TOWARD A POLITICAL CONCEPTION OF MINORITY RIGHTS: RECONCILING SOVEREIGNTY, HUMAN RIGHTS AND MINORITY CLAIMS

by

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Abstract

The question that I will explore in this research dissertation is whether one can defend the rights of homeland minorities as a progressive extension of the existing norms of human rights. This question calls for several deeper inquiries about the nature, the function and the underlying justifications for both human rights and minority rights. In particular, this research project will examine the following issues: on what normative grounds the available norms of human rights and minority rights are justified; if there is any methodic way to use the normative logic of human rights to support substantial forms of minority claims, such as the right to self-determination; whether human rights can take the form of group rights; and finally, whether there is any non-sectarian basis for justifying the minority norms, which can be acceptable from both liberal and non-liberal perspectives.

This research project has some implications for both theories of minority rights and human rights. On the one hand, the research employs the topic of minority rights to shed light on deficiencies of the existing political theories of human rights. On the other hand, it uses the political theory to shed light on how existing theories of minority rights could be improved and amended. The inquiry will ultimately clarify how to judge the merit of the claim that minority rights are or should be a part of human rights norms.

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Chapter 1

Introduction

Today, human rights are widely considered to be the common language of morality within the international community. The idea that each and every human being is a matter of international concern regardless of their geographic, social, cultural and political ties seems to have become, as Rorty describes it, "a fact of the world." (Rorty, 1994, 134)

Human rights are perhaps the most significant moral heritage of the second World War. Since the first adoption of the Universal Declaration of Human Rights in 1948, we have witnessed a revolution in the dynamic of the relationship between states and individuals around the world. The doctrine of human rights has imposed substantial constraints on how states can legitimately treat the people subject to their authority and sovereignty. These norms and constraints have been reflected in numerous international, regional and national legal instruments. They are enforced and monitored through a variety of disciplinary and regulatory mechanisms that have been evolved in the past century around the globe.

Although the idea of human rights has had a strong presence in the international political discourse for the past seventy years, there has been hardly any consensus among political theorists on how to theorize and explain the concept or the content of human right norms. Generally speaking, human rights refer to a set of internationally recognized norms of conduct that are supposed to be observed by states in treating their own people, and any violations of these norms by any state may justify some types of punitive or cautionary actions by outside agents and other states.

The philosophical question of, "What are human rights?" usually asks for more than a description of the practice. This simple question can lead to more complex inquiries about the nature of human right norms, including the following questions: what kind of concepts or objects are human rights, what is the content or scope of human rights, under what conditions one can reasonably extend or amend the list of human rights, or on what normative ground human right norms are justified. Moreover, human rights are generally considered to be "universal" and "action-guiding", so one can also ask in what sense the norms of human rights are universal and how these principles could be action-guiding.

The "core" documents of international human rights law consist of several legal instruments that have been developed throughout the twentieth century. The oldest document is The Universal Declaration of Human Rights ("UDHR"). Other than the UDHR, there are two main international covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both adopted in 1968 and entered into force in 1976). In addition to the main two conventions, there are at least five more conventions including the Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1969), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981), the United Nations Convention Against Torture (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), and the Convention on the Rights of Persons with Disabilities (CRPD, 2008). While human rights conventions are legally binding on the signatories, there are other human rights treaties that are not legally binding, including human rights declarations. Examples are the UDHR, the UN Declaration on the Right to Development

(1986), the UN Declaration on the Rights of Indigenous Peoples (2007), and the UN Declaration on Sexual Orientation and Gender Identity (2008).

The rapid development of these new international instruments demonstrates that the content of human rights has constantly evolved and expanded during the last century. To adopt Beitz's phrase, the practice of human rights is an "emergent" political practice (Beitz, 2009, 9). It is a legal and political practice that most of its main elements are open to new extensions and amendments. This feature of the universal doctrine, in turn, invites the question of whether we can find a methodic approach and a normative framework for future extensions and revisions of the norms of human rights.

This research project started with the simple question of how to judge the merit of the claim that minority rights are or should be a part of human rights norms. But what are minority rights and how are the two sets of rights connected to each other?

The human rights regime is not the only normative doctrine that calls for regulation of the conduct of modern states toward the individuals subject to the state's authority. During the last fifty years, the practice of minority rights has put a new set of constraints on the arbitrary use of power by sovereign states toward individuals belonging to ethnic, linguistic and cultural minorities. Starting in the 1970s and the 1980s, many ethnic minorities, scholars and minority rights activists started to contest the traditional relationship between states and ethnocultural minorities. Since then, the old models of assimilation policies have been considerably transformed into new forms of accommodation and recognition of ethnocultural diversity. Several national institutions, international organizations, and non-governmental organizations are now promoting new

models of multicultural citizenship by supporting cultural diversity, promotion of language rights and recognition of territorial autonomy for homeland minorities. The practice of minority rights has evolved on several fronts including the development of regional and international minority norms and the adoption of multicultural policies in many nation states. At the national level, the majority of liberal democracies in the West have replaced the "melting pot" model, which was based on the old models of assimilation and homogenization, with new locally-designed multicultural policies towards their minorities. At the regional and international level, new norms of minority protection have been developed. These instruments include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992, the European Charter for Regional and Minority Language in 1992, the Framework Convention for the Protection of National Minorities in European Union in 1995, and the UN Declaration on the Rights of Indigenous Peoples in 2007.

However, the practice of minority rights is not as mature nor as widely recognized as human rights both in theory and in practice. While the human rights standards almost have a universal recognition within the international community, backed by several monitoring mechanisms and supported by an array of normative theories, there has been very few important advancements in codifying and theorizing the norms of minority rights since 1995. The popularity of multicultural policies is mostly limited to Western democracies. There is almost no interest in localizing the norms of minority rights in many parts of Asia, the Middle East and Africa. As commonly known, recently in several countries in Europe, the optimism about multicultural policies has been replaced with a broad sense of insecurity about the issues of immigration, diversity and integration.

In addition, there are some confusions in the available theories of minority rights. While many liberal multiculturalists, including Raz and Kymlicka, argue for minority rights as a requirement for liberal autonomy and equality in a culturally diverse society (Raz 1994 and Kymlicka 1995), some others in the liberal camp criticize the way liberal multiculturalists treat cultures as "homogenous and monochromic wholes," (Fraser, 2001) and some scholars, such as Philips, Fraser and Benhabib, warn that this conception of culture could dangerously increase "cultural essentialism" in the society (Benhabib 2002 and Phillips 2007). On another front, communitarian proponents of multiculturalism, including Charles Taylor, generally define minority rights as a communitarian criticism of liberal individualism (Taylor, 1992). In contrast, some liberal critics, such as Brian Barry, condemn the recognition of minority rights altogether by claiming that these policies encourage illiberal practices and undermine liberal values (Barry 2000). These practical and the theoretical problems are among the reasons that the whole project of multiculturalism, as Kymlicka describes it, seems to be "full of conceptual confusions, moral dilemmas, unintended consequences, legal inconsistencies, and political manipulation." (Kymlicka 2009, 8)

Going back to the question of this research, one of the main challenges of the available theories of minority rights is that they are unable to provide a convincing account of how minority rights can fit within the normative framework of human rights. They are not very successful in developing a universal theory of multiculturalism to extend the norms of human rights to protect the claims of historically subordinated national groups. These claims encompass rights such as the rights protection of a minority's cultural and

language rights, the right to political representation, land claims, and some forms of internal legal or political autonomy.

