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Toward Universality; Human Rights and the Necessity of Natural Law

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## Abstract

### Toward Universality; Human Rights and the Necessity of Natural Law

The central argument of this thesis is that the moral universality of human rights requires a single, universal foundation. First, we must prove that a single foundation is possible. Chapter One argues that it is, and that liberal natural law is the most fitting moral framework in which to secure the universality of human rights. After demonstrating the possibility of a single foundation, we turn our attention to its necessity. This project seeks to show that the consensus theory of human rights – that human rights are universal in reach across myriad, culturally specific foundations – is inadequate in its historic contingency. If we are to take human rights' claim to universality seriously, there must be an appeal to a non-contingent basis.

The merits of a natural law foundation to human rights are numerous. Natural reason as a fundamental moral criterion is not peculiar to any particular culture or time period and as such is an apt measure of international black-letter law. Though natural law does categorically reject cultural relativism, it need not necessitate cultural chauvinism. Rather, human rights as expressions of practical reasonableness can be conceived of as limitations on cultural pluralism, promoting disparate cultural practices insofar as they are in accord with reason. Finally, human rights as an outline of the common good serve as a measure of a regime's legitimacy, specifying when it may be justified for a state to limit individual or collective rights in the name of public order (which itself is reducible to rights-claims).

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## Introduction

Following the atrocities of World War II and adoption of the United Nations Charter in 1945, there has been a rapid proliferation of international human rights law.

After explicit mention in the Charter Preamble, “We the people of the United Nations determined... to reaffirm faith in fundamental human rights,” the UN began

enumerating these rights three years later in the Universal Declaration of Human

Rights (hereafter UDHR). Though not a legally binding treaty, the document has gained significant force in customary law and serves as the foundation of

subsequent international legislation. Together with the International Covenant on

Civil and Political Rights (ICCPR) and the International Covenant on Economic,

Social, and Cultural Rights (ICESCR), the three documents comprise the Universal

Bill of Rights.

So what are human rights, and what do we make of the claim to universality?

There is a short and long answer to this question. The short answer comes from

legal positivism: human rights are those rights codified by international law and

recognized by states party to various international treaties. For the positivist,

human rights are only universal in an international normative sense.<sup>1</sup> The approach

is purely descriptive in nature; it identifies the source of human rights as nothing

more than their existence in the legal sphere. While this answer is not wrong, it is

insufficient. Though the presence of international law is a necessary practical

measure to promote the protection of human rights, it does little to examine their

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<sup>1</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), 1-3. Donnelly makes a prudent distinction between claims to international normative universality and moral universality.

moral clout. This is problematic considering the nature of public international law, which is mostly toothless; with the politicization of the international system and its lack of substantial enforcement mechanisms, human rights transgressions are frequently committed without sanction. Without an appeal to moral authority, states have even less of a reason for compliance and self-application.

While the International Bill of Rights explicates an answer to the descriptive question, it fails to identify where these rights come from. There is a focus on the content of human rights and an eschewal of its bases; we have an answer to the question “what are the particular human rights?” but not to “what makes a right a human right?” and “why ought we to uphold them?” Considering the gravity of the claim to universality, this is problematic. Scholars such as Charles Taylor have argued that an appeal to one universal foundation is difficult and unnecessary, settling instead for culture-specific arguments to foster cultural legitimacy and encourage compliance with human rights norms.<sup>2</sup> While this approach may succeed in the short-term to secure the observance of states in the international system with human rights treaties, it is ultimately insufficient in its contingency. It serves as a convenient but temporary solution to the question of the philosophical foundations of human rights and treats the claim to universality lightly.

This brings us to the long answer, one that necessitates a prescriptive approach to human rights, identifying why these rights ought to be respected and realized apart from their mere existence in international black-letter law. The

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<sup>2</sup> Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, March 1996, <http://www.iilj.org/courses/documents/CharlesTaylor.pdf> (accessed October 20, 2011).

project of supplying a single answer to this question is complex, for before an answer is provided, an objection arises. The argument from cultural relativism – that morality is both socially constructed and culturally relative – problematizes the idea of moral universality. With the vast and often conflicting moralities of peoples of the world, countering this claim is daunting.

There are two possible conceptions of human rights that may solve this discrepancy. The first is to identify a moral consensus on how individuals ought to be treated; we can imagine the disparate moral theories in the world as a multitude of Venn diagrams and look to the overlapping section as containing an answer.<sup>3</sup> The second is to locate a single moral justification that substantiates the claim to universality, irrespective of cultural conformity. The former approach presupposes that there does indeed exist some overlap between the cultural practices of the world, that within it there are no prevailing immoral practices,<sup>4</sup> and that it is substantial enough to provide a meaningful human rights discourse- it is *de facto* universal. The latter approach necessarily condemns those cultural practices in discord with the ideas expounded by the identified moral system, effectively debunking the argument from cultural relativism and bestowing foundational universality to human rights. This is precisely the intention of this thesis.

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<sup>3</sup> Jeremy Waldron, "Dignity, Human Rights, and Torture," *Conversations with History*, interview by Harry Kreisler, April 23 2009 (University of California Berkeley).

<sup>4</sup> If a proponent of the consensus approach were to select norms from the overlapping section of the Venn diagram, any picking and choosing would be entirely arbitrary without imposing a value judgment that would itself be subject to the criticism of relativism. For example, both murder and procreation are practices that occur cross-culturally. To condemn the former and condone the latter requires some sort of justification. Even the most intuitively agreeable rationale would necessarily be an evaluative claim, leading to an infinite regress.

Before grounding human rights in a moral system that will give its claim to universality substance, we must make a distinction between the *class* and *content* of human rights; the class refers to the idea of human rights as a whole without regard to its particular content. Individuals may agree on the universality of the class human rights while disagreeing on its content, the specific rights that the class confers to individuals. The claim of foundational universality must be reserved for the class, not its content, for certain rights are only contingently relevant (for example, individual property rights would be meaningless in a society that did not acknowledge private property).<sup>5</sup>

The first chapter of this thesis locates the human rights discourse within the liberal natural law tradition, arguing for a single, universal foundation for the class of human rights. These rights are requirements of practical reasonableness, the faculty that guides one's pursuit of basic goods and selection of projects. They are outlines of the common good and serve to promote man's flourishing. Though natural law challenges the claim of cultural relativism, it does not preclude cultural pluralism, so long as practices are in accord with reason.

The second chapter questions a purported hierarchy of the content of human rights. It distinguishes between inalienable, non-derogable, and absolute rights, and considers the objection to human rights as excessively individualistic and peculiarly Western. Through an appeal to natural rights as interactively expressing the requirements of justice, it concludes that all generations of human rights are equally

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<sup>5</sup> However, when historically relevant, these rights may very well be universal in reach.

basic as expressions of conditions for flourishing, but concedes that there may be a reasonable prioritization of rights realization.

The third and final chapter considers the Rawlsian idea of human rights as limitations on pluralism. It hypothesizes that Rawls' conception of justice as fairness and its consequent principles of right would be strengthened by an explicit appeal to natural law despite the fact that Rawls deliberately avoided foundationalism. This reading of Rawls challenges the idea of human rights as universal in reach across myriad, culturally specific foundations, instead arguing for the single foundation of natural law. My hypothesis will be put to the test through a case study of the conflicting human right to freedom of religion and the capital offense of apostasy under Shariah law.

The central question this thesis seeks to address is whether human rights do indeed require a single, universal foundation. Obviously, we must first prove that a single foundation is possible; I argue that it is, and that liberal natural law is the most fitting moral framework in which to secure the class of human rights. After establishing the moral foundation of human rights, we turn our attention to its necessity. I aim to demonstrate that consensus theory, though instrumentally valuable in promoting normative agreement on human rights, is best seen as a temporary fix to human rights protection. The inadequacy of mere consensus becomes apparent in examining its historic contingency, particularly with regard to proposals of scriptural reinterpretation to accommodate human rights. It may very well be the case that reconciling the most challenging cultural objections to human rights requires first a consensus on norms before working backward to a

foundational agreement, but this must be viewed as a practical solution, and we must not stop at normative agreement if human rights are to be received as truly universal.

The task at hand is admittedly a daunting one. Considering the vast amount of recent scholarship on human rights foundationalism and cultural relativism, this paper will frequently limit the scope of discussion by making numerous concessions. While in some ways this work only scratches the surface, the overall project is intended to shed some light on the merits of foundationalism and the great amount of cultural diversity a single, universal foundation can promote.

## Chapter One

### The Natural Law Foundation of Human Rights

*Et haec quidem quae jam diximus, locum aliquem haberent etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana.<sup>1</sup>*

Natural law theory, with its historical rejection of cultural relativism and claim to universality, is the most fitting foundation for human rights. This chapter will first provide a very brief history of natural law, serving primarily to contrast the paradigmatic theological Thomist theory of natural law from its modern, liberal namesake. It will then examine the principles of natural law, focusing on the notions of practical reasonableness, the common good, and community. This discussion will briefly turn to the etymology and history of natural rights, which I will argue exist as an outline of the requirements of practical reasonableness. It will then wed the idea of natural and human rights, analyze a rights-grammar that will make intelligible the human rights discourse, and conclude with a discussion of cultural relativism and the international community.

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<sup>1</sup> Hugo Grotius, “De Iure ac Belli et Pacis,” from *Cambridge Texts in the History of Political Thought*, ed. Martin Van Gelderen (Cambridge: Cambridge University Press, 2008), xix. “What we have been saying {the principles of natural law} would be valid even if we were to grant that which cannot be conceded without the highest degree of wickedness, that God does not exist, or that human affairs are not taken care of by him.”



## 1.1 A Brief History of Natural Law

Though many scholars identify Aristotle as the father of natural law, this reading is an anachronism. The misunderstanding has likely arisen due to a conflation of original Aristotelian thought with its Thomist interpretation. Aquinas was in many ways an Aristotelian, but his theory of natural law is incompatible with Aristotle's categorical rejection of universally true principles of right.<sup>2</sup> It is more fitting to turn to the Stoics as the source of the natural law tradition, who held that there is an identifiable order to the universe with which conformity constituted the good.

Stoic ontology and ethics are predicated on a material God. The Stoic God is identified with an "eternal reason, which structures matter in accordance with Its plan."<sup>3</sup> For Cicero, man shared in reason, as it is the first common possession of man and God.<sup>4</sup> The universe is determined by the activity of God's plan that shapes it into particular material manifestations of the elements. *Eudaimonia* for the Stoics requires living in accordance with this nature. Though liberal natural law theory is vastly different from this notion in its rejection of divine providence, Aquinas' paradigmatic theory of natural law as man's participation in the Eternal law is clearly related to Stoicism.

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<sup>2</sup> Mark Murphy, "The Natural Law Tradition in Ethics," *The Stanford Encyclopedia of Philosophy*, Winter 2010 Edition, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/win2011/entries/natural-law-ethics/>, (accessed October 2011).

<sup>3</sup> Dirk Baltzky, "Stoicism," *The Stanford Encyclopedia of Philosophy*, Winter 2010 Edition, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/win2010/entries/stoicism/> (accessed October 2011).

<sup>4</sup> Marcus Tullius Cicero, *The Laws*, Book I, from *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present*, ed. Micheline R. Ishay (London: Routledge, 1997), 25.

