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THE HUMAN RIGHT TO BE DIFFERENT: CONTEXT, VULNERABILITY, VALUES, REALITIES AND CONSEQUENCES

AN INAUGURAL LECTURE

BY

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DEDICATION

This Inaugural lecture is dedicated to Our Dear Lord Almighty for His unfailing love and faithfulness.

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THE HUMAN RIGHT TO BE DIFFERENT: CONTEXT, VULNERABILITY, VALUES, REALITIES AND CONSEQUENCES

1) Contextualization- Holistic Nature of Human Rights

Before the Beginning

Ideally, before venturing to contextualize human rights, it ordinarily compels to first present what it is or at least closely represents. Treading on that patch of thought, the question of right will still be espoused[1]; but in this case, the emergence of rights language.

Rights language cannot be said to appear out of a vacuum, rather it evolved somewhat[2] through Western political history, apparently getting to the first golden age in the Europe enlightenment. The stronger revelation is that prior to the enlightenment, social, moral and political values were spoken of in relation to the right – that is, in relation to an objective moral order that stood over and above all people. The said order was conceptualized commonly as the natural law. This, after the rise of Christianity, became associated with the church.

In the discuss under natural law, people had duties to one another and to God; rights were derived from the compelling duties we owe one another under God. The contemporary practice of claiming secular rights, rights that have as their

[1] Fields, A. B. (2003). *Rethinking Human Rights for the New Millennium* (New York): Palgrave Macmillan, 22.

[2] Kamenka, E. (1978). *The Anatomy of an idea, Human Rights* (ed. E. Kamemka and A. Erh-Soon Tay). Port Melbourne: Edward Arnold

anchor the subjective freedoms and liberties of individuals rather than objective rights i.e. the divinely sanctioned moral order of the day, is associated with the long development of the idea of individual liberty, coalescing in the enlightenment.

The rights claimed in the enlightenment made sense to the people due to the fact that they had been preceded by the development of specific conceptions of society, individuality, freedom, liberty, government and religion. Rights protect interests that are recognized as sufficiently important to give rise to duties. Being a normative relationships; they are grounds for reasons for action and are in themselves justifications as a result.

The recognition of rights is independent of the existence of available remedies, i.e. the fact that an individual may not be able to claim his or her right before anybody neither deprives the right of its quality nor the individual at his or status as a subject.[3] Rights can be divided into several categories according to their; origin, subject or right-holder individual and group rights; subject matter civil and political rights, economic, social and cultural rights, collective, group or solidarity; negative or positive; and nature (absolute and another particular or qualified.

The bulk of these rights are conceptualized as individual rights. This imperatively harks back to the notion that human beings have rights by virtue of their humanity which essentially was

[3] *Appeal from a Judgment of the Hungaro/Gechoslovak Mixed Arbitral Tribunal (PCIJ)* (1933), 208, 231.

traditionally understood to apply to individuals only.[4]

This foundation should enable robust description of human rights. In the view of O. D. Schutter,[5] (h)umans rights have a logic of their own. This stems from the fact that they have originated in domestic constitutional documents before becoming part of the *corpus* of international law, and they regulate the relationships between the state and individual rather than relationship between states.[6]

[4] A. A. Cancado Trindade. The *Access of Individuals to International justice* (Oxford University Press, 2011), 1-16; R. McCorquodale, The Individual and the International Legal System; in Evans (ed.), International Law, 4th edn (Oxford University Press, 2014), 280-305: A Orakhelashvili, 'The Protection of the Individual in International Law, (2001) 31 *California Western International Law', Journal,* 241.

[5] Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2010) 11.

[6] Western, Burns, H. (1984). 'Human Rights', *Human Rights, Quarterly*, 6(3); 257-83; Sills, David. L/ (1968) *International Encyclopedia of Social Sciences*. New York: The MacMillan Company and the Free Press, 541. As per the domestic constitutional documents, one of the earliest- The American Declaration of Independence in its preamble unequivocally provides in 1776.

> We hold these truth to be self-evident, that men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed that whenever any form of government becomes destructive of these ends, it is the right of the If people to alter or to abolish it and to institute new governments, laying its foundation on such principles and organizing its powers in such form, and to them shall seem most likely to affect their safety and happiness. In the same spirit, the triumphant constituent National Assembly that proclaimed the Rights of

Indeed, there are innumerable contemporary definitions of human rights, excitedly each introduces a slant to the picture. The UN has it as those rights which are inherent in our state of nature and without which we cannot live as human beings.[7] They belong to every person and do not depend on the specifics of the individual or the relationship between the right holder and the right guarantor.[8] They endow upon everyone by virtue of their humanity, and are grounded in an appeal to our human nature. For Christian Bay, they are claims, that ought to have legal and moral protection to ensure that basic needs are met.[9] In the same vein, these rights have been defined as those minimum rights which every individual must have against the state or other public authority by virtue of his being a member of the human family. Again human rights have been described as the inherent dignity and inalienable rights of all members of the

Man in 1789 in its preamble provides: The representatives of the French people, constituted as a national assembly believing that ignorance, forgetfulness, or contempt of the rights of man are the only causes of public misfortunes and of corruption of governments have resolved to set forth in a solemn declaration the natural, alienable and sacred rights of man, in order that this declaration, being constantly before all the members of the social body, shall remind continually of their rights and duties.

7 O. Byrene, Darre J. (2005) *Human Rights: An introduction* (Singapore: Pearson Education) 5, Mishra Pramod (2000) *Human Rights Global Issues*. (Delhi: Kalpaz Publications), 4.

8 Coicaud, Jean Marc, Doyle, Michael, W. and Marie, Ann (eds.) (203), the *Globalization of Human Rights* (New York: United Nations University Press). 25.

9 Vincent, R. T. (1986) *Human Rights and International Relations* (Cambridge University Press), 12-14.

human family[10] recognizing them on the foundation of freedom, justice and peace in the world.[11] In the view of D. D. Raphael, in a general sense, human rights denote the rights of humans, and specifically, they are rights which one has precisely because of being a human.[12]

In the words of Michael Freeden, "a human right is a conceptual device, expressed in linguistic form that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being that is intended to serve as a protective capsule for those attributes; and that appeals for a deliberate action to ensure such a protection".[13] Several authors[14] in their perspectives laid credence to the rights

[10] Rajawat, Mamta (2001) *Burning Issues of Human Rights* (Delhi, Kalpaz Publication's), 33-47.

[11] Padma T. Kpe Roa (1987) *Principles of Human Rights Law* (ALT Publications), 18-21

[12] *Ibid*, 37

[13] Biswal, Tapan (2006) *Human Rights Gender and Environment* (New Delhi, Vira Books Private Limited), 44. Lipset, Seymor Martin (ed.) (1995), the Encyclopedia of Democracy (London: Routedge), 573; Current, Eleanor (2001), Hobbes's Theory of Rights: A Modern Interest Theory: *The Journal of Ethics*, 6(1); 63-64; Goetz, Philip, W. (ed. (1989) *The New Encyclopedia Britannica*, Vol. VI. (Chicago: The University of Chicago Press), 137; Laslett, Peter (ed.) (1975) *Philosophy Politics and Society* (Britain, A Blackwell Paperback Publication), 135; Sills David, L. (ed.) (1968) *International Encyclopedia of Social Sciences* (New York: The MacMillan Company and the Free Press), 541; Josh; S. C. (ed.) (2006) *Human Rights, Concepts, Issues and Laws* (New Delhi; Akansha Publishing House), 16.

[14] Kumar, Arun Palia (1995) *National Human Rights Commission of India* (New Delhi: Atlantic Publishers and Distributors) 10; Kumar, Jawahar, C. (ed.) (1995) *Human Rights Issues and Perspectives* (New Delhi Regency Publications), 10;, Symonides Jansuz, (ed), Human Rights, Concepts and

connection to the human family. Michael Goodhart informs that they "are closely tied historically to notions of justice and human dignity that are as old as human social interaction itself" and in that context he argues:

> While the idea of human rights has provoked sometimes sharp controversy, it has nonetheless become the dominant normative or moral discourse of global politics and a major standard of international legitimacy.[15]

Further and deeper perceptive to the nature of human rights can be traced to the Charter of the United Nations[16], it was a commitment to purposes and principles, the realization of which in the light of the changing world conditions required substantial adaptation of institutional and procedural arrangements. The Charter embodied limitations on a state's freedom of action and also made provisions for the development of human rights through each nation's constitution, thus, providing[17] a constitutional basis for achieving international peace, security and wellbeing. The Preamble provides:

> We the peoples of the United Nations

Standards (New Delhi: Rawat Publications), 347-49; Western, Burns, H. (1984) Human Rights; *Human Rights Quarterly* 1, 257-58; Claude Richard, P. (ed.). *Comparative Human Rights* (John Hopkins University Press) 3.

[15] Michael Goodhart, *Human Rights Politics and Practice* (Oxford, Oxford University Press), 2.

[16] Signed at San Francisco on June 26, 1945.

[17] Goodrich, L. M. Hambro, Edward and Simons, Anne Patricia (1969) *Charter of the United Nations, Commentary and Documents* (New York: Columbia University Press) 1.

> determined; to save the succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person in the equal rights of men and women and of nations large and small and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in large freedom.

The strong persuasion is that the clauses concerning human rights in the Charter provide the foundation for an impetus to further implement the protection and promotion of human rights. The Preamble contains the members reaffirmation of faith in fundamental human rights and in equal rights of men and women. In Article 1 of the UN Charter, the purposes of the UN is expressed to include co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all with distinction as to race, sex, colour, language or religion.

Article 55 states that:

> With a view to the creation of condition of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United

Nation shall promote;

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic social, health and related problems; and international cultural and educational cooperation; and international cultural and educational cooperation; and

c. universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[18]

All members in accordance with Article 56, pledge themselves to take joint and separate action in co-operation with the organization and for the achievement of the purposes set forth in Article 55[19] Within the same drive, Article 62, the Economic and Social Council (ECOSOC) is endowed with competence to make recommendations on its own initiative, with respect to international economic, social and other humanitarian matters.[20] With these strong foundations, it compels to present these definitions that secure indepth *corpus* of human rights. Antonio Cassese described it as:

[18] Repertory of Practice of United Nations Organs- Codification Division Publications.

[19] Brownlie, Ian (1973) *Principles of Public International Law* (New York: Oxford University Press), 569-70.

[20] Sills, David, L. (1968) *International Encyclopedia of Social Science*, (n. 6), 412.

> …ideological and normative galaxy in rapid expansion, with a specific goal; to increase safeguards for the dignity of the person. Human rights represents an ambitious (and in part, perhaps, illusory) attempt to bring rationality into the political institutions and the societies of all states.[21]

In this context U. O. Umozuruike stated that:

> Human rights are thus claims, which are invariably supported by law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity.[22]

In the case of *Ransome Kuti v. A-G of Nigeria,*[23] Kayode Eso (JSC), succinctly described human rights as: a right which stands above the ordinary laws of the land and which infact is antecedent to the political society itself. It is a primary condition to a civilized existence.[24] For O. W. Igwe:

> Human rights may then be seen as cherished entitlements endowed upon every person in virtue only of being a human and which are not extinguishable (even when they are massive, consistent and systematic) as they carry the status

[21] A. Cassese, (1990) *Human Rights in a changing World* (Temple University Press, Philadelphia) 3.

[22] U. O. Umozurike (1997) *The African Charter on Human and Peoples' Rights* (Martinus Nighoff Publishers) 4.

[23] (1985) 2 NWLR (Pt. 6) 211.

[24] *Ransome Kuti v. A. G. Nigeria*, (n. 23), 229-230.

> of innateness, being inherent, inalienable and therefore immutable.[25]

An ideal summary of these definitions and descriptions was inadvertently made when Boutros-Boutros – Ghali emphasized that:

> …the human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond our apparent division, our temporary differences, our ideological and cultural barriers… As an historical synthesis, human rights are in their essence, in constant movement. By that I mean that human rights have a dual nature. They should express absolute timeless injunction, yet simultaneously reflect a movement in the development of history. Human rights are both absolute and historically defined.[26]

To properly engage in the discussion of the human right to be different, further preliminaries should be established; taking on the holistic nature is imperative as no human right can be taken, appreciated, and tolerated, standing entirely on its own without learning on the others. It has been established that whilst there are a variety of human rights approaches, they are all derived from the international human rights first set forth in the UDHR

[25] O. W. Igwe (2002) *Preliminary studies in Human Rights Law* (Lago; Rings and Favolit Ltd), 6.

[26] Proceedings, World Conference on Human Rights, Vienna (June, 1993), 6.

Universal Declaration of Human Rights.[27] In the view of Stephen Marks, the holistic human rights approach connects all human rights in a unified system, rather than focusing on distinct components.[28] A holistic human rights approach therefore jettisons traditional, hierarchical distinctions between civil and political rights on the one hand, and economic, social and cultural rights on the other, and sees with skepticism individuals, groups and governments that claims to endorse human rights in general while ignoring or rejecting certain categories of rights such as women's rights, rights of democratic participation, or social or economic rights.[29]

A holistic approach emphasizes the universality, interdependency, and equality of all human rights. The perception recognizes that all categories of rights, include positive and negative components, will require resources, may

[27] Universal Declaration of Human Rights, G. A. Res. 217 (111) (A). pmbl, U.N Doc. A/RES/217 (111) (A) (Dec. 12, 1948) recognizing the "inalienable rights of all members of the human family.

[28] E.g., ICESCR, *Ibid* (Codifying the social, economic and cultural rights originally enumerated in the UDHR).

[29] Stephen Marks, 'The Human Rights Framework for Development: Seven Approaches' *in Reflections on the Rights to Development*, 23, 24-25 (Arjun Sengupta et al. eds., 2005) (forcefully arguing that human rights are so interconnected that it is impossible to make progress on some rights without achieving progress in the system as a whole): Isfahan Merali a Valerie Oosterveld, *Introduction to Giving Meaning to Economic, Social and Cultural Rights*, 1, 1 (Isfahsn Merali a Valerie Oosterveld eds. 2001) Emphasizing that the UDHR encompasses a holistic human rights framework in which there is no division or hierarchy of rights).

involve violations, but are deeply essential to human dignity.[30] Several human rights instruments starting from the UDHR lend support to the holistic human rights approach.[31] For instance, Article 28 of the UDHR provides that "everyone is entitled to a social and international order to which the rights and freedoms set forth in this Declaration can be realized.[32] This Article implies a holistic framework in which social, economic and political structures at both the national and international levels support the full realization of all categories of human rights.[33] Further, the holistic approach was supported by subsequent U. N. Declarations, including the Declaration on the Right to Development and the Vienna Declaration and Program of

James W. Nickel, Rethinking indivisibility: Towards a theory of supporting relations between human commissioner for human rights in supporting the indivisibility thesis, thus, requiring countries to endorse all categories of rights); Scott Leckie, Another step towards indivisibility: identifying key features of violations of economic, social and cultural rights, 20 human rights Q. 81, 83 (highlighting the disparity between the international community's consistent commitment to the idea that all human rights are interconnected and the ambivalence of state as demonstrated by their attitudes and practices towards economic and social rights.

30 Stephen P. Marks, 'The Human Rights Framework' Marks, *ibid*, 27 (emphasizing how the exercise of civil and political rights simultaneously advances economic, social and cultural rights of poor people in the context of development).

31 The 1986 Declaration on the Right to Development, the 1993 Vienna Declaration and the Program of Action and the Maastricht Guidelines on violations of Economic, Social and Cultural Rights, all listed the interdependent nature of human rights.

32 UDHR (n.27) Art. 28.

33 Marks (n. 30), 25 (arguing that the provision also implies structural changes, altering power relations at both the national and international level, to realize human rights).

Action, which both acknowledge the indivisibility and interdependency of all human rights and call for equal attention to the implementation of civil, political, economic, social and cultural rights.[34] Much more to these, the holistic approach is reaffirmed in the preambles to both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant Civil and Political Rights (ICCPR). The ICESCR specifically states that:

> [I]n accordance with the Universal Declaration of Human Rights, the ideal of the free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights.[35]

In the same vein, the holistic human rights approach also embraces the principles expressed in the ILO Declaration of Philadelphia and the ILO Declaration on Social Justice, in addition to the ideas that civil and political rights such as

[34] Declaration on the Right to Development, G. A. Res. 41/128, art. 6, UN. Doc. A/RES/41/128 (Dec. 4s 1986) (affirming the indivisibility and interdependence of all human rights); World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, 5 U.N. Doc. A/CONF. 157/23 (July 12, 1993 [hereinafter Vienna Declaration] (All human rights are universal, indivisible and interdependent and interrelated).

[35] ICESCR (International Covenant on Economic, Social and Cultural Rights art. 6(1), Dec. 16, 1966. 933 U. N. T. S., pmpl). The preamble to the international covenant on civil and political rights contains substantially the same language.

freedom of expression and association are essential to sustain progress, and that the "war against want" requires rights without achieving progress in the system as a whole): Isfahan Merali a Valeria Oosterveld eds. 2001) (emphasizing that the UDHR encompasses a holistic human rights framework in which there is no division or hierarchy of rights).

Both natural and international efforts to promote the common welfare.[36] Further, both the social justice and the holistic human rights approaches embrace "a set of values" for evaluating policy and practice.[37] Moreover, both frameworks are now implemented through international law with monitoring and accountability mechanisms.

The two approaches, nonetheless, are possessed of significant differences. The holistic human rights approach sustains but also extends beyond the parameters of the ILO Social Justice approach.[38] Firstly, both approaches are concerned with oppressed groups, however, the holistic human rights approach, unlike the social justice approach, includes all individuals and

[36] Declaration concerning the aims and purposes of the ILO. 1-11, Oct. 9, 1946, 62 Stat. 3485 [The Philadelphia Declaration] on social justice for a Fair Globalization, I. A. (June 13, 2008), 2, 7.

[37] Gillian Mac Naughton, Paul Hunt, 'Health Impact Assessment: The contribution of the Right to the Highest Attainable standard of Health; 123 *Pub Health* 302, 302 (2009) (explaining that human rights establish "an ethical and legal framework).

[38] Eibe Riedel, Monitoring the 1966 International Covenant on Economic, social and cultural Rights in *Protecting Labour Rights and Human Rights: Present and Future of International Supervision* 3, 4 (George P. Politakis, edn, 2007).

groups.[39] Secondly, the holistic human rights approach goes beyond a limited area of life concerns, recognizing that people value many interrelated dimensions of their lives.[40] Thirdly, the holistic human rights approach requires that political, economic, and social institutions treat these dimensions as equally valuable in the lives of the people that they govern.[41] This holistic framework is extensively reaffirmed in the *Vienna Declaration.*

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedom.[42]

[39] Marks (n.30), 27 (explaining that human rights, unlike social justice, does not necessarily depend on a sense of outrage at the poor, but rather on a set of agreed-upon limits.

[40] Marks (n.39), 27 (explaining that individuals impacted by an affordable housing project may also have related concerns regarding health, education information and work and that a holistic human rights approach demands considerations of all of these interrelated rights).

[41] *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*, U.N. DEV. GRP., http://www.undg.org/archive_docs/6959.

[42] Vienna Declaration, (n.30), 5.

Additionally, subsequently, the Optional Protocol to the ICESCR affirms " the universality, indivisibility, interdependence and interrelatedness of all human rights". Primarily, the assertion of the human rights; a dual shield that requires reciprocity. It should be constantly realized that the social justice and holistic human rights approaches have much in common, though, the latter approach offers some distinct advantages as a result of its three key features; universality, interdependency, and equality of all human rights. A brief appraisal will be taken *seriatim;*

1.1 Universality and Inalienability

Human rights are universal and inalienable[43]. Simply, universality means that all people are entitled to human rights at all times.44 In the view of Jack Donnelly, International Law recognizes "[t]hat human rights are, literally, the rights that one has simply because one is a human being".[45] Inalienability means that people cannot voluntarily or involuntarily surrender their own human rights or the human rights of others.[46] An example is, a person cannot sell herself or another into servitude. In that sense, it is taken that all individuals are always holders of human rights because" one cannot stop being human,

[43] UDHR (n.32), pmbl.

[44] U.N. Common Understanding, *Ibid*; A. Belden Fields, Wolf-Dieter Narr, 'Human Rights a Holistic Concept', 14 *Hum. RTS Q.* 1, 20 *(1992) (emphasizing that the holistic approach it mean(s) that all social processes and institutions – political, economic, social and cultural- must be understood and evaluated in terms of their effects upon human rights).

[45] Jack Donnelly, *Universal Human Rights in Theory and Practice* 10 (ed. 2003).

[46] U. N. Common Understanding (n.41).

no matter how badly one behaves nor how barbarously one is treated.[47]

There are numerous international instruments that affirm the universality and inalienable nature of human rights. Firstly, the Charter of the United Nations requires that all members pledge themselves to the promotion of "universal respect for and observance of human rights and fundamental freedoms for all.[48] Secondly, in addition to the express referrals to universality and inalienability in the title and preamble of the UDHR, the language of Article 1 and 2 imply both principles.[49] Properly viewed, the two covenants, in accordance with the U.N Charter and the UDHR, in the same breath recognize the universality and inalienability of all human rights.[50] Thirdly, subsequent instruments such as the 1993 Vienna Declaration simply aver that, [t]he universal nature of these rights and freedoms is beyond question".[51] Put differently, these rights existence, universality, inalienability is self-evident.

1.2 Interrelatedness, Interdependency and Indivisibility

Human rights are additionally interrelated, interdependent, and indivisible. Their interrelatedness is in the sense that they are intricately connected to each other. For Johannes Morsink, the drafting history of the UDHR highlights the organic

[47] Donnelly, *Ibid*, 10.

[48] U.N. Charter arts. 55-56

[49] UDHR, *Ibid*, art. 1 ("All human beings are born free and equal in dignity and rights), art 2 (Everyone is entitled to all the rights and freedoms set forth in this Declaration...").

[50] ICESCR, Ibid, pmbl; ICCPR, *Ibid*, pmbl.

