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Human Rights: The Search for Universality

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Human Rights: A Search for Universality

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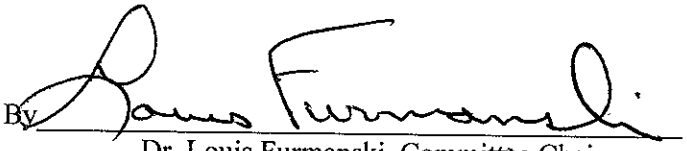
By 

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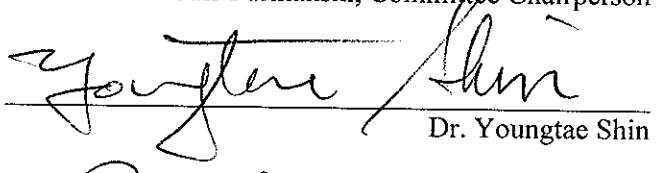

Dr. Youngtae Shin

Dr. Jan Hardt

DEDICATION

To my husband, Jeremy,

Thank you for all of the listening, talking, and unwavering encouragement. This would not be possible without you. I love you dearly.

To my children, Jake and Madeline,

We have our Saturdays back! Thank you for your patience and understanding while I worked away instead of playing outside. I love you both!

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ABSTRACT

Human rights in large part have become a topic of seemingly global appeal. They have become a part of the fabric of the global conversation. Especially within the context of the last sixty years, human rights have become an actionable, practical, and in some cases legally binding set of rights. Current human rights hinge on the idea that all humans no matter where or under what circumstances they were born possess certain rights simply because they were born human. This thesis will discuss the universality of human rights in both theory and in practice. To be more specific, human rights will be discussed by exploring the philosophic foundations of human rights. The language that was used in the structuring and development of the human rights was derived from rights instruments which originated during the Enlightenment Period. However, the underlying philosophy is only representational of a percentage of the people and cultures of the world. Because the underlying philosophy is not cross-cultural, moral and cultural relativism bars human rights from being universal. However, the contention of this thesis is to show that despite the limits of universality in terms of relativism and incoherent philosophic underpinnings, human rights are still a force to be reckoned with as a part of a social construction. A human right may not be an inalienable, inherent right that belongs to a person because he or she is human, but it does have some legitimacy on the grounds that social norms have been constructed over time.

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INTRODUCTION

Human rights in large part have become a topic of seemingly global appeal. They have become a part of the fabric of the global conversation. Especially within the context of the last sixty years, human rights have become an actionable, practical, and in some cases legally binding set of rights. A human right can be loosely explained as a right held by a human simply on the basis of being a human. It has become widely accepted that humans possess certain rights because they are human. Part of this acceptance entails understanding the idea that if humans possess certain rights because they are human, it follows that these rights are universal. The notion that human rights are universal is highly debated, particularly in academia. The discussion surrounding human rights encompasses many disciplines of study.

This thesis will discuss the universality of human rights in both theory and in practice. To be more specific, human rights will be discussed by exploring the philosophic foundations of human rights as well as the contemporary arguments. Second, the universality of human rights will be discussed in the practical terms by examining the implications of societal differences on human rights. This thesis will show that human rights are not universal on either front. Philosophically, human rights are a derivative of Western thought and do not encompass much philosophy outside of this arena. Practically, human rights suffer in applicability across cultures and regimes. To delve into this topic thoroughly, I will first discuss the story of human rights development in positive law before moving on to cover the philosophic foundations of human rights. The universality of human rights will be discussed in the practical terms by examining the implications of societal differences on human rights. The underlying philosophy is only representational of a percentage of the people and cultures of the world. Because the underlying

philosophy is not cross-cultural, moral and cultural relativism bars human rights from being universal Lastly, this thesis will discuss human rights from a constructivist perspective to establish legitimacy for the concept of human rights, despite the issues with universality.

Chapter I. **LITERATURE REVIEW:**

There is a large body of literature concerning human rights. It is a topic of enduring intrigue in the social sciences. In fact, there is an entire academic journal devoted to the subject entitled, *Human Rights Quarterly*, from which much of the literature in review is collected. However, to begin, the idea of whether a universal set of human rights exists would probably be served the best by examining what already has been declared to be universal in that regard. The Universal Declaration of Human Rights delineates what is currently understood to be and is accepted as the primary source for interpreting human rights. The Declaration is comprised of 30 Articles espousing protections including but not limited to the following:

- Everyone has the right to life, liberty and security of person. See Article 3.
- No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. See Article 4.
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. See Article 5. (The Universal Declaration of Human Rights)

To delve into the literature that forms the basis of this thesis, it would be wise to start with an idea of morality. Human rights depend on an agreement of what is moral. In his article, "Moral Relativism Defended," Gilbert Harman expounds on the notions of morality as interweaving concepts that are not necessarily truisms across the board. (Harman, 1975) He uses an example of a person who was raised to have honor and respect for members of his family, but to detest all the rest of society. This person is asked to kill a banker. To him, the banker is not part of the family and therefore, he has no problems morally with killing him. The man's moral underpinnings are clearly associated with what he has been taught and has been culturally accepted within his surroundings. The purpose of this article is to discuss the idea of morality as a non-universal concept. This lends to the idea that human rights, as an attempt to codify morality, may be difficult to achieve as a universal idea.

In another article titled "The Philosophic Foundations of Human Rights," written by Jerome J. Shestack, the author discusses the question: what is meant by "human rights"? Human rights, when thought about from a definitional perspective, are a considerably difficult concept to define, particularly the word "right". A "Right" can have many meanings. It can be associated with legal entitlement or legal immunity. It can mean a person has a certain privilege or is protected. (Shestack, 1998) But in order to put a definition behind what a human right is, there arises a philosophic question: where does the notion come from that humans deserve certain rights merely because they are human? Shestack lists several sources of this notion including religion, natural law, the authority of the State, and others. Each area listed have vast complicated explanations underlying the philosophical milieu for determining human rights, which will be addressed later. The main point for the moment is to suggest that there are many areas of thought associated with what determines a right that is specifically designated to belong to humans, simply on the basis of being human.

As previously noted, the basis for determining human rights has many sources from which to draw. With this in mind, do the human rights that have been listed in the Declaration of Human Rights capture all of these bases? Some argue that the Declaration of Human Rights does not capture all bases, but rather, in large part resembles Western philosophies and cultures. The intent of the Declaration was acutely debated between the delegates drafting the Declaration and then by world leaders as they were urged to adopt the Declaration. The assembling of the Declaration came directly after World War II; "The Charter drafters were motivated in part by what they viewed as the nexus between the aggression of the Axis Powers and the rejection of those regimes of the universality of human rights" (McGuinness, 2011, p. 750). The backdrop of World War II was primarily a Western struggle enveloping much of

Europe and later the United States. To be sure, the Eastern Block was heavily involved in the conflict, but the war began as a result of Adolf Hitler's attempt to cultivate a supreme race which was routed in nationalist rhetoric. When the Declaration of Human Rights was being drafted, its two main goals were to "maintain peace and security around the world and at the same time foster respect for human rights within domestic legal systems" (McGuinness, 2011, p. 750). While the framers of the Declaration came from varying countries and cultural backgrounds, some scholars who argue that the Declaration focuses on Western philosophies point to the Western education and backgrounds of some of the non-Western delegates. The arguments contained in the Western and Non-Western debate run counter to the notion that the Declaration of Human Rights is in fact universal. This is, in fact, one of the more poignant arguments of this thesis.

One of the central ideas behind the formation of the Declaration of Human Rights was to make human rights indivisible for every person. However, the claim that human rights are indivisible is a hard pill to swallow. Nickel explains that, "when indivisibility occurs it has the practical consequence that countries cannot pick and choose among rights" (Nickel, 2008, p. 984). This poses a problem for developing countries that may not be able to implement certain rights as a part of the existing governmental frameworks. To further this idea, developing nations are often immersed in a nationalistic ideology which is often referred to as nation building. This type of situation seeks to further rights for the community as a whole rather than focusing on individual rights. Such is the case with African countries. In a social context, the African "communitarian ideal" of human rights is that "the group is more important than the individual… [and] human rights can only be granted to individuals through national economic development" (Mahmud, 1993, pp. 488-489) This societal thinking leaves human rights for

individuals by the wayside. The Declaration of Human Rights itself is contradictory in this respect. While it puts a strong emphasis on individual human rights, it also seeks to maintain peace by acting as a legal framework designed to advance sovereignty and state authority. McGuinness (2011) says that "this internal contradiction is embodied by the non-intervention provisions of Article 2(7) of the Charter, which provides that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…'" (McGuinness, 2011, p. 751). The Declaration, serves as a standard of rights without having any legal capability to enforce those rights, so as not to infringe on state sovereignty, thus enabling peace. But because the states have sovereign jurisdiction to effectively choose which rights they will implement, it is difficult to see human rights as indivisible.

The Declaration of Human Rights has built in protections for sovereignty, there is room for debate as to whether individuals are truly concerned with the human rights as a universal application. It is not difficult to see that states will have an interest in protecting their sovereignty. As discussed in the article, "Who Cares About Human Rights?," the notion is presented that if a government is going to be concerned with international human rights, the public has to be supportive of this premise. The authors suggest that, "democratic governments that avow allegiance to human rights often find that protecting human rights abroad conflicts with their national self-interests and, in situations of grave human rights abuses, risks the lives of their own citizen soldiers" (McFarland & Mathews, 2005, p. 365) Polls taken in the United States have shown that over the years, public support for human rights' protections have fluctuated drastically and are generally linked to world events. The article discusses that a high point of human rights' support occurred in 1990, when the Berlin Wall fell; but then conversely,

support was at a significant low point when the United States military conducted a humanitarian mission in Somalia that ended very badly, with 18 soldiers being killed (McFarland & Mathews, 2005).

The polls above point out a telling phenomenon that could be associated with public support of human rights. In a study conducted at the University of Geneva, researchers sought to determine if there was a relationship between support or respect for human rights and a country's type of government or the kind of people that made up the population. In other words, the study wanted to see if "people base their judgment merely on their representations of a country's political system or also on the characteristics of its inhabitants" (Staerkle, Clemence, & Doise, 1998, p. 208). It found that people may judge the characteristics of the inhabitants of a country based on its political system. The study also found that people consider the inhabitants of country responsible for their system of government. This can be a telling obstruction to public support of human rights across international borders. If the public of a democratic nation does not have an affinity or empathy for non-democratic nations, the public will have a difficult time formulating a strong support for the human rights of the individuals living in the non-democratic nation, especially when the public places responsibility on those individuals for living within a non-democratic nation.

All of the literature reviewed above lends to the conclusion that the Universal Declaration of Human Rights is flawed in that it cannot be considered to house a universal set of rights that can be practically applied. To further this notion, I will delve into the validity of universality in the coming sections first by determining where the language of human rights arises from, and then comparing that language to language that has not been represented in current human rights.

Chapter II. **HUMAN RIGHTS AS POSITIVE LAW**

Before the drafting of the Universal Declaration of Human Rights, there were no legal documents which were written specifically for the protection of human rights. Prior to the First World War, no international law existed that offered protection for individuals in any matter of rights. Throughout history, there have been legal documents which contain rights that were later included on human rights documents, but no binding international agreement, treaty, or other instrument. Human rights as they conceivably exist today did not exist prior to World War II. That does not mean that there were no notions of human rights; rather, they did not possess the definitive quality that human rights have now.

