

## ANTECEDENTS OF THE IDEA OF HUMAN RIGHTS: A SURVEY OF PERSPECTIVES [1](#)

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### Introduction

This paper surveys some of the antecedents of the modern idea of human rights. It begins with an analysis of the evolution of ideas of natural law and natural rights in Western ethical traditions and political thought. Some points of departure for responding to the relativist critique are then mapped out and the ideas of human rights thinkers and activists from around the world are examined in the context of different philosophies and religions. The paper concludes that in diverse countries and cultures, the presence of deep-rooted traditions of universalism, tolerance, freedom, concern for the poor and needy, interpersonal obligation and government responsibility provide foundations for the development of modern theories of human rights. Furthermore, the modern idea of human rights is itself changing and evolving in response to diverse influences. New conceptual frameworks are emerging for thinking about the cross-cultural foundations of human rights, and for thinking about human rights, poverty and development.

## 1. ANTECEDENTS OF THE IDEA OF HUMAN RIGHTS IN WESTERN POLITICAL THOUGHT

It is often suggested that the modern idea of human rights is based on, or has evolved from, the ideas of natural law and natural rights. The sub-sections that follow survey the historical evolution of these ideas in Western political thought, from their origins in Ancient Greece, to their development in the modern period.

### 1.1 Theories of natural law: Origins in Ancient Greece

Claims that certain actions or policies are contrary to, or are in violation of, human rights are often explained and justified with reference to the idea of natural law. For example, certain actions or policies may be asserted to be 'inhuman' or 'unnaturally cruel'. In international law and jurisprudence, the idea of 'crimes against humanity' is sometimes explained and justified not in terms of positive law, but in terms of appeals to the idea of a 'higher law' or 'natural law'. Broadly speaking, a natural law theory locates claims of these types in the context of a general theory of the good in human life, and of right and wrong in human choices and actions (Finnis, 1998, 685).

The historical origins of the idea of natural law are commonly traced back to Ancient Greece. Generally speaking, the roots of this idea are located in the works of Aristotle. However, as Buckle (1993) suggests, many theories of natural law are associated with the ideas of "universalism" and an "unchanging ethical order"; and to this extent, the roots of the idea of natural law can also be located in Plato's ethical theories.

#### Plato's "universalism" and the idea of an "unchanging ethical order"

Plato proposed that in the realm of ethics - as well as in the realm of mathematics and aesthetics - there exist abstract, eternal and universal truths that exist as elements of an "unchanging natural order". They exist independently of human observation and can be apprehended by processes of reasoning. In elaborating this theory, Plato suggested that the empirical facts of ethical diversity and disagreement in the world do not necessarily challenge the validity of universal truths, because diversity and disagreement do not preclude the conclusion of some views being right and others wrong<sup>2</sup>. These ideas have had an important and enduring influence on Western political thought. Over the centuries, advocates of universalism have defended the proposition that ethical values can have universal validity in the context of different historical epochs, different societies and different cultures. However, this proposition has been criticised by advocates of the various forms of relativism (epistemological, ethical, cultural etc), who have suggested that ethical values are particular, contingent and contextual, rather than universal and absolute. This debate - which characterises many of the modern controversies in the field of human rights today - was foreshadowed by philosophical debates in Ancient Greece. Plato's theories were challenged on the ground that they ignored the important role of culture in the formulation of ethical belief. As Wong suggests, traders and travellers were well-informed about the great variety of moral beliefs and cultural practices prevalent in the world. For example, an ancient text associated with the Sophists suggests that while, for the Lacedaemonians, it was fine for girls to exercise without tunics, and for children not to learn music and letters, for the Ionians, these things were "foul" (1993, 443). The Greek historian Herodotus also highlighted the importance of the role of culture in shaping ethical

belief in his account of the Persian Wars. Herodotus chronicled the story of Darius, King of Persia, who - in asking different ethnic groups about their rituals for the treatment of the dead - encountered fundamental differences in ethical and cultural practices. Herodotus invoked these differences as the basis of a fundamental challenge to the idea of universal values, noting that:

" ... (I)f one were to offer men to choose out of all the customs in the world such as seemed to them the best, they would examine the whole number, and end by preferring their own; so convinced are they that their own usages far surpass those of all others" ([c.400-500 B.C.] 1992, 236).

Plato attempted to refute the relativist challenge and to defend the idea of the objectivity of ethical values. He attributed to Protagoras the view that the beliefs of every person are true for that person - so that truth is simply what the community judges truth to be, rather than "external" or "objective" knowledge - and suggested that this view is self-defeating ([c.360BC] 1987, 66). Plato's question Can there be objective ethical values? relates to the modern question, Is there such a thing as a universal human right? and provided the context in which Aristotle developed his ethical theories.

### Aristotle and the "facts" of human nature

The philosophical roots of the idea of natural law are generally located in Aristotle's ethical theories. Whereas Plato's idea of "objective ethical standards" is associated with the idea of an "unchanging natural order", theories of natural law often imply that objective and prescriptively binding principles of right conduct (or right reason) can be derived from certain "facts" about human nature and existence. Aristotle laid the foundations for this approach. He suggested that it is possible to reject the Platonic search for universal values based on the idea of an "unchanging ethical order" and methods of abstract reasoning, without sliding into relativism and scepticism - by invoking human nature. In Aristotle's view, humans are distinguished by the capacity to reason and to exercise rational choices, and these general features of human nature can provide foundations for accounts of human flourishing or well-being (eudaimonia), human good and good political arrangements ([c.330 B.C.] 1998). In defending and elaborating this view, Aristotle proposed:

"It is evident that the best politeia is that arrangement (taxis) according to which anyone whatsoever (hostisoun) might do best (arista prattoi) and live a flourishing life (zoie makarios)" [Politics, 1324a23-5, as translated in Nussbaum (1988, 146)].

Although Aristotle has been criticised in the modern literature on political liberalism (e.g. in relation to the "over-specification of the theory of the good"), and in the modern literature on equality, democracy and rights (e.g. in relation to women and slavery<sup>3</sup>), his work can be interpreted as setting the stage for subsequent theories of individual rights based on appeals to human nature<sup>4</sup>. Aristotle's recognition of the importance of human flourishing has been highlighted in recent thinking about universalism, capabilities and human rights, with Sen emphasising Aristotle's "clear articulation of the importance of free exercise of capability" (1997,37), and Nussbaum explicitly building on an Aristotelian approach (see Box)<sup>5</sup>. More generally, Aristotle's broad impact on the historical development of the idea of natural law is widely acknowledged. In Ancient Greece, the Stoics developed Aristotle's emphasis on the exercise of rational capacities, and formulated what has been described as the "distinctive claim" of natural law theories - the claim that the natural law, the law of nature, is the law of human nature, and that this law is reason. It was in this form that the idea of natural law was transmitted to the Roman and Medieval Worlds (Buckle, 1993, 163-4).

### **Nussbaum on capabilities and human rights**

In elaborating a theory of capabilities and human rights, Nussbaum (1988, 1990, 1993, 1995a, 1995b, 1999abc) has explicitly built on an Aristotelian approach. Rejecting both the realist proposition that universal values can be identified through abstract processes of reasoning, and the relativist proposition that universal values are not possible because there is no "objective" methodology for evaluating rival ethical claims, she has defended and elaborated the idea that a universal conception of a human being is "both available to ethics and a valuable starting point" (1995a, 70). In Nussbaum's view, shared understandings of the constituent elements of humanness and a good human life may be available across societies and cultures. Empirical methods and anthropological research can help to identify a set of "central and basic" capabilities that "is not the mere projection of local preferences, but is fully international" - providing a basis for "cross-cultural attunement" (1995a, 74-81). In addition, Nussbaum has followed Aristotle in linking the possibility of a universal account of human functioning to a theory of political arrangements. She has argued that a human life that lacks basic and central capabilities may in some sense fall short of being a "good" human life. In Nussbaum's view, this gap between the potential capability for a good human life, and the full realization of such a life, gives rise to moral claims on governments - providing a basis for contemporary ideas about political obligation and human rights (1995a, 74-88).

"[W]e believe that certain basic and central human endowments have a claim to be assisted in developing, and exert that claim on others, and especially, as Aristotle saw, on government ... I think ... [this] is the underlying basis, in the Western philosophical tradition, for many notions of human rights. I suggest, then ... we begin from this notion, thinking of the basic capabilities of human beings as needs for functioning, which give rise to correlated political duties" (Nussbaum, 1995a, 88).

## **1.2 The development of theories of natural law and natural rights: The Roman, Medieval and Early Modern periods**

### The ideas of natural law and natural rights in the Roman World

The Roman lawyer Cicero is widely credited as transmitting the idea of natural law from Ancient Greece to the Roman world, and thereby to the Christian thinkers of the Medieval period. The following passage - regarded by many political theorists as the paradigmatic statement of the idea of natural law - reflects the ways in which the Ancient Greek ideas of natural law were expounded as a basis for political life in Roman times. The idea of natural law, with its emphasis on the "facts" of human nature, ultimately functioned to legitimise the idea of a single, universal and eternal body of law throughout the Roman Empire.

"True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions ... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people ... (and) there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this ... he will suffer the worst penalties, even if he escapes what is commonly considered punishment" ([c.52 BC] 1928, 211).

There are complex jurisprudential debates as to whether or not the modern idea of an individual subjective right - understood as a power or claim - was reflected in classical Roman law. These debates are surveyed in Tuck (1979, 7-13) and revolve around the interpretation of the terms *dominium* and *ius*, usually translated as property and right. The term *dominium* is often interpreted as implying not only proprietorship, but also mastery and control - and the issue at stake is whether the term *ius* (a derivative of the term *dominum*) can be understood not only in so-called "objective" terms - that is, as what is rightful - but also subjectively, as an individual power or claim. As Tuck explains, some authors (notably Villey) have criticised attempts to trace the modern idea of a subjective right back to classical Roman law. In contrast, Tuck suggests that the terms *dominium* and *ius* were subject to a process of historical development and re-interpretation during the Roman period, and that subjective interpretations of *ius* came to the fore. For example, the emergence of the idea of public rights like rights of way resulted in an interpretation of the term *ius* as "something which one possessed as a result of one's relationship with the state, the public or the Emperor" (1979, 11).

### The development of the ideas of natural law and natural rights in Medieval Europe

The idea of natural law was central to philosophical and theological debates during the Medieval period. It was invoked to justify and promote many different theories and agendas - from absolute rule, the divine right of kings and obedience, to early ideas about human rights. The theologian Thomas Aquinas (1226-74) is remembered for his humanising and liberalising influences on natural law thinking. Harmonising the Christian idea of original sin with the Aristotelian concept of human flourishing, Aquinas developed a new theological, moral and political theory that provides an account of the relationships between four types of law - eternal law, natural law, divine law, and human (positive) law - that has been widely adopted as a basis for Roman Catholic teaching. Aquinas argued that natural law is that part of eternal law revealed to rational beings in the form of reason, and has its basis in human nature.

"Whatever is contrary to the order of reason is contrary to the nature of human beings as such; and what is reasonable is in accordance with human nature as such. The good of the human being is being in accord with reason, and human evil is being outside the order of reasonableness... So human virtue, which makes good both the human person and his works, is in accordance with human nature just in so far as it is in accordance with reason; and vice is contrary to human nature just in so far as it is contrary to the order of reasonableness" (ST, I-II, q.71, a.2c; cited in Buckle, 1993, 165).

The development of the idea of natural rights in the jurisprudence and theology of the Medieval period is surveyed in Tuck (1979, 13-31). Important debates over the meaning of *dominium* and *ius* took place from the twelfth century onwards. These debates were often inextricably linked to the elaboration of canon law, and important theological debates - such as those between the Franciscan Monks and Pope John XXII - revolved around the meaning attributed to these rights-based concepts in the 1320s. Ockham's *Opus Nonaginta Dierum* was published in response to these debates, and is cited by some modern authors - notably Villey - as the first work in which a modern theory of subjective rights can be identified. However, in Tuck's view, Gerson's description of *ius* as "a dispositional *facultas* or power, appropriate to someone and in accordance with the dictates of right reason", may have been the crucial turning point. For the first time, the concept of a right was understood in terms of an ability (1979, 22 & 25-26). What is clear is that by the end of the Medieval period, important statements of the idea of *prima facie* rights had emerged from these

jurisprudential and theological debates. This is the idea that was carried forward in theories of natural rights in the seventeenth and eighteenth centuries. It suggested:

"That men, considered purely as isolated individuals, had a control over their lives which could correctly be described as dominium or property. It was not a phenomenon of social intercourse, still less of civil law: it was a basic fact about human beings, on which their social and political relationships had to be posited" (Tuck, 1979, 24).

### The Early Modern period

The ideas of natural law and natural rights continued to develop in the Early Modern period. As in previous periods, these ideas were invoked to promote and justify many different theories and agendas. Much of Reformation and Renaissance thought emphasised the sovereignty of individual conscience and humanism, and these ideas had a significant impact on thinking about natural law and natural rights. Yet as Vincent (1986, 23) notes, some of the thinkers of early Reformation, including Luther, invoked authorities such as St. Augustine and St Paul to enjoin the obedience of Christians to secular authorities, elaborating ideas that ultimately functioned to legitimise the absolute state.

In his work on international law, the Dutch philosopher Hugo Grotius focussed on the problem of how to develop a moral framework that can govern relations between modern nation states, suggesting that peaceful relations could be best maintained in an international system based on principles of natural law. These principles - with their basis in human nature and human rationality - could be accepted by all people everywhere, providing universal standards for evaluating the positive laws of all nation states, and for adjudicating international conflict. In elaborating this proposition, Grotius appealed to the ideas of secularism, suggesting that the principles of the law would have validity "even if we should concede ... that there is no God, or that the affairs of men are of no concern to Him" ([1624] 1925, 13), and characterised the idea of an individual right as a capacity or power.

" [Law can be characterised as] "a body of rights ... which has reference to the person. In this sense a right becomes a moral quality of a person, making it possible to have or to do something lawfully" ([1624] 1925, 35).

The English philosopher Thomas Hobbes placed the idea of natural rights at the centre of a far-reaching political theory. This theory suggested that individuals are endowed with natural rights that are independent of society - including the fundamental right to self-preservation. However, individuals in the state of nature cannot enforce their natural rights effectively. The state of nature is the natural condition of human existence that would obtain in the absence of government, in which people are equal and free. Therefore, in order to achieve the benefits of order and security, people voluntarily agree to submit to government. A social contract is arrived at whereby individuals transfer their natural rights to a sovereign power, and agree to submit to sovereign rule. This political theory is usually interpreted as justifying absolute and unlimited government. In contrast, Enlightenment thinkers elaborated theories that linked the ideas of natural rights, the state of nature and the social contract to far-reaching notions of limited government, popular sovereignty and accountability.

### 1.3 The influence of the Enlightenment

It is often suggested that the modern idea of human rights is a direct descendent of the idea of liberal theories of natural rights that evolved in Western political thought from the Enlightenment period onwards. For example, Jones suggests that many people would use the terms “natural right” and “human right” interchangeably. “The idea of a human right remains that of a right which is ‘natural’ in that it is conceived as a moral entitlement which human beings possess in their natural capacity as humans, and not in virtue of any special arrangement into which they have entered or any particular system of law under whose jurisdiction they fall” (1991,223).

The Enlightenment was an intellectual movement that swept across Britain, America and Europe in the seventeenth and eighteenth centuries. Enlightenment thinkers are remembered for their emphasis on the ideas of science, reason and individualism over custom, tradition and authority. They shared a common view that beliefs and practices ought to be subjected to criticism and to the tests of reason and science, and ought not to be accepted on the basis of attachment, habit, prejudice, superstition, custom, tradition, authority or power. This view gave rise to deeply-penetrating movements for change and reform that impacted on all areas of life, challenging traditional attachments, and transforming the outlooks of individuals, groups and societies. The view of rights as exclusive or limited privileges that rulers grant or bestow to individuals and groups was fundamentally challenged. In opposition to this view, Enlightenment thinkers elaborated theories that characterised rights in universal terms - as the birthright of all people, in virtue of their natural capacity as human beings. Theories of natural rights were increasingly invoked as a basis for protection against arbitrary state power, and to justify resistance to oppression. These theories became associated with new and revolutionary political ideas: with ideas of government responsibility, accountability and popular sovereignty; with the idea that all governments must derive their authority from the consent of the governed; and with the idea that government should be limited by fundamental rights to human life, liberty and well-being.

#### John Locke: Natural rights, the social contract and the principle of consent

**Natural rights.** Individuals are born free and equal and are endowed with natural rights in virtue of their common humanity.

**The social contract.** Individuals come together to form governments in order to secure their natural rights more effectively. A social contract is formed between the government and the people to secure individual rights more effectively. The purpose of government is to protect individual rights.

**The principle of consent.** Individuals do not give up their natural rights when they enter into the social contract. The legitimacy of government depends on the consent of the people.

The three pivotal concepts in Locke's political theory are natural rights, the social contract, and the principle of consent.

Locke introduced the idea of natural rights in relation to a "state of nature" - individuals are endowed with natural rights that are prior to, and independent of, the existence of a government. Previously, Hobbes had characterised the "state of nature" as a condition of "war of every man

against every man" - a social state in which "(t)he notions of Right and Wrong, Justice and Injustice have there no place", and in which life is "solitary, poor, nasty, brutish, and short" ([1651] 1968, 186-8). In contrast, Locke characterised the "state of nature" as a state of "perfect freedom", but not as a state of individual licence. Individuals are born free and equal and are endowed with natural rights to life, liberty and property. These natural rights are protected by "a law of nature ... which obliges everyone", and according to which "no one ought to harm another in his life, health, liberty or possessions". No one has the right to "take away or impair the life, or what tends to the preservation of the life, liberty, health, limb, or goods of another" and "every man hath a right to punish the offender and be executioner of the law of nature" (Locke, [1689/90] 1947, 123-125). However, the protection of individual rights is imperfect in the Lockean "state of nature". Certain advantages - including impartiality and more effective enforcement - could be achieved through government and legislation. Hence Locke proposed that individuals come together and form an organised society in order to protect and promote their rights more effectively. A "social contract" is arrived at whereby individuals "give up their rights to interpret and execute natural law", consenting to obey government and laws, in return for the better protection and promotion of their rights.

Significantly, Locke characterised the social contract as an outcome of free and voluntary individual action. Individuals form governments to achieve a specific purpose - the better protection of individual rights - and political power is based on the principle of consent. Previous philosophies had implied that individuals couldn't withdraw consent from a government without society itself being undermined. For example, Hobbes argued that although individuals retain certain rights under the terms of a social contract, social order depends on strong central government, and the natural right to liberty is transferred to the sovereign power. The implication of Hobbes' argument was that individuals do not have the right to withdraw their consent from a government. In contrast, Locke distinguished between the dissolution of society and the dissolution of government. Individual rights are prior to social obligation, and set the limits of civil obedience. In direct opposition to contemporary ideas of divine right of kings, hereditary and privilege, Locke argued that the power of governments is limited, not absolute. Individuals form a government for a specific purpose - the better protection of individual rights - and the legitimacy of government is contingent on its respect for individual rights. Individuals have the right to withdraw their consent and to dissolve a government that fails to honour the terms of the social contract. Individuals have a right to resist absolute and arbitrary power. If a government violates individual natural rights or exceeds the limits of its legitimate authority, resistance and rebellion are justified.

"The reason why men enter into society is the preservation of their property; and the end why they choose and authorise a legislative is that there may be laws made and rules set as guards and fences to the properties of all the members of the society, to limit the power and moderate the dominion of every part and member of the society;" (II.222)

"Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent" (II.95).

"Whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power...the people ... are thereupon absolved from any further obedience" (II.222).



"Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people who have a right to resume their original liberty, and by the establishment of a new legislative, such as they shall think fit, provide for their own safety and security, which is the end for which they are in society" (II.222).

(Locke, [1689-90] 1947)

Locke also provided qualified support for the principles of liberty of conscience and religious tolerance. In *An Essay Concerning Toleration*, Locke argued that individuals have "absolute and universal right to toleration" in matters of religious worship ([1667] 1993a, 187). In *A Letter Concerning Toleration* ([1685] 1993b), Locke linked the idea of religious tolerance to that of social contract. Given the proposition that the function of government is to protect and promote individual rights, Locke further proposed that - with certain notable exceptions - matters of individual conscience, faith and religion be regarded as beyond the legitimate jurisdiction of the state.

"No peace and security, no, not so much as common friendship, can ever be established or preserved amongst men, so long as this opinion prevails, that dominion is founded in grace, and that religion is to be propagated by force of arms".

"(N)o private person has any right, in any manner, to prejudice another person in his civil enjoyments because he is of another Church or religion".

"I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other".

"These things being thus explained, it is easy to understand to what end the legislative power ought to be directed, and by what measures regulated; and that is the temporal good and outward prosperity of the society; which is the sole reason of men's entering into society, and the only thing they seek and aim at in it. And it is also evident what liberty remains to men in reference to their eternal salvation, and that is, that everyone should do what he in his conscience is persuaded to be acceptable to the Almighty ...".