[51] Vienna Declaration, *Ibid* 1.

interrelatedness of all of the articles, the drafter's intention that each article be interpreted in the context of the whole.[52]

Human rights are interdependent in dual senses, reflecting:

1. The relationships between rights, and
2. The relationships between persons

Firstly, rights are interdependent because the realization of one right may support or reinforce the realization of another right.[53] An instance is that the right to health is dependent upon the right to food, water, and housing, as they are underlying determinants of health.[54] Moreso, the right to health is equally closely connected to the right to education because ill health and absence of health care lower educational achievement by increasing absences and disrupting concentration.[55]

The right to education, on the flip side, can also enhance the

[52] Johannes, Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* 232. (1999) ("The organic character of the text applies both to how it grew to be what it now is, as well as to a deeper interconnectedness of the articles").

[53] U. N. Dev. Program. Human Development Report 2000: Human Rights and Human Development, 74. U. N. Sales No. E. 00.111 B α (2000) (noting that "there are causal links between the realization of one right and that of another").

[54] ECOSOC, CESCR, General Comment 14: The right to the highest attainable standard of health (Art. 12), 3 U. N. Doc. E/C. 12/2000/4 (Aug. 11, 2000) (Linking the right to health to the right work, non-discrimination, privacy, freedom of association and assembly, and the prohibition against torture).

[55] Paul Hunt and Gillian Mac Naughton, 'Impact Assessment, Poverty and Human Rights: A Case Study using the Right to the Highest Attainable standard of Health' 27 (World Health Organization Health and Human Rights Working Paper series, Paper No. 6, May 31, 2006), available at http://www.who.int /hhr/series_6_impact %20 Assessment Hunt_Mac Naughton 1. Pdf.

right to health, for example, by improving access to health information. Further, the right to health is also linked to the right to work due to the fact that ill health may reduce an individual's productivity at work or may limit or prevent that person from working at all.[56] In the same context, the right to work bolsters the right to health by assisting in the realization of related rights, such as the right to food and housing.[57] To validate this, the Commission on Social Determinants of Health, established by the World Health Organization, considers fair employment and decent environment was as important to living long and healthy lives.[58]

Interdependency is key in terms of a holistic human rights approach. In the explanation of Craiz Scott, interdependence may also be understood in terms of the relationships between people.[59] In the context of work rights, for instance, a court

[56] *Ibid*

[57] CESCR General Comment 18 (n. 54), 1 (expressing the essential nature of the right to work, both as an end in itself because the ability to work allows individuals to "live in dignity" and as a means to achieving a host of related rights); Office of the United Nations High Commissioner for Human Rights (OHCHR), *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 7, U. N. Doc. HR/PUB/06/12 (2006) (Illustrating the instrumental relevance" between the right to work and the right to food).

[58] WHO, Comm. On Soc. *Determinants of Health, closing the Gap in a Generation, Health Equity through Action on the social Determinants of Health*, available at http:/.whaeibdoc.who.int/publications/2008/9789241563703_e.ng.pdf (explaining how "[e]employment working conditions have powerful effects on health and health equity" and presenting employment and poverty data from all regions of the world).

[59] Craiz Scott, 'Reaching Beyond (Without Abandoning) the category of Economic, social and cultural Rights', 21 *Hum. RTS. O.* 633, 645 (1999) (giving the example

deciding whether to grant injunctive relief to prevent the dismissal of a group of workers for seeking to unionize world likely consider the workers' rights to work and organize.[60]

Imputing a holistic human rights approach – particularly, the notion that people are interdependent – the court might also consider the rights of the workers' children and other dependents are also at stake.[61] Children in this instance are also right holders, and their rights bolster those of their parents.[62] Further, recognition of the interdependency between the rights of different people can be observed through the international human rights treaties, especially between family members.[63]

Human rights are not only interrelated and interdependent, but are also indivisible. The meaning of the indivisibility of human rights is less obvious than the meaning of interrelated or interdependent human rights.[64] Jack Donnelly's exposition is

of human rights defenders whose right to freely call attention to human rights concerns is directly related to protecting the rights of others.

[60] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th Ed. 2006) (summarizing the decisions of the fact-finding and conciliation commission on freedom of Association, an ILO Body whose mandate is to examine alleged violations of trade union rights throughout the world.

[61] Craig (n.59).

[62] *Ibid*. 645-46 (explaining that where children's social and economic rights were well-established, the rights of workers as parents are more likely to be considered).

[63] *Ibid*, 647 (illustrating the point by referring to domestic deportation cases in which non-citizen parents have invoked their own rights as well as those of their citizen children not to be separated).

[64] James Nickel regards indivisibility as a very strong form of interdependency involving "indivisible bidirectional support": Nick (n.29), 990. For Nickel, two

apt; "the universal declaration model treats internationally recognized human rights holistically, as an indivisible structure in which the value of each right is significantly augmented by the presence of many others".[65] In this same plane, Diane Elson provides a resourceful definition in terms of the obligations that indivisibility imposes upon governments, which incidentally coincides properly with Mark's conceptual framework of the holistic human rights approach. In the view of Elson:

> The indivisibility of human rights means that measures to protect, promote and fulfill any particular right should not create obstacles to the protection, and fulfillment of any other human right.[66]

In this context, Elson, like Marks, sees indivisibility as an essential feature of a holistic approach that treats all human rights as important components of a unified framework- such as that set out in the UDHR. Put differently, the idea of indivisibility means that procedures for allocating resources and evaluating outcomes must account for the interdependence and interrelatedness of all rights.[67]

rights are indivisible only if each right is indispensable to the other. Further, Nickel argues that indivisibility as typically conceptualized in human rights law, is overbroad in that it fails to recognize that some rights may be interrelated but not indispensible. *Ibid*, 1991.

[65] Donnelly (n.45), 27

[66] Diane Elson, 'Gender justice, Human Rights and Neo-Liberal Economic Policies in *Gender Justice, Development, and Rights*, 78, 87-114 (Maxine Molyneux & Shahra eds. 2002).

[67] *Ibid*, 78 (The idea of indivisibility is also an assertion that the procedures for setting priorities for resource use and for judging the effectiveness of resources

1.3 Equality of Rights

One of the core foundations of human rights is that all are inherent to human dignity.[68] In consequence therefore, all human rights have equal status, and "cannot be ranked… in a hierarchical order".[69] The commencement line of the UDHR states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[70] This same words were reiterated in the preamble to the ICESCR and the ICCPR.[71] The equal status of rights was also further reaffirmed in the 1993 Vienna Declaration, which urge the international community and national government to treat human rights "in a fair and equal manner". Explaining in the context of implementation, Elson urges that "there is no hierarchy of human rights as ultimate goals; they are also equally valuable and mutually reinforcing.[72]

Putting these positions together therefore, the holistic approach encompasses all people and all human rights in an equal manner. These then are the principles of universality, interdependency and equality of rights. This approach undeniably reflects the

use must incorporate principles of respect for all human rights).

68 U. N. Common Understanding, *Ibid*, 2.

69 *Ibid.*

70 UDHR, (n.32) pmbl.

71 ICESCR, International Covenant on Economic, Social and Cultural Rights, pmbl; ICCPR, International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 U. N. T. S. 171.

72 1993 Vienna Declaration and Programme of Action, 5, U. N. DOC. A/CONF. 157/23 (July 12, 1993) ("All Human Rights are universal, indivisible and interdependent and interrelated").

original understanding of the international human rights law framework as the UDHR was adopted.[73] In the view of Johannes Morsink, "the organic unity" of the UDHR reflects the belief of the drafters in the fundamental unity of all human rights.[74]

2) Vulnerability – The Fault Line

As the appraisal of vulnerability is undertaken, it is needful to commence on the note that violations of human rights endures at the fault lines. Fault lines are taken to be the range of susceptibility – the lowest ebb of weakness that attracts any seeming object of substance. Vulnerability theory provides a template with which to refocus critical attention, raising new questions and challenging established assumptions about individual and state responsibility and the role of law, as well as creating space to address social relationships of inevitable inequality.[75]

A vulnerability approach argues that the state must be responsive to the realities of human vulnerability and its corollary, social dependency, including situations reflecting

[73] Elson, *Ibid*, 66.

[74] Intriguingly, the holistic vision reflected in the UDHR Framework deteriorated quickly during the Cold War and subsequent decades of neo-liberal policy, and social rights fell to "a secondary status in both international law and the national laws of many countries". See: Daphne Barak – Erez and Aeyal M. Gross, 'Introduction: Do we need social Rights? Questions in the 'Era of Globalization, Privatization and the Diminished Welfare State' in *Exploring Social Rights: Between Theory and Practice* 1, 3-4 (Daphne Barrack Erez and Aeyal M. Gross eds. 2007).

[75] Scott, (n.59), 99 634 (calling for a return to an interdependent framework of human rights, as originally provided for in the UDHR, and arguing against bifurcation of "Civil and political rights" and "economic and social rights").

inherent or necessary inequality, when it initially establishes or sets up mechanisms to monitor these relationships and institutions.[76] Understanding human vulnerability suggests the equality, as it tends to be used to measure the treatment of individuals or groups, is a limiting aspiration when it comes to social justice. Equality essentially is measured by comparing the circumstances of those individuals considered equals. Inevitably, this approach generates suspicion of unequal or differential treatment absent past discrimination or present stereotyping, moreso if practiced by the state.[77] Evaluated in its substantive form, assessments of equality focus specific individuals and operate to consider and compare social positions or injuries at a particular point in time.[78]

The question of vulnerability calls for a state that is responsive to universal human needs and for the reorganization of many

[76] The vulnerability theory has the potential to go beyond the Anglo-American frontier. The influence of neoliberalism as a merchantlist process of social relations as well as a form of rationality capable of extending to all fields of existence, also has relevance within the African contexts; Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism (Verso Books, 2014); Wendy Brown, Undoing the Demos; Neoliberalisms Stealth Revolution* (Zone Books, 2015).

[77] This includes those who are not socially or economically equal, but regarded as such under the law. Moreover, equality implies a comparison that leads to the problematic question; equal to whom? For instance, in the case of women, are male norms and standards the appropriate measure? Such an assimilationist approach to equality presumes the socially and culturally imposed roles, obligations, and burden are similar or equal in nature and regards women and men.

[78] Martha Albertson Fineman, *The illusion of equality: The Rhetoric and Reality of Divorcee Reform* (The University of Chicago Press, 1991).

existing structures, which are currently based on a conception of legal order that unduly valorized individual liberty and choice and ignores the realities of human dependency and vulnerability. In this context, vulnerability theory supplements antidiscrimination approaches in that it is not initially covered with exclusion and inequality but on the nature of the institutions, their functions, and the relationships contained within them. These arrangements apply to everyone in society.[79]

2.1 The Place of Social Justice

In the context of history, social justice was thought to have to have emancipatory potential.[80] This term was used as a rallying cry by progressive thinkers and activists, who understood it to be a call for "the fair and compassionate distribution of the fruits of economic growth," moreso, for the working class.[81] In 2006, the UN Department of Economic and Social Affairs Report, "Social Justice in an Open World, "situates the origin of the term in the advance of industrial and urban capitalism, which was consolidated during the years after the Second World War and

[79] Substantic equality is the subject of much debate. The conflicting opinions of justices Lebel and Abella in *Quebec (Attorney General) v. A.* 2013 SLC 5, (2013) I SC R 61 interpreting section 15(1) of the Canada Charter of Rights and Freedoms is an example of the nature of disagreement.

[80] Martha Albertson Fineman, 'The vulnerable subject: Anchoring equality in the Human condition', 20 *Yale J. L. and Feminism* 1, 18-19 (2008) (expounding that vulnerability theory supplements antidiscrimination approaches).

[81] It has to be noted that it is a contested concept, characterized by specific historic and ideological contexts W. B. Gallie, *Essentially contested Concepts*, 56, 167-98 (1955), Philpapers. For the analysis of the origins of social justice, see Samuel Moyn, *Not Enough: Human Rights in an Unequal World*, 12 (Harvard Univ. Press 2018).

the advent of social democracies; "unlike justice in the broad sense, social justice is a relatively recent concept born of the struggles surrounding the industrial revolution and the advent of socialist (and later, in some parts of the world, social democratic and Christian democratic) views on the organization of society.[82]

Following the industrial revolution, the expansion of large-scale production and growth of markets as the mode of production and distribution increased the availability of goods and services.[83] This made collective lives apparently easier and more comfortable, but it also resulted in skewed advantages – with material affluence for some but poverty, exclusive and deprivation for others.[84] This era of social and political dislocation was referred to as "The Great Transformation"[85] by Karl Polanyi.[86] Further he described how the extension of market dynamics and logic frayed the social fabric.[87] In the context of such societal disruption, social justice, in the words of the UN Report was "a revolutionary slogan embodying the

[82] What occasioned early social justice advocates was apparently the initial distribution of economic gains associated with increased productivity: U.N. Secretariat Department of Economics and Social Affairs, Social Justice in an Open World: The Role of the United Nations 7 (2006).

[83] (n. 82).

[84] Henry Heller, *The Birth of Capitalism* 176 (2011).

[85] Walter Lipmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* (Univ. Wis. Press 2015) (1914); Karl Mark & Friedrich Engels, *The Communist Manifesto* (Plato Press 2008) (1848).

[86] Karl Polanyi, *The Great Transformation* 42 (Beacon Press, 2d ed. 2001) (1944).

[87] Karl also noted the ways in which key elements of society, such as labour and natural resources, were transformed into commodities to be bought and sold.

ideals of progress and fraternity".[88]

Social justice ideas flourished in the United States and was implemented at a federal level through strategies such as progressive income tax, antitrust legislation, and workplace regulation. Indeed, progressive politics led to policies aimed at the fair distribution of public goods and services, the development of the idea of citizenship, social rights, and the welfare state, including the propulsion of reforms relating to education and employment.[89]

The reformers secured the groundswell that the principle of social justice be accomplished by social means. Franklin Delano Roosevelt's "Second Bill of Rights" was a social justice document in which he outlined a vision of "social citizenship" (a fair deal), and it was governmental authority that was posited as ensuring that everyone would be guaranteed protection from the harshness of the market. Succinctly, in FDR's words:

> As our Nation has grown in size and stature, however as our industrial economy expanded – these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men". People who

[88] Social Justice Report, (n. 82), 12.

[89] J. M. Wedemeyer a Percy Moore; 'The American Welfare System'; 54 *Cal. L. Rev. 326* (1966) (Showing the implementation of social justice ideas); Karen Tani, *States of Dependency: Welfare, Rights, and American Governance*, 1935-1972 (Cambridge University Press, March 2016).

> are hungry and out of job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted so to speak, a second bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.[90]

Freedom here is perceived as contingent on economic security, not on the attainment of a fair deal was not designed to be only, or even primarily, an individual responsibility. It is perceived that an active and progressive state and its public agencies were deemed the legitimate sources for robust and coherent distributive policies. Included in the specific entitlements enumerated were the right to: (1) work; (2) decent pay; (3) have a decent home; (4) adequate medical care; and (5) protection from the economic calamities arising from sickness, accident and unemployment in old age or resulting from economic dislocations.

FDR's social justice ideal provides a framework for civilized behavior in governance. The basic principle that government should intervene to provide some level of economic and social protection to those who need it, in the face of economic dislocation and disruption has become institutionalized in

[90] President Franklin D. Roosevelt, State of the Union Message to Congress, (Jan. 11, 1944), http://www.prresidency ucsb.edu/ws/index. Php? Pid = 16518 [https://perma.cc/E7UK-VWM5]

civilized societies.[91] There have developments since FDR's conception of social justice and in this regard, relevance to the understanding contemporary meaning of social justice is the fact that, over the course of the twentieth century, justice has become increasingly understood in economic terms.[92] In fact, the relationship between the individuals economic wellbeing and the market has become fundamental in defining the appropriate role of the state and this is acceptable even among progressives.[93] Philippe Van Paris[94] perception in this context comes under focus. He elaborated on his understanding of social justice in which he placed the individuals not the social-as central[95]. He commenced with the *caveat* that "any defensible

[91] Indeed, social justice was not defined by or limited to what have become the "traditional" protected categories, such as race, gender, or disability. Rather, the category was based on the status of citizenship or on a social identity such as worker or head of household. In that way, it was a more inclusive, one not grounded in discrimination: Daniel T. Rodger, *The Age of Fracture* 35(2012); William Schneider, 'The New Shape of America Politics', *The Atlantic* (1987), https://www.theatlanic.com/past/docs/politics/ polibig/schnnew.htm [https://permaicc/UE2M-aAJ7].

[92] Nancy Frases explores this position in critical thought in the context of second-wave feminism: Nancy Fraser, *Feminism, Capitalism and the Cunning of History: An Introduction* (Aug. 23, 2012), https://perma.cc/8AJW-TGMAX] (Observing how neoliberal policies affect the relationship between feminism and capitalist behavior); Ross Douhat; The Handmaid of Capitalism (June 20, 2012), https://www.nytimes.com/2018/06/20/opinion/feminism-capitalism.html [https.//perma.cc/3H6L-FGMW].

[93] *Ibid.*

[94] Phillipe Van Parijs, 'Social Justice and the Future of the Social Economy'; 86(2) *Annals of Pub & Coop. Econ*. (Special Issue) 191-97 (2015), available at https://pema.cc/aU7WB-36A3].

[95] *Ibid*, 192 (advocating that personal responsibility is a driving force to social equality).

conception of social justice currently, must articulate the importance we attach to equality, freedom and efficiency."[96]

In his context, justice, Van Parijs continues with the assertion that any defensible conception of justice must be liberal and egalitarian, explaining that he means "liberal in the philosophical sense of professing equal respect for the diversity of the conceptions of the good life that are present in our pluralistic societies.[97] With respect to equality, he clearly explained that it is not to be interpreted to mean equivalence in outcome, and this s true whether what is distributed is happiness, income, wealth, health, or power[98]. For Parijs, inequalities in distribution can be justified in two ways.[99] First is the principle of personal responsibility under which inequalities do not violate an egalitarian mandate if they are byproducts of pursuit of individual actions, provided there is what he terms "real freedom".[100] His idea of real freedom is central (and individually focused) in Van Parijs work, though not fully explained. "Equality is not a matter of equalizing outcomes; it is a matter of equalizing opportunities, possibilities, real freedom".[101]

Vulnerability theory challenges inaccurate vision of legal subjectivity. It suggests that a legal subject is primarily defined

[96] *Ibid.*

[97] *Ibid.*

[98] Parijs (n.94) (endorsing that equality of opportunities rather than outcome is the part to egalitarianism of opportunities with narrow exceptions).

[99] *Ibid*

[100] Parijs (n.94), 192 (Justice is about the fair distribution of possibilities, of opportunities of capabilities, of the real freedom to do things".

[101] *Ibid*

by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition.[102] In this state, it has the power to disrupt the logic of personal responsibility and individual liberty built on the liberal stereotype of an independent and autonomous individual. In truth, recognition of human vulnerability, mandates that the neoliberal legal subject be replaced with the vulnerable legal subject, even as a responsive state is substituted for the restrained state of liberal imagination.[103]

Vulnerability connected with a fundamental question: What does it mean to be human? In attending to this question emphasis is placed on the essential aspects of human beings. This of course includes these characteristics, experiences, or situations that are universal, and define human conditions.[104] Further to the answer to this question in vulnerability theory is, of course, vulnerability, which arises because we are embodied beings.[105] Our bodies are inevitably and constantly susceptible

[102] Martha Albertson Fineman, 'Vulnerability and Inevitable inequality', 4 *Oslo L. Rev. 133*, 149, (2017)

[103] *Ibid*, 134 (elaborating that the human condition is more fully reflected by vulnerability and need); Martha Albertson Fineman, 'Equality and Difference – the Restrained state', 66 *Ala L. Rev.* 609, 614, 626 (2015) (discussing how vulnerability theory seeks to further the vulnerable subject and restrained state).

[104] Vulnerability theory presents vulnerability as universal and constant but also recognizes that there are differences among individuals. Horizontal differences are observed if we take a slice of society at any given time and note the differences in embodiment, such as race, gender, gender, ability and other differences.

[105] Fineman, 'Vulnerability and Inevitable Inequality'; (n.102), 1752-53 (elaborating on internal and external life events that can positively or negatively influence our vulnerability).

to changes – both positive and negative, developmental and episodic- over the course of life, and this has implications for our social well-being as well as it is of great need to note that human vulnerability is not set forth as a normative concept. Indeed, it is descriptive, representing empirical observations. In the nature of things, human beings regularly experience change of time, and this includes the possibility of bodily harm, injury, or decline.

In the view of Fineman, M.:

> While vulnerability theory begins with vulnerability; it does not end there. In fact, it is the implications of human vulnerability that are the most significant part of the theory for legal and political thought. Because we are embodied creatures, we are also deponent on social institutions and relationship throughout life.[106]

At this point, it would be ideal to capture an interview that Margaret Thatcher granted to *Women's Own Magazine,* in 1987, where she famously proclaimed that there was no such thing as society:

> They are casting their problems at society. And, you know, there's no such thing as society. There are individual men and women and there are families. And no government can do anything except through people, and people must look after themselves first. It is our duty to look after

[106] Fineman, M. (2019) 'Vulnerability and social justice' *Valparaiso University Law Review*, 53(2), 341-370.

> ourselves and then, also, to look after our neighbours.[107]

This may be taking as a political, not a sociological, statement reflecting her view on state responsibility (or lack thereof). In proper context, the idea of society and how it functions in critical theory are not always obvious, thus, it is important to explicitly reveal the assumptions that are made. It is common knowledge that societies are not all the same, nonetheless, they share universal characteristics. In the first place, any society has to be intergenerational if it is going to perpetuate itself. Again, every society needs a means of organizing itself and establishing the appropriate relationship between the individual and the state. Further, every society must of necessity, device social institutions and relationships that respond to the realities of the human condition, which means responding to human vulnerability and dependency.[108]

Vulnerability theory is more focused on establishing the parameters of state responsibility for social institutions and relationships than it is on setting the limits of state intervention. With this approach to state responsibility, vulnerability theory expands our notion of what constitutes an injury of constitutional significance to include the gross neglect or deliberate disregard of circumstances of profound deprivation

[107] Margaret Thatcher: 'A Life in Quotes', *The Guardian* (April, 8 2013), https://www.theguardian.com/politics/2013/apr/08/margaret-thatcher-quotes [https://perma.ce/v5CG-LYD4].

