

# Chapter 1

## Alternative Philosophical Perspectives on the Origin and Nature of Human Rights

### 1.1 The Embattled Notion of Universal Human Rights: Introduction

We begin this inquiry by exploring the right to vote as an essential aspect of a citizen's right to *full* integration into a particular State. In that regard, the right to vote is held to be fundamentally grounded on the natural inherent right each person possesses as a human being to belong to a particular society. The right thus exists whether recognized in law or not, and regardless whether, in practice, the individual is prevented for some reason or another from exercising that right as a citizen of the State in question (due, for instance, to legal incapacity to vote related to statutory bars based on chronological age requirements for eligibility to vote; actual mental incapacity compromising the very specific skill set involved in the behaviour of voting etc.). Voting then is a prime manifestation of the basic human rights of free association and free expression. The denial of the vote consequently is the denial of a basic human right. That denial is, furthermore, a vehicle for marginalizing an identifiable group and potentially rendering it relatively powerless. Such marginalization, in turn, is likely to contribute to the group's psychological disengagement from the society.

It is argued that the *intuitive* understanding human beings have of fundamental universal human rights is a function of our inherent capacity to potentially reject the notion of suffering inflicted by the other as just. This is the case though we may, for a multitude of reasons, be unable to prevent or end that suffering, or, due to environmental pressures of various sorts, have come to accept that suffering as our lot in life. One's understanding of human rights is not in any simple sense then simply a function of any political, social, cultural or other context in which one finds oneself. The intuitive understanding that there exist human rights then is integrally linked to the inherent capacity for appreciating one's own human dignity. Put differently, human dignity, in its most basic form, is emergent in the rejection of the acceptability of one's suffering caused by another. The appreciation of human rights and human dignity is the stimulus for acts of resistance against oppression. That resistance has existed

for time immemorial and ranges from passive resistance (i.e. even just the desire to survive victimization may be regarded as an act of resistance) to overt, active resistance. The struggle for the youth vote by youth is then, at its core, emblematic of the recognition by young people of their human dignity and intrinsic worth as autonomous persons. Such a perspective on human rights as here described is, in recent years, a matter of great contention, and we consider next some of what fuels that controversy.

## 1.2 The Embattled Notion of Universal Human Rights

The notion of voting rights as inherent, equal and universal is reflected, for instance, in the *Universal Declaration of Human Rights* as follows:

**Universal Declaration of Human Rights, Article 21:**

- (1) *Everyone* has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by *universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures* (emphasis added) [1].

Of late, however, the notion of inherent universal human rights has been under siege in general, and not just in respect of the exercise of the vote as a basic context-independent intrinsic right. So, too, has the view been treated with increased scepticism in some academic circles that democracy can deliver a better human rights situation for all the people in any particular State than can non-democratic regimes. Undoubtedly, the democratic process is not a guarantee of a better life and the enjoyment of respect for one's human dignity. As to the latter point; consider, for instance, the extraordinarily poor quality of life of the Dalit, or so-called 'untouchables' whose ranks number 160 million Indians and another 90 million outside India. Their abysmal human rights situation continues to this date in India, the world's largest democracy, without significant relief in sight [2]. However, at the same time, the Indian State policy, as a democratic State, is one that officially condemns the caste system which is largely responsible for the Dalit population's tragic situation. There have been some considerable efforts made by India to improve the plight of the Dalit with incontestably considerably less than stellar results. Yet, this author would argue that democratic values and mechanisms are essential to any human rights struggle.

Despite democracy's failings to date in delivering an ideal human rights situation for all persons within the State's jurisdiction, the right to a free vote offers hope for the future where candidates running for office are also democratically selected. The denial of the vote, or of a meaningful vote, (as

in a dictatorial regime where the outcome of the election, if there is one, is a forgone conclusion), is, in effect, an official State denial of one's inherent right as a citizen to full participation in, and integration into society. One's well being and status in that society hence remains under threat as a result.