Aquinas' argument, expounded in Question 90: *Of the Essence of Law*, proceeds in this way: "Law is a certain rule and measure whereby man is induced to act or is restrained from acting... the rule and measure of human acts is reason, the first principle of action... [therefore], law is something pertaining to reason."<sup>5</sup> It is in this work that Aquinas defines law as "nothing else than an ordinance of reason for the promotion of the common good, made by him who has the care of the community, and promulgated."<sup>6</sup> What is called "new" or "liberal" natural law theory, despite departing from Aquinas' theological bases, shares some important similarities. We will find that the notions of reason, the common good, and community all remain integral to the theory of natural law over centuries of development.

It is with the work of Hugo Grotius that we find the departure of natural law from theology. In his work *De Iure Belli ac Pacis*, Grotius makes the argument to hold *etiamsi daremus non esse Deum* (even if we were to grant that God does not exist). Human nature is to be understood through our rational capacity; our judgment, which helps us to determine what is agreeable or harmful, discerns what is in accord with our nature, that is, what is a dictate of right reason. All subsequent liberal natural law theory is based on right reason. As John Finnis says, "any theory of natural law must be able to identify conditions and principles of practical right-mindedness."<sup>7</sup> In other words, with the emergence of liberal natural law,

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<sup>5</sup> St. Thomas Aquinas, "On Law, Morality, and Politics," ed. William P. Baumgarth (Indianapolis: Hackett Publishing Co., 1988), in *Philosophy of Law*, eds. Joel Feinberg and Jules Coleman (Belmont CA: Thompson Wadsworth, 2000), 8.

<sup>6</sup> *Ibid*, 9.

<sup>7</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 18.

rationality, divorced from divine providence, became a legitimate criterion for evaluating the moral worth of an action.

## 1.2 The Principles of Liberal Natural Law

The principles of natural law aim to identify the basic forms of human flourishing as goods worth pursuing. This requires a methodology of practical reasonableness to distinguish between acts that are reasonable (moral) and unreasonable (immoral).<sup>8</sup> This methodology allows for one to arrive at a set of general moral standards with which one is able to evaluate the legitimacy of positive law.

Natural law theory rests on the presumption that basic reasons for action are self-evident, known in “non-inferential acts of understanding in which we grasp possible ends or purposes as worthwhile for their own sakes.”<sup>9</sup> Basic reasons for action are those whose comprehension does not require an appeal to more fundamental reasons. They are by definition underived, “for there is nothing more fundamental that could serve as a premise for a logical derivation.”<sup>10</sup> Intrinsic goods – things that are desirable for their own sakes – are the basic reasons for action. Those goods that need appeal to more basic reasons for justification are instrumental, derived, and not self-evident.

The idea that basic reasons for action and intrinsic goods are underived challenges a common misconception of natural law: that we come to know what constitutes right action by a descriptive analysis of human nature. This is a popular

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<sup>8</sup> Ibid, 23.

<sup>9</sup> Robert George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999), 84.

<sup>10</sup> Ibid, 85.

straw man construction of natural law theory, making it vulnerable to criticism of committing the naturalistic fallacy, an illicit reference from facts to norms.<sup>11</sup> Introduced by David Hume as the is-ought problem, the fallacy consists of deriving an ought (a moral imperative) from an is (an ontological fact). Some natural lawyers have attempted to skirt around the issue with arguments such as “the very *is* of human nature has been shown to have an *ought* built into it.”<sup>12</sup> Such a rhetorical leap is unnecessary. If natural law were to derive principles of right action from an assessment of human nature it would indeed be fallacious. But this is not the case. The epistemological source of our knowledge of human nature is through its potentialities, which we come to know by its actuations, and these we know by its objects- intrinsic goods.<sup>13</sup> In other words, our knowledge of human nature is induced from our empirical, practical, underived knowledge of human goods.

This begs the question of what makes these basic goods “good” in the first place. The worth of basic goods is derived from the nature by which their goodness perfects. This necessitates the concession that “those goods would not perfect that nature were it other than it is.”<sup>14</sup> So we come to know human nature through our practical knowledge of human goods, and these goods are good precisely because

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<sup>11</sup> Finnis, *Natural Law*, 33.

<sup>12</sup> Henry Veatch, *For an Ontology of Morals: A Critique of Contemporary Ethical Theory* (Evanston IL: Northwestern University Press, August 1971), 119.

<sup>13</sup> George, *Defense of Natural Law*, 85.

<sup>14</sup> Finnis, *Natural Law*, 47.

they are perfective of our nature. Theoretical knowledge of human nature is in no way prior logically to basic practical knowledge.<sup>15</sup>

### 1.3 Basic Goods and Practical Principles

The identification of basic goods is essential to understand the requirements of practical reasonableness. Basic goods must not fall to subjectivism, for we need them to be defensible to cultural relativism. This is tricky, for basic goods are not directly demonstrable. But their indemonstrability does not necessarily entail subjectivism. The objectivity of a proposition is dependent on its assertion being warranted by sufficient evidence or self-evidence. We need not seek an epistemological certainty greater than the subject matter allows.<sup>16</sup> Inter-subjective validity can very well render our judgments concerning basic goods objective. If such a proposition seems right and cannot be legitimately denied, we are justified in affirming its objectivity.<sup>17</sup>

To defend the objectivity of basic goods, John Finnis uses the example of knowledge as a good to be pursued. The value of knowledge cannot be derived, for example, from a statement like “all men desire to know.” The very fact that a desire is universal does not mean that the desire is itself desirable or good.<sup>18</sup> The good is

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<sup>15</sup> George, *Defense of Natural Law*, 90.

<sup>16</sup> Aristotle, *Nicomachean Ethics*, trans. Robert C. Bartlett (Chicago: University of Chicago University Press, 2011).

<sup>17</sup> Finnis, *Natural Law*, 65.

<sup>18</sup> Let us recall the inadequate “Venn-Diagram” theory of universal rights mentioned on page 3 of the introduction. Consensus alone is not a legitimate basis for ascribing moral significance to a particular good.

not desirable because we desire it; it is desirable because it is good.<sup>19</sup> To say that knowledge is a basic good appeals instead to its self-evidence. This is not to say that in actuality everyone recognizes its value or that the principle of the value of knowledge is innately inscribed. Rather, the understanding of a basic good or practical principle is a rational judgment concerning the fulfillment of human potentiality:

[The value of truth becomes self-evident only when an individual has] experienced the urge to question, who has grasped the connection between question and answer, who understands that knowledge is constituted by correct answers to particular questions, and who is aware of the possibility of further questions and of other questioners who like himself could enjoy the advantage of attaining correct answers.<sup>20</sup>

So what are other examples of basic values and principles shaping our practical reasoning? Our search may be aided by an anthropological survey of those cultural preferences that seem trans-historical. We find that all human societies value human life, that self-preservation is a legitimate motive for action, and that the gratuitous deprivation of human life is to be avoided. All human societies value procreation, insofar as it is in compliance with societally relative prohibitions (e.g. against incest, rape, polygamy). We can find other patterns: cooperation, considering that relationships extend beyond the immediate family; property and

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<sup>19</sup> This is reminiscent of the central question of the Platonic dialogue *The Euthyphro*: Do the gods love the pious because it is pious, or is it pious because the gods love it?

<sup>20</sup> Finnis, *Natural Law*, 65.

reciprocity, or as Finnis puts it, *meum* and *tuum*; friendship; religion, or respect for the supernatural in some regard.<sup>21</sup>

In his chapter on basic values, Finnis lists the seven basic goods to which all other objectives can be reduced. These primary human goods are for the purposes of this discussion a descriptive account of the objects of human nature and do not yet convey moral significance. The first basic good is life, which corresponds to the drive for self-preservation. The value of life encompasses all aspects that make a human being self-determinate, and thus includes health, physical freedom, and arguably the extension of life through procreation. Secondly, and previously discussed, is knowledge, considered not instrumentally, but for its own sake. Thirdly is play, the pursuit of activities that have no point other than the enjoyment of its performance. This may be an individual or social enterprise and can take many forms – physical, intellectual, demanding, relaxing – but is always separate from “serious” activity.<sup>22</sup>

The fourth good is aesthetic experience insofar as we may seek beauty for its own sake. The fifth is human sociability, a spectrum that spans from self-interested collaboration to full-blown, for-itself friendship. Sixth is practical reasonableness, the faculty through which we deliberate on right action.<sup>23</sup> Finally, we have religion, which for Finnis can include the garden variety of worship to any instance of

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<sup>21</sup> Ibid, 83-84.

<sup>22</sup> Ibid, 87.

<sup>23</sup> Germain Grisez. “The First Principle of Practical Reason.” *Natural Law Forum* 10 (1965): 138-201.

personal responsibility that demonstrates a concern of an order “beyond” each and every man.<sup>24</sup>

#### **1.4 Practical Reasonableness and Natural Rights**

The above goods are all equally basic, that is to say they are equally self-evident and fundamental. Though we have identified these goods, the question remains as to how they should be pursued. One must turn to the good of practical reasonableness in order to guide one’s selection of projects. This is the natural law method of working out the moral requirements of the aforementioned descriptive principles.<sup>25</sup>

While the myriad imperatives prescribed by practical reasonableness in seeking basic goods seems to challenge the idea of natural law as one orderly whole, Germain Grisez offers a reading of Aquinas that resolves the issue:

The precepts are many because the different inclinations’ objects, viewed by reason as ends for rationally guided efforts, lead to distinct norms of action. The natural law, nevertheless, is one because each object of inclination obtains its role in practical reason’s legislation only insofar as it is subject to practical reason’s way of determining action – by prescribing how ends are to be attained.<sup>26</sup>

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<sup>24</sup> Finnis, *Natural Law*, 89.

<sup>25</sup> Finnis, *Natural Law*, 101. In other words, practical reasonableness effectively bestows moral significance to the pursuit of basic goods, for it deliberates on a course of action that must negotiate the projects of others, addressing the central moral question “how ought we to live.”

<sup>26</sup> Grisez, “The First Principle,” 200.



The idea of practical reasonableness is what John Rawls calls a “rational plan of life.”<sup>27</sup> This plan is only rational if it is directed by the pursuit of some combination of basic goods and curtails harmful inclinations. Practical reasonableness requires an individual to acknowledge that these goods can be pursued and realized by any human being. While self-preference is reasonable insofar as one’s own well being is understandably their primary interest, it does not make the pursuit objectively more valuable than that of any other. Another requirement of practical reasonableness is respect for every basic value in every action. Of course, a commitment to a particular project will necessarily favor particular basic goods (for they cannot all be pursued simultaneously), but in order for the commitment to be rational, it must be based on an evaluation of one’s capacities and circumstances. Therefore an action that does nothing but impede or devalue the pursuit of a basic good is always immoral.<sup>28</sup>

The final requirement of practical reasonableness is that of fostering the common good.<sup>29</sup> This requirement is of the utmost relevance to natural rights, which are an expression of the “outlines of the common good.”<sup>30</sup> In this context, the common good refers not to a general, utilitarian aggregate but rather to each and every one’s well being within a community, constituted by their pursuit of the basic

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<sup>27</sup> John Rawls, *Theory of Justice* (Cambridge: Harvard University Press, 1971), 408.