[108] Contemporary politics had dictated market and its institutions as the mechanisms to provide for human needs, as well as preserving individual liberty.

and unmet needs on the part of some citizens.[109] The reality undoubted is that if social institutions and relationships are formed to respond to human vulnerability and dependency, then human vulnerability and dependency should form the foundation of our social compact.

Basically, this angle of social perspective in defining vulnerability is very different from that found in traditional social contract theory. Traditional social contract concepts are based on the idea that rational and autonomous individuals consent to cede some of their naturally endowed liberty to the (restrained) state in exchange for mutual protection in a Hobbesian world.[110] Moreso, a vulnerability approach to social justice recognizes that the relationship between the individual and the society is synergetic. Social institutions operate in integrated and sequential ways within society, and individual success depends on the successful integration and operation of those institutions. A social justice paradigm should encompass the whole – not just individual – past of society. From this bent, law is perceived as a primary way in which we order society and structure its synergetic relationships. It thus, provides the rules

[109] Martha Fineman, 'The Vulnerable Subject and the Responsive State'; 60 *Emory L. J.* 251, 254-55 (explaining that the United States provides no constitutional guarantee for basic social goods).

[110] Ironically, the fact that some individuals will succeed and even thrive in this type of Hobbesian world is not surprising. They do so by exploiting and dominating others, including governing structures; Henrik Saetra, 'The state of Nature-Thomas Hobbes and the Natural World'. *Int'l Sci. Pub. NS. Ecology and Safety*, June 2014,177,184 (discussing whether a Hobbesian society will care for or exploit resources and later arguing that "a state not built to be secure, can fall at any time).

governing individuals in their interactions with each other, but also defines the relationship between the individual and the state-including the state's responsibility to the individual's responsibility to the states.

3) Values-Equality and Non-Discrimination

In the view of Daniel M. Sangeeta S. and Sandesh S.;

> The notion that all human beings are equal and therefore deserve to be treated equally has a powerful intuitive appeal. It is one of the central ideals of the enlightenment and at the heart of the liberal theories of the state. The US Declaration of Independence of 1776 famously proclaimed that all men are created equal, and today virtually every liberal democratic state guarantees equality in its constitution.[111]

In the same measure, the principle of equality and non-discrimination has gained an important status in international law. This principle is included in the key human rights instruments and the Vienna Declaration and Programme of Action[112] describes it as a fundamental rule of international human rights law.

Some challenges hung on this rule, particularly in practice. Firstly, no two human beings are equal in the sense that they are identical. For instance, two persons may be equal in respect of

[111] Daniel M. Sangeata & Sandesh S., *International Human Rights Law* (2010, Oxford University Press) 157.

[112] Adopted by the World Conference on Human Rights, 1993, A/CONF. 157/23 (25 June, 1993) Para. 15.

some measurable characteristic- they both weigh 80 kilograms – surely they will always be different in some other respects (political opinion, income, and et cetera). For a proper articulation of the principles of equality, relevant criterion upon which people should be judged to be alike or different will be analyzed. Even when two persons can be said to be alike, it might still be questionable whether they should always be treated equally. Additionally, it is appropriate to decide what kind of equality that is sought to be achieved. Really, do we mean by equality that people should be treated identically? Or that they should be given the same opportunity? Or that they should be placed in the same position? The formulation of equality can come in different shades and deciding which concept of equality to adopt should be a vigorous exercise blending logic and politics. In this regard, equality looks like an "empty ideas".[113] As the concept hangs, it does not answer the questions of who are equals and what constitutes equal treatment.

To seek to resolve this dilemma may involve giving the abstract notion of equality by translating it into concrete legal formulations that make clear which forms of unequal treatment are legitimate because they are based on morally acceptable criteria and which are wrongful. To start with, the terms 'equality and 'non-discrimination have often been used interchangeably. They have been described as the positive and negative statement of the same principle. Seen in this context; whereas the maxim of equality requires that equals be treated

[113] Western, 'The Empty Idea of Equality'(1982) 25 *Harvard LR* 537.

equally, the prohibition of discrimination precludes differential treatment on unreasonable grounds.[114]

Beyond that said above, there has been an increased emphasis on the positive formulation. This newness in terminology highlights that equality implies not only a negative obligation not to discriminate, but also a duty to recognize differences between people and to take positive action to achieve real equality.[115] Properly applied, whereas non-discrimination corresponds to the more limited concept of formal equality, usage of the term 'equality' stresses the need for a more positive approach aimed at substantive equality.

Formal equality can be taken to refer to Aristotle's classical maxim according to which equals must be treated equally or, more precisely, likes must be treated alike.[116] The notion of equality consistently focuses on the process rather than the outcome. Equality therefore is achieved if individuals in a comparable situation are treated equally, regardless of the result. The values supporting formal equality are the liberal ideas of state neutrality and individualism. Put differently, the notion that the state should not give preference to any one group

[114] *E OC* -4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACTHR Series A. No. 4 (1984), Separate Opinion of Rodolfo E. Piza, J. Para. 10 (It appears clear that the concepts of equality and non-discriminationare reciprocal, like the two faces of one same institution.
Equality is the positive face of non-discrimination. Discrimination is the negative fare of equality).

[115] Daniel M. Sangeata S & Sandesh S. (n. 111), 158.

[116] Aristotle, *The Nicomachean Ethics of Aristotle* (JM Dent, 1911) Book V3, Paras 1131 a-b.

and that people should be treated exclusively on their individual merit, regardless of group membership. Again, this idea of equality raises the fundamental question of when for instance two cases can be said to be alike. Admittedly, it inevitable that laws and government action classify persons into groups that are treated differently. Under a progressive taxation system, for example, people are treated differently according to their income; with respect to states with a juvenile justice system, people are treated differently according to their age. Evidently, these distinctions are generally seen as perfectly legitimate since they are found on morally acceptable grounds.

The concept of equality generates other problems like consistency.[117] Firstly, since it is not concerned with the outcome, it does not matter whether two parties are treated equally well or equally badly. Secondly, inconsistent treatment can only be demonstrated if the complainant can find a comparably situated person who has been treated more favourably. Thirdly, treating people apparently consistently regardless of different backgrounds may have a disparate impact on particular groups. In the words of Anatole France, a law which "forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread" will in fact entrench inequality.[118]

The protection afforded by the right of equality and non-discrimination gives concrete expression on which the whole

[117] Fredman, *Discrimination Law* (OUP, 2011) 8-15.

[118] See, *Palmer v. Thompson* 403 US 217 (1971); France, *Le Lys Ronge* (Calmann-Levy 1894) Ch. 7).

international human rights system is anchored that all human beings regardless of their status or membership of a particular group are entitled to a set of rights. Since this is the foundation of all other human rights, equality is often described not only as a right but also as a principle. The crucial nature of equality is reflected in the fact that it is proclaimed in the very first article of the UDHR: "All human beings are born free and equal in dignity and rights".

Article 1(3) of the UN Charter, unequivocally makes clear that one of the basic purposes of the UN is the promotion of the equal guarantee of human rights for all without any distinction. There are so many instruments targeting the realization of the right of equality and non-discrimination under the auspices of the UN. The general human rights instrument guarantees the right to equality and non-discrimination in several of their provisions.[119]

It is widespread knowledge internationally that at the very least,

[119] The UDHR in Articles 1, 2(1), and 7; the ICCPR in Articles 2, 3 and 26; and the ICESCP in Articles 2(2) and 3. And for the specialized human rights treaties, at least three of them are specifically devoted to addressing certain forms of discrimination; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). The Convention on the Rights of the child (CRC) (Arts. 2 and 28) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMEN) (Arts. 1(1), 7, 18, 25, 27, 28, 30, 43, 45, 54, 55 & 70) at least partly pursue the same objective and contain explicit provisions on equality and non-discrimination. The only international human rights treaties without explicit non-discrimination clauses are the Convention against Torture and other Cruel, in human or Degrading Treatment or Punishment (UNCAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

the right to non-discrimination on the grounds of race, sex and religion binds all states, irrespective of their ratification of human rights treaties, because it has become part of customary international law.[120] The inter-American Court of Human Rights has gone further than this and held that also the guarantee against discrimination on other grounds, including language, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth, or any other status, forms part of general international law and, indeed, is a norm of *jus cogens* that cannot be set aside by treaty or acquiescence.[121]

Much more, it is imperative to emphasize that non-discrimination provisions can be subdivided into subordinate and autonomous- free standing – norms. Subordinate norms

[120] The right to equality and non-discrimination is also guaranteed by all major regional human rights instruments; the African Charter on Human and Peoples' Rights (ARCHPR) (Arts. 2, 3, 18(3)-(4), and 28), the American Convention of Human Rights (ACHR) (Arts. 1 and 24), the American Declaration of the Rights and duties of man (Arts. 2, 9, and 35), the ASEAN Human Rights Declaration (Arts. 1, 2, 3, and 9), the European Convention on Human Rights (ECHR) (Art. 14 and Protocol No 12), and the Charter of Fundamental Rights of the European Union (Arts. 20, 21(1), and 23). Additionally, the Inter-American Convention against All Forms of Discrimination and Intolerance provides protection against discrimination based on a long list of criteria, while several specialized regional treaties, such as the Protocol to the ACHPR on the Rights of Women in Africa, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, protect against particular forms of discrimination. 190 see, e.g. *South West Africa Cases (second phase* [1966] ICJ Rep. 6, 293 and 299-300, Barcelona Traction (Second Phase) [1970] ICJ Rep. 3, 32.

[121] OC/18, *Juridical Conditions and Rights of the Undocumented Migrants*, IACtHR Series A No. 18 (2003) Para 100-1 and 1734.

prohibit discrimination only in the enjoyment of the rights and freedoms otherwise set forth in the respect instruments. Article 2(1) of ICCPR is a glaring example; it provides that:

> Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Other subordinate norms include Article 2(1) UDHR, Article 2(2) ICESCB, Article 2(1) CRC, Article 7 ICRMW, Article 1 ACHR, Article 14 ECHR.[122] The ECHR does not contain an autonomous norm in addition to its subordinate provision in Article 14, and so, the jurisprudence of the European Court of Human Rights interpreting it is of a strong guide. In *Rasmussen v. Denmark,*[123] the European Court reasoned that in order to invoke Article 14, an applicant must show that the facts of the case fall 'within the ambit' of another substantive Convention right; a measure that in itself is in conformity with the requirements of a given ECHR right, but is of a discriminatory nature, will violate that right when read in conjunction with Article 14.

[122] ECHR, Art 14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[123] (1984) 7 EHRR 371, Para 29.

Article 7 UDHR, Article 26 ICCPR, Article 2 and 5 ICERD, Article 24 ACHR, and Article 3 ACHPR, are, on the other hand autonomous norms. This is essentially because they guarantee non-discrimination not only in the context of other rights but in general. Buttressing this, Article 26 ICCPR provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the case of *Broeks V. The Netherlands,*[124] the UN Human Rights Committee elaborated on the scope of this provision. Mrs. Broeks had been denied unemployment benefits on the basis of the legislation that provided that married women could only claim benefits if they could prove that they were 'breadwinners' a requirement that did not apply to married men. The Netherlands argued that Mrs. Broeks could not rely on Article 26 ICCPR as it could only be invoked in the sphere of civil and political rights; Mrs. Broeks complaint, however, related to the right to social security, which was specifically provided for under the ICESCR. The Human Rights Committee rejected the government's argument, holding that it did not matter whether a particular subject matter is covered by the

[124] CCPR/C/29/D/172/1984 (9 April, 1987).

ICCPR or some other international instrument. The Committee stressed that 'Article 26 does not merely duplicate the guarantees already provided for in Article 2, but instead 'prohibits discrimination in law or in practice in any field regulated and protected by public authorities.[125] The practical effect therefore is that states parties to the ICCPR have a general obligation neither to enact legislation with a discriminatory content nor to apply laws in a discriminatory manner.

The next interest would be to seek to determine which grounds of distinction are unacceptable and should, *a priori,* be prohibited. Indeed, there is no straightforward package to this poser, rather, it depends on one's moral or political views, as any criterion may be regarded as either relevant or irrelevant. In addition, grounds such as race, colour, or sex are not acceptable criteria for differential treatment. Further, grounds such as membership of a particular group, holding certain beliefs, and national or social origin are outlawed by most human rights treaties. Gleaned from a comparison between the ICCPR adopted in 1966 and the ICRMV, adopted in 1990, what is seen as unacceptable can change over a space of time; the ICRMW has extensively expanded the list of prohibited grounds by adding the criteria of conviction, ethnic origin, nationality, age, economic position, and marital status. Currently, additional criteria, including disability[126] and sexual orientation and gender

[125] CCPR/C/29/D/172/1982 (9 April, 1987) para. 12.3.

[126] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms Act 1(1), the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (2) No one

identity,[127] intersectional discrimination often occurs based on sex in combination with one or more other grounds.[128]

Indirect discrimination occurs when a practice, rule or requirement that is outwardly 'neutral', this is, not based on one of the prohibited grounds of distinction, has a disproportionate impact on particular groups defined by reference to one of these grounds. In this instance, although there is no difference in treatment, due to structural biases, treating unequals equally leads to unequal results. The concept of indirect discrimination has its origin in US and European (EC) law, but now it has found its way into the jurisprudence of international and regional human rights bodies.

The Human Rights Committee recognized the possibility of indirect discrimination, albeit without explicitly referring to the concept for the first time in *Singh Bhinder v. Canada*.[129] This case is about a Sikh who was dismissed from his employment with the Canadian Railway because he refused to comply with a legal requirement that safety headgear be worn at work, as his religion required him to wear on a turban. The Committee found that the legislation may amount to *de facto* discrimination; although it was neutral in that it applied to all persons without

shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1).

[127] To be different to the majority in any setting is to be vulnerable to prejudice discrimination, and even attack. The greater the difference, the greater the risk: Michael O' Flaherty *sexual Orientation and Gender* Identity, Daniel Moekli *et al*., *International Human Rights Law* (2010, Oxford University Press) 301.

[128] Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour '(1991) 43 *Stanford LR* 1241.

[129] CCPR/C/37/D/208/19986 (9 November, 1989)

distinction, it disproportionately affected persons of the Sikh religion. Nonetheless, there was no violation of Article 26 ICCPR as the safety headgear requirement was based on reasonable and objective grounds.

Later in the case of *Althaammer v. Austria,* which concerned the abolition of household benefits that affected retired persons to a greater extent than active employees, the Committee expressly referred to the concept of 'indirect discrimination'.

> The Committee recalls that a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[130]

In 2007, the European Court of Human Rights, in its ground-breaking ruling in *DH and others v. Gech Republic,* came up with an explicit definition of indirect discrimination. In that case, many Roma children had complained that the manner in which statutory rules governing assignment to schools were applied in practice resulted in the placement of a

[130] CCPR/C/78/D/998/2001 (8 August 2003) Para. 10.2.

disproportionate number of Roma pupils in special schools for children with 'mental deficiencies'. Referring to the definition of 'indirect discrimination' in EC law, the Grand Chamber of the European Court of Human Rights stated:

> The court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though concluded in neutral terms, discriminates against a group… In accordance with, for instance, council Directives 97/80/EC and 2000/43/EC and the definition provided by ECRI [The European Commission against Racism and Intolerance], such a situation may amount to indirect discrimination, which does not necessarily require a discriminatory intent.[131]

Similarly, the African Commission on Human Rights and Peoples' Rights seems to have recognized the concept of indirect discrimination when it found a violation of Articles 2 and 3 ACHPR in a case where legal remedies, even though guaranteed to everyone by law, were in practice, only… available to the wealthy and those that can afford the services of private counsel.[132] Also, the Inter-American Convention against all Forms of Discrimination Intolerance of 2013 contains, in Article 1(2), an explicit definition of indirect discrimination.

In bracing up, the most important thing is to ensure that every human being is infact able to enjoy his or her right to equality.

[131] (2008) 47 EHRR 3, Para 184.

The present reality is that the world is presently constituted of the poorest 30 percent collectively owning only 1 per cent of the global household wealth and thus 32 times less than the richest 1 per cent,[133] thus, equal rights remain an unfulfilled promise for large section of the population. Current developments in international human rights law are evidence of a growing recognition that, while prohibitions of discrimination play a crucial role in achieving equality, states also have an obligation to proactively tackle structural patterns of disadvantages. In other words, formal and substantive approaches to equality need to be combined. Of crucial key is to ensure that all people can participate on an equal basis in all areas of economic, social and political life, including in the very decisions on how equality can be realized.[134]

4) Realities – The Contents of Legal Pluralism

On the final lap of these preparatories is a presentation of the contents of legal pluralism. Franz Von Benda-Beckman[135] has noted that there is" little uniformity in the conceptualization of …legal pluralism". This is partly because the concept of legal pluralism has been employed across various disciplines, including anthropology, sociology and legal science. In the socio-legal literature, the concept of legal pluralism is most commonly understood as referring to "a situation in which two

[132] *Purohit and Mooro v. The Gambia*, Communication No. 241/2001, 16th Activity Report (2002) Paras. 53-4.

[133] Davies *et al.*, The Level and Distribution of Global Household Wealth (2010) 121 *Economic J.* 233, 224.

[134] Daniel *et al.*, (n. 111), 172.

[135] Franz Von Benda-Beckmann, 'Who's Afraid of Legal Pluralism' *Journal of Legal Pluralism*, 2002, 72.

or more legal systems coexist in the same social field,[136] or in a similar vein, "the coexistence of different normative orders within one socio-political space"[137] These normative orders may coexist independently from one another, each with their own basis of legitimacy. This has been named 'strong' legal pluralism[138] or 'wild' legal pluralism[139], standing in contrast to 'weak' legal pluralism.[140] In the latter scenario, the functioning of a certain normative system is dependent upon its recognition by another normative order – often, but not necessarily, the state legal system.

De Sousa Santos has shown preference for 'plurality of legal orders' over legal pluralism, and for him, the latter term has a normative undertone and seems to imply that there is something 'inherently good, progressive or emancipatory' about legal pluralism, which he contests.[141] Notwithstanding the different denominations, they all refer to a multiplicity of forms of normative ordering that simultaneously apply to a particular social field. In this context, they do not fundamentally seem to differ from one another, even though the term legal pluralism may evoke somewhat more the impression of 'discrete', 'separate' legal orders, whereas the notions of 'legal' 'pluralities' and plural legalities emphasize more the fluidity

136 Franz (n. 135).

137 Franz and Keebet Von Benda-Beckmann, The Dynamics of Change and Continuity in Plural Legal Orders', *Journal of Legal Pluralism*, 2006, 53-54.

138 Griffith, John What is Legal Pluralism? 24 *Journal Legal Pluralism 'L. I.* (1986).

139 *Ibid* 59.

140 Griffiths (n.138).

141 De Sousa Santos *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworth's, 2002), 89.

and intersection of these forms of ordering. In the latter vein, de Sousa Santos,[142] has coined the term 'inter legality' to indicate different legal spaces superimposed interpenetrated and mixed in our minds, as much as in our actions.

It has been spread on previous pages that a key role in the realization of human rights is or should be played by international human rights law, that is, the codification of human rights in international human rights law is an important vehicle for the protection and promotion of human rights law is the only way of realizing human rights. It is ideal to strongly note that human rights may also be respected, protected and fulfilled through the functioning of other legal systems, such as state law, other branches of international law, including international humanitarian law, international criminal law, or even non-state legal orders. Non-legal ways to enhance human rights may also include the use of media, political action and social mobilization. Human rights may thus have considerable impact even when they are not mobilized as law.[143]

In this context therefore and from a legal pluralism perspective, international human rights law is one of the legal orders that is currently applicable in practically every social field.[144]

[142] *Santos* (n.141).

[143] Sally Engle Merry 'Legal Pluralism', *Law and Society Review* (22) (5) 1988, 869-896.

[144] Helen Quane, 'Legal Plural and International Human Rights Law: Inherently incompatible, mutually reinforcing or something in between? *Oxford Journal of Legal Studies* 2013 33(4), 675-702. She notes that when viewed in conjunction with a state's national law, the very existence of international human rights law represents a particular form of legal pluralism. In her exploration of the relationship between international human rights law and legal pluralism, she

Tamanaha[145] has broadly identified six systems of normative ordering, thus: official or positive legal systems; customary normative systems, religious normative systems; economic/capitalist normative systems; functional normative systems and community/cultural normative systems. He considers human rights as one type of official legal systems, next to, among others, state law and European Union law.[146] The space for human rights (law) in the scheme of Tamanaha as one type of official legal system already points to the fact that normative systems usually consists of differing subsystems. This is evident at various and ever smaller, levels. For example, official legal systems can roughly be divided into international law, regional law (including the European Union, the African Union and the Organization of American States), national/federal state law, and various lower levels of official law depending on the state structure (for instance, provincial and municipal law).

International law itself also consists of multiple subsystems. International human rights law is, then, one of these subsystems, next to, among others, international humanitarian law, international law, international environmental law, and international trade and investment law. In some cases, various

seems to limit herself to a 'weak' conception of legal pluralism (cf Griffiths, 1986), namely to 'explore the extent to which a state's acceptance *de facto o r de jure* of religious and/or customary law within its territory is compatible with the requirements of international human rights law.

145 Brian Z. Tamanaha. *Understanding Legal Pluralism: Past to Present, Local to Global Sydney Law Review*, 2008, 397400.

146 Tamanaha (n. 144).

subsystems of international law will apply concurrently, such as international environmental law and international investment law.[147]

Realty also is that international human rights law is not a uniform system; it is itself multilayered, consisting of a global system (United Nations) and various regional human rights systems, and has diversified towards specific categories of people (Women, children, persons with disabilities, migrant workers, minorities, indigenous peoples, *et cetera*) and thematic layers (torture, discrimination, *et cetera*).[148] In contemporary commentaries, the concept of legal pluralism seems to be increasingly used also to refer to this diversity within a particular legal system or subsystem.[149] In the view of Twining,[150] in the literature on global legal pluralism, the term 'pluralism' has moreover 'sometimes been extended to embrace other referents, such as the proliferation of actors in international relations, and the diversification of supranational courts and tribunals as well as norm-creating agencies.