Regarding the importance of the right to societal participation, consider the situation of the: (a) *stateless de jure* (persons not considered citizens under the laws of any country who may or may not, under international law, depending on the specific circumstances, be considered citizens of the State in which they reside; which State in fact marginalizes them), and (b) the *de facto stateless* (persons who officially have the nationality of the State in which they reside, or from which they have been exiled, but whose citizenship rights are rendered ineffective through various means such as discriminatory mechanisms and persecution, denial of identity papers such as birth certificates etc.). Often it is difficult to distinguish between the two socially constructed categories of stateless populations. The stateless *de jure* and often also the *de facto* stateless (i.e. those without identity papers) have no possibility, even a theoretical one, of improving their lot without pressure from the international community on the State in which they have taken asylum or otherwise reside. This given their exclusion from the vote based on lack of nationality, and/or lack of proper identity documentation etc. The marginalization of the stateless who are denied the vote is associated; furthermore, with a greater likelihood of the denial of other basic human rights. For instance, the denial of the vote impacts on the survival and protection rights of the stateless as well as on their societal participation rights in various domains such as education (i.e. see, for example, the *Case of the Yean and Bosico Children v. The Dominican Republic* concerning *de facto* stateless Haitian-Dominican children denied educational opportunity in the Dominican Republic due to their inability to obtain birth registration documents from the State officials. This denial of identity documents to Haitian-Dominican children in the Dominican Republic occurred despite the children in question having been born in the Dominican Republic, their having Dominican mothers and their having always resided in the Dominican Republic) [3]. Let us consider then some alternative views of the notion of fundamental human rights before we delve deeper into the topic of voting as a basic human right.

### 1.3 On Whether the Notion of Human Rights is Intrinsically Inter-Subjective

Dembour has provided a useful preliminary classification of various scholarly perspectives on the alleged origin and nature of human rights which she describes as follows: ‘...those I call “natural scholars” conceive of human rights as *given*; “deliberative scholars” [conceive of human rights]

as *agreed*; “protest scholars” [conceive of human rights] as *fought for* and “discourse scholars” [conceive of human rights] as *talked about*’ [4]. Dembour makes the unsettling self – revelation, arguably one open to challenge, that:

While I am ready to accept that human rights have become a fact by being repeatedly invoked in politics, law and common discourse, *I do not believe that they would continue to exist were we to cease to talk about them* (emphasis added) [5].

Dembour’s position is clearly antithetical to the notion of human rights as inherent and universal. One can agree that there may be few if any *realized* human rights in a practical sense were we not to talk about them. This since talk tends to stimulate anti-oppression movements; that is, the struggle for the actualization of inherent human rights. In regards to the struggle for human rights, it is important to acknowledge that whether or not one is willing and able to engage in the fight for human rights as an individual, or as part of a collective movement, does not impact on one’s intrinsic possession of the quality of human dignity (though it likely will, properly or improperly, depending on one’s view, influence others’ perceptions of one’s degree of dignity). However, this still leaves us with the question that Dembour poses and which she answers in the negative ‘would [human rights] exist [as a concept] were we to cease to talk about them?’

Human rights discourse, agreements or human rights struggles are not, on the analysis here, the necessary precondition for the emergence or conceptual construction of human rights. Rather, it is here contended that the *individual* human capacity for intuiting that he or she deserves better than to suffer amounts to an informal but most fundamental appreciation of human rights grounded on a personal sense of human dignity [6]. While persons can be led by their oppressor to believe that they deserve to suffer, yet there are always those who in time rise above such inculcation of false beliefs *with no outside assistance*. Such persons may stimulate an anti-oppression movement, or they may simply succeed in liberating themselves spiritually, or perhaps with some luck even in more concrete ways. Hence, we can reject the contention that the understanding of human rights, or the sense that one has a human rights claim, must originate in, and is dependent upon ‘intersubjective confirmation and validation among human beings’ [7]. In other words, the notion of human rights *cannot* be reduced to a ‘social construction’, nor can it be held to be emergent only through ‘collective agreements’ or ‘intersubjective confirmation and validation’ among human beings to use Benhabib’s terminology. Further, as persons in varied socio-political contexts are capable of automatically understanding the degrading nature of suffering inflicted by others precisely because they intuit the existence of human rights, the emergent *notion* of intrinsic human rights (the idea that one has ‘the right to have rights’), is *not* a function of democratic society, or only possible in that political context. Talk of human rights and intersubjective agreements about rights,