To be sure, the notion of rights belonging to humans is nearly as old as our civilized history. As early as 530 BC, "rights" were granted to individuals living in Babylon, in what is now Iraq. The Cyrus Cylinder is an artifact that dates back to around 539 BCE and is inscribed in cuneiform with the story of how Cyrus the Great conquered the ruling King Nabonidus. More than just a story of conquest, the Cyrus Cylinder lists protections for the people living under the new rule of Cyrus the Great. These included freedom from slavery, freedom of religion, and freedom from racial intolerance.

> I am Cyrus, king of the world, great king, legitimate king, king of Babylon … I did not allow anybody to terrorize [any place] of the [country of Sumer] and Akkad. I strove for peace in Babylon and in all his [other] sacred cities. As to the inhabitants of Babylon ... I abolished forced labour ... I returned to these sacred cities … the images which [used] to live therein and established for them permanent sanctuaries. (Michalowski, 2006, p. 427)

The cylinder is sometimes described as the 'first charter of human rights' and since its discovery has served as a segue from ancient history to modern human rights legitimacy. Before the Iranian revolution in 1979, the Shah of Iran endorsed the Cyrus Cylinder as an example of the development of respect for human rights beginning in the Persian Empire.

Another notable document which was a turning point for human rights law was the Magna Carta which was written as a legal decree for England during the rule of King John in the 13th century. The Magna Carta itself was more or less an agreement between the monarchy and the privileged subjects which established limits on the monarchy and required the King and subsequent kings to abide by the law rather than be free from its consequences. Further, the Magna Carta established basic liberties for subjects under English monarchy such as protection from imprisonment without cause, due process of law, and some religious freedoms. Some of these freedoms can be seen in the "thirty-ninth clause of Magna Carta-- 'No free man shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him or send against him, except by lawful judgment of his peers or by the law of the land.' By this clause the [free person] was guaranteed protection of his person and property from arbitrary action." (Painter, 1947, p. 44). The Magna Carta is hailed as the beginning of constitutional law and rule. It set the precedent for law that prescribes protections for all people with limitations of power for the rulers. And while most of the Magna Carta has since been rendered obsolete, there are three statutes from it that remain in the constitutional law of England and are still considered a part of England's uncodified Constitution.

Following the Magna Carta, other legal documents such as the Petition of Right of 1686, which declared civil liberties in England, the United States' Declaration of Independence which was widely centered in individual rights, the United States' Constitution and Bill of Rights, which limited the government's ability to infringe on individual rights and delineated specific protections for individuals rights, have become the precursor and the foundation of modern human rights instruments. Of course the substantial difference between those legal documents and the human rights instruments currently in effect is the breadth of possible enforcement. The

Magna Carta, the United States Constitution and the Bill of Rights each pertain to citizens living within the borders of the state from which the legal instrument was produced. They do not apply to any other state and especially they do not have the legitimacy of being an international standard or law. These documents serve only a limited number of people.

It wasn't until the world was entangled in the major conflicts of the two World Wars that the need arose to find an international standard of peace and security. The League of Nations was formed after World War I for the sole purpose of ensuring that another conflict of such magnitude would not happen again. It was the first international institution that was charged with the goal of maintaining global peace. The idea was that nations would work together to resolve any disputes through tactics of conciliation and the use of sanctions, instead of allowing states to determine the outcome of their disputes with conflict and war. Forming the League of Nations arose as the liberalist answer to the old international system.

> The idea of the League was to eliminate four fatal flaws of the old European states: in place of competing monarchical empires … the principle of national self-determination would create a world of independent nation states, free of outside interference; the secret diplomacy of the old order would be replaced by the open discussion and resolution of disputes; the military alliance blocs would be replaced by a system of collective guarantees of security; and agreed disarmament would prevent the recurrence of the kind of arms race that had racked up international tensions in the pre-war decade (Townshend, 2011).

The League of Nations, however, would be short lived. Its legitimacy was at stake from the time of its conception as several vital nations, including the United States, failed to agree to its terms. Woodrow Wilson, the US president at the time, was largely responsible for the vision of global participation in international affairs and the resulting League of Nations. However, the United States Senate would not ratify US participation in the League of Nations as the United States was following an isolationist foreign policy strategy, attempting to remain separate from

world conflicts that did not directly call for territorial self defense. The League of Nations lacked the power of armed forces and so had to rely on its member nations' agreement and compliance with the terms of negotiations and sanctions imposed by the League of Nations when disputes arose. Compliance was often shaky as nations were reluctant to impose sanctions when they themselves would suffer as a result of the sanctions as well. The League of Nations was unable to prevent World War II, the very scenario it was established to safeguard against. As such, the League of Nations slipped away from the international arena in its original form and instead reshaped into something else in the post-WWII era.

World War II brought about human suffering on a scale that was arguably unprecedented. According to scholars, between eleven and seventeen million people, typically of Jewish descent, were killed in a brutal and systematic genocide (Niewyk & Nicosia, 2000). The reality of the horrific nature of the war and the utter disregard for human life that took place in its duration renewed a very real need to establish an international institution that could prevent such atrocities. In 1945, the United Nations ("UN") was formed from the auspices of the allied powers in World War II, along with twenty plus other nations from around the world. Its purpose was to replace the failed League of Nations as the international peace keeper. This time, the United Nations had the full support of the United States, a vital element missing from the League of Nations. In October 1945, the United Nations was ratified by the major world powers. Along with the need to form a unified institution to maintain peace and security amongst nations, there was a recognized need to address the violence against humanity.

Shortly after the end of World War II, the Allied Powers sought to punish the major transgressors of the atrocious violence committed during the war. By agreement of five of the major allied powers, the Nuremberg Principles were established. The Nuremberg Principles

defined what was considered to be a crime of war that could be punishable by international law. These Principles were the causal authority for the procedures followed in the ensuing military tribunals known as the Nuremberg Trials which sought to adjudicate punishment to war criminals at the international level rather than at the state level. Article One of the Nuremberg Trial Proceedings Agreement states as follows:

> There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities. (Nuremberg Trial Proceedings Vol. 1)

The Nuremberg Trials resulted in several high ranking officers in the Axis Powers being tried and punished for their crimes as specified in the list of crimes in the Nuremberg Principles. These crimes were broken down into three areas: 1) crimes against peace, 2) war crimes, and 3) crimes against humanity. In short, these principles made it illegal to wage wars of aggression, violate laws of war, or commit inhuman acts against civilians (Nuremberg Trial Proceedings Vol. 1). This was an important step for the positive law in the international arena. However, the Nuremberg Principles and trials did not address rights of humanity in times of peace, but rather, only addressed crimes associated with war. While this was an important milestone in international legitimacy and set standards of punishments for war crimes after the war was over, there was still a need to find preventative measures to ensure that crimes of this nature would not happen to begin with.

With this in mind and at the urging of the newly inaugurated President of the United States, Harry Truman, the United Nations set out to establish an International Bill of Rights (Glendon, 2002). The Bill of Rights was to resemble rights documents that had been in place historically, such as the United States Declaration of Independence as well as the French

Declaration of the Rights of Man. The difference here, though, was that the contemplated International Bill of Rights would apply to all men everywhere rather than being rights instruments of individual states. The result of the UN's effort was the Universal Declaration of Human Rights which was ratified in 1948. The Universal Declaration of Human Rights was the premier rights instrument that applied to all persons. As Langlois put it, it was "a declarative statement, that – in the wake of the atrocities of war – international politics is not exempt from accountability to moral norms" and that "these moral norms are laid out in the form of rights, said to be held universally by all human persons and thus given the name human rights" (Langlois, 2004, p. 243). But how did the framers of the Universal Declaration of Human Rights decide which rights were human rights and to what extent those rights would be enforceable?

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Drafting the Universal Declaration of Human Rights was no easy task. The United Nations, which was still in its infancy, established the Human Rights Commission ("HRC") with its first order of business to assemble a bill of human rights. The HRC was comprised as a team of eighteen representatives from various UN member states. The member states represented included the United States, the Soviet Union, the United Kingdom, France, and China, along with Australia, Belgium, Belarus, Chile, Egypt, India, Iran, Lebanon, Philippines, Ukraine, Uruguay, and Yugoslavia. The Human Rights Commission intentionally appointed representative from member states that surrounded the globe. John P. Humphrey, who was the human rights division director or the UN Secretariat said," There would be no point in preparing texts which would not be accepted by governments." (Humphrey, 1984). Eleanor Roosevelt

from the United States was elected as the Chairman of the Human Rights Commission and Peng-chun (P.C.) Chang from China was elected as the Vice Chairman.

The work of the Human Rights Commission began in a less than exemplary fashion with arguments quickly developing about how to organize work and exactly what kind of Bill of Rights, the commission should be assembling. For example, "Col. William Roy Hodgson of Australia and Mrs. Mehta [of India] were adamant that an international Bill of Rights would be meaningless without some machinery for enforcement" (Glendon, 2002, p. 38). Further, philosophical arguments began to pop up before any work could get under way pertaining to popular rhetoric of the day including Marxist comments from Yugoslavia's delegate and opposing debates from the Lebanese delegate. However, eventually Eleanor Roosevelt was able to control the first few meetings of Human Rights Commission and the path was established as how to develop an international Bill of Rights. A part of this path was to streamline the committee. A Four delegate subcommittee, including the three officers, Chairman Roosevelt, Vice Chairman, and Chiang secretary Malik[of Lebanon], along with UN Secretariat Humphrey was formed and tasked with the job of creating a draft that would be presented to the rest of the commission at a later meeting.

UN Secretariat Humphrey did most of the legwork in creating the draft. This is not to say that Humphrey was personally picking which rights he thought should be included. His office worked extensively to create a draft that contains the most common and widespread fundamentals and principles that have developed over the course of human history. To do so, "Humphrey had instructed his staff at the UN to study all the world's existing Constitutions and rights instruments, as well as the suggestions that have poured into the Secretariat from members of the commission, outside organizations, and even from various interested

individuals" (Glendon, 2002, p. 56). Humphrey's draft was an attempt to create a document that contains every conceivable right of humans. It included rights from the revolutionary constitutions of France, the United States, and Great Britain, constitutions of Sweden, Norway, the Soviet Union and several Latin American countries. His draft included extensive notes on each specific right's originating document or documents and the causation for being included on the draft list. This first draft was the premise from which the Human Rights Commission drafted the final approved Universal Declaration of Human Rights.

But Humphrey's draft was not without its problems. The first problem that was noted was the lack of any coherency or structure. The Human Rights Commission realized that it would be problematic to debate each article's validity for inclusion in the final draft without having some structure and thus set out to establish coherency of the document. The Commission charged Rene Cassin, a French lawyer with hefty experience in writing legislation to rework the first draft into a list of rights that made legislative sense. Meanwhile the debate of whether to produce a declaration of rights or a legally binding covenant of rights ensued amongst the commission and "the United States and Great Britain had definite, and sharply divergent, views on what kind of document the committee should be preparing. Geoffrey Wilson [of Great Britain]… urged the committee to prepare a covenant rather than a statement of high-sounding generalities. Eleanor Roosevelt announced that the United States favored a broad Declaration to be followed eventually [by conventions]" (Glendon, 2002, p. 59). The compromise was to work on one of each type of document that could later be decided upon in the final stages.

