Flora Pricilla Kalalo, SH., MH.

LIST OF CONTENT

I. Introduction	1
II. The Historical Origins of Human Rights	3
III. The Motivation of Human Rights	16
IV. Challenges to the Universality and Inalienability Of Human Rights	20
V. The Theoretical Foundation of Human Rights	30
VI. Who Holds Human Rights	45
VII. What are the `Rights' in Human Rights	53
VIII. Conclusion	67
References	69

I. INTRODUCTION

Human rights are almost a form of religion in today's world. They are the great ethical yardstick that is used to measure a government's treatment of its people. A broad consensus has emerged in the twentieth century on rhetoric that frames judgment of nations against an international moral code prescribing certain benefits and treatment for all humans simply because they are human. Within many nation political debates rage over the denial or abuse of human rights. Even in prosperous, democratic countries like Canada much public discourse is phrased in the rhetoric of rights.

Legal documents to protect human rights have proliferated in Canada, culminating in the 1982 entrenchment of the Charter of Rights in the Constitution. Especially since the advent of the Charter, many Canadians have claimed that particular benefits they desire are a matter of human rights and must be provided. Indeed, the claim that the desired benefit is a human right is often meant to undercut any opposition as unprincipled or even immoral.

Lost in much of the discussion is any justification for the high moral ground occupied by human rights. Most political activists and commentators are content just to look at the United Nations' ever-growing body of human rights agreements as proof that these rights exist universally and therefore have to be respected by everyone. Domestic human rights legislation represents the local implementation of internationally-recognized rights that are universal and inalienable. Unfortunately, human rights are far more complicated phenomena than that.

Any inquiry into the origin, nature, and content of human rights reveals tremendous conceptual hurdles that need to be overcome before one can accept their pre-eminent authority.

Indeed, many argue that the problems encountered in this analysis demonstrate that human "rights" are a misnomer, and that the rhetoric of human rights is really a description of ideals – and a controversial set of ideals at that.

II. THE HISTORICAL ORIGINS OF HUMAN RIGHTS

Human rights are a product of a philosophical debate that has raged for over two thousand years within the European societies and their colonial descendants. This argument has focused on a search for moral standards of political organization and behavior that is independent of the contemporary society.

In other words, many people have been unsatisfied with the notion that what is right or good is simply what a particular society or ruling elite feels is right or good at any given time. This unease has led to a quest for enduring moral imperatives that bind societies and their rulers over time and from place to place. Fierce debates raged among political philosophers as these issues were argued through. While a path was paved by successive thinkers that lead to contemporary human rights, a second lane was laid down at the same time by those who resisted this direction.

The emergence of human rights from the natural rights tradition did not come without opposition, as some

argued that rights could only come from the law of a particular society and could not come from any natural or inherent source. The essence of this debate continues today from seeds sown by previous generations of philosophers.

The earliest direct precursor to human rights might be found in the notions of 'natural right' developed by classical Greek philosophers, such as Aristotle, but this concept was more fully developed by Thomas Aquinas in his *Summa Theological*. For several centuries Aquinas' conception held sway: there were goods or behaviors that were naturally right (or wrong) because God ordained it so. What was naturally right could be ascertained by humans by 'right reason' - thinking properly.

Hugo Grotius further expanded on this notion in *De jure belli et pacis*, where he propounded the immutability of what is naturally right and wrong: now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. Thus two and

two must make four, nor is it possible otherwise; nor, again, can what is really evil not be evil.¹

The moral authority of natural right was assured because it had divine authorship. In effect, God decided what limits should be placed on the human political activity. But the long-term difficulty for this train of political thought lay precisely in its religious foundations.

As the reformation caught on and ecclesiastical authority was shaken and challenged by rationalism, political philosophers argued for new bases of natural right.

Thomas Hobbes posed the first major assault in 1651 on the divine basis of natural right by describing a State of Nature in which God did not seem to play any role. Perhaps more importantly, however, Hobbes also made a crucial leap from 'natural right' to 'a natural right'. In other words, there was no longer just a list of behavior that was naturally right or wrong; Hobbes added that there could be some claim or

¹Hugo Grotius, *The Law of War and Peace*, The Library of Alexandria, 1625. p.22

entitlement which was derived from nature. In Hobbes' view, this natural right was one of self-preservation.

Further reinforcement of natural rights came with Immanuel Kant's writings later in the 17th century that reacted to Hobbes' work. In his view, the congregation of humans into a state-structured society resulted from a rational need for protection from each other's violence that would be found in a state of nature. However, the fundamental requirements of morality required that each treat another according to universal principles. Kant's political doctrine was derived from his moral philosophy, and as such he argued that a state had to be organized through the imposition of, and obedience to, laws that applied universally; nevertheless, these laws should respect the equality, freedom, and autonomy of the citizens.

In this way Kant prescribed that basic rights were necessary for civil society: a true system of politics cannot therefore take a single step without first paying tribute to

morality...The rights of man must be held sacred, however great a sacrifice the ruling power must make.²

However, the divine basis of natural right was still pursued for more than a century after Hobbes published his *Leviathan*. John Locke wrote a strong defense of natural rights in the late 17th century with the publication of his *Two Treatises on Government*, but his arguments were filled with references to what God had ordained or given to mankind.

Locke had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and France's Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789. The French declaration proclaimed 17 rights as "the natural, inalienable and sacred rights of man".

The French Declaration of Rights immediately galvanized political writers in England and provoked two scathing attacks on its notion of natural rights. Jeremy

²Immanuel Kant, "Perpetual Peace," in Hans Reiss (ed.), *Kant: Political Writings*, 2nd.ed., Cambridge: Cambridge University Press, 1991, p.125. Note, however, that Kant did not believe that the citizenry could revolt against the sovereign for a misuse of power; thus, the rights of mankind in a Kantian society would lack the ultimate in political enforcement.

Bentham's clause-by-clause critique of the Declaration, entitled *Anarchical Fallacies*, argued vehemently that there can be no natural rights, since rights are created by the law of a society: *Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come *imaginary* rights, a bastard brood of monsters, 'gorgons and chimeras dire'.³

Natural rights are simple nonsense: natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts.⁴ Edmund Burke also wrote a stinging attack on the French Declaration's assertion of natural rights, in which he argued that rights were those benefits won within each society.⁵ The rights held by the English and French were

³Jeremy Bentham, "Anarchical Fallacies; being an examination of the Declaration of Rights issues during the French Revolution", in Jeremy Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, New York: Methuen, 1987, p.69.