(Locke, [1685] 1993b, 403, 400, 393, 423).

Locke's characterisation of the "social contract" - together with the idea that individuals have natural rights that are prior to and independent of society - has been widely criticised in the modern literature. Taylor (1985a) has argued that defenders of the "doctrine of the primacy of rights" are forced to defend an "atomist" thesis, whereby human nature and the human condition are conceptualised in individualistic and self-sufficient terms.

"The term "atomism" is used loosely to characterise the doctrines of social contract theory which arose in the seventeenth century and also successor doctrines which may not have made use of the notion of social contract but which inherited a vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual" (1985a, 187).

In Taylor's view, "atomism" is easily undermined if it can be demonstrated that individuals cannot physically survive in isolation, and that characteristically human capacities can only be developed in the context of human society. For example, the development of human capacities may require identity and self-understanding and it is possible that these can only be acquired and sustained with others - through modes of common expression, understanding and recognition. Hence Taylor rejects the "atomist" thesis in favour of a "social" thesis, whereby living in a society is conceptualised as a necessary condition of the development of characteristically human capacities (1985a, 208-209). Furthermore, Taylor argues that the assertion of any rights-based claim entails an explicit or implicit claim relating to the value of human capacities. The implication is that rights-based ethical theories cannot be independent of underlying theories of the human good or goods. "[A right] has an essential conceptual background, in some notion of the moral worth of certain properties or capacities, without which it would not make sense" (1985a, 195). "To believe that there is a right to independent moral convictions must be to believe that the exercise of the relevant capacity is a human good" (1985a, 198).

Locke's work is often associated in the modern literature with a negative characterisation of freedom, and with the idea of an unlimited right to appropriation<sup>6</sup>. Yet other interpretations are possible. Some authors argue that Locke's theories reflect the idea of positive freedom as well as that of negative freedom - and the idea of economic and social rights as well as that of political and civil rights - providing solid foundations for modern theories of human rights<sup>7</sup>. For example, Locke characterises liberty as more than mere "license" and suggests that the purpose of law is not merely to "abolish" or "restrain" but "to preserve and enlarge freedom" ([1689/90]1947, II.57). In addition, Locke's characterisation of natural law is relatively broad - "no one ought to harm another in his life, health, liberty or possessions". Furthermore, although the idea of natural rights to individual possession and accumulation clearly play a central role within Locke's political theory, it is important to realise that Locke refers to a range of natural rights in the language of property. Indeed, Locke's analysis is consistent with, and supportive of, the idea that individuals have a property right in their own person or self, and relates to modern ideas of the notions of the inviolability of all human beings and self-ownership<sup>8</sup>. Finally, in emphasising the ideas of self-preservation and the means to preservation, Locke seems to come close to justifying a natural right to subsistence.

"(R)eason ... teaches ... that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions" (II.6).

"By property I must be understood here, as in other places, to mean that property which men have in their persons as well as goods" (II.173).

"...(H)is property - that is, his life, liberty, and estate" (II.87).

"(H)e seeks out and is willing to join in society with others who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name 'property'" (II.123).

"Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself" (II.27).

"Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as nature affords for

their subsistence; or revelation ...; it is very clear that God ... (has given) to mankind in common" (II.25).

"(God) has given his needy brother a right to the surplusage of his goods, so that it cannot justly be denied him when his pressing wants call for it; and, therefore, no man could ever have a just power over the life of another by right of property in land or possessions, since it would always be a sin in any man of estate to let his brother perish for want of affording him relief out of his plenty. As justice gives every man a title to the product of his honest industry and the fair acquisitions of his ancestors descended to him, so charity gives every man a title to so much out of another's plenty as will keep him from extreme want where he has no means to subsist otherwise. And a man can no more justly make use of another's necessity to force him to become his vassal by withholding that relief God requires him to afford to the wants of his brother, than he that has more strength can seize upon a weaker, master him to his obedience, and .... offer him death or slavery" (I.42). Source: (Locke [1689/90] 1947).

Clearly, Locke was not a human rights advocate in the modern sense. Locke seems to have characterised right-bearers as male property holders, and excluded Catholics, religious groups with "foreign" political allegiances and atheists from the domain of tolerance. Moreover, Locke is widely cited as a beneficiary of the slave trade. Nevertheless, many of his arguments had a profound impact on claims for fundamental freedoms and rights, and on theories of religious tolerance, as they developed in England and America, and remain highly influential today.

### Paine and the Rights of Man

Thomas Paine was an influential proponent of ideas of natural rights, freedom and national independence. Paine's *Common Sense* ([1776] 1967) and *The Rights of Man* ([1791/2] 1969) had an important and enduring influence by providing a theoretical justification for American Independence and the French Revolution. His political influence was based on his advocacy of three central principles.

#### **Tom Paine on universal principles and the Rights of Man**

- Individuals are born and continue to be free and equal in respect of their rights.
- The end of all political associations is the natural and imprescriptible rights of man. These natural rights are liberty, property, security, and resistance of oppression.
- Sovereignty is not vested in any privileged group or individual but is vested in the nation. No individual or organisation is entitled to any authority that is not expressly derived from the nation.

(Paine, [1791/2] 1969, 166)

Paine elaborated theoretical foundations for these principles based on the idea of a "social contract" between a government and people. Individuals are born with natural rights that are independent of and prior to government, and are derived from common humanity. However, individuals do not have the power to perfectly execute and secure all of their natural rights, and they come together voluntarily to form political associations with the aim of securing their natural rights more effectively. In addition, Paine argued - with Locke and against Hobbes - that in forming

a political association and consenting to government, individuals do not renounce or give up their natural rights. These natural rights are imprescriptible and are vested in the "common stock" of society on the basis of trust. In Paine's view, "Man did not enter into society to become worse than he was before, nor to have fewer rights than he had before, but to have those rights better secured". Therefore, sovereignty resides not in the political organisation, but in the nation. Government should be based on consent, and individuals retain the "right to resist" when the terms of the social contract are broken.

Paine was a pamphleteer and polemicist and applied the theory of natural rights to far-reaching arguments on the crucial issues of the day. These included arguments against hereditary and monarchical systems of government, foreign domination, taxation without representation, and slavery; and arguments for popular sovereignty, constitutional and representative government, the principle of consent and the right to resist, universal male suffrage, national independence, tolerance and religious freedom. In addition, Paine highlighted the relationship between "the rights of man" and poverty, and advanced arguments for economic and social rights. In Paine's view, a lack of respect for individual rights and the absence of representative government can result in adverse policies that disproportionately affect the poor - such as unfair taxes on essential consumption goods and rules that artificially depress wages. In contrast, securing the rights of man and representative government can provide a basis for the redistribution of the burden of taxation, and pro-poor policies such as poor relief, state education for poor children, and old age pensions<sup>9</sup>.

### The German Enlightenment: Kant's argument for universal moral principles

The contemporary idea of human rights reflects a hope and commitment to the idea that it is possible to identify universal moral principles relating to the treatment of all people. Some human rights thinkers believe that principles of this type are based on religion and conscience. Others argue that these universal moral principles are not only what conscience might demand, and what religions might teach, but that these principles can be deduced from the application of human reason. The German philosopher Immanuel Kant was committed to this idea. Inspired by the Enlightenment ideas of reason and science, Kant attempted to formulate a foundational principle of morality - a first principle (or "law") of ethics from which all other valid ethical principles can be derived - on the basis of human reason alone.

#### **Key elements of Kant's argument**

**Freedom and autonomy.** Individuals are free in the sense that they are not forced to act in accordance with their personal desires, happiness or self-interest. They can act autonomously, in accordance with principles of reason. They can choose to act in accordance with universal moral principles.

**Universal moral principles.** These can be identified on the basis of reason alone. Individuals can undertake a thought experiment, abstracting from their own personal desires and interests, and identifying those maxims that would be freely adopted by all individuals in the same position. Maxims of this type can be said to satisfy the condition of universalism.

**Consistency and impartiality.** Maxims that satisfy the condition of universalism are consistent in

form. They apply to all individuals on an equal basis without exception. They exclude the possibility of privilege and bias, and establish an impartial perspective for moral affairs.

**Unconditional moral obligations.** Maxims that satisfy the condition of universalism embody the categorical ought. They are not matters of individual preference, but are "necessitated" and "commanded" by the principles of reason. They give rise to unconditional moral obligations that all individuals ought to obey.

**The categorical imperative.** The "supreme" moral obligation is the categorical imperative: "I ought never to act except in such a way that I can also will that my maxim should become a universal law". This first formulation implies universalism, consistency and impartiality.

**Respect for the dignity of all human persons.** A second formulation of the categorical imperative states: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end". This second formulation implies that no individual ought to be treated arbitrarily, as a means to an end. Individuals are intrinsically valuable, and the dignity and worth of all human persons ought to be respected.

**Internationalism.** Universal moral principles are not limited by geographic location or national boundaries. There is a need for international political institutions that are not driven by national interests and that reflect the universal nature of the human condition. The ideal of a "league of nations" would help to create the conditions for "perpetual peace".

Sources: Kant ([1785] 1991, 67, 91) and ([1795] 1983).

The influence of Kant's ethics on subsequent theories of rights and human rights has proved enduring. The question of whether or not it is possible to arrive at an objective perspective has been a constant subject in the history of Western thought since Plato and Aristotle. As O'Neill (1993) points out, Kant introduced a new dimension to this debate, by rejecting the realist and theological framework within which theories of natural law and accounts of the virtues had previously been developed, and by not relying on subjective conceptions of the good, desires, preferences etc. In addressing the question *What should I do?* Kant proposed that it is possible to construct an impartial moral perspective in ethics by abstracting from everything but the fact of a person's rational agency. Despite many criticisms in the modern literature (relativist, subjectivist, communitarian etc), this proposition is central to many debates in modern political theory, and continues to inform and inspire influential contemporary thinkers such as Rawls (1973) and Barry (1995). More generally, Kant's proposition that individuals ought never to be treated as means to an end is at the heart of many modern rights-based ethical theories. As Scruton (1982, 72) notes, this idea "imposes a universal duty to respect the rights and interests of others, and a rational requirement to abstract from personal involvement towards the viewpoint of the impartial judge".

Although Nozick (1974) interprets the principle of respect in terms of negative obligations or side-constraints, the principle of respect can be interpreted as giving rise to positive obligations to assist, as well as negative obligations of constraint. Authority for this interpretation include the following passages:

"Now humanity could no doubt subsist if everybody contributed nothing to the happiness of others but at the same time refrained from deliberately impairing their happiness. This is, however,

merely to agree negatively and not positively with humanity as an end in itself unless everyone endeavours also, so far as in him lies, to further the ends of others. For the ends of a subject who is an end in himself must, if this conception is to have its full effect in me, be also, as far as possible, my ends" (Kant, 1991, 92).

"[Consider the case of a man who] is himself flourishing, but he sees others who have to struggle with great hardships (and whom he could easily help); and he thinks 'What does it matter to me? ... [A]lthough it is possible that a universal law of nature could subsist in harmony with this maxim, yet it is impossible to will that such a principle should hold ..." (Kant, 1991, 86).

Plant (1991, 207-209) notes that authors have cited these passages as authority for the idea of universal obligations to fulfil basic human needs, and suggests that this interpretation probably goes beyond the text. Furthermore, these passages should be interpreted in the context of Kant's distinction between perfect and imperfect obligations. Nevertheless, there is clear authority for the positive as well as the negative interpretation of the principle of respect for persons in Kant's writings, and this principle - as well as the related idea that individuals are of intrinsic value and worth - are at the heart of contemporary theories of the inviolability of human rights. Indeed, Kant's theories are often cited as the reason for the inclusion of the term "dignity" in the Preamble to the Universal Declaration.

### The French Enlightenment: Natural law and natural rights

The ideas of natural law, natural rights and universalism were further developed in eighteenth century France and provided the intellectual background to - and many of the theoretical justifications for - the French Revolution. Writers of the French Enlightenment often invoked these ideas as a basis for challenging positive laws that were widely regarded as unjust. For example, Diderot was the editor of the infamous Encyclopedia - a body of work that introduced new ideas about reason and science, and challenged many of the orthodox views about the nature and origins of power and authority - and which was published despite many attempts at control and censure. Diderot's (1755) Encyclopedia entry on the subject of natural law was written in direct opposition to ideas of divine right, hierarchy and privilege. It suggested that a person has no "true, inalienable natural rights" apart from "those of humanity", and that the ideas of natural law and natural rights are characterised by a fundamental equality, implying that "the laws should be made for everyone, and not for one person" [cited in Hunt (1996, 37)]. Similarly, Voltaire's Treatise on Toleration (1763) defended the individual right to practice religion without fear of persecution. According to Voltaire, principles of universalism can be identified in many different religions and cultures from around the world and a "great principle" of natural law- that guards against intolerance and guarantees freedom of conscience - should be reflected in human law.

"All over the earth the great principle ... is: Do not unto others what you would that they do not unto you ... (I)n virtue of this principle, one man cannot say to another ... 'Believe, or I detest thee; believe, or I will do thee all the harm I can'" [cited in Hunt (1996, 39-40)].

Rousseau's The Social Contract [1762 (1993)] provided the theoretical basis for many of the ideas of the French Enlightenment. Like Locke, Rousseau rejected Hobbes' characterisation of the idea of social contract, challenging the view that human liberty and natural rights are alienable, and rejecting the proposition that individuals have a duty of passive obedience to the government that they agree to set up. However, although Locke developed a theoretical justification for rebellion if a government violated the terms of the social contract, he did not provide for any machinery, short of

revolution, for the expression of popular opinion and for establishing popular consent. In contrast, the institution of a citizens assembly is central to Rousseau's scheme, and Rousseau's characterisation of the social contract provides for the expression of opinion and consent by the people through the exercise of democratic rights (Cole, 1993, 357). Yet a citizens assembly is, for Rousseau, far more than a vehicle for majority rule. In Rousseau's view, when individuals freely come together to participate in a citizens assembly, they can transcend their individual private interests, and legislate according to purely rational principles that reflect common and general interests. Legislation of this type, he suggests, takes the form of general (universal) rules that bind all individuals equally without exception and reflects the "general will" - where the term "general" refers not simply to a "will held by several persons", but to a "will having a general (universal) object" (Cole, 1993, 380). Furthermore, Rousseau contends that a social arrangement of this type is compatible with individual freedom. The people share sovereign authority collectively, and this authority is inalienable and indivisible [1762 (1993, 192, 199-207)].

Rousseau's ideas have been variously interpreted in modern political theory. Some authors have suggested that Rousseau's political theory is inconsistent and that his theory of individual rights is defective. They have linked the idea of the "general will" to that of "totalitarian democracy" and to cruel violations of human rights that occurred during the French Revolution. Rousseau has also been widely criticised for defending the exclusion of women from political life (Ryan, 1993, xiv-v&xxii). Others, however, have championed Rousseau as an advocate of individual liberty, characterising his proclamation that "Man is born free, and everywhere he is in chains" [1762 (1993, 181)] as an influential challenge to arbitrary, despotic and absolute government, and as a key landmark in the political and intellectual development of the idea of human rights.

#### 1.4 Declarations and assertions of rights and liberties in the political movements and revolutions of the seventeenth, eighteenth and nineteenth centuries

##### **Nelson Mandela on the historical origins of the idea of human rights**

"Between 1912 and the mid-1940s, the period during which I entered national politics, the world experienced two devastating world wars. As a direct consequence, the political value system with which the ANC identified changed and was greatly expanded. Few will dispute that the political culture of human rights, which underwent its severest test during the course of this century, was greatly enriched by the war against fascism. Equally important was the contribution made by the colonial peoples after 1945, in their struggle for independence. This culture of human rights is rooted in and inextricably linked to the political revolutions of the late eighteenth century and those that took place during the mid-nineteenth century. It was adopted by humanity as its common heritage in the Universal Declaration of Human Rights after the Second World War". [Mandela (1991, 75-78)].

##### Declarations and assertions of rights in the English tradition

Declarations and assertions of liberties and rights in England from the Medieval period onwards reflected the idea that the power of the sovereign ought to be limited by "ancient liberties and rights". These declarations and assertions were often based on appeals to the traditions of common law liberties and the rule of law, and challenged deeply-rooted ideas of the divine right of

kings and of unlimited sovereignty. The Magna Carta (1215) was conceded by King John, and is widely interpreted as embodying the central principles of due process. Declarations of liberties and rights were also highly influential in the debates and power struggles between Parliament and the Crown in the seventeenth century. These included The Petition of Right (1628), The Habeas Corpus Amendment Act (1679), and The English Bill of Rights (1689). Although these constitutional and legal innovations are a far-cry from the modern idea of human rights, they were nevertheless influential early models. They had a profound influence on ideas of liberty, rights, freedom, national independence, responsibility, sovereignty and accountability as they developed in Europe and the Americas in the late-eighteenth and mid-nineteenth centuries.

### **The English tradition of common law liberties and the rule of law**

. **The Magna Carta (1215).** This document was acceded to by King John after rebellion by barons in response to feudal grievances, condemning arbitrary judgements and abuses of power, guaranteeing the liberty of the church, and listing the “liberties, rights and concessions” of freemen that ought not to be violated. The symbolic significance of this document is embodied in the principle that “no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished ... unless by the lawful judgement of his peers and by the law of the land”. This clause is widely interpreted as embodying the central principles of the idea of due process.

. **The Petition of Right (1628).** This document “Concerning divers rights and liberties of the subjects” reflected the idea that a sovereign could be justifiably overthrown for transgressions, responds to particular grievances, and asserts the importance of certain principles, including that of parliamentary consent, and that there should be no imprisonment or detention without cause. Although the Petition was acceded to by King Charles I, the period of personal rule that ensued culminated in the outbreak of Civil War.

. **The Habeas Corpus Amendment Act (1679).** The writ of Habeas Corpus protected the rights and liberty of individuals by ensuring that the law courts could order individuals who had been imprisoned or detained to come before them in person, so that their case could be examined. However, a number of methods had been introduced to deprive political prisoners of the benefits of this writ. Following the restoration of Charles II (1660), The Habeas Corpus Amendment Act declared these methods illegal.

. **The English Bill of Rights (1689)** began with a complaint against violations of rights by King James II for going beyond his powers, and for violating ancient “liberties” and “rights” that ought never to be transgressed by the sovereign, including those of freedom of speech and parliamentary consent. The Bill of Rights reflected the ancient idea of liberties and rights, rather than the modern idea of universal human rights. Nevertheless, the Bill of Rights was central to the Constitutional Settlement associated with the Glorious Revolution (1688), the exile of James II, and the inauguration of William and Mary, and represents a crucial landmark in the political transformation of England from an unlimited to a constitutional monarchy. It vindicated the liberties and rights of the people, the principle of parliamentary control and the limitations of the power of the sovereign.

. **The Toleration Act (1689).** This Act achieved limited religious tolerance for Protestant dissenters.

### Declarations of rights in the political revolutions of the late-eighteenth and mid-nineteenth centuries

Whereas the English declarations of liberties and rights were based on appeals to common law liberties and the rule of law, the declarations of rights associated with American Independence and



the French Revolution in the late eighteenth century assumed a more universal form. These declarations of rights appealed not to the legal traditions and customs of a particular country, but to the ideas of a universal law and natural rights. It is true that human rights were often violently and cruelly violated during this period of history, and that the declarations of rights of this period fell far short of the standards embodied in the Universal Declaration of Human Rights and modern international law. Important groups - including native Americans, slaves, women - were excluded from the benefits of the "natural rights of man". Yet the American Declaration of Independence and Bill of Rights, and the French Declaration of the Rights of Man and Citizen provided a new basis for the demands of excluded groups. The principles of universalism reflected in these early models inspired individuals, transformed societies and shaped subsequent ideas of human rights.

### **The American Declaration of Independence (1776) and Bill of Rights (1789)**

**The American Declaration of Independence (1776)** was born of the experience of colonial misrule. The main architect of the Declaration, Thomas Jefferson, was inspired by John Locke's theoretical justification of rebellion in terms of "natural rights". The Declaration details the ways in which the abuse of power by King George III transgressed these principles and states:

"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. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organising its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness" (Declaration of Independence, 1776).

This declaration of inalienable rights of individuals provided the philosophical foundations for the individual rights recognised in the **US Constitution** (1789) and the **Bill of Rights**. The latter (comprising the first ten amendments to the Constitution) affirms freedom of religion, of speech, of the press, of peaceful assembly and of petition; the right of people to security in their homes and to be free from "unreasonable searches and seizure"; the right to property; the rights to trial by jury, to due process, and to a speedy and impartial trial; and rights against self-incrimination and double jeopardy. Nevertheless, the standards set by the US Constitution and the Bill of Rights fell far short of modern international human rights standards, particularly in the following areas:

. **The exclusion of slaves.** There were many demands for the abolition of slavery at the time of the passage of the US Constitution and the Bill of Rights. For example, in 1775, Thomas Paine wrote:

"Is the barbarous enslaving of our inoffensive neighbours ... reconcilable with ... Divine precepts? Is this doing to them as we would desire they should do to us? ... As these people are not convicted of forfeiting freedom, they have still a natural, perfect right to it; and the governments, whenever they come, should, in justice set them free, and punish those who hold them in slavery. ... These are the sentiments of JUSTICE AND HUMANITY" [cited in Ishay (1997, 131-2)]. Nevertheless, slavery was not formally abolished until 1865, by the XIIIth Amendment.

