Islam and Human Rights:
The Search for an Overlapping Consensus

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A Thesis

in

The Department

of

Religion

Presented in Partial Fulfillment of the Requirements
For the Degree of Doctor of Philosophy at
Concordia University
Montreal, Quebec, Canada

December 2010

CONCORDIA UNIVERSITY

SCHOOL OF GRADUATE STUDIES

This is to certify that the thesis prepared

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Entitled**:** **Islam and Human Rights: The Search for an Overlapping Consensus**

and submitted in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY (Religion)

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ABSTRACT

Islam and Human Rights: The Search for an Overlapping Consensus

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Concordia University, 2010

This dissertation begins by emphasizing a distinction between demands of justice and requirements of human rights. In order to clarify this distinction, I explain two predominant views on human rights: humanitarianism (minimalist) and cosmopolitan egalitarianism (maximalist) as unsound and unreasonable views. As an alternative and proper view, I examine the moral and political ideas that constitute a conception of human rights that John Rawls presents in *The Law of Peoples*. I interpret and defend a conception of human rights which is less extensive than the rights that maximalists support and more expansive than minimalists embrace. I show how Rawls conceives the idea of human rights, which rights he counts as human rights and why. The first part of this dissertation followed with three reasons to support Rawls' conception of human rights: the principle of collective self-determination, the normative standards of political obligation, and the value of toleration. The essential idea of Rawls' conception of human rights is as follows: in order to gain support from different ethical and religious traditions, a *freestanding* conception of human rights should be presented. In the second part, I examine

possibilities within Islamic doctrine to include an *overlapping consensus* on a freestanding conception of human rights. The requirement of an Islamic affirmation of a conception of human rights identified in three ideas: a distinction between the law of God and human interpretation, the compatibility of God's sovereignty and human responsibility, and diversity of religious communities as a will of God. I explore and justify these ideas by referring to contemporary Muslim intellectuals' works that are associated with the idea of human rights.

ACKNOWLEDGEMENT

I would like to express my sincere appreciation to my supervisor, Dr. Frederick Bird, whose encouragement, and intellectual support enabled me to develop the ideas of the subject. I am greatly indebted to my external examiner, Dr. Farhang Rajaee, the time and energy which he put into editorial suggestions has been invaluable. I am also thankful to the other members of my thesis committee: Dr. Michel Despland, Dr. Lynda Clarke, Dr. Joseph Smucker, their recommendations and productive feedback have been valuable.

DEDICATION

Dedicated to my wife Tahereh: For her continuous support, unlimited patience, understanding and encouragement.

Contents

Introduction

Global society is characterized by its philosophical, ethical and religious disagreements. What are the implications of the doctrinal conflict – the "fact of reasonable pluralism"[1] – for the understanding of a conception of human rights? How can respect for ethical and religious pluralism be reconciled with the strong belief that everyone possesses basic human rights? Must human rights be located in a particular secular or religious doctrine in order to be justified? How can a conception of human rights be supported by a variety of ethical and religious traditions? In this dissertation, I deal with these questions by focusing on a particular conception of human rights.

Consider the two predominant views concerning human rights which are familiar from the literature of contemporary political philosophy: *humanitarianism (or minimalist)* and *cosmopolitan egalitarianism (or maximalist)*. The minimalist proposes the idea that human rights are limited to the negative rights which individuals could claim against one

[1] John Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993), p. 36.

another, even in a world without social or political institutions.[2] Humanitarianism confines human rights to the protection of physical security.

On the other hand, the maximalist holds that human rights have equal standing with rights based on justice. Put differently, the cosmopolitan egalitarian claims that people everywhere should have the same rights as citizens of a liberal government claim for themselves. Accordingly, only a liberal democratic state can promote fulfillment of human rights.

Contrary to these typical views, in the first part of this dissertation, I elucidate and defend a conception of human rights which is less extensive than that maximalist (cosmopolitan egalitarianism) endorses and more expansive than minimalist (humanitarianism) embraces. This conception is derived from John Rawls' *The Law of Peoples* (1999).[3] In *LP* Rawls expands his ideas on justice to the international society comprised of different "peoples" with different values and traditions. He proposes a

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[2] See Joshua Cohen, "Is There a Human Right to Democracy?" in *The Egalitarian Conscience: Essays in Honor of G.A. Cohen*, edited by C. Sypnowich (Oxford, UK: Oxford University Press, 2006), pp. 226-48.

[3] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999). Hereinafter page references to this work will be made in the body of the text, using the abbreviation "*LP.*"

conception of human rights, as a basic component of an idea of global justice for a culturally plural world.

In fact, Rawls conceives human rights as the broad requirements of justice that are compatible with all reasonable political moralities. He holds that human rights are a "proper subset" of the rights of members recognized and secured in any society that is (at least) "decent." Decent societies include those societies which are recognized by liberal democracies as "equal participating members in good standing of the society of peoples" (*LP*, p. 59). Rawls makes a distinction between the conception of liberal justice and the idea of decency. "All liberal societies are decent, but not all decent societies are liberal. Human rights are common to all decent societies, whether they satisfy the requirements of liberal justice or not."[4]

Making this distinction, Rawls demarcates "human rights proper" from the conception that "simply expand the class of human rights to include all the rights that liberal government guarantee." These rights are fundamental to any "common good idea of justice" and so are not "peculiarly liberal or special to the Western tradition." Therefore, according

[4] Charles Beitz, "Human Rights as a Common Concern," in Robert Goodin and Philip Pettit, eds., *Contemporary Political Philosophy: An Anthology* (Oxford: Blackwell Publishing, 2006), p.365.

to Rawls, human rights set minimal, necessary (although not sufficient from a liberal point of view) requirements of justice that apply to the basic structure of every society. Among the human rights which Rawls described as proper subset are as follows: "the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality …" (*LP*, p. 65).

These rights "play a special role in a reasonable Law of Peoples[5]: they specify limits to a regime's internal autonomy;" only if they are respected can a regime be justified in claiming that other societies have no right to intervene in its internal affairs. They also set moral constraints on the conduct of war, as well as on the reasons that can justify a society's going to war. Most generally, "they set a limit to the pluralism among peoples." Thus human rights play roles that are different from the

[5] The term "law of peoples," relying upon John Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University press, 1986), p. 27, derives from the idea of *jus gentium*. The phrase, "*jus gentium intra se*" indicates what all laws have in common. "Rawls's use of the term "law of peoples" does not, however, have the same meaning. Rawls uses the term "Law of Peoples" to refer to those principles that regulate mutual political relations among peoples, not among individuals or state as such, as was traditionally the case with natural law and law of nations theorists." See David Boucher, "Uniting What Right Permits with What Interest Prescribes: Rawls's Law of Peoples in Context," in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia* (Malden, MA: Blackwell, 2006), p. 23.

roles played by the rights of democratic citizenship in a liberal society; they are “a special class of urgent rights” (LP, p.78-81).

According to Rawls, human rights are the *primary* and necessary conditions for social cooperation or as the requirements of membership in any well-ordered society. However, respect for human rights is not sufficient to make a society a well-ordered one. The other two conditions for domestic institutions must be met: first, political relationships between the government and the people, as well as the political relationships among the people, should be moral relationships, namely respecting the reciprocal duties of justice. Second, the members of the society should be granted “a meaningful role in making political decisions.” For that reason, Rawls thinks that *benevolent absolutisms* which honor human rights are not well-ordered “because their members are denied a meaningful role in making political decisions” (*LP*, p. 4). Rawls realizes that some other societies are not well-ordered as well; these are “burdened societies”[6] (which may lack the capacities necessary for taking part in international society), and “outlaw societies” (that may commit crimes).

[6] That is “peoples living under unfavourable conditions that prevent their having a just or decent political and social regime” *LP*, p. 37.

Thus, Rawls believes that there is a significant moral difference between “decent hierarchical societies” that are well-ordered – namely, their basic structure of political and legal institutions recognize and secure human rights – and those that are not. Given the moral importance of these distinctions, Rawls maintains that if a non-liberal society is governed in accordance with a conception of justice that requires respect for its members’ basic human rights, and if its government seeks to benefit membership in international society governed by a Law of Peoples, then that non-liberal society deserves full and good standing in the international society and is entitled to toleration by liberal peoples.

In the first part of this dissertation, the idea of “human rights proper” is defended further by three reasons, which propose that standards of human rights must differ from and be narrower than standards that one approves for a liberal democratic society. The first is the principle of collective self-determination which is stated in Article 1 of the Covenant on Civil and Political Rights. The second is a distinction between justice and political obligation; the threshold of political obligation should be lower than is set by justice. Finally, the value of toleration, which

indicates that a decent hierarchical society (non-democratic) can have a moral character that liberal societies are morally obligated to tolerate.[7]

In the second part, I will examine contemporary Islamic intellectualism and the challenge of human rights. Given the central idea of Rawls' account of human rights in which a conception of human rights should be freestanding, that is, a conception of human rights suitable for a pluralistic world must be independent from different philosophical, ethical or religious doctrines. Such a conception must serve as the object of an *overlapping consensus* among different ethical and religious traditions. Yet the endeavor of showing that the idea of human rights can be endorsed by different ethical and religious traditions may require revision or reconstruction of these traditions by their adherents. To illustrate this point about the reconstruction or revision of an ethical and religious tradition in order to win an overlapping consensus on a freestanding conception of human rights, I want to examine the most reasonable enterprises in contemporary Islamic thought for the reconciliation of Islamic doctrine and human rights.

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[7] See Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" *The Journal of Political Philosophy,* Vol. 12, no. 2 (2004): pp. 211-212.

I will explore a variety of Muslim intellectuals' endeavors concerning the issue. The common conceptual characteristic of the Islamic intellectualism is that: a religion does not necessarily continue to depend on a particular socio-historical context. Therefore, Islamic doctrine can be reconstructed to make it compatible with the new social and political order. In so doing, some of the Muslim intellectuals emphasize the primary universal values, such as self-determination, toleration, pluralism and religious freedom, and use these values as a way in which a conception of human rights could be included in Islamic doctrine. Many of them make the argument that "God's original intent was consistent with extended rights for human beings, but that the socio-historical experiences were unable to achieve a fulfillment of such intent." [8] However, some of them argue that justice as the core value in Islamic doctrine requires respect for human diversity and recognition of human rights.

The Muslim intellectuals' affirmation of a conception of human rights is ultimately formulated in three ideas: the idea of distinction between Divine law and human interpretation; the idea of compatibility

[8] See Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam," in *Human Rights and Responsibilities in the World Religion*, eds., J. Runzo, N. Martin, and A. Sharma (Oxford: Oneworld, 2003), pp. 301-364.

between God's sovereignty and human responsibility; finally, the idea of diversity of religious communities as a will of God.

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In this dissertation, my aim is *not* to explore the widespread intellectual endeavors to support the idea that religious statements shape our current moral discourse, the conception of justice and the idea of human rights. I am not concerned with various arguments for indispensability of religion in justifying the idea of human rights. Instead, my aim is to interpret and defend an attractive idea that the different reasonable comprehensive doctrines can endorse an independent conception of human rights.

In so doing I will explain a conception of human rights (derived from *LP)* in the light of Rawls' moral and political philosophy which is presented in his masterpieces: *A Theory of Justice*[9] and *Political Liberalism.* Rawls' political philosophy is involved in what has been called *constructive interpretation*.[10] It requires that a theory of justice be limited within the

[9] John Rawls, *A Theory of Justice* (Revised Edition) (Cambridge, MA: Harvard University press, 1999).

[10] For an elaboration of this term see Aaron James, "Constructing Justice for Existing Practice: Rawls and the Status Quo," *Philosophy & Public Affairs*, Vol. 33, no. 3 (July 2005), pp. 281-316.

boundaries of political or social practices of any particular society, but not with the most abstract elements. A constructivist conception of justice represents the principles of justice not as part of some abstract moral rules known through theoretical reason, but rather as "the outcome of a procedure of construction" founded in practical reasoning. Rawls argues that reasoning about what justice demands should proceed from the social practices which are already established.[11] He maintains that among the many existing social practices, we should attend to the most basic existing social structures (i.e., major institutions) because their effects are "so profound and present from the start."[12] According to Rawls, the institutions of a modern democracy aims at creating social "primary goods" (i.e., liberty and opportunity, income, wealth and the bases of self-respect) as a scheme of cooperation among citizens for mutual advantage. Similarly, international law and institutions are aimed at creating "goods" such as peace, national autonomy, and maintaining basic domestic justice as a scheme of cooperation among societies for mutual recognition.[13] Given this Rawls' methodology in political philosophy, his conception of human

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[11] Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 53.

[12] Rawls, *A Theory of Justice*, p. 7.

[13] Aaron James, "Constructing Justice for Existing Practice: Rawls and the Status Quo," p, 287. Rawls says that mutual respect is an "essential part of the basic structure . . . of the Society of Peoples." Rawls, *LP*, p. 122.

rights is part of an answer to the question of what principles of justice must be applied in a global order.

However, Rawls' theory of global normative order in *LP* has confronted some objections, in particular from cosmopolitan egalitarians who accuse him of betraying his own liberal egalitarian commitments. In fact, they express different kinds of criticisms against Rawls' idea, such as: (1) he fails to acknowledge a more robust principle of international distributive justice; (2) he is concerned with justice *between* societies rather than with justice *within* societies; (3) his examination of international justice begins incorrectly with "ideal theory;" (4) his idea of global order is too accommodating to non-democratic peoples; and (5) his conception of human rights is too thin and must be substituted with a more liberal and egalitarian idea.[14]

[14] See also D. Reidy, "Rawls on International Justice: A Defense', *Political Theory,* Vol.32, no.3 (2004), pp. 291–319. Among the critics of Rawls's theory of global order are: Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2007) Chap. 3; Thomas W. Pogge, "Do Rawls's Two Theories of Justice Fit Together?", pp. 206-226; Alistair M. Macleod, "Rawls's Narrow Doctrine of Human Rights", pp. 150-169, both in Rex Martin, and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia?* (Malden, MA: Blackwell, 2006); Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (New York: Oxford University Press, 2006), pp. 8-25; Charles Beitz,"Human rights and the law of peoples," pp. 193-214; Martha Nussbaum, "Women and Theories of Global justice: Our Need for New Paradigms," pp. 147-177, both in D.K Chatterjee, ed., *The Ethics of Assistance: Morality and the Distance*

On the other hand, the defenders of Rawls' *LP* argue that Rawls has simply extended his commitment to toleration to the global context in which cooperation between independent peoples is a moral requirement. Without recognizing the moral requirement for social cooperation on the international level, it is difficult to understand how the cosmopolitans' commitments to liberal ideals can reasonably encourage the types of societies Rawls calls decent. As Rawls says, "… liberal peoples should not suppose that decent societies are unable to reform themselves in their own way. By recognizing these societies as *bona fide* members of the Society of Peoples, liberal peoples encourage this change" (*LP*, p. 61).

The defenders of Rawls have focused upon various arguments in *LP,* such as: Rawls' claim that there is no obligation of distributive justice among societies; his idea that the basic human right does not require a democracy; his idea to extend the argument of democratic peace to decent hierarchical peoples, that is, decent peoples deserve respect because they would not pose a particular threat to world peace (i.e.,

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Needy (Cambridge: Cambridge University Press, 2004); Simon Caney, ''Cosmopolitanism and the Law of Peoples,'' *The Journal of Political Philosophy,* Vol.10, no. 1 (2002), pp. 95–123; John Tasioulas, ''From Utopia to Kazanistan: John Rawls and the Law of Peoples,'' *Oxford Journal of Legal Studies,* Vol. 22, no. 2 (2002), pp. 367–396; Kok-Chor Tan, *Toleration, Diversity and Global Justice* (Pennsylvania: Penn State University Press, 2000), Chap. 4.

peace argument) and so on.[15] However, the central idea of Rawls' account of human rights, that is, a conception of human rights should be presented freestanding, has largely been ignored. This dissertation is primarily devoted to analysis of the idea of freestanding conception of human rights and to show that how this conception could gain an overlapping consensus among different ethical and religious traditions.

[15] The good examples of the defenders of Rawls' *LP* are as follows: Alyssa Bernstein, "Human Rights, Global Justice and Disaggregated States: John Rawls, Onora O'Neill and Marie Slaughter," *American Journal of Sociology,* Vol. 66, no. 1 (2007), pp. 87–111; Joseph Heath, "Rawls on Global Distributive Justice: A Defence," *Canadian Journal of Philosophy Supplementary Volume,* ed. Daniel Weinstock (Lethbridge: University of Calgary Press, 2007); Joshua Cohen, "Is There a Human Right to Democracy?" in C. Sypnowich, ed., *The Egalitarian Conscience: Essays in Honor of G.A. Cohen* (Oxford, UK: Oxford University Press, 2006), pp. 226-48; Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?", *The Journal of Political Philosophy,* Vol. 12, no. 2 (2004), pp. 190-213; Samuel Freeman, "The Law of peoples, Social Cooperation, Human Rights, and Distributive justice," *Social Philosophy & Policy Foundation,* Vol. 23, no, 1 (2006), pp. 26-68; Mathias Risse, "What We Owe to the Global Poor," in G. Brock and D. Mellendorf, eds., *Current Debates in Global Justice* (Dordrecht: Springer, 2005), pp. 81-118; David Reidy, "Rawls on Human Rights: A Brief Defense," *Southwest Philosophy Review*, Vol.19, no. 1 (2003), pp.147–59; Christ Brown, "The Construction of a "Realistic Utopia": John Rawls and International Political Theory," *Review of International Studies,* Vol. 28, no.1 (2002),pp. 5–21; *Leif* Wenar, "The Legitimacy of Peoples," in P. DeGreiff, and C. Cronin, eds., *Global Justice and Transnational Politics* (Cambridge MA: MIT Press, 2002), pp. 53–76. See also several articles in Rex Martin, and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia?* (Malden MA: Blackwell, 2006).

Part I

A FREESTANDING CONCEPTION OF HUMAN RIGHTS

CHAPTER 1

HUMAN RIGHTS AND RAWLS' THEORY OF GLOBAL ORDER

> My purpose is to consider if, in political society, there can be any legitimate and sure principles of government, taking men as they are and laws as they might be. I will always try in this inquiry to bring together what right permits with what interest prescribes, so that justice and utility do not find themselves at odds with one another.
>
> Jean Jacques Rousseau[16]

> I contend that this scenario is realistic – it could and may exist. I say it is also utopian and highly desirable because it joins reasonableness and justice with conditions enabling citizens to realize their fundamental interests.
>
> John Rawls[17]

Since the end of World War II, there has been a profound change in moral thinking about war and the powers of sovereignty. War is now commonly regarded as justified only for reasons of self-defence or in order to protect human rights in grave violations.[18] The limits on powers of

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[16] Jean Jacques Rousseau, *On the Social Contract*, in *The Basic Political Writings*, trans. D.A Cress (Indianapolis: Hackett, 1987), p. 141.

[17] Rawls, *LP,* p. 7.

[18] Although the moral arguments upon rights and wrongs of conducts of war within ethical traditions (the issue of just and unjust war) have a long history, but wars and foreign interventions in the pre-modern world have occurred mostly for interest in political domination, territorial acquisition, or the like. Interventions for humanitarian purposes seem to be a relatively new phenomenon, although a most controversial one: "The controversial issue that remains is not whether the Security Council should act to end massive violations of human rights. In principle, there appears to be agreement that it

sovereignty are a "fundamental departure from the Westphalian conception of sovereignty that ruled from the mid-17th century to the end of World War II."[19] Many of the ethical grounds to restrict the permissible means and ends of war, as well as to limit the powers of sovereignty, are now stated in terms of *human rights*. Thus, in contemporary international law and practices, human rights have come to play the roles of restricting the justifying reasons for war and its conduct and of specifying limits on the internal autonomy of a regime.[20]

In this context, the term "human rights" is sometimes used to refer to purported rights, or to claims that lack appropriate moral justification, or to rights that cannot play the relevant roles. In order to clarify the points that relate to the content of human rights, the basis of justification, and their roles, in this chapter I will briefly examine two typical views about

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should. The problem is the difficulty of obtaining the necessary consensus within the Security Council in any given case." Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, p. 652. For a classical study on just war theories and for the arguments on war against "failed states" for ending massive violations of human rights, see Michael Walzer, *Just and Unjust Wars: A Moral Arguments with Historical Illustrations* (New York: Basic Books, 1977).

[19] Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p. 195.

[20] See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2007); Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002); Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999).

human rights: *humanitarianism (minimalist)* and *cosmopolitan egalitarianism (maximalist)*. As a reasonable alternative to these views, I will explain John Rawls' theory of global normative order and its requirements for a conception of human rights.

I. The Minimalist and Maximalist Views of Human Rights

1. The Minimalist View (Humanitarianism)

According to humanitarianism *(minimalist),* human rights should be understood as the "negative rights" that individuals could claim against one another even in a world without social and political institutions.[21] For instance, John Simmons identifies human rights in this way:

> *Human* rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity. ... [They] will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.[22]

[21] See Joshua Cohen and Charles Sable, "Extra Rempublicam Nulla Justitia?" *Philosophy & Public Affairs*, Vol. 34, no. 2 (2005), pp. 147 – 175.

[22] John Simmons, *Justification and legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), p. 185.

A widespread account of humanitarianism is an interpretation of the idea of natural rights, such as Lockean natural rights, understood as moral rights that individuals would enjoy in "a pre-institutional state of nature." According to this view, claims for human rights which are dependent on institutions, such as rights to political participation, education, and health care, are best articulated as a reference to the interests rather than a statement of rights. [23]

However, as Charles Beitz argues, the rights rooted in natural rights theories and human rights found in international morality do not belong to the same conceptual category. The theory of natural rights was developed to restrain the use of a government's coercive power in circumstances of religious diversity. The great assumption that lies behind the natural rights was the idea that "a central problem of political life is the protection of individual freedom against threat of tyranny." According to Beitz, a realistic reading of the modern social and political history shows that the incentive of international human rights could not have such limited concern. He maintains that human rights of the international declarations have a larger target; they describe and assert social conditions for a flourishing human life. The

[23] See J. Cohen and C. Sable, "Extra Rempublicam Nulla Justitia?" p. 173.

statements of human rights expect "a more ambitious assumption of responsibility for the public sphere than was required by the motivating concerns of classical natural rights theories."[24]

In this way, as Joshua Cohen argues, "the content of natural rights, for their non-institutional setting, is necessarily restricted."[25] In fact, the minimalism confines human rights to protect physical security.[26] Given the Lockean theory of natural rights, it would be difficult for humanitarianism to explain the institutional based human rights, such as the right to fair legal process and the right of political participation. As a result, "the concepts of natural rights and human rights are fundamentally different." And this significant difference has been demonstrated in the several rights articulated in the *Universal Declaration of Human Rights* (*UDHR)* and the later Covenants including "right to a fair hearing," and right to political

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[24] Charles Beitz, "Human Rights and the Law of Peoples" in D.K. Chatterjee, ed., *The Ethics of Assistance: Morality and the Distance Needy* (Cambridge: Cambridge University Press, 2004), p. 199.

[25] Joshua Cohen, "Is There a Human Right to Democracy?" in C. Sypnowich, ed., *The Egalitarian Conscience: Essays in Honor of G.A. Cohen* (Oxford, UK: Oxford University Press, 2006), p. 227.

[26] See Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2003), chap. 1.

participation which presupposed the institutional contexts.[27] In a "pre-institutional state of nature" none of these rights can be reached.[28]

2. The Maximalist View (Cosmopolitan Egalitarianism)

The second typical view of human rights –the predominant mood among contemporary political philosophers– is cosmopolitan egalitarianism *(maximalist).* The maximalist view holds that human rights have an equal measure with rights originated from justice. On this view as a "monistic" theory of morality, a single set of basic standards of justice always applies to individuals everywhere, regardless of background conditions.[29] In other words, cosmopolitan egalitarian claims that "people everywhere stand to one another" in the same way that citizens of a liberal democratic society do: "they have the same rights and the same

[27] See Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p, 196; J. Cohen, "Is There a Human Right to Democracy?" p. 232.

[28] See Joshua Cohen, "Is There a Human Right to Democracy?" pp. 232. For further criticism of a conception of human rights grounded in the Hobbsian and the Lokean theories of natural rights, see Mathias Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights," *European Journal of Philosophy*, Vol. 1, no, 2 (2008), pp. 1–28; Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), pp. 26-32.

[29] See J. Cohen and C. Sable, "Extra Rempublicam Nulla Justitia?" p. 152.

opportunities."[30] Accordingly, human rights require a liberal democratic state. Finally, the maximalist regards all the rights enumerated in the Universal Declaration of Human Rights and later conventions, as genuine human rights.

One of the most important accounts of cosmopolitan egalitarianism is Charles Beitz's theory of international politics. Beitz argues in favor of global application of the two principles of Justice as Fairness, the conception of justice which John Rawls presents in *A Theory of Justice*; he says that "it is wrong to limit the application of contractarian principles of social justice to the nation-state; instead, these principles ought to apply globally."[31]

On the contrary, Rawls emphasizes that "justice as fairness is framed for a democratic society"[32] and its primary subject is the basic

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[30] J. Cohen and C. Sable, "Extra Rempublicam Nulla Justitia?" p. 153. See also David Miller, "Debate Caney's 'International Distributive Justice': a Response," *Political Studies,* Vol. 50, no. 6 (2002), p 976. And Simon Caney, "International Distributive Justice," *Political Studies*, Vol. 49, no. 5 (2001), pp. 974-97. Caney describes "the *principal cosmopolitan claim*" as follows: "given the reasons we give to defend the distribution of resources and given our convictions about the *irrelevance of people's cultural identity to their entitlements*, it follows that the scope of distributive justice should be global" (emphasis in the original) *Ibid*, p. 977.

[31] Charles Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1999), p. 128.

[32] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), p. 39.

structure (the major social and political institutions) of a domestic society. A just basic structure is a scheme of cooperation among free and equal individuals. In an initial situation – which Rawls calls “original position” – representatives of free and equal individuals are sited in fair conditions for choosing the terms of social cooperation.

According to Rawls, two principles of justice would be selected in the original position. The first principle, namely, “the principle of equal basic liberties,” requires protection for liberty of conscience, free speech and freedom of association, liberty and integrity of the person, and rights of political participation. In other words, the first principle contains the requirement of political equality. The second principle indicates that social and economic inequalities are permissible only if they satisfy two conditions. First, conditions of “fair equality of opportunities;” the principle says that people who have similar talent and motivation should have equal chances to achieve desirable positions. Second, “the difference principle” states that social and economic inequalities ought to work to the greatest benefit of the least advantaged members of society. A just social order that secures equal basic liberties and fair equality of opportunity might yet suffer from significant inequalities. The difference principle tells us that

inequalities are morally acceptable only if they bring the maximum benefit to the worst-off members of society.[33]

Justice as Fairness, as Rawls argues, is a theory for the institutions of the domestic society, but some Rawlsian cosmopolitan egalitarians, such as Charles Beitz and Thomas Pogge, believe that this theory should be extended to the global context. Accordingly, there should be principles of distributive justice in a global setting similar to the principles of justice as fairness in domestic society. They argue that there is an international basic structure similar to domestic basic structure, with political and economic institutions associating citizens of different countries – as citizens of the world – together in a global scheme of social cooperation.[34]

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[33] See Rawls, *Justice as Fairness: A Restatement,* pp. 42-49; Rawls, *A Theory of Justice*, pp. 60-90.