<sup>28</sup> Finnis, *Natural Law*, 110. Finnis identifies nine requirements of practical reasonableness. For the sake of concision, this paper condenses and omits those superfluous to the discussion at hand.

<sup>29</sup> Germain Grisez, Joseph Boyle and John Finnis. “Practical Principles, Moral Truth, and Ultimate Ends,” *The American Journal of Jurisprudence* 32 (1987), 110.

<sup>30</sup> Finnis, *Natural Law*, 214.

human goods in a rational manner dictated by practical reasonableness.<sup>31</sup> This is an important distinction; while Bentham, Mill, and the utilitarian camp argue that the good of the whole is the sum of individual goods and is reflected by majority opinion, this does not address the moral objection to the majority ruling the minority at the latter's expense.<sup>32</sup> The common good "is precisely the good of the individuals whose *benefit*, from fulfillment of duty by others, is their *right* because *required* of those others in justice."<sup>33</sup> In the framework of natural law, justice consists of the "concrete implications of the basic requirement of practical reasonableness that one is to favor and foster the common good of one's communities."<sup>34</sup> Natural rights, and for the purposes of this paper human rights, are requirements of practical reason.

### 1.5 The Etymology of "Right"

Before entering into a discussion of rights as requirements of practical reasonableness, it would be prudent to parse the term. The rights idea is frequently misunderstood and has undergone a significant transformation in its history. This examination is the subject of Richard Tuck's work in *Natural Rights Theories* and shows that the notion of *ius* antedates natural law theory.

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<sup>31</sup> The common good closely resembles Rousseau's "general will" whereas the utilitarian aggregate resembles the "will of all."

<sup>32</sup> Elizabeth H. Wolgast, *The Grammar of Justice* (Ithaca NY: Cornell University Press, 1987), 52-53.

<sup>33</sup> Finnis, *Natural Law*, 214 (original emphasis).

<sup>34</sup> Finnis, *Natural Law*, 164.

In the third century AD, *ius* meant either “what is always fair or good... or what is best for all or most in a particular society.”<sup>35</sup> Generations later, Emperor Hadrian wrote that the settlers on the virgin lands of North Africa, an area of his imperial domain, had “the *ius* to possess it, take its crop and transmit it to heirs.”<sup>36</sup> *Ius* came to signify something which one possessed due to a relationship with the state. Though this is close to the meaning of “right” in the current discourse, the classical Romans had no such theory of rights as existing outside of a legal relationship.

There is debate over whether Aquinas had any conception of a subjective right. In his works, *jus* had multiple definitions; primarily, *jus* was “the thing itself,” referring to acts, objects, state of affairs, as subject-matters of justice, roughly translated as “the fair.”<sup>37</sup> Derivative meanings spanned from “the art by which one knows or determines what is just” to “the place in which what is just is awarded” to “the award” or sentence of the judge.<sup>38</sup> Modern natural rights theories ascribe *prima facie* rights to man in nature, something that Aquinas explicitly avoided doing. It suffices to say that we cannot look to Aquinas for the origin of modern natural rights theory.

It is in the 17<sup>th</sup> century that we find an analysis of *jus* that lends itself to modern natural rights. The Spanish Jesuit Francisco Suarez defined the strict meaning of *jus* as “a kind of moral power which every man has, either over his own

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<sup>35</sup> Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 8.

<sup>36</sup> *Ibid*, 11.

<sup>37</sup> Finnis, *Natural Law*, 206.

<sup>38</sup> *Ibid*.

property or with respect to that which is due to him.”<sup>39</sup> Soon after, Grotius’ *De Jure Belli ac Pacis* defined *ius* as “a moral quality of the person enabling him to have or to do something justly.”<sup>40</sup> For the first time, the idea of *ius* was no longer dependent on a posited legal relationship between claimant and respondent.

### 1.6 The Grammar of Rights

The requirements of practical reasonableness are aptly described by the rights discourse. In order to precisely analyze relationships of rights and duties, different jurists have developed terminological systems of expression. Many current natural rights scholars have followed Finnis’ lead in using Hohfeldian rights to make intelligible the relations of rights. These postulates, though seemingly complex, actually help reduce rights-claims to their most basic, three-term relationships: a rights claimant, a respondent, and a particular duty. Developed by the jurist Wesley Hohfeld in his work *Fundamental Legal Conceptions*, the fundamental postulates of the system are as follows.

All rights-claims can be entirely reduced to ascriptions of one or some combination of four rights: *claim-right*, *liberty*, *power*, and *immunity*. For the purposes of human rights claims, only the former two Hohfeldian rights are required to adequately express the claimant-respondent relation.<sup>41</sup> The logical relations between these rights are:

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<sup>39</sup> Ibid, 207.

<sup>40</sup> Grotius, *De Jure Belli ac Pacis*, I, I, iii.

<sup>41</sup> Finnis, *Natural Law*, 200.

- (1) A has a *claim-right* that B should do *x*, if and only if B has a *duty* to A to *x*.
- (2) B has a *liberty* relative to A to *x*, if and only if A has *no-claim-right* that B should not *x*.<sup>42</sup>

It appears that human rights-talk can be reduced solely to claim-rights, either as a positive claim-right – a right to have some duty honored – or a negative right to non-interference.<sup>43</sup> This raises a question on the relationship between rights and duties: are rights and duties correlative temporally and logically? Finnis answers, “It is inappropriate to argue that as a matter of juristic logic duty is logically prior to right, or vice versa,”<sup>44</sup> but this view is objectionable. Dworkin devotes much attention to the difference between rights-based and duty-based theories, stressing that “in many cases, rights and duties are not correlative, but one is derived from the other, and it makes a difference which is derivative from which.”<sup>45</sup> Rights-based and duty-based theories are similar in that they “place the individual at the center,”<sup>46</sup> but differ on a fundamental level: the primacy of right emphasizes freedom from impediments to human flourishing while duty emphasizes conformity to action.

With regard to natural rights theory, this paper assumes the temporal and logical priority of right over duty. We must qualify Finnis’ definition of the common good, “precisely the good of the individuals whose *benefit*, from fulfillment of duty

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<sup>42</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions: as Applied in Judicial Reasoning*, (New Haven: Yale University Press, 1946).

<sup>43</sup> Finnis, *Natural Law*, 200.

<sup>44</sup> *Ibid*, 210.

<sup>45</sup> Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 171.

<sup>46</sup> *Ibid*, 172.

by others, is their right because required of those others in justice.”<sup>47</sup> Rights are not reducible to benefits; rights are exercised whereas benefits are passively received.<sup>48</sup> Rather than viewing benefit as the source of right, H.L.A. Hart suggests human needs: “The core of the notion of rights is neither individual choice nor individual benefit but basic or fundamental human needs.”<sup>49</sup> It is with practical reason that we identify those basic goods that are perfective of our nature –as needs to be fulfilled – and through the faculty of practical reasonableness that we deliberate on right action regarding the security of those basic goods. If fundamental human needs were different, their fulfillment would require different corresponding duties. In other words, duties are contingent and rights come first.

### **1.7 The Limitation and Derogation of Human Rights**

In analyzing the structure of the UDHR, which has served as a model for subsequent international treaties and domestic constitutions in both form and content, we see rights expressed in two ways, “everyone has a right to” and “no one shall be”:

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind...

Article 3: Everyone has the right to life, liberty, and security of person.

Article 4: No one shall be held in slavery or servitude...

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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<sup>47</sup> Finnis, *Natural Law*, 210.

<sup>48</sup> Donnelly, *Universal Human Rights*, 8.

<sup>49</sup> H.L.A. Hart, *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 2<sup>nd</sup> series, 1973), repr. unchanged, in Hart, *Studies on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982). Finnis accepts this claim but refers to fundamental human needs as “basic aspects of human flourishing (205).

Finnis points out that logically, the document's wording is superfluous; these rights could all be transformed into one consistent form.<sup>50</sup> The word choice plays a vital role in conjunction with Article 29:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.<sup>51</sup>

This article limits the possibility of limitation or suspension of the exercise of a right or freedom. The proper reading is that liberties, beginning with the words "no one shall be," are non-derogable. There is a consensus on four non-derogable rights: the right to life; the right to be free from torture and other inhumane or degrading treatment or punishment; the right to be free from slavery; and the right to be free from retroactive application of penal laws.<sup>52</sup> Under no circumstances, including times of emergency and states of war, can these rights be justifiably suspended.<sup>53</sup> But how are we to understand the derogability of positive rights? When may a derogable right be legitimately suspended?

Rights are subject to limitation by each other and by other aspects of the common good, such as public health or order.<sup>54</sup> For example, it may be justifiable to detain and quarantine individuals if they posed a serious threat to public health. In

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<sup>50</sup> Finnis, *Natural Law*, 211.

<sup>51</sup> UDHR Article 29

<sup>52</sup> UN Division for Social Policy and Development.

<sup>53</sup> This is explicated in human rights and humanitarian law documents such as the Geneva Conventions and the International Covenant on Civil and Political Rights.

<sup>54</sup> Dworkin, *Taking Rights Seriously*, 191. "...although citizens have a right to free speech, the government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit."

this way, we can see the individual's freedom "no one shall be subjected to arbitrary arrest, detention or exile"<sup>55</sup> being limited by the right of everyone to "a standard of living adequate for the health and well-being of himself and of his family"<sup>56</sup>; detention is no longer arbitrary.

The discussion of derogability begs the question whether some rights are more inalienable, absolute, or fundamental than others. If this is the case, there may indeed exist a hierarchy of rights and a subsequent prioritization in their realization. This will be further explored in the next chapter.

Before proceeding to address the question of cultural relativism, we may benefit from a truncated recapitulation of the connection just forged between natural law and human rights. Liberal natural law theory, with its identification of basic goods and methodology of practical reasonableness, makes possible a set of general moral standards and provides man as an agent with "rationally grounded options for choice."<sup>57</sup> Human rights are conferred to claimants to protect the independence of individual action through the fulfillment of basic goods, and impose a logically consequent duty on respondents because of requirement by practical reasonableness.

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<sup>55</sup> UDHR Article 9.

<sup>56</sup> UDHR Article 25.

<sup>57</sup> George, *Defense of Natural Law*, 229.



### 1.8 Cultural Relativism and the International Community

Having successfully grounded human rights in the natural law tradition, it is time to put the claim to universality to the test and address the argument from cultural relativism. Cultural relativism often proceeds by imposing a false dichotomy on its prey: that a moral system is either culturally relative or culturally chauvinist. Natural law categorically rejects this claim; “to say that some [cultural practices] are morally bad is not to say that there is only one culture that is morally good.”<sup>58</sup> It is not the case that natural law imposes a single static norm to which peoples of the world should conform; its objection to cultural relativism need not preclude cultural pluralism. Rather, natural law allows for tremendous cultural diversity, respecting that disparate cultural practices can all lead an individual to a fulfilling and moral life. International law actively seeks to protect the right of communities to preserve their distinct ways of life.<sup>59</sup> However, international human rights institutions are justified in forbidding particular cultural norms that constitute human rights violations; natural law simply maintains that such practices exist as a product of the misuse of practical reasonableness, resulting in unreasonable conclusions. In this way, human rights may be conceived of as limitations on pluralism.<sup>60</sup>

We saw above that the final condition of practical reasonableness was fostering the common good. This idea is related to the realization of human rights

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<sup>58</sup> Ibid, 242.