Cassin's draft maintained much of the content contained in Humphrey's original draft, but after careful consideration, had been organized into six rights categories including political,

social, liberty, due process, security, and equality. These rights were borrowed from historical rights instruments that had been poured over in an attempt to find common ideas of basic rights. Rene Cassin was insistent that the "Declaration should base universal rights on the 'great principle of the unity of all the races of mankind,' a principle that had been shamefully violated in the recent war" (Glendon, 2002, p. 67). But the drafting committee was painfully aware that the universal nature of the Declaration would need to transcend cultures if its claim for universal human rights should be realized. The HRC received some assistance with this on a practical tip from the United Nations Education, Scientific and Cultural Organization ("UNESCO") who had conducted a questionnaire researching the international reaction to the commonalities of basic rights found in the range of rights instruments used to formulate the drafts. The questionnaire distributed by UNESCO was sent out as a part of its research into the theoretical validity of human rights. UNESCO reports that the questionnaire was sent to leading intellectuals, philosophers, and political scientists of the time including Mohandis Ghandi and Aldous Huxley (UNESCO and the Declaration). Varying results to the questionnaire were returned, but the overall report was that "the principles underlying the draft Declaration were present in many cultural and religious traditions, though not always expressed in terms of rights" (Glendon, 2002, p. 76). This was a boost for the HRC and it helped get the final draft ratified by the United Nations.

As the HRC continued through the process of drafting, the shape eventually and rather by default, took on that of a declaration. The hope for a bill of rights or legally binding covenant was eventually lost as arguments about the threat to national sovereignty became too compelling. In December of 1948 the UN voted to adopt the Universal Declaration of Human Rights. The Declaration in its finality was a document that did not have any power of

enforcement in the international community, but it served as a standard of human rights that could be used diplomatically to urge cooperation.

Since the adoption of the Universal Declaration, most of the rights delineated therein have been incorporated in UN treaties which make them enforceable and legally actionable. The first of those treaties was the 1948 Genocide Convention which recognizes genocide as a crime in international law and dictates that all ratifying members to the treaty must enact anti-genocide legislation within their state bodies of law. The Genocide Convention has 130 parties at present. In 1966 the UN General Assembly approved both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These Covenants broadly encompass many of the rights contained in the Universal Declaration and make violations of these rights illegal. Of course these covenants are only binding on the states that ratify them. Currently, 167 states are parties to the Covenant on Civil and Political Rights with 74 signatories. The parties have given explicit consent to be bound by the covenant while the signatories politically support the treaty but have not agreed to be legally bound. The Covenant on Economic, Social and Cultural Rights has 160 parties. In essence, nearly 75% of the world has agreed to be bound by both of the human rights covenants. Other human rights treaties that have been adopted by the UN include the Convention on the Elimination of All Forms of Racial Discrimination of 1966; the Convention on the Elimination of All forms of Discrimination Against Women of 1979; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; and the Convention on the Rights of the Child of 1989. (Zalta, 2003).

Chapter III. FOUNDATIONS OF RIGHTS FROM A PHILOSOPHIC PERSPECTIVE:

Current human rights hinge on the idea that all humans no matter where or under what circumstances they were born, possess certain rights simply because they were born human. On the surface it might be very tempting to simply agree that humans are endowed with certain inalienable rights, particularly to those born after the end of the Second World War. When answering the question, "what are human rights?", a person could very readily make a list of any and all human rights included in the vast array of legal instruments that have been written over the past six decades. However, these legal instruments are lists of positive law. As Langlois (2004) states, "it is not these items, which are human rights. Rather, these items were to declare, protect, ensure, implement, monitor and observe human rights. They are not themselves human rights; they are one step removed." (Langlois, 2004, p. 244). To push this idea further, positive law is law that is created at the hands of and sustained by governments, international institutions, or any regime that has legitimate power or governing ability. Positive law has a lifespan only as long as the institution from which it came. This establishes a limit for any law that is created, human rights law or otherwise. Further, positive law is only enforceable within the institution that it was formed. Laws developed in the United States do not necessarily reflect laws created elsewhere.

The limited nature of positive law puts a claim for universality of human rights in a precarious position. If human rights are only thought of as positive law, it follows that they are not wholly universal, but rather a collection of limited rights that could vary from place to place. Looking at human rights through the lens of positive law protections simply will not do as a means of establishing legitimacy. A deeper look must be taken at the roots of human rights and

the possibilities of universality. Human rights themselves can be thought of as being protections for all people from political, social, or legal harm or abuse. But by envisioning human rights purely from the perspective of being rights in positive law, the rights themselves remain a creation of and subject to the authority of the state or institution; and, thus, altogether deny the human the ability to actually possess rights individually without the state or institution. Yet universal rights are said to exist for every person despite these limitations which is the driving force in perpetuating positive law to begin with. Langlois (2004) says, "the belief that in some sense human rights exist beyond positive law has been an essential mainstay and motivation for the critique of inadequate positive law protections of freedoms and privileges considered due to the human person" (Langlois, 2004, p. 247). To rectify the limits of human rights within the context of being purely a product of positive law, it will be necessary to discover the philosophic ontology of human rights. This is best accomplished by discussing the history of the philosophic foundations of human rights. To do this it will be necessary to turn to what Langlois calls the 'law behind the law' and discuss the historical movements and theories which have shaped the understanding and conceptualization of current human rights.

NATURAL LAW

A fundamental philosophic foundation in human rights is inarguably the idea of natural law. Natural law conceptually can take on variations of form, but its basis lies in the supposition that in and throughout nature, there is an inarguable order from which laws of nature can be derived as a result of man's ability to reason. The laws that can be derived from nature constitute an unwavering universality where the laws of nature apply to everyone and everything that exists within the bounds of natural reality. These laws are thought of as unchanging and impermeable and in many individual theories of natural law they can be

attributed to a God, or higher power. The attribution of natural law to a higher power gives the laws a moral position and from this, they are considered to be laws that have the quality of being right. From this premise it follows that man is a natural being and is therefore inherently born into the laws of nature. A common thread throughout the differing versions of natural law surrounds man's ability to think rationally. Because man can think rationally, he is able to decipher from reason the laws of nature and is able to live according to their directives. (Drawing from (Hayden, 2001). Natural law serves as a longstanding basis for human rights on the grounds of its universality. Since current human rights law claims that certain rights exist for every person everywhere, there has to be a fundamental universality from which to draw legitimacy to these claims. Natural law helps to fulfill this legitimacy as it describes the ways in which certain laws are universal and are recognizable to humanity based on the human ability to reason. Natural law, however, has taken on differences in theory throughout history. These differences have helped shape societal changes over time as well.

Classic Philosophy Contributions

To begin with, the earliest complete theories on natural law can mostly be attributed to the Stoic philosophers during the second through fourth centuries, CE. However, the study of natural law would be lacking if there were no mention of the classic philosophy that lay as the groundwork for natural law theorists. As was mentioned previously, natural law hinges on the notion that there is order in nature from which laws can be derived. While Plato did not necessarily have a theory of natural law, he did talk at length about the order of nature and its effects on society. In Plato's Republic, he illustrates this point through dialogue, describing the perfect state -- an ideal city where the citizens living within are appropriated by classes and strive for virtue and honor as the pinnacle of aspiration. The society that is best is the society in

which each class becomes the master of itself and does not attempt to do the functions of another class. In a series of comparisons, Plato describes men to possess the same principles as the state. Members of society too should become masters of themselves. One part of the self mastery is to "do one's one business… and having and doing what is a man's own, and belongs to him"(See Book IV, (Plato, 1892)). The notion of justice for Plato derives from his view of natural order. Men, when becoming the master of their naturally assigned ability and the master of themselves, are thought to be living within the natural order. When men are living within the natural order, they are thought to be just. Injustice, for Plato, is a variance on the natural order. If a person gives into vice, and does not live in harmony with virtue, that person will not be just, but rather will create injustice, not only individually, but also to the state. From this, it begins to take shape the importance of the natural order in Plato's conception of society. From the natural order that people find themselves a part of, there can be derived notions of morality and justice. Plato's natural order falls short of the theories of natural law that lay at the basis for human rights. But it is important to mention quickly Plato's natural order to demonstrate the bedrock of thought that paved the way for future natural law theorists.

Of course, Plato was not the only Classic philosopher to have contributed to the philosophy that was preemptive of natural law. Aristotle joined Plato in this regard. Aristotle, however, is arguably the more important of the two in regard to the foundations of natural law. Aristotle perceived the state as a natural entity. He explained this by looking at the "origin" of the state. Aristotle compared humans to other animals in that it is natural for animals to "leave behind them an image of themselves" (See Book I, 2 (Aristotle, 1885)). In this way, man and woman naturally form a union. Out of the union comes the family. This is a natural progression. Then when families join together, they form a village and so on. From this

Aristotle deduced that the state is a natural formation. And because the state is a natural creation, it follows that man is political by nature. Aristotle perceived man to differ from animals because he had the ability to speak. Speech was seen as the means to assess that which was just or unjust. While this is not entirely the same as future natural law theorists, it certainly lays the groundwork for their further exploration. And while Aristotle does not give the same credence to man's ability to speak that future natural law theorists do, it is an important part of his concept of the state because only men, who can determine good from evil and just from unjust, are capable of establishing the family and the state. This idea is taken further by Aristotle in his discussing of men who live outside of the state. As stated above, those who live outside of the state and are self sufficient are either beasts or Gods. Those living outside the state are not equipped with the ability to be virtuous and are therefore the worst animals of all – filled with gluttony and lust. But those living in the state are bonded by justice, because the state's primary objective is to administer justice (See Book III, 2 (Aristotle, 1885)).

The qualifying similarity between the thinking of Plato and Aristotle is that they were both products of the limited city state. The homogenous atmosphere envisioned and lived in by both philosophers had a threshold of cultural diversity that did not allow political philosophy to cross over into the realm of practicality. But there was soon to be a shift in thinking, and it was to spread almost as quickly as the burgeoning empires. In the *polis*, it was common and a duty for citizens to be active participants in the discussion of political discourse. As cities grew, particularly in Syria, Macedonia, and Egypt, the polis gave way to the *cosmopolis* which were large states filled with diverse groups of people often times spread out geographically. In the *cosmopolis*, direct participation by common citizens was increasingly impossible and the need for sweeping law descending from a leading government body became more necessary. Rome,

which had begun as a city-state, expanded at a rapid pace, and eventually became an empire spanning the majority of modern day Europe. The size and geographic reality of Rome made it clear that alternative models of government were necessary. In a tactful maneuver, "Roman political thinkers responded in a highly practical manner. Leading jurists or legal scholars incorporated elements of the legal codes of the various subject peoples…creating over time a *jus gentium* or law of nations…" (Spellman, 2011, p. 23). At the same time, philosophy took on new ideas. Philosophy for the sophists was a true learning, "a science," knowledge of what things are. But in the same way that diversity dictated laws that were applied 'universally', philosophy also adapted to include universals applications for people of varying backgrounds. It was in this period that Stoicism began to take root.

Stoicism

It is with the arrival of Stoic philosophy that the ideas of natural law really began to take shape. Stoic philosophers were different than the sophists in that philosophy of this time became more centered on ideas of ethics, rather than grand ideas of metaphysics. Stoicism was among the first to introduce God into the language of philosophy, but the Stoic idea of God was not the same personified deity that is common in Christianity or other monotheistic religions. The stoics considered God to be a corporeal principle, or linked to the matter of the universe, and more precisely, to be the *reason* within the matter. Further, "Stoicism identifies God with the world; God is the ruler of the world, but he is in turn substance, and the whole world is the substance of God" (Marias, 1967, p. 92). For Stoics, the natural world was consistent with order. Among nature and as a result of God, nature was equipped with certainty of perpetual order and this order could be conceived as universal law. Further, the laws of nature could be understood by humans alone because of the human ability to reason.