[34] See Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia* (Malden, MA: Blackwell, 2006), pp. 95-114. For more statements of contemporary cosmopolitanism, see Brian Barry, "Statism and nationalism: a cosmopolitan critique," in Ian Shapiro and Lea Brilmayer (eds), *NOMOS, Vol. XLI,* 1999: Global Justice, pp. 12-66; Charles Beitz, "Social and Cosmopolitan Liberalism", *International Affairs*, (1999):75, pp. 515-29; Simon Caney, "Cosmopolitan justice and equalizing opportunities," *Metaphilosophy*, Vol. 32, no. 1/2 (2001), pp.113-34.; Darrell Moellendorf, *Cosmopolitan Justice* (Boulder, Colorado: Westview Press, 2002); Martha Nussbaum, "Patriotism and cosmopolitanism," in Joshua Cohen, ed, *Love for Country: Debating the Limits of Patriotism* (Boston: Beacon Press, 1996); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006), section.4-5; Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000); Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press: 2002); and several

In fact, the cosmopolitan egalitarians defend a global original position in which each "world citizen" has a representative. They argue that a "globalized difference principle" will be endorsed in this global original position – that is, socio-economic inequalities are permissible "only if these inequalities work to the greatest benefit of the world's worst-off" individuals.[35] Both Beitz and Pogge, particularly argue that the huge inequalities in global income and wealth require a significant change in the world's economic institutions.[36]

The central argument of Beitz's theory of a global normative order runs contrary to the classical idea of the morality of states. The argument indicates that the moral legitimacy of states does not derive from themselves, but from their role in achieving justice. In fact, Beitz assumes that principles of morality of state are founded upon the value of personal autonomy, according to which "…individuals are entitled to form and

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articles in Gillian Brock and Harry Brighouse, eds., *The political philosophy of Cosmopolitanism* (Cambridge: Cambridge University press, 2005).

[35] Samuel Freeman, *Rawls* (Landon: Routledge, 2007), p.442. See also Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," p. 98.

[36] See Charles Beitz, *Political Theory and International Relations*, esp. part 3; Thomas Pogge, *World Poverty and Human Rights*, esp. chap. 8.

pursue their own conceptions of what makes life worth living."[37] In other words, the moral importance of states derives from the degree of individual autonomy that provide for their citizens. As Beitz writes:

> Assuming that it is part of the justice of institutions that they treat their members in some sense as autonomous persons, then the claim that unjust states should not be accorded the respect demanded by the principle of state autonomy follows from the claim that it is only considerations of personal autonomy, appropriately interpreted, that constitute the moral personality of the state.[38]

Thus, Beitz argues that, not all states can claim a right of internal autonomy (i.e., the moral significance of state): "only states whose institutions satisfy appropriate principles of justice can legitimately demand to be respected as autonomous sources of ends."[39] So a state's internal autonomy is limited and conditional, and its limits and conditions are determined by the principles of justice. It is important to note that, Beitz does not distinguish between principles of domestic justice and conditions of government legitimacy. Therefore, in his opinion, intervention in another state's affairs for the sake of justice can be morally permissible. Beitz

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[37] Jeremy Waldron, "Moral Autonomy and Personal Autonomy," in *Autonomy and the Challenges to Liberalism: New Essays*, John Christman and Joel Anderson (eds.) (Cambridge: Cambridge University Press, 2005), p. 315.

[38] Beitz, *Political Theory and International Relations,* p. 81.

[39] *Ibid*.

emphasizes that there may be "some warrant for interference in another state's affairs when the state's institutions are unjust according to appropriate principles of justice and the interference would promote the development of just domestic institutions within the state."[40]

In a similar vein, Thomas Pogge in *Realizing Rawls*[41] argues that a Rawlsian liberal must endorse global application of the two principles of Justice as Fairness, equal right to basic liberty and fair equality of opportunity. He holds that these principles would be chosen by the parties in a global original position. Thus, Justice as Fairness should be globalized by "viewing the parties as immediately addressing the world at large and dealing with the organization of national societies only within the context so provided."[42] And he asserts that if we have "Rawlsian commitments," in particular, if we share Rawls' reasons for regarding all human beings as free and equal moral persons, and for focusing on the basic structure, then "we should assess the justice of our global

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[40] *Ibid*., pp. 81-82. However, critics argued that the external intervention might make things worse from the perspective of justice. Just because external agents usually are both less interested in and less familiar about the public interests of the countries in which they intervene than the people live there, therefore it is unlikely they will ever promote their justice. *Ibid*, p. 85. See also Joshua Cohen, "The Terrain of a Global Normative Order," *ocw.mit.edu/NR/rdonlyres/Political-Science/17-000JPolitical-Philosophy--Global-JusticeSpring2003/.../0/lnclass_two1.pdf.*

[41] Thomas Pogge, *Realizing Rawls* (Ithaca, N.Y.: Cornell University press, 1989).

[42] *Ibid*., pp. 241-242.

institutional scheme by reference to the worst representative share it tends to generate."[43]

Pogge presents his position as an interpretation and defense of Article 28 of the *UDHR*: "Everyone is entitled to a social and *international* order in which the rights and freedoms set forth in this Declaration can be fully realized" (emphasis in the original).[44] When assessing the global institutional framework from a moral point of view, we should be concerned, "first and foremost, with its least advantaged participants, those in our world who lack well protected fundamental rights and liberties (as stipulated for example, by the *Universal Declaration* or by Rawls's first principle in its amended form)". Pogge proposed an amendment to Rawls's first principle as that it forbids radical social and economic inequalities involving extreme poverty. Therefore, he favors a global order under which basic rights and liberties would be better protected.

Both Beitz and Pogge characterize themselves as cosmopolitan liberals. Each describes cosmopolitan liberalism differently, but each defines his own approach as opposed to Rawls' idea of global normative order. Beitz contrasts his own cosmopolitan liberalism with a position he

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[43] *Ibid*., p. 259.

[44] Pogge, *Realizing Rawls,* pp. 239.

calls social liberalism, which attributes this later view to Rawls. According to Beitz, social liberalism is "probably the majority view among political philosophers who have thought about international political theory." Its central feature is that "domestic societies or peoples are taken as having non-derivative moral significance." Cosmopolitan liberalism, by contrast, "does not take societies as fundamental;" instead, it "takes the well-being of individuals as fundamental" and interprets "the values of society as derivative," and it regards "the reform of institutional structures, both domestic and international, as an instrument for the satisfaction of the just interests of individual persons rather than for the improvement of societies per se."[45]

According to Pogge, three factors are shared by all cosmopolitans:

> First, *individualism*: the ultimate units of concern are *human beings*, or *persons* - rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states. The latter may be units of concern only indirectly, in virtue of their individual members or citizens. Second, *universality*: the status of ultimate unit of concern attaches to every *living* human being *equally* - not merely to some subset, such as men, aristocrats, Aryans, whites, or Muslims. Third, *generality*: this special status has global force. Persons are ultimate units of concern for everyone - not only for their compatriots, fellow religionists, or suchlike (emphasis in the original).[46]

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[45] Beitz, *Political Theory and International Relations*, p. 215.

[46] Pogge, *World Poverty and Human Rights*, p. 169.

Pogge then distinguishes legal from moral cosmopolitanism:

> *Legal* cosmopolitanism is committed to a concrete political ideal of a global order under which all persons have equivalent legal rights and duties - are fellow citizens of a universal republic. *Moral* cosmopolitanism holds that all persons stand in certain moral relations to one another. We are required to respect one another's status as ultimate units of moral concern - a requirement that imposes limits on our conduct and, in particular, on our efforts to construct institutional schemes. This view is more abstract, and in this sense weaker than, legal cosmopolitanism.[47]

In sum, Pogge's distinction between legal (strong) and moral (weak) cosmopolitanism indicates that strong cosmopolitans require that, as agents, we should admit equal duties or equal responsibilities to everyone in the world,[48] while weak cosmopolitans suggest that people have special obligations to fellow nationals or fellow citizens. As David Miller shows, the cosmopolitanism is in fact reduced to the claim that we owe people *something* as a matter of justice, regardless of national boundaries.[49] So, cosmopolitanism in this weak sense is simply the claim

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[47] *Ibid*.

[48] David Miller notes that the strong account of cosmopolitanism "only makes sense in combination with a political demand for global government. If we were truly world citizens, then equal responsibilities would certainly follow." D. Miller, "Cosmopolitanism: A Critique," *Critical Review of International Social and Political Philosophy*, Vol. 5, no. 3 (2002), p. 84.

[49] See David Miller, "Debate Caney's 'International Distributive Justice': a Response," *Political Studies,* Vol. 50, no, 5 (2002), p.975.

that there are global duties of justice, duties owed by one human being to another that go beyond borders.[50]

Miller argues that the weak (moral) version of cosmopolitanism – which is formulated in terms of a principle of equal moral worth or equal moral concern – "can be accepted by almost anybody – excepting a few racists and other bigots."[51] Thus, one may say that John Rawls' *LP* can be included in the moral version of cosmopolitanism. [52] Just because Rawls

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[50] It is worth mentioning that Beitz and Pogge who in their earlier works were defended a Rawlsian account of global egalitarianism have eventually modified their theoretical claims: Beitz now emphasizes "the derivative rather than intrinsic arguments for greater global equality," and Pogge attaches his case for global economic shift to the principle of non-violation of human rights. See David Miller, "Against Global Egalitarianism," in G. Brock and D. Mellendorf (eds), *Current Debates in Global Justice* (Dordrecht: Springer, 2005), p. 57. See also Charles Beitz, "Dose Global Inequality Matter?" in Thomas Pogge (ed.), *Global Justice* (Oxford: Blackwell Publisher, 2001), pp. 106-122; Pogge, *World Poverty and Human Rights*.

[51] David Miller, "Cosmopolitanism: A Critique," p. 84. In somewhere else, Miller explains the political distance between cosmopolitans and their opponents as follows: "whereas cosmopolitans advocate global principles of distributive justice, anti- cosmopolitans hold that distributive principles only apply within nations and other smaller communities. According to those in the second camp, global principles of justice are non-distributive in character: they may, for example, specify a minimum level of entitlement that applies to human beings everywhere, or they may specify procedures that should govern relationships between political communities, such as principles of reciprocity or mutual aid. In other words, cosmopolitans invite us to compare the shares of resources held by different people in different places, whereas their opponents focus on other aspects of the global order, typically on whether people's basic rights and interests are protected, and on the terms on which political communities interact with each other. For one side, global inequality is a matter of concern in its own right; for the other, global inequality matters only insofar as it translates into poverty, exploitation, or other such non-distributive forms of injustice." D. Miller, "Debate Caney's 'International Distributive Justice': a Response," *Political Studies,* Vol. 50, no. 5 (2002), p. 976.

[52] See also Samuel Freeman, *Rawls*, p. 419. Rawls' "Society of Peoples" described in this chapter satisfies most of Pogge's requirements for a just global order.

insists the honoring of human rights and the duty of assisting peoples living under unfavorable conditions among the principles of justice that should govern "Society of Peoples."

In the rest of this chapter, I will examine Rawls' theory of global normative order as the foundation for a conception of human rights. I will explain Rawls' idea of a people and his distinction between liberal and "decent" peoples. Finally, I will briefly discuss the requirements of respect for human rights.

II. The Society of Peoples

In *LP* Rawls argues against attempts of the Rawlsian cosmopolitans in extending the principles of Justice as Fairness to the global context.[53] In contrast to the cosmopolitans' assertion that the ultimate concern of their view "is the well-being of individuals and not the justice of societies," what is significant to *LP*, Rawls says, "is the justice and stability for the right reasons of liberal and decent societies, living as members of a society of well-ordered Peoples" (*LP*, pp. 119-20).

[53] See *LP*, esp. part 2, section 16.

Rawls' aim here is twofold: he wants to give an account of the role of human rights and of the form that toleration of non-liberal societies must take from the perspective of liberalism "extended to the law of peoples," to prove that his liberal Law of Peoples is acceptable globally– to both well-ordered liberal and non-liberal but decent peoples – and to prove that a society need not be liberal in order to respect human rights.[54]

Rawls describes the two fundamental motivating ideas of *LP* as follows:

> One is that the great evils of human history – unjust war and oppression, religious persecution and the denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder – follow from political injustice, with its own cruelties and callousness. … The other main idea, obviously connected with the first, is that, once the gravest forms of political injustice are eliminated by following just (or at least decent) social policies and establishing just (or at least decent) basic institutions, these great evils will eventually disappear (*LP*, pp. 6-7).

Rawls' idea of the Law of Peoples includes three essential characteristics: first, the idea of people, second, the liberal and decent peoples, and finally the idea of global public reason. In the following pages I examine these characteristics.

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[54] See also Freeman, *Rawls*, pp. 431, 437.

1. The Idea of People

The "basic units of moral concern" in the global normative order might be understood in three ways: "global society as a society of individuals, a society of peoples, and a society of states."[55] Rawls supports the view that the basic unit (or agents) in the global order is a society of peoples. A distinctive feature of it is that there are the principles must be endorsed by the agents for the global order – what Rawls called the "Law of Peoples."

The idea of a people, however, has three "basic features": institutional, cultural, and moral. The first feature, the institutional feature, shows that a people has a government with a set of legal and political institutions that represents its people's interests; "reasonably just … government that serves their [people's] fundamental interests": protecting their territory; preserving their political institutions, culture, independence, and self-respect as a corporate body; and ensuring the safety, security, and well-being of their citizens (*LP,* pp. 23–9, 34–5). The second feature, the cultural condition, indicates that each peoples are also culturally "united by what Mill called 'common sympathies';" Rawls clearly means by

[55] See Joshua Cohen, "The Terrain of a Global Normative Order," *ocw.mit.edu/NR/rdonlyres/Political-Science/17-000JPolitical-Philosophy--Global-JusticeSpring2003/.../0/lnclass_two1.pdf.* p.8.

this an idea of nationality, generally based on "a common language and shared historical memories" (*LP,* pp. 23–5). And finally, the people has a moral nature, meaning that the political society is regulated by a conception of justice, and that the people is prepared to cooperate with other peoples on reasonable terms (*LP,* pp. 23–5, 61–8). Rawls says peoples with these three features differ from the societies he refers to as states:

> How far states differ from peoples rests on how rationality, the concern with power, and a state's basic interests are filled in. If *rationality* excludes the *reasonable* (that is, if a state is moved by the aims it has and ignores the criterion of reciprocity in dealing with other societies); if a state's concern with power is predominant; and if its interests include such things a converting other societies to the state's religion, enlarging its empire and winning territory, gaining dynastic or imperial or national prestige and glory, and increasing its relative economic strength – then the difference between states and peoples is enormous (emphasis in the original)(*LP*, pp. 28-29).

Two characteristics of Rawls' account of the idea of the peoples are important. The first is that, peoples are considered as reasonable in addition to being simply rational (*LP*, 25).[56] This idea is opposed to the idea standardly used in political science (particularly in realist international-relations theory) that states as the rational collective agents

[56] See also Joshua Cohen, "The Terrain of a Global Normative Order," pp. 8-9.

are merely pursue their own interests.[57] Making a distinction between a liberal people and a liberal state, Rawls further elaborates the idea:

> A difference between liberal peoples and states is that just liberal peoples limit their basic interests as required by the reasonable. In contrast, the content of the interests of states does not allow them to be stable for the right reasons: that is, from firmly accepting and acting upon a just Law of Peoples. Liberal peoples do, however, have their fundamental interests as permitted by their conceptions of right and justice. They seek to protect their territory, to ensure the security and safety of their citizens, and to preserve their free political institutions and the liberties and free culture of their civil society. Beyond these interests, a liberal people tries to assure reasonable justice for all its citizens and for all peoples; a liberal people can live with other peoples of like character in upholding justice and preserving peace (*LP*, p. 29).

The second characteristic indicates that a significant interest of a people is not being treated with indignity and contempt but with respect by other peoples: "altogether distinct from their concern for their security and safety of their territory, this interest shows itself in a people's insisting on receiving from other peoples a proper respect and recognition of their equality" (*LP*, p.35).

[57] According to the realist's account of global order, the principal actors are states, "who act rationally in pursuit of their interests, above all their interests in security. Because global society is anarchic there is no central authority with the capacity to make and enforce rules in the global society, states must depend on their own devices. And because of their uncertainty about the intentions of other states, they must be constantly watchful about their own security." Cohen, "The Terrain of a Global Normative Order", p.1.

As Rawls argues in Justice as Fairness, when citizens in a democracy consider the question of the justice of their society's basic structure, they are to think of themselves and each other only as free and equal moral persons, and they are to offer terms of cooperation that they sincerely believe the others might reasonably accept.[58] Similarly, in *LP* when determining what terms of cooperation would be fair, peoples are to employ a criterion of reciprocity appropriate to the kind of social cooperation in question (*LP*, 25).[59] Rawls writes:

> It is…part of a people's being reasonable and rational that they are ready to offer to other peoples fair terms of political and social cooperation. These fair terms are those that a people sincerely believes other equal peoples might accept also; and should they do so, a people will honor the terms it has proposed even in those cases where that people might profit by violating them. Thus, the criterion of reciprocity applies to the Law of Peoples in the same way it does to the principles of justice for a constitutional regime (*LP*, p. 35).

According to Rawls, each citizen of a well-ordered society would ideally have the two moral powers necessary to be cooperating members of society. These moral powers include a capacity for a sense of justice (to understand, apply, and act from principles of justice) and a capacity for a

[58] See Rawls, *Justice as Fairness: A Restatement*, pp. 27-28.

[59] See also, Freeman, *Rawls*, p. 436.

rational conception of the good (to form, revise, and pursue a rational conception of the good). Rawls calls these powers the capacities to be reasonable and to be rational.[60] In a well-ordered democratic society, the citizen assumes that every member of the society is a free and equal moral person and thus regards each member of the society as entitled to the same basic political and legal rights as any other citizen. In *LP* the parallel of the idea of a citizen is the idea of a people: a people is well-ordered in accordance with a conception of justice and also is a non-expansionist non- aggressive society. Thus a people is motivated to take part in a fair social cooperation among well-ordered societies. It requires that a people has the necessary and the sufficient ground of entitlement to equal rights and respect.[61]

2. Liberal and Decent Peoples

The second essential characteristic of the Law of Peoples is a distinction between liberal and decent peoples. A liberal people holds a conception of justice that assigns equal rights – personal and political – to

[60] See Rawls, *Political Liberalism,* pp. 19, 81,103–4.

[61] See Rawls*, LP*, pp. 87-88. See also Freeman, *Rawls*, pp. 430-31.

citizens, and that regards citizens as free and equal persons. By contrast, a decent people does not endorse a liberal conception of justice; instead, it is based on a “common good idea of justice” and regards individuals as basically members of groups (*LP*, pp. 64-65). Although a common good idea of justice ensures basic rights to all members, it does not guarantee the same rights for all individuals as one finds in liberal democracies.

In spite of the above-mentioned difference, utilizing the idea of an original position, Rawls argues that the parties representing liberal and non-liberal (but decent) peoples would endorse the proposed principles of the Law of Peoples as constituting the moral basis of international law and as applying to international relations among all societies (*LP,* pp. 10, 32-33, 39-43, 58). The proposed principles are as follows:

> (1) Peoples are free and independent, and their freedom and independence is to be respected by other peoples.
> (2) Peoples are to observe treaties and undertakings.
> (3) Peoples are equal and are parties to the agreements that bind them.
> (4) Peoples are to observe the duty of non-intervention.
> (5) Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
> (6) Peoples are to honor human rights.
> (7) Peoples are to observe certain specified restrictions in the conduct of war.
> (8) Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime (*LP*, p.37).

In the first step of his argument, Rawls states that the parties are rational representatives of liberal peoples behind a veil of ignorance. This

veil deprives the parties of knowledge about the societies they each represent, including the size of its territory, its level of economic development, its natural resources, its population, and how powerful it is as compared to other societies. What they do each know is that they represent a liberal democratic people.[62]

Rawls maintains that in the second-level original position, the representatives of liberal peoples debating how to interpret the two traditional powers of sovereignty (concerning war and internal autonomy), should ask themselves:

> What kind of political norms do liberal peoples, given their fundamental interests, hope to establish to govern mutual relations with nonliberal peoples? Or what moral climate and political atmosphere do they wish to see in a reasonably just Society of well-ordered Peoples? (*LP*, p. 42).

The answer is that the two powers of sovereignty should be limited, thus the representatives of liberal peoples would choose an interpretation of the eight principles of *LP* according to which the freedom and

[62] Rawls explains that: "The basic idea is to follow Kant's lead as sketched by him in *Perpetual Peace* (1795) and his idea of *foedus pacificum*. I interpret this idea to mean that we are to begin with the social contract idea of the liberal political conception of a constitutionally democratic regime and then extend it by introducing a second original position at the second level, so to speak, in which the representatives of liberal peoples make an agreement with other liberal peoples. ... Each of these agreements is understood as hypothetical and nonhistorical, and entered into by equal peoples symmetrically situated in the original position behind an appropriate veil of ignorance. Hence the undertaking between peoples is fair" (*LP*, p. 10).

independence of peoples, as declared in principle (1), and the duty of non-intervention, as declared in principle (4), are restricted by the requirement to honor human rights, as stated in principle (6); also principle (5) is interpreted as permitting humanitarian military intervention in grave cases (*LP*, p. 42).

In the second step of the argument, Rawls suggests criteria for a decent society and argues that rational representatives of decent non-liberal peoples in an original position behind a veil of ignorance would endorse the same interpretation of the proposed principles as endorsed by the rational representatives of liberal peoples. In fact, Rawls' argument for the principles of *LP* depends on his conceptions of the fundamental interests of decent peoples, non-liberal and liberal (*LP*, 40-41).

The fundamental interests of free and democratic liberal peoples give them reason to seek the benefits of social cooperation among peoples. And they seek to gain these benefits by cooperating in accordance with a criterion of reciprocity. Rawls states that,

> [L]iberal peoples have a certain moral character. Like citizens in domestic society, liberal peoples are both reasonable and rational, and their rational conduct, as organized and expressed in their elections and votes, and the laws and policies of their government, is similarly constrained by their sense of what is reasonable. As reasonable citizens in domestic society offer to cooperate on fair terms with other citizens, so (reasonable) liberal (or decent) peoples offer fair terms of cooperation to other peoples. A people will honor these terms when assured that other peoples will do so

> as well. This leads us to the principles of political justice in the first case and the Law of Peoples in the other (*LP*, p. 25).

Rawls also argues that decent non-liberal societies are "well-ordered" and the parties representing these societies – in an original position – are "rational and moved by appropriate reasons," (*LP*, p. 63). They "do not engage in aggressive wars; therefore their representatives respect the civic order and integrity of other peoples" and thus would "accept the symmetrical situation (the equality) of the original position as fair." He further explains that in virtue of their common good conception of justice, "the representatives strive both to protect the human rights and the good of the peoples they represent and to maintain their security and independence." In addition, the representatives "care about the benefits of trade and also accept the idea of assistance among peoples in time of need" (*LP,* p. 69). Rawls argues that if decent societies accept the proposed principles, these societies should be considered by liberal societies "as *bona fide* members of a reasonable Society of Peoples" (*LP*, p. 84).

However, Rawls realizes that the particular societies may lack the capacities necessary for taking part in a Society of Peoples, or may commit crimes: these are "burdened societies" and "outlaw regimes." "Benevolent absolutisms" seem to be an intermediate case, insofar as they pose no threat to other states and secure human rights domestically,

yet are not well-ordered societies. Rawls describes benevolent absolutism as securing "human rights" or "most human rights" (but not rights of political participation) (*LP*, pp. 4, 63, 92). Well-ordered Peoples may pressure the "outlaw regimes" to observe the Law of Peoples (*LP*, p.93) and have duties of assistance toward the "burdened societies." Here Rawls, in contrast whit cosmopolitan egalitarians, argues that,

> It does not follow, however, that the only way, or the best way, to carry out this duty of assistance is by following a principle of distributive justice to regulate economic and social inequalities among societies. Most such principles do not have a defined goal, aim, or cut-off point, beyond which aid may cease. The levels of wealth and welfare among societies may vary, and presumably do so; but adjusting those levels is not the object of the duty of assistance (*LP*, p. 106).

In so doing, Rawls limits duties to the burdened societies in helping them to build their own institutions.[63] The aim of such duty of assistance is:

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[63] The importance and causal efficacy of institutions – as an essential element of social and economic development – has recently gained sophisticated explanation by many economists and social scientists. For example, Amartya Sen in *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981), has concluded that "famines are economic disasters, not just food crises" p. 162. In other worlds, he argues that famines are not problems of food production, but political and socio-economic structure. For further inquiry about the importance of domestic institutions in current literature see, Mathias Risse, "What We Owe to the Global Poor," in G. Brock and D. Mellendorf (eds), *Current Debates in Global Justice,* pp. 81-118. He cites many references in this regard, for instance, Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990); David Landes, *The wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (New York: Norton: 1998); Dani Rodrik, Arvind Subramanian and Francesco Trebbi, "Institutional Rule: The Primacy of Institutions over Geography and Integration in

> [T]o help burdened societies to be able to manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples. This defines the "target" of assistance. After it is achieved, further assistance is not required, even though the now well-ordered society may still be relatively poor (*LP*, p. 111).

3. The Idea of Global Public Reason

The third essential characteristic of the Law of Peoples is the idea of public reason: the society of peoples is guided by reasons that can be shared by different peoples, and that its content is provided by the principles of the Law of Peoples (*LP*, pp. 55- 57, 121). In order to determine how the ideal of a peaceful world – in which the human rights of all persons are respected – could be realized, Rawls first rejects the goal of a world state:

> I follow Kant's lead in *Perpetual Peace* (1795) in thinking that a world government – by which I mean a unified political regime with the legal powers normally exercised by central governments – would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy (*LP*, p. 36).

Economic Development," (http://ksghome.harvard.edu/~.drodrik.academic.ksg/papers.html); *World Economic Outlook 2003*, Chapter 3.

He then tries to develop a conception of a just order of politically independent peoples which could, realistically, be achieved. It is a conception of peaceful relations among peoples, which each of them are both well-ordered by its own conception of justice and motivated to deal justly with other peoples. Since such peoples differ in their moral character from states, Rawls refers to them using the term “Society of Peoples.” Rawls maintains that they would follow the principles of the Law of Peoples as the basis of public political reasoning in their dealings with each other (*LP*, p. 55).

Rawls first considers the idea of a Society of Peoples in which all societies are liberal-democratic peoples. In *A Theory of Justice* and *Political Liberalism,* Rawls has argued that a just and stable liberal-democratic society is realistically possible. In *LP* he addresses the question of whether just and stable relations among such societies would be realistically possible (*LP*, p, 11, 124-26). He presents of arguments in support of the claim that such a Society of Peoples would be realistically possible. The first argument – the argument of democratic peace – focuses on the empirical and historical facts explaining why well-established democracies have not gone to war with each other and

probably will not do so.[64] The second argument aims to show that liberal peoples have reason to support peace and justice internationally by following the principles of the Law of Peoples. This argument makes appeal to the idea of public reason.

Public reason is a basis for political reasoning that all can share; it comprises "public justifications for political and social institutions – for the basic structure of a political and social world" – that can be offered to and accepted by all.[65] Rawls characterizes his own political conception of justice (Justice as Fairness) as giving one of the various possible forms to the content of public reason for a constitutional democracy. Such form of public reason is a conception of justice that expresses political values that can be shared by all free and equal citizens, thus, a citizen can deliberate within framework of a conception of justice in the sincere belief that the political values it expresses can be endorsed by other citizens.[66]

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[64] See Part I, section 5 of *LP*. Referring to the historical studies for example, Michael Doyle, *Ways of War and Peace* (New York: Norton, 1997), Rawls notes, "Though liberal democratic societies have often engaged in war against nondemocratic states, since 1800 firmly established liberal societies have not fought one another" LP, p. 51.

[65] John Rawls, *Collected Papers*, ed., Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), p. 607.

[66] See John Rawls, "The Idea of Public reason Revisited" in *LP*, p. 140.

The Law of Peoples specifies a form of public reason for a Society of Peoples, which has been termed "global public reason."[67] Here the assumed just social world is not a well-ordered constitutional democracy, but an order of politically independent peoples. Peoples are well-ordered societies meeting various conditions including moral ones that Rawls calls the criteria of decency (*LP*, pp. 23-25). Unlike states as described by Realist theories of international relations (*LP*, pp. 46-48), decent peoples are motivated to realize the ideal of a Society of Peoples by following its public reason, and their domestic institutions meet certain minimum moral standards, including respect for basic human rights (*LP*, pp. 64-67).