. **Racial discrimination.** Universal male suffrage was not achieved until 1870, when the XVth Amendment stated that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of

servitude.

. **The exclusion of women.** The vote was not extended to all women until the adoption of the XIXth Amendment in 1920. Women did not react passively to their exclusion. For example, in 1873, Susan B. Anthony, a strong advocate of women's suffrage, argued that the "blessings of liberty" being withheld from women violated the principles of universality recognised in the US Constitution.

"The preamble of the Federal Constitution says: 'We, the people of the United States ...'. It was we, the people; not we, the white male citizens; ... The only question left to be settled now is: Are women persons? And I hardly believe any of our opponents will ... say they are not. Being persons, then, women are citizens; and no state has a right to make any law, or to enforce any old law, that shall abridge their privileges or immunities. Hence, every discrimination against women in the constitutions and laws of the several states is today null and void, precisely as is every one against Negroes" [cited in Collins (1998, 340)].

In France, the ideals and principles of the Revolution were marred by the violation of human rights during the subsequent "Terror". Nevertheless, the break with traditional ideas of the absolute rule of kings and divine right, and of privilege, rank and hierarchy, inaugurated a new period in human history. The French Declaration of the Rights of Man and Citizen (1789) recognised fundamental individual rights and freedoms, and declared these to be the basis of government. The Declaration unleashed an unprecedented debate about the nature and scope of human rights. New ideas and movements relating to the rights of free black people, the abolition of slavery, economic and social rights, the position of women, national independence and the idea of self-determination, were born and established in this period.

### **The French Declaration of the Rights of Man and Citizen (1789)**

The French Revolution began with a complaint about the exercise of arbitrary powers and violations of rights by Louis XVI. In opposition to ideas of divine right, monarchy and hierarchy, the French Declaration of the Rights of Man and Citizen asserted the "natural, inalienable, and sacred rights of man" that ought to be respected by government. Article 2 states:

"The aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression" [cited in Ishay (1997, 138)].

The Declaration proceeds to affirm a range of individual rights including freedom of speech, opinion, publication; the right to property; the rule of law and the right to the assumption of innocence; and the principle that taxation should be on the basis of representation and consent. The French Revolution is also remembered for unleashing a period of unprecedented debates about the nature and scope of human rights.

. **Demands for tolerance and rights for Calvinists and Jews.** The Edict of Toleration (1787) extended certain civil rights - including the right to religious freedom - to Calvinists. Citizenship rights were extended to all Jews in 1791.

. **Demands for the abolition of slavery.** The French Revolution intensified anti-slavery opinion in

France. Demands for the abolition of slavery and the slave trade were often founded on theories of natural law and natural rights. The National Assembly declared the abolition of slavery in all the French Colonies in 1794.

. **Demands for economic and social rights.** Demands for human rights articulated in the French Revolution included demands for economic and social rights.

“Public assistance is a sacred obligation. Society owes subsistence to unfortunate citizens, whether in finding work for them, or in assuring the means of survival of those incapable of working”. Article XXI of the revised Declaration of June 1793 [cited in Davies (1997,714)].

. **Demands for the equal rights of women.** The revolutionary period witnessed many demands for the rights of women, and in 1790, Olympe de Gouge issued The Declaration of the Rights of Women. The Preamble states:

“Mothers, daughters, sisters [and] representatives of the nation demand to be constituted into a national assembly. Believing that ignorance, omission, or scorn for the rights of woman are the only cause of public misfortunes and of the corruption of governments, [the women] have resolved to set forth in a solemn declaration the natural inalienable, and sacred rights of woman in order that this declaration constantly exposed before all the members of society, will ceaselessly remind them of their rights and duties ...” [cited in Ishay (1997, 141-2)].

Like many other revolutionaries, however, Olympe de Gouge was executed. Women’s Clubs were suppressed, and claims for women’s equality were rejected during the period of turmoil and terror following the French Revolution. The influence of demands for women’s rights during the period of the French Revolution were reflected in Mary Wollstonecraft’s The Rights of Woman ([1792] 1992).

### International movements for freedom and national independence

The French Revolution marked the political transformation of Europe, and inspired and precipitated movements for freedom and independence around the world. In the French colony of Saint Dominique, Vincent Ogé, a mulatto slave-owner, demanded political and civil rights for mulattos, and that mulatto members be represented in the National Assembly in Paris.

"This Freedom, the greatest, the first of goods, is it made for all men? I believe so. Should it be given to all men? I believe so again" (Statement by Vincent Ogé to the Assembly of Colonists, 1789: Hunt, 1996, 103-4).

When his demands were not met, Ogé led an insurrection in Saint Dominique, and he was ultimately executed for leading a mulatto rebellion. Nevertheless, a slave revolt in 1791 resulted in the rise of a black leader, Toussaint l'Ouverture, who virtually achieved independence from colonial rule. The independent republic of Haiti was created in 1804, and l'Ouverture is widely cited as heading the only successful slave revolution in history.

Many of the mid-nineteenth century movements for national independence were inspired by the slogan of "liberty, equality and fraternity". The Enlightenment ideas of universalism, freedom and natural rights helped to generate new ideas of national liberation, self-government and self-determination, providing the theoretical justification for challenges to monarchic, foreign and colonial rule. In 1848 a wave of movements for freedom and national independence across Europe culminated in nationalist revolts in many different countries - including Ireland, Italy, Belgium,

Greece, Poland, Hungary and Norway. The impact of the French Revolution was also felt in Latin America. Hostility to colonial rule and hope of independence inspired by the French Revolution was reflected in the escalating movements for national independence and self-determination. Simón Bolívar - known as "The Liberator" for his role in the independence struggles in Venezuela, Colombia, Ecuador, Peru and Bolivia - was a passionate advocate for the freedom of slaves, and is remembered for linking the ideas of nationalism and freedom to those of economic independence and human rights. For Bolívar, both the exclusion of Americans from positions of office and participation, and the domination of the economy by colonial power, were human rights issues.

"I plead with you to confirm the complete freedom of the slaves as I would plead for my life, or for the life of the Republic" [Simón Bolívar, 1819; cited in UNESCO (1969, 167)].

"Our condition was so negative that I find no parallel in any other civilised group, however much I review the ages and politics of all nations. To claim that a country so fortunately constituted, large, rich and populous, should be purely passive, is that not an infringement, a violation of human rights?" [Simón Bolívar, 1815; cited in UNESCO (1969, 488)].

These important movements for freedom, national independence and human rights influenced the Indian struggle for national independence and the wave of de-colonisation and national independence after World War Two. The right to self-determination was recognised in the Covenant of the League of Nations (1919), the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948), and key international human rights treaties. Ideas about the links between human rights issues and issues of economic independence have subsequently influenced the development of the concept of an "international economic order" in which rights can be achieved, and the concept of the "human right to development".

## 2. RESPONDING TO THE RELATIVIST CRITIQUE: SOME POINTS OF DEPARTURE

### 2.1 The nature and scope of the relativist critique

The relativist critique central to contemporary thinking about human rights. As indicated in Section 1.1, an ethical debate between advocates of universalism and advocates of relativism has ensued for more than 2000 years. This debate is a vast and complex terrain in which the contours of disagreement and debate often prove to be the slip-roads of theoretical debates in other disciplines, including psychology, anthropology, sociology and political theory. In general, universalists defend the possibility of objective ethical knowledge, proposing that it is possible to discover, to deduce or to construct objective ethical standards, and that such standards have universal implications in virtue of their impartiality and neutrality. Relativists disagree, denying that it is possible to arrive at objective ethical standards, and proposing that, as a consequence, ethical standards are particular and contingent, rather than universal and absolute. The ensuing debate addresses the role of reason and abstraction on the one hand, and of the empirical observation of existing norms and practices on the other, in the formulation of ethical standards. Whereas universalists emphasize the role of abstract ethical categories such as human rights in the determination of ethical belief, relativists adopt an empirical approach, highlighting the significance of causal variables such as psychological desires, preferences and emotions; historical, social and

cultural context; and group interests, power and ideology. For example, one influential critique of universalism suggests that ethical statements are not reasoned judgements made on the basis of rational choices, but are subjective statements reflecting individual preferences, hopes and emotions. This critique is associated with a range of ideas and political agendas - including those of subjectivism, emotivism, logical positivism, value pluralism and political liberalism. Another critique suggests that claims of universality and objectivity conceal underlying ideologies and power relations. Again, this critique is associated with a range of ideas and political agendas - including those of Marxism, existentialism and postmodernism. Yet another critique emphasises that there is no way of ranking social meanings or human needs, and that ethical values and practices can only be understood in terms of the ways of life of particular groups. This critique is associated with communitarian philosophy<sup>10</sup>.

Modern anthropology has informed and contributed to the universalism-relativism debate by highlighting the diversity of ethical categories - and of the interpretation, significance and functions of diverse ethical categories - in different cultures, societies and historical periods. In the field of human rights, the absence and presence of the ethical categories "rights" and "obligations" - as well as the interpretation, significance and functions of these ethical categories - has been widely analysed. It is often suggested that the modern concept of human rights - with its emphasis on the individual as a basic unit of society - is absent from traditional societies. For example, Wilson (1997, 6) suggests that the conception of an individual "human being" may be incomprehensible in some cultural contexts, and points out that American-Indian languages such as Navajo and Hopi construct the concept of "humanness" as belonging solely to those within the boundaries of the community. Outsiders are perceived to be non-human to a certain degree, particularly in origin myths. Pollis (1996) suggests that while different traditional belief systems are associated with diverse forms of group identity - for instance, identity with kin, the clan or the tribe - in all traditional societies, the human person is defined by group, rather than individual, identity. Cobbah (1987, 321-322) proposes that the basic unit of traditional African society is the extended family rather than the individual, and that traditional African philosophy characterises the category of an individual human person in the context of his or her community and culture. In Cobbah's view, the concept of rights and obligations in traditional African societies should be conceptualised not in terms of individual autonomy, but as organising principles regulating kinship roles and extended family ties. Legesse (1980, 124-7) proposes that a critical difference between African and Western traditions concerns the importance of the human individual. Whereas in Western liberal democracies the human person is in a paramount position as the "ultimate repository of rights", Legesse implies that an over-riding concern with individual "worth, personal autonomy, and property" is absent from many African traditions and cultures.

As well as highlighting the importance of the empirical observation of diversity and difference in the world, influential theoretical and methodological approaches in modern anthropology have had a significant impact on thinking about universalism and relativism. Many anthropologists have inferred from the empirical observation of diversity and difference in the world the view that ethical values ought only to be evaluated in terms of their particular cultural context. According to this approach, external evaluation of ethical ideals is neither possible nor desirable. It is not possible because ethical categories are contingent and particular - rather than universal and absolute - and there is no "trans-cultural truth" or "rationality" on the basis of which contending ethical claims could be made commensurate and be evaluated. It is not desirable because it inevitably involves the

imposition of one value system upon another, and is inextricably linked with systems of ideology, dominance and power. For example, according to Melville Herskovits:

"[C]ultural relativism is a philosophy which, in recognizing the values set by every society to guide its own life, lays stress on the dignity inherent in every body of custom, and on the need for tolerance of conventions though they may differ from one's own ... [T]he relativistic point of view brings into relief the validity of every set of norms for the people whose lives are guided by them, and the values these represent" (1948, 76).

Herskovits defends the idea of cultural relativism in terms of the scientific principles of independence and objectivity, as well as the ethical value of tolerance. Given the proposition that "... evaluations are relative to the cultural background out of which they arise", he suggests that cultural relativism could overcome methodological biases arising from "enculturation" (the psychological and social processes whereby cultural practices and norms are learnt and adopted) and "ethnocentrism" (the tendency of individuals and groups to view their own ways of life as preferable) (1948, 63-68)<sup>11</sup>. This approach has been highly influential, with the principle that information should be interpreted in a culturally relativistic way - in the terms of the society and context in which it occurs - being widely associated with scientific principles of neutrality, detachment and rigor, and considerable emphasis being placed on the importance of a neutral, non-judgmental and non-interventionist approach [Silberbauer (1993, 16) and Renteln (1990, 76-77)]. Cultural relativism in anthropology is also associated with a rejection of the cross-cultural validity of international human rights norms. Many authors have argued that the idea of human rights - far from being universal - is culturally specific and historically contingent, and is, in effect, a "Western bias". The paradigmatic expression of this view was elaborated by the Executive Board of the American Anthropological Association, in a response to the preparation of the Universal Declaration of Human Rights by the United Nations. This stated that:

"Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered ... Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole ... The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people" (1947, 542-3).

The characterisation of the dominant idea of human rights as a "Western bias" has become commonplace in the contemporary literature on culture and human rights. For example, for Pollis and Schwab, the dominant idea of human rights is "A Western construct with limited applicability" (1979, 1-18). The association between ideas about human rights and power is also a re-occurring theme in accounts of imperialism, colonialism and neo-colonialism, of East-West relations during the Cold War, and of North-South relations today. For example, Chomsky and Herman (1979) analyse the role of human rights ideology in legitimizing North-South imperialism and neo-colonialism on the one hand, and in concealing and disguising the contrary practices of imperialist powers on the other, while Shivji (1989) suggests that the role of human rights ideology has functioned to perpetuate colonial and neo-colonial domination and oppression in Africa.

The critique of universalism has become highly politicised in recent years. The culture-based critique of the idea of universal human rights gained ground at the World Conference on Human Rights, convened in Vienna in 1993, and became closely associated with the promotion of certain political agendas. At the preparatory meetings that preceded this Conference, the negotiating positions of certain East Asian countries - including Malaysia, China and Singapore - raised the spectre of culture-based exemptions to modern international human rights standards. In the event,

neither the Bangkok Declaration (1993) nor the Vienna Declaration and Programme of Action (1993) provide authority for the idea of culture-based exemptions to international human rights standards<sup>12</sup>. Nevertheless, the impression was conveyed of a fundamental North-South division on the issue of universalism versus cultural relativism. These events have had a significant impact on contemporary thinking about the cross-cultural foundations of human rights. Some of the important responses to the relativist critique that have emerged in the literature are surveyed in the sub-sections that follow. Criticisms of relativism are considered and new conceptual frameworks - in which the cross-cultural foundations of the modern idea of human rights can be taken more seriously - are briefly described.

## 2.2 Responding to relativism

### The idea of "contested cultures"

The concept of culture that underlies relativist challenges to the idea of human rights has itself been widely criticised. For example, Barry (1995,4-5) questions approaches that claim to derive conclusions from the allegedly shared values of a society. He suggests that the picture of the world that sustains the anti-universalist programme is an inaccurate one, in which societies are assumed to have distinct, homogeneous and coherent sets of political beliefs. Preis (1996, 289) is also critical of "essentializing" concepts that define culture in terms of static, homogeneous, bounded units and consistent sets of values, neglecting the possible conflicts and contradictions within cultures and societies. Bunting (1993, 8-9, 14) notes that cultural relativism presumes that all members of society will benefit equally from society, and that the question of which groups in society have the power to constitute dominant cultural norms is rarely discussed. Ranger (1983) and Messer (1993, 234) suggest that customs that are represented in terms of "tradition" can sometimes have neither great historical depth nor great cultural importance, and may benefit certain privileged categories of individuals, such as males, or those in power. The use of cultural relativism as an instrument of state power, as well as the potential conflict between relativism and the human rights of women - including the use of tradition and culture to perpetuate and legitimise discrimination - have also been widely discussed in this context<sup>13</sup>. These analyses challenge many of the assumptions on which cultural relativism is premised, and suggest an alternative approach, that characterises different cultures in terms of their plural, dynamic, diverse and contradictory elements.

### The need for more adequate "cross-cultural foundations"

At the same time, the relativist critique has given rise to a new appreciation of the need for greater cultural sensitivity, including the need to develop more adequate cross-cultural foundations for the idea of human rights. It is evident that no cross-cultural understanding and meaning of the idea of human rights can be assumed, and approaches that locate the historical roots of the idea of human rights exclusively in terms of the ideas of natural law and natural rights as they have evolved in Western political thought are increasingly being rejected. Such approaches are historically and ethically limited, and leave the idea of human rights exposed to the charge of Western imperialism. In recent years, there has been an attempt to respond to the relativist critique by broadening out the debate, and by demonstrating that ideas of natural law and natural rights do not provide exclusive foundations for the idea of human rights. Particular emphasis is placed on the need to

establish a cross-cultural and inter-faith dialogue in order to identify shared beliefs and principles that can provide a consensual basis for international human rights standards. Whereas relativists tend to characterise the idea of human rights as being absent from, and alien to, the traditions and practices of many non-Western societies, human rights thinkers and activists have emphasised that the traditions from which the idea of human rights has emerged - traditions of universalism, tolerance and respect for human dignity and worth, traditions of freedom, traditions of concern for the poor, needy and exploited, and traditions of interpersonal obligation and government responsibility - have not emerged exclusively in or from any single cultural tradition. No particular country or culture can claim monopoly ownership of these traditions. They are not the exclusive product of Western society and have deep historical roots in non-Western societies that pre-date the European Enlightenment. Furthermore, the presence of these traditions in different cultures and countries across the world provide solid foundations for the development of modern theories of human rights. As Norani Othman - a human rights scholar from Malaysia - has questioned:

"Does only Western discourse have the capacity to generate such a conception of human rights? Or can an affirmation of human rights be effectively and autonomously generated from within other, non-Western cultural traditions, philosophical idioms, and religious and civilisational frameworks? Are such intellectual resources available in other, non-Western contexts and traditions? (1999, 169)"

#### Anthropological perspectives on shared ethical values

As well as highlighting areas of difference and diversity, anthropological perspectives can assist in thinking about shared ethical values. Although new approaches in anthropology on action and advocacy tend to emphasise this idea, it is important to note that it is rare for even those anthropological approaches that highlight cultural relativism and non-intervention to reject the possibility of shared ethical values in its entirety. For example, Herskovits did not preclude the possibility of identifying universal moral criteria, and suggested that in thinking about cultural relativism, it is essential to differentiate between moral absolutes and moral universals.

"Absolutes are fixed, and, in so far as convention is concerned, are not admitted to have variation, to differ from culture to culture, from epoch to epoch. Universals, on the other hand, are those least common denominators to be extracted, inductively, from comprehension of the range of variation which all phenomena of the natural or cultural world manifest ... To say that there is no absolute criterion of value and morals ... does not mean that such criteria, in differing forms, do not comprise universals in human culture" (1948, 76).

Similarly, while characterising the dominant idea of human rights as "A Western construct with limited applicability", Schwab and Pollis have nevertheless attempted to construct a more adequate framework for thinking about human rights. In their view, "a fundamental revision of how human rights are viewed must take place so that a more realistic cross-cultural standard and perception of rights can be put into place" (1982, viii). Different historical experiences and cultural patterns lead to differing notions of human rights and there is a need for an alternative framework within which discourse on human rights can be advanced. In particular, it is vital "to evolve a cross-cultural community of shared perceptions regarding minimum human rights guarantees". Ultimately, the objective of these authors is to identify "[a] core of human rights guarantees that will insure at least minimum personal security and will not violate traditional, ideological, or cultural values" (1982, 239-240). Similarly, Renteln has attempted to identify a more "legitimate" framework for thinking about the cross-cultural foundations of human rights, rejecting the idea that human rights can be derived philosophically - from ideas of natural law and natural rights - and proposing an empirical



methodology for identifying shared values based on the idea of cross-cultural validation. In Rentlen's view, the view that the theory of relativism does not necessarily preclude the possibility of cross-cultural universals, and the degree of convergence of ethical systems remains an open question until such time as cross-cultural empirical research provides an answer. Furthermore, Renteln proposes that it may be possible to establish a universal conception of human rights through empirical demonstration, invoking the presence of values and practices that function to limit arbitrary violence in different cultures, societies and historical periods as an example (1990, 12, 138). Finally, Wilson has elaborated an approach that attempts to move beyond the universalism-relativism dichotomy and to develop a framework for thinking about the globalisation of human rights and the presence of trans-national legal institutions. For Wilson, the crucial question is not the ontological status of the idea of human rights, but rather how the meaning and use of this idea is materialised, imposed, resisted and transformed in different cultural, social and economic contexts.