<sup>59</sup> 3<sup>rd</sup> Generation solidarity rights do not enjoy the same recognition as the aforementioned civil, political, economic, and social rights but may be still be seen as a precondition for human flourishing. They will be considered in the following chapter.

<sup>60</sup> John Rawls, “The Law of Peoples,” in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999).

insofar as the common good refers to each and every individual's well being within a community. With a closer reading of the common good, we must decide whether states party to international human rights legislation actually comprise an "international community."<sup>61</sup> To speak of an international community would be to challenge the Westphalian notion that the nation-state is a complete community capable of securing the good of individuals.

Critics consider the international system "institutionally defective"<sup>62</sup> since it relies upon the state for application of its law. Even with conceding that international human rights law is dependent on the states party to implement and enforce international law, it is a fact that states without exception coordinate activities with, receive assistance from, and acknowledge the legitimacy of supranatural institutions. The very fact that states willingly subject themselves to the authority of international law is evidence of a departure from the Westphalian idea of sovereignty. Today, it makes perfect sense to speak of an international community, as even the staunchest political realist must acknowledge the dilution of state sovereignty in the past half-century.

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<sup>61</sup> George, *Defense of Natural Law*, 242.

<sup>62</sup> Charles W. Kegley, Jr. *World Politics, Trend and Transformation* (New York: St. Martin's Press, 1981), 495.

## 1.9 Conclusion

Through securing the class of human rights in the framework of liberal natural law theory, the moral authority of international human rights law becomes apparent. Human rights, an outline of the common good, ought to be realized because they allow the individual to pursue basic goods in accord with practical reasonableness. They identify the conditions for flourishing – for human agency – and protect the dignity of man.

The following chapters will tie up many of the loose ends of the first. The second chapter will examine the idea of non-derogable, inalienable, and absolute rights alongside the division of rights into generations to question a purported hierarchy within the universal class of human rights: whether civil and political rights are “sequential or interactive”<sup>63</sup> with economic, social and cultural rights. The third chapter will consider the idea of human rights as a limitation on cultural pluralism and then reconcile the conflicting practice of apostasy under Shariah law with the right to religious freedom to demonstrate the instrumental but contingent value of consensus theory in promoting normative human rights compliance.

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<sup>63</sup> Reginald H. Green, “Basic Human Rights/Needs: Some Problems of Categorical Translation and Unification,” *The Review* (International Commission of Jurists), nos. 24-27, (1980-81), 55.

## Chapter Two:

### A Debate Within the Class of Human Rights

Even prior to the division of human rights into three generations by the French jurist Karel Vasak at the International Institute of Human Rights in 1977, there was much talk of the existence of a hierarchy of rights.<sup>1</sup> Upon the adoption of the UDHR in 1968, which includes civil, political, economic, social, and cultural rights, many states voiced concern over implementation. Lesser-developed countries argued that a discrepancy in domestic capacity made it impossible to hold all states equally accountable for realizing economic and social rights, such as a right to food or education. Other conflicts, ostensibly driven by fundamental cultural differences that foreshadowed the Cold War, further complicated matters when the UN General Assembly attempted to adopt a legally binding treaty containing the rights mentioned in the UDHR.<sup>2</sup> Dispute over the priority of rights proved so great a hindrance to drafting the document that by the time the rights of the UDHR did attain legal force, 18 years had passed, and the treaty was split into two covenants.

The first part of this chapter questions whether the existence of the ICCPR and the ICESCR as two separate documents indicates a fundamental disagreement within the class of human rights. It will consider the relationship between the two covenants, namely whether they are sequential or interactive. Next, it will further

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<sup>1</sup> "Human Rights," *Encyclopedia Britannica* (online; Burns H. Weston, 2011), <http://www.britannica.com/EBchecked/topic/275840/human-rights> (accessed 19 Feb. 2012).

<sup>2</sup> Thomas Hammarberg, "Not by Bread Alone...but not without Bread Either," *UN Chronicle* Vol. 35, Winter 1998.

explore the ideas of non-derogable, inalienable, and absolute rights, and whether they imply a hierarchy in themselves.

## 2.1 The Content of the Covenants

The ICCPR and ICESCR are virtually identical in form. Both preface Article 1 with the statement “The States Parties to the present Covenant... realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant, agree upon the following articles.”<sup>3</sup>

However, the content of the two documents differs greatly. The ICCPR enumerates 1<sup>st</sup> generation (civil and political) rights, such as: the right to life; freedom from cruel, inhuman, or degrading treatment; freedom from servitude; the right to security of person; the right to liberty of movement within one’s home country; the right to leave any country, including one’s own.<sup>4</sup> These rights are almost all negative in nature, in that they serve to protect claimants from excesses of the state. 1<sup>st</sup> generation rights are individualistic and are criticized by some as culturally relative products of the Enlightenment.<sup>5</sup>

The ICESCR lays out 2<sup>nd</sup> generation (economic, social, and cultural) rights, such as: the right to form unions; the right to social security; the right to an adequate standard of living, including food, clothing, and housing; the right to

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<sup>3</sup> ICCPR and ICESCR, Office of the United Nations High Commissioner for Human Rights.

<sup>4</sup> ICCPR, OHCHR.

<sup>5</sup> Numerous documents predating the UDHR, including both the French Declaration of the Rights of Man and Citizen and the American Declaration of Independence, enumerate such rights.

education.<sup>6</sup> These rights are positive in nature and require respondents – states in the international system – to provide tangible, costly goods to claimants.

## 2.2 The Full-Belly Thesis

The fact that some states have sided with one covenant over the other is not necessarily the product of a fundamental ideological divide. There exist many reasons why a state may have opted to sign one or both covenants irrespective of philosophical beliefs. As mentioned above, discrepancies in development and domestic capacity were legitimate practical concerns for many states in the international system.

One of the most frequently cited arguments by proponents of 2<sup>nd</sup> generation rights is the full-belly thesis, of which there is a strong and weak reading.<sup>7</sup> The strong reading regards economic rights as demanding fulfillment prior to 1<sup>st</sup> generation rights. Basically, the idea is that hungry people don't vote and sick children don't learn, so socioeconomic rights, which pertain to basic human needs, ought to be secured first.<sup>8</sup> This is obviously problematic, considering that it could take quite some time for the realization of such rights in lesser-developed states, that lower individual political efficacy often contributes to the perpetuation of mismanaged provisions, and that autocratic despots use the argument to quell

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<sup>6</sup> ICESCR; OHCHR.

<sup>7</sup> The strong/weak reading of the thesis correspond, for the purposes of this paper, to the sequential/interactive relationship between 1<sup>st</sup> and 2<sup>nd</sup> generation rights.

<sup>8</sup> Paul Streeten, "Basic Needs and Human Rights," *World Development* 8 (1980), 107. This is reminiscent of a famous quote from Bertolt Brecht's 1928 musical *Die Dreigroschenoper* (the Threepenny Opera), *Erst kommt das Fressen, dann die Moral*: first comes grub, then comes ethics.

would-be dissenters and maintain a monopoly on power.<sup>9</sup> The weak reading is less disruptive to the security of 1<sup>st</sup> generation rights, viewing both generations as mutually supportive: “‘One man, one vote,’ is meaningless unless accompanied by the principle of ‘one man, one bread.’”<sup>10</sup>

### 2.3 The Relationship of the Covenants

The debate between the strong and weak reading of the full-belly thesis has practical implications in reconciling the two covenants. Few will argue that political freedom alone puts food on the table, so there remain two ways to understand the relationship between the ICCPR and the ICESCR: either the relationship is sequential – economic rights must be fulfilled first – or it is interactive – “economic development requires {both the} active participation of people and the fulfillment of basic economic social needs to be effective.”<sup>11</sup> A sequential relationship would at least suggest a hierarchy in priority of rights realization, whereas an interactive relationship would suggest no primacy of one generation over another.

Those who maintain the priority of 2<sup>nd</sup> generation rights have good reason to find economic rights valuable instrumentally and in themselves. Instrumental value is obvious; feeding the hungry, educating the unlettered, and employing the unemployed clearly alleviates suffering and helps individuals help themselves. But

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<sup>9</sup> Rhoda Howard, “The Full-Belly Thesis: Should Economic Rights Take Priority over civil and Political Rights? Evidence from Sub-Saharan Africa,” *Human Rights Quarterly*, 5(4): 469.

<sup>10</sup> *Africa Contemporary Record* 11 (1978-79), B617.

<sup>11</sup> Ron Meltzer, “International Human Rights and Development: Evolving Conceptions and their Application for EC-ACP Relations,” in *Human Rights and Development in Africa* (Albany, NY: SUNY Press, 1983).

the expression of basic needs as economic rights is important in itself. Social justice becomes a matter of right, distinguishing entitlement from charity.<sup>12</sup>

This need not discount the instrumental and intrinsic worth of 1<sup>st</sup> generation rights. Instrumentally, civil and political rights are valuable in that they ensure equitable distribution of goods, implement reasonable policies, and guarantee social and cultural rights. Viewed this way, it would be absurd for a proponent of 2<sup>nd</sup> generation rights to discount the instrumental value of 1<sup>st</sup> generation rights, since they serve to safeguard a stable social order for economic, social, and cultural rights to be realized.<sup>13</sup> Though less apparent, 1<sup>st</sup> generation rights are necessary in and of themselves because individuals, regardless of economic condition, require individual freedom:<sup>14</sup>

To sacrifice the liberties inherent in the human personality in the name of economic development is to reduce the individual to the role of producer and consumer of goods, which is far too high a price to pay for improving the material conditions of existence.<sup>15</sup>

Evidence shows that higher standards of living prevail in states that uphold both individual freedom and economic rights. Especially in developing areas, input by those affected is essential in ensuring the effectiveness of economic policies.<sup>16</sup>

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<sup>12</sup> Hammarberg, "Not by Bread Alone," 1.

<sup>13</sup> Howard, "The Full-Belly Thesis," 469.

<sup>14</sup> Ibid.

<sup>15</sup> UN Seminar on Human Rights in Developing Countries, Dakar, 8-22 February 1966 (New York, United Nations, 1966) 37.

<sup>16</sup> Ibid.



Generally speaking, governments that limit individual freedom have problems with economic policy; “stability through repression tends to be short-lived.”<sup>17</sup>

Amartya Sen, a Nobel laureate in economics, has studied the implications of 1<sup>st</sup> generation right limitation to famine in South Asia. Sen argues that widespread famine is not solely a result of food shortages, but also of faulty distribution, a product of poor political participation.<sup>18</sup> To be fair, effective political participation in itself requires other rights to be fulfilled: some degree of education, such that the vote of a citizen corresponds with intended policy reform, freedom of movement, so that a voter is able to reach the polls, and so on. This only reinforces the point that rights are best understood as interactive and mutually supportive; the realization of economic rights without political participation is hindered by mismanagement of distribution, and first generation rights in a society without an accompanying acknowledgment of social justice is a recipe for low efficacy and stagnation.