There is little or no link between the available theories of human rights and theories of minority rights. Contrary to the apparent similarity and overlap between the two disciplines, political theorists in each field usually pay little attention to the implications that their theories have for the other field. This disconnection might not be entirely surprising, as there are some significant dissimilarities between the two regimes of rights. Unlike the theories of human rights that simply take individuals as the one and only type of right holder, theories of minority rights generally have to identify a variety of different rights attached to dissimilar types of right holders, such as immigrants, refugees, national minorities and indigenous peoples. However, this should not distract us from the important conceptual features that the two regimes of rights have in common or to disregard the fact that the theoretical advancements in each field can significantly influence the other one.

The question that I will explore in this research dissertation is whether one can defend the rights of homeland minorities as a progressive extension of the existing norms of human rights. This question calls for several deeper inquiries about the nature, the function and the underlying justifications for both human rights and minority rights. In particular, this research project will examine the following issues:

(a) on what normative grounds the available norms of human rights and minority rights are justified;

(b) if there is any methodic way to use the normative logic of human rights to support substantial forms of minority claims, such as the right to self-determination;

(c) whether human rights can take the form of group rights; and

(d) whether there is any non-sectarian basis for justifying the minority norms, which can be acceptable from both liberal and non-liberal perspectives.

Answering these questions demands a critical evaluation of some of the available theories of minority rights including the theories that I call the dignitarian approach and the political approach. This inquiry also requires a thorough review of the existing theories of human rights, including theories such as naturalistic accounts (e.g. Griffin 2009), agreement accounts (e.g. Ignatieff 2001) and political accounts (e.g. Beitz 2009). In the following chapters, I will explore the underlying normative structure of the theories of human rights to identify the required criteria for expanding the scope and the content of the universal doctrine. The next task, then, would be to determine whether any understanding of minority rights could be consistent with or required by any of these normative structures.

In particular, I will defend a version of the Beitz's political theory of human rights, which I call the fiduciary theory, and demonstrate that both the digintarian and the political understandings of minority rights meet the required normative criteria under the fiduciary duty. Consequently, it will be argued that some forms of minority rights fit well within the normative framework of human rights.

This research project has some implications for both theories of minority rights and human rights. On the one hand, the research shows that most elaborated conceptions of minority rights are disconnected from the broader doctrine of human rights, while those theories that are connected have not been very successful in supporting the substantive claims of homeland minorities. On the other hand, this project clarifies some of the ambiguities implicit within the political theory of human rights, especially its inability to provide principled guidelines for substantive evaluation and revision of the scope and the content of human rights. It will be argued that the fiduciary theory of human rights not only provides a more substantial normative ground for explaining the function and the content of human rights, it will also more effectively guide us through expanding and amending the universal norms of human rights. In another word, this research project will employ the topic of minority rights to shed light on deficiencies of the existing political theories of human rights; at the same time, it uses the political theory to shed light on how existing theories of minority rights could be improved and amended. The inquiry will ultimately clarify how one can go about defending the the claim that minority rights should be a part of human rights norms.

Prior to providing a summary of the upcoming chapters, I want to make a brief note on the methodology of this research project.

One can think of two common ways of engaging with normative political discussion concerning the issues of human rights and minority rights. One is what I call "armchair speculation" about how to make inferences from some general moral norms to create and justify an *ideal* theory of human rights with no or little attempt to make sense of the

underlying normativity of *actual* practice of international human rights law. The second approach is to focus mainly on a *description* of the actual practice without providing any meaningful *prescriptive* guideline on how to judge and normatively evaluate the actual practice of human rights.

Some philosophers who take the former approach make assumptions about the nature of humanity, ethnocultural groups or minorities independently of their embodiment in practice; and, then, they try to deduce from a set of higher level moral principles what rights individuals or minorities possess. I think this approach is unhelpful and potentially misleading because it disconnects us from the historical context and ongoing development of the international doctrine and practice.

The latter approach, on the other hand, is mostly void of substantive *normative* analysis of the doctrine. It solely describes what human rights *are* - and not what they *should* be - by restating what is included under the existing international human rights law documents. From the perspective of normative political theory, the main problem with this approach is that it lacks the capacity to provide us with any insight for future revision or expansion of the content or scope of the doctrine. This approach is silent on questions such as whether minority rights *should* be considered as part of universal human rights norms and how to judge the merit of similar claims.

My methodology in this dissertation will be different from both of these approaches. I am interested in the relationship between the actual practice and prescriptive theories. In my view, a more helpful way to practice normative political theory is to start with considering some actual examples of human rights and minority rights claims made by

individuals and groups around the world; and then evaluating these claims to determine the nature of the rights and how specifically these claims and rights relate to more fundamental moral and normative principles, such as equality and justice.

As a result, I will critically review the available theories of human rights and minority rights by examining two competencies of each theory: (1) the degree to which they can make sense of the function and the underlying rationale of the actual practice of international human rights and minority rights around the world; and (2) the capacity of each theory to provide meaningful prescriptive guidelines in revising and evaluating the content of the international doctrine.

The thesis consists of four main sections. The aim of Chapter Two is to provide a historical review of the existing international legal and political mechanisms for protection of ethnocultural minorities. It will identify some of the complexities and challenges in promotion of minority rights as part of the human rights agenda. It will start with a history of the evolution of minority rights from the League of Nations in the beginning of the twentieth century to the recent declaration on the rights of Indigenous Peoples.

Further, in Chapter Two, we distinguish among different types of ethnocultural minorities, including homeland minorities and immigrants. The corresponding rights of each group recognized under the main international and regional legal documents will be discussed, including the norms under the ICCPR and the European Framework Convention for the Protection of National Minorities.

In addition, we will specifically examine the distinction between two types of homeland minorities – indigenous peoples and national minorities – and their entitlements under international laws. The distinction has had some adverse implications for protection of minorities around the world. These implications will be further considered in the case of homeland minorities in Israel.

Chapter Three provides a critical review of the existing normative theories of minority rights by distinguishing between two major ways of thinking about the norms of minority protection: the dignitarian approach and the political approach. Each of these views has a different approach in conceptualizing and defending the norms of minority protection. As a consequence, the two approaches diverge in completely different directions in terms of (1) explaining the content of the minority norms, (2) identifying the appropriate minority groups as the right holders, and (3) describing the relationship between minority rights and human rights regimes.

According to the dignitarian theories, the protection of cultural and linguistic rights of minorities are necessary for promotion of autonomy, identity or dignity of the individual members of the minority groups. The political theories, on the other hand, defend minority rights as the appropriate remedies for the wrongs produced by the unfair distribution of sovereignty and the assimilation policies toward minority groups by the modern nation-states.

I will explain that neither of these theories are successful in providing a normative account that achieves both of the following goals: (a) justifying a substantive and group-differentiated set of standards for the protection of rights of homeland minorities,

particularly in regard to right of self determination; and (b) explaining the normative relationship between minority rights and theories of human rights.

The dignitarian account misidentifies the content of minority rights and lacks the capacity to distinguish between different groups of minorities and their respective rights. The political approach, however, is more responsive to the normative distinction between homeland minorities and immigrants as the right holders. It also provides a more refined explanation of the content of minority rights and its historical context. Unlike the dignitarian view, the political account is theoretically capable of developing group-specific norms; it is also more resourceful in justifying and addressing collective demands of minorities, including the right to some form of territorial sovereignty. The problem with the political account is that it disconnects the project of minority rights from the larger doctrine of human rights. It leaves it unclear at best why minority rights are to be considered as a part of a human rights regime. It will be explained that the available theories have not been developed sufficiently to provide a persuasive account of the existing normative connection between the two regimes of rights.