### Sen's framework

Sen's observation that the historical roots of modern liberal and democratic ideas "can be sought in terms of constitutive elements, rather than as a whole" (Sen, 1997, 35) also provides a useful framework for thinking about the cross-cultural foundations of human rights. In identifying the historical antecedents of the idea of human rights, it is important to recognise that elements that are consistent with and supportive of modern ideas about human rights have co-existed in Western philosophies and cultures with other elements that are neither supportive nor consistent with this idea. For example, ideas and practices including slavery, sexism, racism and fascism have deep historical roots in Western philosophies and cultures and the Universal Declaration of Human Rights was itself prepared as a direct response to the systematic violation of human rights and the holocaust - in which millions of Jews, gypsies, homosexuals and others died - under fascist and Nazi regimes. Furthermore, the historical roots of the ideas of freedom, democracy, and equality, natural law and natural rights are often located in the philosophies that emerged in ancient Greece. Yet slavery was common-place in ancient Greece - with slaves working in domestic service, mining, farming, small-scale industries and public works - and although the Stoic idea of an inner-freedom was of particular appeal to slaves, most Greek philosophers took the institution of slavery for granted. Plato challenged slavery for Greeks while taking for granted the institution of slavery and assuming that the enslavement of foreigners would continue ([c.375 BC]1987, 197). Aristotle acknowledged that some people "regard the control of slaves by a master as contrary to nature". In their view, the "distinction of master and slave is due to law or convention", and that the relation of master to slave is based on force, with "no warrant in justice". Nevertheless, Aristotle elaborated a justification of the institution of slavery, suggesting that some human beings lack the rational power necessary for freedom, and that it is in the interests of such people to be possessed by another as an "article of property".

"(I)t is nature's intention ... to erect a physical difference between the bodies of freemen and those of the slaves, giving the latter strength for the menial duties of life, but making the former upright in carriage and ... useful for the various purposes of civic life ... It is thus clear that, just as some are by nature free, so others are by nature slaves, and for these latter the condition of slavery is both beneficial and just" ([350 BC] 1995, 13-14/&17).

Therefore, in thinking about the cross-cultural foundations of human rights, it is important to avoid double standards. As Sen suggests, the presence of elements in different cultures from around the

world that are not compatible with modern human rights standards - and the fact that these elements are sometimes selectively championed by leaders - ought not to be allowed to obscure the presence of other elements that are compatible with, and supportive of, modern ideas about human rights. Therefore, "(t)he presence of ... [constitutive] components [of the idea of human rights] must not be confused with the absence of the opposite, that is, with the presence of ideas and doctrines that clearly do not emphasise freedom and tolerance" (1997, 36). Sen has re-appraised the ideas of certain non-Western thinkers and actors in the light of this principle (1997, 35-40).

### "Re-occurring ethical principles" and the idea of the "Golden Rule"

Some human rights thinkers and activists express the view that the principles of universalism embodied in the Universal Declaration are given authority by deeply-rooted traditions of universalism and tolerance in different cultures and religions from around the world. It is often argued that these traditions reflect centuries of diverse cultural practices, religious beliefs, philosophical reasoning and reflection on the nature of the human condition. Throughout human history, rules of behaviour have emerged that govern how people should treat one another, and in response to religious beliefs and ethical convictions, individuals and groups from diverse cultures and backgrounds have emphasised the importance of universalism and tolerance as the basis for peaceful co-existence. The importance of universal principles - the recognition that all people share a common humanity, that all individuals everywhere ought to be treated with equal respect and that individuals have negative and positive obligations to respect the dignity of others - has emerged as a fundamental and re-occurring element of philosophical reasoning, ethical conviction and religious belief. Arguably, these traditions provide solid cross-cultural foundations for the idea of human rights. This idea was reflected in a recent statement made by UN Secretary-General Kofi Annan that suggested that ideals of tolerance and mercy have always and in all cultures been ideals of government rule and human behaviour. According to Annan:

"Human rights are the expression of those traditions of tolerance in all cultures that are the basis of peace and progress ... Human rights are universal not only because their roots exist in all cultures and traditions ... The principles enshrined in the Universal Declaration of Human Rights are deeply rooted in the history of humankind. They can be found in the teachings of all the world's great cultural and religious traditions" (1997a).

Amnesty International (AI) has also expressed the view that the idea of human rights is given authority by different ethical and religious traditions from around the world.

"[The demands of the human rights movement] are grounded, ultimately, in the conviction that every human being has an intrinsic value. Over the centuries, this conviction has been given considerable authority from many sources - the dominant beliefs of many diverse cultures, the major world philosophies, and more recently, international declarations and laws (1992, 10-11)". In supporting this statement, A.I. cites expressions of an idea that I will describe as the idea of the ethic of common humanity from around the world (See Box). Despite the great diversity of religious, cultural and ethical belief and practice, similar expressions of the idea of the ethic of common humanity have been identified in different practices, religions and philosophies in different cultures and countries, and going back in history. The ethic is sometimes referred to as the "Golden Rule" - a "summary principle" that recognises that all people share a common humanity and that the intrinsic value and dignity of all individuals everywhere ought to be respected and protected. In its negative form, this ethic rules out double standards and aspires to uniformity and consistency in ethical practice, and recognises that all individuals ought to be treated, out of

respect for their dignity, with equality and consistency of treatment. This principle provides an element of protection for others with whom the individual has no direct links, including others who are different, and others who are distant. In this way, the ethic of common humanity aspires to establish interpersonal obligations beyond a person's immediate connections or loyalties to individuals, families and groups. In its positive form, the ethic of common humanity establishes positive obligations of assistance and aid. Many people from diverse parts of the world argue that expressions of the ethic of common humanity reflect a shared commitment to these ideals, and are adopting these ideals as the basis for the construction of modern theories of human rights<sup>14</sup>.

**Expressions of the ethic of common humanity  
in different cultures and religions from around the world**

**Brahmanism:** "Do naught unto others which would cause you pain if done to you." The Mahabharata.

**Buddhism:** "Hurt not others in ways that you yourself would find hurtful." Udana-Varga: 5,18.

**Christianity:** "Always treat others as you would like them to treat you." New Testament. Matthew 7:12

**Confucianism:** "Do not unto others that you would not have them do unto you." Analects, XV, 23.

**Islam:** "No one of you is a believer until he desires for his brother that which he desires for himself." Sunnah.

**Judaism:** "What is hateful to you, do not to your fellowmen." The Talmud, Shabbat, 31a.

**Taoism:** "Regard your neighbour's gain as your own gain, and your neighbour's loss as your own loss." T'ai Shang Kan Ying P'ien.

**Zoroastrianism:** "That nature alone is good which refrains from doing unto another whatsoever is not good for itself." Dadistan-i-dinik, 94:5. (Source: Amnesty, 1992, 10-11.)

The idea of an "overlapping consensus"

The idea of an "overlapping consensus" has also gained ground in recent thinking about the cross-cultural foundations of human rights. This idea entails thinking of different cultures in terms of "circles" or "sets", and thinking of shared values such as universalism and tolerance in terms of areas of "overlap" or "intersection". It has been influential in inter-faith and cross-cultural discussions about human rights and in contemporary political theory. For example, Charles Taylor poses the following question:

"What would it mean to come to a genuine, unforced international consensus on human rights? I suppose it would be something like what Rawls describes in his Political Liberalism as an 'overlapping consensus'. That is, different groups, countries, religious communities, and civilizations, although holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to an agreement on certain norms that ought to govern human behaviour. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms while disagreeing on why they were the right norms,

and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief" (1999, 124).

Taylor suggests that the idea of human rights might be included in an "overlapping consensus" of this type. Condemnations of murder, genocide, torture and slavery in different cultures may provide a basis for this approach. The ideas of flourishing and well-being have also been highlighted in this context. Many human rights thinkers and activists argue that expressions of universalism, tolerance, respect for human dignity - and the idea of a shared commitment to the ethic of common humanity - provide possible routes forward.

### An "hermeneutical approach" to cross-cultural and inter-faith dialogue

The Sudanese scholar Abdullah An-Na'im has developed a framework for thinking about the cross-cultural foundations of human rights that builds on the propositions that human cultures are (1) identifiable and distinguishable from each other and (2) are characterized by their own internal diversity and propensity to change and mutual influence. In An-Na'im's view, these characteristics can be used to promote normative consensus within and among cultures through processes of cultural transformation (1994, 63). In particular, An-Na'im has advanced the idea of an hermeneutical approach to cross-cultural and inter-faith dialogue. This is an approach that recognises that religions are interpreted and reinterpreted and can be subject to change.

"Religious traditions are hermeneutical processes: they do develop, change and - sometimes - improve in response to circumstances and in dialogue with their context" (An-Na'im et. al., 1995, vii).

Working within this framework, An-Na'im has rejected the traditional emphasis of liberal political theory, arguing that it is neither possible nor desirable to identify a set of neutrally formulated human rights. For An-Na'im, the central issue is not the possibility of abstract or absolute neutrality from any religious, cultural or ideological regime, but rather how to reconcile commitments to diverse normative regimes with a commitment to a concept and set of universal human rights (1995a, 229). Given the facts of cultural and religious diversity, can human rights be interpreted and justified from within religious traditions, such that they are supported, rather than undermined, as the "common core" of a universal morality? [An-Na'im et. al. (1995, viii)].

In considering this question, An-Na'im suggests that cross-cultural dialogue can promote universality at a theoretical or conceptual level by highlighting moral and philosophical commonalities of human cultures and experiences.

" (T)he Golden Rule of treating others as one would wish to be treated by them - which is found in some formulation or another in all the major cultural traditions of the world - can be presented as a universal moral foundation of human rights norms. This principle of reciprocity could provide universal rationale for human rights as those rights which one would claim for himself or herself, and must therefore concede to others. However, efforts to articulate shared values and principles must be founded on mutual respect and sensitivity to the integrity of other cultures, especially in view of colonial and post-colonial power relations between the North and South" (1994, 68).

However, An-Na'im has emphasised the importance of areas of diversity and potential conflict - as well as areas of overlap and agreement - for contemporary thinking about the cross-cultural foundations of human rights. In An-Na'im's view, human rights strategies that focus exclusively on areas of overlap and agreement - and that fail to take account of those areas of difficulty and complexity - will not only be theoretically and conceptually inadequate, but are also unlikely to be

successful in practice. Human rights are contextually interpreted and it is from their context that they acquire their practical meaning. Therefore, "it is important to seek to formulate, interpret and implement all internationally-recognised human rights in proper cultural context" (1994, 63).

Strategies for securing human rights should take into account the diverse loyalties, commitments and beliefs of different individuals and groups - even where these diverse loyalties, commitments and beliefs come into potential conflict with international human rights law.

"The precondition of a real dialogical study of religious diversity is the full appreciation of the divergencies among traditions. Inter-religious dialogue on morality should not begin with simple statements about supposedly common notions and thus avoid awkward issues...The problem is whether the diverse religious anthropologies give way to a common core of 'universal' rights and stimulate adherents to acknowledge them in their cultural context, or prevent adherents from doing so" (Vroom and Reinders, 1995, xiii).

For example, An-Na'im suggests that some religious value systems - including orthodox perceptions of Judaism, Christianity and Islam - tend to deny women equality with men.

Consequently, the enforcement of equality for women by the state could infringe the right of certain Jewish, Protestant, Roman Catholic and Islamic communities to religious freedom. In this context, An-Na'im suggests that a human rights strategy is most likely to be successful if it takes explicit account of this area of difficulty and conflict.

"Without due regard to the consequences or implications of ...diversity and specificity, there is little prospect of global normative consensus ... [Furthermore] if the dangers of ambiguity or confusion are not addressed, the consensus thereby achieved might be superficial and perfunctory" (1994, 63).

In this way, An-Na'im has focussed attention on the importance of culture and context for the implementation of human rights strategies. His views suggest that "efforts to promote respect for international human rights standards are often likely to remain superficial and ineffectual until ... they relate directly to, and where possible are promoted through, local cultural, religious and other traditional communities" (Alston, 1994,8). Furthermore, An-Na'im suggests that cross-cultural and inter-faith dialogue on the subject of human rights is most likely to be successful if direct confrontation is avoided and dialogue is based on a combination of mediation, internal discourse and reconciliation. In particular, individuals and groups ought not to be confronted with the need to make exclusive choices between religious commitment on the one hand, and international human rights law on the other.

"To avoid undermining the legitimacy of a universal human rights project by placing it in direct competition with what people hold as their comprehensive fundamental value system, I would strongly recommend a strategy of internal transformation of perceptions of the religion, culture or ideology in question in order to reconcile the former with the latter" (1995a, 230).

An-Na'im's framework is notable in that it emphasises the role of culture and context - and of diversity and conflict - whilst leaving the space for ultimate agreement and overlap on human rights issues. While suggesting that the doctrine of human rights is the outcome of a particular period in the history of Western culture and philosophy, An-Na'im has not rejected the idea of human rights. Rather, An-Na'im has responded to the relativist critique by articulating the case for better representation and incorporation of non-Western perspectives and for greater cultural awareness and sensitivity within UN human rights processes (Alston, 1994; Alston and Gilmour-Walsh, 1996, 35-36). An-Na'im's framework for thinking about human rights is widely recognised as a far-reaching attempt to transform cross-cultural and inter-faith dialogue into a "global and mutual venture" - rather than the promotion and imposition of a particular cultural or religious interpretation of the idea of human rights (An-Na'im et. al, 1995, xvii). This framework comprises a significant contribution to contemporary thinking about the cross-cultural foundations of human rights.

### 3. ANTECEDENTS OF THE IDEA OF HUMAN RIGHTS IN DIFFERENT CULTURES AND TRADITIONS FROM AROUND THE WORLD

#### 3.1 Antecedents in Islamic traditions of tolerance, freedom and rights

Against this background, human rights thinkers and activists have responded to the relativist critique by challenging the impression of a monolithic Islam that is inconsistent with the idea of universal human rights. As Halliday (1996) suggests, this impression can arise as a consequence of imperialist, racist and essentialist prejudices and processes. Said's (1995) theory of orientalism - which links the representation of the idea of Islam in Western countries to theories of discourse and power - is particularly insightful in this context. In addition, contemporary movements for "Islamization" and "fundamentalism" can give the impression of a monolithic Islam that is inconsistent with modern ideas about human rights<sup>15</sup>. Challenges to these perspectives often highlight the heterogeneity and diversity of Islamic thought, practice and religious interpretation, and suggest that societies with large Muslim populations cannot be represented by a single, homogenous system of values. For example, Halliday notes that there are over fifty Muslim states in the world - with a variety of legal and political systems - and that there is no single body - political or religious - that speaks for the Muslim world as a whole. In contrast to Christianity, the Muslim religion is highly fragmented and operates without even a purported theological and legal central authority. Hence in Halliday's view:

"While many aspire or claim to speak in the name of all Muslims, none do. There is, for example, a world of difference between the position of Saudi Arabia, on the one hand, with its promotion of a conservative 'Islamic' code of rights, and that of Tunisia, which has been in the forefront of the battle for universal rights and which even proposed at the pre-Vienna 'African' conference a denunciation of the threat to human rights posed by religious fundamentalism. In confronting the claims made by governments, individual writers or organizations, one has to take account of their specific context and not assume that they speak for one 'Islamic' world or tradition, or that theirs is the only possible or legitimate interpretation of the religion. We are dealing with a diversity of views and interpretations, not a single body of thought" (1996, 142-143).

The deep-rooted nature of traditions of tolerance, rights, equity and social justice within the Islamic world have also been highlighted in this context. For example, Lauren highlights the famous "Charter of Cyrus" elaborated by "Cyrus the Great" in the Persian Empire more than two thousand years ago. This Charter recognised certain rights of liberty and security, freedom of movement and religious belief, inspiring the Sultan Farrukh Hablul Matin to write:

"For he, it was who, with supreme insight,  
Launched an Empire based not on physical might  
But on the vision of a family of nations  
Linked by bands of Humanity, truth and right" [cited in Lauren (1998, 11)].

Lauren also focuses attention on the work of Al-Farabi, an Islamic philosopher of the tenth century, who wrote in his book *The Outlook of the People of the City of Virtue* of a vision of a moral society in all which individuals were endowed with rights and lived in love and charity with their neighbours (1998, 11). Similarly, the UN Secretary General has highlighted the relevance of Islamic traditions of equity and mercy to the Universal Declaration of Human Rights, noting that Imam Ali, the fourth Khalifa after Prophet Muhammed, instructed the governor of Egypt to rule with mercy and tolerance towards all his subjects:

"... Let the dearest of your treasuries be the treasury of righteous action... Infuse your heart with mercy, love and kindness for your subjects. Be not in the face of them a voracious animal,

counting them as easy prey, for they are of two kinds: either they are your brothers in religion or your equals in creation" [cited in Annan (1997a)].

Annan has also highlighted the work of Sa'adi, the thirteenth century Persian poet, who offered a moving tribute to the values of tolerance and equality among all peoples and nations:

"The children of Adam are limbs of one another And in their creation come from one substance. When the world gives pain to one member, The other members find no rest. Thou who are indifferent to the sufferings of others Do not deserve to be called a man" [cited in Annan (1997a)].

In addition, some human rights thinkers and activists have challenged the theological basis of the view that there is a fundamental inconsistency between Islam and the idea of human rights. Many Muslim thinkers and activists elaborate their claims for human rights within a religious discourse and particular emphasis has been placed on citing and promoting understanding of classic Islamic texts that are consistent with and/or supportive of the modern idea of human rights in this context. It is important to recognise that Islam is a highly rights-focussed religion and certain Islamic precepts and principles place a great emphasis on reform and rights to protect the interests and well-being of vulnerable, oppressed and needy groups. Arguably, these precepts and principles comprise important antecedents of the modern idea of human rights and - when analysed in their historical context - these precepts and principles can provide foundations for modern ideas about human rights. For example, more than 1400 years ago, Qur'anic injunctions emphasised the importance of human diversity, tolerance and respect for human diversity; condemned, limited and regulated the practice of slavery; protected the interests of vulnerable children including orphans and girls; recognised rights that limited the harsh consequences of discrimination against women; and introduced reforms to ensure better provision for the poor.

### **The Qur'an ushered in an age of reform and rights**

**Human diversity, tolerance and mutual respect** Many Qur'anic verses are interpreted as implying that diversity and plurality are inherent characteristics of the human condition and that these characteristics ought to be tolerated and respected. For example, one Qur'anic verse states: "We [God] have created you [human beings] into [different] peoples and tribes so that you may [all] get to know [understand and co-operate with] each other; the most honourable among you in the sight of God are the pious [righteous] ones" [49:13, translation in An-Na'im (1995a, 232)]. Another states: "For each community, we have granted a Law and a Code of Conduct. If God wished, He could have made you One community, but he wishes rather to test you through that which has been given to you. So vie with each other to excel in goodness and moral virtue" [5:48, translation in Nanji (1993, 110)].

**Treatment of non-Muslims** More than fourteen hundred years ago, discrimination against religious minorities was the norm in many different countries and societies. Shari'a limited the harsh consequences of discrimination against religious minorities in Muslim societies, restricting discrimination, and reducing its scope (An-Na'im, 1990, 170&175). Fundamental rights of non-Muslims to protection from internal tyranny and persecution, and freedom of religious practice and personal status, were recognised (Ally, 1996, 253). When judged in their historical context and against the European record, these principles for the treatment of non-Muslims are often noted for their relative tolerance and humanity (Mayer, 1999, 136).

**The limitation and regulation of slavery.** Fourteen hundred years ago, slavery was a common practice in many different parts of the world. Qur'anic injunctions limited and regulated the practice of slavery by emphasising the dignity and personal safety of slaves, and encouraging their emancipation (e.g. 5:89, 24:33, 58:3, 90:13.)

**New rights for women.** Certain practices that affected the interests and wellbeing of women were reformed by Islam. For example, Qur'anic injunctions qualified the exercise of polygamy by Muslim men, and protected women by giving them more control over their dowry. In addition, while distinguishing between the position of men and the position of women, the Qur'an states "And for women are rights over men similar to those of men over women" (2:228), and recognises the rights of women to own property, to a share of inheritance and to divorce. When analysed in their historical context, it is generally agreed that these reforms and rights limited the harsh consequences of discrimination against women (An-Na'im, 1990, 170&175). Indeed, some scholars have argued that, given the position of women in many cultures and societies fourteen hundred years ago, the reforms and rights for women recognised in the Qur'an would have been considered "revolutionary" (Othman, 1999, 181).

**Provisions for the protection of the well-being of the girl-child.** Qur'anic injunctions condemn practices that adversely affect the wellbeing and rights of the girl-child. For example, one verse in the Qur'an condemns the practice of female infanticide. "When the female (infant), Buried alive, is questioned - For what crime She was killed; [81:8-9, translation in 'Al? (1998)].

**Recognition of the importance of education for men and women.** The Prophet Muhammad is reported to have said: "The search for knowledge is an obligation laid on every Muslim" [Hadith, Book II, Knowledge, translation in Robson (1963, 54)]. The word every is generally interpreted as including men and women and this Hadith is interpreted by many scholars as implying that there is an obligation on all Muslims - girls and boys, men and women - to pursue their education as far as possible [eg Ali (n.d., 31&39), Goldsack (1923, 18), Hamidullah (1979, 15-20), Ally (1996, 239)]. In addition, the Prophet Muhammad is reported to have made arrangements for the education of women as well as men and to have encouraged the education of people from all social strata, including the education of slave girls [Hadith, Book III, Knowledge, 4-5: translation in Ali (n.d, 33-34)].