⁴Jeremy Bentham, p.53.

⁵Edmund Burke, *Reflections on the Revolution in France*, James Dodsley, Pall Mall, London, 1790.

different, since they were the product of different political struggles through history.

Soon after the attacks on the French Declaration, Thomas Paine wrote a defense of the conception of natural rights and their connection to the rights of a particular society. In *The Rights of Man*, published in two parts in 1791 and 1792, Paine made a distinction between *natural* rights and *civil* rights, but he continued to see a necessary connection: Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others.

Civil rights are those which appertain to man in right of being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in

all cases, sufficiently competent. Of this kind are all those which relate to security and protection.⁶

This passage reflects another, earlier inspiration for human rights from the social contract views of writers such as Jean-Jacques Rousseau, who argued that people agree to live in common if society protects them. Indeed, the purpose of the state is to protect those rights that individuals cannot defend on their own.

Rousseau had set the ground for Paine decades earlier with his *Social Contract*, in which he not only lambasted attempts to tie religion to the foundations of political order but disentangled the rights of a society from natural rights. In Rousseau's view, the rights in a civil society are hallowed: "But the social order is a sacred right which serves as a basis for other rights. And as it is not a natural right, it must be one founded on covenants."⁷ Rousseau then elaborated a

⁶Thomas Paine, *The Rights of Man*, New York: Penguin Books, 1985, p.68.

⁷Jean-Jacques Rousseau, *The Social Contract*, Maurice Cranston (trans.), Baltimore: Penguin, 1968, p.50. For Rousseau's views of the connection between religion and the state, see: Book IV, ch.8

number of rights of citizens and limits on the sovereign's power.

The debate in the late eighteenth century has left telling traces. Controversy continues to swirl over the question whether rights are creations of particular societies or independent of them. Modern theorists have developed a notion of natural rights that does not draw its source or inspiration from a divine ordering.

The ground work for this secular natural rights trend was laid by Paine and even Rousseau. In its place has arisen a variety of theories that are humanist and rationalist; the 'natural' element is determined from the prerequisites of human society which are said to be rationally ascertainable. Thus there are constant criteria which can be identified for peaceful governance and the development of human society. But problems can develop for this school of thought when notions of a social contract are said to underlie the society from which rights are deduced.

Contemporary notions of human rights draw very deeply from this natural rights tradition. In a further

extension of the natural rights tradition, human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.

However, a persistent opposition to this view builds on the criticisms of Burke and Bentham, and even from the contrarian views of Rousseau's image of civil society. In this perspective rights do not exist independently of human endeavor; they can only be created by human action. Rights are viewed as the product a particular society and its legal system.

In this vein, Karl Marx also left a legacy of opposition to rights that hindered socialist thinkers from accommodating rights within their theories of society. Marx denounced rights as a fabrication of bourgeois society, in which the individual was divorced from his or her society; rights were needed in capitalist states in order to provide protection from the state. In the Marxist view of society, an individual is essentially a product of society and, ideally,

should not be seen in an antagonistic relationship where rights are needed.⁸ However, many socialists have come to accept certain conceptions of rights in the late twentieth century.⁹

Thus, the history of political philosophy has been one of several centuries of debate. The child of natural rights philosophers, human rights, has come to hold a powerful place in contemporary political consciousness. However, neither preponderant belief in, nor even a consensus of support for human rights do not answer the concerns raised by the earlier thinkers - are rights truly the product of a particular vision and laws of a society? Or, are human rights so inherent in humanness that their origins and foundations are incontestable?

A further difficulty, with profound implications, those human rights theories have to overcome is their emergence

⁸See Karl Marx, "On the Jewish Question", Jeremy Waldron (ed.), *Nonsense Upon Stilts*.

⁹For a full discussion see: Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, London: Routledge and Kegan Paul, 1983.

from these Western political traditions. Not only are they a product of European natural rights, but the particular rights that are viewed as 'natural' have been profoundly shaped by the liberalism that emerged in the 19th and 20th centuries. With human rights, the rhetorical framework of the natural rights tradition has come to serve as a vehicle for the values of Western liberalism.

An easy and powerful criticism is that human rights cannot be universal. In their basic concept they are a Western creation, based on the European tradition that individuals are separable from their society. But one may question whether these rights can apply to collectivist or communitarian societies that view the individual as an indivisible element of the whole society. Westerners, and many others, have come to place a high value on each individual human, but this is not a value judgment that is universal. There is substantive disagreement on the extent of, or even the need for, any protection of individuals against their society.

In addition to this problem with the concept itself, there are strong objections to the manner in which human

rights have been conceptualized. Many lists of human rights read like specifications for liberal democracy. A variety of traditional societies can be found in the world that operate harmoniously, but are not based on equality let alone universal suffrage.

A question that will recur in later discussions is whether the 'human rights' advocated today are really *civil* rights that pertain to a particular - liberal - conception of society. To a large extent, the resolution of this issue depends upon the ultimate goal of human rights. If human rights are really surrogate liberalism, then it will be next to impossible to argue their inherent authority over competing political values. In order for human rights to enjoy universal legitimacy they must have a basis that survives charges of ideological imperialism. Human rights must have a universally acceptable basis in order for there to be any substantial measure of compliance.

III. THE MOTIVATION OF HUMAN RIGHTS

Some understanding about the nature of human rights can be gleaned from the various reasons that can be advanced for holding them. A prime concern is to offer protection from tyrannical and authoritarian calculations.

Capricious or repressive measures of an autocratic government may be constrained with the recognition of supreme moral limits on any government's freedom of action. But even among governments that are genuinely limited by moral considerations, there may still be a need to shield the populace from utilitarian decision-making. The greater good of the whole society may lead to sacrifice or exploitation of minority interests. Or, the provision of important benefits within the society may be limited by calculations that public resources should be spent on other enterprises.

The attraction of human rights is that they are often thought to exist beyond the determination of specific

societies. Thus, they set a universal standard that can be used to judge any society. Human rights provide an acceptable bench mark with which individuals or governments from one part of the world may criticize the norms followed by other governments or cultures. With an acceptance of human rights, Moslems, Hindus, Christians, capitalists, socialists, democracies, or tribal oligarchies may all legitimately censure each other. This criticism across religious, political, and economic divides gains its legitimacy because human rights are said to enshrine universal moral standards. Without fully universal human rights, one is left simply trying to assert that one's own way of thinking is better than somebody else's.