Chapter Four focuses on the recent normative justifications for human rights in the literature. The Chapter starts with preliminary notes on cultural relativism and the differences between the major international covenants on human rights. Following Charles Beitz, I will examine three competing branches of human rights theories: naturalistic theories, agreement theories and political theories. In each section, the theoretical strength and weaknesses of each view will be assessed. The limits of the

agreement and naturalistic theories have already been widely discussed in the literature[1] and my discussion in this part of the chapter will largely draw upon these existing discussions.

It will be argued that, in contrast to other theories of human rights, the political theory, as developed in the works of Rawls, Raz and Beitz, is more capable of justifying the actual political practice of human rights and more successful in capturing the normativity of the universal doctrine. The political theory makes an important distinction between the function of human rights and its content. The distinction allows the account to avoid some of the main objections faced by other theories of human rights.

Inspired by the works of Beitz, the final part of Chapter Four goes beyond the existing debate by developing a refined version of the political theory, which I will call the fiduciary theory. It will be explained that the fiduciary theory provides a better normative framework for understanding the function and the content of the international doctrine. It also delivers a more robust normative structure to defend the cultural rights of homeland minorities as part of the international standards of human rights.

Finally, Chapter Five revisits the core question of this dissertation. It will explain why we can employ the normative logic behind the protection of human rights to defend the cultural rights of homeland minorities. This chapter introduces the normative test for reviewing and amending the content of human rights under the fiduciary theory. It will

[1] See: Beitz, C.R. (2009) *The idea of human rights*. New York: Oxford University Press; Scanlon, T. (2014) 'Human Rights as a Neutral Concern', in *The difficulty of tolerance: Essays in political philosophy*. Cambridge: Cambridge University Press, pp. 113–123; Okin, S.M. (1999) *Is Multiculturalism bad for women?* Edited by Joshua Cohen and Matthew Howard. Princeton, NJ, United States: Princeton University Press; Cohen, J. (2004) 'Minimalism about human rights: The most we can hope for?', *Journal of Political Philosophy*, 12(2), pp. 190–213.

argue that we have a strong case for claiming that the available theories of minority rights and some of the suggested norms of minority protection fit conveniently into the larger framework of the international human rights discourse.

The proposed approach also yields constructive answers to some old questions in the field, including questions such as whether group rights can be incorporated within the norms of human rights or whether there is a non-sectarian basis for justifying the minority norms acceptable from a variety of moral perspectives. Based on a multi-factor approach, an argument will be made for expanding the category of indigenous peoples for protection of other types of historically disadvantaged minorities. I will show that my proposed account provides compelling answers to these familiar problems and creates a normative platform for a new understanding of multicultural citizenship and dispersed sovereignty.

Chapter 2

Legal and Political Mechanisms for Protection of Ethnocultural Minorities

The aim of this chapter is to provide a critical review of the existing international legal mechanism for protection of "homeland minorities". It will identify some of the complexities and challenges in promotion of minority rights as part of human rights agenda. In particular, the distinction between indigenous peoples and national minorities under international law and some of its adverse implications will be discussed. Finally, it will provide an explanation of how the adoption of a more robust protection for homeland minorities by the UN would usher a new model of multicultural citizenship based on redistribution of state power and dispersed sovereignty.

1. Minority Rights from the League of Nations to the United Nations

The idea of creating an international mechanism to protect the rights of minorities precedes the creation of the United Nations, dating back to the formation of the League of Nations in 1919. Following the First World War, Europe experienced extensive changes to its borders, which consequently created a series of new ethnic minorities within the new European boundaries. In order to prevent another international conflict, the Allies agreed to respect and protect certain minority rights through adopting multilateral minority treaties monitored by the League of Nations.

The protection scheme, however, was not universal. The application of the special provisions was mostly limited to minorities in the defeated countries, mainly in Central and Eastern Europe. Even within those countries some minorities (e.g., Kurds in Turkey) were not covered. The protection mechanism contained no universally articulated

principle that could be applied to all ethnic minorities around the world. Clearly, the system was unsuccessful in achieving its goals and was a predominant factor in the outbreak of World War II.

It is important to realize that the motivation behind creation of inter-war minority protection by major powers was not purely out of universal appreciation of the inherent value of minority rights. Rather it was a pragmatic calculation for maintenance of peace and security in Europe. The fear was that the newly created state boundaries in conjunction with the dormant ethnic tensions could potentially set off a chain of violence leading to political instability in the region. This concern is still alive and has been one of the main pragmatic reasons for promotion of minority protection around the world. This is what Jacob Levy calls a "multiculturalism of fear." The idea is that minority protection is required not because it is inherently valuable, rather as an important tool in mitigating "dangers of violence, cruelty, and political humiliation [that] so often accompany ethnic pluralism and ethnic politics." (Levy 2000, 12)

The concern about escalation of ethnic violence was one of the reasons behind the shift from minority protection to human rights protection after World War II. The negative experience of the League of Nations was one reason that post-war international law took a passive stance towards the protection of minorities. The United Nations introduced the regime of individual human rights as a substitute for a minority rights system. In fact, the *United Nations Declaration of Human Rights* (*UNDHR*) does not contain even a single reference to the protection of minorities. The early debates on the draft of the Declaration reveal that many countries, including the United States, argued against the inclusion of

provisions regarding minority rights.[2] The hope was that respecting basic individual rights could sufficiently protect the interests of the members of minority groups.

However, the development of modern minority protection in international law was not merely out of a pragmatic consideration to avoid ethnic conflict. It has been widely acknowledged that the protection and accommodation of minorities are part of the protection of human rights. It is the key to achieving full and effective equality for all citizens within a multi-ethnic state. According to liberal multiculturalists, recognition of the rights of ethnic minorities is not only consistent with individual rights and freedoms, it is in fact required by the very principles of egalitarian justice. (Norman, 2006 and Kymlicka 1991)

Over the past fifty years, there has been a strong trend towards recognition of cultural minorities both at the international level and the domestic level. Since 1966, the UN has gradually developed a set of norms and mechanisms with regard to minorities, including the 1992 UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (hereinafter "*UN Minority Rights Declaration*"). Domestically (and particularly within Western democracies), there has been a clear shift toward promoting domestic legal and political frameworks to guarantee a degree of territorial autonomy along with some form of official language status within a federal or a quasi-federal system. The trend is visible for homeland minorities such as the Québécois in Canada, Scots in the United Kingdom, Catalans in Spain, Flemish in Belgium, Sami in Norway, and Swedes in Finland.

[2] See: H.H. Carter, 'Report on Draft Declaration of Human Rights up to the 23rd November – Articles 1 to 22, inclusive,' 23 Nov. 1948, file 5475-DM-1-40, vol. 3699, RG 25, NA.

It is important to bear in mind that, even today, the political discourse of multiculturalism is dominated by two main concerns: there is a right-based concern about the protection of minorities as a universal value and as a part of a human rights regime; and there is a pragmatic concern about proliferation of ethnic conflict and security threat to the integrity of nation states. Policies justified out of these two concerns are not always consistent. On the one hand, states are reluctant to implement policies conferring rights to minority groups when these policies could lead to political instability and conflict. On the other hand, many advocates argue that the protection of cultural minorities can be a source of equality and enrichment as opposed to a source of division and conflict. The next parts will demonstrate how the issue of security plays an important role in motivating—and sometimes crippling—the development of international minority protection.

2. Defining Minorities

The focus of this research project is the rights of *homeland minorities* rather than other forms of ethnocultural groups such as immigrants or religious minorities. Generally speaking, homeland minorities are culturally distinct sub-state groups, who self-identify themselves as a distinct nation or people, and have a close cultural affinity with a particular territory or homeland. In this sense, the category of homeland minorities includes both national minorities and indigenous peoples.