**Obligations to assist.** Islam places a great emphasis on social and economic justice and the Qur'an introduced far-reaching rights and obligations to protect the interests of the poor, needy and vulnerable. For example, the rights of orphans to identity and inheritance are protected and one Qur'anic verse states: "And in their wealth and possessions (was remembered) the right of the (needy)" [51:19, translation in 'Al? (1998, 1358)]. The Qur'an encourages assistance for vulnerable and poor groups such as orphans, the needy and the travelling homeless (eg 2.215) and the obligation to assist members of the wider community is institutionalised through the duty of poor-due or zakah [2:43, translation in Pickthall (1996, 10)]. The UN High Commissioner for Human Rights has recently highlighted the relevance of the Islamic conception of the obligation to assist to Article 29 of the Universal Declaration of Human Rights which states that " everyone has duties to the community in which alone the free and full development of his personality is possible" [Robinson (1998)].

### Islam and the human rights of women

In challenging the theological basis of female subordination in Islamic societies, human rights thinkers have often emphasised the reforming influence of classic Islamic texts, and contrasted these with the subsequent development of religious interpretations and legal codifications. On the one hand, it is often argued that Qur'anic reforms and rights improved the position of women favourably, both in relation to certain pre-Islamic practices, and in relation to the position of women in many other contemporaneous cultures and societies. For example, Othman notes that:

"Muslims past and present, from all juristic schools (madhhab) and political persuasions, orthodox conservatives as well as modernists, acknowledge that Islam was the earliest religion to



emancipate women, giving them rights unknown to any other society at the time. They agree that the Qur'an introduced various positive reforms for women, including a woman's right to contract marriage, to divorce, and to inherit and dispose of her property as she pleases" (1999, 177-8). On the other hand, many human rights thinkers and activists have suggested that these progressive tendencies are not reflected in certain interpretations and codifications in Shari'a Law. For example, in Othman's view:

"Although progressive in tendency, these early ideas of the rights and status of women did not develop further, nor did they sustain any emancipating or egalitarian impetus within the interpretation of Shari'a by later generations of Muslims ... A disregard for the historical context within which the Shari'a was constructed, and for the historical character of the Shari'a itself as it was developed and applied within early and classical Islamic civilisation, has permitted fundamentalists to perpetuate in our own times a pre-modern antagonism against women" (1999, 178/172).

In analysing this issue, human rights thinkers and activists have emphasised the importance of human agency in the construction of gender discrimination in Islamic societies and in the development of certain elements of Shari'a Law. For example, An-Na'im suggests that - although women have full legal capacity under Shari'a in relation to civil law and commercial law matters, in the sense that they have the requisite legal personality to hold and dispose of property and otherwise acquire or lose civil liabilities in their own independent rights - Muslim women do not enjoy human rights on an equal footing with Muslim men under Shari'a law. Yet in elaborating this view, An-Na'im emphasises the human as oppose to the divine basis of certain elements of Shari'a Law, highlighting the distinction between (a) the provisions in the Qur'an (that Muslims believe to be the word of God); (b) the provisions in the Hadith (the sayings of the Prophet Muhammad); and (c) the interpretation, application, development and codification of these standards. Hence for An-Na'im, Shari'a is not the whole of Islam but instead is an interpretation of its fundamental sources. It is best understood "through a consideration for the impact of the historical context within which Shari'a was constructed by the founding jurists of the eighth and ninth centuries out of the original sources of Islam (1990, 165). Similarly, for Othman, what is at present accepted as a body of Islamic tenets and laws concerning women does not rest solely on the Qur'an or on direct interpretation of its text. It also includes references and interpretations from traditions (Hadith and Sunna of the Prophet) as well as accumulated interpretations (tafsir) of classical scholars and exegetes. In this way, Othman suggests that the Islamic paradigm of the ideal role, status, and duties of Muslim women was largely derived from the tafsir of male jurists and scholars - particularly those of the classical age of Islamic civilisation (1999, 178).

The importance of cultural and political variables has also been emphasised in this context. For example, Nanji suggests that certain rules codified into Shari'a Law reflect patriarchal traditions that pre-dated the Qur'an Islam and that "the development and occurrence of customs and practices of seclusion and veiling of women were a result of local tradition and customs, occasionally antithetical to the spirit of emancipation of women envisaged in the Qur'an" (1993, 109). Othman suggests that the interpretation and application of certain religious and legal rules may be contingent on local conditions including cultural factors and invokes the rule of hijab - which entails not just the covering of a woman's face, but also female seclusion and the segregation of social space - as an illustration. In Othman's view, whereas this separation characterises gender relations in much of the Middle East, it is not a traditional characteristic of all countries and societies with large Muslim populations. In Malaysia and other parts of South East Asia, local cultural traditions, including that of adat, define and affirm women's role and public contribution and participation - often in positive, non-hierarchical ways. Consequently, tensions between Southeast Asian cultural

definitions of women's gender roles and rights and traditional Islamic formulations have arisen in relation to the rule of hijab (1999,178). Similar debates have arisen in relation to the practice of "tribal honour" in Afghanistan and Pakistan, the practice of clitoridectomy or female circumcision in parts of Africa and Arabia and the policy implemented in a number of Muslim countries that bans women from being judges (Halliday, 1996, 147). In addition, political variables have been invoked as possible explanations of certain discriminatory laws and practices. For example, Mayer suggests that whereas certain elements of Islamic Law are often represented as theologically binding, eternal and unchangeable, these elements are in fact interpretations that can and do change. Analysing the grounds of reservations entered by various governments to international human rights treaties including CEDAW as part of a political process, she suggests that justifications for these reservations often reflect the view that there is a single and immutable Islamic law. In reality, however, personal status laws vary from one Muslim country to another and change over time within one country and under different political administrations. Furthermore, there is enormous interpretative variety on issues relating to family law and on the question of precisely what Islamic sources mandate in terms of status for women (1995, 107-118).

Some human rights thinkers and activists have suggested that an important agenda for change can be based on the distinction between Qur'anic Law on the one hand, and the interpretation and codification of Islamic religious and legal principles on the other. According to Othman:

"[The] gap between the ethical principles of the Qur'an concerning gender equality and the kinds of retrogressive and male-centred interpretations that have been codified into Shari'a law provides a challenge for modern Muslim women's pursuit of equality and respect for their rights (1999,175/6).

This approach has been applied in practice to the development of human rights strategies. As a leading member of Sisters of Islam - an autonomous non-government organisation of Muslim women - Othman suggests that the primary project for Muslim women's groups in their struggle for women's rights is not simply the recognition of international treaties such as CEDAW. The importance of the increasingly positive record of countries with large Muslim populations signing and ratifying international human rights instruments cannot be denied. However, in Othman's view, the need for Muslim women to relate their claims to their rights under their own cultural and religious traditions - including their rights under Islam - is also fundamental. A key issue is "the need for consensus within their own culture that the kinds of women's rights they are advocating are indeed acceptable on the grounds of a public ethic derived from their own cultural and religious sources" (1999,189). For example, polygamy is an important issue for women's groups in Malaysia. In challenging the notion that men have an inalienable right to exercise polygamy - rather than relying exclusively on international human rights instruments including CEDAW - these standards could be linked to theological challenges based on the notion of consent (1999, 179-181).

Indeed, some thinkers and activists go further, suggesting that the rights introduced in the Qur'an provide a revolutionary basis for a feminist agenda. For example, Fatima Mernissi - a feminist and a founding member of the Moroccan Organisation for Human Rights - is a leading proponent of the view that Islamic ideas and traditions provide rich foundations for ideas of gender equality and the human rights of women. She has expressed the view that:

"... Muslim women can walk into the modern world with pride, knowing that the quest for dignity, democracy, and human rights, for full participation in the political and social affairs for our country, stems from no imported Western values, but is a true part of the Muslim tradition ... Ample historical evidence portrays women in the Prophet's Medina raising their heads from slavery and violence to claim their right to join, as equal participants, in the making of their Arab history. Women fled aristocratic tribal Mecca by the thousands to enter Medina, the Prophet's city in the seventh century, because Islam promised equality and dignity for all, for men and women, masters and servants. Every woman who came to Medina when the Prophet was the political leader of Muslims could gain access to full citizenship, the status of sahabi, Companion of the Prophet. Muslims can take pride that in their language they have the feminine of that word, sahabiyyat, women who enjoyed the right to enter into the councils of the Muslim umma, to speak freely to its Prophet-leader, to dispute with the men, to fight for their happiness, and to be involved in the management of military and political affairs. The evidence is there in the works of religious history, in the biographical details of sahabiyyat by the thousand who built Muslim society side by side with their male counterparts" (1991, viii).

#### Areas of theoretical complexity

However, human rights agendas of these types raise various theoretical complexities. Whereas human rights thinkers and activists tend to cite those verses of the Qur'an that are consistent with and supportive of the modern idea of human rights, the possibility remains that other verses are inconsistent with or even contradictory to modern ideas about human rights (Othman, 1999, 174). The analysis of the Sudanese human rights scholar An-Na'im is particularly important in this context. An-Na'im has cautioned against approaches that overlook the difficulties and complexities involved in reconciling certain aspects of Shari'a law with modern international human rights law, and has emphasised that it is important for human rights thinkers and activists to cite those elements of foundational Islamic texts that give rise to areas of theoretical ambiguity and conflict, as well as those that are consistent with, and supportive of, modern ideas about human rights<sup>16</sup>. In addition, while An-Na'im defends the proposition that the Qur'an and the Sunna modified and tightened the harsh consequences of slavery and discrimination on grounds of religion or gender, he emphasises that improving on a pre-existing situation is not the same as the recognition of a modern human right (1990, 170). Therefore:

"[T]he concept [of human rights] must be distinguished fundamentally from any regime of rights, however favourable it may be, which distinguishes between human beings on ground of gender. It should also be noted that Shari'a not only distinguishes between the rights of Muslim men and women, but discriminates against women in this regard" (1995b, 57).

An-Na'im suggests that human rights strategies that fail to acknowledge these areas of difficulty and complexity are likely to be ineffective because they fail to provide a framework in which areas of difficulty and inconsistency can be explicitly raised and negotiated. Whereas modern international human rights law is based on the principles of universality and non-discrimination, rights and personal status under Shari'a law are based on certain gender and religious distinctions. In addition, Shari'a does not prohibit slavery. Consequently, the implementation of Shari'a law as a basis for public law raises particular concerns in relation to discrimination against women and non-Muslims and in relation to the practice of slavery. In An-Na'im's view, there is a need to explicitly recognise the inadequacy of historical Shari'a as a basis for human rights in the Muslim context and to pose an alternative Islamic foundation for universal human rights [(1990, 164&170-177), (1995a, 238)].

"[T]he only effective approach to achieve sufficient reform of Shari'a in relation to universal human rights is to cite sources in the Qur'an and Sunna which are inconsistent with universal human rights and explain them in historical context, while citing those sources which are

supportive of human rights as the basis of the legally applicable principles and rules of Islamic law today" (1990, 171) 17.

Against this background, An-Na'im has called for an Islamic Reformation - a critical re-examination and re-interpretation of Islam's foundational texts - with a view to removing the bases of discrimination against non-Muslims and women, and reconciling Islamic law with a full range of human rights. He has proposed a far-reaching reform methodology for Islamic public law based on a (claimed) distinction between Qur'anic verses from the Mecca and Medina periods (1990, 179-181), and has expressed the view that: "[o]nce it is appreciated that Shari'a was constructed by its founding jurists, it should become possible to think about reconstructing certain aspects of Shari'a, provided that such reconstruction is based on the same fundamental sources of Islam and is fully consistent with its essential moral and religious precepts" (1990, xiv).

Debates pertaining to the theological interpretation of Islamic texts can and should only be resolved within the internal discourse of the Muslim community, and the evaluation of this proposal is beyond the scope of this Paper. However, a number of general points can be made. First, An-Na'im's reform methodology is based on the teachings of Mahmoud Mohamed Taha, who was tried for sedition and other offences and publicly executed in Sudan in 1985 (Voll, 1990, ix-x), and the idea of putting aside Medinan verses could be regarded as heretical by traditionalists (Othman, 1999, 191). Second, An-Na'im's proposed approach is unusual and important in that it represents a human rights agenda that reflects the importance of challenging traditionalist and fundamentalist perspectives within a theological paradigm. This approach contrasts sharply with the views of many other human rights thinkers and activists including Halliday (1996, 157), who is sceptical of the possibility of religious foundations for the idea of human rights, and highlights the secularist approaches of Gökalp and Atatürk. Third, it is important to avoid double standards and to recognise that - although the implementation of Shari'a law as a basis of public law in some countries raises particularly pressing issues - the relationship between modern international human rights law and many different religions is highly complex. Certain provisions in many different religions may be interpreted as being inconsistent with modern ideas about human rights and the position of many religions on human rights issues is changing and evolving<sup>18</sup>.

### Prospects for Islamic foundations for human rights

As Othman notes, these are complex issues involving "the validity and hegemony of certain religious interpretations over others, gender bias, patriarchy, and the politics of identity" (1999, 191). The difficulties and complexities involved are exacerbated by the fact that support for the idea of a separate Islamic concept of human rights is characteristic of a number of different movements, interests and agendas. The pamphlets on Islam and human rights by Tabandeh (1970) and Mawdudi (1980), together with the increasing number of official documents on Islam and human rights<sup>19</sup>, may be particularly illuminating in this context. In addition, the idea of a separate Islamic concept of the human rights of women has been promoted by movements for Islamization and fundamentalist movements in Muslim countries. Yet these difficulties and complexities should not be allowed to obscure the fact that millions of Muslims from all over the world rely on these deep-rooted Islamic traditions of tolerance, freedom, equity and rights as a foundation for criticising the violation of human rights. Hence, in response to the deteriorating human rights situation in the Sudan in 1997, an imam stated: "Islam does not accept oppression and confiscation of the rights of the people and suppression of the freedom of expression" [cited in Mayer (1999, 25)]. In Iran, a distinguished cleric and religious leader, the late Ayatollah Taleghani, reasoned that the religion of

Islam does not deprive people of their rights to protect, criticise, protest, discuss and debate.

#### **The words of the late Ayatollah Taleghani, a prominent Iranian cleric**

"The most dangerous of all forms of oppression are laws and restrictions forcibly imposed on people in the name of religion. This is what the Monks, through collaboration with the ruling classes, did with all the people in the name of religion. This is the most dangerous of all impositions, because that which is not from God is thrust upon the people to enslave and suppress them and prevent them from evolving, depriving them of the right to protest, criticise and be free. These very chains and shackles are the ones which the Prophet [Muhammad] came to destroy. Islam is an invitation to peace and freedom. Let us keep aside opportunism, group interests, forcible imposition of ideas and, God forbid, dictatorships under the cover of religion. [Let us] raise our voices with the toiling, oppressed, the deprived masses. Islam as we know it, the Islam which originates from the [Qur'an] and the traditions of Prophet, does not restrict freedom. Any group that wants to restrict people's freedom, [the freedom] to criticise, protest, discuss and debate, does not comprehend Islam". Cited in Mayer (1999, 25).

### **3.2 Antecedents in Confucian traditions of universalism and tolerance**

It is sometimes proposed that East Asian countries including China, Japan, Korea, Taiwan, Hong Kong, Singapore and Vietnam share a common Confucian culture. The precepts that are thought to be representative of this culture are often encapsulated in the term "Asian values". A second proposition - that Confucian culture and "Asian values" constitute an obstacle to the full implementation of international standards in the field of human rights - has also come to the fore in recent years, and was particularly influential in the negotiations at the World Conference on Human Rights. These international events have unleashed an unprecedented debate within East Asian societies about the nature and scope of so-called "Asian values" and their compatibility with ideas about human rights. Many Asian NGOs during the Vienna process contested the representation of Confucianism in terms of values that are opposed to modern human rights standards, and the representation of Confucian culture in terms of a monolithic set of "Asian values" has been challenged. Many authors have suggested that East Asia is a diverse region, with heterogeneous cultures and traditions, many of which are consistent with, and provide a foundation for, modern ideas about human rights. For example, Leys argues that:

"Imperial Confucianism only extolled those statements from the Master that prescribed submission to the established authorities, whereas more essential notions were conveniently ignored - such as the precepts of social justice, political dissent, and the moral duty for intellectuals to criticise the ruler (even at the risk of their lives) when he was abusing his power, or when he oppressed the people" (1997, xvi).

Sen (1997) also cautions against representations of a monolithic Confucianism, and suggests that the fact that certain elements within Confucius' Analects have been selectively invoked by critics of international human rights standards does not undermine the validity of other elements that are consistent with, and provide a Confucian foundation for, these standards.

"The championing of order and discipline can be found in Western classics as well. Indeed, it is by no means clear to me that Confucius is more authoritarian than, say, Plato or Augustine. The real issue is not whether these non-freedom perspectives are present in Asian traditions, but whether the freedom-oriented perspectives are absent from them" (Sen, 1997, 36).

Three injunctions issued by Confucius reflect an emphasis on the ideas of universalism and tolerance as a basis for general morality.

### **Universalism in Confucius' Analects**

"Chung-kung asked about benevolence. The Master said, '... Do not impose on others what you yourself do not desire'" (XII.2).

"Tzu-kung asked, 'Is there a single word which can be a guide to conduct throughout one's life?' The Master said, 'It is perhaps the word "shu". Do not impose on others what you yourself do not desire'" (XV.24).

"Fan Ch'ih asked about benevolence. The Master said, 'Love your fellow men'" (XII.22).

Source: Confucius ([c.480 BC] 1979)]

The method of Shu is central to Confucius' Analects. Shu is a process or method for discovering what other people wish or do not wish done to them. Individuals are required to undertake a thought experiment, whereby they put themselves in the position of others, and ask what, in that position, they would like or dislike, and to treat others accordingly. This requirement is expressed both as a negative obligation ("Do not impose on others what you yourself do not desire") and a positive obligation ("Love your fellow men"). As in other ethical systems, the principles of universalism and tolerance provide a basis for far-reaching interpersonal obligations. Individual conduct is governed by principles that provide an element of protection for others who are distant and different, and individuals are required to treat all people - not just one's family or those with which he or she has direct links. These elements of Confucius' Analects reveal the deep roots for the ideas of consistency and uniformity in ethics, and equality of treatment, in Confucian traditions and practices. The recognition that all individuals ought to be treated with equal respect, the idea of equality and consistency of treatment, provide a fertile foundation for the development of modern ideas of human rights.

Human rights scholars in East Asia have also challenged the representation of Confucianism in terms of values that suppresses individual criticism and encourage unconditional submission to authority. The work of human rights scholars on the Chinese mainland - including the work of Du Gangjian and Song Gang (1995) - has been particularly influential in this context. In direct opposition to the view that there is a cultural impediment to developing human rights in Chinese society, these authors suggest that Confucian precepts can provide a Chinese foundation for modern theories of human rights. The interpretation of these authors is that the Analects make clear that not every government is just, wise, or legitimate, that rulers can be wrong and incompetent. Where there is misrule, Confucius does not recommend absolute obedience - or unlimited submission to power - over individual freedom of expression, criticism and resistance. Indeed, Confucius rejects the idea of co-operation with non-benevolent rulers, and encourages actions of citizenship, independence and freedom of speech, criticism of government, the right to be a dissident, and resistance to arbitrary power.

### Freedom of expression in Confucius' Analects

"Zilu asked how to serve a prince. The Master said: 'Tell him the truth even if it offends him'" (14.22).

"When the Way prevails in the state, speak boldly and act boldly. When the state has lost the Way, act boldly and speak softly" (14.3). Source: Confucius ([c.480 BC] 1997).

The Analects also advise rulers about good government and responsibility. According to Du Gangjian and Song Gang (1995, 40), principles of universalism and tolerance expressed in the Analects were intended not only to govern individual conduct, but also to establish that rulers should not force their subjects to do what the subjects were reluctant to do. Clearly, Confucius was not a democrat, and took for granted a hierarchical and elitist system of rule. Nevertheless, the message at the heart of the Analects is that the power and authority of rulers is not unlimited, and that the common people will resist arbitrary and improper rule. Therefore, rulers should govern in the interests of the common people. This injunction begins with the satisfaction of material needs. Rulers should ensure that the people have sufficient food, and should not take away their means of subsistence by forcing them away from their land during the busy seasons. Punishment should be regulated.

"Tzu-kung asked about government. The Master said, 'Give them enough food ...'" (XII.7).

"The Master said, 'In guiding a state of a thousand chariots, approach your duties with reverence and be trustworthy in what you say; avoid excesses in expenditure and love your fellow men; employ the labour of the common people only in the right seasons'" (I.5).

"Tzu-chang said, 'What is meant by the four wicked practices?' The Master said, 'To impose the death penalty without first attempting to reform is to be cruel; to expect results without first giving warning is to be tyrannical;" (XX.2).

Source: Confucius ([c.480 BC] 1979).