Further to the foregoing, sources and mechanisms can be categorized on the basis of the governance level at which they operate. As noted earlier, at the universal level, human rights standards have been set by the United Nation[151] and a number of

[147] Quane (n. 144), 682.

[148] Eva Brems. Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings, 22 *J. L. & Poly* (2014).

[149] William W. Burke-White, 'International Legal Pluralism'. *Michigan Journal of International Law*, 25(4) 2004.

[150] William Twining. Legal Pluralism 101, https://discovery.ulc.ac.uk.

[151] The main ones are; the UDHR; ICCPR (1966); ICESCR (1966); the Convention on the elimination of All Forms of racial discrimination Against Women (1979);

specialized agencies such as UNESCO[152] and the International Labour Organization[153]. Further and largely overlapping in terms of content-standards have been set by regional and sub-regional organizations, in particular the Council of Europe,[154] the Organization of American States[155], the African Union[156] the Association of Southeast Asian Nations[157], and the League of Arab States.[158] Additionally, human rights texts can be differentiated on the basis of their scope *ratione materiae*. Comprehensive texts, aiming at a complete list of human rights[159], coexist with texts that focus on one category of human

the Convention on the Rights of the Child (1989);the International Convention on the Protection of the Right of all Migrant Workers and Members of their Families (1990). The International Convention for the Protection of All Persons from Enforced Disappearance (2006); and the Convention on the Rights of Persons with Disabilities (2008).

[152] For example, Universal Declaration on Bioethics and Human Rights (2005).

[153] ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize, ILO Convention No. 105 concerning the Abolition of Forced Labour, ILO Convention No. 111 concerning Discrimination in respect of employment and Occupation, ILO Convention N. 182, concerning the prohibition and immediate action for the elimination of the worst forms of Child Labour.

[154] The main human rights convention of the Council of Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), known as the European Convention on Human Rights (ECHR).

[155] The main human rights convention of the OAS is the American Convention on Human Rights (1969).

[156] The main human rights convention of the African Union (AU) is the African Charter on Human and Peoples' Rights (1981).

[157] ASEAN Human Rights Declaration, 2012.

[158] Arab Charter on Human Rights, 2004.

[159] For example, Universal Declaration of Human Rights, African Charter on Human and Peoples' Rights, Charter of Fundamental Rights of the European Union.

rights – generally either civil and political rights or economic, social and cultural rights[160] and single-issue texts.[161]

With respect to their scope *ratione personae*, some human rights instruments are universal, being applicable to all human beings, while others have a specific target group for example women[162], children[163], persons with disability[164], or members of minority or indigenous groups[165]. A distinction can also be made based on the legal force of the instrument; a number of human rights norms – constitutions, treaties, customary law are binding; human rights have also been included in formally non-binding soft law like declarations and resolutions. They may

[160] See, International Convention Civil and Political Rights, International Convention on Economic, Social and Cultural Rights, European Convention on Human Rights, European Social Charter (1961 and 1966), American Convention on Human Rights (1969), additionally, Protocol to the American convention on Human Rights in the Area of Economic, Social and Cultural Rights (1999).

[161] For example, Convention Against Torture, International Convention for the Protection of All Persons from Enforced disappearance, Convention on the elimination of all forms of Racial discrimination, European Convention prevention of Torture and inhuman or degrading treatment or punishment (1987), Council of Europe Convention on Action against trafficking in Human.

[162] Convention on the elimination of All Forms of Discrimination Against Women, Protocol to the Charter on Human and Peoples' Rights of Women in Africa (2003).

[163] Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child (1990), Inter-American Convention on International Traffic in Minors (1994).

[164] Convention on the Rights of Persons with Disabilities (CRPD), 6 May, 2022.

[165] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), Council of Europe Framework Convention for the Protection of National Minorities (1995), United Nations Declaration on the Rights of Indigenous People (2007).

nevertheless have strong moral or political force, and even acquire, in the expression of the International Court of Justice (ICJ) a normative value[166].

At another level, there is a great variety among the monitoring mechanisms that accompany binding human rights instruments; these range from judicial control by supranational courts – the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Justice and Human Rights. Also, there are quasi-judicial control – individual complaints examined by expert committees[167], and other forms of expert control and political control in the form of reporting procedures, special rapporteurs, *et cetera*[168].

Indeed, each of these sources is internally coherent, and each monitoring body has developed its own broadly consistent case-law using its own interpretation tools, the picture as a whole is

[166] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Report 1996, 226-254.

[167] For example, the individual complaint procedures before some of the United Nations treaty monitoring bodies; the Human Rights Committee, the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of persons with disabilities and the Committee on Enforced Disappearances; also the collective before the European committee on social rights, and the procedures before the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights.

[168] Self-reporting followed by discussion of the report by an expert body may be considered the standard international human rights monitoring procedure on account of its wide use at the global as well as regional levels: Smith, L. T. (2012). *Decolonizing Methodologies: Research and Indigenous Peoples*. Zed Books.

rather complex. This is the true reality of legal pluralism[169], which can be experienced as a mega-mall wherein rights holders can go 'forum shopping', thus benefiting from the diversity of norms, yet also as a labyrinth in which they and their rights may get lost. This can be said to be a polyphony that may produce a rich harmonious sound that strongly gets a message across, yet may also be a cacophony in which you hear a lot of noise, even noises, nonetheless, cannot distinguish a clear melody.

In core academics, there is the tendency towards specialization; this has led to emancipation, and the field of human rights is not different. General human rights experts have largely been replaced by experts, for example, children's rights, 'women's rights' or 'minorities' or experts in the European Convention or the UN system, or even in one specific freedom, such as press freedom or non-discrimination, privacy, or religion freedom. This specialization is welcome as it has brought the discipline to a higher level; nonetheless, it may like pose the challenge of seemingly creating a fragmented, compartmentalized view of human rights law[170].

In the spirit of holistic approach[171], the study of human rights law as an integrated whole is relevant from the bottom-up perspective of the users of human rights law.[172]

[169] Berman, P. S. (2007) 'Global Legal Pluralism' 80 *Southern California Law Review* 1155-1238.

[170] Desmet, E. (2014) 'Analyzing users' trajectories in human rights (law): a conceptual exploration and research agenda 8(2) *Human Rights & International Discourse'* 121-141.

[171] *Ibid.*

[172] In particular, the principles of universality and indivisibility of human rights

Beings (2005), Council of Europe Convention on preventing and combating violence against Women and Domestic Violence (2011), Inter-American Convention on the Prevention Punishment and Eradication of Violence against Women (1994). Inter-American Convention to prevent and punish torture (1985). Inter-American convention on Forced disappearance of persons (1994).

5) The Human Right to be Different

Down the lane of history, the world has become conversant with the third generation of human rights.[173] In 1945, the international community in its first generation emphasized civil and political rights. The second generation followed with emphasize on economic and social rights. The third generation was an effort to tackle the complex situations which call for more intricate and sophisticated jurisprudential approaches. The emergence of new rights is not an acknowledgment that the rights just arrived; they have always existed, but were not clearly perceived until in contemporary times.

[173] Proposals have been made and a fourth generation of human rights advocated to cover new areas. Approaches to understanding Human Rights of the Fourth Generation includes the thought of: A. V. Cornescu (2009). 'The Generations of Human's Rights: Days of Law'. The Conference Proceedings, Brno: Mosaryk University, where he refers to rights related to genetic engineering, and assumes the ability to refer to rights of future generations; M. A. Lavrick (2005). 'On the theory of Somatic Human Rights'. *Siberia Law Gazette*, 3, 16-26, states that the rights of the fourth generation embody the so-called somatic (from Greek soma-body), or biological human rights, including the right to die, the human being's right to dispose of organs and tissues of his/her body and to their transplantation, sexual human rights, reproductive rights (the right to artificial insemination, the right to contraception), the right to change sex; other writers include M. P. Tirina

The main anchor of this exercise is that there is no jurisprudential or political hindrance to the formation of new concepts, so long as the main goal is to safeguard the inherent dignity of human beings. This then is an endeavour in revealing what has always been there. To buttress this, reliance is had on the Universal Declaration of Human Rights which declared in its preamble the need for "progressive measures, national and international" for the "promotion and "respect" of fundamental human freedoms.[174]

There are evidently innumerable statements of this type echoed in declarations resolutions of the UN, international conferences and seminars, international treaties and by recognized publicists of international and public law. Article 2(1) of the ICESCR is an instance, it states that: "Each state party to the present Covenant undertakes to take steps, individually and through international assistance… to achieve progressively the full realization of the rights recognized in the present covenant"…[175] This abundantly shows that the ability, indeed the obligation, to develop new rights, refine or espouse existing ones is manifestly inevitable.

It is needful that in order to examine the problem which

(2011). *Human Rights Generations: 'Problems of Modern Classification'. State and Law*, 52, 728-732; V. A. Vittiv (2016). Information Rights as a component of Fourth Generation of Human Rights, Scientific Notes of Institute of Legislation of the Verkhovna Rada of Ukraine; Constitutional and Municipal Law', 6, 22-26; P. M. Sukhorolsky (2013). 'Problems of ensuring and Development of Human Rights in Conditions of Information Society'. *Ukrainian Journal of International Law*, 1, 18-23.

174 G. A. Res. 217 U. N. Doc. A/810, 71 (1948).

175 G. A. Res. 2200 A (xxi), 21 U. N. GADR. Supp. (No. 16) 49, U. N. Doc. A/6316 (1966) (annex).

highlights and justifies this endeavour, to first appraise that state of contemporary realities, much more present in most weak democracies with weak and depressing economies. Evidently, despite continual effects and engagements at both national and international levels by human rights activists since 1945, a peculiar and persistent problems which has socio-economic as well as political and legal ramifications which lead to injustice, injury, and denial of dignity. It is undeniable that the peoples who suffer these denigrations are those who are merely "different" from other peoples or groups within a community or a country, and face cultural, social, and economic or in some cases, even legal discrimination by the dominant group or groups.

It would be a dark space in history and for future generation why an age which is attempting vigorously to safeguard even those breeds and species of animals which face extinction did not protect the "different" groups and peoples who are similarly facing "extinction". This has been a challenging reality in our present day life; it is not only important from the point of view of our future, but much more important as an immediate concern. The stark reality is that "different" people[176] perpetually face injustice and injury and legal attitudes and measures of other groups and peoples nationally and transnationally.

5.1 Normative Structure

To secure an anchor for this discuss, it is compelling firstly, to examine the state of international human rights law, specifically

[176] Nirth, L. *The Problem of Minority Groups in the Science of Man in the World Crisis* (R. Linton ed. 1945).

in this area, and then even though briefly, explore an important aspect of constitutional jurisprudence. The primary inquest is whether, after the progressive codification of human rights law following the UN Charter, there still remains an area within the domain of international law requiring protection? The answer is; yes, while great milestones have been covered since the procurement of the UDHR in 1948, and numerous subsequent international human rights instruments, nonetheless, new areas are emerging, to cite an instance, the two covenants[177] generally reflect the UDHR's provisions, but are new rights recognized by the covenants; the right of all peoples to self-determination and to freely enjoy their natural resources and wealth. This fundamental right enables the desirability of having all peoples express their political will, and this has been acknowledged by international law. This novelty then drew in an additional awareness leading to the recognition of a corresponding right namely, the right to development.

Commencing from the 1960's when the UN opened up the First Development Decade for all nations, there has come to exist a yearning to afford respect and aid to people who differ both political and economically.[178] *Pari Passu* with these evolutions of political and economic matters comes the thrust for improving and ensuring the growth of social and cultural aspects of different peoples. More than ever before, there is now a glaring recognition of the need to broaden the protection given the different peoples of the world. There is a thematic shift, the General Assembly of the UN has officially accepted this need to

[177] Nirth (n. 175).

[178] W. Rostow, *the stages of Economic Growth* (1960, Cambridge University Press)

broaden the concept of human rights from the narrower field of economic development to social progress, nationally as well as internationally.[179] The Declaration on Social Progress and Development in article 2 proclaims:

> Social progress and development shall be founded on respect for the dignity and value of human persons and shall ensure the promotion of human rights and social justice.[180]

Also placing weights together is the language of the resolution on International Development Strategy, which states in its preamble: "The ultimate objective of development must be to bring about *sustained improvement in the wellbeing of the individual and bestow benefit on all"*[181]. The emphasis supplied above in the two resolutions by implication stresses that the existing list of human rights[182] is insufficient to maintain respect for the dignity and value of the human person and that in order to achieve social justice, a sustained effort to improve the wellbeing of individuals and to bestow benefits on all people is mandated.

The depth of the discussion of the General Assembly resolutions undeniably show the realization of the world community that despite tremendous progress, man still has goals to attain. In this

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[179] G. A. Res. 2542, 24 U. N. GADR, Supp. (No. 30) at 49, U. N. Doc. A/7630 (1969).

[180] G. A. Res. 2542, 24 U. N. GADR, Supp. (No. 30) at 49, U. N. Doc. A/7630 (1969).

[181] G. A. Res. 2542, 24 U. N. GADR, Supp. (N28) at 39, U. N. Doc. A/8028 (1970) (Italics added).

[182] (n. 174 & 175).

context therefore, it is imperative that some of the realities of the world situation be examined; but before then, a preparatory ground will be made about individual and human rights in western constitutional jurisprudence. Under classical history, jurisprudence in Roman and common law traditions was basically on rights belonging to the individual. The individual is normally the center of the law of remedies, both from the point of view of substantive law and adjectival law. This is the true pointer to the why constitutional protections are crafted in terms of the right of persons. The issue of referrals to group, peoples and communities are terms in modernity. As cited before, the two new rights of importance which must be recognized are first, the right of self-determination and second, the much more complex right of development of different peoples.

It is evident that in human history, virtually in all societies, competition for scarce goods, tangible or intangible, has led to an unequal distribution of power, reward, status and opportunities. This leads to a stratified system of group identification; as a result, a ranking emerges in which different groups have an obvious unequal position. There have been studies of these groups of communities that have been at the receiving end of prejudices but the studies were on the context of racial discrimination. Racial discrimination in the context of groups whose status is inferior in sociological terms primarily because of a descent based on biological characteristics. Put differently, mainly due to visible physical or genetic characteristics some persons are assigned an inferior status within a given society.[183]

[183] Harmannus Hoetink, *The Two Variants in Carribbean Race Relations*. (E. Hosy

In most cases, this pernicious allocation to inferior group status occurs not only on account of somatic factors, but moreso as a result of lifestyle, national or ethnic identity, language, or commonality of beliefs and practices.

Deeply appreciated, these factors pointed out emanate as consequences of genetic and cultural heritage and form part of these individuals' personalities. Much more, where there is a collection of such individuals, these identified factors constitute part of the personality of these people. On this incline, with the progressive development of human right laws, the point has been reached where these differences must be preserved; lest, the dominant groups eventually destroy the differences of those with inferior group status.[184]

Inevitably, the attack on the differences may proceed not only from a dominant group within a community but also from transnational sources.[185] A glaring example is; when an American thinks of advancement and progress for a Nigerian, Iranian, Kenyan, or an Indian farmer, he will first think of technological factors such as the farmer using a tractor. This may indeed spring from a good motives and his own environment and concept of improvement. The scenario changes immediately one takes a tractor into a traditionally rural environment, it begins to have a devastating effect on the local people's identity. In this case, the West's technological impact will gradually erode a distinct people's centuries – old identity

Kaas Trans. 1967).

[184] These various methods are based on the theories presented in K. Glaser & S. Possony. *Victims of Politics* (1979).

[185] Attack in the sense that efforts may be made by others to remove differences.

and personality. In these situation engaged, the right to be different demands a concerted effort by the legal community to preserve such differences.

5.2 Definition

By its nature, definitions are often liable to be confronted with unnecessary lexicographical controversies. Nonetheless, Farooq Hassen[186] has offered the following definition/ description:

1. All peoples have the right to be different. By virtue of this right legal protection is to be afforded to a people who form a group or a community and who because of their physical or cultural characteristics, are singled out from others in a society in which they exist, and are the target of prejudicial and unequal treatment and are thus recipients of collective and individual discrimination.
2. The existence of such groups or peoples within a given community implies the corresponding existence of a dominant group or groups or peoples; the latter are forbidden to erode the identity and personality of the dominated group or its people's culture.
3. Full participation in the totality of the life of the community is the right of the dominated group or people. Although this group or people is treated and regarded and regards itself as a group or people apart, there should be no pressure on such a group or people to

[186] Farooq Hassan 'The Right to be different: An Exploratory Proposal for the Creation of a New Human Right,5 *Loy L. A. Int'l & Comp. L. Rev.* 67 (1982) 72.

gradually abandon their distinct identity of "apartness".

4. Transactional encroachments of the same kind, as declared unlawful above, are to be discouraged and progressively stop.

5. Although the right to remain different is that of a distinct group or people collectively, it is also a right possessed by each and every individual of the group or the people.

An appraisal of this definition/description identifies the author's aim which is to ensure the preservation of different groups and peoples and their heritage, identity, integrity and personality. Another layer to the appraisal is a tacit avoidance of the use of "minority". This is understandable[187], that word is bothersome and may connote a strong identification with nationality and ethnic problems[188] and thus, may either confuse or misdirect attention to something quite different from that which is sought to be accomplished. The general concern here is with that discrimination which occurs when all members of a group or community are treated in such a manner which violates the accepted standards of that community, person or group of persons[189].

Tracing the origin of this unjust practice may not be located with precision in antiquity, though the appearance may be sought in heterogeneous societies. In such societies, all members spoke

[187] D. Hughes & E. Hughes, '*The Anatomy of Racism: Canadian Dimensions*, 1978, *American Journal of Physical Anthropology*.

[188] R. Schermerhorn, these our People (1949).

[189] L. Wirth, '*The Problem of Minority Groups in the Science of Man in the World Crisis'* (R. Linton ed. 1945).

the same language, practiced the same beliefs, and followed the same customs. Somewhat, after a few thousand years ago, when, as a result of conquest and migration, different groups and peoples interacted. Deployed in political processes, larger units arose and the totality of the possessions of the conqueror groups and people began to be considered "superior" and others "inferior". The process has progressed and continued today. The compelling reality today is that there is scarcely a society which is without groups of peoples which are in same measure disprivileged.[190]

In the context of jurisprudence, two crucial questions crop up, desiring just responses:

1. Why do the 'majority' groups (both governmental and private) feel the boiling need to change or abolish the differences of other less dominant groups or peoples. Motivations may not be in the center; moreover, motivation does not follow a consistent pattern and are usually complex rather than simple. That which cannot be hidden as the major underlying there is the feeling of superiority. The feeling of superiority is traceable to the sense of political ascendency, nationally or transnationally. This feeling is deep seated in most societies and may be lessened by the growth of nationality and may be, a mix of education.

2. What are the psychological disadvantages – much more different from the political, legal and economic disadvantages of the disprivileged group. Following

[190] J. Yinger, A. Minority Group in American Society 28 (1965).

> through with, the member of such a group or people experiences a tension as a result of his perceived situation and personal and group aspirations. The said tension, for example, desire to assimilate in the dominant group, produces the gradual erosion of the identity of the individual and eventually of the group.

In the absence of pluralistic institutionalized structures the peoples and groups who are "different" face the danger of extinction and the eventual loss of their identity, culture and personality. Glaser and Possony[191] wrote in 1987:

> One feels his twoness, - an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.
>
> The history of American Negro is the history of this strife, - this longing to attain self-consciousness manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the old selves to be lost. He would not Africanize America, for America he would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American without being cursed and

[191] Glaser & Possony (n.184), 102 (quoting Dubois, 'Striving of the Negro People'; *Atl. Monthly*, Aug. 1897.

spit upon.

This is deeply expressive of the differences which separate groups and peoples from each other, the evidence of multidimensional, historical, and sociological development of man. What is sought in proffering this definition in safeguarding different values which peoples have toward life and keeping the personality of the groups and peoples infact not only from encroachment of more dominant sociological forces nationally but also transnationally.

5.3 Areas Requiring Protection

Upon the definition and illustrations of the right's important jurisprudential, historical and sociological ramifications, the need occurs to emphasize the areas which require protection. The approach has a broad coverage.

5.4 Right to Be Different in the Context of Western Hegemony

One area of great significance in which the right to be different may be useful would be in the preservation of non-Western peoples from technological impact of the Western states and peoples. The rise of Western Science and technology has brought devastating changes on the peoples and their values. The values, perceptions, and attitudes towards life have undergone massive changes since the eighteenth century. The political and economic might of these regions produced the age of imperialism. English and French became world languages. Language along with other forms of contact, began to provide new and foreign value system to distant lands. Due to these

interventions, the "different" people of the world have rapidly lost their different identities. At the risk of exaggeration, we are on the threshold of a "universal" culture. The vast economic differences between the rest of the world and Europe and America have caused serious problems of hegemony and consequent dependency. With respect to this content of western hegemony, the right to be different would safeguard the personalities of the "different" peoples, their values, and identities from western onslaughts.

It is becoming scary to note that Western nations, both at governmental and private levels, are accomplishing by various kinds of contacts – even though apparently, basically in good faith – the implantation of his system of work, science and attitudes. Absolutely for him, better life means more roads, factories and buildings. Peoples, hundreds of millions of them, who live in the great majority of the world have lived for thousands of years "differently". For instance, a transfer of technology, a tractor in a Nigerian village is an example of an act which may change a community's special identity, culture and indigenous thought process. The locals seeing the obvious mechanical and economic advantages of the tractor, not only attempt to change themselves, but even become ashamed of their traditional cultures. The target is to at least, regulate this ever increasing phenomena. It must not be denied that the differences of groups and peoples represent the quintessence of ages and history, civilization and individuality. Abduction of differences is patently wrong; rather producing a world civilization that demands the retention of different peoples, in the long run is sustaining.

5.5 Domestic Problem Areas in the West

It is not only in the Third World that the phenomenon of dominant groups eroding weaker groups feature. In the political unit of the western society, it is manifest. One aspect of western states[192] domestic controversies revolves around a demand of a separatist kind (or secession) by numerically smaller groups. Beyond the secessionist problem, there are many situations in these countries similar to those in a developing states; prejudice and discrimination against the "inferior" groups or peoples. An instance can be taken of the case of Canada.