There is no universally accepted definition of minority or indigenous groups. Although international laws and declarations mainly refer to minorities as "national or ethnic,

cultural, religious and linguistic" groups,[3] none of the international bodies of human rights have defined the constituting elements of being a minority. Part of the difficulty is that there are various types of minorities throughout the world. Some are large and historic, while some others are small and relatively recent. Some have a strong sense of collective identity, while some others have no distinct language or religion. Some are concentrated in well-defined territories, while some others are scattered throughout different parts of a region. Many have warned that formulating a precise definition could potentially deny certain rights to certain groups of minorities in some contexts.

According to the UN guidance for implementation of minority rights, the existence of a minority is a question of fact in each case. However, there are both objective factors (e.g., the size of the group; its density; and whether the group members share ethnicity, language or religion) and subjective factors (e.g., whether the group identifies itself as a minority) to be considered.[4]

Defining the constituting elements of a minority group might appear to be a dull and unimportant task superficially, but it is crucial for our inquiry for two reasons: to have an objective measure to acknowledge the existence of minority groups and to be able distinguish between the normative entitlement of different minorities.

Firstly, no minority groups will be accorded any rights if states deny their existence by refusing to recognize their sub-state groups as "minorities". That is, recognition of a

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[3] Article 27, The United Nations General Assembly. 1966. "International Covenant on Civil and Political Rights." Treaty Series 999 (December): 171.

[4] United Nations, *Minority Rights: International Standards and Guidance for Implementation*. New York: 2010, at 2.

group as a minority is a precondition for recognition of the rights of its members. Historically, due to fear of ethnic politics, many state governments have refused to acknowledge the existence of minority groups, including indigenous people, within their borders. Consider the statement of the representative of Australia during the debate on Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR): "there were, of course the Aborigines, but they had no separate competing culture of their own, for as a group they had only reached the level of food gatherers." (E/CN.4/ SR.369) [5]

Today, countries such as China, India, Turkey and, even, France insist that there is no group characterized as indigenous people or national minorities within their territories. The concern is that recognition of minorities could lead to separatist movements and threatens territorial and social cohesion.

The second reason for importance of defining the basic elements of being a minority is normative. One can distinguish among different types of ethnocultural groups, such as immigrants, religious minorities, national minorities and indigenous peoples. The nature of a group and its vulnerabilities to some extent determine what type of rights the members individually or collectively are entitled to.

Kymlicka, for instance, argues that self-determination and the strongest forms of accommodation must be granted to national minorities and indigenous peoples because they have been involuntarily incorporated into their current state as a result of colonization or conquest (Kymlicka, 1995). In contrast, immigrant minorities are entitled only to the weaker form of protection, such as a fairer terms of integration through

[5] UN Documents E/CN.4/ SR.369 (1953).

temporary measures, because migration was mostly considered to be the result of individual choice and a sign of consent to integrate into the new society.

One of the main criticisms to the current regime of minority protection is that international laws either do not distinguish among different types of minorities, or when they do, as in the case of indigenous people and national minorities, they make the distinction on some unjustifiable basis. The final sections of this chapter will further discuss the group-differentiated approach to minority rights and its normative implication for different minority groups.

3. Two Types of Minority Protection

One can identify two types of minority protections available under current international laws:

a. Prohibition against discrimination: Modern international laws mainly formulate protection of minorities as a part of the human rights protection. Most of legal instruments concerning minorities reiterate the human rights principles of equality and non-discrimination in the context of state-minority relationship. They include equality before the law and the rights not to be discriminated based on race, language and religion. These rights are particularly important for individuals belonging to minorities, because as a member of a minority group one is more likely to be the target of discrimination and marginalization in a multi-ethnic society. The 1992 *UN Minority Rights Declaration* is the main example of this category.

The focus of this type of protection is principally on individual rights, and the rights are mainly formulated in a negative language. They are mainly civil and political rights of

individual members of minority groups that "shall not be denied" or "not to be interfered with". In this sense, they are not collective rights and cannot be exercised by a minority as a group.

b. Positive measures and group rights: the mere reliance on the principle of non-discrimination by itself may not be enough to guarantee equal citizenship for minorities and to ensure that they are able to preserve their cultural particularities. Some international laws, including the recent *UN Declaration on Rights of Indigenous Peoples* ("*UNDRIP*"), require states to take positive steps, or employ special measures to protect their minorities. These steps could range from granting the right to individuals to use minority language in public institutions, to secure a measure of internal legal and political autonomy. The aim of these measures is to shield minorities against forced assimilation within the majority culture by providing them with appropriate legal and political tools to protect their identities.

While the first type of protection almost always is formulated in terms of individual rights, positive measures in some contexts take the format of group rights.

It is critical not to conflate individual rights with collective rights. Many individual rights in fact have collective dimensions: freedom of religion or freedom of association would enable individuals to form diverse groups and exercise their rights collectively. However, these rights are not collective rights. Freedom of religion and freedom of association are rights borne by individuals rather than rights that belong to a group *qua* group. Not every right that is associated with group membership is a collective right. A collective right is a right borne by individuals jointly and not severally. While the right of individuals to join

a trade union, for example, is held in an individual capacity, the right to political self-determination is a right held jointly by a group of people and it is not reducible to that of individuals.

A complex dynamic exists between individual and group rights. In some circumstances, group rights are viewed as preconditions for guaranteeing individual equality. As an example, the right of a person belonging to a minority group to learn about their culture and to receive education in their mother tongue cannot be fully realized, unless the minority as a group gains the opportunity to locally control educational institutions to some degrees. The freedom of expression is another example. When a minority group is not allowed to create, control or gain access to the press and mass media, individual members of the group cannot fully enjoy the benefits of freedom of expression.[6]

Traditionally, states and the intentional organizations have been reluctant to confer collective rights to minority groups. One reason was the fear that granting unqualified rights to groups can result in the violation of the individual rights of the members, particularly in the case of women rights and in situations involving minorities within a minority.[7] The relationship between individual and collective rights will be explained further in Chapter Five.

4. Minority Rights Protection under Existing International Laws

4.1. The *ICCPR*

[6] For more explanation on the relationship between individual and collective rights, see: Jabareen, Y.T. (2008) 'Toward participatory equality: Protecting minority rights under international law', *Israel Law Review*, 41(03), pp. 635–676, at 656.
[7] For more discussion see Okin, S.M. (1999) *Is Multiculturalism bad for women?* Edited by Joshua Cohen and Matthew Howard. Princeton, NJ, United States: Princeton University Press.

Adopted by the UN in 1966, the *International Covenant on Civil and Political Rights* ("*ICCPR*") contains two important articles, article 1 and Article 27, which have been repeatedly invoked by members of homeland minorities.

4.1.1. Article 27

This article came into force in 1976. Article 27 of the *ICCPR* is perhaps the most significant international provision on minority rights. It is the first human rights treaty that includes a specific provision on the rights of minorities and it is the only international instrument concerning minorities that is legally binding on the member states.

The article reads:

> In those States in which ethnic, religious or linguistic 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.

Article 27 is skillfully worded to render the content and the scope of the right strategically ambiguous. It provides no definition for minorities. The scope of the provision is very wide covering all types of ethnic, religious and linguistic minorities. It is also not clear whether the provision requires any positive measures to be taken by states or whether it guarantees any collective rights beyond the generic protection of individual members against discrimination. Its content is framed in individualistic terms, primarily addressing the negative obligation of states not to deny members of minorities

the right to practice their culture, religion and language. The language of the provision simply reaffirms the content of the main provisions of *International Convention on the Elimination of All Forms of Racial Discrimination* ("*CERD*") with regard to minorities.