Interpretations that emphasise the presence of elements in Chinese thought that are supportive of and consistent with the modern idea of human rights are not new. In 1947, UNESCO contributed to the process of the drafting of the Universal Declaration on Human Rights by inviting various thinkers and writers from different countries and cultures around the world to submit their ideas about human rights. Chung-Sho Lo, Professor of Philosophy in West-China University, suggested that the early translators of Western philosophy found it difficult to find an equivalent term for "rights" in Chinese, and that Chinese ethics traditionally emphasised the fulfilment of mutual obligations rather than the fulfilment of rights. However, in Chung-Sho Lo's view, this did not imply that the Chinese never claimed human rights. Indeed, Chung-Sho Lo expressed the view that the idea of human rights developed very early in China, and that the right of the people to revolt against oppressive rulers was established very early on.

"In the Book of History, an old Chinese classic, it is stated: "Heaven sees as our people see; Heaven hears as our people hear. Heaven is compassionate towards the people. What the people desire, Heaven will be found to bring about'. A ruler has a duty to heaven to take care of the interests of his people. In loving his people, the ruler follows the will of Heaven. So it says in the same book: 'Heaven loves the people; and the Sovereign must obey Heaven'. When the ruler no longer rules for the welfare of the people, it is the right of the people to revolt against him and dethrone him ... The right to revolt was repeatedly expressed in Chinese history ... A great Confucianist, Mencius (372-289 B.C.), strongly maintained that a government should work for the will of the people. He said: 'People are of primary importance. The State is of less importance. The sovereign is of least importance" [Chung-Sho Lo: UNESCO (1948, 186-7)].

## **ANTECEDENTS OF THE IDEA OF CIVIL AND POLITICAL RIGHTS IN CHINESE TRADITIONS AND HISTORY**

### **Concern with individual rights and the rule of law in ancient China**

**Law above power.** "Never alter a law to suit the whims of a ruler; law is superior to the ruler". Kuan-tzu, On Legislation, 4th to 3rd century B.C., China: (UNESCO,1969, 122).

**Individual rights and justice as a basis for harmony and unity.** "What makes society possible? Individual rights. What makes individual rights tenable? Justice. Therefore when justice and rights are adjusted, there is harmony. Where there is harmony, there is unity". Hsün-tzu, The Way of Kings, 3rd century BC, China: (UNESCO,1969, 522).

**Individual rights and well-being as a basis for corporate life.** "The consequence of individual life without mutual aid is poverty; the consequence of corporate life without recognition of individual rights is strife. Poverty means anxiety; strife spells misfortune. In order to relieve anxiety and eradicate strife, nothing is as effective as the institution of corporate life based on a clear recognition of individual rights." Hsün-tzu, 3rd century BC China: (UNESCO,1969, 303).

### **Concern with freedom from cruel and unusual punishment and the need for uniform, predictable laws in the *Annals of the Sui***

"Harsh penalties and rules that are not uniform must be entirely abolished. We establish laws and statutes in advance [before inflicting punishment] in the desire that men may no longer harbour the intention of transgressing and that the country may have regular punishments, according to the principle of punishing without anger ... [F]rom the days of the preceding dynasties it had become the invariable practice of the authorities to employ extra-legal methods in the interrogation of accused persons. Sometimes they used instruments [of torture to extort confessions], such as great cudgels, the flogging of bound [prisoners], the wheel, the boot, ankle-crushing, and the bastinado with laths. Under these varied and atrocious punishments, many accused persons resigned themselves to making false [confessions]. Even if [those accused] were handed over to justice in accordance with the letter [of the law] there were always manipulations [of the laws] and excesses, so that no man could justify himself. Nowadays all cruel methods have been entirely abolished". Legal treatise of Sui-shu, Annals of the Sui, 590-617: (UNESCO,1969, 456-457).

Chinese human rights thinkers have also challenged the view that there is a fundamental incompatibility between socialism and human rights. It has been variously argued that a range of political priorities and goals - such as political stability and order, economic growth, development, poverty reduction, the achievement of basic needs and the fulfilment of economic and social rights - should take priority over the implementation of political and civil rights. These views have been articulated in a range of different contexts and at different times in history. In China, as Yu



Haocheng (1995, 99) notes, the slogan that "democracy cannot feed people", and the idea that the implementation of the right to subsistence - which is reflected in the Chinese Constitution - constitutes an obstacle or barrier to the fulfilment of political and civil rights, have often prevailed. During the Cold War, ideological struggles over the meaning and content of human rights were reflected in international negotiations over international human rights standards, and socialist countries were often associated with an exclusive emphasis on economic and social rights. However, Chinese human rights scholars (eg Yu Haocheng, 1995) are increasingly challenging the view that economic and social rights should be prioritised over political rights. Indeed, challenges of this type are not new in China. In 1929, in a publication entitled "On Human Rights", Luo Longji wrote:

"Of course human rights include clothing, food and many other things more important than these two". (Cited in Yu Haocheng, 1995, 101.)

Furthermore, Chinese scholars are increasingly challenging the view that there is a theoretical incompatibility between Marx's works on the one hand, and the idea of human rights in the other. For example, in Xia Yong's analysis:

"Whether one starts from the logic of the thoughts of the whole human race or that of modern Western thought, obviously what Marx criticised was not the normative human rights, but the practice of human rights in real life... [I]t is very dangerous to regard Marx's empirical evaluation of human rights as his whole concept of human rights... Popular views such as 'human rights could not be applied in China' and 'human rights are but a way of the bourgeoisie in the West' etc., are examples of such a danger". (Cited in Yu Haocheng, 1995, 98-99.)

Indeed, Marx referred to the process of "political emancipation" - as reflected in the American and French Declarations on the Rights of Man - as "great progress" 20. As the following passage illustrates, Marx was a passionate defender of many civil and political rights.

#### **Karl Marx on the importance of freedom of the press**

"A free press is the eye of the spirit of the people, ever and everywhere open, the confidence incarnate which a people has in itself, the bond of words that links the individual to the State and to the world, the culture personified which transforms material struggles into spiritual struggles, and turns the crude and the concrete into the ideal. It is the confession without reservations of a people to itself ...It is the spiritual mirror in which a people sees itself - and self-knowledge is the first prerequisite for wisdom. It is the light of the public mind that can be carried to the humblest dwelling more cheaply than gas can be laid on. It is universal, omnipresent, all-knowing. It is the ideal world constantly springing from the real world and flowing back to it, always enriched in spirit, in order to bring fresh life to it". (Karl Marx Debates on the Freedom of the Press, Rheinische Zeitung, 1842: (UNESCO, 1969, 239).

### **3.3 Antecedents in Buddhist traditions of universalism and compassion**

Buddhism has many deep-rooted traditions of compassion, benevolence, universalism, tolerance and freedom. These traditions are applied as the basis for individual action, for inter-personal relations, and in public ethics. Many Buddhists believe that the ideals of the "righteous king" were reflected in the life, principles and actions of the great Emperor Ashoka, who ruled a huge Indian Empire in the third century B.C. Ashoka witnessed the violence and carnage that resulted from battles between his own armies, and those of the King of Kalinga (Orissa), with horror and remorse. Convinced that the human cost of violence and war are too high, and determined to learn

the lessons of human history, and to ensure that the tragedies of war and violence would not occur again, Ashoka renounced all violence and war. He converted to Buddhism, and set out to expand his influence not through annexation and force, but through "rightousness rule" - based on the idea of dharma, or right conduct. He developed new principles of public ethics and civil morality - reflecting the values of compassion, tolerance, benevolence, and impartiality - in an attempt to inaugurate a new era of justice and peace. He introduced new standards relating to the need for the tolerance of diversity; the obligations of leaders; the administration of justice; and concern with, and responsibility for, the fulfilment of basic needs. These principles and standards were declared in stone inscriptions across the Empire. Although Ashoka was a benevolent ruler, rather than a democrat, or an advocate of human rights in the modern sense, his elaboration and practical application of these new principles and standards are the bases of his reputation as a great leader and statesman, and Ashoka's idea of right conduct is often ranked alongside democracy as one of the great ideas in human history. [Sen (1997, 1999b, 235-238), Wood (1999, 70) and Morgan (1996, 60,76-78,83)].

### **Learning the lessons of human history : Ashoka's Edicts (3rd century BC India)**

**Tolerance.** "Never think or say that your own religion [Dharma] is the best. Never denounce the religion of others".

**Mutual respect and peaceful co-existence.** "(T)here should be the promotion of spiritual strength among men of all sects ... (T)here should be no extolling of one's own religion or deprecating of another's religion ... By acting otherwise, one injures one's own religion and also harms persons belonging to other religions ... Concord among all religions is surely desirable ... For this purpose are employed many officers ... (T)his is the fruit of all these measures, namely, that there are secured the promotion of one's own religion...".

**The costs of violence and war.** "(C)onquest ... was characterized by killing, death, or captivity of the people. That is the profoundly painful and regretful feeling of the beloved of the gods... [In war] there befall [to pious and innocent persons] violence, death, or the deportation of beloved kindred. The friends, esteemed comrades, companions, and kingsmen ... suffer a calamity, and that calamity proves to be a personal violence to them. This is the lot of all men and is considered deplorable by the beloved of the gods".

**The obligations of leaders.** "Just as I wish for my children that they should become endowed with all good and happiness of this world and of the other world, so I wish even for all men".

**Concern with the impartiality and uniformity of the laws.** "Since it is to be desired that there should be uniformity in law and also uniformity in justice, from this time forward such is my injunction ..."

**The right of appeal.** "To men on whom sentence has already been passed and who are in confinement or have been condemned to death, three days have been granted by me as their rightful respite in order that (during that interval) some of their relatives may submit appeals for their life ...".

**Concern with, and responsibility for, the fulfilment of basic needs.** "Everywhere, two kinds of medical treatment have been established...namely, medical treatment for men and medical treatment for animals. Medicinal herbs useful for men and useful for animals have been imported and planted wherever they were not to be found. Similarly, roots and fruits have also been imported and planted wherever they were not to be found. On the roads trees have been planted and wells have been dug for the use of men and

animals”.

“On the roads, banyan trees have been planted by me so that they should give shade to men and animals. Mango-groves have been planted. At every half krosa, I have caused wells to be dug. Rest-houses for the night have been built. Many water points have been provided in various places for the use of men and animals”

Source: (UNESCO, 1969; 98, 177, 179, 240, 242, 402-3, 465)

His Holiness The Fourteenth Dalai Lama of Tibet (1999) has highlighted the relevance of ancient Buddhist principles to ethical reflection and action in the contemporary world. In *Ancient Wisdom, Modern World*, he suggests that the capacity of all people to experience happiness and suffering is a fundamental aspect of the human condition and that the recognition of this shared capacity provides a foundation for modern views about shared human interests and common humanity. The notion of universalism is central to the Dalai Lama's approach and the Tibetan phrase of *shen dug-ngal-wa-la mi-sö-pa* (the "inability to bear the sight of another's suffering"/ the capacity to empathise with and participate in the suffering of others) is also directly relevant. According to the Dalai Lama, compassion should be undifferentiated and universal in scope and - given the tendency of individuals to ignore the needs and rights of others and to focus on their own narrow preferences - ethics is necessary as a means of broadening the sphere of individual empathy and concern. The practical application of ethical principles can help to ensure that the capacity of others to experience happiness and suffering is taken into account in individual thought and action. In the modern world, the growing acceptance of the universality of human rights reflects the need for this wider perspective. The experience of Nazi atrocities in Europe in the twentieth century demonstrated the necessity of legislation and international conventions as safeguards against future atrocities, to secure peace and to avoid suffering and pain. In addition, the Dalai Lama has called for a new global ethic that can help to develop "a sense of universal responsibility - of the universal dimension of our every act and of the equal right of all others to happiness and not to suffer" and to cultivate a culture in which "all human diversity is acknowledged and the rights of all are respected" (1999, 68, 171, 226).

Aung San Suu Kyi, the leader of the movement for democratic reform in contemporary Burma, has also invoked ancient Buddhist principles as a foundation for modern ideas about human rights.

#### **Aung San Suu Kyi on Freedom from Fear**

“Most Burmese are familiar with the four *a-gati*, the four kinds of corruption ... [P]erhaps the worst of the four is *bhaya-gati*, for not only does *bhaya*, fear, stifle and slowly destroy all sense of right and wrong, it so often lies at the root of the other three kinds of corruption ... [F]ear of being surpassed, humiliated or injured in some way can provide the impetus for ill will. And it would be difficult to dispel ignorance unless there is freedom to pursue the truth unfettered by fear. With so close a relationship between fear and corruption it is little wonder that in any society where fear is rife corruption in all forms becomes deeply entrenched ... The effort necessary to remain uncorrupted in an environment where fear is an integral part of everyday existence is not immediately apparent to those fortunate enough to live in states governed by the rule of law.

Just laws do not merely prevent corruption by meting out impartial punishment to offenders. They also help to create a society in which people can fulfil the basic requirements necessary for the preservation of human dignity without recourse to corrupt practices. When there are no such laws, the burden of upholding the principles of justice and common decency falls on the ordinary people ... The Universal Declaration of Human Rights of the United Nations proclaims that "every individual and every organ of society" should strive to promote the basic rights and freedoms to which all human beings regardless of race, nationality or religion are entitled. But as long as there are governments whose authority is founded on coercion rather than on the mandate of the people ... concerted international action to protect and promote human rights remain at best a partially realized struggle. There will continue to be arenas of struggle where victims of oppression have to draw on their own inner resources to defend their inalienable rights as members of the human family."

Cited in (Agosín, 1999, 80-84).

### 3.4 Antecedents in Indian traditions of universalism, tolerance and diversity

The High Commissioner for Human Rights has stated that the search for unity in cultural diversity is a particular responsibility of the United Nations. The Secretary-General of the United Nations has called on all people world-wide to do our part "to make possible a global civilization that is defined by its tolerance of dissent, its celebration of cultural diversity, and its insistence on fundamental, universal human rights" (Robinson, 1998). These ideas have foundations in deep-rooted Indian traditions of tolerance, mutual respect and peaceful coexistence. The ancient idea of unity in diversity reflects the ancient Hindu emphasis on oneness and truth. This idea was articulated and interpreted by the great Indian leader Mahatma Gandhi. For Gandhi, the search for truth is the search for human oneness. In contrast to the ideas of cultural hegemony, Gandhi argued that the message conveyed by the idea of unity in diversity is one of universalism, tolerance, mutual respect, and peaceful co-existence. Gandhi's life and actions reflected the hope that a modern, free and independent India would be constructed on the foundation stones of this ancient idea.

#### **Building a culture of tolerance, peaceful co-existence and mutual respect: Mahatma Gandhi on the Indian tradition of unity in diversity.**

"I think that we have to find unity in diversity...we are all children of one and the same God and, therefore, absolutely equal".

"The need of the moment is not one religion, but mutual respect and tolerance of the devotees of the different religions. We want to reach not the dead level, but unity in diversity. Any attempt to root out traditions, effects of heredity, climate and other surroundings is not only bound to fail, but is a sacrilege".

"The Gujarat Vidyapith hopes to build a new culture based on the traditions of the past and enriched by the experience of later times. It stands for the synthesis of the different cultures that have come to stay in India. This synthesis will naturally be of the Swadeshi [Indian] type where each culture is assessed its legitimate place, and not of the American pattern, where one dominant culture absorbs the rest, and where the aim is not towards harmony, but towards an artificial and forced unity".

### Kautilya, freedom and the obligations of rulers

Sen [(1997) and (1999b, 235-238)] has highlighted the importance of Kautilya - a contemporary of Aristotle, who lived in the fourth century B.C. - in thinking about the cross-cultural foundations of the idea of human rights. Although Kautilya's writings are often cited as proof that freedom and tolerance were not valued in the Indian classical tradition, Sen offers an alternative interpretation. Noting that "the focus on freedom is clear enough in Kautilya as far as the upper classes are concerned", Sen suggests that in so far as a view of the good life emerges from Kautilya's writing, it is a view that is entirely consistent with a freedom-valuing ethical system. Furthermore, Sen suggests that Kautilya's focus on freedom for the upper classes is not so very different from the ancient Greek focus on free men, as opposed to slaves or women.

"Kautilya is no democrat, no egalitarian, no general promoter of everyone's freedom. And yet, when it comes to the characterisation of what the most favoured people - the upper classes - should get, freedom figures quite prominently. The denial of personal liberty of the upper classes (the so-called "Arya") is seen as unacceptable. Indeed, regular penalties, some of them heavy, are specified for the taking of such adults or children in indenture - even though the slavery of the existing slaves is seen as perfectly acceptable" [Sen (1997, 37)].

Conventionally, Kautilya is recognised not for his influence on the idea of freedom, but for his views on governance, the obligations of rulers and political economy. Kautilya's main work Arthashastra ("economic science") was profoundly influential. In interpreting this work, Sen suggests that Kautilya attaches little importance to political or economic equality, and that his vision of the good society is strongly stratified according to lines of class and caste. In his attempts to promote order in the kingdom and to ensure the happiness of subjects, Kautilya is often remembered as a "benevolent autocrat", whose power is to be maximized through proper organisation - if necessary, through the violation of freedoms. Yet Sen suggests that the Arthashastra presents ideas and suggestions on practical subjects such as famine prevention and administrative effectiveness that remain relevant even today. Kautilya recognises the obligations of the king to "provide the orphans, the aged, the infirm, the afflicted, and the helpless with maintenance," along with providing "subsistence to helpless women when they are carrying and also to the [newborn] children they give birth to". Clearly, this acknowledgement by a benevolent autocrat of the benefits of undertaking paternalistic state assistance to the poor and destitute, is a far cry from valuing the freedom of all people to decide how they wish to live, or from the modern idea of human rights. Nevertheless, in tracing the historical antecedents of the idea of economic and social rights, the significance of the obligations of government to poor and vulnerable groups - and of the value of government action in relation to famine relief - cannot be denied.

### Traditions of tolerance within the Moghul Empire

In addition, in re-appraising the work of certain non-Western thinkers and actors in relation to modern ideas about human rights, Sen (1997, 37) has suggested that the Moghul emperor Akbar, who ruled between 1556 and 1605, was one of the "powerful expositors and practitioners of tolerance of diversity in India". Although Akbar was not a democrat or a proponent of the modern idea of human rights in the modern sense, he nevertheless valued religious and social diversity,

arguing against religious interference, and for state policies of religious tolerance. Underlining the lessons of human history, Akbar noted:

"In the past . . . to our shame, we forced many Hindus to adopt the faith of our ancestors. Now it has become clear to me, that in our troubled world so full of contradictions, it cannot be wisdom to assert the unique truth of one faith over another. The wise person makes justice his guide and learns from all. Perhaps in this way the door may be opened again, whose key has been lost" [cited in Wood (1999, 77)].

In addition to emphasising the importance of tolerance in relation to belief and practice, Akbar advocated the fair and non-sectarian treatment of subjects, and attempted to build on the diverse traditions represented in the Empire - Muslims, Hindus, Jains, Christians, Jews, Zoroastrians and others - to formulate a "synthesis" of religious views. As Sen points out, these ideas may not have been so easily tolerated in parts of sixteenth century Europe, where the Inquisition was being pursued. Indeed, despite the vies of some exponents of Hindu politics in contemporary India, the tolerant nature of much of Moghul rule has often been recognised in Indian thought. For example, Sri Aurobindo stated that:

"The Moghul empire was a great and magnificent construction and an immense amount of political genius and talent was employed in its creation and maintenance. It was splendid, powerful and beneficent and, it may be added, in spite of Aurangzeb's fanatical zeal, infinitely more liberal and tolerant in religion than any Medieval or contemporary European kingdom or empire" [cited in Sen (1997, 38)].

#### Traditions of universalism, tolerance and equality in the Sikh religion

The Sikh religion has also made an important contribution to the contemporary idea of human rights through its emphasis on the ideas of universalism, tolerance and equality. Indeed, many Sikh's believe that the modern concern for human rights for all reflects the messages of Guru Gobind Singh ("Recognise the oneness of the human family"), Guru Nanak ("[F]orget all ideas of caste or race") and Guru Amar Das (who condemned the practices that adversely affected the interests of women, including the practice of Sati and female infanticide [Singh (1990, 11) and Kaur-Singh (1990, 21)]. Hence one Sikh scholar has expressed the view that:

"In stressing the equality of all human beings, men and women, their emphasis on social and religious tolerance and their brave and forthright attack on all notions of caste, class or racial superiority [the Gurus] gave us, in a sense, the forerunner of the United Nations ideal, the key, not only to sanity and survival in the world today, but also to the positive realisation that different cultures, different ways of life, are not barriers between people, but gateways to a fuller understanding and enrichment of life itself" [Singh: cited in Nesbitt (1996, 121)].

#### Contributions to the UNESCO Human Rights Research Project (1947-8)

In response to UNESCO's invitation in 1947 to thinkers and writers from different countries and cultures around the world to submit their ideas about human rights, S.V. Puntambekar from Nagpur University contributed a piece on The Hindu Concept of Human Rights. He stated that:

"Great thinkers like Manu and Buddha have laid emphasis on what should be the assurances necessary for man and what should be the virtues possessed by man. They have propounded a code as it were of ten essential human freedoms and controls or virtues necessary for good life. They are not only basic, but more comprehensive in their scope than those mentioned by any other modern thinker. They emphasise five freedoms or social assurances and five individual possessions or virtues. The five social freedoms are (1) freedom from violence (Ahimsa), (2) freedom from want (Asteya), (3) freedom from exploitation (Aparigraha), (4) freedom from

violation or dishonour (Avyabhichara) and (5) freedom from early death and disease (Armitatva and Aregya). The five individual possessions or virtues are (1) absence of intolerance (Akrodha), (2) Compassion or fellow feeling (Bhutadaya, Adreha), (3) Knowledge (Jnana, Vidya), (4) freedom of thought and conscience (Satya, Sunrta) and (5) freedom from fear and frustration or despair (Pravrtti, Abhaya, Dhrti)" [Puntambekar: UNESCO (1948, 197)].