The prime rhetorical benefit of human rights is that they are viewed as being so basic and so fundamental to human existence that they should trump any other consideration. Just as Dworkin has argued that any conception of 'rights' trumps other claims within a society,

human rights may be of a higher order that supersedes even other rights claims within a society.¹⁰

Other motivations for human rights may stem from a fear of the consequences of denying their existence. Because of the currency given human rights in contemporary political debate, there is a danger that such a denial will provide support for brutal regimes that defend their repression on the grounds that international human rights norms are simply a fanciful creation that has no universal authority.

The United Nations conference on human rights held in Vienna in 1993 saw some of the world's most repressive governments making precisely this argument, and few people would wish to provide further justification for this position. In addition, a great deal of political advocacy relies on human rights rhetoric to provide a legitimating moral force. Without the appeal to human rights, democratic champions would have to argue the desirability of values such as equality and freedom of speech across the often incomparable

¹⁰Ronald Dworkin, "*Rights as Trumps*" Stanford : Stanford Law Books, 2013

circumstances of the world's societies, rather than asserting that such benefits just inherently flow from human existence.¹¹

¹¹Douglas Husak, "*The Motivation for Human Rights*", (1985) 11 *Social Theory and Practice*, 249-255. If rights are not inherent to all humans, there is also a fear that non-person humans - such as the comatose - will not be protected from ill-treatment. For a discussion of these points see: Douglas N. Husak, "Why there are no Human Rights", (1984) 10 *Social Theory and Practice*, 125-141.

IV. CHALLENGES TO THE UNIVERSALITY AND INALIENABILITY OF HUMAN RIGHTS

Unfortunately, the very motivations and benefits of human rights pose direct challenges to their existence. Human rights are *universal* since they are said to belong to all humans in every society. Human rights are also supposed to be *inalienable*; because they flow from and protect human existence, they cannot be taken away without endangering the value of that existence. However, these universal and inalienable qualities of human rights are disputable in both their conception and operation.

To some extent, the universality of human rights depends upon their genesis. Moral standards, such as human rights, can come into being in two manners. They may simply be invented by people, or they may only need to be revealed to, or discovered by, humans. If human rights are simply an invention, then it is rather difficult to argue that every society and government should be bound by something they disagree with. If human rights have some existence

independent of human creation, however, then it is easier to assert their universality. But such independent moral standards may arise in only two ways: if they are created by God, or if they are inherent in the nature of humankind or human society.

Unfortunately, both these routes pose substantive pitfalls. No divine origin for universal human rights would be acceptable, nor is it often advanced, since there is no one God that is recognized universally; just because Christians or Moslems claim that their divinity has ordained and proscribed certain treatment of humans does not provide the legitimacy needed for that moral code to bind devotees of another religion.

The alternative origin that could justify universality would be the acceptance of human rights as natural rights that anyone could deduce from the nature of humankind or human society. However, an atheistic critique of divine moral standards is just as telling when applied to rights derived from human nature.

The God or human nature that is said to be the source of human rights may be nothing more than an invention of the human mind, an invention that may vary according to whoever is reflecting on the issue. A less astringent argument is still just as damning. Even if one accepts that there is a God or a core human nature, there is no definitive way to sort out differing visions that people have of God or human nature.

The universal authority of any particular view is initially endorsed only by the adherents of that view. Nevertheless it is possible for human rights to have their genesis in religion or the prerequisites of human society. Even if human rights start within a specific religious or societal tradition, they could acquire universality as other people come to agree. It is also possible for human rights to become globally recognized because several different approaches may reach the same conclusion. For instance, atheistic natural rights theorists, Christians, and Muslims, may all eventually agree for quite different reasons on a number of ways in which people should be treated; these then can form the basis of human rights standards.

However, the different paths to that agreement only lead to an agreement on the benefits, not necessarily on their origin, justification, or application. The differences become important when one moves from a focus on the benefits identified as "human rights" to their practical operation; there is, as will be discussed below, a great difference between a duty-based and claim-based fulfillment of the benefits.

Another set of problems arise if human rights are creations, pure and simple, of the human intellect. Human rights standards could be created in a variety of ways. In one method, a gradual growth of consensus builds around norms of behavior that eventually acquire an obligatory character. It may be difficult to trace the epistemological origins of this consensus, but the end result is a broad base of agreement that human beings should be treated in certain ways.

In another method, there may be a conscious attempt to create binding rules of behavior in a more contrarian manner. A certain group of individuals or state governments may lead the development of international agreements on

human rights. And, as more states join in these agreements, the moral and legal force of the international accords becomes stronger and stronger. Essentially this is the course that has been followed in the development of the human rights documents created by the United Nations and other regional international organizations.

In both these approaches to the creation of human rights, the motivation may be principled or consequentiality. If principled, human rights are necessary because they reflect certain moral standards of how humans should be treated. If consequentiality, human rights are needed because they standards may prevent the awful repercussions of having no limits on the manner in which governments or groups may treat other human beings.

Beyond the genesis of human rights, wherever they come from, lies a fundamental challenge to their universality, regardless of their origin. With any inception of human rights, one is faced with having to acquire acceptance of their authority. There is a problem in that not everyone will share the same motivation or inspiration for human rights. Not

everyone will agree that everything asserted as a human right is indeed one. At a very basic level, the proclamation and acceptance of human rights norms inherently involves majoritarian morality.

Human rights are agreed to exist because a majority says they do. Specific goods and benefits are treated as human rights because a majority says they do. But, what of the minorities who object to the concept of universal human rights, or disagree with the particular entitlements to be included in lists of human rights? Why should they be bound by what others believe? What happens when a minority sincerely believes that some benefit being deliberately denied them by the majority is a matter that they view as a human right? In many specific human rights contexts, a problem of moral majority assumes central importance.

With either an invented or natural genesis, human rights are meant to protect some aspect of humanity. Human rights may be those entitlements that we have by virtue of being human, but there are real difficulties in determining

which attributes of human life require protection under human rights standards.

Basic human traits are determined by both physical attributes and the activities undertaken by a human. The most obvious physical qualities encompass gender, race, size, shape, and health - including disabilities. Among human activities, one can distinguish between those necessary for sustaining life and those which fill that life. The requirements for sustaining life include nourishment, shelter, clothing, and sleep.

Proper health care is needed for human life to be sustained in the long term. And the human species can only survive with procreation. But most humans do not merely exist; they fill their lives with myriad activities. Perhaps the most important activity is that which is usually referred to in order to distinguish humans from all other animals: humans have a creative imagination that provides higher forms of thought that lead to intellectual inquiry and spirituality.