Despite this language, in 1994, the Human Rights Committee in its General Comment provided a new interpretation of Article 27, which includes some positive obligations for states. The committee recognized that the enjoyment of rights under Article 27 may require adopting "positive legal measures" to ensure the effective participation of members of minority communities in decisions affecting them.[8]

The Committee has noted that, particularly with respect to indigenous peoples, the preservation of their use of land and resources could be an essential part of minority protection. For example, in *Ivan Kitok v. Sweden*,[9] the Committee held that where economic activity and way of life (reindeer husbandry of the Sami culture in this case) is "an essential element in the culture of an ethnic community", the activity falls under the protection of Article 27. There are several other decisions under the Optional Protocol to Article 27. In *Lubicon Lake Band v. Canada*,[10] the Committee affirmed that state developments that threaten the way of life and culture of an indigenous group could constitute a violation of Article 27. However, the right to self-determination was rejected

[8] UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.
[9] *Ivan Kitok v Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988).
[10] *Lubicon Lake Band v Canada*, Communication No. 167/1984, UN Doc. Supp. No. 40 (A/45/40) at 1 (1990).

by the Committee as inadmissible under this article in the case of *Mikmaq Tribal Society v. Canada*.[11]

From these decisions, it is clear that Article 27 has been invoked mostly by the Committee in protection of indigenous groups, and not in favour of other types of homeland minorities. Even in the context of indigenous peoples, the enforcement of Article 27 fell short of addressing some of their significant demands, such as securing a degree of local or regional autonomy, the right to use a minority language in governmental institutions, and the prohibition on settlement policies designed to encourage the majority to migrate to minorities' historical homelands.

4.1.2. Article 1

Article 1 of the *ICCPR* recognizes the right of self-determination, i.e. the right of "all peoples" to "freely determine their political status". As the Human Rights Committee has expressly declared in its General Comment No. 12, the right of self-determination is of particular importance because its realization is a precondition for the promotion of other rights in the Covenants. Article 1 is a unique provision in many ways: in both Covenants, *ICCPR* and *ICESCR*, the right to self-determination is located apart from, and before all, other rights and, unlike most provisions, it is not formulated as an individual right of "every human being", rather it is construed as a collective right of "all peoples".

Despite its language, the right to self-determination is extremely unclear and controversial with regard to its legal content. The Committee has not clarified the concept

[11] *Mikmaq Tribal Society v. Canada*, Communication No. R 19/78 (1980), Views of 20 July 1984.

of "self-determination", nor has it provided a clear definition of what constitutes "peoples" under this article.

There is an international consensus that the right to self-determination in article 1 has a very restricted scope and is mainly limited to peoples who were under oversees colonial oppression. Since Article 1 could be used as a ground for claiming full-scale political independence or secession, the Committee has always been cautious in accepting complaints invoking violations of the right to self-determination under the Optional Protocol to the *ICCPR*. In *Lubicon Lake Band*, the Committee made it clear that (a) individuals cannot claim violation under Article 1 and (b) the Committee will not determine which cultural groups fall under the concept of "peoples".[12]

The position of the Committee has been reaffirmed in subsequent cases. These cases confirm that Article 1 is mainly restricted to peoples who have been subject to external colonization (also known as "saltwater colonization"). It does not include internal minorities within a territorially contiguous state. The narrow interpretation of article 1 has been echoed in the Supreme Court of Canada decision in *Reference re Secession of Quebec*:

> "The international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all

[12] *Lubicon Lake*, *supra* note 10, at para 32.1.

three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."[13]

4.2. UN Minority Rights Declaration

Following the fall of communism, the General Assembly adopted a *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* in 1992 in order to respond to potential ethnic conflict in Eastern Europe. The mandate was "to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity."[14] The instrument was a political declaration and is not legally binding.

Similar to Article 27 of the *ICCPR*, the Declaration frames the rights only in individualistic terms. Moreover, the Declaration is full of ambiguities. It calls for states to "adopt appropriate legislative and other measures" without clarifying what sort of positive measures are required to be implemented and without identifying the precise obligations of the state members.

4.3. Minority Rights in Europe

The experience of Europe regarding the codification of minority rights began with the collapse of the Soviet Union in 1989. In the early 1990s, a number of ethnic conflicts broke out in Yugoslavia. Faced with the threat of increasing ethnic violence, the EU

[13] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 128.
[14] Article 1, UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135.

member states decided to set up a regional mechanism to monitor the treatment of minorities in post-communist Europe. Due to the unpleasant experience of Europe with ethnic conflict, the predominant view was that protection policies are legitimate so far as they have the capacity to promote political stability in the region. The Organization for Security and Cooperation in Europe (OSCE) created the position of the High Commissioner on National Minorities specifically to formulate new standards in collaboration with the Council of Europe. In fact, compliance with these standards became a precondition for joining the European Union and the NATO.

The Council of Europe's 1995 *Framework Convention for the Protection of National Minorities* ("*Framework*") is perhaps the most detailed and effective legal instrument on the rights of minorities at the international level. Similar to the 1992 *UN Minority Rights Declaration* and Article 27 of the *ICCPR*, the *Framework*'s provisions are mainly aimed at protecting civil and political rights of individual members of minority groups.

However, instead of adopting a general format of the *UN Minority Rights Declaration*, the Council took steps to narrow down the scope of the protection and tailored the application of the provisions to the situation of "national minorities." It also specified certain positive measures and obligations for the EU member states, including the right of individuals belonging to national minorities to learn their minority language, to use their languages in public and private, and to set up their own private educational establishments.

Although the codification of minority rights by the European institutions entailed more positive and detailed requirements than that of the UN, the provisions remain silent on more challenging issues, such as granting minorities the right to self-determination.

4.4. The UN Declaration on the Rights of Indigenous Peoples

Another paradigmatic example of the codification of minority rights is the recent *UN Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"). It was adopted in 2007 following more than twenty years of negotiations. A large majority of states voted in favour of the Declaration, while the United States, Canada, Australia and New Zealand initially voted against it and subsequently adopted the Declaration on qualified terms.

Unlike the *UN Minority Rights Declaration* and the European *Framework*, the *UNDRIP* is largely focused on collective rights. It clearly addresses the right of indigenous peoples to self-determination and autonomy in matters relating to their internal and local affairs (Article 3); the right to use and control the land and resources that they have traditionally owned (Article 26); the right to develop and maintain their institutional structures, including judicial systems (Article 33); and the rights to maintain and develop their distinct cultural identity, their spirituality, their language and their traditional way of life (Article 12 and Article 36).

Perhaps one of the most significant contributions of the *UNDRIP* to international laws is that it addresses not only the right of minority citizens within a state, but also the structure of the state itself. It focuses on the distribution of sovereign power over citizens within different territories of a single state and requires re-distribution of sovereignty in

order to rectify historical injustice. It is an affirmation of a new model of multiculturalism that involves pluralism of state and dispersed sovereignty.

While the *UNDRIP* is not a legally binding instrument under international laws, it reflects the commitment of the member states to respect the idea that indigenous peoples have a right to internal self-determination. The declaration demonstrates that there is no inherent reason not to accept the concept of collective rights to internal self-determination under international human rights law. In this sense, it has significant implications for the protection of other ethnocultural minority groups and further evolution of international law.

5. The Dichotomy of National Minorities and Indigenous Peoples

It has been acknowledged by many commentators in the field that indigenous peoples and national minorities, in a great number of cases, share similar concerns about their experience with regard to historical injustice, discrimination, cultural integrity, and their attachment to their historic land. According to Anaya, "indigenous and minority rights issues intersect substantially in related concerns of non-discrimination and cultural integrity" and their demands are justifiable under "common normative considerations" (Anaya 2004, 21). Nevertheless, there is a clear distinction between their entitlements under international laws. While indigenous peoples can enjoy from collective rights of self-determination, every other type of minority, including national minorities, are entitled only to individual rights of non-discrimination. In this section, some of the undesirable implications of this distinction will be discussed.