The source of disunity is politically and philosophically Canadian. Institutional ideology by common law layers.[193] The argument has been by French-speaking Canadians that this evolution by lawyers and courts ignored the importance of constitutional obligations to protect the French language and culture. Development wise, this has not only preluded the existence of fundamental rights, but also of language rights, without which smaller groups of peoples have little confidence in the confederation and the future. Explained, the grievance is that the dominant group, through its language, law and attitudes, has not an appropriate place to the non-dominant group or people for almost a hundred years. The result is injustice which is resented by the French-speaking people of Quebec.[194] In the

[192] For example, Canada, Spain and the United Kingdom.

[193] Conklin, 'Constitutional Ideology, Language Rights and Political Disunity in Canada'; 28 *New Brunswick L. K.* 39 (1979), Cohen; 'The Search for Viable Federalism', *3 Man. L. T. I.* (1969), Hogg, 'Constitutional Reform in Canada', 6 *Yale Studies in World Order* 285 (1980), Matas, 'Can Quebec be separate? 21 *McGill L. J.* 387 (1975).

[194] Similar scenario plays out in Cameroon but in different contexts. It will be seen

midst of this type of controversy, it becomes compelling to project a human right to be different which will ensure that societies, and the legal systems, do not fall into a pattern which not only threatens the weaker groups identity, but become the cause of serious political, even international, conflict in the course of time.[195]

5.6 Disprivileged People Syndrome

There are varying degrees of what might be called the "disprivileged people syndrome" in all heterogeneous societies. To hit it on the head, it would be utopianism to feel that in a segmented world, inhabited by many different kinds of peoples. Mostly involved in severe and perennial competition for prestige, honour, wealth and opportunity, inter-group tension can be completely removed. Viewed thus, social inequality is unfortunately the rule of universal application. Various groups have hierarchical patterns that are evident. Melvin Tumin, an eminent American social scientist explains how power differentials of various groups result in social stratification:

> A Society consists of various strata arranged in a hierarchical order based on the amount of power,

that acceptance of the right to be different will not, in fact, support secessionist, wars and tendencies; rather, it will be the pivotal anchor to prevent these tendencies from politically erupting into dangerous situations.

[195] William Conklin has appreciated this problem thus:

> I shall suggest that customary constitution law prior to confederation demonstrated that political authorities in Canada were obligated to ensure that francophone and Anglophone be able to understand and express themselves in their own language when their own rights and privileges were at issue. The normative beliefs, as evidenced in institutional history prior to

> property, evaluation and psychic gratification that the strata characteristically receive. This is the general picture of a stratified society, and all societies are stratified in this way to some degree. The word "social" is an important qualifier, since the strata consist of socially defined statuses that receive socially prescribed quotas of power, property and prestige.
>
> Today, serious expression of discontent with the prevailing modes of distributing goods and services makes the entire world. The discontent is, of course, eloquent testimony to its presence. On one level the nations of the world constitute a worldwide system of stratification: the haves versus the have-nots. And within every nation, including all the so-called socialist countries, stratification is also to be found.[196]

The human right to be different *inter-alia* aims to sustain the vulnerable personality; on the economic and political fronts, the more the world's civilizations progress, the more we can hope for the betterment of the underprivileged. This should not be sacrificed on the altar of their historical identities.[197] This

confederation, imposed serious.

[196] M. Tumin, *Social Stratification: The Forms and Functions of Equality* 13, 17 (1967).

[197] The resolution and covenants cited, collectively known as the International Bill of Rights (n.174) aim at removing the "stratified" nature of groups. The "right to development" and the two United Nations Decade of Development have attempted to close the gap in the varying economic levels of peoples.

position is so essential as it should guide in a proper understanding of the matter. Properly procured, different peoples will have a sense of dignity, though they may be economically weak or disadvantaged.

6) Challenging Traditions – Main Thrust

A concept accepted or practiced way back in time may seem insurmountable, like the age old saying- when in Rome, do as the Romans do. This is a classical example, implying that:

I. While in a particular place, it would be prudent to act, behave and live like the majority.

Constitutional obligations which could only have been subsequently met with great difficulty, given the twentieth century constitutional ideology in English-Speaking Canada of the people living there; and

ii) Since we are speaking of Rome, which was the world at a certain time, the innuendo is that it is expedient, in a political and sociological sense, to try to emulate the dominant or superior group or peoples. The human right to be different breaks the psychological thrust of age old attitudes like that embedded in the famous adage.

The most well-known controversy has manifested in the treatment of blacks in the United States, and for the real touch of this, referred will had even laconically, the quintessence of the writings of Rev. Ralph Abernathy and Dr. Martin Luther King, Jr. for such writers, notwithstanding the protection of individual rights by the constitution, there persists a prejudice and a violence which causes infinite varieties of pain and anguish to

the Blacks simply because they are different from the rest of the population. Denial of basic access to employment, recreation, living accommodation, education is a reflection of the violence. Law is unable to defend such matters unless the psychology of the society is behind same.[198] It is common knowledge that lawmakers may have ideas while enacting laws of a constitutional nature, but in the implementation stage, if the philosophy of the law is not shared by the community at large, the law may have no effect. To ensure proper sociological trends, this right is projected to create a general awareness that it is proper to allow people to be different.

Similar situations apply in the United Kingdom (though different slides) where a very large number of social and somatic groups and peoples can be found. There is no history of animosity springing from phenomena such as slavery, however, admitted social stigmatization of inferior or superior groups and people still exists. Various groups of people find it difficult to

[198] Abernathy has described this violence as follows: There is a violence in the land. The violence that is presented, and of which I speak, takes on various forms. It is inflicted mainly upon poor and black people. There is violence of an unjust war perpetuated upon a tiny nation of brown people 10,000 miles away from the United States mainland. There is also the violence of racism, which manifests itself in many forms. The violence is seen in the practice of denying decent human survival of the masses, only to give sums of unnecessary resources to the classes. The violence of racism is seen in police brutality; exploitation of the ghetto, the plantation, the colony, or whatever you choose to call that area where poor and black people struggle to live or exist. Violence is evident in an unjust educational system, which pollutes the mind because it is not honest and truthful; in unemployment, underemployment, poor housing, in adequate medical and dental care, and the many other forms of repression and oppression imposed by the power structure upon the black and poor people. This violence is seen so clearly in

survive against sociological violence to their identity. Successive British governments have recognized these factors and have taken steps to ameliorate same, as race-oriented laws have been passed to improve race relations and even media like television have commenced programmes in languages which have large numbers of immigrant populations.[199]

The position in the United Kingdom was aptly captured thus:

> The United Kingdom is thus a country without a strong tradition of open racial discrimination, in which no major group espoused a racist ideology and which some of the coloured immigrants regarded as their cultural homeland. Nevertheless, the ethnic conflicts and adjustments which have taken place appear strikingly similar to those in countries which have known a history of slavery and a racist ideology. The problems of ethnic adjustment seem strikingly similar regardless of the disparity of historical background.[200]

One of the main thrust of this exercise is to persuade that the human right to be different will go a long way to achieve justice

our country, the United State of America- the wealthiest and most prosperous of all nations – a nation that preaches one thing and practices another. This the most destructive form if violence: R. Abernathy, the Non-Violence Movement: The Past, Present and the future 181 (Goldstein ed. 1971).

[199] For example, Hindi and Urdu language programme have been in existence since the early 1960's.

[200] Hunt & Walker, *Ethnic Dynamic: Patterns of Inter-group Relations in various societies* 316 (1979).

by allowing different peoples to have their historical identities maintained by law.

6.1 International Illustrations

Having espoused the impact of dispriviledge people syndrome on western countries on weaker communities and peoples, the evaluation suggests there are major areas that can be identified where, notwithstanding the international Bill of Rights and domestic constitutional provisions, the dispriviledge people syndrome manifests and spreads. The challenge therefore is to make available an easy understanding of the main types of current prejudices; if a right to be different were present, victimization on the basis of merely being different could be avoided.

6.1.1 On the Basis of Nationality

What apparently unites a linguistic-cultural nation is ethnicity as the nation is linked by historical and cultural identity. So also is a proto-nation-an ethnic group of nation which is struggling for political and cultural self-determination, and has not yet attained that status. Such cases show cases that shared language is a central indication.

It is common, in all heterogeneous society, dispriviledge peoples are not accepted by others possessing similar characteristics. The reason of course is not farfetched; there is hierarchical struggle for various self-interest. A striking example is the Russian attempt to keep the Mongolian-Asia peoples in such a position as to be unable to challenge the "Russian peoples" of the former USSR. The weaponizing

instrument in this respect "Russification" by mandatory use of the Russian language. The process as employed is by gradual erosion of identity, secured through the use of a common language, resulting to the personality of the other peoples being transgressed. If the right to be different is adopted, it will safeguard the difference between the Asia and European components of that vast communities.[201]

Many research finding on Russia's sociological evolution agree that the different groups and peoples are being made to surrender to the dominant culture and identity and the target are particularly those groups which are more obviously different – Ukranian Catholics, Amenians, Mongol-Buddhist, Turkish Muslim groups of North Caucasian, Central and Eastern Asiatic regions and Jews.[202] And it has been observed that the Russia problem is in various forms more serious than similar problems in the United States or the United Kingdom. The National Security Advisor to President Carter, Zbigniew Bizezinski, predicted on the problem thus:

> It is not inconceivable that in the next several decades the nationality [ethnic] problem will become politically more important in the Soviet Union than the racial issue has become in the United States.[203]

In the view of Farooq Hassan on this issue:

[201] According to 1970 census, there are 129 million Russians and 113 million non-Russian in the fifteen different republics of the USSR. *Ethnic Minorities in the Soviet Union* (E.Goldhogen ed. 1968) (See particularly xi-xiv of Introduction).

[202] *Ibid.*

[203] Brezinkski, *Forward* to v. Chernovil, the Chronicle Papers (1968).

> In terms of numbers, the problem of ethnically different peoples finding themselves in a dispriviledge position is among the most widespread in the world. In recent history some well-known events have only too vividly stressed the fate of the different people. The plight of certain peoples during and following civil wars has been well-documented; they include the Nigerian Civil War concerning the Ibos; the Pakistani Civil War concerning the Bengalis; and the plight of the Biharis at the hands of the Bengalis after the creation of Bangladesh. The Biharis, according to many reports, are facing physical extinction. Moreover, the cases of apartheid in South Africa and of Palestinian problems in Israel have been a center of international conflict since the formation of the UN.[204]

The list is endless, but not all of these misfortunes receive notoriety. Indeed, most may not have attracted international attention and include the Nagas in North-east India, the Dravivian States in South India, the Chinese in Malaysia, the Asians in East Africa (Indi Amin's treatment of Asians in Uganda did become an international problem, but without a civil war), the tension between the Tutsi and Hutu in Rwanda, the Arab-Negro problem is the Sudan, and many massive tribal conflicts in Zaire, Burundi, Mauritania, Chad, Somalia and

[204] Farooq (n. 186) 82.

Kenya. On a conservative basis, the list is not exhaustive, but a chart showing some import groups and peoples who have been placed, in this dispriviledge people syndrome may present a useful guide.[205]

6.1.2 On the Basis of Race

It is evident that nationality or ethnicity is the most widespread basis of discrimination, but social stratification on the basis of race certainly triggered more emotion. In contemporary liberal and intellectual climate among educated classes racial prejudice generates a more immediate rebuke than one based on nationality, religion or language. These points are emphasized;

[205]

Countries and Regions:	*Disprivileged peoples:*
Afghanistan,	Baluchis,
Algeria,	Sindhis,
Australia. Pathans,	Berbers, including Kabyis, Aborgines.
Burma	Indians
Canada	French-Speaking
Cyprus	American Indian
Czechoslovakia	Turks
Europe	Germans
Fiji	Roman (Gypsies
Indonesia	Indians
Iran	Japanese
Iraq	Kurds
Israel	Arabs
Japan	Ainu
Northern Ireland	Burakumin
Philippines	Masai
Poland	Catholics
South America	Indians
Spain	Muslims

firstly, race, as a term, has both a biological and sociological usage; the present concern is with sociological usage. Secondly, members of a separate race may also constitute a separate nationality; thus within a heterogeneous state, they may be subjected to double punishment: discrimination on the basis of nationality as well as race.

In the context of science, the entire population of the world belongs to a single species: Homosapiens, the species homo sapiens is polytypic. Our single species is subdivided into five or six major racial groups. Eick-stedt in his study identified six subgroups or races of Homo Sapiens, namely;

I) Europids

(ii) Mongolids

(iii) Indianids

(iv) Negrids

(v) Khoisanids

vi) Autralids[206]

St. Lanka (Ceylon)	Basques
Uganda	Tamils
Yugloslavia	Croats
	Moslem
	Turks
Zanziba	Arabs

This list is illustrative of the worldwide nature of this type of discrimination. Nationality appears to be a prime cause leading to a lesser status in almost all heterogeneous communities.

[206] von sudasien) II Tell, 2: Halfte, Die Jungere Enforschungsgeschichte der Sudasiaten 6 *Zeitschrift for* Eikstedt, *Geschichte der anthropoloshen Namemburg*

And for Coon, there are five races:

i) Cancasoids

(ii) Mongoloids

(iii) Congoids

(iv) Capoids

(v) Australoids

Each group can further be divided into anthropological types. The predominant features of nationality and ethnicity are similarity of historical, cultural, social and religious background[207]; but the main criteria in classifying races are mainly, hair, skin, eye-shape, profiles *etcetera.*

Indeed, racial prejudice arouses more immediate reaction, but prejudice on the basis of nationality creates an impact on a larger scale.[208] The irony is that the social significance attached by all heterogeneous societies to physical and somatic appearance is apparent. From inception, childhood, throughout school, then in employment and marriage, the stark reality is that one has to live with discrimination if one is of a race within the dispriviledged

and Klassifikation (unter Bet onung der Erforschung Rassendunde 151-210 (1937).

[207] B. Berry *Race and Ethnic Relations* 46-47 (3rd ed. 1956)

[208] For example, statistics show that mortality since World War II (as a result of genocide, Civil Wars, war killings and maneuvers) on the basis of ethnicity and nationality is thousands of times greater than mortality from racial clashes. By one account, since 1960 the combined deaths of people in the U.S.A., UK and South Africa as a result of racial clashes is approximately 600; hundreds of thousands world-wide will die as a result of ethnic conflicts: Cherne, 'into a Dark Bottomless Hole', 32 *Freedom* 10-14 (1975).

people syndrome. All over the world, this people who are dispriviledged and in this category are spread across. By all available accounts, the largest measure of somatic different is between Euripides and Negoids and in all places where these two come together, for example, Europe and America, hell is let loose. Similar prejudices are pronounced when groups of different races meet in Nigeria[209], in all Africa, the Middle East, Asia, Russia and Latin America.

6.1.3 On the Basis of Language and Religion

The third major basis of discrimination is in language and religion. Recall that, an erosion of a separate and distinct people occurs with the suppression of its language. An eminent American political scientist[210] emphatically asserted that in multilingual societies, modernization intensifies group struggles and brings language issues into the spotlight. In education, industry, and urbanization, language becomes of supreme importance; it is usually the means of competition. In reaction to this, constitutions of many multilingual states prohibit discrimination based on languages, for example, Nigeria,[211] India, Yugoslavia, Russia, and Switzerland. Nonetheless, these provisions do not obviate prejudice. Despite legal provisions, which are only for major ethno linguistic

[209] Nigeria is made up of several ethnic groups majority of which are the Igbo, Hausa and the Yoruba. Within these ethnic groups are several tribes numbering 371: *Vanguard* News, May 10, 2017.

[210] *Politics and Society* (E. Nordinger ed. 1970).

[211] S. 42(1) of the 1999 Constitution, though did not expressly mention language, yet one of the components of any ethnic group is its culture, expressed through its language.

groups, strife and denial is still experienced.[212]

In India for example, due to motivation of rationalism, Hindi is the official language of the Federation. Notwithstanding, this has met serious challenges from the southern states of the Union; a compromise was reached in 1967 and English was retained as a second official language.[213] In other areas of India, such problems exists which like Russia provides a leading example of a large multilingual state.

This challenge is not limited to large states: it is equally found in a smaller countries like Malaysia, Pakistan, Indonesia, Ethiopia and Sri Lanka. As has been explored earlier in Canada; the case of Quebec is a major illustration of this kind in a Western country, showing that this problem may arise anywhere in the world.

Religion is analogous to language, which becomes important when group interaction produces competition. Examples are the minorities in Northern Ireland, Israel, Sudan, Thailand and the Philippines. A remarkable historical event was the creation of Pakistan and India from the undivided Indian subcontinent by the British in 1947. In the name of religious differences, hundreds of thousands of people were killed or made refugees. In a similar nature and form, conflict during the past decades occurred in Lebanon between Christians and Muslims.

6.1.4 On the Basis of Culture

Culture, the last baseline of discussion is of huge impact. The

[212] *The Times of India* (Bombay) (May 3, 1961).

[213] (n. 212).

prejudice it generates are on two major hangers. Firstly, there may be direct discrimination against individuals. Secondly, there may be an attempt to deny the entire group or people's equal opportunity to maintain or develop its culture.[214] An outstanding feature of an attack on the culture of a weaker group is not the attempt to abolish it altogether (as may be the intendment in the case of language), but rather to advance the position of the dominant culture. In this context, an important article of the Covenant on Economic, Social and Cultural Rights does not aim at providing redress when the dominant culture is attempting this advancement.[215]

In these circumstances, the human right to be different will provide protection in a hitherto unprotected field. A reading of the covenant will reveal that its purposes differ, this is clear in article 15.

A comparison of cultural discrimination generally coincides with one or more of the previously mentioned categories. It is intense, apart from the disprivileged status of entire people, prejudice take place against individuals, families and groups of families. This prejudice is more pronounced now that there are migration of large numbers of people into different countries

[214] Schacter; 'The Evolving International Law of Development'; 15 *Colum. J. Transnational L. Journal* (1976).

[215] G. A. Res. 2200 (XXI), 21 U. N. GAOR Supp. (No. 16) 49, U. N. Doc. A/6316 (1966) Article 15 of this covenant states.

> (1) The states parties to the present Covenant recognize the right of everyone; (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (2)

who seek improved economic conditions. In numerous instances, cultural discrimination against the individual is affected by many, even innumerable members of the host or dominant groups.

An example is when an African or Asia engineer comes with his family to work in Europe; he brings with him his own lifestyle, values and perceptions. Undeniably through covert or overt means, he and his family are subjected to cultural invasion of the host people cultural norms. The human right to be different will again provide protection against that invasion; it is founded on a realization that all people and individuals have the right to be different. Multiple examples exist of this type of discrimination of peoples, as general opposed to individuals or families in many parts of the world. Russia, Europe, U.S, between Turkish and Greek people in Cyprus, between oriental and European Jews in Israel, in the struggle between northern and southern people of for southern people of Sudan or between American and local blacks in Liberia.

7) Core Direct Legal Principles and Norms Obliging us to develop the Human Right to be Different

The push of jurisprudential foundation for moving into this realm of protection has been previously formulated.

The steps to be taken by the states parties to the present covenant for the conservation, the development and the diffusion of science and culture. (3) The states parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. (4) The states parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the

Notwithstanding that, further legal principles and norms specifically will be examined that place an obligation on society to not only procure but much more respect this existential right. Recall that these goals which permeated legal thought upon the formation of the UN have demonstrated a legal obligation to further emphasis this right. The newness evolving is deliberations for a new international strategy. In Resolution 31/1741 paragraph 2, the General Assembly decided to convene a special seminar in 1980 to:

> Assess the progress made in the various forums of the UN systems in the establishment of new economic order and, on the basis of that assessment to take appropriate action for the promotion of the development of developing countries, and international co-operation including the adoption of new international development strategy for the 1980's.

Again, it will be recalled that during the course of the First Development Decade[216], no special mention was made of human rights, but that was rectified and emphasis focused in 1965.

By another Resolution which acknowledged the need for special attention, at both national and transnational level, for the promotion of and respect for human rights within the strategy for development.[217] In the same vein, the International Conference on Human Rights in Tehran in 1968 acknowledged

scientific and cultural fields.

[216] G. A. Res. 1710, 16 U.N. GAOR Supp. (No. 17), U. N. Doc. A/5100 (1962).

[217] G. A. Res. 2027, 20 U. N. GAOR, Supp. (No. 14) at 37, U.N. Doc. A/6014 (1966).

the "profound connection" between economic development and human rights.[218] As a cap, while introducing the second development decade, the General Assembly recognized that: "The success of international development activities will depend in a large measure…on the elimination of colonialism, racial discrimination, apartheid… and on the promotion of equal political, economic, social and cultural rights for all members of the society.[219]

The conception of the human right to be different is paramount in the third generation of new legal rights to combat existing and lingering injustices hinged on denials. Other measure of rights like self-determination and development, have only been accepted not long ago. This new regime of right is a part of the same general approach and attitudes of enlightened international thinking. None of the existing human rights approach specifically addresses the problems highlighted here. The previously discussed international covenant on economic, social and cultural rights differs in focus. Also, the Convention on the Elimination of All Forms of Racial Discrimination has a similarly broad message, but only for racial problems.[220] An instance is Article 1(1) that defines racial discrimination as: "Any discrimination, exclusion, restriction or preference based on race [or] colour". In Article 1(2) the Convention makes it clear that exclusions or restrictions can be made by states between citizens and non-citizens.

[218] Final Act of the International Conference of Human Rights, U. N. Doc. A/CONF. 32/41.

[219] G. A. Res. 2626, 25 U. N. GAOR, Supp. (No. 28), 39, U.N. Doc. A/8028 (1970).

[220] *Ibid.*

It is ideal to note that none of the current international treaties, though having the same philosophical approach and aiming at similar goals, exactly secures the human right to be different. Nonetheless, the foundation, in the intellectual, legal and philosophical sense, is laid from numerous international trends, as previously outlined.