Stoics perceived that man was endowed by the supreme God with the gift of reason. He is the only animal out of all the animals that has the ability to reason and reflect. Because no other animal is capable of reason, it is concluded that it is the most superior faculty that a man can possess. Cicero believed the ability to reason to be godlike and in this way, since both man and God had the ability to reason it must be their tool to communicate. Further, since both man and God had the ability to reason, they were both able to deduce that which is right or good. Cicero linked that which is right to law and therefore linked men and Gods together by law. He thought of men and Gods as residing in one large commonwealth where each had its place and rank in the commonwealth all under the overall rule of the one supreme God.

The ability to reason that humans possess paved the way for the universal appeal of Stoicism. Cicero discusses his belief that all men are alike in their ability to reason and therefore whatever is true for one man is true for all men. Men with their faculty of mind are all able to learn, though education differs from person to person. They too have the same senses and therefore observe things in the same ways. Further, men have the ability to speak and because they have the ability to reason, the ability to learn, and perception of the senses are equal, then man expresses the same ideas everywhere, although Cicero acknowledges that these ideas are not spoken with the same words. From this it follows that, "there is no member of any nation who cannot attain true virtue, if he takes Nature as his guide … For all to whom Nature gave the power of reasoning have received from her also the ability to reason correctly" (See Book One (Cicero, 1907)).

One of the more defining characteristics of Stoicism is that is established a sort of complacency of duty. People were capable of finding positive outcomes even in the most horrible of circumstances. Epictetus (55-135 CE) was a strong advocate of this kind of

thinking. He thought that "many events and circumstances are not in our power to control; what is in our power is the ability to adapt to all that we face and to maintain a virtuous position" (Spellman, 2011, p. 26). This was translatable into how others should be treated as well. The laws found within nature as a result of reason that expose the moral compass of nature, are the basis for the laws of man. Laws of man are expressions of those right actions in *commands* and *prohibitions*. And justice is served by prohibiting a person from acting in a way that is not in accordance with nature. "To know what accords with natural law…one reasons about the common good. Our duty…is always to act in the general welfare" when there is a choice between personal advantage and public welfare (Boucher & Kelly, 2009, p. 109).

It was not long after the dawn of the Common Era that the thinking began to make another important shift in the newly expanded Roman Empire. Stoic philosophy had offered some notions of universality and the idea of divinity within nature which seemed to pacify some of the more intellectual and elite people. It offered a universal order and code from which to draw self worth, virtue and morality and a source from which to base human law as was interpreted from the laws of nature by man's ability to reason. However, the poor, downtrodden, and impoverished people began to find solace in another source. They were turning to the newly burgeoning religion of Christianity. While Stoicism shed light on reason and its ability to find comfort or peace in any situation, no matter how bleak or dire, Christianity offered a similar solution with a little less effort of thought.

Christianity – Medieval Philosophy

The God of Christianity was different than the God introduced by the Stoic philosophers. The God of Christianity is more of a personification than the universe creating force known to the Stoics which encompasses all of nature. The Christian God played a very

important role in the political landscape of the medieval period. Natural law continued its prevalence in thinking during this period; however, natural law became deeply entrenched in Christianity. This entrenchment with religion played a part in the creation of rights.

Natural law changed over time with the advent of Christianity. The Stoics discussed the laws of nature as being derivative of the natural order of the universe that was attributed to a corporeal principle of God. But as the monotheistic Christian religion took on a stronghold amongst people, it affected the philosophy as well. Thomas Aquinas discussed natural law in his work *Summa Theologica* describing natural law as being the product of the rational interpretation of Divine Providence which is the eternal law that governs the universe and which has been created and maintained by God. (Aquinas, 1915). Man is capable of participating in the eternal law because of his ability to reason. Aquinas said too that the rational creature "has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end."(See Question 91, Second Article (Aquinas, 1915). This can be taken to mean that morality can be found within the eternal law and decoded by the rational creature. Aquinas goes on to clarify that being able to discern what is good and evil is the function of natural law, and the ability to do so derives from being made in the image of God and imprinted with the "Divine light". (Aquinas, 1915).

This natural law thinking transposed over to positive law and the development of rights began taking place as a part of the changing composition of natural law. According to Richard Tuck, the language of rights began appearing during the middle ages. (Tuck, 1979). The morality that was engrained in natural law theory helped to push along the development of rights and rights language as a matter of moral duty. A.J. Langlois very eloquently describes

this development of duty and in summation says that natural law was more or less a prescription of God's will, which came with moral obligations of certain behaviors. Those obligations required that people had a duty to act or behave in certain ways, which in turn meant that the recipients of those obligated duties had rights. (Langlois, 2004). In simpler terms, it can be interpreted from natural law that it is morally good to take care of the sick or wounded rather than to leave them care for themselves. In return, the sick or wounded have a 'right' to be cared for. It should be pointed out that rights did not exist in positive law at this time, but rather the development of passive rights was occurring. Historically, providing for the poor is an example of the development of passive rights from natural law in the Middle Ages.

In the Middle Ages, the use of Canon Law became a common occurrence and was taught alongside Roman Law particularly in the twelfth century after the rediscovery of Justinian's *Digest*, the massive collection of codified law instituted under the direction of the Emperor Justin in the sixth Century, which became studied by students of law. (Pennington, 1998). Meanwhile during the twelfth century, another collection of law was put together, this time Canon Law, by a jurist named Gratian. This collection, *Decretum*, became quickly merged with the Roman Law contained in the *Digest* thus creating a realm in which natural law provided by God could enter into the legal world of codified law. (Pennington, 1998). It was within this system of jurisprudence that the development of rights language began to take shape. As stated above, providing for the poor was an important part of the development of rights. Natural law, having the quality of coming from the prescribed law of God, held that within everyone is a natural force that knows to do what is good and to not do what is bad. In *Decretum* there were several texts that described the need to take care of the poor as a command of natural law. One text in particular attributed to Rufinus of Acquileia which said, "No one

may call his, on what is common, of which, if he takes more than he needs, it is taken with violence" (Pennington, 1998, p. 244). This can be taken to mean that it is wrong to take more than a person needs, particularly when others are in need. This Canon Law was mulled over by the jurists and scholars of the day and eventually, there became laws protecting the poor including rights of poor people to be able to provide for themselves, including a right to steal food.

While the Medieval period had a significant contribution to rights development, it also was a time of communal belief in God which kept the individual from having any prevalence in law or philosophy. Medieval natural law held some similarities of belief as those of the Stoics such as the belief that the existence of mankind could be worthwhile even under the most degrading circumstances. In fact much of the thinking of the time was aimed at convincing people to not expect much in this life, but to find solace in the reward of an afterlife. It was this confusing blend of philosophy that contributed to the changing dynamic of thought that ushered in the Modern era.

MODERNITY

Although pinpointing a specific time that closed the Middle Ages is difficult, it can easily be said that a shift in thinking occurred that differed dramatically from the philosophers of the last 1200 years. The shift occurred as a result of several causes that took place during the period of time between 1400 and 1700 C.E. namely the Protestant Reformation, the Renaissance, advances in scientific discovery and a resurgence of classic literature and philosophy. But this was a very tumultuous period, filled with war after war. The political landscape gradually changed from autonomous collectives of local leadership, where people had been ruled by barons and wealthy land owners, to an absolutist rule. Large sprawling kingdoms

became the typical ruling leadership. People began to view the secular arena as a possible source of truth instead of being completely locked into the notion of God as supreme truth. New ideas in humanism began circulating and the focus started to shift to the individual.

The shift to humanist thinking is critical in the development of human rights theory. It is inarguable that a large catalyst for this shift was a product of the Augustinian monk, Martin Luther. Luther was conflicted with the church's selling of indulgences and Canon Law which was passed down from church leadership. He was convinced that the church had lost sight of what Christianity was supposed to be and had instead monopolized religion to further governmental power. Luther wanted the church to get back to early Christianity and that "a true church was a fellowship bound by faith, not a coercive institution with sovereignty over land and rulers…" (Spellman, 2011, p. 64). He believed that every person was capable, and moreover it was a duty to develop a personal relationship with God. Morality was an individual pursuit based on the teachings of the bible. In this way, if people understood the bible personally, they could be moral, creating a more tolerable society. Luther translated the bible into German and with the invention of the printing press, the message spread very quickly. People across Europe were being equipped with an idea that they could think for themselves. They were able to pursue individual scholarship. This shift in thinking served as a catalyst for much of the conflict of the sixteenth and seventeenth century. After the start of the Reformation, the backlash from the church was tremendous. Divisions arose between Protestants and Catholics and conflict erupted as states attempted to retain authority and at the same time handle the new insights into individualism. One of the more famous conflicts, the Thirty Years' War, which took place in what is now Germany, was a largely destructive conflict that started out as fighting between Catholics and Protestants, but took on a political nature as

the conflict continued. It seems to have embodied the style of life and the cultural milieu of the time. The struggle between ideology and power, however, had a dramatic influence on philosophic writers of the era, and it is with this conflictive historical setting that we can move on to discuss the beginnings of modern philosophy and its influence on human rights.

Social Contract Theory

During the latter stages of the Middle Ages, we started to see the beginning of the development of rights language where rights were based off of duties of performance which could be said to be in accordance with divine law or providence. Because of the influx of humanist thinking, the shift took hold in the realm of rights language and development. With the validity of God in question, the source for natural law became an area of debatable contention. It might seem that at this juncture, the notion of rights could be tossed by the wayside. If a right was the opposite end of a duty, and that duty was presumably put forth by God, then what happened to the duty, and thus the right, if God did not exist? The answer is not simple but rather, became a complex and lengthy debate which encompassed the rising tides of rationalism and individualism and which produced in its wake the notions of subjective rights.

Subjective rights took on the premise that people had rights inherently, and further that rights did not require a higher power for their basis of legitimacy. With individualism on the rise in the Protestant Reformation, the conflicts between the authoritative Catholic and Protestant states became front and center in the political and philosophic rights debate. The Catholic political standing was such that ordinary people did not have access to God personally, but only by and through the officials of the church. The Protestants were quickly developing the idea that there was no need for any third party in the relationship between a person and God and that church officials could not control the personal nature of a relationship with God.

(Spellman, 2011). The conflicts that erupted as a result of the polarity of thinking heavily influenced the philosophers at the time. Writers such as Thomas Hobbes and John Locke wrote about natural law and natural rights within this conflicted political arena. The conflicts, however, pushed the idea of subjective rights forward and into rights as part of a social contract.

Hobbes described in his most influential work, *The Leviathan*, a state of nature, which was a picture of how life existed in the absence of an established government. In the state of nature, men were lawless, fearsome and conniving, where men feared death above all. According to Hobbes, men are born equal, but not equal as it pertains to wisdom or strength; rather they are equal in desire to pursue their own advancement, or in the simplest terms, in their need to ensure their own survival. But this equality of desire gives rise to the inequality inherent in the state of nature. To escape the chaos and insecurity of state of nature, men entered into social contract whereby an established government would protect the individual.

Within the state of nature there are natural laws and natural rights. Laws of nature, Hobbes says, are rules that are generally discovered due to reason, and these rules forbid men to do anything that is in opposition to continued survival. Hobbes also points out that man have a right of nature to preserve his own life and as a part of that right, is able to do that which is necessary to his preservation. The difference between laws and rights, according to Hobbes is that a law binds people to certain behavior, or obligates obedience and a right is a liberty, or the 'absence of external impediments', and is an actionable cause supplying people with ability to do or to stop others from doing something. From this Hobbes says that according to the laws of nature, every person should work to acquire peace so that he may continue his existence and he should exercise his natural right or liberty to attain it. But in the state of nature, there is always war and conflict, and from that it can be said that man has a right to everything because "there is

nothing that he can make use of that may not be a help unto him in preserving his life against his enemies" (See Chapter 14 (Hobbes, 1839).