Some important implications of the idea of global public reason are following: first, the public reason reflects the virtue of *toleration*. This indicates that liberal peoples do not insist that the content of the global public reason corresponds to the principles of a liberal conception of justice, that is, do not insist that those principles should be applied to all societies (*LP*, p. 59). The second implication is that the terms of argument among peoples would be shared; thus, the global public reason should not depend on a conception of citizens as free and equal persons. Therefore, its terms can be accepted by both liberal and non-liberal decent peoples

[67] See Joshua Cohen, "Is there a Human Right to Democracy?" p. 228.

(*LP*, p. 57). Finally, the idea of global public reason is a matter for treatment of other peoples – both liberal and decent non-liberal – as equal cooperators. It specifies cooperation within the principles of the Law of Peoples. Political societies are to apply the principles as practical guidelines and regulations for their conduct and institutions (*LP*, p. 42).

III. The Requirement of Respect for Human Rights

Given the above brief explanation of Rawls' theory of global normative order, we can understand that why Rawls includes in the Law of Peoples a principle requiring respect for human rights.

As we have seen, among the principles that Rawls sets for the Law of Peoples are the principles that specify moral reasons for restricting the permissible ends and means of war, as well as moral reasons for setting limits to the states' sovereignty. Rawls believes that war is justified only for reasons of self-defence or in order to protect human rights in extreme cases, and that human rights specify limits to a regime's internal autonomy (*LP*, p. 79). If a government systematically violates the human rights of its own people, it should be regarded as an "outlaw" and "may be subjected to forceful sanctions and even to intervention" (*LP*, p. 81) by the liberal and decent peoples. Also the idea of human rights can serve as restrictions on the "reasons for war and its conduct"

(*LP*, 79). In a morally acceptable global order, war may be waged only against another state in self-defence or to secure human rights of the peoples as violated by their own state. Therefore, wars cannot justly be waged in the interest of maintaining military superiority or access to economic resources, or to expand national territory, which historically have been the primary reasons for warfare (*LP*, 94-97).

Thus, human rights as a significant standard should be honored by a reasonable Law of Peoples. According to Rawls, the idea of human rights has three primary *roles* within the Law of peoples:

1. Their fulfillment is a necessary condition of the decency of a society's political institutions and of its legal order.
2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit to the pluralism among peoples (*LP*, p. 80).

Because of the special roles Rawls ascribed to human rights for ensuring social cooperation within the Society of Peoples, he did not include among them all the moral rights of persons. The peoples, who ensure only human rights but not all liberal rights satisfy a criterion of decency, even though they are not just from the liberal moral perspective (*LP*, 78, 83). But for Rawls, decency is an important subject of political morality since it is sufficient for a people to enjoy the rights to self-determination and non-intervention (*LP*, p. 83). An implication of Rawls' idea of global order is that the Society

of Peoples can be just whether all of its members are just (from the liberal point of view) or not (*LP*, p. 70).[68] As a result, the task of the Society of Peoples is to ensure basic human rights of all peoples and not "to enforce the liberal rights of democratic citizenship among all peoples."[69] Achieving democratic justice should be left to the self-determination of each politically independent people (*LP*, pp.61, 85).

As we have seen, the main concern of *LP* is the problem of how to minimize war while at the same time securing individual basic human rights through law and protecting and promoting representative government. According to Rawls' theory of global normative order, world peace can be justly maintained only if a political conception of justice applicable to global order and can be endorsed by all societies that satisfy certain minimal criteria of social justice, which he calls the criteria of decency. These societies would form an association of well-ordered societies (a Society of Peoples) based on a law of peoples. Rawls also argues that it is necessary to formulate a reasonable law of peoples in

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[68] In support of this idea, Rawls elucidates that in certain matters, churches – for example the Catholic and the Congregational churches – might be treated equally, "even though the first is hierarchically organized, while the second is not." As another example: "universities also may be organized in many ways…. But the fact that universities' internal arrangements differ doesn't rule out the propriety of treating them as equals in certain circumstances" (*LP*, pp. 69-70).

[69] Samuel Freeman, *Rawls*, p. 437.

order to settle disagreements about which rights should be regarded as human rights.

As Rawls estates, “the criterion of reciprocity applies to the Law of Peoples in the same way it does to the principles of justice for a constitutional regime” (*LP*, p. 35). In fact, *LP* extends to international political relations the same fundamental political values expressed in Justice as Fairness. In *LP* the parallel of the idea of a citizen is the idea of a people: a people is well-ordered in accordance with a conception of justice and also is a non-expansionist non- aggressive society. Thus a people is motivated to take part in fair social cooperation among well-ordered societies. It requires that a people has the necessary and sufficient ground of entitlement to equal rights and respect. However, while *LP* is based on the same fundamental political values as Justice as Fairness, it does not require non-liberal societies to adopt liberal-democratic political system.

Finally, in *LP* Rawls develops a moral justification for “two basic and historically profound changes in how the powers of sovereignty have been conceived since World War II.” The first is that “war is no longer an admissible means of government policy and is justified only in self-defense, or in grave cases of intervention to protect human rights.” The second is that “a government’s internal autonomy is now limited” (*LP*, p.

79). Rawls offers a moral justification for these changes by arguing that no decent, well-ordered society would have any reason to reject them.

CHAPTER 2

THE IDEA OF POLITICAL CONCEPTION OF HUMAN RIGHTS

> We must always start from where we now are, assuming that we have taken all reasonable precautions to review the grounds of our political conception and to guard against bias and error…. The idea of realistic utopia reconciles us to our social world.
>
> John Rawls (*LP*, p. 121).

In this chapter, I examine a conception of human rights which is less extensive than the rights that the maximalist view (cosmopolitan egalitarianism) endorses and more expansive than the minimalist view (humanitarianism) embraces. This account, which is derived from Rawls' *LP,* affirms rights to a reasonable standard of living, health and education and a form of accountable political system, although not a right to democracy.

This conception of human rights as a part of the Law of Peoples should be understood as resting on the ideas of Rawls' later political philosophy. Both the Law of Peoples and Justice as Fairness are political conceptions of justice, and together they constitute "political liberalism" (*LP*, p. 55). As Rawls says, the Law of Peoples is "a *political* conception of right and justice" (*LP*, p. 3). In order to understand what this means, I will

briefly examine the idea of freestanding (political) conception of justice – which is explained in *Political Liberalism,* then I will explore the idea of a political conception of human rights in *LP*, and how Rawls associates it with the idea of "decency" and a "decent society."

I. The Freestanding Conception of Justice

In *A Theory of Justice*[70] (hereinafter, *Theory*), Rawls proposed an ideal of a well-ordered democratic society based on the agreement on a conception of justice embedded in the virtue of fair cooperation among citizens as free and equal persons. In his second book, *Political Liberalism*[71] (hereinafter, *Liberalism*), Rawls realized how in *Theory* he had not taken the fact of reasonable pluralism seriously enough. In *Theory,* the conception of justice as fairness was dependent on a comprehensive liberal philosophy of life that only citizens who affirm it would have reason to endorse Justice as Fairness. In *Liberalism,* however, Rawls asks whether Justice as Fairness can be released from this dependence; can views that do not agree on the fundamental moral

[70] John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: Harvard university Press, 1999).

[71] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).

principles, nevertheless agree on a political and not metaphysical conception of justice?[72] *Liberalism* defends this possibility by arguing that achieving an overlapping consensus on the political conception of justice under conditions of ethical, religious and philosophical disagreement is quite feasible.[73]

I will now briefly explain the three fundamental ideas of *Liberalism* that specify sufficient conditions for a well-ordered society, that is, the idea of a political conception of justice, the idea of an overlapping consensus of reasonable comprehensive doctrines on this political conception, and the idea of public reason.[74]

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[72] See Joshua Cohen, "A More Democratic Liberalism," *Michigan Law Review*, Vol. 92, No. 6, (1994): pp. 1503-1546.

[73] Political liberalism, Rawls says, proceeds by "the method of avoidance:" it leaves aside controversial topics in theology, philosophy of mind, epistemology, and moral philosophy. He argues that the ideas which Justice as Fairness constructed are widely shared by those who live in a democratic culture. See Rawls, "Justice as Fairness: Political Not Metaphysical," in John Rawls, *Collected Papers*, ed. Samuel Freeman, (Cambridge, MA: Harvard University Press, 1999), p. 394.

[74] Rawls, *Political Liberalism*, P. 44.

1. The Idea of Political Conception of Justice

The most important characteristic of a just and well-ordered liberal democratic society is to be regulated by a political conception of justice. In Rawls' definition, a political conception of justice has three distinct features: First, its subject is the basic structure of a society. Second, it is presented as a freestanding notion, and "The third feature of a political conception of justice is that its content is expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society."[75]

A political conception of justice is presented as a freestanding view in the sense that it is "expounded apart from, or without reference to," any particular comprehensive doctrine. A comprehensive doctrine is a moral doctrine that applies to a wide range of moral subjects, not only to the basic structure of society, and includes ideals of personal character and of relationships of various kinds; if it is fully comprehensive, it covers all of the virtues and all of the values of human life. Rawls assumes that "all citizens [in a well- ordered liberal society] affirm a comprehensive doctrine to which the political conception they accept is in some way related," and he conceives the political conception of justice they accept as "a module,

[75] Rawls, *Political Liberalism*, p. 13

an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it." Although the political conception is justifiable by reference to these doctrines it is not presented as derived from any of them, or as an application of any of them to the basic structure of society.[76]

Such a freestanding conception of justice rests on Rawls' assumption that there are certain deeply well-established ideas and principles that citizens share in a constitutional democracy, whatever their conceptions of the good. However, in *Theory*, Rawls underestimated the diversity of ethical and religious perspectives. Because of the conditions of a liberal democracy, there is no realistic possibility that the members of even a well-ordered society will ever come to agree on the foundations of justice, or on any particular conception of good.[77] So "if the role of a conception of justice is to be practically conceived – as aiming to supply a basis for public arguments all can accept – then other bases for agreement must be found."[78]

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[76] Rawls, *Political Liberalism*, p.12.

[77] See Cohen, "A More Democratic Liberalism," pp. 1505-6.

[78] Samuel Freeman "Introduction" in *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003), p. 34.

Rawls thus argues that justice as fairness is a conception founded on what he calls "fundamental intuitive ideas" about freedom, equality, and fairness latent "in the public culture of a democratic society."[79] So political ideas and conceptions do not presuppose the truth of and do not belong to any single comprehensive doctrine; instead, they may be found in a democratic society's public political culture.

In discussing the third feature of a political conception of justice, Rawls first explains what he means by the public political culture of a democratic society. He continues by distinguishing it from the "background culture" of civil society in which various associations and organizations and different comprehensive doctrines arrange the citizens' daily lives. Finally, he explains how justice as fairness illustrates this feature:

> justice as fairness starts from within a certain political tradition and takes as its fundamental idea that of society as a fair system of cooperation over time, from one generation to the next. This central organizing idea is developed together with two companion fundamental ideas: one is the idea of citizens (those engaged in cooperation) as free and equal persons the other is the idea of a well-ordered society as a society effectively regulated by a political conception of justice. We suppose also that these ideas can be elaborated into a political conception of justice that can gain the support of an overlapping consensus.[80]

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[79] Rawls, *Political Liberalism*, p. 13, and also Rawls, "The Idea of Overlapping Consensus," in Rawls, *Collected Papers*, p. 429.

[80] Rawls, *Political Liberalism*, pp. 14-15.

The justification of Justice as Fairness is complete with the achievement of an "overlapping consensus." Such a consensus can be achieved when adherents of various comprehensive ethical and religious doctrines endorse Justice as Fairness on moral grounds.[81]

2. The Idea of Overlapping Consensus

Given the fact of reasonable pluralism, the idea of overlapping consensus aimed at explaining how the political conception of justice can remain stable over time. To put it differently, how is it possible for the political conception of justice to win support from different reasonable ethical and religious doctrines, so that adherents to those doctrines can be morally motivated to do what the political conception requires? The idea of overlapping consensus assumes that reasonable citizens in a well-ordered society can endorse the political conception in accordance with the ideas and values latent in their comprehensive views.[82] For example, Kantians may endorse the political conception of justice as a precondition of the autonomous moral agency, while Christians, Jews and Muslims may

[81] See Rawls, "The Idea of an Overlapping Consensus," p. 424.

[82] See Rawls, *Justice as Fairness: A Restatement,* p. 32.

support the same political conception as a precondition for fulfilling divinely imposed obligations.[83]

In so doing, the idea of an overlapping consensus offers a twofold argument for a political conception of justice. The first is the idea that reasonable citizens can support the political conception in terms of "public reason," the reasons and ideas embedded in democratic political culture. The second is this assumption that reasonable citizens can also affirm the political conception founded on non-public reasons that derive from their distinct comprehensive doctrines. When all the reasonable comprehensive doctrines fulfill this second stage, then there is an overlapping consensus.[84]

In *Political Liberalism*, Rawls illustrates the development of an overlapping consensus on the political conception of justice with a brief discussion of how Catholics and Protestants achieved an overlapping consensus on the principle of toleration. The principle of religious toleration, which was primarily accepted in order to put an end to religious conflict, gradually came to be accepted by Protestants and Catholics for moral reasons. Although in sixteenth century the acceptance of the

[83] See J. Cohen, "A More Democratic Liberalism," p.1520.

[84] See Rawls, *Justice as Fairness: A Restatement,* pp. 32-33.

principle of toleration was a mere modus vivendi, not an overlapping consensus: since "both faiths held that it was the duty of the ruler to uphold the true religion and to repress the spread of heresy and false doctrine." [85] Rawls thinks that the long experience of social cooperation with those of other religions ultimately diminished hostility between Catholics and Protestants and removed the obstacles to moral acceptance of the principle of toleration. Similarly, we might conjecture that different reasonable religious and ethical traditions that have long flourished in a democratic culture will come to embrace the basic intuitive ideas and political values on which Justice as Fairness is founded. [86]

3. The Idea of Public Reason

The third fundamental idea of *Political Liberalism* is the idea of public reason. If a conception of justice functions as a basis for the public political deliberation, therefore it should be interpreted in accordance with

[85] Rawls, *Political Liberalism*, p.148.

[86] See Rawls, "The Idea of Overlapping Consensus," p. 441.

the “principles of reasoning and rules of evidence” available to the common reason of democratic citizens.[87] Rawls states that,

> Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.[88]

The idea of public reason has two essential features: the first is the fundamental political questions to which it applies; they are questions of “constitutional essentials and matters of basic justice.”[89] Constitutional essentials concern the general form of government and political processes as well as the equal basic political rights and liberties of citizens. Matters of basic justice have to do with the basic structure of society and, in particular, how it ought to respond to social and economic inequalities. “The second feature is the persons to whom the idea of public reason applies; they are persons who lead discussions of the fundamental

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[87] Rawls, *Political Liberalism*, p. 224.

[88] *Ibid*., p. 137.

[89] *Ibid*., pp. 227-230.

political questions in the public political forum."[90] Rawls defines this forum as follows:

> [It] may be divided into three parts: the discourse of judges in their decisions, and especially of the judges of a supreme court; the discourse of government officials, especially chief executives and legislators; and finally, the discourse of candidates for public office and their campaign managers, especially in their public oratory, party platforms, and political statements.[91]

Rawls argues that public reason specifies an ideal conception of citizenship for a constitutional democratic regime. It is a normative ideal: it imposes on citizens "a moral, not a legal duty – the duty of civility" that restrains the way in which citizens should deliberate about the fundamental questions of their political life.[92] But how can citizens support the ideal and fulfill the duty? Judges, chief executives, legislators and candidates for public office can fulfill their duty if they "act from and follow the idea of public reason and explain to other citizens their reasons for

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[90] Philip. Quinn, "Religious Citizens and Public Reason" in Philip Quinn, *Essays in the Philosophy of Religion*, ed., Christian Miller (New York: Oxford University Press, 2006), p.189.

[91] John Rawls, "The Idea of Public Reason Revisited," in John Rawls, *Collected Papers*, p.575. A reasonable political conception of justice, Rawls says, has three important features: first, a set of basic rights, liberties, and opportunities; second, assigning special priority to these rights, liberties, and opportunities; and finally, ensuring all citizens the adequate means to make effective use of their freedoms. *Ibid*., p.582.

[92] Rawls*, Political Liberalism,* p. 217.

supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable."[93] And how can citizens who are not government officials obey the duty of civility? One of the obligations of all democratic citizens is that they should try to "be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality."[94]

In this way, Rawls argues, a reasonable political conception of justice is needed in order to constitute "the content of public reason" and to make public reason "complete."[95] For public reason to be completed, it is required that the meaning of competing political values be decided in accordance with a political conception, and not simply in accordance with citizens' or officials' own ethical and religious views. When judges, legislators, and citizens appeal to comprehensive doctrines to make political decisions that are not acceptable by a reasonable political conception, other citizens are manipulated for reasons they could not

[93] Rawls, "The Idea of Public Reason Revisited," p. 576.

[94] Rawls, *Political Liberalism*, p.218. See also Quinn, "Religious Citizens and Public Reason," p. 189.

[95] Rawls, "The Idea of Public Reason Revisited," in *LP*, pp. 144-145.

accept on the basis of their shared view as democratic citizens.[96] Therefore, citizens are treated as subjects and not as free and equal persons. The idea of public reason, thus, specifies *shared moral and political values* in order to generate public deliberation and to make constitutional democratic government work.[97]

II. The Idea of Political Conception of Right

In *LP,* Rawls asserts that his Law of Peoples "is developed within political liberalism and is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples" (*LP*, p.9). In so doing, Rawls attempts to provide "a particular political conception of right and justice that applies to principles and norms of international law and practice" (*LP,* p. 3). The question which this conception answers is the following: how can the conception of Justice as Fairness, elaborated in *Political Liberalism* for a liberal democratic society, be plausibly "extended" to the

[96] *Ibid*, p.137.

[97] See Rawls' discussion on the idea of public reason as an essential element of deliberative democracy in "The Idea of Public Reason Revisited," in *LP*, pp. 138-140.

global level – to an international society comprised of different "peoples" with different values and traditions?[98]

In LP Rawls aspires to present a "political conception of human rights" – as a part of an idea of global justice – for a culturally plural world. As I have explained in the previous chapter, this conception of human rights is also a part of an idea of global public reason: a shared basis for political argument which expresses a *common reason* that adherents of conflicting philosophical, ethical and religious traditions can be expected to share (*LP*, p. 68). In the rest of this chapter, I will explain such a conception of human rights.

1. Human Rights Proper

Human rights – in Rawls' view – imply the normative standards that must be met by any "decent" society. In other words, he conceives human rights as minimal and necessary – but not sufficient from the point of view of liberalism – requirements of justice that apply to the basic structure of any well-ordered society (*LP*, p. 61). These rights are fundamental to any "common good idea of justice" and so are not "peculiarly liberal or special

[98] See *LP*, pp. 31, 128.

to the Western tradition" (*LP*, p. 65). Thus, Rawls says, "political (moral) force" of human rights "extends to all societies and they are binding on all peoples" (*LP*, p. 80). But it does not require that they must be enjoyed everywhere in virtue of the common humanity or as citizenship rights in the sense of "rights as trumps" common to liberal legal theories.[99] Instead, Rawls argues that human rights are common to all peoples, since they are compatible with all reasonable political morality, including those of both "liberal" and "decent hierarchical" peoples.

> The list of human rights honored by both liberal and decent hierarchical regimes should be understood universal rights in the following sense: they are intrinsic to the Law of Peoples and have a political (moral) effect whether or not they are supported locally (*LP*, p. 80).

Therefore, according to Rawls, "human rights are distinct from constitutional rights from the rights of liberal democratic citizenship." Human rights are "a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide." These rights "play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a

[99] See, for example, Ronald Dworkin, "Rights as Trumps," in Jeremy Waldron, ed., *Theories of Rights* (New York: Oxford University Press, 1984) pp. 153-67.

regime's internal autonomy" by setting "a necessary, though not sufficient, standard" for the decency of a society's political institutions and legal order. Although a society's having a government that secures human rights is not sufficient to make it a decent society, but is sufficient to make it morally unjustified any attempts by the governments of other societies to use diplomatic or economic sanctions or military force to change its domestic institutions. Finally, human rights set a limit to pluralism among peoples. As a result, human rights play roles that are different from the roles played by the rights of democratic citizenship in a liberal society (*LP*, pp.78-81).

In Rawls' view, human rights are "a proper subset of the rights" (*LP*, 81) founded on justice, and particularly are distinct from the conceptions that "simply expand the class of human rights to include all the rights that liberal government guarantee" (LP, p. 78). Rawls specifies these rights as follows:

> Among the human rights are the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly) (*LP*, p.65).

Rawls, however, does not regard this list of human rights as complete and comprehensive, but instead as a brief summary of "human

rights proper," which he distinguishes from certain purported human rights that are asserted in international declarations (*LP*, p. 80, n.23). Of the 30 Articles of the United Nations Universal Declaration of Human Rights of 1948 (*UDHR*), Rawls thinks that Articles 3 to 18 may fall under the category of human rights proper, "pending certain questions of interpretation" (*LP*, p. 80, n.23). These include the central elements of due process and the rule of law (Articles 6-12 and 17); the right to refuse nonconsensual marriage (Article 16); a right against cruel, inhuman or degrading punishment and against torture (Article 5); the right to seek asylum (Article 14); the right to a national identity (Article 15); and the right to freedom of movement (Article 13). He regards the special conventions on genocide (1948) and on apartheid (1973) as obvious implications of these rights (*LP*, p. 80, n.23). Rawls also makes it clear that the rights of minority populations must be respected in the law of peoples (*LP*, p. 38). Moreover, although the principles of the law of peoples may not prohibit gender discrimination in social and political life, Rawls insists that women have the basic human rights to have their interests represented in the procedure of consultation and to express dissent which might lead "to important reforms in the rights and role of women" (*LP*, pp. 75, 78).[100]

[100] Some critics have claimed that Rawls' conception of decent society does not give

Rawls also includes the right to personal property and to subsistence among social and economic rights. He understands subsistence as a right to a "minimum economic security" including "general all-purpose economic means" sufficient to make "sensible and rational exercise" of the liberties afforded in a political society (*LP*, p 65, note.1). Importantly, he also says that all peoples have a "duty of assistance" to ensure that the basic needs of all members of society are met and that these needs must be understood in terms of the economic means as well as institutional resources necessary for them "to take advantage of the rights, liberties, and opportunities of their society" (*LP*, p. 38, fn # 47).

However, among the Articles of the *UDHR* that Rawls disqualifies; he explains that some, for example, Article 1, "seem more aptly described a stating liberal aspirations," while others, for example, Articles 22 (which expresses a right to social security) and 23 (which speaks of a right to

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women political rights of any kind. For example, Martha Nussbaum has criticized Rawls' conception and described it as "inadequate and half-hearted in the remedies that it offers." See "Women and Theories of Global justice: Our Need for New Paradigms," in D.K Chatterjee, ed., *The Ethics of Assistance: Morality and the Distance Needy,* pp. 147-177. I think this judgment is not fair, because a distinct feature of the decent society is that it provides each member of society, with certain extend of political representation. This is what defines the moral character of decent societies and distinguishes them from benevolent absolutisms. Although decent societies are not just – from the liberal point of view – and lack the institutions of representative democracy which guarantee political participation of citizens as equal and free persons; nevertheless, as will be discussed in this chapter, the procedure of consultation in decent societies ensures a right to political participation.

equal pay for equal work and of a right to join trade unions), “appear to presuppose specific kinds of institutions” (*LP*, p. 80, note 23). In addition, Rawls disqualifies many of the economic and social rights affirmed by the *UDHR.* He intentionally excludes the right to holiday with pay (Articles 24); the right to education directed at “the full development of human personality” (Article 26) or the right “to enjoy the arts and to share in scientific advancement” (Article 27). He also does not include on his list of proper human rights, the full liberal right to freedom of expression (Article 19), and the right to democratic political participation (Article 21). Rawls disqualifies these Articles because he conceives human rights as the broad requirements of justice that can be satisfied by the various political systems, not only by a constitutional democracy.

Broadly speaking, Rawls’ “human rights proper” represent the moral core each of the six categories of rights enumerated in the *UDHR* and the two *Covenants.* These categories include: (1) rights concerning the security and integrity of persons, (2) rights respecting basic individual freedoms, (3) rights regulating political participation,

(4) due process rights insuring non-arbitrary state action, (5) equality rights, and (6) social and economic rights.[101]

But, where is Rawls' "human rights proper" derived from? In *A Theory of Justice*, Rawls presents his main principles of justice as follows: "All social values liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."[102] He then applies the term "primary goods" to these social values, and argues that a democratic society's basic structure is fair to all citizens, only if it distributes equal shares of primary goods to each citizen. The primary goods are products of cooperation among the members of a single society. In *LP*, the parallels to the primary goods of justice as fairness are products of cooperation between the society of peoples (*LP*, p.41); they include (I) societies' security from the threats of other societies; (2) societies' recognition of, and respect for, each other's political independence and property rights; (3) societies' recognition of each other as having the juridical power to take part in treaties; (4) societies'

[101] James Nickel and David Reidy make use of these six categories in their "Relativism, Self Determination and Human Rights," in Deen Chatterjee, ed., *Democracy in a Global World: Human Rights and Political Participation in 21st Century* (Lanham, MD: Rowman and Littlefield, 2007).

[102] Rawls, *A Theory of Justice*, p. 54.

assurance to each other of at least the minimum of resources necessary to secure human rights domestically; and (5) a people's security versus the abuse of power by its own government (*LP*, p.37).

These principles are parallels the primary goods of justice as fairness in virtue of their relation to the fundamental interests of peoples. Rawls determines what the fundamental interests are by considering the idea of fair social cooperation among well-ordered societies. He employs a normative idea of a participant in such social cooperation, namely, "the idea of decent peoples." In Justice as Fairness, too, he employs a normative idea of a participant in fair social cooperation of the relevant kind, namely the idea of a citizen of a well-ordered society who has an appropriate sense of justice; and this normative "idea of the person" shapes his conception of citizens' fundamental interests (LP, p. 55, 87-88).

In this way, the central focus of social and political cooperation in Rawls' Justice as Fairness is once more represented in his account of human rights. Here human rights are "recognized as necessary conditions of any system of social cooperation," (*LP*, p. 68) whether liberal-democratic or non-liberal-democratic. In other words, human rights are conceived as the minimal freedoms and protections that the members of any society need for the most basic practice of "the moral powers necessary to engage in social

cooperation"[103] and take part – as a member – in a political society. Peoples who are denied human rights are not cooperating in any way; instead (like slaves) they are compelled or manipulated.

> A social system that violates these rights [i.e. human rights] cannot specify a decent scheme of political and social cooperation. A slave society lacks a decent system of law, as its slave economy is driven by a scheme of commands imposed by force. It lacks the idea of social cooperation (*LP*, p.65).

What we can conclude, so far, is that a decent society is a system of political and social cooperation. Its laws are not mere commands imposed by force, but instead "impose *bona fide* moral duties and obligations on all persons" within the territory of the society, which all the members of the people recognize as fitting with their common good idea of justice (*LP*, pp. 65, 66). In contrast with a slave society, a decent society's common good idea of justice assigns and protects human rights to all members of the society.

[103] Rawls, *Justice as Fairness: A Restatement*, p. 20.

III. A Decent Society and its Criteria

Rawls' account of the idea of political conception of human rights is thus linked to the conception of a decent society. Now let me briefly explain what are Rawls' criteria of decency and his description of an imaginary decent society.

1. the Criteria of Decency

According to Rawls, the decency of a society's political and legal system is the necessary conditions for social justice; therefore, any society structured according to an idea of justice, whether liberal or non-liberal would recognize and secure human rights (*LP*, 87-88). Rawls defines two criteria of decency as follows:

> (1) First, the society does not have aggressive aims, and it recognizes that it must gain its legitimate ends through diplomacy and trade and other ways of peace (*LP*, p.64).