however, facilitate the understanding that other human beings also, by virtue of their humanity, have an inherent entitlement not simply to survive but to thrive. In short then there is an empirical basis for holding that human rights are inherent (a 'given' in Dembour's terms) originating in the human capacity for dignity which arises with the insight that life should not be imbued with suffering inflicted by others. That capacity is the well-spring of devotion to the concept of universal human rights in the face of continuing strife, unstable political situations, violence and injustice. The source of that capacity that gives rise to a personal sense of human dignity is a mystery and hence there is no attempt here to explain it. Rather, the point is that it is the inherent potential for appreciating one's own human dignity (i.e. the psychological and visceral understanding that one ought not to suffer at the hands of another) which translates into a tacit understanding of human rights. At some point, that intuitive understanding, when shared with others in perhaps, at first, a very obtuse fashion; initiates a process which, over time, ultimately gives rise to an articulation and conceptual elaboration of various human rights frameworks through talking, protest struggles and finally formal agreements as to the substance of those rights and who possesses them.

#### **1.4 On Whether Appreciating One's 'Right to Have Rights' Requires a Certain Level of Cognitive Competence**

Morsink holds the view that the notion of the universality of basic human rights requires that people have the universal power to understand that they have rights (i.e. understand that they have 'the right to have rights') [8]. The current author, however, contends that rights are an inherent aspect of one's humanity and not simply a function of one's capacity for self-reflection and conscious thought. Thus, this author disagrees with Morsink that a reasonable level of cognitive competence is a prerequisite for discovering that one has rights. This may *seem* to be the case given that the indicia for that understanding may vary dramatically as cognitive competence increases. For instance, someone of average or better cognitive competence is likely able to articulate, to some degree, their conception of their own rights and converse with others about basic human rights. In contrast, someone who is greatly cognitively compromised may only manifest, in the most rudimentary way, their understanding of rights. That is, their behaviour may reveal a visceral reaction to their own suffering. That reaction to suffering inflicted by another, even in the most cognitively compromised human being (i.e. severely brain injured person, persons affected by dementia etc.), or developmentally immature (i.e. the youngest among us), is most commonly anger and resistance, to the extent feasible, given the person's physical and situational constraints. Such pure resistance to suffering imposed by the other without the ability

to consciously entertain language concepts, or articulate them can be interpreted as an understanding of rights at its most primitive level. It is an appreciation that things (i.e. one's quality of existence) could be better. It is in recognition of such a universal understanding of rights—demonstrated in a multitude of ways and at various levels of sophistication—that the current author holds that there is an inherent universal appreciation of fundamental human rights. The current author's view thus differs from that of Morsink who holds that understanding the 'right to have rights' is a universal capacity only for the cognitively competent. This latter view is reflected in the following Morsink quote: 'I argue that every *normally healthy* human individual has the epistemic equipment to *discover* that we all have human rights (emphasis added)' [9]. The implication appears to be in the Morsink quote that persons who are not cognitively competent have no appreciation of rights, which as discussed, the current author would respectfully dispute. However, Morsink's notion of *discovering* that one has rights is an intriguing one and is discussed in what follows.

## 1.5 On Discovering One's Human Rights

Morsink holds that a distinction must be made between: (a) the *personal capacity* for the *discovery* of human rights (the discovery that each person has a 'right to have rights') as a function of the intrinsic nature of cognitively healthy human beings *versus* (b) 'the later *justification* of this belief to *others* after we have made our [own] discovery [of our basic human rights]' [10]. The current author is in accord with Morsink in rejecting the notion that the *understanding* of the 'right to have rights' requires inter-person agreement or validation.