Hobbes offers a solution that flows logically from man's right in the laws of nature. He says that if man is to attain peace, all men have to give up their right to preserve their life, which will end the conflict inherent in the state of nature. The caveat is that every man will have to give up their right, or no one can, because if only one or some do, others will be in a predatory position and able to overpower those who have given up their right. For Hobbes, the only solution is transference by all men, their right of nature to a sovereign leader, who can protect people from transgressors. Therefore, in order to leave the state of nature, men must enter into a social contract, wherein they transfer their individual right to self preservation in exchange for security. For Hobbes, the best answer to escape the state of nature is to enter into a social contract and establish a commonwealth ruled by a sovereign who is powerful and coercive enough to ensure justice. In this way, men will have liberty or freedom. While there have transferred their natural right to individually usurp or defend against power of preservation, they now have no obstacle or obstruction to life. Living in a social contract, they are free from the fear of death and free to do that which is their will to do, so long as it does not hinder another's liberty.

John Locke had a similar idea of the state of nature. His state of nature, however, had a better picture of man in the absence of government. Men in the state of nature, having rational ability of thought, were inclined to further their own survival. To Locke, the idea of property was prominent in that property was a means to better a person's life. Property held the keys to political power. And in the state of nature, since men were partial to their own advancement, they did not have the capacity to act as an indifferent judge when their natural right to property

was being infringed upon. Further, man was not capable by himself to deliver appropriate punishment nor did man have the strength individually to actually punish and would therefore be unjustified. Man therefore entered into a social contract, giving up his power to self judge any wrongs committed against him and instead giving that power to a government, to be an impartial judge and advocate for fairness and appropriate protections. For Locke, the role of the government was to protect the individual and his property.

The idea of property is an important notion for Locke and a foundational element in his political theory. For Locke, a person has a natural right to property. If a person produces something by means of his labor, that person has a natural right to the product of his creation. Locke says, "Whatsoever…he removes out of the state that Nature hath provided…, he hath mixed his labor with it … and thereby makes it his property."(See Chapter 5, §27 (Locke, 1764). This property that is created from the fruits of labor cannot be infringed upon by other men. Another proviso of creating property was that man was limited to produce only as much as he could without over accessing natural resources which others may need for their self preservation. As Waldron highlights in his essay, according to Locke the resources used must follow certain conditions such as: "the amount initially acquired must be related closely to the labor performed; the acquisition must not lead to waste; and …[the] appropriation of resources must not drastically worsen the position of others" (Waldron, 2009, p. 216). According to Locke, man has the natural right to possess and dispose of his personal property as he pleases. Further, the natural right to property has an aspect of duty to only use what is necessary and without greed so as to ensure the rights of others, a concept which is reminiscent of the Medieval philosophers' natural law duties.

What can be taken from both Hobbes and Locke in terms of the progression of human rights is the continuation and advancement of the notion of rational thinking of humans as a derivative of nature. Despite Hobbes's bleak outlook on humanity, "[he]believed that people in the state of nature had the ability, as a function of rational self-preservation, to combine forces, enter into contract, and create a common power…" (Spellman, 2011, p. 71). His philosophical approach had a universal underpinning in that all men had the capacity to think by way of his ability to reason. And his notions of universality are furthered by his insistence on laws of nature and natural rights. Since every man had the ability to draw from nature the right to preserve himself, each man was inherently, by virtue of being born human, endowed with at least one right. As will be discussed later, human rights are based at the simplest level on an idea which mimics Hobbes' right to self preservation. It is evident, too, that the natural laws that were prevalent and fundamental to Stoicism were influential to Hobbes, in the very least in terms of language. Meanwhile, Locke's philosophical contributions played heavily in the influences of much of the rights systems set up currently. His concepts of life, liberty and property are echoed in the American Constitution. But it is quite evident too that his writing and premise is largely centered on divinity. This quality is reminiscent of Stoic philosophers as well. For Locke, man's ability to reason is his method for being able to ultimately perform the will of God. This puts limitations on the universality of Locke's rhetoric. While it has similar qualities of univerality in terms of defining natural laws that apply to all, it cannot be said that all believe in a god, let alone the Christian God to which Locke was referring.

Hobbes and Locke lived in the war torn time of European history which was encapsulated during the crux and aftermath of the Protestant Reformation. The conflict involved radical new ideas of individualism and humanism crashing head on with the old ideas

of divine providence. Through looking at the works of Hobbes and Locke, we can see that the conflict had a large impact on the philosophy of the time. Hobbes drew heavily from well established natural law theory into his ideas of natural law and natural rights; but rather than submit entirely to the ideas of the past, he furthered ideas that natural law was not necessarily dependent upon God, but was a given. Locke, on the other hand, maintained the natural law position that moral guidance and duty was a product of divinity, all the while, bolstering the idea that the individual has rights despite a belief in God. This duality of argument began to create a rather significant dilemma in subjective rights theory as well as in theories of universal natural law based on divine providence. No longer did the claim of God have the same universal legitimacy. Theorists had to find a way of explaining moral duties and their corresponding subjective rights in the absence of God if rights were going to be found sustainable.

Enlightenment

To keep up with the timeline of history, the age of the Enlightenment is mostly associated with the eighteenth century. During this period, major advancements in science were taking place that would help transform the political spectrum from the age of divinity to the age of reason. The laws of nature began to take on the appearance of occurring without the assistance of God due to accomplishments in science, "not least of which was Newton's demonstration that a deep pattern of unity and law governed an essentially mechanistic physical universe at every level, helped to amend this outlook." (Spellman, 2011, p. 86). As ground was further gained in areas of science, the use of reason and methodology began to take root in other arenas as well, not least of which was political theory. "For most political thinkers of the eighteenth century, then, reason provided the standard by which human social relations and civil

authority were to be justified." (Spellman, 2011, p. 86). This meant that the potpourri style of philosophy characteristic of the seventeenth century, which was encumbered by the effects of religious conflict, shook off some of the old natural law theories of divine providence and began to streamline. As Langlois says, "the theological metaphysic of the human as a creation – a creature – of the divine, designed to be fulfilled when obeying natural law, was a metaphysic which could no longer claim universal, intellectual, or popular precedence." (Langlois, 2004, p. 253).

There begins to be an emergence of the trend of secular subjective rights with the writings of Jean Jacques Rousseau who also wrote about a social contract. Unlike Hobbes's view of man, according to Rousseau, if left in the state of nature, man is good. In fact, Rousseau wrote that men in the state of nature were naturally equipped with the innate desire for self preservation; however, men possessed a naturally altruistic quality where it was beneficial to maintain the preservation of others. Rousseau said that this altruistic quality "is a natural feeling which, moderating in each individual the activity of love of oneself, contributes to the mutual preservation of the entire species…in the state of nature it takes the place of laws, morals and virtue" (Rousseau, 1775, p. 47). It was Rousseau's opinion that the notion of property was what created the tendencies of immoral action such as greed and deceit. Further, it is property and production and protection of it that have forced the formation of the state. As Spellman eloquently summed up, "in a sweeping indictment, [Rousseau] claimed that human nature had been corrupted by the productive capacity of humans in society, by the arts and sciences, the institution of marriage, the falseness of organized Christianity, and, most disturbingly, by the invention of private property" (Spellman, 2011, p. 91). Rousseau believed that once a man was born, he was enslaved by society.

While the notion of the state of nature is reminiscent of the social contract theories of Hobbes and Locke, it is easily discovered that the social contract put forth by Rousseau is anything but an escape from the state of nature, but rather a mechanism to return to the freedom inherent within it. Rousseau progresses the social contract idea into something that is more tailored to the individual pursuit of liberty or freedom. Rousseau contends that entering the social contract is the only way to achieve freedom. The established governments, according to Rousseau were no more a legitimate governing body than they were a construct of the rich and greedy maintaining control and wealth over the poor and desolate. The social contract, in fact, was meant as a way to reconstruct the typical society that had enslaved man thus far, which entailed a "new contract, not between rulers and ruled, but between free and equal members who understand the value of unity and cohesiveness, and who commit themselves to active public service in a reconceived—and markedly statist—political order" (Spellman, 2011, p. 92). To do as such, everyone within the social contract forfeits the same degree of freedoms that were available in the state of nature, but everyone also demands the same duties from each other. Everyone in the social contract is a part of the whole and the decisions that affect the whole are made as a whole, or by what is considered the general will. The decisions of the general will are then carried out by the government which is a separate body from the general collective of people.

The concept of the general will put the power of rule within the people itself, rather than in the capacity of a single sovereign. It was a significant development in the transformation of people from subordinate subjects to participating citizens. What is more, the participating citizens were not called upon to interpret the will of a God, but rather formed a consensus by means of reasonable agreement. The concept was inspirational to those people living in France

during the late 18th century who used the writings of Rousseau to spawn a revolution and a document declaring rights for man.

> The Declaration of the Rights of Man and Citizen opens with the statements that,
>
> 1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
> 2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.
>
> *See* (Declaration of the Rights of Man and Citizen (1793))

Meanwhile, in the burgeoning colonies of North America, a war was being fought over the leadership and entitlement thereto of the peoples living across the Atlantic from their British motherland. There became an overwhelming sense in the American colonies that they should not be owned or run by a sovereign who was not present. The American Revolution was fought and won by the American colonists and the result was the installation of a democratic republican government that was ruled by a Constitution and Bill of Rights. More aptly and more impacting on human rights was the Declaration of Independence which declared that men all men had rights. Its second sentence reads that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (Jefferson, 1776) This thinking that men are endowed with rights is reminiscent of the natural law theorists. However, the Declaration of Independence was also reminiscent of the social contract theorists. This can be deduced from the Declaration of Independence as it calls for the procurement and protection of rights by forming an institution of government at the "consent of the governed" and further, that should a government grow into despotism, that is the "right, it is the duty, to throw off such Government" (Jefferson, 1776). The drafters of the Declaration of Independence and the founding documents of the United States seemed to have melded together the prominent

theories of the past into a newly considered arrangement wherein the people would govern by reason in an attempt to establish an equality of rights. Further the drafters explicitly added in the Constitution of the United States a clause for the separation of church and state whereby binding the government from participating or advancing any certain religion within the United States. This was a departure from the well established monarchies of Europe. To be sure, however, the monarchies of Europe were under attack and suspicion by the theorists of Europe. Europeans began to wonder if they might too be better off without a monarchy but rather with an elected republic.

One of the prominent political ideas of the eighteenth century was that certain truths could be derived from natural law through the use of scientific methodology. The garnered truths from natural law were the underlying legitimacy for the inalienable rights that were guaranteed to all men. But what this overarching theoretical position lacked was a consistent agreement of what the derivative truths were. One of the leading writers to this end was David Hume. Before Hume reason was the product of natural law is usually as a consequence of proximity or kinship with the divine will of God. Hume, however, was an atheist and did not adhere to the idea of morality as a product of God but rather, he thought it was a product of the human psyche. Hume was, if not the first, one of the first philosophers to introduce the idea of the human psyche and its relationship to morality. He believed people to be a blank slate and ideas were impressed upon our minds only after having experience with physical contact. For Hume, this idea was just as true for sensory perceptions such touch, taste, hearing, smell, and sight, as it was for psychological impressions. Judgment of fact and judgment of morality were separate. From Hume's point of view, man is only able to draw judgment of fact from the observations and experiences he is able to achieve in his limited capacity. He can only say that

water is wet after he has touched it and from this observation he can reason that water will be when it the next time he touches it. While sensory perception enables man to make judgments about whether water is wet or dry, it does not entail observation or judgment about whether the water is good or bad or nice or mean. Hume delivers the idea that moral judgments are rooted in a separate part of men's psyche that he qualifies as non-rational. As Hume says in his Treatise, reason alone "can never immediately prevent or produce any action by contradicting or approving of it" (Hume, 1739). Decisions to act on judgments of morality are only made using sentiment or as Hume would say, passion. "Moral judgments and values originate not in reason or our cognitive capacity, but in the passions. Passions may be judged wise or foolish praiseworthy or blameworthy, but not true or false." (Kelly, 2009, p. 231).