A society meeting this first criterion is one that "respects the political and social order of other societies." Either it does not seek to increase its power relative to other societies, or if it does, "it does so in ways compatible with the independence of other societies, including their religious and civil liberties." This condition entails that if a society has a comprehensive doctrine, whether religious or secular, which influences the

structure of its government and its social policies, this doctrine should support "the institutional basis of its peaceful conduct." A society meeting this criterion thus differs from "the leading European states during the religious wars of 16th and 17th centuries" (*LP*, p. 64, all of the quotations in this paragraph).

> (2) The second criterion has three parts.
> (a) The first part is that a decent hierarchical people's system of law, in accordance with its common good idea of justice, secures for all members of the people what have come to be called human rights.
> (b) The second part is that a decent people's system of law must be such as to impose *bona fide* moral duties and obligations (distinct from human rights) on all persons within the people's territory.
> (c) Finally, the third part of the second criterion is that there must be a sincere and not unreasonable belief on the part of judges and other officials who administer the legal system that the law is indeed guided by a common good idea of justice… (*LP*, pp. 65-67).

In defining the idea of decency and in deduction of its criteria, Rawls says that just like the idea of the reasonable in political liberalism:

> [T]here is no definition of decency from which the two criteria can be deduced. Instead we say that the two criteria seem acceptable in their general statement. I think of decency as a normative idea of the same kind as reasonableness, though weaker (that is, it covers less than reasonableness does). We give it meaning by how we use it (*LP*, p.67).

Rawls gives an "account" of decency which, he says, "is developed by setting out various criteria and explaining their meaning" (*LP*, p.67).

> The reader has to judge whether a decent people, as given by the two criteria, is to be tolerated and accepted as a member in good standing of the Society of Peoples. It is my conjecture that most reasonable citizens of a liberal society will find peoples who meet these two criteria acceptable as peoples in good standing. Not all reasonable persons will, certainly, yet most will (*LP*, p.67).

Here, it seems that Rawls does not offer an independent justification for his criteria of decency in order to support his claim that a decent hierarchical society should be tolerated by liberal societies. One may say that he merely defines the criteria of decency by considering the example of Kazanistan, which he thinks liberals should regard as a non-liberal society eligible for toleration. But, as I will argue in the third chapter, Rawls in fact offers arguments independent of the example of Kazanistan in support of his criteria of decency and his conception of human rights. But in the meantime, let me summarize what he says about Kazanistan.

2. A Decent Hierarchical Society

Rawls defines the criteria of decency by considering the example of an imaginary society Kazanistan which, he thinks, liberals should regard as a non-liberal society entitled to toleration and to recognition as a member of the Society of Peoples (*LP*, p. 79).

Kazanistan is a Muslim society, but a decent non-liberal society need not be religious, Rawls says, "[m]any religious and philosophical doctrines with their different ideas of justice" (*LP*, p.64) may lead to institutions satisfying the conditions of decency.[104] In Kazanistan religion and state do not separate. The favored religion is Islam, so only Muslims can hold high political and legal positions. However, other religions are not only tolerated, but encouraged "to have a flourishing cultural life of their own and to take part in the civic culture of the wider society" (*LP*, p. 76).[105] This idealized decent Islamic society is characterized by its enlightened treatment of non-Islamic religions, believing that "all religious differences between peoples are divinely willed," that "punishment for wrong belief is for God alone," and that different religious communities should respect one another (*LP*, p. 76, fn # 17).[106] In addition, the rulers of Kazanistan have not aggressive aims against their neighbors, since they deny military interpretations of *jihad* in favor of a moral and spiritual one (*LP*, p. 76).

[104] Although Rawls elaborates here only one type of non-liberal, decent society: the decent hierarchical people, he explicitly notes that there may be other types of decent societies. For example, Stephan Angle in "Decent Democratic Centralism," *Political Theory*, Vol. 33, No. 4 (2005), pp. 518–46, argues that the model of "decent socialist people" in the case of Chinese socialism might satisfy Rawls' criteria of decency, if certain reforms were made.

[105] See also Michael Walzer, *On Toleration* (New Heaven: Yale University Press, 1997), in which he argues that many paths can lead to toleration.

[106] For a discussion on these principles see Roy Mottahedeh, "Toward an Islamic Theory of Toleration," in Tore Lindholm and Kari Vogt, eds., *Islamic Law Reform and Human Rights* (Oslo: Nordic Human Rights Publications, 1993).

Furthermore, Kazanistan satisfies the second criterion of decency, because its political and legal system constitutes a “decent consultation hierarchy” (*LP*, p. 64). This is a type of basic structure that a decent society could have. Rawls maintains that all decent hierarchical societies are “*associationist* in form: that is, the members of these societies are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy,” or in an equivalent basic structure that gives “a substantial political role to its members in making political decisions” (*LP*, p.64). Although the members of a decent hierarchical society do not have the same equal political rights as the citizens in a democratic society (*LP*, pp, 66, 83), they do each have some political rights, and the system as a whole serves to secure certain fundamental interests for each member.

In Kazanistan, “each person engages in distinctive activities and plays a certain role in the overall scheme of cooperation”, and everyone belongs to a group represented by a body in the political system (*LP*, p.72). There is “a family of representative bodies whose role in the hierarchy is to take part in an established procedure of consultation and to look after what the people’s common good idea of justice regards as the important interests of all members of the people” (*LP*, p.71). Rawls further elaborates this idea:

> In political decisions a decent consultation hierarchy allows an opportunity for different voices to be heard... . Persons as members of associations, corporations, and estates have the right at some point in the procedure of consultation (often at the stage of selecting a group's representatives) to express political dissent, and the government has an obligation to take a group's dissent seriously and to give a conscientious reply.... [T]he dissenters are not required to accept the answer given to them; they may renew their protest, provided they explain why they are still dissatisfied, and their explanation in turn ought to receive a further and fuller reply. Dissent expresses a form of public protest and is permissible provided it stays within the basic framework of the common good idea of justice (*LP*, p.72).

Kazanistan's consultation hierarchy satisfies six conditions or guidelines. The first three are intended to ensure that the fundamental interests of all groups are consulted and taken into account.[107]

> First, all groups must be consulted. Second, each member of a people must belong to a group. Third, each group must be represented by a body that contains at least one of the group's own members who know and share the fundamental interests of the group. …Fourth, the body that makes the final decision – the rulers of Kazanistan – must weigh the views and claims of each of the bodies consulted, and, if called upon, judges and other officials must explain and justify the rulers' decision. In the spirit of the procedure, consultation with each body may influence the outcome. Fifth, the decision should be made according to a conception of the special priorities of Kazanistan. Among these special priorities is to establish a decent and rational Muslim people respecting the religious minorities within it. ...Sixth and last – but highly important – these special priorities must fit into an overall scheme of

[107] In a footnote, Rawls states that "the procedure of consultation is often mentioned in discussions of Islamic political institutions; yet it is clear that the purpose of consultation is often so that the Caliph can obtain a commitment of loyalty from his subject, or sometimes so that he can discern the strength of the opposition" (*LP*, p. 72, fn #12).

> cooperation, and the fair terms according to which the group's cooperation is to be conducted should be explicitly specified (*LP*, p.77).[108]

Moreover, the bodies in the consultation hierarchy meet in assemblies where representatives can raise objections to government policies and obtain replies from members of the government. "Dissent is respected in the sense that a reply is due that spells out how the government thinks it can both reasonably interpret its policies in line with its common good idea of justice and impose duties and obligations on all members of society" (*LP*, p.78). And dissent can lead to reform: "I further imagine, as an example of how dissent, when allowed and listened to, can instigate change, that in Kazanistan dissent has led to important reforms in the rights and role of women, with the judiciary agreeing that existing norms could not be squared with society's common good idea of justice" (*LP*, p.78).

However, Rawls does not hold that every society that respects the basic human rights he enumerated is a decent society. [109] Benevolent

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[108] Rawls explains that these conditions are close to John Finnis's sense of the common good in his *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 155ff. See *LP*, p.77, fn # 19.

[109] For a useful discussion of what it means to respect basic human rights as rights, see also Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd edition, (Princeton, NJ: Princeton University Press, 1996), esp. chap. 3.

absolutisms honor human rights but are not well-ordered "because their members are denied a meaningful role in making political decisions" (*LP*, p.4). Rawls' criteria of decency are necessary conditions for a well-ordered society; and the criterion that applies to the domestic institutions of the society has three parts, one part of which is the requirement that human rights be respected. The implication is that respect for human rights is not sufficient to make a society a well-ordered one. The other two conditions for domestic institutions thus must be met in order that the political relationships between the government and the people, as well as the political relationships among the people, be moral relationships in which mutual duties of justice are recognized and also in order that the members of the society be afforded a meaningful role in making political decisions (*LP*, pp, 63, 64).[110]

Thus, the idealized decent hierarchical society, which Rawls describes, conforms to the idea of a well-ordered society, although not to the idea of a well-ordered liberal society. In *A Theory of Justice,* Rawls characterizes a well-ordered society as "one designed to advance the

[110] Some commentators of Rawls' idea of decent hierarchical society argue that the modern democracies formerly were decent in the above sense. "For example, eighteenth-century Britain had some respect for human rights, a constitutional government and gave the people some measure of political representation, but it was clearly not fully democratic. Other democracies have had similar historical routes." See Walter Riker, "The Democratic Peace is Not Democratic: On Behalf of Rawls' Decent Societies," *Political Studies,* Vol. 57, No. 3 (2008), pp. 1-22.

good of its members and effectively regulated by public conception of justice."[111] He says that such society is one "in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles."[112] In *Political Liberalism,* Rawls characterizes a well-ordered society the same way, however, he adds a third feature to a well-ordered society: "citizens have a normally effective sense of justice and so they generally comply with society's basic institutions which they regard as just."[113]

Although a decent hierarchical society is a well-ordered one, its institutions do not satisfy the liberal criterion of reciprocity.

> This criterion requires that, when terms are proposed as the most reasonable terms of fair cooperation, those proposing them must think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated or under pressure caused by an inferior political or social position (*LP*, p.14).

All liberal conceptions of distributive justice satisfy this criterion, even though they may interpret the idea of citizens as free and equal persons,

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[111] Rawls, *A Theory of Justice*, p. 453.

[112] *Ibid.*, pp. 4-5.

[113] Rawls, *Political Liberalism*, p. 35.

as well as the idea of society as a fair system of cooperation in different ways. “Citizen will differ as to which of these conceptions they think the most reasonable, but they should be able to agree that all are reasonable, even if barely so” (*LP*, p.14).

As a result, a decent non-liberal society’s conception of domestic justice will not be regarded as reasonable by the citizens of a liberal society; from a liberal point of view, a decent non-liberal society is an unjust, or less than perfectly just, society (*LP*, p.78, 83). But, a liberal can nevertheless recognize a decent non-liberal society as having moral character: it is well-ordered in accordance with a legal system founded on a “common good” conception of justice that includes protection of human rights of all members of the society, and ensuring the rights of political participation. Therefore the political relationships in this society are not relationships of mere coercion, since both the officials of the government and the people governed recognize, and try to fulfill their duties and obligations as specified by the conception of justice. [114]

[114] Rawls says that “something like Kazanistan is the best we can realistically – and coherently – hope for. It is an enlightened society in its treatment of religious minorities. I think enlightenment about the limits of liberalism recommends trying to conceive a reasonable just Law of Peoples that liberal and nonliberal peoples could together endorse. The alternative is a fatalistic cynicism which conceives the good of life solely in terms of power” (*LP*, p. 78).

CHAPTER 3

THE RATIONALE FOR HUMAN RIGHTS PROPER

> I believe that the cause of the wealth of a people and the form it take lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues.
>
> John Rawls (*LP*, p. 108)

In this chapter, my aim is to provide further reasons for understanding of why Rawls limits the set of human rights as he does. I will explain three arguments in support of the idea of "human rights proper" that proposes standards of human rights should be distinguished from and be narrower than standards that one approved for a liberal democratic society. Those arguments are as follows: first is the principle of collective self-determination which is stated in Article 1 of the Covenant on Civil and Political Rights. The second is a distinction between justice and political obligation; the threshold for political obligation is lower than the threshold for justice. Finally, the value of toleration, which indicates that a decent hierarchical society (non-democratic) can have a moral character

that liberal-democratic societies are morally obligated to tolerate.[115] Let me now briefly explain these arguments.

I. The Principle of Collective Self-determination

Since the end of the First World War, the principle of self-determination was suggested as a necessary basis and framework for global order. Later, it was incorporated in Article 1 of the United Nations Charter which called upon the members "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Its importance was emphasized by the 1966 Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, whose first articles state the following: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." In addition, in 1970, General Assembly Resolution 2625

[115] These three reasons which I will elaborate in this chapter, have been derived from Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" pp. 211-212.

declared that, “Every state has the duty to respect this right in accordance with the provision of the Charter.”[116]

1. The Content of the Right of Collective Self-Determination

In general terms, self-determination is a matter of individual’s *autonomy,* regulating its own personal affairs free from external intervention. Although individuals almost never attain complete autonomy, societies can achieve significant measures of self-government within limited areas. So, collective self-determination is a matter of the state, that is, of a political community’s holding and practicing sovereignty over its territory.[117] Thus, a right of collective self-determination conveys the following: each *state* – an organized political community – has a right to exercise rule in its territory through the procedures of governmental institutions without external intervention.[118]

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[116] Cited from Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (New York: Oxford University Press, 2000), pp. 1265-67.

[117] See David Copp, “Democracy and Communal Self-Determination,” in *The Morality of Nationality*, eds., R. McKim and J. McMahan (New York: Oxford University Press, 1997), p. 278.

[118] See Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, p.1266.

Therefore, the right of collective self-determination is a right that a given state expects all other states and international agents to recognize its internal autonomy and observe the principle of non-intervention toward it. But, it is limited by two conditions: first, it can be overridden whenever a state engages in grave violation of human rights. Some theorists thus confine the right of self-determination to *legitimate* states, that is, those with effective institutional protection of human rights, not those engaged in systematic violation of socio-economic and political rights of their citizens, and those that do not pursue aggressive aims towards external peoples.[119] The second condition is derived from a citizen's right to reform the political institutions under which it exists.[120] This condition derives from a more general right of self-determination, namely, the self-determination of citizens which indicates that the *citizens* of each state have the right to establish, maintain, or change its political institutions. In other words, the sovereignty of power belongs to the people and must be exercised collectively.[121] More precisely, a state's right of self-determination derived from this basic right that indicates when an external state violates a

[119] See Allen Buchanan, "Self- Determination, Secession, and the Rule of Law," in *The Morality of Nationality*, eds., McKim and McMahan, pp. 301-23; David Copp, "The Idea of a Legitimate State," *Philosophy and Public Affairs,* Vol. 28, No.1 (1999), pp. 3-45; Rawls, *LP*, p. 38.

[120] See David Copp, "Democracy and Communal Self-Determination," pp. 280-81.

[121] *Ibid*.," p. 282.

legitimate regime's internal autonomy, therefore, violates its people's right to establish and preserve itself as a self-governing political system.

Thus, recognizing that the collective right of self-determination derives from the individual's right to self-governance justifies that each individual would have a meaningful right to participate in making political decisions about their own society. As far as citizens exercise autonomy at the political level through their participation in a collective self-governing society, therefore, denying citizens' right of political participation is in fact violating the citizens' right to autonomy. [122] As a result, a people has a right of collective self-determination simply because individuals have the right to be self-governing in the above mentioned minimal sense.

The question of how the collective self-determination has to be carried out is a different issue and it is not specified by international covenants. A people's right to self-determination requires that the basic structure of society is to be derived from the consensus of the whole community, not through the preferences and interests of particular internal agencies or the external states. But once the agreement has been reached, the specific form of political institutions and the public

[122]. See Avishai Margalit and Joseph Raz, "National Self-Determination," *The Journal of Philosophy,* Vol. 87, No. 9 (1990), pp. 439-61.

participation should be open to debate. Although, it is usually expected that the institutions which are to govern public political life be freely determined by popular consent and work by democratic principles, it is not clear that the terms of "popular consent" and "free determination" of a special political arrangement require democracy.[123]

The traditional argument for national self-determination is based on the idea that peoples are attached to the way of life of their political community; it is therefore important to respect that way of life and the internal efforts to improve it. In other words, the right of self-determination is based on the idea that cultures or nations are worth preserving, so that the advancement of cultures is the significant purpose of the principle.[124] Here, the proper subjects of a right to self-determination are nations or peoples, namely, organized societies whose members are united by a common language and shared historical and cultural heritage.

In *LP,* Rawls argues that the decent societies are entitled to respect, because they are collectively self-governing peoples. All liberal democracies claim for themselves a right to self-determination or self-

[123] See Margaret Moore, *The Ethics of Nationalism* (New York: Oxford University Press, 2001), pp. 24-27.

[124] See Margalit and Raz, op. cit.; Moore, *The Ethics of Nationalism*; and David Miller, *On Nationality* (Oxford: Clarendon Press, 1995).

governance. Rawls argues that the liberal democratic peoples should recognize and respect other peoples – who as moral agents – have the same collective right to self-determination. Liberal peoples must respect non-liberal yet decent peoples "not on grounds of prudence, but on grounds of basic principle."[125]

Thus, the Law of Peoples "does not require decent societies to abandon or modify their religious institutions and adopt liberal ones" (*LP*, pp. 63, 121). As Rawls emphasizes that liberal peoples should avoid even non-coercive sanctions against those societies.

> [I]t is not reasonable for a liberal people to adopt as part of its own foreign policy the granting of subsidies to other peoples as incentives to become more liberal... . [S]elf-determination, duly constrained by appropriate conditions, is an important good for a people... *(LP, p* 85).

While decent societies enjoy the good of popular attachment to their own culture and the way of life, they are capable of self-reform. Their capacity for reform can be enhanced if liberals respect them as equal members of the Society of Peoples.[126] Therefore, Rawls insists that

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[125] See Stephen Macedo, "What self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples", *Fordham Law Review*, Vol. 72, no. 4 (2003), pp. 1721-1741.

[126] Asserting that liberal peoples must encourage decent peoples, Rawls writes: "Leaving aside the deep question of whether some forms of culture and ways of life are good in

"decent societies should have the opportunity to decide their future for themselves" (*LP*, p. 85).

II. Political Obligation vs. Justice

The second reason in support of "human rights proper" which I will examine is as follows: the requirements of political obligation are narrower than the requirements of Justice as Fairness. According to Rawls, a condition of a society's being well-ordered is that its members are morally obligated to obey its laws; but if the society's legal and political system does not secure their fundamental interests, then they are not so obligated. In his discussing of what he calls "the basic idea of society," Rawls says that a society's legal system must be a viable one, and that in order to be viable, a legal system must "have a certain content," for example the minimum content of natural law as discussed by H.L.A. Hart.[127] But a society governed by a legal system is not necessarily a society in the sense in which Rawls uses this term. He understands the

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themselves (as I believe they are), it is surely, *ceteris paribus*, a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. In this way political society is expressed and fulfilled" (*LP*, p. 61).

[127] Rawls, *political Liberalism*, p. 109. Hart's minimum content of natural law include the respect for life, property, promises and natural justice, See H. L.A. Hart, *The Concept of Law* (Oxford, UK: Oxford University Press, 2nd ed., 1994), pp. 190-95, 156-57.

idea as a society "whose members engage, not merely in activities coordinated by orders from a central authority, but in activities guided by publicly recognized rules and procedures that these cooperating accept and regard as properly regulating their conduct."[128]

In Rawls' account of the idea of society, every society has "a conception of the right and the good on the basis of which its members accept the rules and procedures that guide their activities." Every such conception "includes a conception of justice that can be understood as in some way advancing the common good." And when following its conception of justice a "society takes into account the good of all its members and of society as a whole." When this last condition is not met, then instead of "a society with a legal system imposing what are correctly believed to be genuine obligations," there is a government that "merely coerces its subjects who are unable to resist."[129] Therefore, the political and legal system of a society must be guided by a conception of justice meeting the condition of taking into account the good of all of its members of society as a whole. Thus, given Rawls' position that a society with a

[128] Rawls, *Political Liberalism*, p. 108.

[129] *Ibid.*, p. 109.

viable legal system is not necessarily a morally justifiable system of social cooperation, he goes beyond Hart's view.

Rawls then makes reference to Philip Soper's account of political obligation.[130] Soper argues that if the regime of a political society is to obligate and not merely coerce, its system of law must recognize and respect certain rights including not only a minimum right to the security of life, liberty and property, and a right to justice understood to support at least formal equality, but also a right to discourse, since political obligation requires a reciprocal relation between ruler and ruled allowing for mutual respect, and this requires a good faith official aim to administer justice.

Now, recall Rawls' necessary condition for moral justification of a society's political and legal system, namely, the common good idea of justice which requires that the fundamental interests of everyone in the society must be secured. When interpreted in light of the arguments made by Soper, this condition yields the requirement that the idea of justice recognize everyone in the society as having at least certain fundamental

[130] See Rawls, *Political Liberalism*, p. 109; Rawls, *LP*, pp. 65, 67. It worth noting that Rawls in his discussion of political obligation does not mention Ronald Dworkin's account of associative obligations, but there are remarkable similarities. For Dworkin's account of associative obligations, see his *Law's Empire* (Cambridge, MA: Harvard University Press, 1987), chap. 6.

rights, which Rawls calls *human rights*. Let me now briefly explain Soper's arguments for requirements of political obligation.

1. Soper's Account of Political Obligation

In his *A Theory of Law*,[131] Philip Soper tends to take a moral approach to legal theory by posing the question, "what must law be if it is to obligate?" He aims to show that the concept of law implies obligation by showing that law obligates and that this fact is one of the phenomena that must be explained by an account of the legal systems (*TL*, pp.11-12). Soper says that the essence of his theory of law is captured by a modified formulation of Aquinas' definition of law as "an ordinance of reason for the common good, made by him who has care of the community" (cited in *TL*, p. 55). Soper states that:

> Instead of interpreting the definition to limit "law" to those ordinances that in fact serve the common good, one interpret it instead to require only that legal directives aim at serving the common good, however wide of the mark they may fall. Legal systems are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interests of all. It is this claim of justice, rather than justice in fact, that one links conceptually with the idea of law. Thus, the differences

[131] Philip Soper, *A Theory of Law* (Cambridge, MA: Harvard University Press, 1984), hereinafter cited as *TL*.

> between law, morality, and coercion may be represented in terms of the variables of force and the belief in value. Law combines the organized sanction with the claim to justice by those who wield the sanction. Morality makes the same claim but lacks the sanction. Coercive systems rely on the sanction alone, unaccompanied by any concern for justice (*TL*, p. 55).

According to Soper, a good faith defense of the system of law as in the interest of all is a necessary condition of there being a "reciprocal bond between rulers and ruled" (*TL*, p. 55). And, he argues, this is required if a legal system is to be distinguish from a coercive system. He maintains that, this feature of a legal system is essential to the idea of law: a "system is a legal system not only because basic ground rules are accepted, but also because such rules are defended as acceptable" (*TL*, p. 56).

Soper then argues that a necessary condition of the relation between rulers and ruled that generates political obligation is an official claim of justice, that is, "a good faith effort by those in charge to govern in the interests of the entire community, including the dissenting individual." This condition constitutes one of the two conditions which together establish political obligation. The other condition relates to the fact that "the enterprise of law in general – including this particular legal system, defective though it may be, that confronts an individual – is better than no law at all" (*TL*, p.80).

With regard to the latter condition, Soper asserts that if the anarchists were right, and all legal systems were undesirable or immoral, then there would be no need for political obligation. But the anarchists are wrong, because legal systems promote security and stability (*TL*, p. 81). However, a "particular legal system that has so deteriorated as to deny even the minimal security that makes the general enterprise valuable will not yield" the obligation to obey (*TL*, p. 83).

Soper's theory of political obligation thus "depends on the falsity of anarchism but does not further depend on the correctness of the underlying political or moral principle of a particular society" (*TL*, p. 83). Whether one has a prima facie obligation to obey the law does not depend on whether the system is socialist instead of capitalist, or whether the system is just or not; it does not depend on the answer to the question of which kind of legal system is best, but rather on the answer to the question of whether any legal system is defensible at all (*TL*, p. 83).

Soper argues that given that the first condition of political obligation is met, then whether one has a prima facie obligation to obey the law depends on whether those in charge are making a good faith effort to govern in the interests of everyone in the community. He holds that if one owes respect to those making a good faith effort to govern well, this is dependent on their acknowledging one's autonomy and one's interests:

> Acknowledgment of the value of law arises out of a rational appraisal of self interest in the maintenance of a coercive social order. A system that ignores the individual's self-interest undercuts the basis for the bond between ruler and ruled. . ..the rulers' respect for my autonomy in evaluating the extent to which law reflects my interests requires them at least to consider those interests in exercising their authority (*TL*, p.84).

Thus certain conditions on the contents of the beliefs about justice held by the governing officials must be met. According to Soper, the prima facie obligation to obey the law depends on the case that the legal system reflects the interests of all of the governed. But this significant conclusion still requires further specification. What interests must be considered, and how?

Soper derives a small number of "natural" rights from the two conditions presented above, which he regards as necessary and sufficient to establish a prima facie obligation to obey the laws of a given legal system. These are the right to security, the right to formal equality, and the right to discourse. They are, he argues, the only rights that deserve the name "natural" from the perspective of legal theory (*TL*, p.133).

Soper agrees with Hart that Legal systems must provide at least minimum protection for life, liberty, and property. However, whereas Hart argues for this conclusion on the ground that no system that fails to do so can remain viable, Soper argues for it on the ground that "without such protection no system, even assuming viability, could yield obligation" (*TL*,

p. 130). In so doing, Soper argues, the obligation derives from an honestly held idea of justice (TL, p. 121). He maintains that:

> One may protest the assumptions of the theory and attempt to prove its inapplicability on the facts while still recognizing and respecting the human concern that attaches to the erroneous moral outlook. Kant's claim that good will deserves moral respect… at least has force as a guide to the basis of prima facie obligation and respect (*TL*, pp. 121-122).

But not just any conduct can be interpreted as an expression of good will:

> There is one exception to this conclusion where the difference in manner of treatment becomes so great as to become a difference in kind. When the treatment accorded the disadvantaged group is so severe as to destroy the minimum security that law must provide, obligation is also destroyed. Thus a systematic policy of genocide creates no obligation for the victimized group, however sincere the official belief in the justice of the policy. So, too, policies short of genocide that nevertheless undermine minimal security leave the affected individuals or groups without obligation (*TL*, p. 122).

So it is important to note that, claims of justice are inadequate to distinguish coercive regimes from legal regimes to which political obligation is attached. Since government officials in tyrannical regimes typically make insincere claims of justice as a means of social control, Soper maintains that good faith claims of justice are a different matter, for – as Kant argued – a good will deserves moral respect (*TL*, pp.121-122). The sincere pursuit of justice or the common good must be the dominant motive of the actions of governing officials, and if they instead pursue self-interest or the interests of certain groups, the excluded groups and

individuals have no political obligation; or if the claim to justice is a deliberate lie, it generates no obligation (*TL*, pp. 122-123).

Sopor points out that in practice it will not be very difficult to determine whether claims of justice are so insincere as to destroy the basis for obligation:

> Where there is little conventional doubt about the immorality of certain practices - torture, slavery, wholesale denial of human rights to selected groups - one is not likely to conclude that regimes where such practices occur are best characterized as victims of their own self-deception. Either the case is one of deception pure and simple (political prisoners are tortured but officials knowingly deny the fact) or the cases are morally more complicated than one supposed (apartheid is sincerely thought to be justified), at most a case of moral blindness, not self-deception. But the difficulty of uncovering degrees of deception and of distinguishing self-deception from mere moral blindness provides an unexpected possibility for deriving at least one important substantive right, apart from security, from the concept of law (*TL*, p.125).