Humans also communicate constantly the results of their thinking. Physical movement from one place to another

is another continuous activity of all but the most disabled humans. Human beings are in essence very social animals and much of our activities take place through associating with other humans. In some instances this association is the special intimacy of kinship or close friendships. In others, humans act gregariously with acquaintances and many perfect strangers.

The consequences of this gregariousness furnish the underlying problems of establishing universality in the human attributes described above. Most humans live within readily identifiable social units, such as family, tribal, or national groups, that fundamentally shape the manner in which an individual's most basic characteristics are manifested. These social groupings determine what languages one learns to speak, the style of dress, acceptable foods, religion, form of communication and etiquette, sense of physical beauty and ugliness, the kind of shelter, and the notion of division of roles within one's social groupings. These are not simply superficial differences.

While some individuals willingly adopt new life styles, many believe that their lives can only be satisfying by maintaining their traditional ways. For some, indeed, styles of dress, food, and behavior are inextricably linked to deep religious beliefs. One group's delicacies or even staples may be quite unacceptable to others. There may be just disdain or revulsion, such as the reaction of many people to eating raw fish, or there may be a strong, religious offence taken to certain foods, such as offering pork to Moslems or beef to Hindus.

Thus, many profound differences emerge among human beings that are the product of where they were born and with whom they grew up. While one could identify various qualities of human life that are universal, there is tremendous variation in the manner in which those qualities are realized.

These acquired societal values pose difficulties when they define, or even conflict with, the basic attributes of human life listed earlier. Individual societies develop particular conceptions of what constitutes a dignified life, the

essential needs of humans, as well as the relationship between individuals and their community. Particularly complex issues arise when there is a clash between conflicting spiritual and temporal values within or between societies.

These difficulties come to the forefront when one tries to ascertain whether global standards can be set by human rights on the treatment that must be given to all human beings.

V. THE THEORETICAL FOUNDATION OF HUMANRIGHTS

Several competing bases have been asserted for universal human rights. It is essential to understand these various foundations, since they can result in quite different understandings of the specific benefits protected by human rights. As well, each approach to human rights has different strengths and vulnerabilities in facing the challenges posed by relativism and utilitarianism.

Many have argued that human rights exist in order to protect the basic dignity of human life. Indeed, the United Nations Declaration on Human Rights embodies this goal by declaring that human rights flow from "the inherent dignity of the human person". Strong arguments have been made, especially by western liberals, that human rights must be directed to protecting and promoting human dignity.

As Jack Donnelly has written, "We have human rights not to the requisites for health but to those things `needed' for a life of dignity, for a life *worthy* of a human being, a life

that cannot be enjoyed without these rights" (original emphasis).¹² This view is perhaps the most pervasively held, especially among human rights activists; the rhetoric of human-rights disputes most frequently invokes this notion of striving for the dignity that makes human life worth living. The idea of promoting human dignity has considerable appeal, since human life is given a distinctive weight over other animals in most societies precisely because we are capable of cultivating the quality of our lives.

Unfortunately, the promotion of dignity may well provide an unstable foundation for the construction of universal moral standards. The inherent weakness of this approach lies in trying to identify the nature of this dignity. Donnelly unwittingly reveals this shortcoming in expanding upon the deliberate human action that creates human rights. "Human rights represent a social choice of a particular moral vision of human potentiality, which rests on a particular

¹²Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, p.17

substantive account of the minimum requirements of a life of dignity".¹³

Dignity is a very elastic concept and the substance given to it is very much a moral *choice*, and a particular conception of dignity becomes paramount. But, who makes this choice and why should one conception prevail over other views of dignity? Even general rejection of outlandish assertions of dignity may not indicate agreement on a core substance. There might be widespread derision of my assertion that I can only lead a truly dignified life if I am surrounded by 100 doting love-slaves. But a disapproval of the lack of equality in my vision of dignity does not necessarily demonstrate that equality is a universal component of dignity.

While one of the most basic liberal beliefs about human dignity is that all humans are equal, social division and hierarchy play important roles in aspects of Hindu, Confucian, Muslim, and Roman Catholic views of human life. Indeed, 'dignity' is often achieved in these views by striving to fulfill

¹³Donnelly, p.17.

one's particular vocation within an ordered set of roles. But, if human rights are meant to be universal standards, the inherent dignity that is supposed to be protected should be a common vision. Without sufficient commonality, dignity cannot suffice as the ultimate goal of human rights.

An alternative basis for human rights draws from the requisites for human well-being. One advocate of this approach, Allan Gewirth, would agree with Donnelly that human rights are drawn in essence from humankind's moral nature, but Gewirth does not follow Donnelly's conclusion that human rights are a moral vision of human dignity. Rather, Gewirth argues that "agency or action is the common subject of all morality and practice".¹⁴ Human rights are not just a product of morality but protect the basic freedom and well-being necessary for human agency.

Gewirth distinguished between three types of rights that address different levels of well-being. Basic rights safeguard one's subsistence or basic well-being. No

¹⁴Allan Gewirth, "Why There Are Human Rights", (1985) 11 *Social Theory and Practice*, 235-248, at p.235.

subtractive rights maintain the capacity for fulfilling purposive agency, while additive rights provide the requisites for developing one's capabilities - such as education. Gewirth differentiates between these rights because he accepts that humans vary tremendously in their capacity for purposive agency. Through what he calls the principle of proportionality, humans are entitled to those rights that are proportionate to their capacity for agency. Thus, individuals who are comatose only have basic rights to subsistence, since they are incapable of any purposive action.

Gewirth's approach, however, has been strongly criticized by those who argue that human rights cannot be universal if they are derived from one's capacity for agency. Indeed Douglas Husak has used Gewirth's theories to argue that there can be no rights that extend to all human beings.¹⁵Husak makes the crucial distinction between humans and persons, and he points out that some humans may be considered non-persons because they are incapable of ever performing any purposive agency. Even if one accepts

¹⁵Douglas Husak, "Why There Are No Human Rights", (1984) 10 *Social Theory and Practice*, 125-141

Gewirth's rebuttal that all humans are entitled to at least basic rights because they are either prospective or former purposive agents, there still remains in his theory the notion some will find unsettling: not all humans possess all human rights to the same degree (or at all).