The fact that certain rights are universal human rights and not context specific is implicit, Morsink points out, in the notion of 'manifestly illegal' acts defined as such based on the 'conscience of humanity.' (Acts that are manifestly illegal are those held to be intrinsically profoundly wrong regardless of the situation in which they occurred) [11]. The concept of 'manifestly illegal acts' is one found formalized in the Rome Statute [12] (the enabling statute of the International Criminal Court) in its references to 'genocide' and 'crimes against humanity.' However, the concept of 'manifestly illegal' acts and the duty not to commit certain crimes that offend the conscience of humanity predates the Rome Statute and was part of customary law and the rules of war prior to the codification of such rules in any military manual or international treaty (i.e. consider the execution in 1474 of Governor Landvoigt Peter von Hagenbach for what today we would term 'crimes against humanity' committed under superior orders while he was delegated by Charles, the Duke of Burgundy to run the government of the fortified city of Breisach on the Upper Rhine. His trial for ordering non-German mercenaries to commit the mass murder of male civilians,

and the rape and brutalization of women and children was instigated by the Archduke of Austria after Charles was killed [13]. The fact that the concept of 'manifestly illegal' acts was operative prior to codification is an indicator that humanity is capable of the moral intuition that certain acts are inherently unjust. Our understanding of universal human rights then cannot be simply reduced to human rights law or formalized agreements between State Parties. Indeed, notions such as 'manifestly illegal acts' persisted as meaningful despite the fact that written and unwritten agreements prohibiting such acts continued throughout the millennia to be broken. The Rome Statute is an articulation of more than simply an agreement amongst States Parties to the Statute to submit to the jurisdiction of the International Criminal Court. It is a codification of an inherent tacit understanding possessed by all of humanity that all persons have a right to have rights and to be protected from grave suffering maliciously and intentionally inflicted by others.

Morsink holds that the *Universal Declaration of Human Rights* was in fact addressed to the everyday person (rather than to 'jurists, scholars, international lawyers, diplomats or any other kind of expert') in recognition of the inherent human competence to understand the 'right to have rights' [14]. He explains further that the change in the drafting stage from the title of the Declaration from '*International Declaration of Human Rights*' to '*Universal Declaration of Human Rights*' 'shifted [as intended] the attention from the international delegations that did the proclaiming to the peoples of the world being addressed' [15].

To recap briefly, the view espoused here is that the notion of the human being's 'right to have rights' is an intrinsically available understanding for all persons though that understanding may vary in sophistication depending on cognitive and emotional competence. That understanding of fundamental human rights generally dawns on human beings as a result of their personal experience with suffering imposed by other human beings. Most often, for the cognitively competent at least, the notion of rights is tied up also with the perception that their own suffering is the result of some 'injustice' perpetrated by others. In some cases, an appreciation of rights arises as a result of the human capacity to empathize with others who are suffering especially if due to perceived injustice. The likelihood of perceiving injustice is, furthermore, exponentially increased when persons become aware of grave crimes such as mass atrocities.

The notion articulated here then is that of human beings having an inherent capacity for understanding the 'the right to have rights'. On this perspective, people's understanding of injustice predates legal definitions of the same. This, since human beings intrinsically know suffering when they see it though we may, for various reasons, not be willing to acknowledge it, or may have been manipulated by others not to acknowledge it. Human beings then naturally intuit the notion of injustice given that suffering is inherently categorized as unjust when it is *imposed* rather than

*chosen*. Of course, there is the possibility that this process can be subverted i.e. as when powerful persons, groups or institutions manage to convince persons to re-categorize their own suffering as a ‘blessing in disguise’ or as ‘chosen’ when, objectively speaking, in actuality, it was ‘imposed.’ As a result, the sufferer has difficulty distinguishing when and when not his or her basic human rights are being denigrated or even, in practice, negated. One thinks, for instance, in this regard of the situation of street people in modern urban centres in the West. They are generally impoverished, often desperate for food, often suffering severe health problems and, not uncommonly, consumed by a substance abuse problem. Social service agencies and members of the social elite often contend that the street life is the preferred choice for the majority of the chronically homeless. In fact, many homeless persons may even ostensibly voice the same view. This given that the chronically homeless are afforded insufficient long-term support for their health and substance abuse problems (where these exist) and housing predicament. It is less psychologically painful for many chronically homeless to maintain a vestige of dignity and suggest that the street for them was a free choice; or at least is so at present. The latter may be the most palatable ‘line’ or scripted position given that the chronically homeless individual typically has no access to the resources which would be needed to contest the violation of their basic human right to a healthy life and a minimally decent standard of living.