It is easy to distinguish indigenous peoples and national minorities in the Americas, as the former have been mostly colonized and settled by the Europeans, while the latter have come from Europe and later been incorporated into a larger state. For example, the Québécois in Canada falls under the category of national minority, while the Inuit are widely considered as indigenous peoples.

However, in many parts of the world, including Asia and Africa, it is not an easy task to draw the same type of distinction among minority groups. Most of the homeland minorities in Asia have not been the target of settlements by a distant colonial power and instead they have been incorporated into the neighbouring state. As a result, it is difficult to apply the Western categories of national minorities or indigenous peoples in the context of Asia or Africa to determine clearly which group truly qualifies as indigenous.

The lack of clear distinction between the minority groups has been used by countries such as China and India to deny the existence of indigenous populations within their borders. Since there are many groups in Asia and Africa who suffer from the same type of injustice and vulnerability as the New World indigenous peoples, the international organizations have consistently insisted on the global application of the concept of "indignity".

Another factor that has added to the confusion about the two categories is the sharp distinction between legal entitlements of national minorities and indigenous peoples. As previously discussed, the existing international norms treat national minorities and indigenous peoples as two categorically different types of minorities, entitled to two distinct forms of legal protection. In dealing with national minorities, the international

regime typically follows integrative strategies limiting their rights mainly to the principles of equality and non-discrimination. Indigenous groups, on the other hand, are often treated with accommodative approaches, allowing them to enjoy collective rights in order to preserve their distinct culture and public institutions.

The attempt to maintain such a rigid distinction has adverse implications in practice. It incentivizes national minorities to strategically redefine themselves as indigenous peoples because every right and privilege that is available under the rubric of "national minorities" is also available to indigenous peoples, but not the other way around. As Kymlicka explains, "the problem here is not simply that the category of indigenous peoples has grey areas and fuzzy boundaries…The problem, rather, is that too much depends on which side of the line groups fall on, and as a result, there is intense political pressure to change where the line is drawn." (Kymlicka 2011, 201) [15]

Unsurprisingly, since the adoption of the new regime of indigenous rights, many homeland minorities around the world have considered to identify or re-identify themselves as indigenous peoples. Examples include groups such as the Tibetans in China, the Palestinians in Israel, and the Roma in Europe. In what follows, two of these cases will be explained.

5.1. Homeland Minorities in Israel

Ethnic minorities in Israel, including Palestinians and the Bedouin Arabs in the Naqab, have increasingly attempted to reframe their struggles for equal citizenship to include

[15]For a detailed discussion, see: Kymlicka, W. (2009) *Multicultural Odysseys: Navigating the new international politics of diversity*. Oxford, United Kingdom: Oxford University Press.

collective rights of self-determination. In doing so, according to Jamal, the minorities are "refocusing their search for full citizenship in Israel by emphasizing the obligation of the state to recognize them as an indigenous [group]" (Jamal 2011, 5). Several Palestinian intellectuals have noted that Palestinian Arabs in Israel meet most, if not all, criteria of indignity, including priority in time; self-identification as indigenous; and experience of subjugation, marginalization, exclusion, and discrimination.[16]

The Naqab Bedouins are another homeland minority in Israel who originally had a nomadic desert-dwelling lifestyle, but their traditional way of life has been rapidly modified through the government settlement policies. Since the 1948 conflict, Bedouin Arabs have been the subject of military rule, land confiscation, and expulsion from their homelands. The UN human rights treaty bodies have repeatedly expressed deep concerns over "the discrimination faced by Bedouins" and the poor living conditions of the Bedouin Arabs who are "subjected on a regular basis to land confiscations, house demolitions, fines for building 'illegally,' destruction of agricultural fields and trees, and systematic harassment and persecution by the Green Patrol."[17]

Since the UN does not recognize any rights for national minorities in controlling settlement policies which affect them, both Palestinians and the Naqab Bedouins have recently engaged in relabeling themselves as indigenous population and demanded Israel to respect and fulfill their rights held under "international legal documents and principles concerning indigenous peoples." (Amara 2012, 186)

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[16] Jabareen, H. (2002) 'The Future of Arab Citizenship in Israel: Jewish- Zionist Time in a Place With No Palestinian Memory', in Levy, D. and Weiss, Y. (eds.) *Challenging ethnic citizenship: German and Israeli perspectives on immigration*. United States: Berghahn Books.

[17] Committee on Economic, Social and Cultural Rights, Concluding Observations: Israel, U.N. Doc. A/53/40 (1998) at para. 254.

6. Possible Solutions

As it was discussed above, the sharp distinction between legal entitlements of national minorities and indigenous peoples is dubious. Since the existing regime for protection of national minorities at the international level is insufficient for the actual accommodation of their rights, national minorities are often incentivized to strategically adopt the label of indigenous peoples, even when the label does not properly fit their identity.

There are several options in dealing with the problem of the dual minority regime. One approach is to continue with the existing system by restricting the right of self-determination only to indigenous peoples, and granting the rest of minorities the generic rights of non-discrimination under Article 27. Another option would be to adopt a separate international mechanism, parallel to the *UNDRIP*, that would develop targeted norms for national minorities. A third option would be rejecting the dichotomy of national minorities/indigenous peoples and extending the protections available for indigenous groups to include other types of homeland minorities.

One way to evaluate these solutions is to understand what type of normative justifications would entitle a group to more substantive collective rights. Extending greater protection to other homeland minorities requires similar normative grounds for justifications. From a moral perspective, if the available arguments for protection of indigenous peoples could be applied to situations of other types of minorities, the extension of the protection to those groups would be a valid and justifiable course of action.

One of the main underlying rationales for the moral entitlement of indigenous peoples to self-determination is expressed in the Preamble to the *UNDRIP*:

> Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.[18]

The main concern here is the historic injustice experienced by indigenous populations who used to be sovereign nations in control of their own political, economic and social institutions. They have suffered from a brutal and unsolicited assertion of sovereignty over their peoples, lands and resources by outside colonizers. The colonization process at the time was supported by international law. As Macklem put it, "International indigenous rights mitigate some of the adverse consequences of how international law validates morally suspect colonization projects that participated in the production of the existing disruption of sovereign power." (Macklem 2008b, 533)

One can find examples of many national minorities who have suffered from analogous historical injustice. Similar to indigenous peoples, Québécois, Catalans, Kurds, Palestinians and Tibetans are culturally distinct groups who were previously sovereign nations in their homelands, and yet they have been subjected to a morally suspect assertion of sovereignty and suppression of their culture and identity, not by a distant colonial power, but by a neighbouring power. In fact, international law has actively perpetuated this type of injustice by dramatic and unfair redistribution of sovereign power throughout the past two centuries. The classic example of such redistribution is redrawing

[18] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

sovereign boundaries in the Middle East after World War I by the Treaty of Lausanne, through which Kurds and Palestinians lost their entitlement to exercise sovereign authority over their homelands. As Macklem explains,

> International legal rules determine which collectivities are entitled to exercise sovereign authority and over which territory and people such authority operates. In doing so, international law effectively performs an ongoing distribution of sovereignty among certain collectivities throughout the world… minority rights serve as instruments that can mitigate injustices associated with the kinds of recalibrations of sovereign power embodied in the Treaty of Lausanne that international law treats as possessing international legal force. (Macklem 2008b, 532)

However, not all ethnocultural minorities have been under similar constraints and, consequently, are not entitled to the same norms and substantive rights. The subjugation of ethnic minorities by inside or outside powers and their vulnerabilities do not always raise similar normative considerations. Different minorities have different natures and needs, so the strength of their entitlements may vary.