Another basis for human rights has been put forward by John O'Manique that is based on evolution and human development.¹⁶O'Manique was motivated by the desire to find a truly universal basis for human rights theories that are not as susceptible, as is dignity, to controversial interpretations or denial by others. Thus, human rights should be founded upon something inherent to humans rather than some moral vision that is created by human action. O'Manique argues that a satisfactory basis may lie in the following set of propositions:

P1 I ought to survive

P2 X is necessary for my survival

¹⁶John O'Manique, "*Universal and Inalienable Human Rights: A Search for Foundations*", (1990) 12 *Human Rights Quarterly* 465-485

P3 Therefore, I ought to do/have X.¹⁷

The real hurdle in this set of propositions lies in finding agreement in P1. The requisites for survival are fairly easily ascertained by scientific inquiry. Thus if there is concordance on the notion *I ought to survive*, then the logical construction of this model produces the conclusion that one ought to have X if it is necessary to survival. O'Manique is on fairly firm ground when he asserts that, "The belief that survival is good is virtually universal".¹⁸

He does concede that there are religious beliefs that hold that a person's life can be sacrificed, but usually this sacrifice is done to further the survival of others. So O'Manique determines, "The exceptions do not 'prove' the rule, but they do point to the strong probability that the belief that survival is good is found, explicitly or implicitly, in almost all human beings".¹⁹

One might add that some value in human survival may be found in any society, since no culture comes to mind that

¹⁷O'Manique, p.473.

¹⁸*Ibid*, p.473.

¹⁹*Ibid*, p.473.

has tolerated unrestricted, recreational homicide. O'Manique also draws from theories of evolution to establish that the goal of humans has to be the survival of the species. So, there would be universal agreement with the statement, "Humans ought to survive". But survival of the group, community, or human species is very different from the survival of each and every particular individual.

O'Manique develops his theory much beyond the notion of survival. Indeed, he explicitly dismisses the idea that the source of human rights lies in the needs for human subsistence. O'Manique wishes to propel human rights into a further plane, by basing human survival upon the full development of human potential. The initial proposition P1 in the model above really becomes "I ought to develop". As O'Manique says, "Human aspirations are not to the maintenance of existence but to the fulfilment of life... If we believe that one ought to survive, it is because we believe that one ought to develop".²⁰

²⁰*Ibid*, p.475.

In O'Manique's vision, human rights would include rights to things needed for subsistence but also go on to cover all aspects of intellectual and emotional development. He tries to limit in some way the range by insisting that the needs for development can be ascertained through research.

However, he also reveals the broad sweep of matters that could be included when he addresses this issue: "The existence of such needs for human development - the need for association with other human beings, for self expression, for some control over one's destiny, and even the need for love and for beauty - can be observed and even empirically confirmed within the social sciences and psychology".²¹O'Manique may well lose some support with this incredibly vast range of issues that he would include within the human rights rubric.

A fundamental difficulty with using the fulfillment of human development as a basis for human rights is that it can have a meaning that is relative to each culture and individual. This relativism even creeps into O'Manique's discussion when

²¹*Ibid*, p.476.

he concludes, "A community and its members will develop to the extent that the members of the community support the development needs of others in the community, *in ways that are appropriate to that community*" (emphasis added).²² Just what is needed for fulfillment in expression, love, or autonomy will be given profoundly different interpretations in Bedouin, German, or Japanese societies.

O'Manique tries to address this aspect of his theory by conceding that the specific entitlements necessary to human development may vary over space and time, but the general grounds for those claims will remain constant.

The final alternative basis for human rights would provide the needs for human existence.²³ Human rights may be limited to providing all humans with the needs for their physical subsistence. But, this subsistence would involve a certain degree of minimal comfort beyond merely keeping one's organs working, because human subsistence also consists of being able to function. Advocates of the other

²²*Ibid*, p.481.

²³A recent needs-based approach to human rights is found in: Johan Galtung, *Human Rights in Another Key*, Cambridge, Mass: Polity Press, 1994.

approaches to human rights have dismissed needs to subsistence as too narrow a foundation, but this criticism may not account for the ramifications that flow from the range of human needs.

Human rights would guarantee the provision of the food, clothing, and shelter without which anyone would perish. In addition, basic health care assures human survival; my grandmother died in 1924 from appendicitis, while I am alive today because an operation was available for my own attack of appendicitis in 1968. Since most households are not simply provided with the requisites to life but buy them with the wages of their labor, one can easily extend the range of human rights into other benefits relating to the work force.

This extension is particularly true if the satisfaction of needs is accomplished not by directly supplying the specific goods needed, but in providing the capacity for individuals to provide for themselves. In a broad socialist view, work should be guaranteed to all that are capable. In a more restricted view, the education necessary to obtaining the work needed to sustain oneself is a human right. Thus, human rights can

cover a large, and very expensive, array of social-welfare programs. Quite a fundamental reformation of most political systems would occur if governments seriously addressed welfare programs as essential human rights.

There are some distinct advantages in basing human rights on the needs of subsistence. The prime benefit lies in universality possible with this foundation that eludes the other approaches to human rights that have been outlined above. One might possibly find a similar consensus on the propositions "Humans should survive", "Humans should develop", "Human should lead a life of dignity (or well-being)". However, there will be much less disagreement over what is meant by, or needed for, 'survival' than one will find for 'dignity', 'well-being', or 'development'.

Human rights based on subsistence can be much more readily applied as global standards. Nevertheless, there is still some concern with variations that will result from different societies' views of the specific ways in which needs should be satisfied. As noted earlier, different cultures have quite diverse notions of what food, dress, or shelter are

acceptable. There are even profound differences in approaches to health care, with some societies rejecting 'western' medicine in favor of spiritually-based theories of ailments and therapies.

There is also a concern that it is just not practical to translate the proposition that humans in general should survive into concrete action to ensure that each and every human being survives. There is a point at which no society can afford to devote the resources needed to keep every individual alive as long as possible.

These four approaches to human rights reflect quite different inspirations and ultimate goals, but there is common ground among them. Theories of human rights based on dignity, well-being, or development all are motivated by a desire to protect and cultivate some quality of life; because one is alive, one should lead a life filled with dignity, well-being, or continuing development.

A view of human rights based on subsistence is ultimately concerned with simply preserving life itself. But this distinction should not ignore an overlap, as a common

ground among all theories of human rights is the assumption that human rights include subsistence rights. Approaches based on dignity, well-being, and development add protections for these qualities of life onto the right to existence, although subsistence rights often seem to be forgotten.