Still remains the question of lesser-developed countries, which is a matter of supply and demand. Economic rights are costly, and resources are not equally distributed around the globe. International legislation recognizes this disparity and subsequently invokes the concept of progressive realization to set realistic standards for states of differing capacity.<sup>19</sup> The onus is on the state to provide a good faith effort to realize 2<sup>nd</sup> generation rights as expediently as possible. Since the

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<sup>17</sup> Hammarberg, “Not by Bread Alone,” 2.

<sup>18</sup> Amartya Sen, “Poverty and Famines: An Essay on Entitlement and Deprivation,” *Third World Quarterly*, Vol. 4, No. 1 (Jan., 1982), 187-188. In some cases, such as the Bengal famine of 1943, famine was not correlated with food shortages at all.

<sup>19</sup> ICESCR Article 2: the Covenant imposes a duty on all parties to “take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

limitations on governmental authority imposed by 1<sup>st</sup> generation rights do not cost anything, progressive realization does not apply.

## 2.4 Third Generation Rights

It should be apparent by now that the classification of 1<sup>st</sup> and 2<sup>nd</sup> generation rights are not only non-conflicting, but rather mutually supportive. There is, however, another emerging generation of human rights that go beyond the scope of the two Covenants. Third Generation Rights – also known as solidarity rights, including the right to peace, right to a healthy environment, right to intergenerational equity, right to natural resources, and other group and collective rights – are particularly difficult to safeguard in the face of political realism.<sup>20</sup> National interest often challenges the notion of equitably distributing natural resources across states in the international system,<sup>21</sup> the preservation of habitats at the expense of rapid development, and so on. As such, these rights are absent in the majority of international black-letter law.

Solidarity rights are admittedly difficult to codify and realize. The right to peace, for example, places an extraordinary and potentially conflicting onus on the state. The state, with a duty to uphold both national security and citizens' right to peace, must weigh seemingly contradictory options. In this way, an individual's right to peace may very well necessitate conscription of another the case of a

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<sup>20</sup> "Human Rights," *Internet Encyclopedia of Philosophy* (Andrew Fagan, 5 July 2005), <http://www.iep.utm.edu/hum-rts/> (accessed December 2012).

<sup>21</sup> This is well illustrated by the World Trade Organization's recent criticism of China for monopolizing the world supply of rare earth minerals.

defensive war. Still, the difficulty of rights realization should not be cause for abandoning the cause altogether.

Many non-Western thinkers have argued that the absence of solidarity rights in international legislation is a Western imposition. It is true that during the drafting of the UDHR, which laid the groundwork for subsequent documents, the loudest voices were Western ones. This has led thinkers such as Eddson Zvobgo to question the legitimacy of the document: "I am convinced that were the UDHR to be debated again in the General Assembly, the final draft would be significantly different from that which was adopted in 1948."<sup>22</sup> Proponents of Third Generation Rights like Zvobgo find it inconceivable to divorce the individual from the community and environment. This is a reflection of an (not exclusively) African and Asian idea:

To most of them, the concept of the human being as an autonomous, separate, and self-determining actor is as nonexistent as it is absurd. Such a person – separate and alone, pursuing a self-determined path to happiness and self-fulfillment – would be curious to them.<sup>23</sup>

Such an idea merits our consideration as the current project is committed to determining whether the classification of rights into generations implies a hierarchy, or even worse, a fundamental cultural divide. Solidarity rights, even conceived as non-reducible to individual rights without loss of meaning,<sup>24</sup> are

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<sup>22</sup> Eddson Jonas Mudadirwa Zvobgo, "A Third World View on Human Rights," in: *Human Rights and American Foreign Policy*, eds. Don. P. Kommers and Gilb. D. Loescher, 1979, 93.

<sup>23</sup> Ibid.

<sup>24</sup> Koo VanderWal, "Collective Human Rights: A Western View," in *Human Rights in a Pluralist World: Individuals and Collectives* (Westport CT: Meckler, 1990), 86.

entirely compatible with our definition of human rights as an outline of the common good arising from requirement of practical reasonableness. Just as we expanded the traditional notion of the community to encompass states in the international system,<sup>25</sup> we may similarly parse the idea of the community to resolve the discrepancy. As VanderWal argues, states on an individual and international level constitute the “national community.”<sup>26</sup> The national community is respondent to the claims of inclusive, “natural communities,” to rights concerning collective goods that are necessary for human flourishing.

That man is, by nature, a social animal was made obvious thousands of years ago.<sup>27</sup> Liberal natural law recognizes sociability as a basic good, which means it is not reducible to any other, more basic, good. As such, the portrayal of Western thought as thoroughly individualistic is an unfounded claim. The requirements of practical reasonableness are more fully explicated with mention of solidarity rights, despite their difficulty of implementation. A comprehensive account of human rights relies upon both the individual and collective requirements for *eudaimonia*.

Having concluded that the categorization of rights into three generations need not imply a hierarchy, we may turn our attention to other sources of contention within the class of human rights: non-derogable, inalienable, and absolute human rights.

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<sup>25</sup> Chapter 1, Cultural Relativism and the International Community.

<sup>26</sup> VanderWal, “Collective Human Rights,” 88.

<sup>27</sup> The notion of the *zoon politikon* goes back at least to Aristotle in the 4<sup>th</sup> century BC.

## 2.5 The Question of non-Derogable and Inalienable Rights

We have previously mentioned the four non-derogable rights: the right to life; the right to be free from torture and other inhumane or degrading treatment or punishment; the right to be free from slavery; and the right to be free from retroactive application of penal laws.<sup>28</sup> Though recognized as normatively legitimate, by what logic are these particular rights distinct from others that are subject to limitation or suspension? Does the non-derogability of these rights signify heightened importance, and if so, does this imply a hierarchy?

Derogability is a legal concept, referring to the ability of a (legal) right to be repealed or revoked temporarily by a state in times of crisis.<sup>29</sup> In searching for something distinctive about a moral right, it makes sense to frame the debate as a matter of alienability and absolutism. Inalienable rights are those rights that cannot be surrendered or transferred. They may be thought of as “essential limitations on all governments,” justifying a “right to resistance” in case of infringement.<sup>30</sup> Hegel offers a fuller treatment of the idea in his *Philosophy of Right*:

The right to what is in essence inalienable is imprescriptible, since the act whereby I take possession of my personality, of my substantive essence, and make myself a responsible being, capable of possessing rights and with a moral and religious life, takes away from these characteristics of mine just that externality which alone made them capable of passing into the possession of someone else. When I have thus annulled their externality, I cannot lose them through lapse of

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<sup>28</sup> “10.2 Human Rights in Times of Emergency,” United Nations Office of Economic and Social Affairs: International Norms and Standards (online), <http://www.un.org/esa/socdev/enable/comp210.htm> (accessed January 2012).

<sup>29</sup> Ibid.

<sup>30</sup> Francis Hutcheson, *Recherches Sur L'origine De Nos Idées, De La Beauté Et De La Vertu*. Translated by Anne-Dominique Balmès. Paris: J. Vrin, 1991.

time or from any other reason drawn from my prior consent or willingness to alienate them.<sup>31</sup>

In this way, all human rights appear equally inalienable. They arise out of uniquely human needs that necessitate protection as required by practical reasonableness. The lawful detention of a convicted felon is not equivalent to the relinquishing of any right, though there are obvious restraints on freedom of movement, political participation, and so forth. Rather, so long as the felon retains his personhood, he retains the right not to be arbitrarily detained and all others.

In a similar way, the unlawful violation of a right does not signify its alienability. The very criteria by which we find such a violation unlawful is in its opposition to practical reasonableness. Thus, when Rousseau claims, “man is born free, and everywhere he is in chains,”<sup>32</sup> the problem is not that the right is alienable, but that respondents have failed to uphold it. In other words, the fact that certain rights are violated or infringed upon does not in any way affect their alienability.<sup>33</sup>

We saw in Chapter One under “The Limitation and Derogation of Human Rights” that limitation of derogable rights was justified by a state “to protect the rights of others, prevent catastrophe, or to obtain...major public benefit.”<sup>34</sup> Having concluded that all human rights are equally inalienable but acknowledging that some are subject to limitation, we must appeal to a different category of right to split

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<sup>31</sup> Hegel, *Elements of the Philosophy of Right*. Cambridge (England: Cambridge University Press, 1991), 94.

<sup>32</sup> Jean-Jacques Rousseau, *The Social Contract*, trans. Jenry Tozer (London: Swan Sonnenschein & Co., 1902).

<sup>33</sup> For the purposes of the current discussion, rights violations occur without regard for the claimant and to an unjustifiable end, whereas rights infringements consider the claimant but justifiably supersede his right (namely for the promotion of other rights).

<sup>34</sup> Dworkin, *Taking Rights Seriously*, 191.

the difference. Those rights that are “categorically exceptionless”<sup>35</sup> and entirely resistant to trade-offs are termed absolute rights.

## 2.6 Absolute Rights

Absolutism appears the moral equivalent of legal non-derogability. In seeking to identify those absolute human rights, we need only appeal to the aforementioned requirements of practical reasonableness. Understood generally, the good of practical reasonableness allows us to negotiate our pursuit of basic goods with that of others. But let us recall the specific requirements of practical reasonableness that were laid out previously<sup>36</sup>: that it be directed by the pursuit of some combination of basic goods; that it acknowledge that basic goods can be pursued and realized by any human being; that it respect every basic value in every action; and that it fosters the common good.<sup>37</sup> The third requirement gives us an exceptionless imperative: that it is always unreasonable to choose directly against any basic value.

This imperative is nothing other than a duty imposed by practical reasonableness. As discussed above, duties are logically consequent to rights. Specifying absolute rights therefore requires an examination of those exceptionless duties. So what duties are exceptionless? Individuals have an unequivocal duty to refrain from gratuitously impeding another’s flourishing. From this duty, others can be specified: to refrain from taking another’s (or one’s own) life as a direct means to

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<sup>35</sup> Joel Feinberg, *Social Philosophy* (Englewood NJ: Prentice Hall, January 1973), 87.

<sup>36</sup> Chapter One: Practical Reasonableness and Natural Rights.

<sup>37</sup> Finnis, *Natural Law*, 104-127.

a further end, to refrain from baselessly imprisoning or enslaving another, to refrain from lying in those cases where factual communication is expected, and so on.<sup>38</sup>

We can understand the moral implications of non-derogable legal rights within the framework of absolute rights. The non-derogable right to life is an absolute, as there are no exceptions that make murder a reasonable action. While a consequentialist may object with a hyperbolic example – “would you kill one innocent person to save one million (presumably innocent) infants” – no utilitarian calculus can make reasonable the blatant deprivation of life. There is no “weighing” of goods here; saving the infants’ lives would not be the result of the murder, but rather the product of a totally distinct action, one of innumerable and unknowable consequences of the original, immoral-in-itself act.

Similarly, the other non-derogable rights cannot be justifiably suspended. Torture cannot be justified by the potential for extracting truths, no matter how valuable it may be – especially considering that no empirical data suggests that torture is a more effective method of interrogation than any other;<sup>39</sup> slavery cannot be condoned by the potential for economic output or growth; and the retroactive application of penal laws cannot ever be considered a reasonable practice.

These claims on the exceptionless nature of certain rights necessitate the obvious concession that in practice, these rights are overridden with some frequency. We can conceive of situations where one’s right to life may be exercised against others’. In such a case, we may appeal to the doctrine of double effect as the

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<sup>38</sup> Ibid, 225.