That right is the right to discourse. It derives from the fact that one needs to know whether the government officials sincerely believe in the justice of the legal system and of their actions. If they do so, Soper argues, they will be prepared to respond to normative challenge with normative justification of their coercive orders. Therefore, if the basis for mutual respect that underlies law and obligation is to be maintained, individuals must have the right to test the sincerity of the official justifications by means of discourse; they must have “a right to insist on

evidence of the bona fides of belief in the only form in which sincerity can be tested: communication, dialogue, exchange, debate" (*TL*, p.134).

The right of discourse that Soper defends, however, is much more limited than the freedom of speech and press essential to a liberal democracy. As Soper indicates, he is defending a right of discourse as part of a theory of what law must be if it is to obligate, and hence as part of a theory of the necessary and sufficient conditions of prima facie political obligation in general, not as part of a theory of a particular legal order such as a liberal democracy.

> The natural right, as opposed to the right derived from liberal political theory, is a consequence of the requirement of sincere official belief in justice. The concept of sincerity as I have developed it has two components: honest belief in fact and respect for the possibility of dissent… . Discourse is necessary to ensure that belief is honest, particularly in light of the ease with which self-deception is possible. But discourse is also necessary because the reason that honest belief deserves respect stems from the individual's recognition of and tolerance for value disagreement; if that recognition and tolerance is not mutual, obligation again does not result (*TL*, P.141).

Establishing the requirement of recognition of the right to discourse, these arguments do not rely on claims such as that discourse is required as a means of enhancing individual personality, or that it is required as a means of ensuring individual participation in the governing process. The core value of the right of discourse is the justification of the basic political structure, and "what is important is the credibility of the official posture that

society is open to new values and plausible challenges to accepted visions as they emerge." The right of discourse is not a personal right to proselytize or a right to self-expression; it is "a right only to ensure that the other side of the normative issue has been fairly considered by officials in an attempt to gain control through the rational influence of ideas" (*TL*, pp.141-142).

As a result, in Soper's view, the rights to security, formal equality, and discourse are natural rights, in the following sense: they are "rights against the state which can be invaded or ignored only at the cost of losing the title of law" (*TL*, p. 132). Soper distinguishes natural rights from other moral rights by connecting the idea of natural rights with the idea of law as he understands it.

In spite of fundamental similarities, there exist several key differences between Soper's account of natural rights and Rawls' conception of human rights as follows: First, Rawls adds an international dimension to Soper's conception of natural rights as he transforms it into political conception of human rights. Second, Rawls expects that the conception of justice in a decent political society must grant rights of political participation in addition to the rights Soper counts as natural rights. Third, Rawls aims to develop a political conception of human rights that does not pre-suppose the truth of any particular comprehensive doctrine and that is consistent with the many different arguments for those

basic rights that are offered by different comprehensive doctrines, both religious and secular. Finally, whereas Soper is concerned with the question of what law is, Rawls is concerned with the question of what are the necessary conditions of a morally justifiable system of political and social cooperation. Rawls requires the obligation to obey the laws of a society be grounded not merely in respect for the government's good faith effort to serve the common good, but also in the requirements of justice, as understood in that society.

III. The Value of Toleration

In the remaining of this chapter, I explain the value of toleration; the third reason for the "human rights proper." In *LP,* Rawls raises the question of how liberal-democratic peoples are to tolerate non-liberal and non-democratic peoples, and he states that "if all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways (if such there are, as I assume) of ordering society" (*LP*, p. 59). According to Rawls' understanding of liberalism, a liberal society should tolerate non-liberal societies that meet his criteria of decency.

> Some may say that there is no need for the Law of Peoples to develop such an idea of toleration. The reason they might give is that citizens in a liberal society should judge other societies by how

> costly their ideals and institutions express and realize a reasonable liberal political conception. Given the fact of pluralism, citizens in a liberal society affirm a family of reasonable political conceptions of justice and will differ as to which conception is the most reasonable. But they agree that nonliberal societies fail to treat persons who possess all the powers of reason, intellect, and moral feeling as truly free and equal, and *therefore*, they say, nonliberal societies are always properly subject to some form of sanction – political, economic, or even military – depending on the case. On this view, the guiding principle of liberal foreign policy is gradually to shape all not yet liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal (*LP*, p. 60).

So the question apparently remains open: why are decent non-liberal peoples *entitled* to be tolerated and treated with respect by liberal peoples? Rawls argues that by recognizing decent non-liberal societies as *bona fide* members of the Society of Peoples, liberal peoples encourage such societies to reform themselves and increase the probability that they will recognize the advantages of liberal institutions (*LP*, p. 62). Rawls writes,

> Certainly the social world of liberal and decent peoples is not one that, by liberal principles, is fully just. Some may feel that permitting this injustice and not insisting on liberal principles for all societies requires strong reasons. I believe that there are such reasons. Most important is maintaining mutual respect among peoples. Lapsing into contempt on the one side, and bitterness and resentment on the other, can only cause damage (*LP*, p. 62).

According to Rawls, the claim to tolerate the non-liberal societies may "require strong reasons" in order to be justified.[132] I suggest the following considerations in justifying Rawls' idea of toleration of decent non-liberal peoples.

1. The Reasonable Idea of Toleration

In *LP* Rawls argues that as the fact of reasonable pluralism sets the conditions to be met by a political conception of liberal democracy, in which it has a reasonable idea of toleration "[…] that will show the reasonableness of toleration by public reason." Similarly, a political conception of the Law of Peoples should express "a reasonable idea of toleration derived entirely from the category of the political" (*LP*, pp. 16-19). This condition means that it should not be derived from any particular comprehensive doctrine, since "the political conception will be strengthened if it contains a reasonable idea of toleration within itself, for that will show the reasonableness of toleration by public reason" (*LP*, p.16).

[132] Some critics argue that only representative democracies deserve respect. For example, Brian Barry claims that all non-liberal democratic states must be treated as the outlaw states. See Brian Barry, *Culture and Equality* (Cambridge, MA: Harvard University Press, 2001), pp. 138-139.

Rawls uses the term “reasonable” to distinguish between liberal and non-liberal societies. A liberal society is a reasonable society, in that its basic structure is regulated by a political conception of justice that satisfies the criterion of reciprocity, which applies to a scheme of social cooperation between free and equal citizens. Rawls asserts that a non-liberal society is not as reasonable as a liberal society as described above (*LP*, p. 83). However, a non-liberal society can be a well-ordered society, if its basic structure regulated by a common good conception of justice, but, this conception of justice does not satisfy the criterion of reciprocity.[133] Therefore this society is classified as a non-liberal and not fully reasonable society.

Thus, Rawls acknowledges that a non-liberal society, whether well-ordered or not, is not a full just society – from a liberal point of view. But, there is a significant moral difference between those non-liberal societies that are well-ordered, that is, regulated by a conception of justice that recognizes and secures basic human rights, and those that are not.[134] Emphasizing the moral significance of these distinctions, Rawls argues

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[133] For a discussion on this criterion, see Rawls, *Political Liberalism* (hereinafter *Liberalism)*, p. 67.

[134] For an analysis of this point see Alyssa Bernstein, “Human Rights, Global Justice, and Disaggregated States: John Rawls, Onora O’Neill, and Anne-Marie Slaughter”, *American Journal of Economics and Sociology,* Vol. 66, no,1 (2007), pp. 86-111.

that if a non-liberal society is governed in accordance with a conception of justice that requires respect for its members' basic human rights, and if its government seeks to gain and retain membership in a Society of Peoples governed by a Law of Peoples, then that non-liberal society is entitled to toleration by liberal peoples. To tolerate a decent non-liberal society, he explains, here means "not only to refrain from exercising political sanctions – military, economic, or diplomatic – to make a people change its ways," but also to recognize it as an "equal participating member in good standing of the Society of Peoples" (*LP*, p. 59).[135]

Now we understand what Rawls means by "reasonable idea of toleration:" it is a conception of toleration reached by interpreting it in terms of the idea of the reasonable. The virtue of reasonableness is the foundation for Rawls' idea of public reason. Reasonableness requires that

[135] Will Kymlicka argues that there are –nonliberal– models of toleration that offer tolerance between communities, and not between individuals. On these views of toleration, individual liberty is not a principle to be considered. Kymlicka recalls the case of the Millet system in the Ottoman Empire. Millet system was composed of communities of different religions (Muslims, Jews and Christians), each of them empowered by imposing its religious beliefs on the society of its own Millet and, thus, by restricting several individual liberties –such as freedom of conscience. Nevertheless, toleration between different Millets was strictly respected and, actually, proved to be quite functional over the five centuries of the history of the Ottoman Empire. See Will Kymlicka, "Two Models of Pluralism and Tolerance" in David Heyd, ed., *Toleration: An Elusive Virtue* (Princeton, NJ: Princeton University Press, 1996), pp. 83-87.

the public reason of a Law of Peoples not be based on any particular comprehensive doctrine whether religious or secular.[136]

2. The virtue of Reasonableness

Reflecting on the idea of social cooperation among equals, Rawls considers reasonableness as a virtue that people may display when engaged in such cooperation. "[T]he moral power that underlies the capacity to propose, or to endorse, and then to act from fair terms of cooperation for their own sake is an essential social virtue," everyone can exercise and not be displayed only by saints or altruists. People display it in ordinary life whenever they engage in social cooperation, while aiming to advance their own ends, as long as, they "stand ready to propose fair terms that others may reasonably be expected to accept, so that all may benefit and improve on what every one can do on their own" (*Liberalism*, p. 54).

This idea resonates the idea of reciprocity. Persons engaging in social cooperation are reasonable only if they are willing to endorse and

[136] Rawls says, political liberalism "moves within the category of the political and leaves philosophy as it is." Rawls, *Political Liberalism,* p. 375.

act on fair terms; they regard terms as fair only if they meet the criterion of reciprocity. This criterion requires that those proposing the terms "reasonably think" that those offered them might "reasonably accept them," i.e., that they could accept them without being "dominated or manipulated, or under the pressure of an inferior political or social position," but instead on a free and equal standing (*Liberalism*, pp. xliv, xlvi, and li.). Persons engaging in social cooperation among equals ought to be reasonable. The characteristics of reasonable person in Rawls' view can be summarized as follows: (1) (a) possesses the two moral powers – the capacities for a sense of justice and for a conception of the good, (b) possesses the intellectual powers of judgment, thought, and inference, (c) holds a conception of the good in the light of a comprehensive doctrine, (d) is able to be fully cooperating members of society over a complete life; (2) is able to propose and follow a conception of justice, knowing that the other citizens will do so; (3) recognizes the burdens of judgment; (4) has a reasonable moral psychology; and (5) recognizes the five essential elements of a conception of objectivity.[137]

Rawls discusses two basic aspects of the value of reasonableness: two kinds of motivation that a reasonable person would have. First, a

[137] See Leif Wenar, "Political Liberalism: an Internal Critique," *Ethics*, Vol. 106, no. 1 (1995), p. 37.

reasonable person is “willing to propose fair terms of cooperation;” and second, a reasonable person is “willing to recognize the burdens of judgment and to accept their consequences” (*Liberalism*, p. 54).

3. The Burdens of Judgment

By “the burdens of judgment” Rawls refers to “the sources, or causes, of disagreement between reasonable persons” (*Liberalism*, p. 401).These sources or causes of disagreement are “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”

> As reasonable and rational we have to make different kinds of judgments. As rational we have to balance our various ends and estimate their appropriate place in our way of life; and doing this confronts us with great difficulties in making correct judgments of rationality. On the other hand, as reasonable we must assess the strength of people’s claims, not only against our claims, but against one another, or on our common practices and institutions, all this giving rise to difficulties in our making sound reasonable judgments. In addition, there is the reasonable as it applies to our beliefs and schemes of thought, or the reasonable as appraising our use of our theoretical (and not our moral and practical) powers, and here too we met the corresponding kinds of difficulties. We need to keep in mind these three kinds of judgments with their characteristic burdens (*Liberalism*, p. 56).

This is not only unreasonable but also unrealistic to suppose that "all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain."[138] Because "many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion." And this holds not only regarding moral judgments but regarding all kinds of important or difficult judgments (*Liberalism*, p. 58).

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[138] Instead, Rawls says "the more obvious sources" of disagreement (the burdens of judgment) are as follows:

"a. The evidence -empirical and scientific - bearing on the case is conflicting and complex, and thus hard to asses and evaluate.

b. Even where we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgment.

c. To some extent all our concepts, and not only moral and political concepts, vague and subject to hard cases;....

d. To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. …

e. Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment.

f. [A]ny system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized. …" (*Liberalism*, pp. 56-57).

4. Reasonable Comprehensive Doctrines

But, what determines whether a comprehensive doctrine should be considered as reasonable according to the criteria appropriate to the Law of Peoples? Recall the two basic aspects of the virtue of reasonableness: (1) a reasonable person is "willing to propose and honor fair terms of cooperation;" (2) a reasonable person is "willing to recognize the burdens of judgment and to accept their consequences" as regards freedom of thought, liberty of conscience and toleration (*Liberalism*, p. 48, fn # 1). Here, the terms of cooperation are the principles of the Law of Peoples. A society is reasonable if it is both willing to propose and honor fair principles, as well as willing to recognize the burdens of judgment and to accept their consequences as regards toleration.

The consequence of the free exercise of reason is the development of a variety of doctrines, secular and religious. In a liberal democratic society, reasonable people who affirm comprehensive doctrines will affirm reasonable ones. Rawls defines reasonable doctrines as having three main features:

> One is that a reasonable doctrine is an exercise of theoretical reason: it covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner. It organizes and characterizes recognized values so that they are compatible with one another and express an intelligible view of the world. Each doctrine will do this in ways that distinguish it from other doctrines, for example, by giving certain values a particular primacy and weight. In singling out which values to count

> as especially significant and how to balance them when they conflict, a reasonable comprehensive doctrine is also an exercise of practical reason. Both theoretical and practical reason... are used together in its formulation. Finally, a third feature is that while a reasonable comprehensive view is not necessarily fixed and unchanging, it normally belongs to, or draws upon, a tradition of thought and doctrine. Although stable over time,…, it tends to evolve slowly in the light of what, from its point of view, it sees as good and sufficient reasons" (*Liberalism*, p. 59).

The point that reasonable doctrines tend to evolve slowly is relevant to the case of societies like Kazanistan: by hypothesis, such a society has already become more moderate and liberal; it may continue to develop in the same direction. Being themselves reasonable, they will acknowledge that reasonable people can affirm different comprehensive doctrines, and also that all reasonable people are subject to the burdens of judgment. And they will think it unreasonable to use political power to repress comprehensive views that are not unreasonable. Here, "being reasonable" is:

> part of a political ideal of democratic citizenship that includes the idea of public reason. The content of this ideal includes what free and equal citizens as reasonable can require of each other with respect to their reasonable comprehensive views. In this case they cannot require anything contrary to what the parties as their representatives in the original position could grant. So, for example, they could not grant that everyone must affirm a particular comprehensive view (*Liberalism*, p. 62).

In a Society of Peoples, however, the virtue of reasonability is not part of a political ideal of democratic citizenship; it is instead part of a

political ideal of social cooperation among free and equal peoples. The content of this ideal includes what reasonable free and equal peoples can require of each other with respect to their reasonable comprehensive views.

In *LP* Rawls aims to develop a conception of right and justice applicable to relations among peoples, specifying their mutual duties and the limits of state sovereignty, that would be a political conception on which there can be an "overlapping consensus of reasonable doctrines." This aim leads him to develop a Law of Peoples that avoids "excluding doctrines as unreasonable without strong grounds based on clear respects of the reasonable itself" (*Liberalism*, p. 59). Here the burdens of judgment are relevant: Recognizing them "limits the scope of what reasonable persons think can be justified to others, and... this leads to a form of toleration and supports the idea of public reason" (*Liberalism*, p. 59).

The implication of Rawls' view is that the societies less just than Kazanistan (which secures the basic human rights for all of its members) are not entitled to membership (or to good standing) in the Society of Peoples. They do not have the rights of peoples, including full rights of self- determination and non-intervention, and other peoples do not have the duties to tolerate them and cooperate with such unjust societies.

Rawls argues that a society such as Kazanistan could exist.[139] He shows that if there can be decent non-democratic societies, that have such a moral character, liberal societies are obligated to tolerate them (*LP*, p.75, note 16). Then, the principles guiding liberal societies in their conduct toward other societies should be such that decent non-democratic societies can endorse those principles. And if liberal societies are to require other societies to respect human rights, then this requirement and its associated justification of human rights, should be such that decent non-democratic societies can endorse them (*LP*, p. 68). He does so because he thinks it is not morally permissible for liberal societies to compel all non-democratic societies to become liberal democracies; the mere fact that a society's political system is not democratic is not obviously sufficient justification for the use of coercive force against it to compel domestic institutional change. Thus Rawls argues that a conception of justice and human rights applicable to global order must be endorsable by all peoples, that is, by all decent societies, whether liberal

[139] Rawls points out that "The Law of Peoples does not presuppose the existence of actual decent hierarchical peoples any more than it presupposes the existence of actual reasonably just constitutional democratic peoples. If we set the standard very high, neither exists" (LP, p. 75). However, some commentators of Rawls' the Law of Peoples have offered the actual examples of decent hierarchical society. For instance, David Reidy in his "Rawls on International Justice: A Defense," *Political Theory*, Vol. 32, no. 3 (2004), pp. 291–319, states that, in some respect, Oman could be a decent society, and Chris Brown in his "John Rawls, 'The Law of Peoples' and International Political Theory," *Ethics and International Affairs*, Vol. 14, no.1 (2000), pp. 125–32, argues that Rawls' concept of decent hierarchical peoples could be extended to the societies such as Egypt, Saudi Arabia, Malaysia, Singapore and Thailand.

or non-liberal. It must meet the criterion of reciprocity. This criterion requires that a conception of human rights depend on no particular comprehensive ethical or religious doctrine.

Part II

IN SEARCH OF AN OVERLAPPING CONSENSUS

CHAPTER 4

HUMAN RIGHTS AND ISLAMIC DOCTRINE

> [Islam] demands loyalty to God, not to thrones.... The ultimate spiritual basis of all life, as conceived by Islam is eternal and reveals itself in variety and change. A society based on such a conception of Reality must reconcile, in its life, the categories of permanence and change.
>
> Mohammad Iqbal[140]

The central idea of Rawls' account is that a conception of human rights should be freestanding, that is, a conception of human rights suitable for a pluralistic world must be independent of any incompatible philosophical, ethical or religious doctrines.[141] This conception can serve as the object of an overlapping consensus among different ethical and religious traditions; each may offer a different line of argument.[142] In this regard, Rawls' view recalls the observation in the Universal Declaration of

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[140] Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, ed., M. Saeed Sheikh (Lahore: Iqbal Academy Pakistan, 2nd edition, 1989), p. 116.

[141] See Rawls, *LP*, p. 68.

[142] Charles Taylor argues for the use of an idea of overlapping consensus in the context of Buddhism. See Charles Taylor, "*Conditions of an Unforced Consensus on Human Rights"* in Joanne Bauer & Daniel Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 124-145.

Human Rights (*UDHR)* that human rights are "a common standard of achievement for all peoples and all nations." Jacques Maritain[143] – who participated in discussions leading to the *UDHR* – says that the point of formulating an idea of human rights, to be shared by adherents of different traditions, was to make agreement "not on the basic of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of [humanity] and knowledge, but upon the affirmation of a single body of beliefs for guidance in action."[144] Given this practical role of the idea of human rights and in a context of diversity, we need to avoid justification for human rights by referring to a "particular comprehensive religious doctrine or philosophical doctrine of human nature." Rawls' account does not rely on these arguments that "human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights" (*LP*, p. 68). To argue in these ways, that is, "to tie human rights exclusively to a single, ultimate foundation would

[143] Jacques Maritain (1882–1973), French philosopher and political thinker was a leading Christian figure in 20th century attempts to reconcile Catholic social thought with democracy and human rights.

[144] Jacques Maritain, "Introduction," in *Human Rights: Comments and Interpretations*. A symposium edited by UNESCO (Paris: UNESCO, 1948).

be to undermine the possibility of justifying them to those who hold a different comprehensive doctrine."[145]

Therefore, a freestanding conception of human rights aims to create an agreement on the recognition of the fact of pluralism of ethical and religious traditions. But the agreement will not stand with awareness of the contents of these traditions. I do not argue that we can *find* a political conception of human rights within existing comprehensive doctrines. Instead, as Rawls emphasizes, there are ways to revise or elaborate an ethical and religious doctrine that is "non-liberal in its conception of the person and political society, but that is also consistent with a reasonable conception of standards to which political societies can reasonably be held."[146]

Thus, in order to avoid presenting a political conception of justice (and human rights) in the wrong way, "we do not look to the comprehensive doctrines that in fact exist and then draw up a political conception that strikes some kind of balance of forces between them."

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[145] Jon Mandle, *Global Justice* (Cambridge: Polity, 2006), p. 51. Rawls says that "still, the Law of Peoples does not deny these doctrines" (LP, p. 68).

[146] Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p. 194. Cohen argues that attempting to articulate a conception of human right in an ethical tradition without fresh elaboration of that tradition by its proponents will lead to either substantive minimalism or cultural relativism.

Instead, we should distinguish "between the initial allegiance to, or appreciation of, the political conception and the later adjustment or revision of comprehensive doctrines to which that allegiance or appreciation leads when inconsistencies arise."[147] In this way, the endeavor of showing that the idea of human rights can be endorsed by different ethical and religious traditions may require revision or reconstruction of those traditions by their adherents.[148] It is worth noting that, reconstruction or revision of a tradition does not simply mean to make the tradition in question compatible "with the demands of the world, but to provide that tradition with its most compelling statement."[149] To illustrate the point about reconstruction or revision of a tradition regarding a conception of human rights, I want to examine the most reasonable

[147] John Rawls, *Justice as Fairness: A Restatement*, pp. 188, 193. Rawls maintains that "These adjustment or revisions we may suppose to take place slowly over time as the political conception shapes comprehensive views to cohere with it" *Ibid*, p.193.

[148] The necessity of revision or elaboration of comprehensive doctrines by their proponents in order to achieve an overlapping consensus on the conception of justice as fairness as well as the conception of human rights has been addressed and emphasized by Rawls, *Justice as Fairness: A Restatement,* p. 37, 188-89, and Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" pp. 201,207. Muslim intellectuals also have argued that Islamic revivalism or reformism cannot succeed without a fundamental reconstruction, rethinking or reformation of Islamic doctrine. See for example, Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam;* Mohammed Arkoun, *Rethinking Islam: Common Questions, Uncommon answers* (Boulder, Colo.: Westview Press, 1994); Nasr Hamid Abu Zayd, *Reformation of Islamic Thought: A Critical Historical Analysis* (Amsterdam University Press, 2006). See also Daniel W. Brown, *Rethinking Tradition in Modern Islamic Thought* (Cambridge: Cambridge University Press, 1999).

[149] Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p. 201. See also Rawls, *Political Liberalism*, p. 62.

position in the current Islamic reformation what has been called “Islamic intellectualism.”

I am not interested here in which *rights* are human rights by deriving them from Islamic doctrine; instead, I am concerned with which *views* emerging from the Islamic tradition are reasonable responses to the requirements of affirmation of a conception of human rights. Put differently, my aim is “to explore the possibilities for achieving a normative reconciliation”[150] between the Islamic fundamentals and human rights. I concentrate on the theoretical concepts, elaborated by Muslim intellectuals which are justifiable and affirmed within the framework of the Islamic tradition. What I hope to achieve in this chapter is to identify and to analyze the potentialities within Islamic doctrine for endorsing a freestanding conception of human rights.

I. The Epistemological Basis of Islamic Intellectualism

The central idea of contemporary Islamic intellectualism can be formulated as follows: “the connection between the revealed text and

[150] I have borrowed the phrase from Khaled Abou El Fadl, “The Human Rights Commitment in Modern Islam,” p. 303.

modern society does not turn upon a literalist hermeneutic, but rather upon an interpretation of the spirit and broad intention behind the specific language of the text."[151] The most reasonable account of the religious epistemology among Muslim intellectuals, elaborates this central idea as follows: religion is God-sent and therefore is eternal, pure and absolute, but, its understanding is bounded by the limited human cognitive faculties.[152] Thus, one cannot attribute sacredness and completeness to any interpretation of the religion, because sacredness and absoluteness reside in religion itself. No understanding of religion is sacred and eternal forever. In fact, every proper understanding of religion depends on the pursuit of a methodical, systematic, and justifiable inquiry.[153] This process of investigation, which is directed at the true meaning of religious texts, always takes place within the broader context of human inquiry regarding the world in general.

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[151] Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), p. 231. For a general survey of the Muslim intellectuals see Charles Kurzman, *Liberal Islam: A Source Book* (Oxford: Oxford University Press, 1998); see also, *Journal of Democracy*, Vol. 14, no. 2 (2003). This issue of the journal is dedicated to the ideas of Muslim intellectuals.

[152] See also Hossein Kamali, "The Theory of Expansion and Contraction of Religion", http://www.seraj.org/kamali.htm.

[153] Abdolkarim Soroush, *Qabz va Bast-e Tiorik-e Shari'at* (The Theory of Contraction and Expansion Religious Knowledge), (Tehran: Serat, 1990), p. 249. The translation of the passages are mine.

This hermeneutical-epistemological attitude, assumes that no text stands alone; every text is to be considered with a context: "It is theory-laden, its interpretation is in flux, and presuppositions are here as actively at work as elsewhere in the field of understanding. Religious texts are no exception."[154] Therefore, any interpretation is subject to expansion and contraction according to prior assumptions (these assumptions can be of a very different nature, ranging from philosophical, historical, and theological to more specific assumptions of linguistics and sociology).[155] Since presuppositions are time-bound, they do change and evolve religious knowledge constantly. In other words, religious knowledge, in an ongoing dialogue with the other branches of human knowledge, is constantly changing and reconstructing over time.

Another major assumption is that the sacred text is silent and that only through those presuppositions and assumptions that one can hear the voice of revelation. In addition, since the interpretation of "the text is social by nature and depends on the community of experts, it entails right

[154] Abdolkarim Soroush, "The Evolution and Devolution of Religious Knowledge," in *Liberal Islam: A Sourcebook*, ed. Charles Kurzman (New York: Oxford University Press, 1998), p. 245.

[155] Ibid.

and wrong, certain and dubious ideas. A wrong interpretation is as important as a right one, from the evolutionary point of view."[156]

The preceding arguments as Soroush points out can be briefly outlined as follows:

1. The sacred scripture is silent.
2. Religious knowledge is relative that is relative to the presuppositions.
3. Religious knowledge is age-bound, because presuppositions, themselves, are time-bound.
4. Revealed religion itself may be true and free of contradictions but religious knowledge is not necessarily so.
5. Religion may be perfect or comprehensive but not so for the religious knowledge.
6. Religion is divine; but the interpretation of religion is a human endeavor. [157]

This approach does not imply that man-made science and knowledge are to replace religion; instead it indicates that the body of knowledge accumulated by the human reason should be utilized for refining and developing man's understanding of religion. The religious scholars always consult the sacred text and the tradition. But, it is the task of religious scholars to be constantly aware of the underlying structure and

[156] Soroush, "The Evolution and Devolution of Religious Knowledge," p. 245.

[157] Soroush, *Qabz va Bast-e Tiorik-e Shari'at,* p. 278.

theoretical account that they take for granted as they try to make sense of the sacred text. And they should attempt to extend their framework and keep it rationally reliable and feasible.[158]

This approach to religious epistemology calls for contemporary Muslim scholars to revise their understanding of Islam in light of the many fundamental intellectual challenges being posed today to any living religion. This approach attempts to specify a research program for Islamic revivalism. The type of revivalism and reformism that it promotes is mainly concerned with extra-religious values, such as reason, justice and morality and the foundations required for a time-bound understanding of the divine text.