One possible solution, suggested by various authors, is a multifactor extension of indigenous rights to other homeland minorities. I find this solution attractive, and indeed will conclude in chapter five that it is the appropriate solution, and one that fits with human rights. However, before we can properly evaluate this solution, we need first to examine in a more thorough way both the theories of minority rights (in chapter 3) and theories of human rights (in chapter 4).

Chapter 3

A Critical Review of Normative Theories of Minority Rights

My goal in this chapter is to examine two ways of conceptualizing and defending the norms of minority rights. These two ways of thinking about minority rights are, what I call, the dignitarian account and the political account. In a nutshell, the dignitarian theories attach universal value to promotion of culture and language as a means for protection of autonomy, identity or dignity of the members of the minority groups, while political theories explain minority rights mostly in terms of remedies for wrongs produced by the international laws and the assimilation policies toward ethno-cultural minorities by the modern nation-states. I will explain why neither of these theories provides a satisfactory theoretical framework for protection of minorities.

I will argue that the dignitarian understanding misidentifies the content of minority rights and lacks the capacity to distinguish between different groups of minorities and their corresponding rights. The political conception, on the other hand, provides a more appropriate account of the content of the norms and its historical context; however, it disconnects the project of minority rights from the larger doctrine of human rights and the existing international protection centered around human rights forums. It will be explained that the available theories have not been developed sufficiently to provide a persuasive account of the actual link between the two regimes of minority rights and human rights, particularly with regard to group entitlements including the right to self-determination.

1. The Dignitarian Account

What I call the dignitarian account encompasses a variety of different arguments for protection of the rights of minorities. These theories are not usually labeled under one category in the political or legal literature. I use the term "dignitarian" as an umbrella term for covering different lines of reasoning. They all share a basic assumption that access to one's own culture is a precondition for the sense of dignity and autonomy of individuals. The idea is that without a secure cultural context one cannot possibly realize one's capacity to live as a free and autonomous person.

Most of the dignitarian arguments have been developed by liberal theorists after the debate on minority rights reemerged in the 1990s at the forefront of international law in the post-Cold War era. Originally, the aim of many of these arguments was to illustrate that, unlike the common view of the time, cultural rights can be justified based on the liberal values. According to these theories, the post-Cold War surge in international minority protection was not a communitarian reaction of minorities to protect illiberal or non-liberal practices from the pervasive effects of Western liberal individualism; on the contrary, it was claimed that the rise of minority rights is not only consistent with the universal extension of human rights norms, but it is also required by the core liberal values, such as individual autonomy and freedom.

The dignitarian account includes many different arguments. One line of reasoning is what Joseph Raz has presented in his "Multiculturalism: a Liberal Perspective". He argues that the ability of an individual to choose her own preferred way of life among different options mainly depends on the individual's access to her own culture. It is only through

the lens of one's own culture that an individual can realize what options are available and what it means to choose among any of them. According to him, freedom requires "options that depend on rules that constitute those options…only through being socialized in a culture can one tap the options that give life a meaning. By and large, one's cultural membership determines the horizon of one's opportunities of which one may become, or (if one is older) what one might have been." (Raz 1994, 70-71)

Kymlicka has advanced a similar type of reasoning. He argues that meaningful choice among options presupposes a culture or what he calls a "context of choice". It is against this cultural context that individuals can cultivate their capacities for agency and autonomy. Accordingly, culture is what defines the boundaries of our world through which we find our available options and role models, and decide which one of them is worth following. By having access to a "societal culture", the individual members are provided with "meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life" (Kymlicka 1995, 76). As he explains, it is through a "rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their values" (Kymlicka 1995, 83). He also suggests that a secure cultural structure is a requirement for maintaining equal dignity in a culturally diverse society: "if a culture is not generally respected, then the dignity and self-respect of its members will also be threatened" (Kymlicka 1995, 89).

A similar account of dignitarian view focuses on the role of one's culture in facilitating a healthy social interaction with others as a necessary condition for exercising autonomy

and freedom of individuals. In his well-known article, "Politics of Recognition", Charles Taylor developed a communitarian version of the argument. He argues that culture of a community has an essential role in forming the identity of the community members, and, therefore, misrecognition of the culture of minorities by the larger society results in misrecognition of the identity of individual members. This misrecognition could damage self-respect and self-image of those who are identified as the members of those groups. Pointing to the situation of women, African American, and indigenous peoples, he claims that "misrecognition shows not just the lack of due respect, it can inflict its victims with crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need" (Taylor 1992, 26). On the liberal side, Tamir makes a similar point while narrowing down the scope of the argument to the national culture. She writes, "Membership in a nation is a constitutive factor of personal identity. The self-image of individuals is highly affected by the status of their national community" (Tamir 1993, 73).

Generally, the main thrust of these arguments is that individual dignity—including human flourishing, self-esteem, identity and autonomy of the individuals—is closely tied to recognition of one's culture. As a result, misrecognition could damage the ability of the individuals to pursue a meaningful and autonomous life.[19]

The dignitarian approach relies on the assumption that cultural, religious and linguistic affiliations are fundamental features that we all share as human beings. This explains why

[19] Some other arguments point to other roles of culture in facilitating social relation. Tamir and Miller, for example, explore the way national culture is the source of solidarity, trust and intergenerational bounds in a society. See Tamir, Y. (1993) *Liberal nationalism*. United States: Princeton University Press, p. 74; and Miller, D. (1995) *On nationality*. New York, NY: Oxford University Press, pp. 91, 92.

the dignitarian account comfortably fit into the larger doctrine of human rights. On this view, the international regime of minority protection is required as an extension of human rights regime in order to protect these fundamental features of humanity.

2. The Critique of the Dignitarian Approach

Although the dignitarian account has presented one of the most common arguments for protection of minority rights, it is not the most persuasive justification available in the literature.

A number of issues can be raised about the dignitarian understanding of minority rights:

(1) it misidentifies the content of the minority norms by failing to make clear distinctions between different types of minorities and their corresponding rights;

(2) it ignores the historical context within which the minority claims are being made; and

(3) it relies on the abstract and ambiguous concepts, such as dignity and autonomy, while making controversial assumptions about the role of culture in human life.

The following sections shall explain each of these points.

2.1. The Problem of Identifying the Content of the Norms and the Distinction between the Rights Holders

One can distinguish among different types of ethno-cultural minority groups around the world, including immigrants, religious minorities, national minorities and indigenous peoples. The nature of a group and its vulnerabilities to some extent determine what type of rights the members individually or collectively are entitled to. In many Western

democracies, the strongest modes of group rights (e.g., the right to self-administration and land claims) are only available to homeland minorities, including historic national minorities and indigenous peoples. In contrast, immigrants are usually considered to be entitled only to the softer forms of protection, such as a fair term of integration within the larger society.

This trend is visible in the case of many national minorities in the West: the status of indigenous peoples in North America, Quebec in Canada, Scotland in the United Kingdom are all examples of the contemporary pattern for accommodating homeland minorities. Through this pattern, homeland minorities have been offered some degree of territorial autonomy within the federal system along with some form of official language status. However, a similar protection has not been extended to immigrants because immigrants are mostly regarded as "voluntary economic migrants who chose to relinquish access to their native culture by migrating" (Song 2016).

One of the main criticisms of the dignitarian arguments for minority protection is that they do not have the capacity to distinguish among different types of minorities or provide a meaningful guideline about the content of the norms appropriate for different groups of right holders. Particularly, the account is unable to make sense of the current international trend in minority protection, which provides stronger forms of accommodation such as internal territorial autonomy to homeland minorities and weaker type of protection to other cultural groups.