<sup>39</sup> Jeannine Bell, “One Thousand Shades of Gray: The Effectiveness of Torture,” *Indiana Legal Studies Research Paper* No. 37, 15 Aug. 2005.



natural law method of resolving moral dilemmas. “A person {or state} may licitly perform an action that he foresees will produce a good effect and a bad effect provided that four conditions are verified at one and the same time”:

1. That the action in itself from its very object be good or at least indifferent;
2. That the good effect and not the evil be intended;
3. That the good effect be not produced by means of the evil effect;
4. That there be a proportionately grave reason for permitting the evil effect.<sup>40</sup>

The deprivation of basic goods is in itself wrong- the permissibility of the act lies in whether it is intentional or not. An act that foreseeably and intentionally deprives a civilian of his life is morally egregious, but an act that foreseeably and unintentionally deprives a civilian of his life in the name of a foreseeably greater good may be permissible. One must hesitate to call such an action “good”; by definition, we can only aim to resolve a dilemma in the way that is “least bad.” “The notion of a justifiable abridgment of an inalienable {or absolute} right is one of morality’s concessions to an imperfect world.”<sup>41</sup>

There are likely other absolute rights that can be identified by similarly working backwards from those exceptionless duties extrapolated from the maxim “it is always unreasonable to choose directly against any basic value.” However, such a project is not necessary for the task at hand, determining whether the presence of absolute rights – the moral equivalent of non-derogable legal rights – implies a hierarchy within the class of human rights.

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<sup>40</sup> Joseph Mangan, “An Historical Analysis of the Principle of Double Effect,” *Theological Studies*, 16: 515.

<sup>41</sup> Diana T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia University Press), 1985, 144.

## 2.7 Equality and Priority

We have seen that all human rights are equally inalienable, considering that they belong to claimants by their very nature and cannot be surrendered under any circumstances. However rights in practice are often trumped, abridged, and suspended, whether by other rights or in the name of public order (which itself is reducible to rights relationships). In many cases, this trade-off is justified,<sup>42</sup> but we have demonstrated the existence of at least four absolute rights that cannot be reasonably suspended.<sup>43</sup> What are we to make of this distinction, and can we maintain that all rights are created equal if some are absolute while others are not?

That some rights can be suspended while others cannot need not imply anything other than a solely normative hierarchy. In seeking to promote the common good, the international community is right to recognize that some rights are more practically fundamental. It is rather obvious that a right to nationality or to own property would mean nothing to an individual who has had his right to life violated. Similarly, those rights that express the “most basic” human needs, such as 2<sup>nd</sup> generation rights to food and shelter, must be upheld if an individual is to exercise other and less practically urgent rights.

The practical considerations of states in the international system have no bearing on the equality or importance of human rights as an outline of the common

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<sup>42</sup> Recall the quarantine scenario where individuals’ right to freedom of movement is trumped by an appeal to public order.

<sup>43</sup> An absolute right is never “suspended”; it never ceases to exist and always merits most serious consideration. This is not the case with legally derogable and morally non-absolute rights, where suspension effectively puts certain rights claims on hold in the name of expediency and public order. Still, suspension need not imply alienation.

good. Human flourishing requires the realization of the full spectrum of rights, corresponding both to our basic, vegetative needs as organisms to those rights merited by our rationality. If we are to locate any rights that are fundamental or logically prior to others, we must look elsewhere.

## 2.8 Fundamental Rights

Some scholars have argued that all natural or human rights are expressions of a more fundamental right. J.L. Mackie has proposed the right of persons to “choose how they should live.”<sup>44</sup> If we are to give this any consideration, it can only be with the qualification “within reason” added. Hart offers a fundamental moral right that appeals to this idea (albeit indirectly) in his work *Are There Any Natural Rights?*

In the work, Hart offers the conditional “if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.”<sup>45</sup> The idea here is that the very notion of a right and its consequent duties involves justifications for limitations on freedom. We have rights because of requirement by practical reasonableness, and any limitation of our freedoms (negative rights) requires justification, whether it be by an appeal to other rights, expediency, and so on. In this way, a person has a default right to be free, and this freedom is to be enjoyed equally by all men.

Mackie’s fundamental right to “choose how one should live” and Hart’s “equal right of all men to be free” are so nebulous that without explication they are utterly

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<sup>44</sup> J.L. Mackie, “Can There Be a Rights-Based Moral Theory?,” *Midwest Studies in Philosophy* 3 (1978), 351.

<sup>45</sup> H.L.A. Hart, “Are There Any Natural Rights?” In *The Legacy of H. L. A. Hart: Legal, Political and Moral Philosophy*, (Oxford: Oxford University Press, 2008).

without meaning. Explication of such a broad claim results in the specification of the many human rights that exist as an outline of the many aspects of the common good. These rights are not logically fundamental; they are an abstraction of particularly and reasonably specified rights into a vague common denominator. The point of the human rights discourse is to address how we should live, and if anything, the discourse is currently too sparse to adequately express the many requirements of practical reasonableness. Thus, the search for a condensed, “fundamental” natural right is working precisely backwards.

### **2.9 All Rights are Created Equally**

We conceded earlier that there may exist, for practical purposes, a normative hierarchy of human rights. This is actually useful, as it sets precedents for cases of conflicting rights-claims. It is reasonable that the right to life is understood as more urgent than the right to freedom of speech, and as such, free speech may be justifiably limited to in the name of public security. That having been said, there is little reason to conceive of human rights in a hierarchy of importance. We have demonstrated that the different generations of rights are interactive, not sequential, and that non-derogability and absolutism need not challenge the import of derogable and non-absolute rights. Just as all basic goods are equally basic and fundamental, no one human right is any more basic or fundamental to one’s nature.

The next chapter will consider real-world examples of cultural pluralism in conflict. Though we have framed the human rights discourse in the natural law tradition, there remains the argument that such a conception is peculiarly Western.

Many thinkers propose that instead of singular foundationalism, cultural legitimacy can only be bestowed to human rights through culturally specific arguments.

Scholars such as Abdullahi An-Na'im argue that this is the most practical way to deconstruct the many existing barriers to human rights implementation.

Manifestations of such barriers can be seen in the numerous reservations to human rights treaties. For example: "Qatar reserves non-compliance for any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion."<sup>46</sup> Before entering into a discussion on deconstructing such cultural obstacles, we will consider whether the contingency of culturally relative arguments undermines the security of the class of human rights. This will require a consideration of John Rawls' political thought. After a discussion on human rights as limitations on pluralism, we will turn our attention to whether an intra-cultural solution can reconcile the penalty for apostasy under Shariah law and the human right of religious freedom.<sup>47</sup>

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<sup>46</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment.

<sup>47</sup> The conflict between Shariah law and public international law is most evident through an analysis of reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment.

## Chapter Three

### The Necessity of a Universal Foundation

No theory of human rights for a domestic or international order in modern society can be advanced without considering Rawls' work.<sup>1</sup>

Rawls' political thought, particularly the thought experiment of the veil of ignorance, provides insight into reconciling human rights and purported cultural barriers.

While his work concerns the universality of human rights, Rawls deliberately eschews foundationalism, instead arguing for the universal reach of human rights norms across myriad, culturally specific, foundations.<sup>2</sup> In this chapter, I hypothesize that the Rawlsian theory of human rights can be strengthened if grounded in the single, universal foundation of natural law, challenging the normative consensus theory. This reading will be put to the test through a case study representative of cultural pluralism in conflict: freedom of religion versus the capital offense of apostasy under Shariah law. The discussion will examine an intra-cultural suggestion for securing human rights compliance – a temporary solution for ameliorating rights abuses – and conclude with an appeal for a single, universal foundation upon which human rights can be respected without historic or cultural contingency.

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<sup>1</sup> Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly* 20.2 (The Johns Hopkins University Press, 1998), 230.

<sup>2</sup> John Rawls, "The Law of Peoples," *On Human Rights: The Oxford Amnesty Lectures, 1993* eds. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 41-82, in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 1999), 530.

### 3.1 Rawls' Theory of Justice

Rawls' thoughts on human rights were developed within the framework of "justice as fairness." As such, it would be prudent to briefly address this notion of justice before delving into its specification of particular rights. For Rawls, justice is "the virtue of practices where there are assumed to be competing interests and conflicting claims, and where it is supposed that persons will press their rights on each other."<sup>3</sup> There are two principles of justice: that each person has an equal right to the most extensive liberty compatible with a like liberty for all; and that inequalities are arbitrary unless it is reasonable to expect that they will work to everyone's advantage.<sup>4</sup>

Rawls arrives at the two principles of justice through a thought experiment called the veil of ignorance. In deliberating about requirements of justice, Rawls rightly acknowledges that thinkers may be biased based on their particular position in society. Any conclusions drawn in such a way are likely to be self-interested.<sup>5</sup> In order to remove any personal bias, Rawls proposes that the discussion take place under the veil of ignorance. Under the veil of ignorance, individuals deliberate about justice without knowledge of their position in society; they have no idea which socioeconomic class they may be born into, what natural aptitudes they may

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<sup>3</sup> Rawls, "Justice as Fairness," *Philosophical Review*, 64, no.1 (January 1955), 3-32, in *John Rawls: Collected Papers*, 56.

<sup>4</sup> *Ibid*, 48.

<sup>5</sup> We can imagine that a destitute individual would prefer extensive governmental provisions to improve his condition whereas a wealthy individual may not desire to pay such taxes.

possess, what their conception of the good may be, and so on.<sup>6</sup> This is what Rawls calls the “original position.”<sup>7</sup> The conclusions individuals reach in the original position – the two aforementioned principles of justice – serve as criteria by which one may evaluate the legitimacy of social arrangements.<sup>8</sup>

### 3.2 Rawls’ Principles as Requirements of Practical Reason

It is difficult to resist the temptation to draw numerous parallels between Rawlsian thought and natural law. Let us recall that for the natural law theorist, justice can be understood as the “concrete implications of the basic requirement of practical reasonableness that one is to favor and foster the common good of one’s communities.”<sup>9</sup> In this way, Rawls’ definition – “the virtue of practice where there are assumed to be competing interests and conflicting {rights} claims...” – expresses the concrete implications of practical reasonableness in a world where scarcity exists and some rights must be exercised at the expense of others. Deliberation in the original position is an exercise of natural reason unadulterated by self-interest.

Both of Rawls’ principles of justice are similarly compatible with a theory of human rights as an expression of the requirements of practical reasonableness. Rawls’ first principle of justice, “that each person has an equal right to the most extensive liberty compatible with a like liberty for all,” is related to our previous discussion on the limitation of rights. It is the unfortunate case that not all rights

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<sup>6</sup> Rawls, “The Justification of Civil Disobedience,” *Civil Disobedience: Theory and Practice*, ed. Hugo Bedau (New York: Pegasus, 1969), 240-255, in *John Rawls: Collected Papers*, 178.

<sup>7</sup> Ibid, 177.

<sup>8</sup> Ibid.