Morsink’s explanation of the origin of the understanding of the ‘right to have rights’ as personal discovery (with which this author largely concurs) accords with the fact that:

... people everywhere have known all along (especially in situations of gross abuse and violation) about inherently existing human rights. The invention of these rights [in the sense of their being expressly articulated, communicated to others and perhaps codified in some form, whether in sophisticated form or exceedingly rudimentary form, in legal or non-legal terms etc.] should not be ascribed to one historical period or one region of the world [16].

To provide historical detail on this point (the fact that people of all historical periods have had a conception of the ‘right to have rights’) is beyond the scope of this book. The current author will leave demonstration of that point thus to some ambitious expert on the history of humankind.

## **1.6 Evaluating Various Perspectives on the Origin of the Notion of Human Rights**

### ***1.6.1 The Discourse Notion of the Origin of Human Rights***

With respect, the flaw in Dembour’s position that human rights are but a socially constructed by – product of various ‘talk’ (legal discourse, everyday discourse etc.) is that she never does explain what gave rise to this



discourse; this ‘human rights talk’ in the first instance. Further, there is no explanation flowing from the discourse perspective as to why human rights talk appears to be a universal pre-occupation even in the face of dictatorship from the earliest times as reflected in resistance movements stemming from such talk.

### ***1.6.2 The Protest Notion of the Origin of Human Rights***

The perspective which views human rights notions and standards as arising out of protesting wrongs [17] has a similar problem to that of the discourse perspective on the origin of human rights. There is no explanation of what gave rise to the protest (the human rights struggle) in the first instance as opposed to a reaction of passive acceptance. That is, what is the basis for persons perceiving the ‘wrong’ (i.e. the human rights violations) in the first instance? The current author has suggested that persons *intuit* that suffering inflicted by others is a wrong and thus have a primitive *intrinsic* sense of the notion of human rights.

### ***1.6.3 Human Rights Concepts as the Products of Inter-Subjective Agreements***

Recall that Dembour uses the term ‘deliberative scholars’ to refer to those who hold that human rights originate in agreements. The modern forms of those agreements include, for instance, international human rights treaties, international covenants and declarations concerning human rights and the like. The question arises then as to ‘what is the basis for understanding that agreements may *not* always give adequate voice to the oppressed given the under-inclusive nature of those agreements?’ That is, how can an agreement be considered flawed in recognizing and protecting human rights, as they so often are, if the very origin and acknowledgement of human rights strictly emerges on the basis of those *de-limited* agreements and *restricted* collective understandings and definitions? What is the basis for dissent regarding the agreement, and the dissenters’ attribution to the agreement of inadequacies in not going far enough to protect universal human rights? Clearly human beings have a sense of human rights that is not strictly bounded by the corners of extant agreements or even self-interest and the desire for power though those factors, of course, are also at play.

It is the continued suffering of persons that allows human beings to think past the current agreements and elaborate a more sophisticated rights scheme which is more encompassing. Thus, human rights advocates struggle against power elites and others with a vested interest in the status quo when they contribute to the deliberative process that gives rise to rights

agreements. On the view here then everything is *not* relative. Human suffering is universally abhorrent to all those who honour their own intuitive understanding of the inherent human rights of every person irrespective of personal characteristics or socio-cultural or political or other contextual considerations [18]. As this author has argued previously elsewhere, oppressors understand that brute force alone is not sufficient to overcome resistance given the resilience and dignity of human beings. Hence, the attempt to de-humanize the perceived enemy by all manner of propaganda is always *ultimately* a futile attempt to legitimize the eradication of even the perception that the victimized have inherent, fundamental and inviolable human rights [19].