Hume's depiction could easily leave his readers with a cold and bleak outlook on humanity. If the nature of humanity does not reside on an underlying moral concept, or if morality does not adhere to the auspices of fear of God, what is the motivation for morality? For Hume this motivation can be explained by convention and public interest. In his Treatise Hume used an example of two men rowing a boat. The two men worked together to row the boat because the two men have a common goal to move the boat forward. (Hume, 1739). The common goal is a common interest and from the interest the men act towards that common goal. The common interest is enough motivation for their actions to be in conformity. Common interest can be transposed into morality and action thereon. In his essay on Hume Paul, Kelly gives an example of common interest in respecting property, a concept Hume discusses at length in his treatise. Kelly discusses the concept of recognizing reciprocity saying that, "each person recognizes that he has an interest in respecting property of others, provided that others recognize a similar interest" (Kelly, 2009, p. 234). The recognition is important because it

creates a convention based solely on common interest. It is this recognition and creation of social convention that Hume believed to be the basis for a need to government which is based on necessity rather than a contractual agreement between rulers and subjects. "Hume argues that the authority and legitimacy of political rule is derived not from the origin of government, but from its utility" (Kelly, 2009, p. 237).

Hume's work was instrumental in the development of Jeremy Bentham's and John Stuart Mill's theoretical approach of Utilitarianism. The premise of Utilitarianism is based on the notion of pleasure. The pursuit of happiness is found by maximizing pleasure. With this being said, the idea of what is pleasurable can only be determined by the individual. For what may give happiness to one, might not give happiness to another. Because the idea that what is pleasurable is an individual pursuit, it follows that some pursuits of pleasure may cause harm to others. To this end Bentham believed that there should be a governing body that would operate under a utilitarian ideology creating "the greatest good for the greatest number". However, Mill argued that this idea was logically flawed, in that the greatest good was not always in everyone's interest. So if a utilitarian system would ultimately deprive people of fulfilling the pursuit of pleasure simply because they were not in the majority, there would be no reason to support the system. Mill made the argument that in order for a utilitarian system to work, there had to be an idea of "rational priorities".

Mill's concept of rational priorities among human nature is based on the idea that some pleasures are naturally better than others. Although this seems contradictory to the notion that pleasure is an individual determination, Mill relies on human psychology to further his argument, citing what he calls the "science of character". "Character is the control of one's own emotions and impulses, on which depends the ability to make genuine choices" (Portis, 2008, p.

134). He argues that a person cannot truly be happy with a pursuit if he suspects that there is something better available. Therefore, making choices is necessary to the development of what Mill describes as character and essentially to one's happiness. Although Mill does not specifically state any list of pleasures that are inherently better than others, he places education as one of the most rewarding means of attaining happiness. He suggests that educating oneself will allow for the development of character which in turn allows a person to choose more wisely and will ultimately lead to greater and more meaningful happiness.

As earlier stated, it is an inherent part of the pursuit of pleasure that, some pursuits will cause harm to others. Under the principal that human nature's rational priorities can be determined by the use of the development of character, it can be deduced that a system of oversight can be placed to account for the idea of harm. With this in mind, Mill delineated a system of government that may work well within these freedoms and constraints. In Mill's concept, government should serve three purposes. The first was to maintain order, by restraining those who would cause harm to others by gratifying their own pleasures. While it is not the government's job to keep people from harming themselves, it is responsible for ensuring that others are not harmed by ones actions. The second purpose was to maintain large infrastructure such as roads, postal systems and so on. And the third purpose was to promote and assist in the development of character. "Mill contends that government must work to minimize the defects in character that make government necessary in the first place. Order cannot be achieved without progress" (Portis, 2008, p. 138). In order to do this, Mill proposes a representative democracy. The representative democracy was a mechanism that would allow for representatives in the public service sector to talk with one another to discuss and encourage the notion of personal interests and to further educate citizens to pursue their true interests.

What can be gathered from the works of Hume, Bentham and Mill is the turn toward a utilitarian approach to government and rights enforcement. In the quest to discover an agreement on natural laws or truths that could be discovered by observation and measurement in the same way that scientific theorems were being quantified and qualified, it was discovered more so that there was no such agreement. Rather, philosophers began to see that humans possessed psyches that could not necessarily be measured but were independent of one another in their ability to reason. It was this type of thinking that pushed forward the ideas of individual liberty and freedom to pursue individual efforts of happiness. The utilitarian perspective is such that the ability to choose individual happiness is key to achieving it, and that no one should interfere with another's pursuit of happiness. To this end, ideas of utilitarianism found a need for a government and protection of rights based on the government's usefulness. For instance, "Hume found no compelling sanction for government in divine right theory, hereditary claims… or Lockean social contract theory" (Spellman, 2011, p. 103). He thought that governments were formed, maintained or changed as a result of complex social situations and further that, "we obey government because it is useful to us; when it becomes oppressive we may employ the language of abstract natural rights to justify acts of resistance, but in reality we cannot agree what these rights are and instead fight back because the state has lost its utility for us" (Spellman, 2011, p. 103).

The enlightenment period in and of itself brought about changes in political theory that had lasting repercussions on human rights theory. Rights became more than just the opposite end of a duty and were enshrined in positive and negative law. The notions of divine law were replaced by the ability to reason ideas of scientific methodology. And then these notions of scientific methodology as a means to discover truths of morality were countered by the

progressions of the study of human behavior. The progressions in human behavior lead to ideas about the state being an entity that should be utilized. People demanded that they be seen as individuals and that they be treated well by their state. Further, it became the responsibility of the state to provide for the people. This demand paved the way for great changes in the structure of society throughout the following century which was wrought with the frantic pace of the Industrial Revolution.

What has been described in this last section has been the historical ontology of human rights. Human rights were not born into thin air in the 1940's after the end of the atrocious World War II, but rather were a product of rights philosophy that has been shaped over nearly two millennia. More precisely however, the crux of the rights language used as the underlying basis for the legitimacy of human rights comes from the rights documents associated with the Enlightenment. These documents, which included the United States Declaration of Independence, the US Bill of Rights, The French Declaration of the Rights of Man, and others from around the world that were similar in fashion and nature, were assimilated and melded together to form a unified and collective group of rights that could be agreed upon by most as belonging to all. Of course, what has been shown in this section is that the rights language belonging to the Enlightenment period is not specific to that period of time, but rather is a culmination of progressions in rights language and theory. Human rights took on the language of inherent and inalienable rights that were listed in the rights documents of the Enlightenment period, but that had developed over the centuries through changes in theories of natural law. The purpose of discussing the history of the philosophical foundations of human rights was to show that there is no single place, time or theory that can be associated with the understanding and development of human rights. This makes the notion of universality difficult. Further, the

lack of universality makes a hard case for the legitimacy and enforcement of rights that are said to belong to everyone everywhere.

NON WESTERN HUMAN RIGHTS

The concept of human rights is heavily inundated with Western philosophy. It is by no accident that the entire philosophical study of this thesis thus far has included only philosophers of Western origin. There are many Non-Western philosophies that have been overlooked until this point. This was done with the intention to show that Western philosophy contains the cornerstone for development of today's human rights. Morality is often associated with human rights. It cannot be said that Non-Western philosophies lack notions of morality. Indeed, morality is a deeply rooted theme in much of the Non-Western philosophy to be covered. Morality, though, was often characterized by duty, self responsibility, obedience, compassion, and love. There are fundamental differences between the Western philosophies of equality and entitlement, the Eastern philosophies of duty and compassion, and the Middle Eastern philosophies rooted in Islam and Sharia Law. These differences do not make one better than another. But as was discussed previously in the section covering the human rights in positive law, it is evident that the language of human rights as written in the Declaration of Human Rights is largely of Western philosophical descent. In the process of forming the Universal Declaration of Human Rights, it has already been said that representatives from around the globe were involved. However, the rights language included in the final Declaration is not found in Non-Western philosophies and there is much argument that the Non-Western philosophies are not represented in the final Declaration. I will not discuss in depth the many different philosophies of Non-Western origin, but I will explicate a few examples to illustrate this point.

Of the many Non-Western philosophical areas not represented in the language of the Declaration of Human Rights, probably the most poignant is that of the Islamic religion and culture of the Middle East. Islam has as a standard of law, the standard of Sharia Law. While Sharia Law establishes guidelines and laws for living within the standard of the religion of Islam, it does not contain language that is commensurate with the human rights language in the international arena. Further, many living outside of Sharia Law would argue that it limits human rights for women and for those who are not Muslim. As Donnelly points out in his essay, "Human Rights and Human Dignity," that within Sharia Law, "the rights that exist are not human rights, but legal rights, rights held not simply as human beings but as a result of one's legal or spiritual status." (Donnelly, 1982, p. 307). Of course within Islam there is much to support the notion that there are duties to treat others well. Again quoting Donnelly, "Muslims are regularly enjoined to treat their fellow men with respect and dignity, the bases for these injunctions are not human rights but divine commands which establish only duties, that is, which deal only with right in the sense of what is right" (Donnelly, 1982, pp. 306-307). Despite the duties to treat others of the same faith with dignity and according to what is right, Sharia Law and the religion of Islam, which account for a large culture in the Middle East, contain little that resembles the human rights that are declared to be universal in the Universal Declaration.

Farther East, philosophies of Confucianism, Buddhism and others dominate the cultures and the peoples of the Orient. The philosophy of Confucianism centers on benevolence. It is more a way of being which focuses on kindness and respect of others by way of obedience and virtue. It also centers on the idea that people can always improve themselves. Learning is not limited and cultivation of the self is important. Confucianism places great emphasis on family

structure in a patriarchal setting and this structure is transferred over to his view of society. "Even thought Confucius taught that government should be benevolent, his ethical teachings place great stress on the hierarchical relationship of individuals in society and on the demands of obedience. In a virtuous state, Confucius emphasized that all people have a duty to contribute to its unity and harmony" (Hayden, 2001, p. 271). Further, as Donnelly points out, rulers and governments have duties to take care of the interests of the people, but there are no rights established as a part of this obligation. (Donnelly, 1982). Further, when drafting the Declaration, P.C. Chang, the representative of China in the Human Rights Commission, discussed at length the differences of philosophic perspective. There was significant difficulty integrating concepts of "reason" and "ren" or "two man mindedness" which were similar, but in translation, lacked coherency. "A word emblematic of an entire worldview and way of life, *ren* has no precise counterpart in English" (Glendon, 2002, p. 67).

This example of difference in language is one of many differences in outlook and concept in Eastern and Western thought. Of course, the issue being presented in this thesis is that the language of the Universal Declaration of Human Rights contains the language and philosophy that is Western. This section makes way for the ensuing discussion of the problems of claiming universality in a largely varied world.