<sup>9</sup> John Finnis, *Natural Law*, 164.



can be realized, and the state must deliberate on right action regarding conflicting rights claims. Human rights express a “minimum standard of well-ordered political institutions for all peoples who belong,”<sup>10</sup> a bottom-line of dignified treatment. To expand the strength of a right to be practically non-negotiable would be an exercise of futility. It suffices to say that “the most extensive liberty compatible with a like liberty for all” is markedly similar to the natural law specification of human rights that are only to be limited by the exercise of other rights.

The point of Rawls’ second principle– that “inequalities are arbitrary unless it is reasonable to expect that they will work to everyone’s advantage” – is to secure a fair, but not necessarily equal, distribution of goods to individuals; it defines “what sort of inequalities are permissible.”<sup>11</sup> For example, an individual that is born into a tremendously wealthy family does not merit his wealth based on anything other than his birth; he is an arbitrary product of nepotism. Unless societal mechanisms were in place to ensure that the wealth be distributed to everyone’s advantage, his enjoyment of privilege would not be just. However, it is justifiable that certain special benefits be added to some offices, perhaps to attract the requisite talent in order to better perform duties to benefit others.<sup>12</sup>

Rawls’ second principle of justice is in keeping with the requirements of practical reasonableness, namely, “no arbitrary preference amongst persons.”<sup>13</sup> While the requirements of practical reasonableness are stated with regard to the pursuit of basic goods, it is not too much of a stretch to apply it to matters of

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<sup>10</sup> Rawls, “The Law of Peoples,” 552.

<sup>11</sup> Rawls, “Justice as Fairness,” 49.

<sup>12</sup> *Ibid*, 50.

<sup>13</sup> Finnis, *Natural Law*, 106.

distribution in a political system. One individual's enjoyment of basic goods is not objectively more valuable than that of another. With this in mind, individuals in the original position, unsure of what rung of the socioeconomic ladder they are to be born into, would reasonably conclude that a just society could not rightly favor an individual without it benefitting each and every member of the community.<sup>14</sup>

### 3.3 Rawls' Eschewal of Foundationalism

In his many writings on human rights, Rawls deliberately avoids proposing a single philosophic foundation, maintaining that the law of peoples is based on a constructivist, public political conception of justice and not a comprehensive moral doctrine.<sup>15</sup> Though Rawls concedes a universal basis for human rights, he is not resigned to abandon the universality of their reach. His conception of human rights can be understood as a minimum standard of treatment for peoples who belong to a just society. Human rights for Rawls serve three roles: as a necessary condition of a regime's legitimacy; to sufficiently exclude justified and forceful intervention by other peoples; and to set a limit on pluralism among peoples. To be a legitimate political institution – what Rawls calls a well-ordered society – a state must at least uphold the rights to life, security, personal property, freedom of conscience and association, and emigration.<sup>16</sup>

For Rawls, holding human rights as criteria of a regime's legitimacy does not presuppose the idea that persons are atomic units in a society possessive of

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<sup>14</sup> Rawls is not here appealing to a calculated "greater net utility," but rather to the natural law conception of the common good.

<sup>15</sup> Rawls, "The Law of Peoples," 551.

<sup>16</sup> Ibid, 552. Rawls does not seek to provide an exhaustive list.

individual rights. This is essential for the human rights to be politically neutral.<sup>17</sup> In an individualistic society, rights would be conferred to individuals as citizens, while in an associationist society, rights would be conferred to individuals as members of groups. Rawls abandons an argument for the individual as the constitutive unit of society in order to appease would-be critics of Eurocentrism and secure compliance:

Admittedly it {the conception of rights as possessed exclusively by groups} ensures these rights to persons as members of estates... and not as citizens. But that does not matter. The rights are guaranteed and the requirement that a system of law must be such as to impose moral rights and duties is met. Human rights understood in the light of that condition cannot be rejected as peculiar to our Western tradition.<sup>18</sup>

In keeping with the permission of culturally relative formulations of human rights, liberal societies must recognize the legitimacy of any society that upholds human rights- “well-ordered societies are not necessarily liberal.”<sup>19</sup> Differing justifications for the promotion of the reasonable law of peoples are not grounds for sanction or military pressure in keeping with the second function of human rights. If, however, a regime does violate human rights, a criterion of legitimacy, pressure – ranging from diplomatic to military – may justifiably be applied.<sup>20</sup> Such a violation would exceed the limits on pluralism, the third role of human rights.

Such flexibility softens the claim to universality. Universality as such has some merits: in minimizing criticism of human rights as a Western imposition, it facilitates agreement on human rights norms and subsequently promotes the

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid, 553.

<sup>19</sup> Rex Martin, *Rawls and Rights* (University Press of Kansas, 1985), 36.

<sup>20</sup> Rawls, “The Law of Peoples,” 553.

common good. However, we must be skeptical of contingent foundations. If there is reason to think that the contingency of a foundation is highly susceptible to change, then there exists a serious threat to the security of human rights. While Rawl's eschewal of foundationalism does evade objections of relativism, it is at a serious cost.

### 3.4 A Natural Law Reading of Rawls

I hypothesize that a natural law reading of Rawls can bolster the universal claim of human rights without necessarily falling to subjectivism. In speaking of the source of human rights' universality, Rawls says the following:

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.<sup>21</sup>

This in itself is starkly reminiscent of human rights as requirements of practical reasonableness. That these principles be applied to different subjects "as they arise in sequence" is a concession that certain rights are not trans-historical.<sup>22</sup> But considering that certain human needs, or conditions for flourishing, are indeed universal, certain conclusions of practical reason must command more than foundationally contingent consideration. Natural law as a single foundation does not impose static prescriptions; the good of practical reasonableness negotiates the

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<sup>21</sup> Ibid, 533.

<sup>22</sup> Recall that a right to property is meaningless in a society with no conception of private ownership.

dynamic and historically contingent obstacles that arise in one's pursuit of basic goods.

We have already discussed that natural law does not exclusively bestow rights to individuals considering that human rights as outlines of the common good must promote the basic, irreducible good of sociability.<sup>23</sup> Thus the objection of associationist societies to which Rawls conceded rights as possessions of citizens need not rattle the foundation of natural law. Even more, an objection to any conception of individual rights is unreasonable considering that groups are predicated on the participation of individuals. It is the sum of individuals' acknowledgment of group authority that makes membership significant in the first place. Neither Rawls' constructivist approach to human rights nor that of natural law abstracts man from the community: "In talk of human rights, it is assumed that human beings live in societies."<sup>24</sup>

A natural law reading of Rawls is consistent with his permission of non-liberal well-ordered societies, but only values culturally contingent justifications for human rights norms as a temporary point from which to arrive at a universal foundation. Without appeal to a non-contingent base, the security of human rights remains subject to change. Human reason is the ultimate foundation for human rights, and any other non-contingent basis would be reducible to it. To determine whether a natural law reading of Rawls' thought is actually necessary, we will turn to the intra-cultural proposal of Abdullahi An-Na'im to reconcile human rights and Islam. The conflicting human right to freedom of religion and treatment of apostasy

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<sup>23</sup> 2.4 Third Generation Rights.

<sup>24</sup> Martin, *Rawls and Rights*, 36.

under Shariah law will be considered as a litmus test. If a culturally specific solution proves sufficient to secure the respect of religious diversity, then it would appear that a universal foundation is unnecessary and that Rawls need not appeal to natural law. However, if the contingency of the solution is so great that it does not unambiguously uphold freedom of religion, our hypothesis will granted added credibility.

### **3.5 Apostasy and Shariah Law**

Apostasy, the renunciation of a religion by an individual, is protected by Article 18 of the Universal Declaration of Human Rights:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>25</sup>

This freedom is at odds with Shariah law, the traditional law of Islam, as it considers apostasy a capital offense. This is problematic considering that numerous states in the international system incorporate the tenets of Shariah to some extent in domestic law. States such as Turkey and Kazakhstan have moved away from Shariah as a source of secular law, while others such as Pakistan and Sudan have mitigated the harsher principles of Islamic law through acknowledging the supremacy of the state constitution. However, there remain some states that do not

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<sup>25</sup> Universal Declaration of Human Rights.

concede the supremacy of religious law (namely Saudi Arabia) and fully apply the Shariah.<sup>26</sup>

There are two sources of Shariah law: the Qur'an and *Sunna*. The Qur'an is believed by Muslims to be the literal word of God, revealed by the angel Gabriel to the Prophet Muhammad. As such, there is little room for interpretation or debate concerning this source of Islamic law.<sup>27</sup> The *Sunna* reflects the traditions of the Prophet and is an authoritative source of law in Islamic jurisprudence. While the Qur'an does not explicitly mention execution as the penalty for apostasy, the *Sunna* does: "The blood of a fellow Muslim should never be shed except in three cases: That of the adulterer, the murderer and whoever forsakes the religion of Islam."<sup>28</sup> This is quite obviously inconsistent with any serious conception of human rights.

### 3.6 A Historical Approach to Islamic Law

If Shariah law is to serve as the basis of civil law for a state in the current international system, and if that state is to have any legitimacy by the aforementioned criteria of a well-ordered society, the capital punishment for

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<sup>26</sup> Abdul Aziz Said, "Human Rights in Islamic Perspectives," from *Human Rights: Cultural and Ideological Perspectives*, ed. Adamantia Pollis and Peter Schwabb (New York: Praeger, 1979).

<sup>27</sup> Certain Islamic scholars have debated whether scripture is subject to interpretation. Averroes, an Aristotelian philosopher and Islamic jurist, believed that religion and logic could not conflict, and that in the case of literal discrepancies between the two, scripture ought to be interpreted allegorically. This view was highly criticized by more orthodox Islamic jurists and led to the termination of his public career.

<sup>28</sup> Abdullahi An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: a Case from the Sudan," 16 *Religion* (London: Academic Press Inc., 1986), 197-223, in *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*, ed. Mashood A. Baderin (Burlington: Ashgate, 2010), 233.

apostasy must be abandoned. An intra-cultural solution has been proposed that accommodates human rights norms through a dynamic interpretation of Islamic law. This proposal, popularized by Mahmoud Mohammed Taha and taken up by Abdullahi An-Na'im, is predicated on a historical approach to Shariah.

The idea is simple. Shariah law, an interpretation of scripture, was codified by Islamic jurists beginning in the 9<sup>th</sup> century. This interpretation did not occur in a historical vacuum; rather, the jurists, conditioned by the sociopolitical attitudes of their time, understood and interpreted the original texts as confirming their beliefs.<sup>29</sup> The current Shariah accordingly reflects many beliefs that are, to put it mildly, dated. For example, the societal inequality of men and women was not uniquely Islamic in the Middle East, but rather common practice throughout most of the world.<sup>30</sup> As societies progressed, liberal institutions, not bound to a static, prescriptive document like the Shariah, were able to freely adopt norms to match shifts in ideology. Conversely, Islamic states, treating the Shariah as a fixed moral authority, became stuck in the past. The incompatibility of the Shariah with today's prevailing ideologies need not be seen as an incompatibility of Islam and the international community. Instead, a modern interpretation of scripture, reflecting the more egalitarian ideals of today, can be compatible with human rights.

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<sup>29</sup> Mahmoud Mohamed Taha, *The Second Message of Islam*, trans. Abdullahi An-Na'im (Syracuse: Syracuse University Press, 1987), 74.

<sup>30</sup> An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives," 3 *Harvard Human Rights Journal*, 1990, in *Islam and Human Rights*.