### 1.7 A Critique of the Post-Modern View of Human Rights as Context-Specific and of the Pre-Disposition to a Non-Interventionist Stance

Dembour suggests that some theorists consider that human rights has become ‘the new “religion” in the secular world’ and the basis often for unjustified widespread unbridled intervention into the affairs of various global jurisdictions [20]. In contrast, the view here, in opposition to Dembour’s post-modern perspective, is that it is in fact colonial not to intervene where the most fundamental human rights are denied. To adopt a relatively strict non-interventionist stance is to accept the *erroneous* presumptions, by implication, that: (a) human rights are a justifiably discretionary grant by the local power elites (regardless of whether these power elites have fashioned a system that perpetuates the suffering of a people or identifiable group(s) within the society), and that (b) it is impossible to discern the ‘powerful’ from the ‘powerless’, ‘oppressor’ from ‘victim.’ For instance, Dembour suggests that one *cannot* easily identify ‘human rights victim, violator and professional’ and she endorses the view that this ‘triangle’ is a *fallacy* [21]. It is here contended that it is unwarranted and wrong to suggest that such distinctions (human rights victim, violator and professional) are most often meaningless or fallacious, and then use that as an argument to suggest that a non-interventionist approach is the appropriate ‘moral stance du jour’ which all should endorse (i.e. since non-interventionism is allegedly culture-sensitive, respectful, and non-colonial). This author contends, in opposition, that the relatively non-interventionist stance of most post-modern theorists denigrates others by allowing their suffering to continue as accidents of fate determined by the cultural and geographic situational context in which they happen to find themselves.

What is true is that the statuses of ‘human rights violator’, ‘victim’ or ‘professional’ (NGO aid worker, human right advocate etc.) are, *in some cases*, potentially interchangeable in that one can hold more than one

status at the same time. For example, it is a fact that a certain small number of U.N. peacekeepers (compared to the numbers deployed) have been responsible for sexual exploitation of children in various States in which they had been sent to protect the local people caught in civil war and other conflicts. Hence, in such an instance, ‘peacekeeper’ becomes simultaneously ‘human rights violator’, but it is the latter designation that counts in such a case, and the international community has a responsibility to bring such persons to account for their crimes. Consider also the example of certain child soldiers who may have committed war atrocities. They are simultaneously considered, by some at least, as human rights victim and violator. No international criminal court, however, has sought to prosecute child soldiers recognizing that they are fundamentally human rights victims. Most having been abducted, and forced by their adult captors to kill or be killed, while others have been forced to rely on rebel combat units for their survival having lost their family in the hostilities. Within the rebel combat units the ‘child soldier’ is typically abused physically and often sexually (i.e. used as human land mine detectors sent ahead of the adults in the unit such that it be the children who are blown up should they inadvertently step on the mine thus saving the lives of their adult ‘comrades’) [22]. The point here is that where there is great human suffering, we can and must make distinctions between ‘human rights victim’ and ‘human rights violator.’ This is required lest we risk losing our very humanity; all the while adroitly and illegitimately rationalizing our inaction in moral terms. Our failure to condemn the imposition of suffering, and/or to do all possible to prevent and end it (even where it exists on a mass scale) is the predictable consequence of not just ill-conceived political self-interest. It is fostered also by a post-modern, cultural relativist paralysis of conscience that too often encourages non-intervention even where it may be warranted. Non-intervention, under some circumstances, can unfortunately amount to a disregard for universal human rights which essentially ‘destroys the solidarity of the human family’ (the latter eloquent phrase is borrowed from Morsink) [23].

## 1.8 Analysis of the Alan Dershowitz Model of the Origin of Human Rights Notions

The view expressed here is, in part, akin to that of Dershowitz, namely that the origin of the conception of human rights derives from our rejecting the experience of suffering caused by others. The current author’s perspective, however, is not identical to that of Dershowitz (who is a ‘protest scholar’ in Dembour’s terms). Dershowitz, as this author understands him, views rights as ‘legal constructs’ that emerge out of humanity’s experience with, and reaction against injustice or ‘wrongs’ as Dershowitz terms it (i.e. our