II. Muslim Intellectuals' Responses to the Challenge of Human Rights

As to the issue of human rights, Muslim intellectuals presented a variety of conceptual responses. Some of them methodologically locates the primary universal values, such as religious pluralism, toleration, and religious freedom and employ these values as a way in which a

[158] *Ibid*.

conception of human rights can be included in a formulation of Islamic doctrine.[159] On the other hand, many intellectuals make the argument that "God's original intent was consistent with a scheme of greater rights for human beings, but that the socio-historical experience was unable to achieve a fulfillment of such intent."[160] Still, the others argue that justice as the core value in Islamic doctrine, which takes the ethics of mercy seriously, requires respect for human diversity and recognition of human rights that are due to human beings.[161] In the rest of this chapter, I briefly examine the most important representatives of these enterprises and show how the Islamic doctrine might be formulated in a way that can gain the support of an overlapping consensus on a freestanding conception of human rights.

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[159] See, for example, Abdolkarim Soroush, *Reason, Freedom and Democracy in Islam*, trans. M. Sadri and A. Sadri (Oxford: Oxford University Press, 2000).

[160] Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam" in J. Runzo, N. Martin, and A. Sharma, eds., *Human Rights and Responsibilities in the World Religion* (Oxford: Oneworld, 2003), pp. 301-364. For Muslim intellectuals that are associated with this form of reasoning see Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford: Oxford University Press, 2001); Farid Esack, *Qur'an, Liberalism, and Pluralism* (Oxford: Oneworld, 1997); Abdulhi A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University press, 1996); Abdullahi A. An-Na'im, *Human Rights, Religion and the Contingency of Universalist Projects* (Syracuse: Syracuse University Press, 2001); Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (Cambridge: Islamic Texts Society, 2002); Ahmad Moussali, *The Islamic Quest for Democracy, Pluralism, and Human Rights* (Gainesville: University Press of Florida, 2001).

[161] See Khaled Abou El Fadl, *Islam and Challenge of Democracy* (Princeton, NJ: Princeton University Press, 2004).

1. Soroush and the Value of Toleration and Pluralism

Muslim intellectuals acknowledge that a conception of human rights may have originated as a non-religious idea, but its significance and generality can win support by different religious doctrines. For example, Abdolkarim Soroush[162] argues that the religious knowledge, "as a variety of human knowledge," contributes positively to our understanding of the conception of human rights. According to Soroush, the problems related to global ethics, such as world peace and human rights, require the

[162] Abdolkarnn Soroush (1945-present) was born into a lower middle-class family in Tehran. He attended the highly reputed Alavi high school - an independent school - in which its founders adopted an educational philosophy that embraced both the modern sciences and religious doctrine. Following high school, Soroush entered the University of Tehran to study pharmacology with studying Islamic philosophy on his own. Soroush's interest in the relationship between religion and politics was reinforced by the lectures of Ali Shariati, who attracted a great number of activist students. When he went to England to continue his study, Soroush added to his scope of intellectual interests the history and philosophy of science. In his graduate program, Soroush acquainted himself with Western philosophers, ranging from Hume and Kant to Popper and Kuhn, who would also influence his later religious epistemology. In September 1979, a few months after the Islamic revolution, Soroush returned to Iran and served on the Advisory Council of the Cultural Revolution, a position from which he later resigned. His increasing criticism of the Islamic government has resulted in his tenuous relationship with the current clerical order. Soroush has expressed his disappointment with the leaders of the revolution, whom he initially supported, but have gradually become hard-line reactionaries. Soon, "he not only became subject to harassment and state censorship, but also lost his job and security. His public lectures at universities in Iran are often disrupted by hardline Ansar-e-Hizbullah vigilante groups." (http://www.drsoroush.com/Biography-E.htm) Soroush is primarily interested in the philosophy of science, comparative philosophy, philosophical theology and particularly the mystical and philosophical system of Maulana Rumi. He is the leading figure in the religious intellectual movement in Iran. Soroush has been affiliated with many educational institutions, including Harvard, Princeton, Yale, Columbia, and the Wissenschaftskolleg in Berlin. In 2005 Time named him one of the world's 100 most influential people. For a good account of Soroush's intellectual influences and development, see, "Intellectual Autobiography: An Interview," in *Reason, Freedom, and Democracy in Islam* (New York: Oxford University Press, 2000), pp. 3-25.

contribution of diverse ethical and religious traditions: “We are all travelers on a ship, if one person pokes a hole in it, all of us will drown.”[163]

Soroush argues that a plurality of voices, both secular and religious, is required for justice to be fulfilled. Furthermore, in order to arrive at the truth, various perspectives are needed to be considered. However, he considers the “vast scope of insoluble religious differences compounded by the self-assurance of everyone involved.”[164] Adherents of different religious traditions often claim that theirs is the only path to the truth and salvation, and that therefore they ought not to tolerate people’s beliefs in other traditions. They may attempt to convert others or to call them infidels and wage war against them. But, on Soroush’s view the facts point to a contrary conclusion; he argues that the existence of diverse ethical and religious traditions, gives “rise to the suspicion that God may favor this pluralism.”[165] Each of these ethical and religious traditions may offer an “aspect of the truth,” the whole of which can only be discovered by recognizing these insights into “guidance and salvation.”[166] Along with asserting the divine cause of diverse religions, and also given the

[163] Soroush, *Reason, Freedom and Democracy in Islam*, p. 25.

[164] *Ibid.,* p. 72.

[165] *Ibid.*

[166] *Ibid.*

implications of the Qur'anic verse that there is "no compulsion in religion (2:256)," then we have reasons to embrace religious pluralism as a will of God.

In so doing, Soroush recognizes the necessity of religious toleration – as an outcome of religious pluralism – in societies claiming to support human rights. Religious toleration, he argues, derives not from "liberal mindedness, faithlessness, or scepticism", rather, it stems from a "profound philosophical anthropology" and an "intimate knowledge of the intricacies of the human soul."[167] Therefore, a religious individual who treats other people with intolerance, due to their beliefs, actually, commits an intellectual mistake in failing to distinguish between people and beliefs. One may disagree with a belief and find it to be false, yet at the same time find the holder of that belief "blameless, respectable, and even commendable."[168] Toleration, Soroush says, "concerns believers not beliefs."[169]

Soroush thinks that religious pluralism and religious toleration constitute an argument for democracy. Given his understanding of

[167] Soroush, "Tolerance," in Abdolkarim Soroush, *Reason, Freedom and Democracy in Islam,* p. 139.

[168] *Ibid.*, p. 138.

[169] *Ibid*.

democracy as a method of restraining political power, he says that the "only thing that is required of a democracy is tolerance of different points of view and their advocates."[170] The existence of different points of view, through the channels of political parties and free press, serves to verify excesses of political power.[171] The freedom of expression of different religious perspectives is particularly important in religious governments. "Belief is a hundred times more diverse and colorful than disbelief. If the pluralism of secularism makes it suitable for democracy, the faithful community is a thousand times more suitable for it."[172] The existence of diverse ethical and religious doctrines and various interpretations of religion promote "understanding of the principles of right and justice."[173]

Thus, in societies that are regulated by religious law, allowing for a variety of religious knowledge enables those societies to create "free, just and reasonable" religious jurisprudence. As a matter of fact, contemporary Muslim societies are reducing Islam to religious

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[170] *Ibid*.

[171] Amartya Sen has argued that real benefits of the modern democratic government are strongly associated with the presence of a free press. A free press, Sen argued, manages the corruption and excesses in government that, when left unchecked, eventually violate its citizens' basic human rights. See Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000), esp. chap. 6.

[172] Soroush, "Tolerance," pp. 144-145.

[173] *Ibid*., p. 150.

jurisprudence (*fiqh*). But Islamic history and culture have clearly shown that *fiqh* is not the same as the religion of Islam. Soroush argues that by recognition and toleration of different reasonable understandings of Islam, this wrong mixture of religion and religious jurisprudence would eventually be corrected. He maintains that "free faith and dynamic religious understanding are inseparable from free, just, and reasonable jurisprudence."[174]

In accordance with his understanding of the divine origin of faith, Soroush argues that religious jurisprudence can only be just when it recognizes the religious significance of freedom of thought. To enforce laws in order to display the religiosity or apostasy of citizens, would intrude into God's dominion. One may ask "What authenticity and ground would religious law have if it disregarded the freedom of faith and the humanity of understanding, refused to base its precepts upon these, and neglected to harmonize its regulations with them?"[175] This will demonstrate the hypocrisy of religious laws – that claim they are inspired by God – if they actually oppose the dynamics of religious experience and belief.

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[174] *Ibid.*, p.150.

[175] *Ibid.*, p. 144.

Thus, religious freedom specifies a basic feature of a religious society:

> Freedom is essential. Even those who adopt the path of religion and submission are valued because they have chosen this path freely. True submission is predicated upon the principle of freedom; indeed, they are the one and the same. Is there any merit in an imposed religion or forced prayers? Have we forgotten the Qur'anic verse: 'Let there be no compulsion in faith?'[176]

Soroush maintains that God intends for humans to be free. Freedom enables individuals to be genuine religious believers. Persons who are coerced into a belief will go through the motions of the faithful, but without any religious content. "Religion is, by definition, incompatible with coercion. Freedom has two virtues: it endows life and the choices we make in it with meaning."[177] The genuine religious life is entirely compatible with a truly democratic government.

According to Soroush, the governments which restrict religious freedom out of fear that apostasy will result, are limiting the discovery of truth. Those "who shun freedom as the enemy of truth and as a possible breeding ground for wrong ideas do not realize that freedom is itself a

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[176] Soroush, *Reason, Freedom and Democracy in Islam*, p. 97.

[177] *Ibid.*

truth *(haq).*"[178] The confidence in the capacity of freedom to arrive at the truth is evidence of trust in God. Religious rulers who attempt to restrict human freedom exhibit a lack of trust in God.[179] Although, freedom "might upset personal convictions ... it cannot possibly offend the truth except for those who presume to personify the absolute truth."[180]

Soroush also criticizes those who argue for the elimination or limitation of freedom in an attempt to prevent challenging ideas. Freedom encourages peoples to challenge the existing practice, and the assumptions of authoritarian institutions. Therefore, only those who "consider themselves to be directly inspired by God, who profess to possess the absolute truth, and who find their reason above benefiting from the assistance and consultation of others, will refuse the gifts of freedom."[181]

Furthermore, Soroush argues that a society that secures religious freedom or liberty of conscience, in fact, distinguishes "religion as an

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[178] *Ibid.*, p. 90.

[179] *Ibid.*, p. 100.

[180] *Ibid.*, p. 91.

[181] *Ibid.*, p. 92.

individual experience from religion as a collective institution."[182] Although the notions of religion as a personal experience and as a social institution may overlap, in order to respect religious freedom, the two must remain distinct.

In sum, Soroush's idea of human rights is based on his religious epistemology (the theory of contradiction and expansion of religious knowledge) which I discussed earlier. The distinction between religion and religious knowledge and mutual contribution of extra-religious knowledge and intra-religious knowledge in interpretation of Shari'a and humanization of religion are the key to reformulation of Islamic doctrine. Soroush considers the values such as pluralism, religious freedom and toleration as central to developing a conception of human rights in the Muslim world. He takes the normative position that a religious society is a moral society and not necessarily a society where strict religious jurisprudence binds its *modus operandi*. His conviction, in which the truth might be discovered through open discussion and consideration of diverse moral perspectives, provides a sound basis for cross-cultural dialogues about the possibility of a global ethics of human rights.

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[182] *Ibid.,* p. 22.

2. An-Naim and the Hermeneutical Shift in the Public Law of Shari'a

Many Muslim intellectuals argue that God's intent is consistent with human rights, but the social and historical experiences were disputed and even blocked the materialization of such intent. Given this argument, Abdullahi An-Na'im[183] claims that the classical understanding of Qur'anic texts prevents the Islamic law from reconciling to modernity and hampers attempts for reform within the traditional methodology. He explains that the

[183] Abdullahi Ahmed An-Na'im (1946- present) is Sudanese scholar in Islamic law with a degree in Shari'a from the University of Khartoum and Diploma in Criminology from the University of Cambridge. He is currently the Charles Howard Candler- Professor of Law at Emory University in Atlanta, Georgia. An-Na'im is a distinguished scholar of Islam and human rights, and human rights in cross-cultural perspectives. An-Na'im was the Executive Director of the African bureau of Human Rights Watch. In 1968 "An-Na'im joined the Islamic reform movement of *Ustadh* Mahmoud Mohamed Taha in Sudan, and continued to participate in its work there until the movement was suppressed in December 1984." When Islamic fundamentalism took political power, An-Na'im left the country in April 1985. Then, he thought that his primary mission is to publicize and develop the main ideas of his mentor, Mahmoud Taha. He started with publishing an English translation of Taha's main book, *The Second Message of Islam* (1987), and began to develop the legal and human rights implications of that methodology. "The primary objective of his scholarship has been a combination of the development of a liberal modernist understanding of Islam and the promotion of an overlapping consensus over the universality of human rights among different cultural and religious traditions of the world." He took a more strategic approach to human rights issues through the implementation of three major projects: "(1) cultural transformation and human rights in Africa, which seeks to challenge cultural and religious obstacles to women's access to land in seven countries, (2) a global study of the application of Islamic family law, and (3) a fellowship in Islam and human rights." An-Na'im's last book, *The Future of Shari'a*, focuses on "the struggle of Islamic societies to define themselves and positively relate to the local and global conditions under which they live." The central idea of this book is that the "relationship among religion, state, and society is the product of a constant and deeply contextual negotiation, rather than the subject of a fixed formula, whether a claim of total separation or total fusion of religion and the state." He claims that "the paradox of separation of Islam and the state while maintaining an organic relationship among Islam, politics and social interaction, can only be mediated through practice over time, rather than completely resolved through theoretical analysis." For a brief account of his intellectual life, See, http://people.law.emory.edu/~aannaim/

traditional methodology does allow a considerable degree of interpretation through *ijtihad* (i.e., independent juristic reasoning). Further, the classical principles of jurisprudence (*usul al-fiqh)* cannot exceed the limits of its own hermeneutics.[184] Therefore, both law and methodology must be reformulated since much of the law is no longer applicable:

> Given the fundamental conception and detailed rules of Shari'a, it is clear that the objectionable aspects cannot possibly be altered through the exercise of *ijtihad* as defined in historical Shari'a for the simple reason that Shari'a does not permit *ijtihad* in these matters because they are governed by clear and definite texts of the Qur'an and Sunna.[185]

In contrast with this, An-Na'im argues that "contemporary Muslims have the competence to reformulate *usul al-fiqh* [principles of jurisprudence] and exercise *ijtihad* even in matters governed by clear and definite texts of the Qur'an and the Sunna as long as the outcome of such *ijtihad* is

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[184] See Abdullahi An-Na'im, "A Modern Approach to Human Rights in Islam," in *Human Rights and Development in Africa,* eds. Claude Welch and Ronald Meltzer (Albany: State University of New York, 1984), p.83. He states, "It is true that for centuries Shari'a has succeeded in adapting itself to changing conditions through the essential flexibility of its sources and basic principles, coupled with the ingenuity of the jurists. Muslim propagandists have therefore tended to assume that Muslims can continue today to reform Shari'a in the same way. But as suggested above, even on the bases of fresh *ijtihad,* that is the exercise of independent juristic reasoning, such reform is inadequate because of the limitations placed by explicit texts of the Qur'an and *hadith* on reform within the framework of the traditional Sha`ri'a."

[185] Abdullahi Ahmed An-NI'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press, 1990), *p. 50.*

consistent with the essential message of Islam."[186] But, how this hermeneutical shift can reconstruct the meaning of morality and law in the Qur'anic texts?

An-Na'im argues that it is possible to obviate the clear and explicit texts that are not subject to reinterpretation through the traditional conception of *ijtihad* particularly those that are incompatible with human rights and justice. The solution he offers is that Islamic law must be derived from the Meccan text of the Qur'an and not the Medinan one. An-Na'im explains this approach as follows:

> […] in this book, *The Second Message of Islam* …, *Ustadh* Mahmoud[187] proposed to shift certain aspects of Islamic law from their foundation in one class of texts of the Qur'an and Sunnah and place them on a different class of texts of the Qur'an and Sunnah. The limitations of reform noted above are removed by reviving the earlier texts, which were never made legally binding in the past, and making them the basis of modem Islamic law. Explicit and definite texts of the Qur'an and Sunnah that were the basis of discrimination against women and non-Muslims under historical Shari'a are set aside as having served their transitional purpose. Other texts of the Qur'an and Sunnah are made legally binding in

[186] An-NI'im, *Toward an Islamic Reformation*, pp. 28-29.

[187] Mahmoud Mohamed Taha, the leader of the Republican Brotherhood in Sudan, was executed in 1985 for his opposition to what he believed to be arbitrary and distorted application of Shari'a in Sudan. His main book, *The Second Message of Islam,* translated by An-Na'im was published by Syracuse University Press in 1987.

order to achieve full equality for all human beings, regardless of sex or religion.[188]

Elaborating on his mentor *Ustadh* Mahmoud Taha's thought, An-Na'im suggests that the Qur'an should be understood as containing two messages responding to two stages during the twenty-three years of revelation and that these messages should be distinguished by the particular texts of Mecca and Medina.[189] The basic assumption of An-Na'im's methodology for reform is that the Meccan text contains the eternal and fundamental message of Islam. The substance of the message emphasizes the original principles, values, and moral character of Islam and conveys "the stage of the truth *(al-haqiqah)* or knowledge."[190] It emphasizes the inherent dignity of all human beings and the equality of

[188] An-Na'im, "Introduction" in Mahmoud Mohamed Taha, *The Second Message of Islam,* trans. Abdullahi An-NI'im (Syracuse, NY: Syracuse University Press, 1996), p. 23.

[189] This distinction between the Meccan and Medinan texts is not a new idea and was developed by the Malikite jurist Abu Ishaq al-Sbatibi (d.*1388)* in the fourteenth century. It is interesting to note that while An-Na'im and Sbatibi share this impression of the Qur'an, they depart from each other regarding the meaning and elaboration of this understanding. While Sbatibi, through an inductive survey of the Qur'an, argues that abrogation was not applied to the Meccan universals but only to Medinan rulings, An-Na'im regards the universals themselves as abrogated by the clear and explicit texts of Medina. Moreover, while Sbatibi calls for a holistic approach to the Qur'an, by which every part of the later Medinan text must be viewed and explained in terms of the earlier Meccan text, An-Na'im divides the two revelations into separate entities that are relatively independent of each other. See Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997), chap. five.

[190] See Taha, The *Second Message of Islam,* p. 46.

all persons regardless of gender, race or religious belief as well as the freedom of choice in matters of faith.[191] The verses address the whole of humanity through expressions such as "O, mankind" and "O, children of Adam," that speak to all people at all times.[192] This message transcends all temporal classifications and limitations and provides an inclusive meaning of Islam.

The content of this message, however, shifted from the stage of truth to that of dogma *(al-aqidah)* with the migration of the Prophet to Medina. An-Na'im associates the change of the message with the inability of the emerging Muslim community to implement the message of the Meccan period, because, it was entirely inappropriate for seventh century Arabian society. He states "When that superior level of the message was violently and irrationally rejected and it was practically demonstrated that society at large was not yet ready for its implementation, the more realistic

[191] Examples of this are found in the Qur'an, verse 16:125 instructing the Prophet to: "Call unto the way of thy Lord with wisdom and fair exhortation, and reason with them in the better way: for thy Lord is Best Aware of him who strayeth from His way, and He is Best Aware of those who go aright."As well as verse 18:29 "Say: (It is) the truth from the Lord of you (all). Then whosoever will, let him believe, and whosoever will, let him disbelieve." I have used *The Holy Qur'an*, trans. Abdullah Yusuf Ali, eleventh edition (Beltsville, Maryland: Amana Publications, 2004).

[192] Verse 49:13 provides: "O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you."

message of the Medina stage was provided and implemented."[193] The message of the Meccan period was rejected, because it did not offer practical support for the survival and unity of a community existing in a hostile environment. The Medinan text was revealed specifically to the early Muslim community in order to guide and assist them in establishing and spreading the religion in a violent social situation. The audience of the revelation is no longer universal but speaks to a particular nation of adherents to the new faith, indicated by phrases such as "O, believers" or "O, you who have attained the faith" (2:178) instead of "O, mankind."

Because the audience of the revelation in Medina is specific, the content is also specific, related to actual circumstances and events of the time, and offering practical solutions to social realities. This is observed in the relationship between the Muslims and non-Muslims, by which the strength of the faith and its political survival could not be secured by following the principles established in Mecca (non-coercion, peaceful co-existence) but called for explicit permission of forceful action, which was justified by the historical context of violent inter-communal relations. However, the use of force was allowed in a progressive manner,

[193] An-Na'im. *Toward on Islamic Reformation,* pp. 52-3.

demonstrating a gradual change in the content of the message.[194] The Qur'an first permitted force in self-defense and retaliation for injustices executed by unbelievers,[195] but, An-Na'im emphasizes that "the overwhelming impact of the Qur'an of Medina has been to sanction, if not positively command, the use of varying degrees of coercion on non-Muslims to induce them to convert to Islam."[196] These verses are a Medinan phenomenon intended to confront the immediate issues of that society.

Thus, the Medinan text contains verses that addressed and regulated the affairs of the Muslim community that were appropriate for

[194] An-Na'im, *Toward on Islamic Reformation*, p. 55. An-Na'im also explains this as "the overlap between the two stages of Mecca and Medina led to a gradual rather than an abrupt change in the content of the message. In the same way that force was sanctioned in a gradual, progressive manner, sanction for noncompulsion and the use of peaceful means continued to appear in the Qur'an during the early Medina period. For example, verse 2:256, 'there is no compulsion in religion, the right path has been determined and set aside from the wrong path' was revealed in the Medina period."

[195] Verse 2:190 states: "Fight in the cause of Allah those who fight you, but do not transgress the limits [initiate attack or aggression], for Allah does not love the transgressors." And verse 22:39-40, "To those against whom war is made, permission is given (to fight), because they are wronged;- and verily, Allah is most powerful for their aid;- (They are) those who have been expelled from their homes in defiance of right,- (for no cause) except that they say, "our Lord is Allah.. Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure."

[196] An-Na'im, *Toward an Islamic Reformation*, p. 55. He cites verse 9:29, which enjoins Muslims to, "Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the religion of Truth, (even if they are) of the People of the Book, until they pay the *Jizya* (the tribute) with willing submission, and feel themselves subdued." This verse references force against *dhimmis* (non-Muslim; the peoples of the book).

that historical time. The Islamic society that was developing could not completely release itself from pre-existing norms and institutions. One example is the well-established institution of slavery that Islam recognized and accepted, yet attempted to adjust its circumstances through improving its conditions.[197] The intent of the revelation was for the ultimate eradication of the institution by restricting its occurrence and encouraging its abolition, but An-Na'im finds that "since there was no internal mechanism by which slavery was to be rendered unlawful by Shari'a it continued to be lawful under that system of law up to the present day."[198] In the case of women, the Qur'an could improve their status but not radically modify their position, because such a fundamental change in the social norms would have resulted in upheaval and a total rejection of Islam.[199] In the Medinan text, the organization of the Muslim community

[197] While there is no verse in the Qur'an that directly sanctions slavery, many verses presuppose its existence and its legal abolishment is not explicitly commanded. Verse 47:4 restricts the scope of slavery by advocating the release of prisoners of war: "Therefore, when ye meet the Unbelievers (in fight), smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom: Until the war lays down its burdens." Verses 4:92 and 58:3 prescribe the liberation of slaves for religious atonement for some sins, verses 2: 177 and 90: 11-13 recommending this as an admirable act.

[198] An-Na'im, *Toward an Islamic Reformation,* pp. 174-5.

[199] See Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, (Boulder, CO: Westview, 1995), p. 98. Mayer says, "Not only did the Qur'an dismantle existing institutions that contributed to women's degraded and vulnerable status, but Islam conferred rights on women in the seventh century that women in the West were unable to obtain until quite recently. Muslim women, for example, enjoyed full legal personality, could own and manage property, and, according to some interpretations of the Qur'an, enjoyed the right to divorce on very liberal grounds."

was regulated through rules and legislation that consistent with that environment, such as the detailed rules concerning marriage, divorce and inheritance. While the detail and clarity of the text was useful and necessary in establishing the foundations of the first Muslim society, these guidelines were specific to that time and place. As Fazlur Rahman points out, “The Qur’an, although it is the eternal Word of God, was, nevertheless, immediately addressing a given society with a specific social structure. This society could, legally speaking, be made to go only so far and no more.”[200]

The two texts of the Qur’an, however, are not mutually exclusive, Rahman explains the importance of both texts this way: “The Prophet could have, had he so chosen, indulged in *merely* grandiose moral formulas. But then he could not have erected a society. Therefore, a legal and a moral approach were both equally necessary.”[201] The message of Medina has been elaborated and explained, its legal instructions offered for immediate application to create the first Muslim society, but the message of Mecca was only outlined and its moral principles await

[200] Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 2th edition, 1979), p. 232.

[201] *Ibid*.

implementation.[202] Their elaboration and interpretation require a fresh understanding of the Qur'an for which An-Na'im's offers his methodology.

The shift in emphasis from one set of Qur'anic texts to the other entails an important rethinking of the Qur'an and a reconstruction of the law it generates. An-Na'im accepts that Islamic law in the present day must be based upon the Qur'an and Sunna. He clearly indicates that "it is not suggested here that Islamic law should simply follow developments in human history regardless of the provisions of the Qur'an and Sunna."[203] However, it should be emphasized that the approach to those sources as well as the concepts, ideas, and laws that are derived from them, are done through a process of human interpretation. In support of this An-Na'im maintains,

> This principle should be easily appreciated by Muslims because even the Qur'an, which they believe to be the literal and final word of God, clearly describes itself in verses 12:2 and 43:3 as something conveyed through the vehicle of the Arabic language in order to be reflected upon and understood through the faculty of reason. In verse 29:49, the Qur'an describes itself as something which is understood and appreciated by the hearts and minds of those granted knowledge. Consequently, Muslims should realize

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[202] Taha, *The Second Message of Islam, p.* 47.

[203] Abdullahi An-Na'im, "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism," *German Yearbook of International Law,* Vol. 31 (1988), p. 324.

> that they are always dealing with a *human interpretation* of their sacred sources rather than the sources *per se.*[204]

In so doing, An-Na'im emphasizes the significance and the scope of human interpretation in understanding the Qur'an in order to convince Muslims that his conceptual proposal is viable and legitimate. It is not merely a reinterpretation of the Shari'a that he seeks but a critical adjustment in how the Islamic texts themselves are regarded.

An-Na'im begins with an inquiry into how the Islamic scriptures are conceived by the legal interpreter. He argues that those texts and their normative implications can only be understood in terms of the knowledge and experience of the world by the reader and that since the world changes over time, this knowledge and experience changes. This hermeneutical principle leads him to argue that "Islam should not be bound by any particular understanding of its scriptural sources."[205] If Islam is not bound to one interpretation because of the nature of narrative, An-Na'im can call for a fresh understanding of the sources. This would necessarily leads to a new legal structure, by which the principles of

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[204] Ibid., p. 334.

[205] An-Na'im, "Toward an Islamic Hermeneutics for Human Rights," in *Human Rights and Religious Values,* eds. Abdullahi An-Na'im, J.D. Gort, H. Jansen, and H. M. Vroom (Grand Rapids: William B. Eerdmans Publishing Company, 1995), p. 238.

Islamic law formulated by the classical jurists no longer remain as the only valid and applicable law.