### 3.7 Consensus through Reemphasis

We have seen that Shariah, the moral code of Islam, is based on the Qu'ran and Sunna, and that its current content is incompatible with the criteria of a well-ordered society. For scholars to argue that a reinterpretation of scripture can produce a new Shariah in keeping with human rights norms requires that there be identifiable passages in scripture upon which to draw. This may require the repudiation of those passages that explicitly contradict principles of human rights, or at least a reemphasis to those passages that uphold them. Indeed, some messages of Islam seem at odds with one another:

The Prophet, peace be upon him, said "Whosoever changes his religion, kill him."<sup>31</sup>

Let there be no compulsion in religion. Truth stands out clear from error. Say, the Truth is from your Lord. Let him who will, believe, and let him who will, reject it.<sup>32</sup>

Much of An-Nai'm's work calls for a juridical revolution to reinvent, not merely reform, the Shariah.<sup>33</sup> This new Shariah, based on a modern interpretation of Islamic sources, must be created outside the existing framework of Islamic law; "the fundamental mistake of Islamic modernists is that they sought reform within the framework of Shariah."<sup>34</sup> The formation of the new law requires a shifting of legal

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<sup>31</sup> An-Na'im from the *Sunna*, "The Islamic Law of Apostasy," 211.

<sup>32</sup> Koran 17:70; 2:256.

<sup>33</sup> An-Naim, "The Islamic Law of Apostasy," 214.

<sup>34</sup> An-Na'im, "A Kinder, Gentler Islam?," 52 *Transition*, 1991, in *Islam and Human Rights*, 41.

efficacy from one text to another and the exercise of what An-Na'im calls "rational juristic reasoning."<sup>35</sup>

To be fair, this process is more than a matter of reemphasis; it requires that certain unreasonable passages be ignored entirely. This would be unacceptable for the Islamic fundamentalist who takes scripture in its entirety as the literal word of God as conveyed to the Prophet. Still, it does provide a valuable route for the many peace-loving Muslims who strive to live both in accord with the requirements of their religion and practical reasonableness. An-na'im's proposal is not one of secularism, though it does aim to make Islamic law less objectionable to the sensibilities of liberal democracies. If Islam is to be reconciled with the doctrine of human rights, the current Shariah must be abandoned, as it universalizes practices that, though common at one point in time, are now repugnant to the criteria of a well-ordered society.

### **3.8 The Contingency of Consensus**

Such an intra-cultural solution may very well be the most expedient means of securing compliance with human rights norms in Islamic states. A new Shariah could frame human rights as a moral requirement of Islam and would not ask Muslims to acquiesce to a Eurocentric foundation. However, we must acknowledge that there exist many practical barriers to its implementation. Reinterpretation of scripture to accommodate egalitarian ideals would upset the male-dominated societal structures in Islamic states and challenge the vested interests of powerful

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<sup>35</sup> An-Na'im, "The Islamic Law of Apostasy," 216.

forces in the Muslim world.<sup>36</sup> It would be an especially hard sell to those more orthodox practitioners that consider any such change in interpretation to be a dilution of culture imposed by the Western world.

We must also be wary of the proposal's contingency. The very idea of such a radical shift underscores the liberty with which one may interpret scripture into a set of moral requirements. With enough mental gymnastics, a jurist could likely read scripture as requiring a wide array of moral prescriptions; a new Shariah could be abandoned just as quickly as it was formed. Perhaps it is the case now that, considering the hegemony of the United States and prevailing egalitarian ideals, it would be prudent for Islam to accommodate human rights. But if power in the international community were to shift, and if the Arab world were to be freed of diplomatic pressure and the threat of sanctions, there is no guarantee that human rights would remain a priority. Without acknowledgment of some criterion other than divine authority – especially given the volatility of its prescriptions – the contingency of this intra-cultural solution to reconcile human rights and Islam is too great to adequately secure human rights.

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<sup>36</sup> An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives," in *Islam and Human Rights*, 104.

### 3.9 The Necessity of a Universal Foundation

In Islam, revelation takes the form of law.<sup>37</sup> For traditional Muslims, faith precedes reason; obedience of the law is paramount and practices are not subjected to practical reason. “Obligation is the way to what is right”; the doctrine of Islam explicates a comprehensive way of life governed by divine revelation.<sup>38</sup>

Implicit in the argument for a new, historically conditioned reading of Islamic texts is an attempt to reconcile the religion with reason. An-Na'im's proposal of a modern Shariah first requires that Muslims accept the current egalitarian attitudes with which it seeks to conform, since otherwise there would be no impetus for reinterpretation. To accept these ideals, that individuals ought to be guaranteed a certain bottom-line of treatment, would mean interpretation of scripture would occur through a tinted lens. With human rights compliance as a specified objective, An-Na'im's proposal requires that an interpreter subject faith to reason in searching for those passages that comply with human rights norms. Though there is no explicit appeal here to natural law, it is evident that even a culturally relative argument for human rights cannot be divorced from reason.

Practical reasonableness is a necessary criterion for a well-ordered society's compliance with universal human rights. A Shariah that is entirely historically relative cannot convey the moral weight of human rights. The foundational universality bestowed by a natural law conception of human rights does not require trans-historical validity in the strict sense; of course human rights have not been

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<sup>37</sup> This is also the case with Judaism, but considering that the religion does not seek to proselytize it has been less problematic.

<sup>38</sup> Ahmad Farrag, “Human Rights and Liberties in Islam,” in *Human Rights in a Pluralist World: Individuals and Collectives* (Westport: Meckler, 1990), 133.

acknowledged and respected throughout history. But we may conceive of history as, if not necessarily teleological, morally progressive.<sup>39</sup>

Throughout the ages, we have come to understand those practices that promote our individual and collective flourishing. The Peace of Westphalia following the 30 Years War; the formation of the UN Charter and proliferation of international law following the Second World War; these are all examples where, after our consciences were heightened by the most egregious violations of human dignity, the international community converged on certain opinions regarding the common good. From here on, barring any cataclysmic event that would render our current notion of the international system absurd, we have no reason to think human rights may ever justifiably be abandoned.

Only with an appeal to reason as the foundation for human rights can an Islamic state be, in a Rawlsian sense, a well-ordered society. This does not require that Muslims abandon their religion or even obedience to the Shariah. Rather, it demands that persons everywhere recognize the merits of human rights as distinct from their own subjective convictions. Human rights as limitations on pluralism must not permit the total historical contingency of a new Shariah as a permanent solution to securing the common good. If nothing else, a new Shariah promoting normative agreement on human rights can serve as a position from which to reason to a universal foundation. Cultural legitimacy can be attained through the selection of scriptural passages resonating with the human rights doctrine, but it is only with recognition that even the literal word of god ought to be subjected to reason that

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<sup>39</sup> As argued by Harvard psychologist Steven Pinker, *The Better Angels of Our Nature* (New York: Viking Adult, 2011).

human rights can be truly universal. A historically conditioned Shariah can only permanently reconcile human rights and Islam if it is to acknowledge that a wide spectrum of liberties are here to stay, and that it is unequivocally good that the individual be the arbiter of his own destiny.

## Conclusion

Let us recapitulate the argument for the necessity of natural law as a single moral foundation upon which human rights may be erected without historic contingency. We first sought to demonstrate that a single foundation was possible.<sup>1</sup> Liberal natural law, with its identification of basic goods as necessary for human flourishing and rejection of cultural relativism, is the most fitting moral framework to locate human rights. Human rights, requirements of practical reasonableness and expressions of conditions for agency, arise from an empirically inductive account of those goods perfective of our nature. Our identification of goods only gives us a *descriptive* account; goods to be pursued and rights to be realized come to prescribe *moral* imperatives through the faculty of practical reasonableness, which dictates how we ought to negotiate our life projects with those of others.

We then examined an alleged hierarchy of the content within the class of human rights to determine whether the sub-classes of inalienable, non-derogable, and absolute rights signified any stratification in importance. Conceived of as expressions of human needs, we determined that the requirements of practical reasonableness are most aptly described by all three generations of human rights. These rights are best seen as mutually supportive, not sequential. If there is a hierarchy of right, it is only one of practical realization.

Having argued for human rights content as equally expressing the many preconditions for human flourishing and having grounded the class of human rights upon a natural law foundation, we turned to a case study of cultural pluralism in

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<sup>1</sup> Chapter One: The Natural Law Foundation of Human Rights

conflict to illustrate the necessity of a universal foundation. Through a natural law interpretation of Rawls' conception of human rights as limitations on pluralism, we examined the intra-cultural argument of Abdullahi An-Na'im to reconcile Shariah law with the human right to freedom of religion. We concluded that the contingency of a historical approach to Islamic law was too great to adequately secure the protection of human rights. It is only with both an appeal to natural reason as an evaluative criterion and an acknowledgment that human rights – expressions of universal human needs – are here to stay, that human rights can enjoy true, non-contingent universality.

An implicit but highly important theme recurrent in this thesis bears emphasizing. The foundation of liberal natural law is not incompatible with many of the disparate cultural practices of the world. A natural law conception of human rights does not preclude cultural pluralism- it limits it. The limitations of pluralism permit, to put it simply, those practices that are “within reason.” Practical reasonableness is a dynamic faculty. As such, natural law does not prescribe static norms. Within differing social, political, and cultural contexts, one's pursuit of basic goods must negotiate different variables. In this way, we may view cultural pluralism as “the outcome of the exercise of human reason under free institutions.”<sup>2</sup>

Few argue against the universality of the human capacity for reason or deliberation, but many do find problematic the various, seemingly contradictory products of deliberation reached by individuals across the globe. As already addressed, that individuals pursue different basic goods in different ways is to be

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<sup>2</sup> Rawls, “The Law of Peoples,” 564.



expected both intra-culturally and inter-culturally. Liberal natural law theory can encompass the many doctrines of the world so long as individuals everywhere live in accord with reason. This requires some degree of self-reflection. Practical reason is not peculiarly Western, but it is peculiarly human. As such, to accept any precept without scrutiny is to insult the faculty that distinguishes man from beast. We have learned well from history what atrocities may arise from the dogmatic acceptance of ideas.

We must be skeptical of those who seek to curtail the activity of the human mind, to limit individual freedom, and criticize the human rights doctrine as a Western imposition. Objections to the idea of human rights are not frequently levied by the marginalized. The empowerment of individuals everywhere, a mandate of practical reasonableness in fostering the common good, is likely to displace those despots who would subjugate their fellow man to perpetuate their unmerited privilege. But we must maintain unambiguously that persons ought to be guaranteed a certain minimum standard of treatment based on nothing other than their membership in a moral community; that the dignity of man ought to be protected from excesses of the state; that the indigent be made able to help themselves.

Critics of human rights meticulously cite the many differences between cultures of the world. In doing so, they develop a tunnel vision that blinds them to all of the commonalities that exist between us. It is upon these shared characteristics that a more productive human rights discourse should be predicated. Persons everywhere subjectively experience the world around them, set goals, and

experience pleasure and disappointment. We all hope, fear, and direct our lives in ways we see fit. Regardless of the god to which one prays or the nation to which one belongs, these things are timeless and merit acknowledgment. Human rights as expressions of basic human needs, requirements of practical reasonableness, and safeguards to a dignified life are no more Eurocentric than reason itself.

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