What convinces as formidable, showing the will of the international community can be seen in the historic landmark: "The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.[221] This Declaration provides, *inter alia* proclaims the duty of the states to cooperate with one another in order to promote international economic stability and progress and the general welfare of the nations. An in-depth appraisal shows that these goals capture strongly this right. In a stronger view, and philosophically, it is a part of this new international trend that is embedded in this major declaration.

In a further attempt to strengthen this right, Farooq Hassan asserts that:

> The major characteristics have been identified. The quintessence of this concept is the mandate of all states to allow people to remain as they are; that is, different from each other. The right mainly applies to a large number of people, a group, or people, but can equally apply to an individual or a family or a group of families in

[221] G. A. Res. 2625, 22 U.N. GAOR, Supp. (No. 28) 121, Doc. A/8028 (1970).

surroundings different from their own.[222]

7.1 Implementation Modalities

7.1.1 International

Relying on precedent or empiricism, there are three systems in international human rights law concerned with enforcement and implementation. The European system is the beauty to behold in terms of implementation.[223] The European Commission and Court of Human Rights have built an impressive system. Following is the system envisaged in petitions and complaints by the UN system, which is less efficient. The UN system is more prolonged; the substance of grievance must be a persistent denial and additionally must be gross. Moreso, this system mostly is of an investigatory nature. It is not actually contentious, as compared with the European System. At the international level, the least effective can be said to be the reporting system as exemplified by the International Covenant on Economic, Social and Cultural rights.[224]

Evidently, this right, being more in line with sociological norms, are related closely to the problem dealt with by the economic, social and cultural rights covenant. Properly projected, this right aims at changing long settled sociological attitudes, prudence and wisdom demands a careful approach. It may not be ideal to apply petition as envisaged in the optional

[222] Farooq Hassan (n.) 91.

[223] It may not be needful to examine details, e.g. state petitions, individual petitions, etc., at this point.

[224] The International Covenant on Economic, social and cultural rights: G. A. Res. 2200A (xx1), 21 U. N. GAOR, Supp. (No. 16) 49 U. N. Doc. A/6316 (1966)

protocol to the civil and political rights covenants. Usually, the violation of this right is less by states and more by sociologically dominant groups with states. This calls into action a reporting system along the line advocated by Article 16 of the Covenant on Economic, Social and Cultural Rights. As the basis in a great majority of cases is sociological action, and cultural rights. As the basis in a great majority of cases is sociological action, and not state action, against disprivileged peoples, dissemination of this right is thus of highest significance.

7.1.2 National

Greater attention should be placed at the national levels because the challenges lie here. Two reasons are outstanding. The main challenge is that, while individuals may be disprivileged, the real beneficiaries would definitely be groups and peoples. The point of note is that Roman and Anglo-Saxon systems of jurisprudence, as applicable today, generally do not conceive of groups in contentious litigation and so the rights are bestowed on individuals. For a comprehensive realization in this context, different approach may be projected.[225] Another challenge is the coexistence of this right with constitutional law provisions relating to "the equal protection of the law", *Ex hypotheses*, if there is a bill of rights, which most written constitution have then giving more protection to a disprivileged people violates the equal protection clause. To avoid this problem, a number of constitutions like that of Pakistan and India, provide the acceptance of what has been called "reverse discrimination".

(Annex).

[225] N. Kittrie, '*The Right to be different: Deviance and enforced therapy* (1979). This work deals with criminal law and the position of different kinds of delinquents.

This is in tune with an important international treaty that provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups in individuals requiring such protection…to ensure… equal enjoyment or exercise of human rights and fundamental f reedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[226]

Clearly, this provision allows reverse discrimination in favour of the disprivileged peoples. In the United States, this problem has been dealt with mostly in connection with racial matters and controversies. The equal protection clauses of the fourteenth amendment have been at the center of the controversy. The United States Supreme Court has held that when the survival of a small religious community is threatened by a general law, the state, unless its interests are quite important, must make an exception from the general law for the religious community.[227] The Supreme Court in other cases has approved measures that protect women from the impact of past employment

[226] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7 1966, art, 1(4), 660 U. N. T. S. 195.

[227] *Wisconsin v. Yoder*, 406 U. S. 205 (1972).

discrimination[228], that gave armed services veterans a civil service advantage in compensation for the time lost from the job market, and the provide specific remedies for past racial discrimination in the operation of the public schools.[229] In a landmark case, *Regents of the University of California v. Bakke,*[230] the Supreme Court held that reverse discrimination practiced by the University of California in favour of disadvantaged students, by which Bakke was denied admission, was a violation of the equal protection clause of the fourteenth amendment.

In the face of this type of inconsistency Farook,[231] has put forward the following suggestions applicable at the national implementation scheme.

1. Subsequent to the making of this new right at the international level all states should undertake under the treaty to create local committee to examine their domestic constitutional law.
2. The mandate of these local committee should be to incorporate the basic points of the definition of the right to be different in the fabric of local law.
3. As far as practicable, effort should be made to allow group actions. The aim of the remedial law so devised would not be the punishment of the offenders, but rather the protection of the disprivileged.

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228 *California v. Webster*, 430 U. S. 313 (1977.

229 *Personnel Administrator of Mass v. Feeney*, 442, U.S. 256 (1979).

230 438 U. S. 265 (1978).

231 Farook (n. 186) 94.

4. For such protection, it may be considered feasible to have a conciliation or arbitration procedure rather than a court determination by contentions litigation.

5. These conciliation committees should be composed of the senior leaders of various disprivileged peoples and dominant groups. Furthermore, these committees should include persons of recognized competence in the international human rights field.

6. The procedures to be adopted should be left to the various committees in different countries.

7. All countries party to this convention should, under their international obligations, report to the international body[232] as suggested earlier and the results of the cases should each be brought before the conciliation committees.

In this implementation machinery, emphasis is placed on a sociological and legal format. Purely, this is as much a sociological problem as a legal one. The psychological advantage and result of this right would be to even prevent such violative tendencies by stressing the fact that people can be different and should maintain their differences, the result may be to improve a centuries old sociological phenomenon of human history. The driving aim of this endeavour is as much a change in sociological and psychological attitudes of people the world-over as providing judicial concepts in the field of international human rights.

[232] This international body, ideally should be the ECOSOC, and reports submitted through the Secretary General.

A complex sociological factor is manifest in this right. In addition to procedure and precedent, its protection should assume a somewhat quasi-legal or conciliation system, to allow the participation of not only lawyers but group leaders on the plane of sociological and anthropological needs of different societies at different times. It is strongly expected that, in due course, and with the growth of precedent and a new jurisprudence connected with this right, the process will enhance and concretize. After all, evolution is a sure sign of matured legal doctrines.

The reality undisputed is that in all heterogeneous societies the impact of the dominant groups effects in destroying the disprivileged peoples' identity will be stopped or minimized by this right, especially in the following cases, by:

a) Allowing them the official use of the language in at least their geographical area, and general by giving it more prominence;

b) Allowing them to maintain their own heritage and norms with respect to dress, eating practices and social habits, and in discouraging trends which tend to force the disprivileged people to adopt the dominant peoples' identity, the aim mainly being to foster a varied society and not a uniform one;

c) Allowing and encouraging the traditional educational practices, background learning practices, background and learning system of the disprivileged people; also their names, modes of address, manner of greetings, *et-cetera;*

d) Encouraging social acceptance of people who are different, particularly in public places; educational institutions and places of employment, also encouraging their participation in public and civil affairs;

e) Countering the formidable influence of western technology on the nascent states (in terms of industry) by encouraging educational programmes to counter the influence of powerful media; also to encourage their culture by mass media institutions;

f) Directing a progressive thrust in educational institutions at all levels, for courses and classes emphasizing the history and background of different peoples of that community;

g) Allowing the religious or other practices- festivals, daily practices and observation – to become more widely known, at least by state-run media;

h) On the lines of the affirmative action programme in many countries as differently practiced, working toward a broader representation in places of employment, universities *et cetera;*

I) Disseminating state run programmes emphasizing that there are different kinds of people, each possessing its own identity; and

f) International dissemination of the type described in (I) above

The above are only a few cases, aimed at allowing people to

preserve what they have. In its nature and form, prejudice like a hidden pain, hard to pinpoint, but still is clearly felt by its targets. The greater essence of this projection is that it will make in road in the totality of that prejudice.

7.1.3 Individual's Right to be Different

The foregoing, though primarily dealing with peoples' right to be different, also appertains indirectly to an individual's right to be different; the impact is indeed more impressed on the individual than the group. For the individual, the effect is incisive and more aggressive. Jurisprudentially, in the previous analysis, it was noted that the human right to be different, though basically a collective right, is also an individual right. For a clearer understanding, a group being a large collection of separate individuals, *ex hypothesis,* all that has been said earlier would equally apply here; however, this selection is indepth in appraisal characteristics resulting in differences stemming from group-linked causes, then his or her protection is necessary. Secondly, the category of characteristics (i.e., disprivileged group-linked characteristics) should, at a minimum, not subject the individual to invidious discrimination by states. A clear instance is immigration. Immigration practices and laws have been subject to criticisms for discriminating against individuals belonging to certain groups or nationalities.

This particular challenge is pronounced in countries where economic benefits are available for people of poorer countries, such as U. S or Australia, made up through continuous immigration. A state like Australia is usually criticized for, in effect, attempting to keep a pro-Western white bias in

immigration policies. It is quoted of an Australian Minister of Immigration as saying; "[i]t is cardinal with us that Australia, though attracting different people, should basically remain a substantially homogenous society".[233]

8) Prelude to Consequences – Digging Deep

Before delving into the consequences of the violation of the human right to be different, -deeper insights will be made revealing further the central nature of this right, compelling a stronger understanding.

One of the most fundamental and least analyzed of all human rights is the right of individuals to their cultural identity and tendencies that represent their personality. In this context, culture embraces as earlier highlighted religious, ethnic, cultural and social identification. The right of cultural difference is the right of individuals to their identity without group, individual and governmental interference. In the United States, Justice Brandeis captured the essence of the right when he stated: "The makers of our constitution conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued of civilized men".[234]

As earlier stated, in the context of international law, the right to cultural difference has been recognized in many documents, including the Universal Declaration of Human Rights[235] and the International Covenant on Civil and Political Rights and the

[233] Yetmana Steele, Majority and Minority Relations 256 (1972).

[234] *Olmstead v. United States*, 277 U. 3 438 (1928) (Brandies, J. Dissenting)

[235] Universal Declaration of Human Rights, G. A. Res. 217 A (III) U. N. Doc. A/810 (1948)

International Covenant on Civil and Political Rights.[236] Specifically, Article 27 of the ICCPR provides:

> In those states in which ethnic, religious or linguist minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[237]

This human right as interpreted contains both a regulative and a positive aspect. Justice Brandeis "right to be let alone "captures the negative aspect of the right. But the right has also been recognized as having a positive aspect, particularly in relation to the rights of indigenous people and minority groups. With regard to the positive aspect of the right to difference, the Human Rights Committee overseeing the implementation of the *ICCPR stated the following* in its 1994 General comment on Article 27:

> …[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples…The enjoyment of these rights may require positive legal [means] of protection and measures to ensure the effective participation of members of minority

[236] International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* Mar. 23 1976, *entered into force for the U.S.* June 8, 1992, 999 U. N. T. S. 171 (1966).

[237] *Ibid*, 179

communities in decision which affect them.[238]

For the purpose of deeper understanding, regard will be focused on Australia, basically to showcase our peculiarities. There are many circumstances where differential treatment is necessary in order to achieve true equality of outcome. An instance is the International Convention on the Elimination of All Forms of Racial Discrimination[239] developed the broad principle of non-discrimination on the basis of race.[240] This instrument makes it clear that distinction on the basis of race are not forbidden if they qualify as "special measures" to overcome disadvantage, and may even be required.[241]

On the example of Australia like the United States, she has a tragic history in relation to its treatment of the indigenous population. A core aspect of that history has been the lack of understanding of the customary association of indigenous people with their land. This lack of understanding has been central to the disadvantages and alienation suffered by Aboriginal people in Australia. That has been remedied partly by the recognition of customary native title rights under

[238] *General Comment Adopted by the Human Rights Committee*, U.N. GAOR, Human Rights Committee, 50th sess. 1314th mtg. 7, U. N. Doc. CCPR/C/21/Rev 1, Add. 5 (1994).

[239] International Convention on the Elimination of All Forms of Racial Discrimination, Mar.7 1966 U. N. T. S. 195 *(entered into force* Jan. 4 1966). See W. J. F. M. Van der Wolf, Human Rights: Selected Documents 91 (1994).

[240] *Ibid 92.*

[241] 8 Van der Wolf (n.6), 92 states: Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental

Australian law.[242]

A learned writer[243] has stated:

> [T]he relationship of indigenous peoples to their land is of a qualitatively different nature from the relationship of non-indigenous people to land so that it requires differential treatment in order to achieve substantive equality of outcome…The issue is not solely to do with principles of non-discrimination. It relates to equality rights generally, and, to the specific rights of ethnic minorities and indigenous people. True equality requires measures (a) to ensure that members of racial minorities are placed in every aspect on a footing of perfect equality with other citizens and (b) to ensure for the minority means for the preservation of their particular characteristics and traditions. This was decided as long as 1935 by the Permanent Court of International Justice in its Advisory Opinion on *Minority Schools in Albania.* The need for differential treatment to protect the basic and distinguishing characteristics of minorities has been reiterated

freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

[242] *Mabo v. Queensland* (1992) 175 C. L. R. I; Native Title Act 1993, Ch. 2 (cth.) (The NTA) (Austl)

[243] Garth Nettheim, 'The International Implication of the Native Title Act Amendments', Vol. 4. 9 *Indigenous L. Bull* 12 (1998).

> on a number of subsequent occasions. For example the judgment of Judge Tanaka in the 1966 *South West Africa* in the International Court of Justice".

It is taken as fundamental Article 7 of the UDHR, which mandates that; "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law."[244] For Justice Guadron of the High Court of Australia, ensuring equality outside the area of mathematics is an infuriatingly elusive concept.[245] The content of the law in Western democracies has traditionally involved sameness and differentiating treatment, no matter how different the circumstances of the persons concerned. Accepting and applying this approach, which is based on the failure to acknowledge and tolerate difference, can result, and indeed has resulted in cruel oppression and injustice.[246] On the opposite, the Aristotelian approach deals with equality in the face of existing differences and thus, allows consideration of those differences according to the particular difference involved.[247]

Justice Gaudron has asserted that legal analysis in Australia has to some extent accepted the idea that, where different exists, identical treatment may compound underlying inequality and produce further injustice.[248] In this sense, he observed, '[T]here

[244] Netheim (n.225).

[245] Van der Wolf (n.6) 32

[246] Honourable Justice Mary Gaudron, 'Towards a Jurisprudence of Equality'; Address to the Bar Readers Course, Brisbane (July, 20, 1994), 1.

[247] *Gaudron* (n.228), 12-13.

[248] *Ibid* 14-15

are two aspects of equality. The first requires that artificial and irrelevant distinctions be put aside; the second requires that distinctions which are genuine and relevant be brought to account". From various aspects, the demands for equal justice by indigenous people and other minorities, including many women, are demands for legal recognition and consideration of their different social, cultural and economic circumstances.[249] Much more and ideally, the law must respond to these particular needs, whether as persons invoking its protection or as persons who must answer to it for its misdeeds.[250] The law and equality involve the recognition of genuine difference, and where it exists, different treatment adapted to that difference.[251]

One big challenge confronting the judiciary is recognizing, accepting, understanding and adapting to diverse population.[252] To produce real, rather than illusory, equality and justice *for minority groups,* the UDHR and other human rights instruments must seriously address these legal challenges. In the view of Justice Gaudron, it is much easier for the law to proceed as through differences do not exist.[253] Evidently, as the societies become more diverse, with people from different ethnic and religious backgrounds with divergent cultural values living

[249] *Ibid* 15

[250] *Ibid* 16

[251] *Kirtinyeri v. Commonwealth* (1998) 152 A. L. R. 540, 557-558 (articulating Justice Gaudron's additional observations in relation to the scope of the Commonwealth's power to legislate under the "power conferred by Section 51(xxvi) of the Constitution".

[252] *Ibid*.

[253] *Gaudron* (n.228).

together in one community, difficulties become greater.[254]

The right to cultural difference may indeed transcend many cultures and many other rights. This is testified by the International Commission of Jurists, who in December 1997, released its reports on human rights abuses in Tibet.[255] It concluded that self-determination for the Tibetan people was both urgent and critical for their future survival as a cultural and religious group.[256]

The Dalai Lama, in an interview recorded in the Commission's report, expressed his very real fear that the destruction of Tibetan culture in his homeland would render valueless any ultimate achievement reason for the right to cultural difference and identity for indigenous people and many other minority groups might transcend many other rights.

On these contexts, the courts in Australia defer to the wisdom of Parliament. Except expressly stated in the legislation or by necessary implication, the courts will presume that parliament did not intend to pass legislation that would remove fundamental rights and freedoms from its purview.[257] Progressively, international standards have been drawn upon to influence the development of the common law[258], and the interpretation and application of certain rights and freedoms.[259]

[254] *Ibid.*

[255] *Ibid.*

[256] Barbara Crossett, Legal Experts' Group says 'China Is clamping Down on Tibetan's', *N. Y. Times*, Dec. 27, 1997, at A4.

[257] *Ibid.*

[258] *Coco v. The Queen* (1994) 179 C.L.R. 427, 436-437.

[259] *Mabo v. The Queen* (175 C. L. R., 42; *Dietrich v. The Queen* (1992) 177 C. L. R. 292, 306, 321; *Jago v. Dist.* Ct. of N. S. W. (1988) 12 N. S. W. L. R. 558-569.

Under contemporary international law, failure to regard a material treaty obligation can lead to the vitiation of certain decisions made by government authorities or bodies.[260]

8.1 The Status of Customary Beliefs

Matters about the right to difference often arise in unexpected ways. Some experiences in Australia may serve as general cause. The questions and lessons learnt have a poignant *significance extending* beyond Australian shores.

Just like in many communities the world over, particularly Africa and Asia, in some *Australian* Indigenous communities there is a customary belief that certain spirits endanger Aboriginal children.[261] An aboriginal was stranded with his child in the Austrian bush when his car broke down on a very dark night. The father heard noises in the bushes which he believed were made by the *Pulyarts;* evil spirits with supernatural powers which sometimes take children but are afraid of light and fire. He feared for his child and lit a fire to protect his child against the spirits but accidentally burnt out a large area of prime wheat land. The father was charged with unlawfully setting fire to land during a period in which a total ban applied under the Bushfires Act (WA) of 1954.[262] The issue

[260] *Theophanous v. The Herald & Weekly Times Ltd*. (1994) 182 C. L. R. 104, 159-63.

[261] *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C. L. R. 273, 287-257-88; John W. Perry, 'At the Intersection – Australian and International Law' *Austl. L. J.* 841, 850-53 (1997) (discussing the Commonwealth government's response to Teoh).

[262] Maureen Tehan, 'Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era', 'Vol. 7, 3 *Pac. Rim. L & Poly J.* 765, 771-73 (1998).

centred on; should protecting his child in accordance with custom constitute a defence to the charge? The judge held that was not a defence, and sentenced the father to community service and probation.[263]

In another case, an Aboriginal elder is obligated to protect the spiritual wellbeing of the tribe's children. That wellbeing was perceived to have been jeopardized by a photographer capturing the "spirit" of certain children without permission. The elder forcibly removed the camera from the photographer. Again, the question is; was the assault and property damage involved in the recovery and exposure of the film an offence? A magistrate ruled that it was not, as he was satisfied that the conduct was an exercise of a valid claim or right under customary law.[264]

In aboriginal custom, there is "pay-back" requiring a spearing of the leg of a violent offender by the victims family.[265] If the offender is unavailable, the payback may be against an innocent *member of the offender's family*.[266]

Bail was refused for an offender so that he could receive his pay-back while he was awaiting trial for murder. Of interest is this questions; would the granting of bail have protected an innocent member of his family from grievous bodily harm to the

[263] Len Moore, 'The Queen v. Carlton James Winmar: Repelling the Pulyarts-Cultural Clash and Criminal Responsibility', 46 *Abor. L. Bull.* 17 (Oct. 1990).

[264] *Len More* (n. 245)

[265] Nancy Williams & Marcia Langton: The Law of the Land Holds Sway, *The Age*, Feb. 23, 1998

[266] *Barnes v. The Queen*, http://www.austiii.edu. au/do/disp.pl/au/.. .eme_ct/unrep960.html?querry= title (Barnes)>.

offender?[267]

The standard practice is that intellectual property laws confer property rights on individuals. In most customary laws and practices including in many places in Nigeria, many spiritual and other images related to land and information relating to natural tribal medicines are the "property" of the tribe rather than individual.[268] The question is: Can rights conferred under copyright and patent laws vest in the tribal custodian of such rights under customary law or are they lost so the "rights" may be exploited by the community at large without recompense to the tribal owners of the rights? In this regard an indigenous Reference Group on Cultural and Intellectual Property prepared draft guidelines for protecting Aboriginal heritage in this area.[269]

Lake Mungo is listed as a World Heritage area in the state of New South Wales, which was the site of aboriginal ceremonial burials twenty to thirty thousand years ago. The burials are amongst the earliest with which there is a spiritual association with death. Due to soil erosion caused by Australian pastoralist, this peculiar record of Australia's Aboriginal past is threatened with permanent destruction. Invaluable and irreplaceable anthropological research is essential to ensure pride, respect and understanding of this extraordinary aspect of Aboriginal

[267] *Barnes v. The Queen* But see the *Queen v. Williams* (1976) 14 S. A. S. R. I, 7 (discussing that the police should recognize the cultural divergences of Aboriginal people and adjust their tie treatment of aboriginals accordingly); *Jungarai v. The Queen* (1982) 5 *A. Crim. R.* 319 (discussing that court's willingness to take into account customary punishment in sentencing).

[268] *Debra Jopson;* Culture Clash '*Sydney Morning Herald*, April, 20 1998, 13.

[269] Jopson (n. 250).

heritage for all Australians. It has been revealed that according to Aboriginal tribal law and custom, the diggings necessary to the research can interfere with the spirits of the ancestors of the local aboriginal people. With this, the Aboriginees refused to allow the digging to continue. The agitation here is- whether the digging is necessary to protect or enhance heritage or will it destroy it?