According to An-Na'im, the transformation of such principles embodied in the Qur'an is a consequence of awareness of the influence of historical context on the method and even content of their interpretation:

> In interpreting the primary sources of Islam in their historical context, the founding jurists of Shari'a tended not only to understand the Qur'an and Sunna as confirming existing social attitudes and institutions, but also to emphasize certain texts and "enact" them into Shari'a while de-emphasizing other texts or interpreting them in ways consistent with what they believed to be the intent and purpose of the sources. Working with the same primary sources, modem Muslim jurists might shift emphasis from one class of texts to the other, and interpret the previously enacted texts in ways consistent with a new understanding of what is believed to be the intent and purpose of the sources. This new understanding would be informed by contemporary social, economic, and political circumstances in the same way that the "old" understanding on which Shari'a jurists acted was informed by the then prevailing circumstances.[206]

In sum, An-Na'im believes that the public law of Shari'a was, and still is, based more on the sources of the Medina period than those of the Mecca period. The founding jurists presumed a process of *naskh* (abrogation or repeal) of certain scriptural texts to reconcile the

[206] An-Na'im, "Human Rights in the Muslim World: Socio-Political conditions and Scriptural Imperatives", *Harvard Human Rights Journal,* Vol. 31, no. 3 (1990), p. 47.

inconsistencies that arose, in the hope of establishing comprehensive system of Shari'a.[207] According to Mahmoud Taha, *naskh* could not be permanent, since "there would be no point in having revealed the earlier texts." As An-Na'im says "*naskh* was an essentially logical and necessary process of implementing the appropriate texts and postponing the implementation of others until the right circumstances for their implementation should arise."[208] In this way, he argues that since Medinan conditions no longer existed, we should return to the original message of Mecca period. As a result, the basis of Shari'a should be transformed from the texts of the Medinan to the earlier Meccan period. This hermeneutical shift, in fact, reverses the process of *naskh,* accordingly preserves those texts which were abrogated in the past into current law and abrogates texts which have been enacted as Shari'a. The new body of law would be the modem Shari'a. Upon the acceptance of the interpretation of the Qur'an as an historical document which indicate that Islamic law must be proceed from the moral message revealed in Mecca, An-Na'im suggests a reconciliation of the Shari'a and international standards of human rights:

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[207] An-Na'im, *Toward an Islamic Reformation,* p. 49.

[208] *Ibid*., p. 56.

> Thus we have Muslim demands for self-determination by the application of Islamic law in public life. Yet such Islamic law cannot possibly be Shari'a as historically established. The only way to reconcile these competing imperatives for change in the public law of Muslim countries is to develop a version of Islamic public law which is compatible with modem standards of constitutionalism, criminal justice, international law, and human rights.[209]

[209] *Ibid*., p. 9. See also Ishtiaq Ahmed, "Abdullahi An-Na'im on Constitutional and Human Rights Issues" in Tore Lindholm, &. Karl Vogt, eds., *Islamic Law Reform and Human Rights* (Oslo: Nordic Human Rights. 1993) pp. 63-66; An-Na'im, "Islamic Law, International Relations, and Human Rights: Challenge and Response," *Cornell International Law Journal,* Vol. 20, no. 2 (1987), pp. 317-335.

3. Abou El Fadl and the Islamic Moral Commitment to Human Rights

The last example of contemporary Muslim intellectual's effort to reconcile Islamic doctrine with the conception human rights which I briefly examine in this chapter is Khaled Abou El Fadl.[210] He attempts to present a systematic exploration of Islamic legal theory as it associates with human rights. According to Abou El Fadl, the broad tradition of Islamic political morality could potentially support an idea of human rights. He argues that despite the doctrinal potentialities found in the Islamic tradition, without the necessary moral commitment there can be no conception of human rights in Islam. Such a moral commitment is not simply a function of political pragmatism or opportunism; instead, it requires that "the human agent plays a significant role" in the

[210] Khaled Abou El Fadl (1963- present) is a professor of law at the UCLA School of Law. He holds a B.A. from Yale University, J. D. from University of Pennsylvania Law School and M.A. and PhD from Princeton University. "He also received formal training in Islamic jurisprudence in Egypt and Kuwait." Abou El Fadl "is a strong proponent of human rights and is the 2007 recipient of the University of Oslo Human Rights Award, the Lisl and Leo Eitinger Prize." He was also named a Carnegie Scholar in Islam for 2005. He serves on the Advisory Board of Middle East Watch, and was formerly on the Board of Directors of Human Rights Watch. He has also served as a commissioner at the US Commission on International Religious Freedom. Abou El Fadl as "a prolific author and prominent public intellectual on Islamic law" and modern Islam, concentrates on a scholarly approach to Islam from the moral point of view. He is the most critical and powerful voice against puritanical and Wahhabi *Islam.* His recent work focuses on issues of authority, women, toleration and democracy in Islamic tradition. For a brief account of his life and work, see http://www.scholarofthehouse.org/abdrabelfad.html

determination of the morality on the basis of a rational inquiry into God's creation.[211]

Abou El Fadl shows that a great deal of debate concerning the challenge of human rights within the Islamic tradition is associated with the idea of sovereignty of God.[212] According to the predominant interpretation of the doctrine of God's sovereignty, God as the sole legislator and lawmaker seeks to regulate all human interactions, and that Shari'a is a complete moral code that determines every possibility.[213] Accordingly, any normative perspective which is derived from human reason or socio-historical experiences is fundamentally unsound and unacceptable. The only acceptable normative principles are those derived from the divine commands as found in the Divine text.[214]

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[211] See Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam," in J. Runzo, N. Martin, and A. Sharma, eds., *Human Rights and Responsibilities in the World Religion* (Oxford: Oneworld, 2003), pp. 301-364.

[212] *Ibid*.," p. 309.

[213] See Khaled Abou El Fadl, *Islam and Challenge of Democracy* (Princeton, NJ: Princeton University Press, 2004).

[214] Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam," p. 310.

This idea of God's sovereignty leads to the denial of and hostility against any human-made system that is not grounded in the Divine text.[215] Instead, "all moral norms and principles ought to be derived from a sole source: the intent or will of the Divine."[216] Human beings must apply God's divine legislation and refrain from assuming any basic principles of what is right or wrong independent of His commands. In other words, a society must simply be ruled by the basic principles of the Islamic Shari'a. As an eternal phenomenon, the Shari'a requires the duties and rights of individuals and the state. Therefore, since legislation of the basic principles of government and personal morality is sealed off from human knowledge, the doctrine of God's sovereignty constitutes the only acceptable basis for any legitimate moral and political system.

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[215] For example, Sayyid Qutb (1906-1966) and Abul A'la Mawdudi (1903-1979) – two leading fundamentalist ideologists- clearly expressed that the people either follow divine sovereignty or follow human autonomy. Qutb not only encourages Muslims to avoid learning from non-Muslims, but also suggests that Muslims have a duty to "fight all the polytheists and unbelievers." Sayyid Qutb, *Milestones on the Road,* trans. Badrul Hasan, in *Contemporary Debates in Islam;* ed. Mansoor Moaddel and Kamran Talattof (New York: St.Martin's Press, 2000), p. 234. Qutb argues that "man-made" and "self-devised" systems of human organization "place impediments in [Islam's] way." *Ibid*, p. 243. Similarly, Abul A'la Mawdudi claims that, "[…]in Western democracy, the people are sovereign, in Islam sovereignty is vested in God and the people are His caliphs or representatives." Abul A'la Mawdudi*, Human Rights in Islam* (Lahore: Islamic Publications, Ltd., 1977), p.*7.*

[216] Abou El Fadl, "The Human Rights Commitment in Modern Islam," p. 310.

Such an interpretation of the idea of God's sovereignty, in fact, assumes that "human agents have complete access to the will of God." Moreover, it supposes that there is a Divine law aimed at regulating all human interactions. This interpretation of God's sovereignty can be used for overcoming the agency of people in managing the affairs of their polity. This means "that only an elite will rule in God's name while pretending to implement the Divine will."[217]

However, Abou El Fadl argues that this conception of God's sovereignty is not justifiable by the principles of Islamic theology. He thinks that it is quite possible that,

> God leaves it to human beings to regulate their own affairs as long as they observe certain minimal standards of moral conduct and that such standards include the preservation and promotion of human dignity and well-being.[218]

Therefore, the idea that God is sovereign does not provide grounds "to escape from the burdens of human agency." [219]

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[217] Abou El Fadl, *Islam and Challenge of Democracy,* p. 9.

[218] *Ibid*.

[219] *Ibid*. According to the Islamic fundamentals, individuals are responsible and accountable agents: "And fear the day when ye shall be brought back to Allah. Then shall every soul be paid what it earned, and none shall be dealt with unjustly" (Qur'an, 2:281). Or again: "But how will they fare when we gather them together against a day about which there is no doubt. And each soul will be paid out just what it earned" (3:25). And

According to Abou El Fadl, the doctrine of God's sovereignty in classical Islamic thought is honoured in the search for the ways that human beings might be able to approach "God's beauty and justice." He maintains that if God's sovereignty is used to argue that,

> [T]he only legitimate source of law is the Divine text and that human experience and intellect are irrelevant to the pursuit of the Divine will, then the idea of Divine sovereignty will always stand as an instrument of authoritarianism … . But that authoritarian view denigrates God's sovereignty.[220]

Thus, he argues that the problem of God's sovereignty and human freedom in the Islamic doctrine needs to be analyzed through a proper understanding of the epistemology of Shari'a. This suggests that between the Islamic fundamentals and human rights lies a role for human agency, both of which – in an interpretive process – can be realized in a Muslim society. Abou El Fadl emphasizes that the role of the human agency in such an interpretive process is not only admitted by Shari'a discourses, but it is in fact indispensable to the understanding of the limits of

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"On the day when every soul will be confronted with all the good it has done and all the evil it has done, it will wish there were a greater distance between it and its evil" (3:30).

[220] Abou El Fal, *Islam and the Challenge of Democracy*, p. 9.

interpretation in the face of the perfection of the Divine.[221] Let me now briefly examine this epistemic-hermeneutic debate on Shari'a.

Pre-modern Muslim jurists have investigated the issue whether or not every jurist was correct in his interpretation. In this regard, the jurists were divided into two schools. The first school known as the *Mukhatti'a* argued,

> [T]hat every legal problem ultimately has a correct answer; however, only God knows the correct response, and the truth will not be revealed until the Final Day… . In this sense, every *mujtahid* [jurist] is correct in trying to find the answer; however, one reader might reach the truth while the rest might mistake it.[222]

And the second school, known as the *Musawwiba,* argued that,

> [T]here is no specific and correct answer (*hukm mu'ayyan*) that God wants human beings to discover; after all, if there were a correct answer, God would have made the evidence indicating a divine rule conclusive and clear… . Human beings are not charged with the obligation of finding some abstract or inaccessible, legally correct result. Rather, they are charged with the duty to diligently investigate a problem and then follow the result of their own *ijtihad* (judgment or opinion). … [W]hat God wants or intends is for human beings to search – to live a life fully and thoroughly engaged with the divine…. In sum, if a person honestly and sincerely believes

[221] *Ibid.*, p. 34.

[222] *Ibid.*, p. 32.

> that such and such is the law of God, then for that person it is in fact God's law.[223]

Based on this intellectual tradition, Abou El Fadl suggests that "Shari'a ought to stand in an Islamic polity as a symbolic construct for the divine perfection that is unreachable by human effort."[224] The central idea in both attitudes is the matter of human determination. In fact, both schools seek to reach God's law, but whether it is the actual law of God is beyond human knowledge. So what remains it is just human understanding or *fiqh*.

According to an Islamic religious epistemology, there is a fundamental distinction between Shari'a and *fiqh.* It has been argued that "Shari'a is the Divine ideal, and that *fiqh* is the human effort to understand and apply this ideal. Shari'a is perfect, true and immutable – *fiqh* is not."[225] In other words, "Shari'a as conceived by God is flawless, but as understood by human beings, it is imperfect and contingent." In fact, Shari'a as the ideal of God's law is considered as a metaphysical entity

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[223] Ibid., p. 33. See also Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001) which outlines these two schools of thought and their potential impact on modern Islam.

[224] Abou El Fadl, *Islam and the Challenge of Democracy*, p. 33.

[225] Abou El Fadl, "The Human Rights Commitment in Modern Islam," p. 322. See also my earlier discussion on religious epistemology of Muslim intellectuals in this chapter.

distinct from human attempts to understand it. On this view, "Shari'a is not merely a set of positive rules but also a set of principles and a discursive process that searches for the Divine ideals. As such, it is a work in progress that is never complete."[226]

What we can conclude, so far, is that a juristic statement on divine command is merely the potential law of God, whether because we will find its rightness on the Last Day (according to the first school) or because its rightness is depending "on the sincerity of belief of the person" who follows it (according to the second school).[227] Given this religious epistemological principle, Abou El Fadl convincingly argues that,

> If a legal opinion is adopted and enforced by the state, it cannot be said to be God's law. By passing through the determinative and enforcement processes of the state, the legal opinion is no longer simply a potential – it has become an actual law, applied and enforced. But what has been applied and enforced is not God's law – it is the state's law.[228]

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[226] *Ibid.*

[227] Abou El Fadl, "The Human Rights Commitment in Modern Islam," p. 226.

[228] Abou El Fadl, *Islam and the Challenge of Democracy*, p. 34.

Therefore, "a religious state law is a contradiction in terms."[229] He emphasizes that,

> [T]he state may enforce the dominant subjective commitments of the community (the second school), or it may enforce what the majority believes to be closer to the divine ideal (the first school). But in either case, what is being enforced is not the law of God.[230]

This indicates that the laws formulated and applied in a government are completely and absolutely secular, and must be treated as such.

It is important to note that, while we can say that moral ends may derive from divine commands, we cannot say that any set of laws that attempts to fulfill this moral commitment is divine as well. So, Abou El Fadl argues that "Muslims might be able to assert that justice and mercy are universal moral values." They might even be capable to realize that "justice and mercy are part of the divine charge to humanity – God wants human beings to be just and merciful."[231] In the remaining of this chapter, I briefly explain Abou El Fadl's argument on how justice, as a core moral value, can promote a commitment to human rights in Muslims' political morality.

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[229] *Ibid.*

[230] *Ibid.,* pp. 35-36.

[231] *Ibid.*, p. 22.

According to Abou El Fadl, "justice plays a central role in the Qur'anic discourse." Justice is asserted as an obligation we owe to God, and also to one another. Thus, "the imperative of justice is tied to the obligations of enjoining the good and forbidding the evil and the necessity of bearing witness on God's behalf."[232] Although the Qu'ran does not provide a conception of justice, "it emphasizes the ability to achieve justice as a unique human charge and need."[233]

Abou El Fadl elaborates on the Muslim jurists' arguments for justice on the basis of the idea of social cooperation. The jurists argued that "God created humans weak and in need of cooperation with others in order to limit their ability to commit injustice." They maintained that without social cooperation, people are not able to defeat injustice, or establish justice. The jurists asserted that "God has created human beings diverse and different from each other, so that they will need each other." This need will make them increase their natural tendency to cooperate in achieving justice.[234] Thus, the relative weakness of human beings and their

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[232] *Ibid*., p.18.

[233] *Ibid*., p.18. Rahman also discussed the obligation of justice in the Qur'an, see, Fazlur Rahman, *Major Themes in Qur'an, Second Edition* (Minneapolis: Bibliotheca Islamica, 1994), pp. 42-43. See also, Toshihiko Izutsu, *Ethico-Religious Concepts in the Qur'an* (Montreal: McGill-Queen's University Press, 2003), pp. 205-61.

[234] Abou El Fadl, *Islam and the Challenge of Democracy*, p.19. "This juristic discourse is partly based on the Qur'anic statement that God created people different from one

remarkable diverse abilities will encourage people to engage in fair social cooperation.[235]

Abou El Fadl argues that the Qur'anic celebration and blessing of human diversity may encourage the pursuit of social justice and may create "various possibilities for a moral commitment to human rights" in modern Islam. He explains that this commitment,

> [C]ould be developed into an ethic that respects dissent and honors the right of human beings to be different, including the right to adhere to different religious or nonreligious convictions…. Furthermore, it could be developed into a notion of delegated powers, in which the ruler is entrusted with serving the core value of justice by ensuring the right of assembly, cooperation, and dissent. Even more, a notion of limits could be developed that would restrain the government from derailing the quest for justice or from hampering the right of the people to cooperate, or dissent, in this quest. Importantly, if the government failed to discharge the obligations of its covenant, it would lose its legitimate claim to power.[236]

The important point here is that justice requires that every member of society have at least some basic rights which should be secured. "A

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another and made them into Nations and tribes so that they will come to know one another (Qur'an, 49:13). Muslim jurists argued that the phrase "come to know one another" indicates the need for social cooperation in order to achieve justice." *Ibid*.

[235] The Muslim jurists' arguments for justice and social cooperation are remarkably similar to medieval and early modern thought in the Christian West. See Jeremy Waldron, "Democracy and Conflict," in *Ibid*., pp. 55-58.

[236] *Ibid*., p. 20.

society that fails in this task is neither merciful nor just."[237] This point suggests the possibility of basic individual rights in Islamic doctrine.

Abou El Fadl states that, the pre-modern Islamic juristic tradition did not formulate a conception of individual rights as entitlements, but the juristic tradition did formulate an idea of protected fundamental interests of individuals. In the Islamic jurisprudential theory, "the interests of the people divided into three categories: the necessities (*daruriyyat*), the needs (*hajiyyat*), and the luxuries (*kamaliyyat or tahsiniyyat*)." Major institutions of a legitimate state must satisfy these interests; "in descending order of importance: first, necessities, then needs, then luxuries." In the juristic tradition, "the necessities are further divided into five basic values (*al-daruriyyat al-khamsah)*: religion, life, intellect, lineage or honor, and property."[238]

Although "the Muslim jurists did not develop the five basic values as broad categories" to include social and political content, yet, this does not prevent the possibility that the above-mentioned values could play as a foundation for a theory of basic individual rights in the modern Islam. Therefore, Abou El Fadl argues that the protection of religion should be

[237] *Ibid*., p. 23.

[238] *Ibid*., pp. 23-24.

developed to mean the right of religious freedom; the protection of life should mean the right of life; the protection of the intellect should include the right to freedom of thought and expression; the protection of honor should mean the protection of human dignity; and the protection of property should mean "the right to compensation for the taking of property".[239]

Arguing that the juristic tradition did not develop a conception of basic individual rights does not mean that that tradition was unaware of the idea. By contrast, as Abou El Fadl shows, the juristic tradition has expressed sympathy with people who have been "unjustly executed for their faith or those who died fighting against injustice." Muslim jurists have "condemned the imposition of unfair taxes and the usurpation of private property by the government."[240] Importantly, the majority of Muslim jurists did not condemn rebellion against a tyrannical government.[241]

Broadly speaking, Muslim jurists have expressed some views which demonstrate their humanitarian sentiments. For example, they "developed the idea of presumption of innocence in all criminal and civil proceedings

[239] *Ibid*., pp. 23-24.

[240] Abou El Fadl, "The Human Rights Commitment in Modern Islam," p. 337.

[241] *Ibid*. See also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2003), pp. 234-94.

and argued that the accuser always carries the burden of proof (*al-bayyina ‘ala man idda’a*).” In matters related to criminal cases, “the jurists argued that it is always better to release a guilty person than to run the risk of punishing an innocent person.” The same principle was applied on issues associated with heresy: “Muslim jurists repeatedly argued that it is better to let a thousand heretics go free than to wrongfully punish a single sincere Muslim.”[242] In addition, the jurists argued that heterodox groups may not be annoyed or assaulted until “they carry arms and form a clear intent to rebel against the government.” Importantly, Muslim jurists also

> … condemned the use of torture, arguing that the Prophet forbade the use of *muthla* (mutilations) in all situations, and they opposed the use of coerced confessions in all legal and political matters.[243]

However, Abou El Fadl argues that the most challenging debate on individual rights in the Islamic juristic tradition is associated with “the rights of God and the rights of people.” The rights of God should be retained by God in terms that God alone can judge how the violation of these rights

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[242] Abou El Fadl, *Islam and the Challenge of Democracy*, p. 24.

[243] *Ibid*., 25. “A considerable number of jurists in Islamic history were persecuted and murdered for holding that a political endorsement (bay’a) obtained under duress is invalid” *Ibid*. See also Abou el Fadl, *Rebellion and Violence*, pp. 86-87.

can be punished and God alone has the right to forgive such violations.[244] Moreover, Muslim jurists argued that "all rights not explicitly retained by God" will be maintained by people. However, "while violations of God's rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by the people."[245] Importantly the jurists asserted that "if the rights of God and rights of people (mixed rights) overlap, in most cases, the rights of people should prevail." The justification for this idea has been that human beings need their rights and need to claim those rights here and now, but the rights of God are merely for the benefit of human beings, and "God can vindicate God's rights in the Hereafter if needed."[246]

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[244] Classical jurists identified most acts of worship, and prescribed punishments in Qur'an as part of the rights of God. For example, fasting during the month of Ramadan, praying five times a day, or the punishment for adultery are parts of the rights of God. They made distinction between acts of *'ibadat* (worship) and *mu'amala*t (conduct involving social interaction). *'Ibadat*, were ascribed to the rights of God, while most *mu'amalat* were ascribed to the rights of people. Ironically, modern fundamentalists have declined the distinction between the two categories, claiming that all conduct, including social interactions, fall within the realm of *'ibadat*, and then claiming that the State is responsible for enforcing the rights of God on this world and that the rights of God take priority over the rights of people. See Khaled Abou El Fadl, "The Human Rights Commitment in Modern Islam," p, 362.

[245] Abou El Fadl, *Islam and the Challenge of Democracy*, pp. 25-26. For instance, "a right to compensation is retained individually by a human being and may only be forgiven by the aggrieved individual. Neither the government nor God has the right to forgive or compromise such a right of compensation if it is designated as part of the rights of human beings." *Ibid*.

[246] *Ibid*., p. 27.

As noted above, with regard to individual rights, Muslim jurists did not suggest a set of definite and universal rights that should be possessed by each individual. Instead, they have

> … conceived individual rights as emerging from a legal cause produced by the suffering of a legal wrong. … a person does not possess a right until he or she has been wronged and obtains a claim for retribution or compensation as a result.[247]

Thus, Abou El Fadl suggests that the transforming of this traditional conception of immunities to a modern conception of rights requires a paradigm shift. In so doing, "[the] rights become the property of individual holders, regardless of whether there is a legal cause of action."[248] The set of rights which are considered as fundamental are those required to achieve a decent society. The five values mentioned earlier could be regarded as the fundamental individual rights if those values properly reconstruct in the light of the diversity of human condition. In this way, the idea of juristic tradition concerning the priority of rights of people over the rights of God should be understood as "a claimed right of God may not be used to violate the rights of human beings."[249] In general terms, a basic

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[247] *Ibid*..

[248] *Ibid.*

[249] *Ibid.,* p. 28.

principle of Shari'a is that, all laws are for the benefit of human beings.[250] Here and now, we should only be concerned with exploring and the establishment of the rights which are required to achieve a just society. According to this understanding, the moral commitment to human rights does not in itself entail a lack of commitment to God, instead it represents a "necessary part of celebrating human diversity, honouring God's vicegerents, achieving mercy, and pursuing the ultimate goal of justice."[251]

[250] Abou El Fadl emphasizes that in the Qur'anic discourse, God is beyond benefit or harm, and therefore divine commands are in fact intended to benefit human beings alone and not God. For an elaboration on this point, see Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford: Oneworld, 2001), pp. 32-33.

[251] Abou El Fadl, *Islam and the Challenge of Democracy*, p. 28. Abou El Fadl explains that "it is not the premodern juristic tradition that poses the greatest barrier to the development of individual rights in Islam. Rather, the most serious obstacle comes from modern Muslims themselves. Especially in the last half of the past century, a considerable number of Muslims have made the unfounded assumption that Islamic law is concerned primarily with duties, and not rights, and that the Islamic conception of rights is collectivist, not individualistic" *Ibid*.

CONCLUSION

In this dissertation, I have argued that Rawls' theory of global normative order presents a set of principles of justice and rights applicable to international law and practice which, if followed, would lead to the creation of a just, stable and peaceful world. The resulting global order would be a *realistic utopia*; respect for human rights would be guaranteed by societies cooperating with each other in accordance with principles that secure and advance their legitimate interests. Such a world would be more just and peaceful than ours now is. And, in principle, it is possible to realize such a global order even given the realities of human nature and cultural diversity.

Rawls has shown that human rights, as he understands them, have a very strong foundation: they can be justified by means of the analysis of idea of a well-ordered society. His arguments do not presuppose any particular comprehensive doctrine, nor do they presuppose any particularly liberal conception of justice. Instead, giving the idea of human rights as an essential element of an idea of global public reason, Rawls argues that the justification of human rights needs to be "formulated in terms that can plausibly be shared;" the idea necessarily means that a

conception of human rights and its content "cannot be formulated by reference to a particular religious or secular moral outlook."[252]

Human rights, here are understood as the broad requirements of justice that are consistent with all reasonable political moralities include "liberal" and nonliberal "decent" peoples. In other words, human rights are a "proper subset" of the rights of members recognized and secured in any society that is (at least) decent. Given the fact of reasonable pluralism, the idea of human rights cannot meet the agreement of all reasonable peoples if it draws on ethical or religious traditions that they do not share. It was the central idea of this dissertation that, diverse reasonable traditions each with complex dynamical structures and incompatible patterns of argument can develop the basis for a shared view of human rights with their own rational. As Abdullahi An-Na'im indicates,

> If international human rights standards are to be implemented in a manner consistent with their own rationale, the people (who are to implement these standards) must perceive the concept of human rights and its content as their own. To be committed to carrying out human rights standards, people must hold these standards as emanating from their worldview and values.[253]

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[252] Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" pp. 196-97.

[253] Abdullahi Ahmed An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia, PA: University of Pennsylvania Press, 1992), p. 431.

However, it is important to note that one should not identify the content of an idea of human rights "by taking an empirical survey of the values that different societies happen to share"[254] and searching for inherent compatibility. Instead, affirming of a freestanding conception of human rights, as a normative inquiry, requires reconstruction or revision of the ethical and religious traditions by their adherents. As my reading of works of Muslim intellectuals should demonstrate, the Islamic fundamentals can be interpreted in a way that is *compatible with* a freestanding conception of human rights.

In the Islamic context, the most challenging issue associated with a conception of human rights is the idea of God's legislative sovereignty which revealed in the Qur'an and its relation to any claim of rights. This issue goes back to the debate between two most influential pre-modern theological and ethical schools, namely, the Mu'tazilite and the Ash'arite on the case of conflict between God's revelation and human morality, which of the two gets priority. [255]

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[254] Jon Mandle, *Global Justice*, p. 64. See also, Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p, 200.

[255] These schools have flourished in the eight through tenth centuries. For examination of these ethical traditions, see Majid Fakhry, *Ethical Theories in Islam* (Lieden: E. J. Brill, 1991); George Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge: Cambridge university Press, 1985); Wilfred Madelung, *Religious schools and Sects in Medieval Islam* (London: Variorum Reprint, 1985); Richard Martin, *Defenders of Reason in Islam:*

The Ash'arite school tends toward a "divine command theory," believing that God's commands alone determine morality.[256] This issue was addressed by Socrates in his dialogue with Euthyphro. He asked: "Is the pious or holy beloved by the gods because it is holy, or holy because it is beloved by the gods?"[257] Socrates favored the first alternative. He argued that "goodness or rightness or holiness is neither explained nor constituted by the gods loving it or approving it or willing it. On the contrary: what is good or right or holy is good or right or holy independently of anyone's attitudes toward it –including those of the gods."[258] Contrary to Socrates' view, the Ash'ariyya argued that good actions are good just because God commanded them, and evil are evil because God prohibited them.[259] But, the Mu'tazilite school endorsed a form of natural law theory: God has revealed moral law to human beings, and has prescribed obedience to it, but the moral law is intrinsically good.

Mu'tazilism and Rational Theology from Medieval School to Modern Symbol (Oxford: Oneworld Publications, 1997); Daniel Brown, "Islamic Ethics in Contemporary Perspective," *The Muslim World*, Vol. 89, no. 2 (2007), pp. 181-192.

[256] On an insightful analysis of divine command theory, see William J. Wainwright, *Religion and Morality* (Ashgate, 2005), part II.