Chapter IV. **ARGUMENTS OF UNIVERSALITY**

What can easily be said about the pursuit of establishing a philosophical outline for the foundation of human rights legitimacy is that the task is not guaranteed to produce a definitive result. The arena of Western thought is a jumbled complex mixture of several similar and yet wildly varying ideas. From natural law being a derivative of divine providence to possessing natural inalienable rights from the dictates of human reason, to the use of psychology and utility to form systems of government which enforce only laws which work to the utility of its governed, rights themselves have had to climb a mountain of rhetoric to establish any claim of legitimacy. The main position of human rights, however, is that they are universal and inalienable, meaning that they belong to everyone everywhere, and they cannot be taken away even if the rights carrier should wish it. Thus far, this thesis has been unable to establish a philosophical argument that can successfully position itself behind the requirements of human rights.

Secondly, varying cultures, norms, and rights language, or a lack thereof, have arisen as major problems for the claim of universality in human rights. There are undeniable differences which exist between the philosophic culture from which the language of human rights was derived and the great many other philosophic cultures of the world. To be sure, there is an abundance of argument expounding on the increasing cosmopolitanism of the international arena that compel some to agree that human rights are in fact universal. However, as will be discussed in the following section, arguments of relativism strongly suggest that universality in human rights may be an impossibility. What has been noticed in the period of time since the Universal Declaration of Human Rights was established is that very few states actually agree to be complicit. The rights listed in the Declaration do not comprise a list of rights that all states

agree are inherent to humans. As was discussed in a previous section of this thesis, current human rights documents such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, have roughly two thirds of the world's states as signatories, but only about a third of them are actual parties. If the human rights listed were in fact universal, it would seem that there would be greater consensus about supporting and complying with them globally. The lack of support and agreement about human rights can be attributed to the differences in cultures, norms, philosophies and so on that happen from place to place.

Over the course of this section, I will discuss the problems with the claims of universality in human rights by addressing the moral and cultural relativist arguments. Further I will discuss human rights as a progression of philosophy and political outcome that has constructed over time. This social construction undermines the universality of human rights as it shows human rights as belonging to a temporal reality, rather than as a constant and inherent part of being human. To begin with, I will start with the arguments of relativism.

MORAL AND CULTURAL RELATIVISM

There is little argument that human rights have a moral element. The rights language that was the precursor for human rights was littered with natural law theory which is based heavily on tenants of morality. Here, however, this can get into arguments of moral relativism. Moral relativism has to do with the idea that moral judgments are not universal. Gilbert Harman, in his essay "Moral Relativism Defended," explores the idea that morality is only an assertion that can be made between people who agree that something is moral. Moral relativism hinges on the idea, and rightly so, that morality is not a concept that can be overarching and all-inclusive. Further moral relativism contends that judgment on morality can only be assessed when the

judgment is appropriate. Appropriateness of moral judgment relies upon similarity of thought between the person being judged and the person doing the judging. For example, consider Person A who grew up in a community where slaughtering and consuming dogs was normal. Now imagine that Person A stole Person B's dog, butchered and ate it. Consider that Person B has been raised in a community where eating dog is immoral. Under this pretense Person B might be predisposed to pass judgment against Person B on the basis that it was wrong of Person A to eat the dog. Now while there may be an argument about the morality contained in the notion of stealing, moral judgment is not appropriate when considering the differing positions on consuming dogs. While it might appear obvious to Person B that eating dogs is wrong, the idea of wrong in association with eating dogs for Person A does not exist. As Harman would say, assuming this person was wrong," would be a misuse of language... But that would imply that our own moral considerations carry some weight with him, which they do not" (Harman, 1975, p. 5). Now while this example may appear to be far-fetched, consider people in India who believe cows to be sacred compared to the United States where cows are an everyday part of food consumption.

From these examples it can easily be construed that morality does not take the same form universally. Further what one person or one group considers to be moral is not necessarily considered moral by another person or group. From this follows the opposite side where what one person considers immoral is not necessarily considered immoral by another. Morality is relative to specific understandings of a person or group. In the case of the group if something is immoral there is an agreement amongst the group that it is so. It probably simply from this that another group may think the same action is moral. But in determining which group is morally

right or wrong is an exercise in futility. As Harman says, "An action may be wrong in relation to one agreement but not in relation to another" (Harman, 1975, p. 4).

This makes placing judgment on others particularly curious with of all moral agreements are not the same. "The judgment that it is wrong of someone to do something that makes sense only in relation to an agreement or understanding" (Harman, 1975, p. 3). Therefore if a person places judgment on someone, that person assumes they are of the same moral agreement as the other person. For instance, If I judge a man as being morally wrong because he has multiple wives, I have assumed that he two believes having multiple wives is wrong. If he does not believe that having multiple wives is morally wrong I cannot necessarily judge him to be morally wrong, but rather morally different. That is not to say I have become open to the idea of multiple wives or that my moral convictions have changed. I can very easily disagree with the action of having multiple wives, and I can say that this man does not have the same morals that I do, but I cannot definitively judge him to be wrong about the action when there are multiple, at least two in this case, versions of morality associated with the action. "We make inner judgment about the person only if we suppose that he will be motivated by the relevant moral considerations (Harman, 1975, p. 4).

In the case of universal human rights it's easy to see that moral relativism creates a hefty problem for universality. As has been discussed previously there are significant differences in the philosophic foundations of human rights simply between the generalized notions as Western and Non-Western cultures. The notion of what is moral has developed to form building blocks of different shapes, sizes, and colors will depend where or who was developing idea. If we first look at the Western foundation of morality, we can see the basis of morality come from several different places. In classic philosophy morality was an offshoot of virtue. In Platonic theory,

men were considered virtuous if they sought to achieve the highest form of their particular capabilities and did not interfere in another's pursuit of the same. In medieval philosophy we see morality as a derivation of God's will and the ability to interpret God's will is a result of the power of reason. During this time, it was crucial to act in accordance with the will of God so that when a person's life was over they would be rewarded with eternal life in heaven. Moral actions were those that could be justified as being in accordance with the reasonable interpretation of God's will. In Hobbesian and Lockean theories, morality was less an idea of right or wrong and more an idea of fairness. Later in the enlightenment period, while God still played a crucial role in some ideals of morality, the notion of individual morality in connection with the relationship between the state and its citizens became forefront. Over the span of just Western philosophical foundation, morality has taken on many different shapes. At present, the versions of morality among Western states can be argued to be largely not cohesive. Looking to the United States as an example, the argument of morality is rampant. Some people think it is immoral to allow abortions or homosexuality. Others think capital punishment is immoral and these are just to name a few. Each of these concepts of immorality is backed by a barrage of arguments that have persuaded the beholder of each of these concepts to agree in their validity.

Stepping outside of Western philosophy and looking further into the morality of non-Western philosophies, the picture becomes even more convoluted. The tenants of Confucianism reveal that morality is a self-fulfilling process tied to duty obedience and respect. The tenets of Buddhism tout that morality is a symptom of compassion. Going back to the example of homosexuality there are some stark differences in morality. In the West, homosexuality is for the most part an accepted lifestyle. But in the Middle East, it is absolutely not acceptable. However as Zubaida (2011) points out, in the Middle East in the past, there has been an

exception for homoeroticism. It was acceptable for men to have homoerotic relationships with young boys and even take them on as concubines up until the age of maturity. When the boy began to be a man, there could be no relationship because at that point, it would be considered a homosexual relationship and would be wrong. (Zubaida, 2011). The West defines sexual encounters with young boys or girls as pedophilia and it is absolutely unacceptable. It really makes a statement about the differences in what is considered moral and what is not between the regions. It is a daunting thing to suggest that one set of standards is more moral than the other when they both have such estranged concepts of what is morally acceptable.

To further the idea that human rights lack universality, it would be wise to delve into the notions of cultural relativism. This area is at the forefront of the human rights conversation. Cultural relativism, according to Richard Mullender (2003) in his article concerning universalism and relativism, has two basic premises. The first pertains to an argument of diversity where the world is comprised of a vast array of societies and cultures which each has its own interpretations of morality, spirituality, philosophy and law. Mullender says that, "this prompts the conclusion that Universalists should resist the temptation to identify human rights as serving the interests of all people in all contexts" (Mullender, 2003, p. 71). The second premise Mullender discusses is that the idea of rights cannot be found to cross cultures. From this, relativists suggest that it is not particularly possible or justifiable to exact a set of rights for another culture. These arguments must be taken seriously regarding human rights as the notion of human rights relies on universality. The conceptual premise of the universality of human rights is that rights are endowed to humans on the basis of being human. If the arguments of relativism hold true, the conceptual premise and universality of human rights could be shattered.

To get a better understanding of how cultural relativism is aptly applied to the concept of human rights, it should be first concluded what it is. Originally the notion of cultural relativism was a response theory to the theory of cultural evolution which saw culture as having evolved from being savages or undomesticated to being advanced and modern. While this may seem accurate on the surface, the evolutionist theory had apparent racist overtones. Those writing on the subject were situated in the Western society and "Naturally Western civilization ranked highest on the scale because the standard for judging was based on Western values." (Renteln, 1988, p. 57). This coincided with the view that European or Western cultures were those that cultural progress was to be judged against. Cultural relativism challenged cultural evolutionism on the grounds that Western modernity might not possess superior authority on progress. The running agenda for early cultural relativism was tolerance and enculturation. As the field progressed, it began to counter the notion of morality as cross cultural. In terms of culture, relativists propose that morality is determined by the cultural position of respective societies. If this is true, then any universal approach to morality must be entirely cross cultural, or it will fail. However, relativism highlights the idea that morality is an idea acquired through the standards of a society and the versions are different according to each society. At this point, though, cultural relativism might better be explored by discussing its potential downfalls.

There are many arguments against cultural relativism, which is not surprising given the importance placed on the human rights discussion. Jack Donnelly (2007), one of the leading writers in defense of human rights universality, points out several of the opposing arguments in his article, "The Relative Universality of Human Rights," he lists six specific arguments, some of which overlap, that criticize the validity of cultural relativism. These arguments can be summarized in two general arguments. The first is the argument that cultural relativism

tolerates too much tolerance. Donnelly suggests that under the guise of relativist tolerance, even the most atrocious 'genocidal' societies would necessarily have to be tolerated. (Donnelly, 2007, pp. 295-296). The second argument pertains to the idea that values of cultures are unchanging. Donnelly discusses cultural relativism as limiting a culture's ability to revise or change its values or that it "assumes the impossibility of moral learning or adaptation except within (closed) cultures." See Id.

To address Donnelly's arguments, I shall start with the first. Cultural relativism has been largely argued against on its seemingly apparent view of tolerance. The argument suggests that cultural relativism implies absolute tolerance. This view can appear very disturbing when looking to cultures whose violence and repression are overwhelming. Critics "insist that it undermines our ability to condemn repressive practices in other countries…the argument most often advanced was that according to relativism we could not have fought the Nazis because relativism calls for absolute tolerance." (Renteln, 1988, p. 58). Leaving aside the fact that the United States did not participate in the fight against the Nazis until it was attacked and was in effect, *forced* to participate; the problem with Donnelly's argument is that he assumes cultural relativism to be prescriptive, rather than descriptive. Relativism is not a theory that places value in judgments, but rather is a theory about value judgments. Tolerance is not a stipulation associated with relativism. The argument that says that relativism requires tolerance for all cultures and norms, is an argument that comes from a culture that is tolerant. Renteln labels this as enculturation saying that, "Enculturation is the idea that people unconsciously acquire the categories and standards of their culture" (Renteln, 1988, p. 62). For people living in America, toleration is a "value preference" of the country. Further, he goes on to say that, "In fact, one could argue that it is because of the theory of relativism that Americans could

reject tolerance…. Perhaps a commitment to another value such as egalitarianism or humanitarianism or some other should take precedence over tolerance. It is not the theory of relativism that makes tolerance supreme, but rather the uncritical acceptance of this value by Americans". (Renteln, 1988, p. 63). In short, Donnelly's claim that relativism allows for atrocities of morality because it requires tolerance of all cultures is a misreading of the theory of relativism. Relativism does not require that a judgment of morality be made, but rather, it expresses the reality that there are many cultures that have their own view of moral norms.