8.2 Conflicting standards and cultures and the Right to be Different

The issue of conflicting standards and cultures and the place of the right to be different vibrates in many societies but much more pronounced in situation of indisprivileged groups. The High Court of Australia in *Masciantonio v. The Queen*[270] availed Justice McHugh (though dissenting) the opportunity to comment on the adoption of the ordinary person *standard used in criminal* cases. Exposing the injustice, he revealed that: "Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect values of those minorities.[271]

The conundrum of the use of the ordinary man standard reflects in cultural relativism. For example, provocation is a defence to a charge of murder, reducing the murder charge to a manslaughter charge.[272] The generally accepted test is whether the provocation is such that it is capable of causing an ordinary person to lose

[270] (1995) 183 C. L. R. 58.

[271] *Masciantonio v. The Queen* (1995) 183 C. L. R. 58, 74.

[272] C. E. Weigall & R. J. Mckay, *Criminal Law and Procedure*, N. S. W. (6th ed., 1956) 23 46.

self-control and react in the manner in which the accused reacted.[273] Indeed, the ordinary person in a multicultural society is obviously a legal fiction. Provocation often arises from anger, insults or violent retaliation that in many instances have a significant cultural dimension. The question that arises in the ordinary person's test should be based on the values of an ordinary person in the dominant group or by reference to those of the minority class to which the accused belongs, or should the test be entirely subjective; thereby, acknowledging not just the differences attaching to a group, but individual difference.[274]

Perplexing issues trail the cases of differences. It is manifest also in the difference in the values of the dominant class and the minority class and in this instance over body mutilation, which has formed a part of many cultural traditions. In the case of Jewish people, male circumcision shortly after child birth is carried out in accordance with religious practice.[275]

It has become widespread now that body piercing and inscription have become a popular western practice and making fast in roads into many communities, involving piercing of tongues, lips, nostrils, eyebrows, nipples, and genitals. For many other communities including indigenous people it has included initiation rites involving perforation of parts of the body. Scarring tattoos, chipping and filing of teeth and

[273] *Ibid.*

[274] Simon Bronitt & Kumaralingan Amirthalingam, 'Cultural Blindness: Criminal Law in Multicultural Australia' 21(2) *Alternative L. J.* 58(1996).

[275] Doriane R. Coleman; 'The Seattle Compromise: Multicultural Sensitivity and Americanization' 47, *Duke L. J.* 717, 759 (1998). This equally applies to some ethnic groups in Nigeria.

stretching of ear lobes. On record is a report that in excess of thirty-five countries around the world, including twenty-eight Africa countries, practice some form of female genital mutilation.[276] The same *question comes up:* should the practice be abolished because the dominant class views are different from the views of the minority class?

The persuasion and project are strong, even incisive, much more in many Western countries to outlaw the performance of all forms of female genital mutilation by making it an offence to perform any act of female genital mutilation.[277] Beyond this, but on a fair space, it is important to understand the conceptual complexities involved in such measure. As usual, the radiating question is: Does prohibition by the dominant society of the practice of an ancient cultural tradition of a people involve a moral judgment of cultural inferiority of the society that has long practiced it? Or is the appropriate analysis one that acknowledges that within certain ethnic groups there are also dominant groups which impose their culture on the group? If so, the practice of female genital mutilation may reinforce and perpetuate a dominant patriarchy which continues that tradition to the exclusion of the voice of women who are thereby excluded from any choice in relation to its continuance. What essentially should be addressed is irrespective of views regarding whether a cultural tradition that offends fundamental

[276] Catherine L. Annas, Irreversible Error: The Power and Prejudice of Female Genital Mutilation' 12 J. *Contemp. Health L. & Pol'y* 325 (1995).

[277] Abbie J. Chessler, 'Justifying the Unjustifiable: Rite v. Wrong'; 45 *Buff. L., Rev.* 555, 591-93; Melissa A. Morgan, Female Genital Mutilation: An Issue on the Doorstep of the American Medical Community. 18 *J. Legal De Med*. 93, 101-10 (1997).

values should be changed by prohibition, prohibition without education is not only offensive, but may fail to achieve its objective.

A prominent view on the role of education within the relevant community is to be found in the joint statement[278] of three United Nations agencies. These agencies stated that:

> Even though cultural practices may appear senseless or destructive from the [personal and cultural] standpoint of others, they have meaning and fulfill a function for those who practice them. However, culture is not static; it is in constant flux, adapting and reforming. People will change their behavior when they understand the hazards and indignity of harmful practices and when they realize that it is possible to give up harmful practices, without giving up meaningful aspects of their culture.[279]

It is not only unacceptable but vigorously counterproductive that the international community remains passive in the name of a distorted vision of multiculturalism. The utility of change has found strong voice at the local level.

> To be effective at local and community levels, the imposition of the universal must be by way of an opening in the cultural itself, not by external

[278] Joint Statement by the World Health Organization (WHO), United Children's Fund (UNICEF) and United Nations Population Fund (UNFPA) on Female Genital Mutilation, World Health Organization (1997).

[279] *Ibid.*

> imposition on the culture. Therefore, it is of great importance to nurture cultural rethinking, reinterpretation and internal dialogue….[280]

8.3 Drawing it Closer-the Human Right to Autonomy

The Universal Declaration of Human Rights, ratified in 1948 after World War II, primarily laid the foundation of international human rights law. Undoubtedly, it was the first universal statement on the basic principles of inalienable human rights, and excitedly created a common standard of achievement for all people and all nations. The principles laid down in the Universal Declaration are echoed in the laws of more than 90 countries around the world. Numerous mechanisms have been established to monitor, promote, protect and develop human rights. Nonetheless, for some, the protection of human rights remains an unfulfilled promise. It is of great concern that notwithstanding that human rights have triumphed globally; no other historical period has witnessed greater violation of these rights. The UDHR has become a major tool for legitimating the Post-World War II order both nationally and internationally, but is this document adequate and sufficiently coherent for addressing the complexities of contemporary life?

Ubi societas, ibi jus. Law is perceived to possess a principal function of control, to maintain a particular order in the community established on certain grounds, and further, to guarantee the protection of human rights. This raises the core question: Does it imply that a person has only those rights that

[280] Richard Falk, 'Cultural Foundations for the International Protection of Human Rights; in *Human Rights in Cross-Cultural Prospective: A Quest for Consensus* 44, 49 (1999).

have been enacted? In the context of contemporary realities, the development of the international community since 1948, are these rights same in form and context? Law is not a divine instrument to universalize social values. The sparkling truth is that an individual possesses a more extensive range of rights than any written legal act could encompass. The fact that a person has rights has nothing much to do with enacting these rights in legal documents. This raises the question: Does a person have rights even if they are not enacted?

The foregoing background prepares the reception of the reality that an essential part of contemporary human right is the concept of personal autonomy. Every person has to have autonomy so that he/she can feel free to make decisions. The imperative is that a person who feels free to make decisions will feel secure and happy. Persons with autonomy/autonomous personality are understood to be an essentially independent and individually developing entity. In the view of these learned writers:

> Of course, we cannot underestimate the role of society. Because the individual's life is not isolated and always influenced by many external factors, the intrinsic need to attain happiness and harmony often collides with obstacles. The individual often encounters the power of state control. Restrictions, rules and authorized interference into the individual's privacy make the issue of autonomy particularly important to survive as an individual the person agrees to

> accept certain limitations upon his or her freedom to act.[281]

Every state is internationally obliged to guarantee basic human rights by all legitimate means- legislation, law enforcement, *et cetera.* These include the right to life, from which all the other humans rights derive. This right is generally referred to as encompassing the right to private life the basic understanding of human life itself. The right to private life or the right to have an autonomous area of life can be described using various terms, for example a "right to choose" or a "right to freedom". There is essentially no particular list of activities defining the limits of private life (that is, privacy), which is an area of freedom. Also, the content of the right to private life (the right to personal autonomy) is hard to define and identify in most cases.

Can a human being be autonomously free only in a self-centered relationship? In this context therefore, it is important to consider the contemporary standards of life in different societies irrespective of their developmental level. There are many effective regulators, other than laws, that prescribe the rules and norms of behavior that govern the exercise of rights and freedoms. They include reputation, social standing, or perceived authority and may substantially affect autonomy and private life itself. Laws, public order and tradition are not the only structures that inform the view of personality and spheres of behavior. *Raison d'etre* of an individual's autonomy originates from a nature of human being *ipso facto.*

[281] Jaunius Gambis, Vytaute Bacianskaite & Jurgita Randakeviciute, *Do Human Rights Guarantee Autonomy?* University of Vilnius, Lithuania, 79.

As previously captured, the international community presented the UDHR[282] to the world as a helpful guide for societies in transition. It became a common standard of achievement for all people and all nations. Human rights and freedoms have been defined in different terms and dimensions, by different schools and cultures. Put differently, countless criteria are involved in delineating the content of rights universally or *ad hoc*. Notwithstanding this variety of approaches based on different theories, most definitions refer to the individual's personality and his/her abilities to exercise certain rights and freedoms in particular situations:

> Human rights are not just a doctrine formulated in documents. They rest on a common disposition towards other people and a set of conviction about what people are like. It is only up to personal discretion (autonomy) and compatible public good as to how extensively and productively a human being can fulfill his/her preferences pursuing maximum happiness. As all authentic forms of rights and l iberties, autonomy i tself can also be characterized as the unity of differentiated.

It is of utmost importance that autonomy be practicable in a way

[282] The Declaration was envisioned and adopted in response to the failures of the League of Nations and the atrocities of World War II. Many believed that a third world was imminent. Lessons and insights after the numbering process resulted in the recognition of a new status for individuals. Shale Horowitz & Albrecht Schnabel (ed.) *Human Rights and Societies in Translations: Causes, Consequences, Responses*. United Nations University Press, Tokyo, 2004, 30.

that gives every individual an effective sense of justice which entails the recognition; "that other human beings are agents like yourself, with projects and values of their own-projects and values that may impose limits on the things that you want to do in pursuit of your own projects and values.[283]

This then implies that personal autonomy requires every person to treat others in the same way that he/she would not want to be treated. This ethical or moral maxim is common to many cultural traditions. In this context, ethical conduct treats persons as equals, for the ultimate moral imperative to treat others in the way one would oneself want to be treated presupposes that we are, in some sense, equals.[284]

There are conditions that are necessary for autonomy to flourish. They can be divided into two; internal and external. Firstly, an autonomous individual must know what he/she wants to achieve and secondly must live in a favourable environment that provides means and resources to facilitate the realization of one's potential. Other conditions influences this categorization. If a person's options in life are seriously limited by constant suffering or by severe physical disability, his/her is correspondingly limited. Moreso, if one lives in grinding poverty and has to devote his/her whole life to scraping by a mere substance, autonomy will be severely impaired because of limited options in life. Some writers regard such limitations upon the individuals autonomy as constraining freedom no less than legal prohibitions deliberately imposed by other people.

[283] Allan Apperley. 'Liberalism. Autonomy and Stability', *British Journal of Political Science*. 30(2) 2000, 291-311.

[284] D. A. Richards/ 'Rights and Autonomy' *Ethics* 92(1), 1981, 3-20.

Peter Jones describes them as limits to what people are able to do rather than what they are free to do.[285] An example is, if someone wants to travel to Dubai and as it is now, the plane ticket is too expensive for such a person, does it mean that he/she is not free to do that? Or if a person does not have enough money? All these conditions compromise external facilities.

Different dimensions emerge to define the resources of autonomy, and they include: opportunities to act, expression of ego, beliefs, preferences, logical calculation, and rationality. This set of conditions is by no means exhaustive, but definitely may vary, according to a given situation and personality. Ideally, absolute autonomy may only be practicable as far as it has a positive effect. Such effects may be diverse, either positive or negative. Autonomy is a matter of type and degree, not something that some individuals possess while others lack completely.[286] In this sense, a question arises whether it is possible to enhance the degree of autonomy by interfering in other people's lives to facilitate other options and choices.

The core point of note is that basic human rights are the rights necessary for the development and exercise of autonomy.[287] Human dignity is pivotal to the development of human rights. In otherwords, denial of the individual and the master of his/her own life is the consequence of the gross human rights violation in all societies. The beauty of this display is that dignity lies in interdependence with privacy. Privacy is a freedom which may

[285] Peter Jones. *Rights*. Palgrave Macmillan, London, 1995.

[286] *Ibid.*

[287] William J. Tolbott. *Which Rights should be Universal*? Oxford University Press, Oxford, 2005, 113.

be legitimized through the natural rights affirmed in a nation, state or international community. Autonomy derives from privacy in terms of a privileged condition firstly guaranteeing a minimum capacity of behavior, physical welfare sustenance, and a balancing of core needs and rights. Such privacy, irrespective of the legal right to private life, builds the framework for personhood- the foundation of autonomy.

The innately private nature of human being dictates the necessity to observe the sense of privacy which guarantees a potential wider range of rights and freedoms. This can be illustrated by a comparison of basic physical and psychological rights.

> We desire food because we need food, though we do not necessarily have it. Some might say that we desire privacy and autonomy because we need them, though we do not necessarily have them. I say we desire privacy and autonomy because we have them, in the sense that it is in our natures to be private and autonomous, and that, indeed, we do not necessarily need them, in the sense of needing more than we innately have. Although we innately have the degree of privacy and autonomy required for personal identity to subsist, we nonetheless both need and desire to maintain these innate properties.[288]

The first article of the UDHR states that: [a]ll human beings are born free and equal in dignity and rights. They are endowed with

[288] Tolbott (n.269), 18.

reason and conscience and should act towards one another in a spirit of brotherhood". In response to this, it is stated that:

> This phrase reveals that on the basic level, human rights may be understood as a model of relationship between two individuals. The basis for human rights was established in the Universal Declaration of Human Rights with the recognition of individual person's possessing special worth and dignity precisely as individuals. Basically, human rights are morally superior to society and state, and under the control of individuals, who hold them and may exercise them against the state in extreme cases. Personal autonomy and human rights are highly connected and cannot exist without one another. This reflects not only the equality of all individuals but also their autonomy, their right to have and pursue interests and goals different from those of the state and its rulers.[289]

Autonomy in this context is fundamental to the idea of human rights. It may be taken as a complex supposition about the capacities, developed or undeveloped, of persons, which enable them to act in a particular way. Autonomy requires the ability to reason, make, and carry out simple plans on the basis of one`s desires,[290] These enablements cause persons to call their life their own, self-critically reflecting on and revising, in terms of

[289] Jaunius Gumbis, (n.263) 82.

[290] D. A. J. Richards (n.266).

arguments and evidence to which rational assent is given, which desires will be pursued and which disowned, which capacities cultivated, or in which left unexplored, with what or with whom in one's history one will identify, or in what theory of ends or aspirations one will center one's self-esteem one's integrity, in a life well lived.[291]

For an individual to be treated with concern and respect, he/she must first be recognized as a moral and legal person. This definitely requires certain basic personal rights. Rights to recognition before the law to nationality[292] are prerequisites to political treatment as a person. In a different vein, the right to life, as well as rights to protection against slavery, torture, and other inhuman or degrading treatment are essential to recognition and respect as a person. There are three principal values:

a) that individual human being are important;

b) that individual are to count equally in terms of whatever features make us worth counting; and

c) that individuals are agents.

Agents are creatures who are capable of conceiving and of trying to bring to fruition projects and values. To be an agent is to be autonomous in the minimal sense. These three are more fundamental than the others.[293]

The core idea of human rights embodies a normative

[291] UDHR, Articles 6, and 15.

[292] UDHR, Articles 3, 4 and 5.

[293] Alan Apperley (n. 265).

perspective of respect for such capacities. Autonomy may be seen not as isolation but in terms of a supportive social environment of critical dialogue and reciprocity. Society may accept responsibility for defects in autonomy which it has unjustly fostered and to which, in the balance of considerations of justice, it must give appropriate weight.[294] It must be recalled that in 1947, when the General Assembly of the United Nations was preparing to vote for the adoption of the Declaration, the Association of American Anthropologists appealed with a statement to the commission that was preparing the project of the text of the declaration.

The Association of American Anthropologists was trying to prove that respect for the rights of an individual means respect for cultural differences, because an individual realizes himself/herself as a person through his/her culture and there is no methodology which could be used to quantifiably estimate one culture or another. For them, standards and values exist only in the culture of their origin, and any attempt to formulate the postulates which come from the faith and moral codes of one culture and apply them to the entire global society is doubtful.[295] In this context, it is argued;

> That is why we need personal autonomy. Society is gaining in density and, for this reason, a person needs a sphere of his/her life where he/she would not be controlled and could have the opportunity to take any actions he/she pleases under the

[294] *Ibid.*

[295] L. Xiaorong, *Postmodernizmas ir universalios zmogausteises'* [Postmodernism and Universal Human Rights] *Siaures Afenai* (2005), 739.

condition that it would not affect anyone else.[296]

"Zone of privacy" according to Heinze,[297] "is a zone of freedom" which is why the right to private life or, in other words, the right to have an autonomous sphere of life can be described using different terms, for example, a right to choose, or a right to freedom. Flowing from the foregoing, it can be asserted that the concept of private life is quite far-reaching. It also includes the right to keep information about one's personal life outside of the public sphere in certain circumstances. This is the reason for the difficulty of fully articulating the content of the right to private life (the right to personal autonomy). It would be much easier if it were possible to determine the sphere of the private life. Society would then avoid many contradictions between public interest and the autonomous sphere of a person. As in the case of *Niemietz v. Germany,* the European Court of Human Rights pointed out:

> The Court does not consider it possible or necessary to attempt an exhaustive definition of the nation of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own "personal life as he chooses and to exclude therefore, entirely the outside would not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships

[296] Jaunius Gumbis (n. 263) 84.

[297] Eric Heinze, *Sexual Orientation: A Human Right An Essay on International Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 1995, 113.

with other human beings.[298]

9) Inventing New Human Rights

Facing realities include acknowledging the fact that advanced technologies transform our daily lives and increasingly, severe limitations impose themselves upon all human kind and affect law. The evolution of law during the past century reveals a change in the legal force of many different forms of legal documents. All legal systems generally confirm that both written and unwritten law has always existed in parallel. The situation has been captured thus:

> Even sixty years ago, legislation itself was not so intensive. Daily life was mostly regulated by unwritten rules, by the observation of customs, social standards and traditions. For example, signed forms of contracts were not as common as nowadays, when individuals underwrite the vast majority of their legal actions. The same situation can also be found in the field of lawmaking. There is now an expressed need to regulate as many sphere of human life as possible, including communication, internet access, education, marriage and travel.[299]

The issue of reinventing human rights is widespread now. It is built on the belief that all human rights derive equally from the status of autonomy in compliance with dynamic social prerogatives; but new regulation does not essentially translate to

[298] *Niemietz v. Germany*, Appl. No. 13710/88, 23, ECHR 1992 – II.

[299] Jaunius Gumbis (n. 263) 84.

new human rights. Nonetheless, the interpretation of human rights by each new generation is always positive and necessary.

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In the view of the United Nation Commission for Human Rights, Navi Pillay:

> The Universal Declaration wise does not to rank rights. On the contrary, it recognized the equal status of political and civil rights with economic, social and cultural rights and underlined that all rights are inextricably linked Violations of a set of rights reverberate on other rights and enfeeble them all.[300]

The former United Nations Secretary-General Ban Ki-Moon[301] noted that the food emergencies, the degradation of the natural environment, the financial crisis and the unrest that they engender, all underscore that those who are at the frontlines of hardship are likely to be victims of the ripple effects of human rights violations. All these statements illustrate the imminent development of human conditions and dynamic nature. Eminently, this requires flexible law and mechanism of control.

Of primary importance is the acceptance that the (re)invention

[300] Jaunius (n. 263).

of human rights is grounded in new perspectives *about* individual autonomy. Indeed, before it can truly be said that they can possess human rights, people must first have to be perceived as separate individuals capable of exercising independent judgements. To be truly autonomous, a person must be recognized as legitimately separate and secure in his/her separation, but have human rights. Personhood must be appreciated in some more expressive model.

Human rights depend on both self-possession and on the recognition that all others are equally self-possessing. An ambiguous notion of the status of others illustrates the incomplete and uncertain matrix of relations, often open to a discriminative display of mutual respect and equality.

The other sides of this scenario are situations when it becomes compellingly essential to intervene in the person's private life to avoid harm and protect the rights of other people. In the case of *K.A and A.D. v. Belgium,*[302] the European Court of Human Rights investigated a matter that raised the issue of the extent to which acts of sadomasochism[303] ought to be protected by the right to respect for private life. The major issue that has to be determined was whether interference with the applicants right to engage in sexual relations is derived from the right to autonomy over one's own body, an integral part of the notion of

[301] Ban Ka-Moon, born 13 June, 1944 is a South Korea politician and diploma who served as the eight Secretaries –General of the United Nations between 2007 and 2016.

[302] *K. A. and A. D. v. Belgium*. Application No. 42758/98, 45558/99, 2005.

[303] Sadomasochism, deriving pleasure, often of a sexual nature, from the infliction of physical or psychological pain on another person or on oneself or both.

personal autonomy, which could be construed in the sense of the right to make choices about one's consensual sexual practices, which were a matter of individual free will.

Accordingly, there had to be particularly serious reasons for the interference of public authorities in matters of the Convention. However, in this case, sexual practices were not carried out with the person's free will. For this reason, the European Court of Human Rights decided that the government institutions of Belgium that took action to stop these activities and punished the person responsible for harming other people did not violate the right to private life because these institutions were acting in accordance with the public interest.