experience with and reaction against man-made suffering if you will in the current author's terminology) [24]. Further, he holds that rights are *not* connected in any way with the very nature of human beings. It is on the latter point that the current author disagrees, and argues instead that it is *in the nature of all individual human beings* to potentially understand one or more of the following at some level: (a) that suffering when imposed against one's will is a 'wrong'; or at least something to be resisted; (b) that all persons deserve justice and, (c) that all persons, therefore, have a concomitant inherent right to resist injustice. This is not to say that various circumstantial factors may not militate against the individual's resolve to honour the rights of others such as when there is a serious scarcity of life-sustaining resources available, or even when there is an abundance of accessible resources. It is because the oppressed are potentially capable of intuiting their inherent fundamental human rights, that the powerful who, based on their utilitarian judgments deny a segment of the population justice, remain ever concerned with the possibility of resistance [25]. The youth voting rights movement is here considered to be an example of such resistance to injustice; an injustice operationalized via the blanket age bar against voting for persons under age 18 years which exists in most Western States.

## 1.9 Challenging the Political Conception of Human Rights

Baynes, Ignatieff, Rawls and others defend a view of human rights conceived as 'international norms aimed at securing the basic conditions of membership or inclusion in a *political* society (emphasis added)' [26]. There are various iterations of this view which is favoured by different academic scholars; each variation having some unique elements. All have in common, however, the notion that human rights are *not* inherent universal 'natural rights' that are apolitical and independent of legal or political recognition possessed based simply on one's humanity, but rather that human rights are political constructions. Baynes suggests, as do many other scholars holding the aforementioned political conception of human rights, that natural human rights, if they exist at all, would only be 'negative rights'; not positive. This since 'positive rights' could allegedly only arise in a political society where the duties of the government toward members of the polity are recognized by agreement. Since many of the rights listed in international human rights instruments involve 'positive rights', the argument of those who oppose the notion of 'natural human rights' is that these are not genuine human rights. However, the current author argues that 'positive rights' are in fact grounded on 'natural rights' i.e. the right to an adequate standard of living (the right to adequate food, housing etc), for example, as articulated in the *Covenant on Economic, Social and Cultural Rights* is tied to the 'negative right' not to have one's survival jeopardized or one's

security of the person infringed in other ways (both of which eventualities are very much more likely when one is destitute).

Baynes suggests that many rights contained in human rights instruments ‘only make sense within the context of definite social and political institutions’ [27]. One such example Baynes maintains is the *Universal Declaration of Human Rights* [28] guarantee of universal suffrage which only makes sense in the context of society structured with institutions allowing for representative government. Yet, Baynes himself concedes, as he must, that: ‘It might be argued that these more concrete “institutional” rights, at least if they are genuine rights, can nonetheless be viewed as a specification of a more natural right – such as the right to life or liberty’ [29]. Baynes offers no counter-argument on this point as the current author suspects no ‘human rights as political construction’ theorist can. Rather, he states in this regard: ‘I do not wish to argue that it is impossible to interpret some human rights in this way [positive rights reduced to natural rights].’ [30]. Yet, Bayne claims that interpreting positive rights linked to societal institutions as particular expressions of a fundamental natural right:

... is not the most natural way [i.e. uncontrived way] to interpret the rights found in leading human rights documents. And it does not appear to be a plausible strategy for some widely recognized human rights, such as a right to nationality (or membership in a political society) [i.e. see Article 1 of the Universal Declaration of Human Rights] [31].

The right to nationality and to membership in a ‘political’ society can, contrary to Baynes assertion, in fact be linked to the natural right for survival and autonomy and free association. It is clear that the stateless and de facto stateless are extremely vulnerable and the violation of their most basic human rights is a matter of great concern and priority for the United Nations High Commission on refugees (as many stateless persons are refugees as well) and other U.N. human rights bodies. Marginalization from society, regardless the basis, compromises one’s liberty rights by constraining opportunities and, in many instances, can mean the chances for survival have been compromised (i.e. those marginalized from so-called mainstream society, as in many instances are the Roma peoples of Europe for example, suffer the consequences in terms of poor health and all of its ramifications as well as in a myriad of other ways that amount to infringements of natural inherent fundamental human rights). Thus, basic human rights such as the right to nationality, while associated with political societal arrangements and institutions, are *not*, as the supporters of the political conception of rights would have it, ‘special rights’ dissociated from ‘natural rights’ [32].