However, the recognition of these common aspects of the four theories of human rights should not lead one to conclude that their differences are simply ones of emphasis. The distinctive focus of each theory results in significant variations in their lists of specific human rights or the kind of activities humans may indulge in. Human rights based on subsistence would not include the range of democratic rights that most liberals argue are an essential element of human rights based on dignity.

Some liberals would argue that a life without dignity may not be a life worth living; so disenfranchised, repressed people - such as Iraqi Kurds - may be justified in an armed rebellion involving deaths but which ultimately brought liberty to the whole population. However, a human rights

approach based on subsistence may require on a non-violent strategy for political change since the preservation of life is the ultimate goal.

In the end, the choice of foundation for human rights may depend upon what one wishes to protect. One may be alarmed that democratic rights or equality may not be included in a human rights approach based on subsistence, in which case a theory based on liberal dignity would be adopted. But consequentialist motivations will not serve as a firm basis upon which to promote human rights among those who do not share one's concerns.

These discussions illustrate that the foundation for human rights may be neither self-evident nor universally accepted. One chooses, explicitly or implicitly a particular justification or basis for human rights, and that choice will have important consequences upon the range of benefits that fall within human rights. Choice pervades human rights from their conception to their delivery, and those choices may well undermine the very foundation of human rights' moral authority

VI. WHO HOLDS HUMAN RIGHTS

Even if there were agreement upon a foundation for human rights, there remains another fundamental question: who can possess human rights? One may simply assert that all humans hold all human rights; after all, human rights are said to be those benefits to which we are entitled simply by being human. But what is meant by being 'human' is vague since the life cycle of Homo sapiens ranges from conception to death and decay.

There is profound controversy over how and when a human acquires and then loses human rights between those two periods. Even before conception, sperm and eggs exist that contains human genetic material. One may decide easily that these are human cells but not 'human beings', because they contain incomplete sets of human genes.

After conception, however, controversies arise about the status of the developing fetus. From a mass of undifferentiated cells, the embryo quickly grows into a

recognizably human entity. Many distinguish fetuses from babies that have emerged from their mothers and say that separate human life only begins with 'birth'.

This can be an arbitrary distinction since a very premature baby is at much the same stage of development whether inside or outside the womb; the differences centre on how a baby receives nutrition and oxygen. One can specify an arbitrary point for the acquisition of rights, such as conception, neural development, viability, or emergence from the womb. But this approach is bound to erupt in controversy, because not everyone will agree on a given point. Abortion is such a divisive issue precisely because various groups hold different beliefs about when human life starts.

Alternatively, one can argue that there is some special quality of human life that provides a basis for possessing rights; when that quality is acquired, so are rights. This approach is favored by many, since it allows for the distinction between humans and other animals.

Human rights are rights particular to human beings, thus the basis of the claim to rights should be something that differentiates humans from other animals. With a sharing of an enormous proportion of genetic material between humans and primates, the distinction is usually drawn on the basis of some quality of human life not shared by other animals rather than physiological characteristics. Specifically human qualities are usually identified from our capacity for intellectual, moral, or spiritual development.

The difficulty with trying to assign rights on the basis of some quality of human life is that not all human beings may possess such an attribute. Douglas Husak has written a poignant critique of the notion of *human* rights based on his objection that some human beings merely exist.²⁴ Some mentally-ill patients lack any basis for purposive agency; they are seemingly unaware of their surroundings, incapable of rationale thought, or unable to distinguish right from wrong.

²⁴Douglas Husak, "Why There Are No Human Rights", (1984) 10 *Social Theory and Practice*, 125-141.

But, his most telling arguments arise from comatose patients, notably those with no known chance for recovery.

Husak distinguishes between humans and persons, and he points out that some humans, such as the comatose, are non-persons. Persons are human beings with capacities beyond mere existence that produce a quality of life. Non-persons simply lack the qualities of life that one wishes either to protect or use as the key to acquiring rights.

The distinction between humans and persons is often used to justify aborting fetuses, because the human fetus is not considered by many to be a person. In the end, Husak argues that the phenomena called human rights are really rights of persons: "There are no *human* rights".²⁵

This debate over the qualification of a human creature to possess human rights is fundamental to a number of topics. The rights of children and the mentally ill may depend greatly upon what foundation one adopts for the possession of rights. Similarly, the existence of rights to life in

²⁵Husak, p.125

abortion, infanticide, and euthanasia are directly related to what status one accords to undeveloped fetuses, mutant newborns, or terminally-comatose adults.

If human rights are justified on some characteristics of the human species, can those rights be held by individual humans who lack these species traits? Some answer this question by distinguishing between possessing rights and exercising them. Thus a healthy child may possess the full range of human rights, but be unable to exercise them, particularly rights of an intellectual nature. Others may find this distinction too convenient an answer and contest the very existence of rights that cannot be exercised by their holders.

Another controversy over the possession of human rights relates to whether they are benefits intended for individual humans, or whether they can also be collective benefits for groups of humans. Some, such as Donnelly, argue that human rights are properly held by only individuals.²⁶ Others contend that human lives are lived within group

²⁶Donnelly, pp.143-51.

settings and the full enjoyment of human life can only be realized when those groups are able to flourish. Whether human rights can include collective rights is a particularly crucial issue in analyzing whether the human rights regime protects a group's culture and language, or a group's right to self-determination.

In Indonesia, the guarantee of human rights becomes part of the constitution of the state and is an important thing to do. The main reasons which is proved that the Republic of Indonesia guarantees human rights for example, acceptance of the rule of law (*rechtstaat*), the enactment of Pancasila as national principle, and the acceptance of the principle of "integralistic state".

The principal of the lawstate which is adapted by the 1945 Constitution is the lawstate in the broad sense or material commonly called welfare state, thus the guarantees for human rights to be part of the positive law in Indonesia automatically

In the 1945 Constitution was not found Pancasila term. However, in terms of material, Pancasila means the

unity of the five precepts contained in opening alinea the 1945 Constitution, in accordance to Presidential Instruction No. 12 year 1968 date April 13, 1968 which is contain an official arrangement that are Belief in the divinity of God, just and civilized humanity, the unity of Indonesia, the democracy led by understanding wisdom among honorable representatives from the parliament house, Social justice for all of the people of Indonesia. From the precepts shows that Pancasila contain and guarantee human rights.

Designers of the 1945 Constitution receives integralistik state concept as asset that is the most suitable considered for Indonesia. In the concept of integralistik state, human life and other people are not apart from other world or other people. Humans and the group are seen as an entity that related each other. Thus, integralistic state must be realized in a spirit of kinship, companionship, and cooperative.