Mahatma Gandhi also responded to the UNESCO invitation, by emphasising the importance of obligation as a basis of rights.

"I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for" [Gandhi: UNESCO (1948, 18)].

### Ghandi and the non-violent path to human rights

Gandhi's life and work demonstrated that ancient teachings of non-injury, non-violence, peaceful co-existence and mutual respect can be successfully applied in the struggle for rights in the modern world - in struggles against foreign domination, economic exploitation, the caste system, and religious and ethnic supremacy, and in struggles for national independence, freedom and human rights. New campaigns that aimed to improve the position of women and to fulfil the basic human rights of the so-called "untouchable" caste - including rights to education for girls and boys, rights to access water from public wells, and rights to use temples for worship - grew into national movements under Gandhi's leadership. In leading these struggles and building these campaigns, Gandhi explicitly appealed to the idea of rights.

"I wish I could persuade everybody that civil disobedience is the inherent right of a citizen...Civil disobedience...becomes a sacred duty when the State has become lawless, or ... corrupt ...[The right to civil disobedience] is a birthright that cannot be surrendered without surrender of one's self-respect" [cited in (King, 1999, 286-7)].

In addition, Gandhi appealed to elements of the diverse range of Indian religions - including appeals to Hindu messages of unity in diversity, Sikh messages of common humanity, the Christian message of universal love, Islamic messages of universalism, obligation and justice, Buddhist message of compassion, tolerance and peace, and Jain messages of noninjury and nonviolence. The ancient Jain principle of the the renunciation of intent to injure was central to Gandhi's philosophy and strategies for action. Gandhi argued passionately that struggles and campaigns for justice, freedoms and rights, the means must always be as pure as the ends.

"I have never believed, and I do not now believe, that the end justifies the means. On the contrary, it is my firm conviction that there is an intimate connection between the end and the means, so much so that you cannot achieve a good end by bad means" [cited in King (1999; 280).]

For Gandhi, the principle that the means must be as pure as the ends is a matter of morality, but also of tactics. In order to guarantee that the intended results will be secured, the means of action should always embody and/or reveal the ends of action - the purpose or goal to be achieved.

Arguing that the means or method of a struggle or campaign ought never to be separated from the results or ends to be achieved, Gandhi applied these ideas as a basis for action in struggles and campaigns for independence, freedoms and rights. His framework for ethics and action revolved around the ideas of ahimsa (noninjury/ nonviolence) - the means of action, "a kind of power whose essence is nonviolence"; and satyagraha, "the power of truth", a "process of educating public opinion such [sic] that it covers all the elements of society and in the end makes itself irresistible".

As a consequence of this process, the power in ahimsa is transformed into political action and the intended end of action - that is, truth - is secured (King, 1999;14-15,309).

Gandhi's life and work demonstrate the power and efficacy of nonviolence in struggles for change and reform. At the end of the twentieth century, and the beginning of the twenty-first, the conviction that non-violence is an effective and practical alternative to force changes in ideas, laws and systems of governments, is at the forefront of ideas about human rights. According to one author, "[t]he teachings of Gandhi emphasise his belief that human beings have at their disposal the power to settle group conflicts without violence". This idea of latent "people's power" was an important influence on the "revolutions" of the late 1980s in Eastern Europe, and is central to the ideas of the Czech thinker and human rights campaigner, Václav Havel. It is influential in human rights campaigns in diverse countries including Burma and Mexico (King, 1999, 16, 369-477).

### **3.5 Some Christian and Jewish perspectives: Rights-based strategies and the non-violent struggle against racism in the United States; liberation theology; and the vision of liberation.**

#### **Discrimination, racism and the human rights agenda**

Discrimination and racism are a central human rights issue in many countries. A recent report by Amnesty International noted that although the USA was founded in the name of democracy, political and legal equality, and individual freedom - and despite its claims to international leadership in the field of human rights, and its many institutions to protect individual civil liberties - the USA is failing to deliver the fundamental promise of rights for all. In certain cases, the authorities have failed to prevent repeated violations of basic human rights, and despite serious attempts this century to overcome racism, the USA has not succeeded in eradicating the discriminatory treatment of blacks (African Americans), Latinos and other minority groups. Slavery was formally abolished in 1865, but racial segregation remained legal until the 1960s, and despite long and proud traditions of struggle for anti-racism and civil rights, surveys suggest that many in the USA are unfamiliar with the rights they possess, and do not appreciate that the Constitution and the Bill of Rights are there to protect everyone in the USA from abuse of power by government. [Amnesty International (1998, 1-13)]

In the US in the 1950s and 1960s, Gandhi's vision of the non-violent struggle for human rights was taken up by the symbolic leader of the civil rights movement, The Revd. Dr. Martin Luther King Jr. In reflecting upon "overcoming, without monstrous and widespread violence, the perversity of racial injustice", King argued that the nonviolent resistance of Gandhi was the "only morally and practically sound method open to oppressed people in their struggle for freedom". The "first principle for the civil rights movement was that the 'means must be as pure as the end'". King also supported the Gandhian proposition that "a pure motive can never justify impure or violent action" and the nonviolent principle that "ends and means must cohere". He argued that non-violence was a practical and effective - as well as a moral - alternative for the struggle for rights and freedom, and that non-violent means are the only route by which lasting bitterness can be avoided, cycles of violence and retribution can be broken, and a culture of mutual respect, reconciliation and peace can be constructed. By adopting nonviolent struggle as a form of social protest and mobilization for legal reform, King hoped to prevent white citizens from feeling defeated and humiliated, and to



avoid the temptation for blacks to take on "the mentality of victors" (King, 1999; 96, 168, 282, 284). Hence:

"Seven years after India attained its freedom, on the other side of the globe a nonviolent protest began that was based on the same principles and understanding of power. It soon evolved into a regional mass movement that sought to persuade a nation to confront its institutionalized racism and change the laws that upheld it. Within one decade, major national legislation had destroyed the legal support for the racial caste system in the United States" (King, 1999; 197).

Ideas of universalism and interdependence were also at the centre of King's agenda for reform. These ideas were reflected in King's Last Sunday Sermon. In this revealing statement of faith and hope, King made reference to the message of universalism and interdependence articulated by the poet John Donne, and made these ideas relevant to modern conditions.

"We are challenged to develop a world perspective. No individual can live alone, no nation can live alone, and anyone who feels that he can live alone is sleeping through a revolution. The world in which we live is geographically one. The challenge that we face today is to make it one in terms of brotherhood" [cited in King (1999, 518).]

In addition, in leading and building the campaign for civil rights, King invoked American democratic traditions in support of the claims of black people in America for civil rights. As King declared in his speech to the mass meeting at Holt Street Baptist Church, Montgomery, 5 December 1955: "The great glory of democracy is the right to protest for rights" (King, 1999, 314). King located the claims for civil rights for black people squarely within the traditions of the political revolutions in Europe and America in the eighteenth and nineteenth centuries. Discriminatory laws denied black people their rights as human beings (King, 1999, 142-3) and the struggle against exclusion from political power and for full political participation was a struggle for equal rights and opportunities based on the ideals established in American political and constitutional history.

"They are seeking to save the soul of America. They are taking our whole nation back to those great wells of democracy which were dug deep by the founding fathers in the formulation of the Constitution and the Declaration of Independence. In sitting down at the lunch counters, they are in reality standing up for the best in the American dream" [cited in King (1999, 315)].

Finally, in leading the mass movement for civil rights, King built on the deeply-rooted religious traditions of hope, faith, liberation and resistance of the African-American church. As one veteran of the civil rights movement explains, traditions of religious resistance by black people in America can be traced back through the nineteenth, eighteenth and seventeenth centuries. These traditions had their origins in rebellions on slave ships, and were fuelled by the experience of slavery.

"The tradition of black, Southern grass-roots protest and resistance - starting with the leaders of slave uprisings and rebellions, moving on to untold numbers of slave preachers, and up through the many local figures whose actions taken together would comprise the mid-twentieth century civil rights movement - started in the church ... King brought to the practice of preaching his deep roots in an historic church ... With strong biblical mandates for the overthrowing of injustice, there evolved a vocabulary that formed the basis for the modern quest for freedom" (King, 1999, 98-99).

The movement for civil rights in America, and the life and work of Martin Luther King, symbolise the important role played by religious hope and faith, the vision of liberation, and traditions of religious resistance and action, in the movement for human rights. Millions of thinkers and activists from all over the world have been inspired and motivated by Old Testament traditions of liberation and hope and New Testament traditions of the liberation of the oppressed (e.g. Luke 4) and special concern for the poor and needy - in which the poor are said to be specially blessed and deserving of special concern (e.g. the Sermon on the Mount, Mathew 5-7, Luke 6:20 and Mark: 10:21). For example, in Guatemala, the thinker and activist Rigoberta Menchú, who has been at the forefront of campaigns for the human rights of indigenous groups, has spoken of the motivation and

inspiration from her Christian faith and commitment (1984, 141). The liberation theology movement that emerged in Latin America in the 1960s also built on these traditions. Religious thinkers such as Gustavo Gutiérrez and Leonardo Boff set out to examine the spectrum of Christian faith from the standpoint of the poor and oppressed and to establish a clear Biblical basis for action for and by the poor. The liberation theology movement now has millions of followers in many different countries throughout the world and is an important force in campaigns for human rights, particularly campaigns for the human rights of poor and marginalized groups [Boff and Boff (1987) and Sigmund (1993)]. In South Africa, the role of the Christian Church in the struggle for human rights and against apartheid is symbolised by the religious and human rights thinker, Archbishop Desmond Tutu, who has conveyed a message of justice, peace, reconciliation and healing, in the struggle for human rights. The former President of South Africa, Nelson Mandela, has repeatedly acknowledged the important role of many different religions in the struggle for human rights in South Africa, and - in paying tribute to the contribution of Jewish people to the struggle for human rights in South Africa - has highlighted the importance of the messages of hope and liberation inspired by the Old Testament.

“(T)he Passover festival, commemorating the emancipation from slavery of the children of Israel in Ancient times, carries a message of universal human significance that has moved millions throughout history, transcending all boundaries of geography, race, or creed. The figure of Moses, the liberator, has served as an inspiration to every people who have been compelled to struggle for their liberation. The immortal words he spoke to Pharaoh, “let my people go!” reverberate through the corridors of time” [Mandela (1992, 159)].

### 3.6 Antecedents in African traditions and cultures and the need for new theoretical frameworks

Human rights activists and thinkers have challenged the view that the modern idea of human rights is alien to traditional African values and practices and irrelevant to African needs and priorities. As Annan has remarked:

"I am aware of the fact that some view [the concept of human rights] as a luxury of the rich countries for which Africa is not ready. I know that others treat it as an imposition if not a plot by the industrialized west. I find these thoughts truly demeaning of the bearing for human dignity that presides in every African heart" [Annan (1997b): cited in Bankie et. al. (1998,v)].

In responding to relativism, human rights thinkers and activists often argue that elements of traditional African thought can provide foundations for modern theories of human rights. For example, Neto analyses the question of the origins of human rights in the context of Angolan society, noting that:

"In seeking to understand humanity we should not divorce the être humain from his/her culture ... In our area, the world is seen as built on a foundation of circulating energies, in which the vital principle is the anima. Thus the origin of animism. Our philosophy seeks to establish harmony and equilibrium amongst anima ... What is fundamental to our culture is respect for others and the complementarity of differences. In this context, to define African human rights is to recognise the harmony, dignity, equality and inalienable rights of all members of the human family" (1998, 34). Wiredu identifies the presence of many human rights values in traditional Akan thought. The term Akan refers to a group of related languages found in West Africa and to the people who speak them, living predominantly in Ghana and parts of Côte d'Ivoire. He suggests that:

"Akkan thought recognised the right of a newborn to be nursed and educated, the right of an adult to a plot of land from the ancestral holdings, the right of any well-defined unit of political organization to self-government, the right of all to have a say in the enstoolment or destoolment of their chiefs of their elders and to participate in the shaping of governmental policies, the right of all to freedom of thought and expression in all matters, political, religious, and metaphysical, the right of everybody to trial before punishment, the right of a person to remain at any locality or to leave, and so on" (1990, 257).

Deng argues that certain human rights values can be identified in the traditions and practices of the Dinka of Southern Sudan. In his view, "there can be hardly be any doubt ... that some notions of human rights are defined and observed by the Dinka as part of their total value system" (1990, 271). While it is true that traditional Dinka society was highly stratified and characterised by inequalities, notions of human rights and human dignity nevertheless formed an integral part of Dinka value systems - in terms of both the overriding goals for life and ideals for relationships between people. Deng suggests that these deeply-rooted values could be of practical application today, providing a basis for cross-cultural communication in Sudan, and enriching the process of universalization in the promotion of human rights. Others have emphasised that the ideas of the fulfilment of basic needs and distributive justice are deep-rooted in many African societies and traditions, and these ideas are often cited as antecedents of modern theories of economic and social rights. For example, Kazenambo suggests that in some cultures in Namibia, land was distributed to families for use on the basis of need. While recognising that societies were stratified - not only by age and sex, but also into castes of nobles, freemen and slaves - and that a certain proportion surplus food was given to the chief, Kazenambo notes that the Chief's control over surplus food was a "stewardship" on behalf of the group. Food was distributed for ritual occasions or stored for periods of poor harvest in the future, and Kazenambo expresses the view that mechanisms of this type reflected the principle (if not always the practice) that each individual was guaranteed adequate land for his or her sustenance (1998,118).

The importance of the oral tradition is particularly influential in Africa, and important values are often conveyed by the spoken word. Human rights activists and thinkers have emphasised the importance of citing those traditional African proverbs that are consistent with, and supportive of, modern notions of human rights.

#### **African proverbs**

**Equality.** "Men are not like bundles of millet, among which it is advantageous to choose the biggest." (The need to treat all men with equality. Against chiefs who have personal preferences. Songhai proverb).

**Justice.** "The poor man pleads, the judge listens". (Do not be your own justiciar; all are entitled to justice. Amharic proverb, Ethiopia).

"Do not accept a verdict given in your absence". (Djerma-Songhai proverb, Africa)

"One should not oppress with one's size or might". (It is wrong for a strong man to oppress the weak. Akan proverb, Ghana.)

"Whatever is unjust towards others is not worthy of the name Justice". (Djerma-Songhai proverb, Africa)

**Diversity.** “You cannot insist that everyone shall behave in the same way”. (Burundi proverb)

**Reciprocity.** “One who does not wish to be abused, does not abuse” (Ibo proverb, Nigeria)

**Respect.** “Trampling on another’s right to seek your own ends in disappointment” (Akan proverb, Ghana)

**Respect for women and the girl child** “Whether man or woman, rich or poor and so on, there are no basic differences; all are humans born of woman and doomed to die” (Mongo proverb, Congo)

“When a python is killed, men go to see, and when a leopard is killed, they also go and admire, for both are noble beasts. Likewise with man: whether a woman is delivered of a daughter or gives birth to a son, it is the same; both are human. Whether a man be rich or poor, we should hold him in affection, for he is man.” (Mongo proverb, Congo).

“I would have you know that another person’s right is a live coal; if you take hold of it, it will burn your hand”. (Djerma-Songhai proverb, Africa)

**Protection of the poor.** “Never deprive a poor man of his possessions” (Burundi proverb).

**Limits on the power of the chief.** “Where man is denied, the devil himself loses his rights. (A protest against oppression by the chief and a warning to him. The Fulani say that a chief whose subjects are all slaves is not a chief, because nobody dares to tell him the truth. Power is a dialogue. Hala, in Fulani, means “right”, but also, literally, “speech”, word”, “logos”. Fulani proverb).

UNESCO (1969; 43, 119, 189, 240, 272, 302, 390, 451, 452, 513)

The view that the modern idea of human rights values is irrelevant to contemporary African needs and priorities has also been widely challenged. It is often argued that the lessons of the historic struggle for human rights in South Africa provide overwhelming evidence of the undeniable relevance of international human rights standards to the African Continent.

### **Are human rights a Western cultural bias? The lessons of the history of the struggle for human rights in South Africa**

The history of the struggle for human rights in South Africa illustrates the relevance of international human rights standards to all people, in different countries and cultures, and challenges many myths about the “Western” nature of human rights. Nelson Mandela has highlighted the importance of the Universal Declaration of Human Rights (1948) for this struggle. The principles enunciated in the Universal Declaration served to vindicate the justice of the struggle against apartheid, and raised the challenge that freedom, once achieved, would be dedicated to the implementation of human rights standards (1998).

“It is not a widely known fact that during the Second World War, after Churchill and Roosevelt concluded the Atlantic Charter, the then-president of the ANC, Dr. A.B. Xuma, appointed a blue-ribbon committee of African thinkers and political leaders to draw up a charter for Africa, applying

the principles embodied in the Atlantic Charter to the African continent. That document, titled "The African Claims" remains one of the most important statements of the central values subscribed to by the ANC. Anyone who reads it, even today, will agree that it is one of the best contributions to this universal human rights culture emanating from our country" (1991, 78).

The United Nations was involved in human rights issues arising from the South African situation from 1946 onwards. Violations of human rights were investigated and apartheid was denounced by the UN General Assembly as a crime against humanity (Reedy, 1986, 36). This action proved that the systematic violation of human rights in South Africa was not a "domestic" matter - falling within the aegis of "national sovereignty" - but was of legitimate and legal concern to the entire world body. Within South Africa, the principle that international concern with human rights does not stop at geographical boundaries was well understood by the victims of the apartheid regime. Accusations of "Western bias" were rejected on the grounds that all people are entitled to human rights. As the South African Constitutional Judge Albie Sachs has noted:

"In South Africa, it was not people whose ancestors had come from Europe who had fought most consistently for what is called Western democracy, but people of African and Asian origin. While most people of European descent were extolling the notion of racial dictatorship in either repressive or benign form, the idea of non-racial democracy was kept alive in the prisons, the underground and in exile largely by blacks. In the light of our history, therefore, nothing was to be gained by fixing the label "Western" to the word "democracy" ... (1998, 40-41).

Following the abolition of the apartheid system, The Bill of Rights entrenched in the new South African Constitution (1996) is a cornerstone of democracy, affirming the values of human dignity, equality and freedom, and enshrining the rights of all people. These include rights to life and property, to freedom and security of the person; rights to freedom of religion, belief, opinion and expression; rights to peaceful assembly and to freedom of association and movement; rights to equality before the law, to a fair trial; and rights that relate to detention and imprisonment. Rights relating to the freedom to choose work and labour relations, to culture and information, to the environment, and children's rights, are also included. In addition, The Bill of Rights recognises economic and social rights - including the rights to adequate housing, healthcare, food, water and social security, education - and the responsibility of the State, within available resources, to achieve the progressive realisation of these rights. Finally, slavery, racial and sexual discrimination, and the deprivation of citizenship, are prohibited. The need to implement these human rights, and to create a sustainable culture of human rights, is now a priority in South Africa.

The role of international human rights standards in the struggle against apartheid, and the centrality of the ideas of democracy and human rights in the new South Africa, demonstrates the importance and relevance of the idea of human rights in Africa, and provides a historic example. To quote Albie Sachs again:

"Democracy and human rights do not belong to any part of the world, even less to any race. They may be likened to a single giant tree with roots in all the regions of the world, nurtured by the sufferings and struggles of people everywhere. Just as the world helped the struggle against apartheid and for democracy and human rights in South Africa, so did the South African struggle, the negotiated settlement, the policy of reconciliation and the process of transformation help the world. The tree of democracy in the world grows stronger because of its roots in our continent; our continent gains strength because it is organically connected to that tree" (1998, 45).

African influences and the evolving human rights agenda

The modern idea of human rights is not static, but is dynamic and evolving, and African concerns and priorities are influencing the contemporary agenda in many different ways. For example, African perspectives have highlighted the need for new thinking about accountability in the field of human rights. In Nigeria, the role and responsibilities of the major multinational oil companies in respect of human rights violations has come to the fore in the wake of the "Ogoni crisis" and the execution of Ken Saro-Wiwa. Given the dominant position of oil producing companies in the national economy, the need for a broader concept of international obligation in relation to the protection and promotion of human rights has come to the fore. Although international human rights law is formally only binding on states, increased emphasis is being placed on the responsibilities of other actors, and new standards of corporate responsibility are beginning to emerge<sup>21</sup>. Similarly, recent thinking about the role and responsibility of the International Financial Institutions in relation to international human rights standards - civil, political, economic, social and cultural - has been influenced by African perspectives, and the view that international financial institutions are not exempt from obligations in relation to all human rights - economic, social, cultural, civil and political - is becoming increasingly influential<sup>22</sup>. African human rights thinkers and activists have long since emphasised the importance of economic and social rights, helping to highlight this concern in international fora, and the idea of the indivisibility and interdependence of all human rights is now a crucial element in defining the nature and scope of international human rights standards<sup>23</sup>. For example, the Senegalese human rights advocate, and Secretary-General of Amnesty International, Pierre Sané, has rejected the idea that economic development is faster where free speech and other rights are constrained, commenting that "[n]owhere has it been demonstrated that in order to develop you need to torture". In addition, Sané has highlighted the centrality of economic and social rights to the civil and political rights agenda.