It is here contended that the narrow political conception of basic human rights potentially leads to: (a) an illegitimate erosion and delimitation of what are considered fundamental, inherent human rights, and to (b) inertia when it comes to protecting those rights; particularly when the

gross human rights violations are occurring outside of one's home State jurisdiction. Baynes, in his review of various theorists who endorse the view of human rights as 'political' conceptions, or constructions, makes reference to their concomitantly favouring a limitation of what are considered fundamental human rights:

...human rights are political in that the type of justification given for them is determined by their political role or function. Since they are norms for the assessment or evaluation of political societies, and possibly, even for justified sanctions on them, *it is important that the norms be ones that it is reasonable for political societies to acknowledge* (emphasis added) [33].

According to Ignatieff [Michael Ignatieff is a scholar who supports the notion of human rights as 'political conception'], *human rights should...not be seen as 'moral trumps' that are above 'politics,' but rather as a continuation of politics by other means...they are also thoroughly political themselves* and so not able to bring political disputes to any definitive closure of conclusion (emphasis added) [34].

On the basis...that human rights are a product of political compromise, Ignatieff...defends the view that they [human rights] should be *minimal in content*...based on what Ignatieff calls a 'minimalist anthropology' (emphasis added) [35].

Rawls' defense of a *limited set of basic human rights* in the Law of Peoples has been the target of much criticism and confusion... (emphasis added) [36].

Put differently, those scholars who endorse a political conception of human rights (as opposed to the notion that fundamental human rights are natural rights), generally advocate that what counts as fundamental human rights is continually up for negotiation and compromise depending on what is considered politically feasible and advantageous for the mutual self-interest of the State parties involved. However, at the same time they argue that the enumerated basic human rights recognized by the international community should be limited. What is most noteworthy about such a political conception of human rights as advocated by individual political theorists and other scholars is that such a view is *not* coming from vulnerable individuals or populations, but from the powerful elite. The latter enjoy the full benefit of their societal status and generally enjoy a full panoply of fundamental human rights which their fellow nationals may or may not enjoy. The upshot of the latter situation is that, *in practice*, the restriction of basic human rights that would ensue due to reliance on a purely political conception of human rights would apply always to the 'other'; not to the particular high profile scholars; diplomats and international delegates to the U.N. etc. endorsing such a view.

It should be understood that politics no doubt enters into the drafting and adoption of international human rights treaties, and that concessions are inevitably made in the interests of adoption and ratification of such instruments. However, this does *not* detract from the fact that fundamental human rights exist independent of such political processes as inherent

and universal intrinsic aspects of our humanity. The notion of fundamental human rights as but political contrivances; a way of doing ‘politics by other means’, as Ignatieff would have it, (as opposed to the notion that politics enters into the affirmation and implementation processes of what are natural inherent rights, or rights derived from such natural universal rights), creates the dangerous *illusion* that the concept of human rights is meaningless. However, recall, as discussed, that the notion of universal human rights and manifestly illegal acts (due to their inhumanity) existed in mankind’s consciousness long before political negotiation of the matter or codification of such concepts (as in the Rome Statute of the International Criminal Court). This points up the fact that fundamental human rights cannot be *reduced* to politics; though politics certainly changes the colour of what States are willing to concede in the way of respecting the basic human rights of those within their jurisdiction and control and those beyond.

It is interesting to note, in the context of this discussion of human rights conceived as political constructions, that the *Universal Declaration of Human Rights* makes specific reference to the fact that fundamental human rights must be accessible *regardless* of the specific social and political context in which the individual finds him or herself:

**Universal Declaration of Human Rights (UDHR): Article 28.**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized [37].

This author would agree with Baynes that Article 28 of the UDHR can be interpreted as a ‘demand for inclusion.’ On this reading, however, Article 28 of the UDHR presupposes a ‘natural human right’, not a view of human rights as a context-dependent ‘political conception’. Humans are by nature in need of affiliation for their mental and physical integrity and survival itself. Respect for fundamental human rights is then not just a correlate of full societal inclusion, but a precondition for it, and as such intricately tied to the natural basis of human rights. The notion of fundamental human rights is thus inextricably bound with the universal inherent need for societal inclusion.