Three reasons above shows that the Republic of Indonesia guarantees and protects human rights, which is one element of a country referred as.²⁷

²⁷ Flora Pricilla Kalalo, *Prinsip Negara Hukum dan Hak Asasi Manusia*, in *Jurnal Hukum Unsrat* Vol. XII/No.4/Okttober-Desember/2007, Laboratorium Hukum Fakultas Hukum Universitas Sam Ratulangi, p 1.

VII. WHAT ARE THE `RIGHTS' IN HUMAN RIGHTS

The nature of human rights is complicated even beyond the controversy over their source or who may hold them. A critical debate continues over what is meant by human *rights*. The universality and inalienability of a human right depends to a large extent on the character of the `right' involved.

It is necessary first of all to distinguish between the adjectival use of the word `right', which means good or proper, from the substantive `a right', which is a special, possessable benefit. Not everything which is right (good) is a right, although many people mistakenly inflate the concept of a right by asserting benefits they believe are `right' to be `rights'.

This confusion has become evident in the assertion of what are known as `second-generation human rights' - such as the right to economic development and prosperity - and `third generation human rights' - which cover the rights to

world peace and a clean environment. While some human rights advocates accept the inclusion of these benefits as rights, others argue that prosperity and peace are 'right' but not substantive rights.

Even with the substantive term 'a right', however, there are several different meanings. In 1919, Wesley Hohfeld laid down a useful set of four distinctive connotations that can be given to the phrase "A has a right to X".²⁸ Perhaps the most common meaning given to this phrase conveys the notion of a *claim-right*. It is a claim that A has against a correlative duty of another, B; A has a right to X, and B has a duty to let A have or do X. The duty B has may be positive, in the sense that action is required on B's part to allow A to enjoy X; if A has a right to health care; B has a duty to provide it.

There may also be a negative duty, in the sense of B having to refrain from interfering in A's possession of benefit

²⁸Wesley N. Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, (New Haven: Yale University Press, 1919). For a clear summary of this work see Jeremy Waldron, *Theories of Rights*, (New York: Oxford University Press, 1984), pp.6-10

X; if A has a right to privacy, B must refrain from prying in A's affairs. It is important to note that the duty may be owed by a particular person or official, or the duty may generally lie in the whole community. The essential characteristic of a claim-right is the inherent connection between A's claim to a benefit and B's duty - A can make a claim that B must perform the duty.

However, there are other connotations of the phrase 'A has a right to X' that do not involve a corresponding duty on another's part. The term may mean that A has a *liberty* with respect to X. In this view, A has no obligation not to do or have X, which may be different from the status of other people. Also, A can make no claim against another, because no-one else has a duty with respect to A's enjoyment of X. A liberty may be enjoyed by all, such as the right to wear what one pleases while doing household chores.

A subset of liberty is *privilege*, because A may have no duty not to do X but others do. For instance, in some English colleges the dons have a right to walk across the grass in the quadrangle, although others must use the pathways instead.

In any liberty there is no duty on anyone to provide the X involved; i.e., no-one has a duty to provide the lawns simply for the dons to walk upon.

To say that 'A has a right to X' may also indicate that A has a *power* to effect changes in X. Thus an owner of a bicycle has the right to sell it, and a customs officer has the right to confiscate property or detain people at the border.

Hohfeld's fourth interpretation of 'A has a right to X' conveys the notion that A has an *immunity* that B is unable to change. Thus, MP's have a right to free speech that protects them from prosecution for speeches given in the House of Commons, and it is a right which cannot be changed by the executive, police, or courts.

There are other uses of 'having a right' that should be added to those identified by Hohfeld, because these other uses refer to ideals, needs, or wants that are simply expressed as rights. The confusion between adjectival and substantive right has led to the frequent use of rights to describe ideals. Thus, the rights to prosperity and peace are ideals or goals to strive for that some express as rights.

Confusion arises when people assert a right to a benefit because it fills a need. But, not all needs are rights; I may need a car to drive to work in, but few would agree that I have a right to a car. Finally, many confuse benefits they want with benefits they have a right to; free, post-secondary education and complete bursaries may be desirable, but are not viewed as rights by many.

These uses of rights also involve confusion between making a claim and having a right.²⁹ One does not hold a right simply because one claim so, neither is it necessary to make claims in order to possess rights. It is not the act of claiming that creates rights. Thus, the claim to a right to prosperity or world peace does not establish that those benefits exist as rights. Neither does the fact that someone satisfies another's claim confirm a right's existence; a beggar may claim a right to \$5 from a businessman, who may give the money, but that does not establish the beggar's right to it.

²⁹For a discussion of the relationship between claims and rights see Alan R. White, *Rights*, (Oxford: Oxford University Press, 1984), pp.115-132.

It is important also to note that one may benefit from another's duty, without having a right to that benefit. Christians may believe that they have a duty to give money to charity, but that does not mean that charities have a right to Christians' money.

These different notions of 'right' are important to bear in mind when discussing human rights. The most common interpretation given to the 'right' in human rights is that of claim-rights. There is a defined benefit to which individuals are entitled, and there is a correlative duty on others in relation to that benefit. This tendency may be partly due to the increasing codification of human rights into legal documents. It is far more efficacious if human rights are conceived of as claim-rights, because those who are deprived of their rights may argue that others (usually their government) must be compelled to fulfill a duty to provide the benefit.

Since much human rights activism centers on the respect for rights contained in international agreements, it is natural for attention to Centre on governments as duty-

holders since they are the entities directly bound by the human rights documents.

If human rights are claim-rights with a correlative duty on some body to provide or safeguard the benefit, however, a major problem arises in identifying that duty-holder. Most often it is assumed that if an individual is being denied some human right, the duty falls on their government to rectify the situation.

A serious difficulty emerges if the correlative duty lies only with an individual's government, however, because the abuse of human rights may occur by private individuals or corporations. For example, tremendous injustices result from the caste system in India because of the way people treat others who belong to a lower caste. In this instance, the actual infringement of human rights is largely perpetrated by individuals rather than the government.

While the government has accepted a responsibility to try and end the practice, caste is so deeply entrenched in Indian society that it has so far proved impossible to stamp out. A further complication arises when a government either

is incapable of providing a benefit protected by human rights - such as the Ethiopian government's inability to provide food during the worst of the famines - or when a government simply fails to respect human rights. If an individual's government is the central duty-holder, then the rest of the world can shake their heads saying 'tut-tut' without feeling any sense of duty to intervene.