"The World Bank, through its economic programme, is imposing an economic order that means reducing social rights, by cutting health and education policies. Governments have to restructure their economies in order to pay back their debts and they use force in order to impose their views ... We [at Amnesty International] continue to focus on political killings and disappearances... But those violations are [often] committed against people who want to change their society, who want to change economic relations, to change social conditions, so by working for them we are indirectly working for the indivisibility of human rights ... While we are not working directly with economic rights ... [m]ore and more ... [there is] a convergence of all NGOs working in development and human rights<sup>24</sup>".

Hundreds of millions of people in Africa have inadequate access to basic necessities such as food, jobs, water, shelter, education, health care and a healthy environment, and African perspectives have been important in bringing the idea of extreme poverty as a violation of human rights - and the human right to development - to the centre of the international agenda. The recognition that the implementation of many human rights is not cost-free - together with the existence of resource constraints in many African countries - has resulted in a growing acceptance of the view that high levels of international debt constitute an obstacle to the achievement of human rights<sup>25</sup>. Indeed, the identification of specific obstacles to the full implementation of all human rights - including the full implementation of economic and social rights and the right to the development - and of the special problems of the developing countries in achieving these objectives, are now important elements of human rights analysis and fact-finding. The experiences of resource-constrained African countries has influenced recent thinking about the role and responsibilities of developed countries in promoting and protecting all human rights world-wide. The importance of the international obligation to assist has been highlighted and this priority is giving rise to new thinking

about human rights, development, international co-operation, assistance and aid.

### The evolving idea of human rights and the need for new theoretical frameworks

The evolving idea of human rights raises the need for new theoretical frameworks in which the proposition that poverty is a violation of human rights can be analysed more adequately. For example, Mrs. Mary Robinson, the UN High Commissioner for human rights (1997, 6) has stated that "(p)overty itself is a violation of numerous basic human rights". In what type of theoretical framework can this proposition be made sense of? This is a difficult and controversial question and raises many complex debates. Some authors have argued that poverty is not a denial of basic human rights, and that the counter-claim is of rhetorical value only. In contrast, Sen's work on freedom, rights and capabilities contributes to the development of a framework in which the proposition that extreme poverty is a violation of basic human rights can be analysed more adequately. The emerging paradigm shift in ethics, economics and development away from welfare and utilitarianism - and towards capabilities and rights - is central to this debate<sup>26</sup>.

#### **The evolving concept of human rights: The need for new theoretical frameworks.**

Sen has suggested that the assessment of 'value' in ethics and economics ought to go well beyond utilities, and that the evaluation of states of affairs ought to take explicit note of the violation and fulfilment of rights (1996, 26). However, in Sen's view, two common frameworks for rights-based reasoning - welfarist frameworks on the one hand, and deontological frameworks on the other - are unsuitable. Welfarist frameworks (including utilitarianism) are unsuitable because they are based on a narrow conception of human well-being, and fail to give intrinsic weight to the violation and fulfilment of individual rights. In contrast, deontological frameworks do give intrinsic weight to the violation and fulfilment of individual rights. However, these are based on an outcome-independent characterisation of rights, and are associated with the idea that rights are absolute constraints that cannot be traded-off under any circumstances. In Sen's view, this idea is "fundamentally defective". The claim that moral evaluation can be indifferent to the consequences of the exercise of rights is "implausible" and is undermined by problems of "multilateral interdependence" that arise "in valuing rights in a society" (1984, 311-315). In addition, deontological frameworks provide inadequate foundations for the ideas of positive freedom and positive obligation, and for rights-based claims arising from famines, hunger and poverty (1982c; 1987a, 56-57&70-78; 1996). Hence in Sen's view:

"(T)he failure to introduce fulfilment and non-realization of rights in the evaluation of states of affairs produces a lacuna that can scarcely be made good either by inflexible deontological constraints used without consequential evaluation or by trying to catch the importance of rights in terms of the metric of utilities" (1982a, 13). "(T)he greatest scope for moral obligation to relieve hunger may arise in particular moral structures which are consequentialist but not welfarist" (1982c, 358).

Against this background, Sen has advocated the development of new frameworks for rights-based reasoning in which the violation and fulfilment of the "traditional" negative freedoms (liberty, non-discrimination, freedom of expression etc.) - as well as claims like "the right to freedom from hunger" and "the right to adequate means" - can be analysed more adequately. Many of Sen's ideas - including those of metarights (1982c), entitlements (1981; 1982c; 1984, 310-315), capability and functioning (1982b, 1984, 1985abc, 1987b, 1992a, 1993), wellbeing and agency

freedom (1985b), effective freedom and counterfactual choice (1992a, 66-69; 1993, 44-46) and social-choice-formulations of freedom and rights (1970,1991,1992b,1996) - are directly relevant to this project. These ideas challenge the outcome-independent characterisations of freedom and rights proposed in Hayek (1960, 1982) and Nozick (1974). They suggest an alternative framework for valuing negative and positive freedoms, and for grounding negative obligations of restraint and omission, as well positive obligations of protection, support and aid. In this way, “minimal demands of well-being (in the form of basic functionings, e.g. not to be hungry), and of well-being freedom (in the form of minimal capabilities, e.g. having the means of avoiding hunger)”, can be characterised as rights that “command attention and call for support” (1985b, 217).

Sen has developed the idea of a capability-rights system in this context. In contrast to Nozick’s (1974) characterisation of rights as side-constraints, and Dworkin’s (1977) characterisation of rights as trumps, Sen has suggested that the fulfilment of individual rights be included among the goals of a system. In this way, the violation and fulfilment of individual rights can be incorporated into the evaluation of end-states, and be related to negative and positive obligations through consequential links (1982a, 1985c). Furthermore, Sen has proposed that:

“There is ... some advantage in characterising goal-rights as a relation not primarily between two parties but between one person and some “capability” to which he has a right, for example, the capability of person i to move about without harm. This rather blurs the distinction between rights that relate to so-called positive freedoms and those related to negative freedoms such as liberty and non-coercion. If all goal-rights take the form of rights to certain capabilities, then a goal-rights system may be conveniently called a capability-rights system” (1982a, 16).

Whereas the classic view characterises rights as the logical correlates of obligations, and emphasises the relationship between distinct agents (e.g. between one person and another person, or between one person and the state), Sen’s idea of goal-rights focuses on the relationship between one agent and a goal or outcome to which that agent has rights (1982c, 347). Hence “goal-rights may or may not be formulated in terms of two-person right-duty correspondences”, and can take the form of “capability-rights and corresponding duties” (1982a, 38). The idea of a “basic capability-human rights-government obligations” approach builds on this proposal. This idea focuses on a tripartite relationship between basic capabilities, human rights and government obligations. It suggests that the fulfilment of human rights that protect and promote the exercise of basic capabilities be included among the goals of a system, incorporated into the evaluation of states of affairs, and related to government obligations through consequential links. This idea could provide a conceptual and practical basis for apportioning obligations on governments and a powerful framework for thinking about accountability (Vizard, 1999).

## Conclusion

This paper has surveyed some of the antecedents of the idea of human rights in different countries and cultures. It has suggested that although the natural law and natural rights traditions are important influences on the modern idea of human rights, this idea has not emerged exclusively in or from any single cultural tradition. Traditions of universalism, tolerance, freedom, concern for the poor and needy, interpersonal obligation and government responsibility are present in diverse cultures and countries, providing foundations for the development of modern theories of human rights. Furthermore, the modern idea of human rights is itself changing and evolving in response to diverse influences. New frameworks for thinking about the cross-cultural foundations of human rights are emerging, and there is a need for new theoretical frameworks for thinking about human rights, poverty and development. The emerging paradigm shift in ethics, economics and



development away from welfare and utilitarianism - and towards capabilities and rights - is central to this agenda.

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## Footnotes

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Special Advisor to the Administrator - for their help, support and comments. The author acknowledges responsibility for the views expressed and for any inaccuracies or errors.

2 These ideas about knowledge and belief are elaborated in Plato ([c.360 B.C.] 1987) and ([c.375 BC] 1987)) and are discussed in Wong (1993,444), Crombie (1963, 33-128) and Lear (1988).

3C.f. section 2.2 ("Sen's framework").

4For example, see Miller (1995, 87-139).

5However, Sen does not commit himself to identifying valuable capabilities on the basis of an Aristotelian approach to non-relative values. For example, see Sen (1993, 46-48).

6See Nozick (1974, 178-182) and Donnelly (1989, 93-97) for different interpretations of the "Lockean proviso".

7 See Desai (1999, 2), Donnelly (1989, 104-109) and Jones (1994, 107-108&168) for a discussion of these issues.

8 Eg see Rowley (1998), Cohen (1995).

9 See Paine ([1791/2] 1969, 232-295) and ([1797] 1967).

10See, for example, Ayer (1967), Berlin (1969), Foucault (1972,1980), Hollis and Lukes (1982) Honderich (1985), MacIntyre (1985), Mackie (1977), Nagel (1986), Popper (1967), Rorty (1989, 1991), Sartre (1969), Stevenson (1963), Waltzer (1983) and Williams (1985).

11 Treating cultural relativism as the basis of "a cross-cultural theory of value" raises a number of difficulties. Schmidt suggests that cultural relativism entails that "(i)n every case the rightness of any act or goodness of any thing for a member of culture A is justified by reference to what in fact is considered right or good in culture A", so that "no value judgment is justified only with reference to a particular culture and has no inherent objectivity of other cultures". Hence "Herskovits and others think that the thesis [of cultural relativism] provides an objective justification for the value judgement that tolerance is good". However, in Schmidt's view, this line of reasoning is false. Emphasising the logical distinction between the proposition "x is the case" and the proposition "x ought to be the case", Schmidt suggests that knowledge of difference and diversity is compatible with different value theories, and does not imply specific value judgments (1955, 783-788).

12 The Bangkok Declaration expressed the "aspirations and commitments of the Asian region", recognising that: "... that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds" (Regional Meeting for Asia of the World Conference on Human Rights, 1993, A8). The Vienna Declaration and Programme of Action states that "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms..." (World Conference on Human Rights, 1993, A5). Both paragraphs have been variously interpreted, and are widely cited by both defenders and critics of the concept of universality.

13 Eg see Schwab and Pollis (1982), Nussbaum (1999abc), Coomaraswamy (1996, para. 105-115) and UNHCHR (n.d.).

14 The Golden Rule provides an important link between the idea of cross-cultural frameworks for thinking about human rights, and the work of Kant. Scruton (1982, 70) suggests: "Kant regarded [the] first formulation of the categorical imperative as the philosophical basis of the famous golden rule, that we should do as we would be done by". For an important comment on this issue, see Kant ([1785] 1991, 92).

15 For example, calls for Muslims to reject international human rights standards on theological grounds include the following: "What they call human rights is nothing but a collection of corrupt rules worked out by Zionists to destroy all true religions" [Ayatollah Khomeini: cited in Mayer (1999, 27).] "When we want to find out what is right and what is wrong, we do not go to the United Nations; we go to the Holy Koran. For us the Universal Declaration of Human Rights is nothing but a collection of mumbo-jumbo by disciplines of Satan" [Khamene'i, former President of Iran: cited in Mayer (1999, 27).] "The Universal Declaration of Human Rights, which represented secular understanding of the Judaeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognised by the Islamic Republic of Iran; his country would therefore not hesitate to violate its provisions" [paraphrasing of the words of Said Raja'i-Khorasani, a representative of Iran at the UN, defending Iran from charges of the violation of human rights: cited in Mayer (1999, 8).]

16 For example, An-Na'im interprets verse 49:13 of the Qur'an as implying that human diversity or pluralism is inherent in the divine scheme of things, and is designed to promote understanding and co-operation among peoples. At the same time, An-Na'im points out that other interpretations might emphasise diversity and pluralism within the global Islamic community (Umma) and restrict righteousness to Muslims. In addition, An-Na'im recommends that verse 49:13 ought not to be cited in isolation but rather in conjunction with other verses - eg 3:28, 4:139, 144, 8:72-73 - that have a more exclusive emphasis (1995a, 232-233). Similarly, An-Na'im recommends that those Qur'anic verses that recognize rights of women be read in conjunction with other verses that are sometimes cited as a theological basis for female



subordination, such as verse 4:34, which establishes general male guardianship over women (1990, 180).

17 For example, An-Na'im suggests that although the formal abolition of slavery in Muslim countries is not at issue - and although Shari'a "sought to restrict the sources of acquisition of slaves, to improve their condition, and to encourage their emancipation" - nevertheless, slavery "is lawful under Shari'a to the present day". Similarly, An-Na'im suggests that although Shari'a restricted the incidence and reduced the scope of discrimination against non-Muslims and women, nevertheless, non-Muslims and women do not enjoy full legal capacity under Shari'a. Indeed, An-Na'im expresses the opinion that, when viewed from a modern perspective, Shari'a seems to sanction discrimination on the grounds of religion and gender. Certain rules in personal and private law (e.g. rules that make gender distinctions regarding marriage to non-Muslims, and the prohibition on marriage to non-believers), and in private and family law (e.g. rules that make gender distinctions in relation to the number of partners in marriage, the grounds of divorce and inheritance shares), could be regarded as discriminatory (1990, 172-176).

18 The evolving position of the Christian Church on human rights issues can be illustrated by the change in views towards slavery during the course of the eighteenth century. Despite some early condemnations, the institution of slavery was still accepted as inevitable by many Christians in the early eighteenth century, with the Bishop of London declaring in 1727 that slavery was not incompatible with Christian principles. At that time, certain Biblical images and passages - including the story of the "Curse of Ham" in the Old Testament and passages attributed to St. Paul in the New Testament (such as Colossians 3:22) - were sometimes invoked as theological justifications of slavery. In addition, the view that slavery was beneficial in that it "saved" individuals from "paganism" and provided them with access to Christianity - and even that Africans were "without souls" - was expressed by many Christians. However - under the influence of the "Evangelical Revival" and the abolitionist movement - the position of the Christian Church on the issue of slavery was "revolutionised" during the course of the eighteenth century. Christianity and slavery were increasingly thought to be incompatible. The practice of slavery was formally condemned by the Catholic Church in a Papal Bull in 1839 and certain Biblical elements - including images of liberation and resurrection and certain passages by St Paul (such as Galatians 3:28.) - were increasingly invoked as a justification for emancipation. [Bragg (1999), Thomas (1998) and Felder (1993).] The position of the Christian Church on certain human rights issues also remains controversial today. For example, the position of women in Christianity has been widely debated and interpretations of different elements of the Bible - including elements attributed to St. Paul that seem to emphasise the differences between men and women (such as Ephesians 5:21-25 and 1 Timothy 2:12) and elements attributed to St. Paul that seem to support the idea of equality (such as Galatians 3:28) - have generated particular controversy (Shannon, 1996, 205). Feminists that have attempted to vindicate the human rights of women within a Christian discourse continue to struggle against opposition and the continued controversy shrouding the question of the representation of women in Christian traditions was exposed in debates following the publication of the work *Mary and Human Liberation* [see Balasuriya (1997)]. In addition, the natural law tradition is sometimes invoked by religious elements in contemporary debates in opposition to modern ideas about the human rights of women, and the Vatican position on the Cairo population conference in 1994 was criticised by many human rights thinkers and activists [Mayer (1995, 119-126)].

19 Some of these are reviewed by Mayer (1999). For example, the 1972 Charter of the Organization of the Islamic Conference - the international organisation to which Muslim countries belong - reaffirms the commitment of Islamic countries to "the UN Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful co-operation amongst all people". The Universal Islamic Declaration of Human Rights, prepared by representatives from Egypt, Pakistan, Saudi Arabia and others under the auspices of the Islamic Council (an affiliate of the Muslim World League), was presented to UNESCO in 1981. The Cairo Declaration on Human Rights in Islam was endorsed in 1990 by the foreign ministers of the Organisation of the Islamic Conference, and was submitted to the World Conference on Human Rights in Vienna in 1993 by the Saudi foreign minister. Mayer notes that this Declaration was promoted by the Saudi foreign minister as embodying the consensus of the world's Muslims on rights in the run up to the Vienna process. At one point, Iraq joined Iran in pressing the UN Commission on Human Rights for the acceptance of this document as an Islamic "model" of human rights. [See Mayer (1999, 11/21-22)].

20 Marx ([1844] 1987) characterized political emancipation as the process whereby a State abolishes its theological stance, and differences in birth, religion, class, property, education etc are made non-political categories. He expressed the view that although the process of political emancipation represents "great progress", this process does not in itself bring about full human freedom. Marx criticisms of - and qualifications to - the idea of rights are best understood in this context. For example, Marx criticized rights-based theories for failing to address underlying structures of power, social and economic inequality, economic compulsion and exploitation. He questioned the emphasis of much rights-based reasoning on the legal recognition of rights, without adequate considerations of issues of substantive freedom - or the realization and enjoyment of rights in practice. He suggested that rights-based theories claim to be "natural" and "universal", whereas in reality these theories are ethically relative, socially constructed and

historically contingent. Finally, Marx questioned the emphasis of rights-based theories on the "isolated" individual, whereas, in his view, rights are exercised in the context of communities and societies.

"Let us discuss for a moment the so-called human rights, human rights in their authentic form, the form they have in the writings of their discoverers, the North Americans and French! These human rights are partly political rights that are only exercised in community with other men. Their content is formed by participation in the common essence..." . [[1844] 1987, 144) and Waldron (1987,119-136).]

Marx's criticisms of, and qualifications to, the idea of rights are reflected in the modern literature in many different ways. The proposal that the ethical claims of objectivity and universality conceal underlying power relations constitutes an important point of departure for the various forms of ethical anti-realism and relativism. Marx's work is also associated with critiques of human rights from the perspective of power and with the idea that human rights reflect social and economic conditions, rather than universal laws. Finally, Marx's work has had an important influence on the idea of the "necessary conditions" for the exercise or enjoyment of human rights in practice, on the concept of positive freedom, and on justifications for economic and social rights.

21 See, for example, Human Rights Watch (1999); Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (adopted in UN General Assembly Resolution 53/144 on 8th March 1999); and Office of the High Commissioner for Human Rights (2000).

22 See for example, The Special Rapporteur on the realization of economic, social and cultural rights expressed the opinion in his second progress report to the Sub-Commission that : "the institutions directly involved in designing, promoting and monitoring programmes of structural adjustment, such as the World Bank and IMF, are not exempt from considering the human rights implications of their work programmes". [See E/CN.4/1996/22 5 February 1996 paragraphs 50 and 51].

23 For example, Article 5 of the Vienna Declaration and Programme of Action states: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".

24 Independent, 14 June 1993.

25 The identification of obstacles that can impede the full achievement of economic, social and cultural rights has been an important element of the analytical and fact-finding framework adopted by the UN Committee on Economic, Social and Cultural Rights. Specific obstacles, difficulties and problems - including those related to high levels of debt, structural adjustment, economic transition, extreme poverty, and extreme inequalities in income distribution - have been highlighted in this context. [See, for example, the Committee's analysis of the "factors and difficulties impeding the implementation of the Covenant" in the Concluding Observations of its Reports on Senegal (E/C.12/1993/18) and Mexico (E/C.12/1993/16)]. The concept of obstacles has also been a feature of analyses of the special problems the right to development. For example, the Declaration on the Right to Development highlights the existence of serious obstacles to development, constituted by the denial of civil, political, economic, social and cultural rights, and suggests that States have a duty to co-operate with each other in ensuring development and eliminating obstacles to development [General Assembly resolution 41/128 of 4 December 1986]. Documents of related interest include: UN Economic and Social Council: E/CN.4/1998/27; E/CN.4/1998/22-24; E/CN.4/1995/25&/Add.1-2; E/CN.4/Sub.2/1995/14-15; E/CN.4/Sub.2/1997/9; E/CN.4/Sub.2/1997/17; E/CN.4/Sub.2/1996/13-14; E/CN.4/1995/25; E/CN.4/1995/101. UN High Commissioner for Human Rights: Commission on Human Rights resolution 1997/10-11; 1997/17; 1996/10; 1996/12; 1995/13, 1995/16. Sub-Commission resolutions 1995/28, 1995/32, 1995/30, 1994/40-1, 1996/26, 1996/23. General Assembly Resolution 1996 51/97.]

26 Some of the issues conceptual issues involved in characterizing extreme poverty as a denial of human rights will be discussed in Vizard (2000). Also see the frameworks developed in Shue (1977) and Gewirth (1982, 1996).