[257] Plato, "*Euthyphro"* in *The Republic and Other Works,* trans. B. Jowett (Garden City, NY: Anchor Books, 1973), p. 435.

[258] Wainwright, *Religion and Morality*, p. 73.

[259] It should be mentioned that the majority of Muslim jurists and theologians have inclined to divine command morality in the above sense.

The Mu'tazila held that "by investigation of general goods, we can move from empirical inquiry of harms and benefits to a determination of divine command."[260] The Ash'ariyya, on the contrary, believed that only God's commands define standards of right and wrong as well as good and evil. In other words, on the Ash'arite view, the moral quality of an act is completely independent of its consequences. Only the command of God determines an act as right or wrong independently of any human assessment of resulting benefit or harm. From such a strict position, some Ash'ariyya even insisted, if God commands an act which seems wrong, it would be right for human beings to do it.[261]

Thus, the Ash'ariyya asserted the sovereignty of God at the expense of human freedom; they believed that God is unbound by any moral standards. Two characteristics of Ash'ariyya are particularly important: the first is holding a pessimistic view on the ability of human intellectual faculties to make ethical judgments. If God's commands are the only normative source of "right" and "wrong", then the moral knowledge can only be gained through revelation. The second is supporting a form of Scripturalism. Given the conviction that God's

[260] See Anver M. Emon, "Natural Law and Natural Rights in Islamic Law," *Journal of Law and Religion*, Vol. 20, no. 2 (2004 - 2005), pp. 351-395.

[261] See George Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge: Cambridge university Press, 1985), p. 59.

commands alone are the normative source of right and wrong, and deep suspicion of human intellectual faculties, the only way is to comply with definite commands of God.[262] In this sense, the Ash'arite school is positivist as it expected that one must search explicit scriptural text for authority and clarity of divine commands.

On the contrary, the Mu'tazilite claimed that the sources of normativity (morality) are recognizable by reason or intuition, and not by text alone. According to the Mu'tazila, God, as well as human beings, is bound by moral principles, and therefore any religious text that seems inconsistent with moral standards must have been incorrectly interpreted. More precisely, on the Mu'tazilite view, God does not violate morality, that is God could not commit evil and injustice. Although, the Mu'tazila believed that "right" and "wrong" recognizable through reason and revelation, and the two sources of knowledge are always reconcilable, they argued that right and wrong have an objective reality that exist in a

[262] See A. K. M. Abdulhay, "Ash'arite" in M.M. Sharif, ed., *A History of Muslim Philosophy* (Wiesbaden: Otto Harrassowitz, 1963-66), Vol. 1. See also Majid Fakhry, *Ethical Theories in Islam* (Leiden: E. J. Brill, 1991).

state of nature. Therefore morality is inherent and recognized, but not constituted by mere scriptural text.[263]

Muslim intellectuals are engaged and in conversation with this historical experience of Islamic humanism.[264] I consider the three intellectuals, treated here as clear examples. As pious and rationalist Muslims – self-identified as neo-Mu'tazila – building upon the heritage of Mu'tazilite rationalism, they firmly believe in the compatibility of Islam and modernity, a distinction between divine law and its interpretation, and the diversity of religious traditions. The neo-Mu'tazila are approaching Islam both from within and without, and combining contemporary intra-religious and extra-religious knowledge. The heart of their theory is the assertion that no religious interpretation is ever complete and final. They argued that religion may be divine, but interpretation of it is simply human, that is fallible and social-historically constructed. Muslim intellectuals assumed that the text, sacred or not, never speaks for itself; instead, it always manifests meaning through the dialogical enterprise of the reader of the text. The role of human agency in the interpretive process exceeds

[263] See Mir Vali El Din, "Mu'tazilite" in M.M. Sharif, ed., *A History of Muslim Philosophy*, Vol. 1. See also Sophia Vasalou, *Moral Agents and Their Deserts: The Character of Mu'tazilite Ethics* (Princeton, NJ: Princeton University Press, 2008).

[264] For an elaboration of this term see Lenn, E. Goodman, *Islamic Humanism* (New York: Oxford University Press, 2003).

beyond the determination of the law. The neo-Mu'tazila believed that, Shari'a is not simply about substantive law; instead, it is a way of thinking about "the relationship between the Divine will, human interpretation, and human reality."[265]

Like the Mu'tazila, Muslim intellectuals not only acknowledge that the moral obligations may come from God, but they maintain that God through His pure and profound wisdom obligates people to avoid corruption and to achieve benefits. In so doing, they argue that once Muslims are able to assert that the moral obligation might be constituted by divine commands, but the corruption and benefit are qualities subject to rational inquiry, this will lead to a major advancement in the attempt to justify a conception of human rights within Islamic tradition.[266]

However, one could ask what an Islamic formulation of a conception of human rights would be. The key elements of such a formulation are that it should be both acceptable to global public reason (i.e., an affirmation of the freestanding conception of human rights) and adequately Islamic, that is to be plausible to believers (i.e., to provide that tradition with its most compelling statement). This enterprise can be

[265] Abou El Fadl, "The Human Rights Commitment in Modern Islam," p. 360.

[266] *Ibid*.

understood as the search for a certain type of *equilibrium*: how might a formulation of Islamic doctrine be included in an *overlapping consensus* on a freestanding conception of human rights?

As we have seen, a crucial problem of formulation a conception of human rights in Islamic tradition arose from a particular interpretation of the idea of sovereignty of God. It was argued that because the contents of right and wrong are given primarily by the firm and determinate rules of God (expressed in Shari'a,) the faithful Muslim should obey firmly and uncritically the authority of Shari'a and should attempt to enforce God's rules.

Therefore, any deviation from God's sovereignty whether legal, political, or even personal is a corruption of true Islam. Any kind of submission to human – social, political, or individual – impressions, are considered as unbelief. In this view, although God's domain covers both the ordinary and the spiritual life, its implication is mostly related to politics.[267] The divine law determines moral rules and Muslim's political identity. So the Shari'a becomes the only meaningful law and the Islamic political system the only acceptable polity. These arguments are used to

[267] For example, Mawdudi states that "there must exist a God-fearing community devoted to the sole purpose of establishing and maintaining the sovereignty of God on earth." Abul A'la Mawdudi, *The Islamic Movement: Dynamics of Values, Power and Change,* ed. Khurram Murad (Leicester: The Islamic Foundation, 1984), p.80.

justify the conflict between political Islam (the fundamentalists) and liberal democracy, because of the presumed inherent incompatibility between Islamic doctrine and modern thought.

So, this interpretation of the idea of sovereignty of God is followed by some figures and movements within the Muslim world which consequently deny the idea that Islamic societies must secure the basic rights for each person. This interpretation supports fundamental rights only for those who are able to act rightly; freedom of thought and expression for those with correct beliefs, and freedom of assembly for those who are prepared to forbid the wrong.[268]

But the alternative interpretation of the idea of sovereignty of God leads to a different conclusion. It argues that God has created human beings with the intellectual capacity to understand the requirements of God's law. In fact, this interpretation of God's sovereignty argues in favor

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[268] See Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p. 209.The view of Sayyid Qutb's on liberty of conscience is one of the examples of this kind of interpretation. According to Qutb, liberty of conscience is an issue of freedom from false worship and false social values. See Sayyid Qutb, *Social Justice in Islam,* trans. John B. Hardie (New York: Octagon Books, 1970), pp. 53–68. The other example is the Iranian exclusivist and dogmatic clergy, Ayatollah Taskhiri who argued for the idea of human dignity by making a distinction between a "potential" and an "actual" dignity. He assumes that all human beings that are called to lead a virtuous life pleasing to God are "potentially" equal in their human dignity. However, he who fulfills his duty faithfully can claim a higher degree of "actual" dignity than he who fails to satisfy the religious values. See Heiner Bielefeldt, "Western Versus Islamic Human Rights conception? A Critique of Cultural Essentialism in the Discussion on Human Rights," *Political Theory*, Vol. 28, no. 1 (2000), pp. 90-121.

of the ability of human beings to acquire knowledge of the substance of God's commands (obligations and prohibitions) by reference to benefits and harms associated with actions. Three ideas are essential to this formulation. The first idea indicates a conceptual distinction between the true and eternal statements of law as set down by God (i.e. Shari'a) and the human understanding of the law, which is theory-laden, contextual and fallible.[269] Acknowledging and giving sufficient weight to this distinction between Shari'a and its human interpretation creates spaces for the disagreement and error which are unavoidable in human interpretive activities, and also for endeavors to improve understanding of Shari'a and reinterpreting it under changing conditions.

The second idea is the compatibility between God's sovereignty and human responsibility. The sovereignty of God is to give final judgment on the sincerity of faith and righteousness of acts, and that the responsibility of man is to provide instructions of moral duties. Related to this idea is the principle that "there shall be no compulsion in religion" (2:256). Along with asserting the previous two ideas we may have a case for more extensive guarantees of basic rights, as conditions of social cooperation and the fulfillment of the responsibility of all human beings.

[269] See my discussion on the religious epistemology of Muslim intellectuals in chap. 4.

The final idea is that the plurality and diversity of religious communities not only is a natural human condition but also is a will of God. Religious pluralism is not a product of the misunderstanding and antagonism of a group of religious community; rather it is a consequence of multilateral structure of the reality meeting the demand of human perception.[270] Moreover, the diversity of religious traditions has manifested itself that God may favor this pluralism.[271] In sum, if the initial two ideas can provide a basis to extend fundamental rights to all members in an Islamic community, bring them together with the third idea suggests a sound basis to support a freestanding conception of human rights as an essential part of global ethics. [272]

As I have interpreted in this dissertation, an approach that one may call "Rawlsian global ethics: the search of an overlapping consensus." Rawls has proposed a form of non-public reasoning for defending a political conception of human rights from within distinct ethical traditions.

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[270] See Soroush, *Reason, Freedom and Democracy in Islam,* p. 71.

[271] In this regard, Qur'an clearly expresses that "To each among you have We prescribed a law and an open way. If God had so willed he would have made you a single people. But His plan is to test you in what He hath given you; so strive as in a race in all virtues. The goal of you all is to God; it is He that will show you the truth of the matters in which ye dispute" (5:48)

[272] See also J. Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" pp. 209-210.

Rawls defined this form of nonpublic reasoning as arguing "from what we believe, or conjecture, are other people's basic doctrines, religious or secular, and trying to show them that, despite what they may think, they can still endorse a reasonable political conception that can provide a basis for public reasons."[273]

I have examined the capacity of a given comprehensive religious doctrine and whether it can gain an *overlapping consensus* on a freestanding conception of human rights. Taking Islam as a reasonable comprehensive doctrine and exploring theoretical potentialities within that tradition; my aim was to show what kind of authentic and reasonable affirmation can be presented by an ethical tradition.

The idea of an overlapping consensus – in this case – serves to show how a just and stable global order is possible. In order to achieve this aim we should assume that "there are many reasonable comprehensive doctrines that understand the wider realm of values to be congruent with, or supportive of, or else not in conflict with, political values

[273] Rawls, *Political Liberalism*, p.156.

as these are specified by a political conception of justice"[274] and human rights.

Thus, the idea of political liberalism can be educative; teaching us about new political possibilities and about neglected aspects of our own comprehensive doctrine. The basic moral and political ideas and values such as toleration, inclusion, and cooperation might not be prominent in a reasonable ethical or religious tradition. But, the advancement of a political conception of justice and right can lead to revise a reasonable ethical or religious tradition and its winning the support of an overlapping consensus.[275] In addition, it may provide moral interest in building a liberal democracy by showing how liberal theory specifies and combines those values.

As we have seen, the major feature of Muslim Intellectuals' arguments for reformulation of Islamic political morality was as follows: the type of political system which Muslims create and justify, whether monarchical, dictatorial or democratic depends on their very presuppositions. These presuppositions exist prior to their understanding

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[274] Rawls, *Political Liberalism*, p.169.

[275] Rawls mentions that an example of how a religion may do this is An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human rights, and International Law*, esp. pp. 69-100. See John Rawls, "The Idea of Public Reason Revisited," in *LP*, p. 151.

of the Divine text, and their attempts to construct a political order through practical reasoning.

In their efforts to reformulate Islamic doctrine, Muslim intellectuals have shown interest in critical rationalism, and the ideas of pluralism, progress, and secularism. They believed that modernity is an inevitable process of change in the historical development of human societies. Although Muslim intellectuals prized modernity, they remained critical and arguing that an Islamic society "can enjoy the freedoms of modern democratic government without ignoring the existence of God."[276] They acknowledged that shared basis of justice and human rights can be formulated in a variety of ways, through different ethical and religious traditions.

The term of "global ethics" does not mean that we think there is only one global set of answers appropriate to all contexts. Instead, it means that we, holders of different ethical and religious doctrines, should be open to reasoning from anywhere that deals with our situation. So, we might better understand the implications of Rawls' conception of human rights and the idea of decent society if we take seriously the moral and

[276] Soroush, "The Idea of Democratic Religious Government" in Soroush*, Reason, Freedom and Democracy in Islam*, p. 129.

political thoughts in neo- Mu’tazila intellectuals. At the same time, Muslim intellectuals might better understand the implications of their own political ideals if they build a deep and serious engagement with Rawls’ political philosophy.

POSTSCRIPT

AYATOLLAH MONTAZERI'S IDEA OF ISLAMIC STATE AND ITS COMMITMENT TO HUMAN RIGHTS

In the first part of this dissertation, I have explained that Rawls' conception of human rights is distinct from and narrower than his conception of justice (i.e., justice as fairness). Rawls conceives human rights as minimal, but necessary requirements of justice – although not sufficient from a liberal point of view –that can be satisfied, at least in principle, by various political systems, not only by a constitutional democratic regime. Therefore, he argues that human rights are common to all peoples, since they are compatible with all reasonable political moralities, including those of both "liberal" and "decent hierarchical" peoples. By contrary, the dominant maximalist theories of human rights reject Rawls' significant demarcation between human rights and justice, and claim that human rights require a liberal democratic state. Adopting this maximalist view, some of Iranian intellectuals claim that the reconciliation of human rights (as an essential element of modern ethics) and religion (as a traditional world-view and value) is not feasible.

But, as we have seen, Rawls' theory of global normative order attempts to put no unnecessary obstacles on affirming a conception of

human rights by tying its formulation to a particular religious or ethical comprehensive doctrine. It is left to different ethical and religious doctrines to elaborate a shared basis of human rights within their own terms. One of the most noticeable instances that show how it is possible to achieve a reconciliation of religious morality and human rights in Islamic legal tradition is the valuable intellectual insights and honest practical commitment of the late Ayatollah Montazeri.[277] The life of that great man which was rife with love to truth and compassion towards people is a typical religious instance of defense of justice and rights of the citizens especially the deprived and the depressed ones. For instance, his endeavor to guarantee the right to due process of law associated with political dissenters and his quarrel with Ayatollah Khomeini over the mass execution of political prisoners in the first decade of the Islamic revolution as well as his recent juristic opinion on the recognition of Baha'is civil rights are worth to be mentioned.

[277] "Grand Ayatollah Hussein-Ali Montazeri (1922 – 19 December 2009) was a prominent Muslim jurist and theologian. He was one of the leaders of the Iranian Revolution in 1979. He was once the designated successor to the revolution's Supreme Leader Ayatollah Khomeini, with whom he had a falling out in 1989 over government policies that Montazeri said infringed on people's freedom and denied them their rights. Montazeri remained politically influential in Iran, especially to the reformist movement. He was widely known as the most knowledgeable senior Islamic scholar in Iran and a *Grand Marja* (religious authority) of Shi'ite Islam. For almost three decades, Montazeri had been one of the main critics of the Islamic Republic's domestic and foreign policy. He had also been an active advocate of democracy, civil rights and human rights in Iran. He was a prolific writer of books and articles." From Wikipedia (with some modifications): http://en.wikipedia.org/wiki/Hussein-Ali_Montazeri

In some of his recent works, Ayatollah Montazeri especially dealt with the issue of human rights. Montazeri's effort to affirm an idea of human rights in his *Resaleh Huqooq* (*A Treatise on Rights*),[278] which is full of reference to Qur'anic verses and *Hadith*, *Fatwas* (juristic opinions) and theological arguments, deserves scrutiny and contemplation. At the beginning of *the Treatise*, Montazeri acknowledges human rights as the right of membership in a political community on the basis of social contract. As he writes, "What meant here are the rights which belong to people on the basis of legislation and contract" (*Treatise*, p. 12). He enumerates the fundamental human rights comprising of the rights to life, self- determination, personal property, freedom of thought and speech, as well as bodily and social security (*Treatise*, p. 15).

Montazeri supports the freedom of speech and conscience, as the most important rights which every human being should possess, in a way that is compatible with the most important doctrine of modern ethics, namely the ideal of personal autonomy which entails the ability of individuals to choose, revise, and change their conception of the good. He states that,

[278] Ayatollah Hosseinali Montazeri, *Resaleh Hoqooq* [*A Treatise on Rights*] (Qom, Entesharat-e Arghavan-e Danesh, 2006), hereinafter cited as *Treatise*. The translation of the passages are mine.

> A human being by nature has the ability to think and to choose a religious conviction. Islam has recognized the possibility of applying this ability as a right. If someone arrives at a conviction after thought and scrutiny and he finds it as true and corresponding to reality, he cannot neglect it, as deemed by reason, and he is obliged to observe its implications (*Treatise*, pp. 21-22).

Montazeri is clearly aware that this right is fundamental and indispensable. He argues that the indisputable right of self-determination requires not to be able to remove or restrict someone' freedom without any rational allowance or reliable canonical reason. The interesting thing is that in his opinion freedom of thought is not restricted to choosing a particular conviction, but he goes beyond and respects freedom of changing one's conviction:

> Having [freedom] of speech and conscience, expressing and changing them, and being aware of ideas and thoughts of others, is the right of every man and it shall not be associated with any kind of religious offenses like apostasy, corrupting, degenerating, affront, calumny, and the like (*Treatise*, pp. 50-52).

In so doing, Montazeri strongly supports ensuring and securing of the basic rights of religious minorities in an Islamic state. He writes,

> In the modern world that countries have constitutions which specify the rights of groups and individuals; voting of the religious minority groups to the constitution as a national covenant, has the same weight as practice of *dhimmah* [a traditional principle to protect

> Jews and Christians' rights in Muslim world]. Therefore, they enjoy the same rights and responsibilities as possessed by the other members of society (*Treatise*, pp.121-122).[279]

In addition, Montazeri supports the right of freely flourishing life for the religious minorities in accordance with their own traditions.

In support of the idea of human dignity and equality which he considered as a basic and underlying principle for other legislated laws, Montazeri cites and interprets Imam Ali's statement that "…people are divided into two groups; either they are similar to you in religion (religious brothers and sisters) or are alike you in Kind (creation)" (cited in *Treatise,* p.35). He points out that Imam Ali regards brotherhood in religion (conviction) equal to humanity and being of the same kind and attaches no preference in terms of rights for the mere conviction. Montazeri continues to support this idea by referring to some traditions *(Hadith)* on recommending fairness, toleration, love and compassion in treating all human beings. He says that such traditions generally demonstrate that not only treating people disrespectfully is morally wrong, but that "all human

[279] For an analysis of *dhimmeh* and its association with minorities rights and human rights, see Timothy William Waters, "Reconsidering Dhimmah as a Model for a Modern Minority Rights Regime," in Carl Wellman and M. Habibi Modjandeh, eds., *Theoretical Foundation of Human Rights* (Qom: Mofid University Publications, 2007) .

beings regardless of their religion, faith or conviction have inherent dignity" (*Treatise,* p.35).

An important point to note here is that although it has often been said that a virtuous man enjoys both inherent (or potential) and actual dignities, Montazeri argues that this presumed actual dignity has no effect on civil and social rights of people, and that all individuals enjoy these rights regardless of the degree of their faith and devotion. As he writes:

> If religiosity (or devotion) is considered as the source of rights for human beings, then the rights of the individuals should decrease or increase, weaken or strengthen on the basis of strength and weakness of the individuals' true beliefs. While this is not absolutely the case, and the strength and weakness of the individuals' true beliefs is only the source of spiritual dignity and being valuable before God (*Treatise,* p. 37).

His most important argument in defending the inherent dignity therefore is that, the affirmation of human dignity without ensuring and securing a set of civil and social rights is neither reasonable nor possible.

One of the basic rights which Rawls enumerates under human rights proper is the formal equality that is (in judicial system) equal cases must be treated equally. Montazeri also addresses this right and says: "all people have equal rights before the tribunal. Court should not be making any difference between the poor and the rich, the weak and the strong." He argues that the unjust and discriminatory treating persons involve

postponing or preventing an individual to enjoy her/his rights. He strengthens this argument by *Imam Ali's* statement that, "the judge should treat both parties in the tribunal in equal ways in every manner; equally looking and pointing at them, and inserting them in equal places." According to Montazeri, the significant point which this statement highlights the process of treating people equally, particularly when issuing a verdict (*Treatise,* pp.91-92, all of the quotations in this paragraph).

Among the human rights which Montazeri conceives as basic, are economic rights such as the right to occupation and trade. Referring to the Qur'anic verse that, "[…] in their wealth there is a due share for the beggar and the deprived" (70: 19), he emphasizes the duty of the government to assist the less-advantaged members of society through various forms of subsidies (*Treatise,* pp.53-57).

The important basic right that has not been mentioned in Montazeri's account is women's human rights. He briefly addressed the family rights, more precisely the traditional role and status of women that is articulated in the Islamic jurisprudence (which are faced with the fundamental challenges and criticism formulated by Muslim feminism).

However, as I have explained in the second chapter, the right of dissention against the government's policy is one of the important basic rights which a decent society is required to secure. In fact, this right

presents a mechanism for legal and political reform in a decent hierarchical society. Montazeri points out that through the political participation, “all the members of society can legitimately express their own ideas and opinions to reform and change the strategies of the government.” In Islamic tradition, this important right and responsibility is known as the principle of “commanding right and forbidding wrong.” According to this principle, the government should consult the people or their representatives and hear their opinions. It also implies that the governors have to respect people’s rights to take control over the conditions under which they live and act, and have to respect the public concern about any unjust political practice. So the government does not have right to force anything upon its people. As Imam Ali says:

> People would not be able to give their benevolent advice to the rulers if they lack the power to check the abuse of the authority. The rulers should govern their subjects in a manner which they feel their government is fair and not to be felled (cited in *Treatise*, pp. 62-63).

Thus, similar to Rawls’ idea of decent hierarchical regime, Montazeri holds that an Islamic decent society not only requires to securing human rights by its political and social institutions, but also it should ensure the meaningful role of the members of the society for making political decisions, that is, the right to determine the form of the government and the mutual duties of justice between the rulers and their

subjects. Furthermore, he argues that "in an Islamic government, people are the main source of legitimacy." In this way, he suggests the significant condition of the moral legitimacy of state:

> Whatever the members of an Islamic society determine the social and national interests are they could put them in the statement of their oath of allegiance to the government then the governors have the duty to fulfill these fundamental interests; if the government did not meet the promise, this would lead the government to lose its legitimacy (*Treatise,* p. 64).

So far, in our comparative analysis, we examined some ideas in Montazeri's *Treatise* that affirm Rawls' second criterion for basic institutions of a decent society.[280] Now we deal with Rawls' first criterion which says "the [decent] society does not have aggressive aims, and it recognizes that it must gain its legitimate ends through diplomacy and trade and other ways of peace" (*LP*, p. 64). In a similar way, Montazeri discusses issues associated with just war theory and the moral principles which should govern international relations. Let me briefly explain some of those ideas.

Montazeri holds that an Islamic government should reject aggressive policies and must respect the internal sovereignty of other

[280] See the second chapter of this dissertation, pages 72-77.

nations. He emphasizes that “Muslim societies should not wage war against any nation that does not engage in war; the culture, laws and recognized borders of such a nation must be respected by Muslims.” Needless to say that cooperation and mutual understanding can lead to strengthening diplomatic practices. “The Muslim societies have the duty to respect all agreements concluded between them and other nations such as, international agreements and covenants which cannot be violated unilaterally.” He maintains that all arguments which have been offered in the Islamic juridical tradition for fulfillment to promises and contracts, they could be applied to international covenants (*Treatise*, p.115).

Furthermore, Montazeri not only rejects aggressive approach towards other nations, but supports the priority of perpetual peace. He cites some traditions which encourage and recommend that “if a nation is asking for peace and acting it, you must desire it, too”. And, “if they offered peace, which enjoys God’s consent, you should not reject it; since it brings relief for soldiers, and comfort and benefits the citizens” (*Treatise*, p.117). According to Montazeri, waging wars against other nations can only be justified for self-defense. Moreover, he offers an ethical and spiritual interpretation of *jihad* which denies territorial acquisition and political dominance: “the primary aim of *jihad* in Islam was not territorial acquisition or forcing people to accept Islam” (*Treatise*, p.117).

As I have explained in the first chapter, decent political regimes have duty of assisting other peoples. They have a moral commitment to assist the disadvantaged peoples in helping them to build their own institutions, and to terminate injustice and cruelty by using force on the "outlaw regimes" in order to observe the international laws. By drawing attention to these moral commitments, Montazeri states that "it is the duty of Muslims' communities (the Islamic *ummah*) to help liberation of the Muslim or non-Muslim peoples under rule of cruel and unjust regimes not being able to protect themselves." He refers to Imam Ali's advice to his sons as follows: "Always be against unjust and help for the oppressed." Thus, he supports engagement in humanitarian interventions and the efforts to make a more just and peaceful world. As he states:

> No government and no peoples have the right to intervene with the internal affairs of other peoples in matter of form of religion, government and so on, which are accepted by their subjects. However, the intervention based on international agreements and laws is justified in cases such as, a people dominated by an outlaw regime and ask [for help] from other peoples in order to change their dreadful situation, or problems associated with the nuclear weapons and international drug trade which threaten international security (*Treatise*, pp.118-119).

As the concluding remarks, I think one of the most important models of a decent hierarchical regime is Ayatollah Montazeri's conception of an Islamic state. It has commitment to human rights and based on principles resembling Rawls' criteria of decency. He offers an

Islamic government in terms of an idea of guardianship of jurist, one elected by the people or their representatives. However, one cannot take this conception as an ideal political theory, but, it can be categorized as a reasonable political theory, if we regard it as an alternative to an outlaw regime, and generally as a theory of transition to democracy in a non-pluralistic religious community.

In fact, as I have examined in this dissertation, Rawls regards the idealized model of a decent hierarchical regime as an intermediate period between the dictatorship and democracy. The history of transition to the stable democratic governments – as Robert Dahl points out – shows that a number of modern democracies in several areas of Europe have stemmed from the constitutional monarchies (or a kind of decent hierarchical governments). For example, England, in 19th century had a constitutional monarchy which slightly ensured human rights and respected a limited political participation. But, surely that was not a full democratic government as we understand it today, "as 1832 in Great Britain the right to vote extended to only 5 percent of the population over age twenty."[281] Dahl emphasizes that "until the eighteenth century and

[281] Robert Dahl, *On Democracy* (New Haven: Yale University Press, 2000), pp. 22- 23.

later, democratic ideas and beliefs were not widely shared or even well understood".[282]

Finally, a decent hierarchical regime such as Montazeri's idea of an Islamic state can be regarded as a well-ordered one. Because the main institutions of a decent hierarchical regime founded on the common good conception of justice that includes protection of human rights for all the members of society, and ensuring the rights of political participation; it has a moral character and thus can be regarded as a well-ordered political system. But, since its basic structure is regulated by a particular religious doctrine, rather than a public conception of justice, and thus the citizens of this society are not regarded as free and equal individuals, therefore one cannot regard the idea as a democratic political order. However, as Rawls states, "something like Kazanistan [an idealized Islamic decent society] is the best [non-liberal and non-democratic society] we can realistically – and coherently – hope for. It is an enlightened society in its treatment of religious minorities. … The alternative is a fatalistic cynicism which conceives the good of life solely in terms of power" (*LP*, p. 78).

[282] Ibid, p. 24.

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