Other governments may feel bound to act, but that feeling of obligation may simply come from their own sense of altruism rather than a belief that human rights bind all governments to help if the government most directly responsible fails to fulfill its duties. Another scenario may arise when government leaders believe that a duty to help lies directly with its citizens rather than the government.

Former Premier Van der Zalm of British Columbia argued in the 1980s that it was not his government's responsibility to provide resources to food banks that were struggling with soaring numbers of impoverished individuals. His view was that such acts of charity are best left to private individuals.

One could develop this notion by asserting that every individual owes a duty to help others in their community, and that the government would be eroding this private duty if it intervened; indeed a government should not support food banks, in order to foster a relief effort by the members of the community. Another difficulty arises in those parts of the world where the state structure has dissolved into anarchy, such as occurred in Somalia and Lebanon; where there are no governments, are there no duty-holders.

There is also a strong feminist critique of the idea that governments are the sole duty holders; Gayle Binion argues that non-government actors may be absolved of responsibility or left unimpeded in their ill-treatment of women.³⁰

Complex problems arise because there are many possible duty-holders. If human rights set moral standards for the treatment of all humans, those standards should bind anyone who is capable of infringing those rights - be they

³⁰Gayle Binion, "Human Rights: A Feminist Perspective," (1995) 17 *Human Rights Quarterly* 515-20.

corporations, governments, or other human beings. Thus, the correlative duties involved in human rights as claim-rights are duties that do not necessarily reside solely with an individual's government.

The violation of some human right may be perpetrated by one individual against others, such as an employer who discriminates against a racial group in hiring. Or, a duty to respect human rights may be held by a group within society, such as a religious majority's obligation to tolerate other religious practices. There may be a general duty on the community to act collectively, as with the example of community efforts to run food banks. An individual's own government often has a direct duty, for example, to refrain from arbitrary detention and torture.

On some occasions, many will argue that foreign governments have a duty to intervene; for instance, the Front Line States in southern Africa believed they had some duty to help liberate the black majority from apartheid in South Africa. Finally, there may be a duty that lies with all humanity; such an obligation is often expressed in private, international

relief movements to alleviate suffering among famine victims. Governments may only be intermediary duty-holders who should try and intervene to safeguard human rights from actions by their citizens, but those citizens bear the direct duty to respect the human rights of others.

With any form of rights, but particularly with claim-rights, there are problems that arise with their definition, exercise, and enforcement. There may be conflicting views even on the existence of a particular right. For example, some Islamic governments have denied that there can be freedom of religion because the Koran proclaims that one of the greatest sins for a Muslim is to forsake Islam for another religion.

Even if there is agreement in principle on the existence of a particular right, there may be conflicts over what activities or goods are specifically protected by that right. In Canada, for instance, judges have been divided over whether the freedom of expression includes communications

between prostitutes and their clients.³¹ There can also be profound debate when two or more rights conflict in a given situation.

A continuing problem is posed for women's rights by several religions that stipulate particular roles for women that are subservient to men; in these instances the right to equality conflicts with the freedom of religion. Another difficulty may arise over whether a benefit is really a claim-right, with correlative duties, or some other type of right or claim without corresponding obligations.

For instance, academic freedom may be viewed as either a privilege or a claim-right. If a claim-right is involved, there may still be many questions about who in particular holds a correlative duty, and what type of action is required to satisfy that duty. For example, if there is a right to health care, must it be provided by the government or charities; and, must the health care be provided free of charge.

³¹The Manitoba Court of Appeal held that prostitutes' communications were not included in the freedom of expression embodied in the Canadian Charter of Rights and Freedoms. However, this decision was overturned in the Supreme Court of Canada, where a majority declared that these communications were included in the general right.

A central dilemma revolves around how to settle these questions of enforcement. If human rights operate uniquely in a moral plane, then the definition, acceptance, and respect for rights can involve a controversial, tortuous route. In the end, fulfillment of human rights will depend upon a spirit of consensus and the effect of community opprobrium. Disputes that involve profoundly different value systems, however, may go unresolved. With the codification of human rights into legal documents, one may limit some of the range of debate, but only with institutional structures for adjudicating can there be authoritative resolutions.

Controversial interpretations of human rights are not eliminated with the creation of agencies to enforce human rights.

The record of national courts reveal that judges within the same society can be deeply divided over the definition and enforcement of human rights; for example, almost 31 percent of the Supreme Court of Canada's Charter of Rights decisions between 1983 and 1989 involved dissenting opinions, where one or more judges disagreed completely

with their colleagues on the resolution of the rights issues at stake.³²

Within many societies there are patterns of deference to the judiciary that allows their court's majority view to settle authoritatively most disputes over human rights. However, some societies are so divided that deference is not voluntarily given, such as enforced black acquiescence to the white judiciary in South Africa during the apartheid regime, and the discretionary choices made by judges will not be accepted as final resolutions of rights disputes.

There is an even deeper problem if international institutions are to adjudicate rights disputes that involve societies with very different cultural norms; losing parties may simply not recognize the adjudicators' authority to impose what are seen as alien values. In these circumstances, codified human rights will end up operating on much the same plane as purely moral standards.

³²Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal", (1991) 24 *Canadian Journal of Political Science* 289-307, at p.297

VIII. CONCLUSION

These introductory discussions about the origin and nature of human rights pose significant challenges to their operation as universal standards of behavior. Fundamentally diverging foundations for human rights may be given, that ultimately must rely upon either divine revelation, human reason extrapolating from nature, or deliberate human invention and agreement.

Even if a satisfactory basis for human rights can be constructed, further fundamental challenges emerge to both the 'human' and 'rights' dimensions of human rights. It is not self-evident what it is about humans that generates the moral entitlement to certain benefits, neither is the status clear of those humans who do not share these qualities.

A particular problem is posed by the manner in which these benefits are asserted to be 'rights', since this concept can operate in practical circumstances as a liberty, power, immunity, or claim-right. The locus of any corresponding duty

for a claim-right is no less problematic. Consequently human rights must be examined more closely, because they are at once so important and yet so vulnerable to probing questions about their origin, foundation, substance, and operation.

Canadians, among others, may readily embrace the rhetoric of human rights. But we do need to ask whether these human rights are really *civil rights*, in the sense of belonging to a particular conception of society. By studying the theoretical under-pinning of human rights, as well as their operation in the context of specific practical rights issues, we may come to a fuller appreciation of the extent to which human rights depend upon deliberate (although often obscured) policy choices.

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