As to Donnelly's second argument, he suggests that relativism places a static hold on cultures where if an idea emerges in one culture, it cannot be shared with another culture. This makes the introduction of human rights into cultures that are not privy to human rights language a hard or impossible sell. For Donnelly that causes a lack of moral progression within a culture and "dangerously assumes the moral infallibility of culture." (Donnelly, 2007, p. 295). As stated earlier, relativism does not make judgments of value, nor does it attempt to limit the capacity of cultures. Relativism is merely a theoretical approach to understanding that cultures have differences of norms, values and morals. It does not suggest that cultures do not or cannot change, adopt, inherit, or replace any of those norms, values, or morals.

As has been discussed in previous sections, the philosophic rhetoric of human rights is that of Western descent. There is argument that even though it is written with Western language, the rights are universal enough to carry through to all nations and all peoples living within. Thinking about it from a reverse perspective, if Eastern philosophy was used as the basis and primary language to construct a universal declaration of rights, it would be difficult to imagine Western countries' compliance. The reason that Western countries are more able to comply with the declaration is because it is written for them.

HUMAN RIGHTS IN A CONSTRUCTIVIST APPROACH

What has been discussed thus far is a historical approach to the positive law and the philosophic foundations of human rights. I have taken a look at some of the differences in perspectives between the cultures and language and have seen that not all cultures are compatible with the language of human rights. The discussion thus far has been about whether human rights can be considered universal and can belong to each and every person. What we have discovered is that human rights conventions and international positive law instruments were the answer to the atrocious and horrifying acts committed during World War II. Further, the language that was used in the structuring and development of the international positive law was derived from rights instruments which originated during the Enlightenment Period. The language of human rights has been retrieved from theories of natural law that have progressed and been formulated into positive law over the course of a few thousand years. The argument that has been presented so far is that human rights claim to be universal, but are based on philosophy that is only representational of a percentage of the people and cultures of the world and thus are limited in their capacity to be universal. The product of this thesis is intended to show that human rights are not universal, but despite this observation, human rights have legitimacy in the sense that they are a social construction.

In order to get to the intended product, let me first introduce some of the theory of social constructivism. This will lend to the idea that human rights have been constructed and there may be a new way of looking at human rights, rather than just pronouncing them to be universal and then warding off scholarly argument to the contrary. In the abstract sense, Social Constructivism is a theory of international relations that holds that the social world is more important than the physical world. This can be shown in a simplified example by imaging a

person that walks into a house. He looks around the living room, and as one might imagine there are several types of furnishings in the room, maybe a coffee table, a sofa, an end table, and maybe a rug on the floor. When asked to sit down, out of all of the furnishings, he will most likely choose to sit on the sofa, despite the fact that there are other pieces of furniture and even the floor that would physically hold the person. This happens because people have constructed meaning and have decided that the sofa is the appropriate place to sit. This example is on a very small scale, but it is representational of how we can think about the way the international system works. Individual societies have become socially constructed over time and have taken on values and norms that are distinct to those individual societies. Further, these values and norms work together to create over time a social identity which is recognizable by those living within that society and to those outside of it. Societies interact with other societies, each society with its own identity. For constructivists, how societies, in conjunction with their respective social identities, interact with other societies and the differences in norms and values *is* the system of international relations. "[The international system] is a human invention or creation not of a physical or material kind but of a purely intellectual and ideational kind. It is a set of ideas, a body of thought, a system of norms, which has been arranged by certain people at a particular time and place." (Jackson & Sorenson, 2010). As such, the international system has become the recognizable anarchic system because of the interplay between societies over time, which is ultimately the result of human interaction and social identity development. One of the more important features of social constructivism, however, is the idea that there are no static ideologies and societies, and that even the international community, is always in flux. If thought about from the position that all of the moments of history before now have shaped the present state of affairs, then the present is currently shaping the future state of affairs. This

means that no societal identity will remain untouched or unchanged and further, that those changes will occur from within the society as well as a response to the interplay with other societies.

Human rights, when viewed through the lens of a constructivist approach, can find legitimacy outside of the daunting claim of universality. Jack Donnelly, although a leading scholar for the universality of human rights, helps to further the constructivist position by arguing that human rights are the result of specific occurrences over time that the encompassed people in disadvantaged situations fighting against their respective disadvantage. They are the result of political circumstance and inequality. He says, "An authoritative list of human rights emerges out of an ongoing series of political struggles that have changed our understanding of human dignity" (Donnelly, 2003, p. 57). More than just a series of political struggles, however, I would argue that the recognition of disadvantage is a result of changes in thinking philosophically. In my analysis, the changes in philosophical purview are related to and a representation of the identity of a society. Wars, coup d'états, revolutions and the like are the physical manifestations of defining and redefining societal identities.

Human rights have been emerging from an historical heap of philosophical changes. If we look to the teachings of St. Augustine and the followers of the church at the time, we find people who were led to think their disadvantage in life was a temporal passing and they would be rewarded in the afterlife. Their view was anything but individualistic. It was not a just struggle of policy, but also philosophical perspective that held them in repression. It was only with the reemergence of learning in the period of the Renaissance that gave way to pursuits of the individual which resulted in conflict and political change. When social contract theory gave way to the Enlightenment and the French and American Revolutions, people began to identify

themselves as individuals who had rights worth protecting. These rights became the backbone of the human rights language that emerged after World War II. The gradual changes in philosophy facilitated the needs for political changes and that both make up continually progressing identities of societies. In this way, human rights have become a part of the fabric and identity of many societies and thus been woven into the international community.

It is important to recognize that only a percentage of states have actively acknowledged human rights. As has been stated earlier, the language of human rights has been derived from Western philosophic foundations. It was also discussed in the last section that there are differences in culture and morality which make cross cultural universality of human rights seem like an anomaly and its possibility to be very unlikely. Despite the inability to claim universality as a legitimizing factor, human rights have claims of legitimacy on the grounds of constructivism. As has been discussed, changes over time within societies have formed identities of those societies and that human rights have become a part of the identity of many societies. In Western societies, after World War II, human rights became a very real part of many states' identities. The human rights delineated in the Universal Declaration of Human Rights were familiar to the Western international community and rather easily became a legitimate source for rights to which humans were entitled. The language of human rights had been a developing part of Western identity for arguably close to two thousand years. The states that have developed their social identity with language of human rights are not necessarily distinctly Western, but have taken on a liberal form that has been redefining itself recently. "Some legal scholars now discuss a community of "liberal states" seen as a sphere of peace, democracy, and human rights and distinguish between relations among liberal states, and those between liberal and nonliberal states" (Risse, Ropp, & Sikkink, 1999, p. 8). These liberal states,

as they have taken on human rights within their own societies, have encouraged states in the international community to do the same. Adhering to human rights principals can be attributed to part of a state's identity and in this way, other states can recognize and determine how well and in what ways they will be able to interact. It is a defining aspect of a state. Further, this has a reverse effect on a state, where a state will be redefined by its interactions with other states because "human rights norms have constitutive effects because good human rights performance is one crucial signal to others to identify a member of the community of liberal states" (Risse, Ropp, & Sikkink, 1999, p. 8).

This community of liberal states, of course, does not include actors in the international arena and there are many states that are considered to be authoritarian. These authoritarian states do not share identities similar to those of the liberal states. But because the identities of states are in a relatively constant state of interaction, it happens that some identities become adopted by other states. Sometimes out of philosophic change within the community, but more often than not, these adoptions come out of some benefit that might occur as a result. There may be promises of foreign aid or military assistance if a state takes on the norms of another state. These material pressures do not necessarily mean that a state will change its social identity, but there are occurrences where the social identity does become redefined by the addition of the material benefit of norms adoption. "Even instrumental adoption of human rights norms, if it leads to domestic structural change such as redemocratization, sets into motion a process of identity transformation, so that norms initially adopted for instrumental reasons, are later maintained for reasons of belief and identity" (Risse, Ropp, & Sikkink, 1999, p. 10). For instance, in the Philippines under the rule of ex-President Ferdinand Marcos, the state was under martial law. But in 1981, he made changes to the government, suspending martial law and

implementing constitutional reform including democratic elections. These changes were made in advance of a visit from Pope John Paul, II to the Philippines. However, when the state elected a new President, the use of fair elections became part of the identity of the state. Similar changes have happened in Egypt, with the ousting of the long time president Hosni Mubbarrak. Much of the Arab Spring has lasting effects that exemplify the socializing of human rights. "While old leadership is not persuaded, the new leadership has internalized human rights norms and shows a desire to take its place in a community of human rights abiding states" (Risse, Ropp, & Sikkink, 1999, p. 10).

What can be seen to be occurring is a constructivist change where human rights gain legitimacy as a part of the identity of individual societies as well as within the international community. What this does for human rights is that it takes away the necessity for the claim that human rights are universal. In a response to Jack Donnelly's persistent argument for the universality of human rights, Michael Goodhart notes, "that if we understand the legitimacy of human rights as a function of their global appeal, their lack of universality need not appear so damaging." (Goodhart, 2008, p. 192). It may never come to pass that every state has human rights within its identity at a given time. The constant of constructivism is that societies are always in flux. The changes in norms, philosophy, customs, positive law and so on will continue to progress as states define and redefine themselves and in turn redefine the international system.

Chapter V. **CONCLUDING REMARKS**

Human rights culminated from an evolving complex and lengthy history. This thesis has shown that in positive law, the notion of human rights has existed for several thousand years. The standard of human rights became clear, however, within the last century when the Universal Declaration of Human Rights was adopted by the newly operational United Nations in 1948. This standard of human rights was the product of a long ranging philosophical history of natural law theories which permeated the culture and philosophy of Western states over the last two millennia. The philosophy behind human rights did not fully encompass philosophies from around the world which made an argument of universality highly questionable. Differences in norms, values and morals between cultures call into question whether or not human rights have legitimacy since the philosophy underlying the language of human rights demands that these rights belong to everyone, everywhere.

This thesis covered arguments of relativism and the probability of human rights having the capability of being a cross cultural norm, but after looking into norms and philosophies outside of the Western thought, it has become clear that human rights are not a cross cultural norm. If this is true, it might seem that the very core of human rights would be shaken as the claim for universality is a benchmark for their existence. One might be led to the conclusion that without the belief that human rights belong to all people, no matter their race, cultural affiliation, location or otherwise, that human rights could not exist. But this thesis argues that despite the ability to claim universality, human rights have an established legitimacy. Over time, human rights have been socially constructed as a result of historical changes in philosophy and political progress. They have become a part of the identity of many states and have dramatically influenced the international arena. It is my contention that human rights will

continue to carve out a path in the identities of states for a long time to come. Despite any drawbacks that may be conceived without a claim for universality, human rights will carry forward because they have become an important part of the world community. Perhaps in time, all societies of the world will identify with and have in their norms, values, and positive law the principals and standards of human rights.

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