A caution is raised; who is entitled to fill the gap between the control spheres of two equally autonomous individuals? An extensive catalogue of rights and freedoms may not suffice. The challenge is that a regime of newly bestowed rights may burden people with volume and complexity of information without necessarily precluding new *ad hoc* situations. The individual is ordinarily challenged to evolve additional capacities, skills, experiences, enhance knowledge and specialization. Enactments of new rights alone may not be fully effective. This is because the trends of modern they cannot be predicted for even fifty years from now. On the other hand, and additionally, overall social development is seemingly inseparable from human rights. Human rights are complement in self-tendencies. And for Jaunis Gumbis and others:

> Because of intense global integration, development and human rights are becoming different, logically distinct, but operationally and

> conceptually linked issues. Prior to this, human rights had possessed autonomy and power in certain fields (marginal groups of people, self-determination, etc. The process of the social change are simultaneously rights- based and economically grounded, and should be conceived in such terms, including human rights as a constituent part.[304]

For the Noble Prize Winner Amartya Sen, social development is the expansion of capabilities or substantive human freedoms, "The capacity to lead the kind of life [a person] has reason to value… [D]espite unprecedented increases in overall oppulence, the contemporary world derives elementary freedoms to vast numbers – perhaps even the majority – of people.[305]

It is persuasive to argue that autonomous people can invoke the lack of universal human rights assistance as the primary weakness of a state. Properly expressed, if a person is not able to embrace his/her life activity and pursue satisfying results because of vagueness and lack of legal instruments, such an individual is free to act in compliance with minimum public expectations, and extensive personal preferences, Promoting and protecting the right to autonomy (or autonomy as freedom *per se* entails change and modernization in democracy, strengthening of the state and society with self-sustaining purposeful members. In this realm of reasoning, it can be

[304] Jaunius Gumis (n.) 86; *Peter Uvin. Human Rights and Development*. Kumarian Press, Sterling, Va, 2004, 122.

[305] *Gumis* (n. 263).

advanced that if state policy is not aligned with human rights, it progressively loses stability, human resources and self-control. Any state or regime cannot forebear vindication of rights and freedoms because of lack of legal base and practice.[306]

As we progress and advance the issue of autonomy, it becomes compelling to address this; why should anyone care for the human rights of others?. If the decision would be that global community really needs human rights, what should be best ways of guaranteeing and protecting human rights? In this regard, Fagan[307] argues that the cornerstone of human rights must be concern for human suffering. This at least partly addresses the question of why we need human rights; by caring and protecting the rights of others, we create more opportunities as the ring effect, will induce the protection of own rights.

Moreso, since we have the whole mechanism of guaranteeing human rights in enacted declarations and equally we have a system of institutions that should protect human rights, the balance is that we have more guarantees that there may be a minimum violation of our rights.

On another phase, it has been argued that suffering is not alien to the human condition or to the development of humanity as a concept.[308] Taking a retrospective review, there are examples in human history, law has severally intervened in the private life of human beings. In some cases, law fails to conform to the future life standards and legislation are forced to enact laws to solve

[306] *Ibid.*

[307] Andrew Fagan, 'Back to Basics: Human Rights and the Suffering Imperatives' '*Essex Human Rights Review* 5(2), 2008.

[308] *Fagan* (n. 289).

major issues of life and contemporary needs, which require retroactive corrections in certain circumstances.

Before the civil rights movement in the United States, for example, the Southern states had laws which created different legal rights according to whether the person was black or white, thereby violating the natural law tenet of equality. In this case, as the positive law violated the principles of natural law; the legally correct action was to disobey the unjust positive law. Millions of people protested violating these unjust laws of racial segregation. One of the first acts of civil disobedience was when Rosa Parks, a black women, defied the segregation laws of Alabama requiring blacks to sit at the back of the bus by sitting in the front of the bus. She violated a positive law, but not the natural law.

Arguments ordinarily are raised urging that suffering is one of the most important characteristics of every human being and is the engine of development in global society. And then the resulting question is – why do we need human rights that protect human being from suffering if this process is so beneficial? If we put aside the question of the basis and form of the so-called natural rights, which spanned over several centuries of mostly European thought, the ideal thing would be to acknowledge that the modern human rights movement was fundamentally motivated, *inter alia,* as a response to the Holocaust, that hideous icon of human suffering for post-war generations. In context and content, the UDHR should be seen, in part, as an historical doctrine motivated by something that defied discussion and interpretation but simply was fundamentally and utterly wrong. In the flowing of explanation, the aim of the

UDHR and subsequent human rights treaties was to restore respect for humanity and human dignity. This much is true, as the documents declare a vision of how the world ought to be, recognizing that inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace. As beautifully captured:

> On the other hand, human suffering and discrimination continues largely and has not been s ignificantly reduced. Moreover, at a fundamental level, human rights are stuck in an intractable bind between being at once broad and progressive, and specific and narrow. Under such circumstances, personal autonomy is extremely important. Since we cannot regulate everything or enact all pertinent rights in one document, personal autonomy may act as a useful flexible standard for delineating human rights.[309]

As principally conceived in the UDHR and other human rights regimes and instruments autonomy belongs exclusively to the individual. In considering personal autonomy, it is deeply crucial to understand how the individual is modeled and thus captured the idealistic vision of an autonomous person.

> The individual is modeled on a Kantian autonomous subject, theoretically free of gender or class. The focus of the declaration upon this subject reflects the hopes and idealism of a world released from the grip of World War II;

[309] Jaunius Gumbis, (n. 263) 88.

> promoting the right of the individual in the wake of a horrifying genocide and the spread of ideology.

Truly, it may seem odd, even misleading to see the positive law as the primary source of human rights. Human rights and justice derive from the conscience of every individual, from their perception of the limits of freedom. It is this understanding that is subsequently enacted by authorities and recognized on official law. Society gives the authorities only the function of caretaker and protector of these rights and freedoms.

The UDHR is taken as a powerful tool for the protection of individual rights. In the process of protecting these, the concept and importance of personal autonomy cannot be ignored. The document cannot interfere in personal autonomy but rather draws a definitive normative line between what constitutes the fundamental conditions for right and wrong in the primarily public sphere.

> In other words, the Universal Declaration of Human Rights regulates human rights in the sphere where the rights of individuals collide. This sphere can be called public life. However, in his/her private life, in the autonomous sphere, a person is absolutely free to act in any way he/she wishes. Basically, human rights protect the ability of individuals to meet their basic needs and live autonomous lives. To live a minimally good life one must be able to hope and dream, to pursue one's goals and carry out projects, to live

life on one's own terms.[310]

Of immense importance is the realization that human rights instruments at local, regional and international levels cannot regulate everything and guarantee all the rights that all individuals need. For instance, in addition to fundamental human rights, such as the right to life, the right to freedom, and the right to private life, individuals need a variety of different rights never to be enacted in any legal document and guaranteed globally.

Humans are too different and it is impossible to foresee what right will be needed, even in the near future. There is where personal autonomy captures the vacuum-a sphere of life that enables a person to plan his/her action and realize those particular rights. "Some people do not need the thing that would let them occupy…social role and others need things that they do not need to occupy these roles especially if they hope to occupy other rules."[311]

In this context, N. Hassoun provides us with an example of a monk who may not need to have children or be a worker, but meanwhile would need religious freedom, on the hand, if this monk were o leave his monastery, he should have the opportunity to have a job and children.

Modern human rights-based clams to individual autonomy arise

[310] 'Interpreting the Universal Declaration of Human Rights for a New Generation, International Human Rights Law Reflective Essay', student: "213332" available on-line at www.humanrights. Unimelly.edu.au/download.cfm? Download File = 0585786 D-9632 – AF86-DIE 13630 A064 F44 [Accessed 2-8-2024].

[311] Nicole Hassoun, 'Human Rights, Needs and Autonomy', Proceedings for the 3rd International Conference on Philosophy. Aitner, Athens, 2008, 9.

primarily not out of opposition to community but essentially from the desires of persons to use intellectual and technological innovations to supplement their continued traditional ties with genetically and geographically based communities.[312] Relating this to universalism, Madigan writes "we cannot speak of universal rights if there is no universal nature to which such rights attach. In turn, we cannot speak of universal human nature if there is no single end for human beings".[313]

10) Consequences of Violations of The Human Right to be Different

10.1 Consequences of Inter- Group Conflict in Heterogeneous Societies

This appraisal will demonstrate the vital importance of this right and emphasize the need to prevent the annihilation of the differences between different peoples which are a part of the world's heritage. The reality is that in any society inhabited by different groups, frictions are bound to occur. It plays out in this scenario – either the dominant group will reject groups different from itself, or it will accept them in a qualified sense. Rarely would there be total acceptance without social qualification.

[312] Thomas M. Frank, 'Are Human Rights Universal'? *Foreign Affairs*. No. 80/1(2001).

[313] Janet Holl Madigan. *Truth, Politics, and Universal Human Rights.* Palgrave Macmillan, Basingstoke, 2007, 139. For Peter R. Baehr, most human rights enshrined in the Declaration have become *ergaomnes* obligations and have now a direct effect over everyone. The two-element theory requires a rule to precise requirements to be recognized as an international customary rule. On the other hand, universal human rights instrument are based on the assumption that they reflect universally accepted norms of behavior. Peter R. Baehr. *Human Rights: Universality in Practice*. Palgrave Macmillan, Basingstoke, 1999.

In the expression of Milton Gordon's classification[314], the following reactions take place:

i) Extermination – most extreme

ii) Expulsion

iii) Exclusion

iv) Transmuting Pot

v) Melting Pot – least extreme

The classification suggests that the most extreme reaction occurs when the dominant group is bent on the extermination of the lesser group. In that order, expulsion is less extreme than that. Following is by exclusion, which means de facto exclusion, through a lesser sociological status. The fourth reaction in this descending scale is called "transmuting pot". In this case, the aim of the dominant group is to force the members of the lesser groups to disassociate themselves from their specific ethnic and cultural characteristics and associated themselves with those of the group itself. This is seemingly like – "When in Rome, do as the Romans do". In the nineteenth century, Lord Mac Canley made a similar scheme for producing a brand and class of Indians when he wanted "Indians by birth Englishmen by education".[315]

In concrete terms, reference to "disprivileged peoples

[314] Gordon, 'Assimilation in America: Theory and Reality', 90 *Daedakys J. Am Acad. Arts & Sci.* 263 (1961). This Gordon's chart applies to America, but the characteristics of the analysis has general application.

[315] Minute on Indian Education by Thomas B. Mac Canley – [February 2, 1835] This Day in it.

syndrome" means when a person differs from the majority, and interacts in a given society, he or she faces the difficulties earlier outlined. Put differently, in practical terms the discrimination of the nature discussed here is usually though not always, against an individual. He or she suffers because he or she is linked to a disprivileged group or people.

Similar results are experienced if the individual is not a member of a minority or disprivileged group, but simply follows a member of a minority or disprivileged group, but simply follows a behavioural pattern which is different from the one followed by the community. In this instance, instead of dominated and dominant groups, the focus is on the individual-without any connection with an accepted group and the majority. Here, the suffering in either case is similar in being singled out from the rest of the community. Nonetheless, the impact and afflictions effects though similar, but the extent may differ. An illustration is, a deviant member of a society who racially or ethnically belongs to a dominant group will not face the same extent of prejudice or discrimination which would be faced by a deviant member of a racial minority community.

What is focus in this exercise is that discrimination against an individual can occur because he or she is different by:

a) Belonging to a disprivileged group; or

b) Being deviant in appearance, belief or manner.

The individual dimension of this challenge may have these different sources, but the two are clearly distinguishable. Accepted, no legal system, national or international, can protect every kind of difference. Some differences are hidden or

swallowed in other peoples' human rights. While expanding the international and national protection of human rights, the real objective is to protect new human rights and not every manifest or hidden individual interest.[316] On this baseline, by and large, existing differences should be preserved. At a minimum, these differences should not be the occasion for invidious discrimination by the government. The real essence for protecting the individual's right is, if not protected, the individual group which is different will eventually be affected and changed.

The characteristics of the different or deviant person, which have to be protected, especially within a traditional constitutional law field, deserves examining. This area spans across personal actions in social, political and religious matters. Endeavours have been made to include as much as possible of the private domain in the protected category. Until recently, private matters were considered the concerns of the society and the state. This trend is the major area where the individual who is different will benefit. Since the concepts of private and public are connected with social norms, an acceptance of this right to be different may cause changes in society's thinking.

In this broad category of private behaviour, the real aim is to remove societal traits impinging on this human right. In this case, it may be hasty to give a precise list of such behaviours that should or should not be protected since every society will provide a different answer.

[316] K. Vasak, Are New Human Rights Needed? 12 *Human Rights J.* (Aug.-Sept., 1979).

The least extreme reaction is the melting pot theory and is said to be typical of the United State. This theory envisages the blending of all cultures and people – with slight favouritise of the host peoples identity – by producing a new product. In America the Anglo-Saxon people merged with other immigrants to produce an American People. Notwithstanding, as in the case of melting metals, the one with the greatest quality will emerge as the dominant component of alloy produced. In America, "The American People" is obviously more Anglo-Saxon upon part of the innumerable other immigrant components.

The considerations above are the reactions which reject inferior groups; in some cases, qualified acceptance takes place. Generally, in heterogeneous societies, there is basically a two-tier consequence; (i) cultural pluralism, or (ii) partition. With cultural pluralism, the theory is that the society accepts diversity. Technically, this may be true in the law, but factually it is a different scenario. Former USSR was supposed to be an example of this phenomenon. A better example is that of Canada or may be Yugoslavia. In the case of partition, it is said to be like divorce; people just agree to live separately by some form of political compromise. Switzerland is commonly cited as an example. However, many partitions are not harmonious and usually result in bloody clashes and civil wars.

10.2 The Inevitable

In sobriety, truth is spoken; violations of human rights attract dire consequences that are inevitable. Violating human rights, in this case the human right to be different has far- reaching and serious, even overwhelming consequences, both for individuals

and societies. The consequences include:

1. Individual Suffering

This ordinarily is the first point of impact. It leads to direct harm and suffering for individuals whose rights to be different are being violated. This can include physical harm, psychological trauma, discrimination, and denial of basic needs such as food, shelter, and healthcare. The trauma is explainable, when your personality and personhood is denied; your humanity is afflicted.

2. Long-Term Societal Effects

The violation of the human right to be different can have long- lasting effects on societies, including intergenerational trauma, cycles of violence, and a vicious breakdown of social trust. Rebuilding trust and repairing the damage caused can be a lengthy and challenging process. Moreso, it has multiplier effects.

3. Social Unrest and Conflict

The denial of the human right to be different may ultimately lead to widespread human rights violations, recall it is the holistic nature; and can contribute to social unrest and conflict within society. It naturally follows without fail that when people`s rights are not respected, it can lead to grievances, resentment, and a breakdown of social cohesion, potentially escalating into violence and vengeful conflict.

4. Loss of Credibility and Legitimacy

Governments, institutions and person that engage in

denial of the right to be different risk loose credibility and legitimacy in the eyes of their subordinates, citizens and the international community. This state of affairs generally is a prelude to further disasters, thus, weakening their ability to lead or govern.

5. Economic Consequences

The violation of the human right to be different can have negative economic consequences. For example, discrimination and lack of access to education or healthcare can limit people`s ability to fully participate in the economy, leading to lost productivity and hindering economic development.

6. Undermining Democracy and Rule of Law

Human right violations directly or indirectly occur in contexts where there is a lack of respect for the rule of law and democratic principles. Cumulatively and in the long run, when human rights are not respected, it can erode trust in institutions and undermine the foundations of a democratic society.

7. Legal Consequences

Individuals, institutions and states that violate human rights may face legal consequences, including domestic and international legal actions, prosecutions for war crimes (in situations where conflicts ensue), crimes against humanity, crimes of genocide, and potential sanctions and/or other penalties.

8. International Condemnations

> Violations of human rights, not withstanding widespread domestic challenges, can lead to condemnations from the international community. This may result in diplomatic isolations, sanctions, or other forms of pressure on the violators to change their behavior.

10.3 Impunity

This is a consuming consequence- the air of not subject to accepted norms and its corrosive effects which spread like wild fire with its cancerous afflictions.

The *'nothing mega'* atrocious feelings that produce *'na we deh here'* syndrome. Its damnation in fast eating into the system at all levels and is the viper that devours sanity and ignites strong divisions and hidden hatred that awaits opportunities to explode. The root cause of the foregoing is the failure to accept different peoples. Once this is recognized, it will produce-in time-a better psychological and cultural environment. The right to be different is thus of crucial significance in alleviating the difficulties identified. It would be ideal to support the foregoing with the position of the former Secretary-General of the United Nations:

> Indeed human rights, viewed at the universal[317] level, bring us face-to-face with the most challenging dialectical conflict ever; between "identity" and "otherness", between "myself" and "others", they teach us in a direct, straight forward manner that we are at the same time

[317] At the regional levels, domestic level and individual level

> identical and different. Thus, the human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effect to find our temporary differences, our ideological and cultural barriers.[318]

11) Conclusion

Physically, each of us has a unique heartbeat, just as each have unique thumbprints, eye prints, and even voice prints; our heartbeat is slightly different patterns. It is amazing that out of the billions of people who have ever lived, no one has had a heartbeat exactly liked yours. These lead to the self- evident reality that the beauty of creation lies in the differences *"egbe bere ugo bere, nke si ibeya ebela, ya zi ya ebe oga ebe" [meaning "Live and Let Live"].*

The differentials create the sustaining rhythm in all we do, say and feel. Even the mighty cannot be so classified except in the context of the weak; so also the rich as to the poor, the tall as with the short; the white as with the black. Differences at all times, in all spaces, procure the enablements, the guage and the measure that sustains. Without differences, we are ill-defined, and the anchor to bond ceases to be.

Personal freedom itself is the core postulate in the context of human rights. Every human being is inherently free to choose how extensively he/she wants to enjoy rights. No authority

[318] Opening statement of United Nations Secretary-General, Boutros Boutros-Ghali, World Conference on Human Rights, the Vienna Declaration and Programme of Action, June, 1993, 7.

individual or institution has power as a regulator of the ego of the autonomous person. Freedom derives from behavior and consciousness of the human being. The supremacy of freedom is the ultimate regulator of our times. Autonomy constitutes a prerequisite for proper implementation of human rights. The stronger personal autonomy is, the more advanced and productive a human being may strive to become. An autonomous person is the best self-advisor on compliance to his/her expertise and life style.

Rights embedded in a legal document are not sufficient to guarantee and protect a modern individual. The international community and domestic norms and institutions have to create a mechanism that would provide the individual the proper legal conditions to exercise his/her own rights in accord with existing social values.

Equality must accept the boundaries that have been imposed upon it by a jurisprudence of identity and discrimination, and the politics that has grown up around this jurisprudence. The promise of equality must not be conditioned upon belonging to any identity, category, nor should it be confined to only certain spaces and institutions, be they deemed public or private. This has eaten deep into our conscience, practice and customs and so we proudly sing: *"Enye ndi ebe'a, enye ndi ebe'a* [meaning: Let each part have a right to partake in collective patrimony].

Equality must be a universal resource, a radical guarantee that is a benefit for all. We must begin to think of the state`s commitment to equality as one rooted in an understanding of vulnerability and dependency, recognizing that autonomy is not a naturally occurring characteristic of the human condition, but

a product of social policy. Humans are created in a determinate form, expressing only their form and content and cannot give what they do not have; they are a specie in defined content, exuding their nature and cannot offer more. Any demand beyond that capacity is in futility, just like the demand of total loyalty howsoever interpreted. Such demands fail not because of more unwillingness but rather, due to innate constraints and incapacity. Personal autonomy is fundamental for the development and implementation of human rights. The improvement of human rights is impossible without the adequate growth of human dignity. If we depreciate a particular individual and the initiator of one's conduct, we create a causal relationship between gross violations of human rights in the community and infringement of the right to private life.

We have so widened the catch (drag net) of enmity such that there are no limits to the frontiers of those who are our enemies.

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CITATION

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Professor Onyeka Wiliams Igwe was born on the 22nd of January, 1962 at Okigwe, Imo-State. He is the second son of Chief B. N. Igwe and Lolo Joy Igwe, both of blessed memory.

He attended Urban Primary School Okigwe, where he obtained his First School Leaving Certificate (F.S.L.C.). In 1978 he obtained the WAEC having attended Madonna High School, Ihitte, Imo State. He also attended Alvan Ikokwu College of Education, Owerri in 1979 and graduated in 1981 with NCE in Accountancy/Commerce. He attended University of Calabar in 1985, graduating with LL.B (Hons) in 1989 and thereafter in 1989 attended and obtained BL from Nigerian Law School in 1990.

Professor Onyeka Williams Igwe further in 1993 attended and obtained LL.M in 1995 from University of Calabar, in 2005, he attended Abia State University and obtained therefrom in 2011, a Ph.D in International Human Rights Law.

He started his teaching and research career as a Lecturer II at the University of Calabar, Calabar Cross Rivers State in 1996. In 2014, after Sabbatical Leave Service in Rivers State University (in 2013), he transferred his service to the same University as a Senior Lecturer, and grew to the rank of Professor of International Human Rights Law in 2018.

From 2012 to 2013, he was the Consultant on Human Rights to the Government of Cross Rivers State. He has acted as Head,

Department of Public and International Law, Faculty of Law, University of Calabar, Calabar Cross Rivers State: 2009 to 2011. Upon resuming on transfer from University of Calabar in 2014, he acted as Head of Department Jurisprudence and International Law, 2014 to 2018.

He was appointed Associate Dean, Postgraduate School, in 2020 and was also reappointed in the same capacity in 2022 for another term of 2 years. He was Member, University Accommodation Advisory Committee, 2014-2018. Also, he was Member, Ad-hoc Committee for the Review of Senior Non-Academic Staff Appraisal Form, 2014.

Professor Onyeka Williams Igwe is author of seven (7) books on Law, three of which were published in Germany. He has also authored a monograph. Some of the high points of his academic career are:

a) Four papers published by Social Service Research Network achieved more than 61 downloads and more than 250 abstract views in one week.

b) His article: "Terrorism, the Rule" Rule of Law and the Nigerian Nation", was awarded the Best Paper, by IASET, Global Research Forum, Publishers of International Journal of Humanities and Sciences (IJHSS).

c) He has equally attended numerous conferences both nationally and internationally presenting papers, reflecting contemporary issues.

d) He has published more than 90 articles both locally and internationally.

Professor Onyeka Williams Igwe is married to Nwa Nma his heart throb Lady Ifeoma Mercy Igwe and this wonderful relationship is blessed with 2 wonderful children.