The reason for the failure of the dignitarian account to make such a distinction is clear. From the standpoint of the arguments of dignity or autonomy, every single group of

ethnocultural minorities have a similar normative stance with regard to the claim to have access to "one's own culture." Benhabib clearly draws attention to this point when she writes, "if culture is valuable from the standpoint of political liberalism because it enables a meaningful range of choices in the conduct of our lives…then, there is no basis for the theorist to privilege national culture over immigrant ones, or the culture of religious groups over those of social movements" (Benhabib 2002, 66). While Benhabib herself is skeptical of the need to make any distinctions between minority groups, I will argue in the following chapter that such distinctions are normatively valid and important.

Additionally, it is far from clear how the dignitarian arguments would justify a set of standards comparable to the actual practice of minority protection in many Western democracies. It is unclear why the appeal to dignity and the necessity of access to one's culture require anything more than a minimal form of protection, such as the negative obligation of states not to deny members of minorities the right to enjoy their culture, to profess and practice their religion, or to use their own language. This minimal content is reflected in article 27 of *ICCPR*, which is basically an anti-discrimination provision. It simply reaffirms that members of minorities must be free to enjoy freedom of speech, association and religion, similar to all other citizens. According to many commentators, the minimal content of these norms provide insufficient protection for cultural minorities (Barany 2005, 192). The norms fall short of addressing significant demands of cultural minorities such as the right to use a minority language in governmental institutions, funding of a minority education system and media, a measure of local or regional autonomy, a guarantee of effective political representation, and the prohibition on

settlement policies designed to encourage the majority to migrate to minorities' historical homelands.

2.2. The Problem of Historical Context

The dignitarian account not only misidentifies the content of the rights, it also overlooks the important historical context of the minority claim-making. Throughout modern history many homeland minorities have suffered from severe assimilation process including unjust resettlement policies; bans of native language and religion; and brutal assertion of sovereignty over minority members, their lands and resources. The recent struggles of homeland minorities for recognition and cultural rights are taking place against this history of brutal and unsolicited process of integration of minority groups into the larger "national" culture.

To understand the historical context, one must consider the political process through which nation-states became the definitive political unit in the modern political history. During the last two centuries, the nation state model emerged in the West as the only political unit to replace all the previous forms of states including empires, colonies, theocracies, city-states, and feudal states. This process of *building* a "nation" had a tremendous effect on state-minority relations, from politics and economy to language and culture.

Through this process many countries around the world have diffused a single national identity within their territories during the 18th and 19th centuries. The process involved modernization at many levels, from industrialization and mass market economy to standard education in public schools and bureaucratic system of government. Some

scholars argue that nationalism, liberalism and industrialization in the West were mutually dependent in their development during the modern political history. A single national identity created a bigger market for an industrial economy and standard education enabled citizens from remote parts of the territory to more effectively engage in the marketplace. As Gellner notes, "the needs of an advanced industrial society encourage the development of a standard language and a standard high culture over a vast territory. In these highly mobile yet often anonymous societies, people need to be able to talk to people they do not see, and interact with people they barely know."(Gellner 1983, 168).

National identity and standardized education system are also consequential for creating a democratic political system, as they provide for greater solidarity and opportunity for all citizens from different social classes to participate in the public domain. As Miller and Canovan explain, a single national identity has in fact promoted social solidarity and, consequently, became essential for advancement of democracy and distributive justice in the West (Canovan 1996).[20]

However, nationalism influenced homeland minorities in a different and a more brutal way. To put it very briefly, it resulted in aggressive assimilation policies to homogenize different ethnic communities into a single national "melting pot". Diffusing a common national identity, or as Norman puts it *forging* a national identity (Norman 2006, 29), required the state to assimilate all national minorities within its borders into the

[20] For further discussions see Miller, David. *On Nationality*. New York, NY: Oxford University Press, 1995, pp. 50-80; and Canovan, Margaret. *Nationhood and Political Theory*. Cheltenham: Edward Elgar Publishing, 1996, Sec. 3 and 4.

mainstream culture of the majority. National minorities were mainly considered by the majority to be the competing candidates in the process of nation-building, because similar to the majority group, minorities had their own social and political structures and institutions operating in their own language. The project of *constructing* a national identity by the majority involved a project of *de-constructing* and destroying social and political structures of national minorities residing within the 'national' borders. This in turn has resulted in marginalization of the minority culture, language, and identity.

Modern states have used varieties of strategies in their assimilation polices; many of them were extremely severe, cruel, and discriminatory. Some examples are ethnic cleansing, terrorizing minority communities, forcing minorities to move from their homeland and disperse throughout the country, banning minority language and religion from all forms of public space, and drawing the province boundaries in a way that the minority could not form majority even in their own territory.[21] The brutal process of assimilation is particularly true in the case of indigenous peoples in the "New World" (Anaya 1996).

Of course, throughout the twentieth century and particularly after the universal declaration of human rights, the nation-building policies adopted by the states have become more constraint. Now, after two centuries of nation-building, many minority cultures have been homogenized within the 'melting pot' of national culture; nevertheless, there are still many struggles for recognition and survival of the remaining groups. Many homeland minorities have responded to this process, as Kymlicka notes,

[21] For a detailed evaluation of the influence of the nation-building process on national minorities, see Norman, W.J. (2006) *Negotiating nationalism: Nation-building, federalism, and secession in the multinational state*. Oxford: Oxford University Press, p. 29; and Kymlicka, W. (2001) *Politics in the vernacular: Nationalism, Multiculturalism, and citizenship*. Oxford: Oxford University Press, USA..

"by fighting to maintain or rebuild their own societal culture, by engaging in their own competing nation-building" (Kymlicka 1997, 10). The claims of national minorities and indigenous peoples – including their demand for control over their homeland resources and institutions, policies regarding the language and education curriculum, the official language of the local government, and settlement and immigration policies – make sense only against this modern history of unsolicited and aggressive assimilation policies of the modern nation states.

This historical context is part of what sets aside the entitlements of homeland minorities from other ethno-cultural groups, such as immigrants, whose integration were mostly the result of individual choice and consent. The dignitarian approach to minority rights generally ignores the normative significance of this background in evaluating the demands of minority cultures.

2.3. The Problem of Ambiguity of the Concept of Dignity

Most of the arguments from human dignity are too general to provide any specific guideline about which set of rights should be granted, under what conditions, to which right holders. Part of the reason for this confusion is that these arguments are mainly based on a vague concept of dignity or autonomy, while making controversial assumptions about the relationship between dignity and the access to one's culture. For example, some theorists have criticized the alleged relationship between national culture and self-respect. Spinner, for example, holds that "no good reason is ever given why *national* culture is tied to our self-respect. If we grant that our self-respect is tied to our group, why assume that our national culture is most important for our self-respect? Can

our self-respect not be tied to a culture different from our national one? Or to several cultures?" (Spinner-Halev 2004, 4)

Another aspect of this ambiguity is that the dignitarian account does not clarify what particular set of rights follows from the tie between culture and dignity. For instance, by claiming that access to culture is very significant for developing individual autonomy, it is not clear whether we are justifying individual right to access to *a* culture or to *a specific* culture; whether it means for the state to ensure everyone has proper access to their own culture in the *private* sphere or whether it obligates the state to build relevant political institutions in the *public* sphere and grant minorities substantive political rights, such as territorial autonomy. [22]

The ambiguity of the concept of dignity and autonomy becomes more problematic if we attach universal value to their normative importance and expect them to remain persuasive across different cultural traditions. The liberal understanding of dignity and the normative significance of autonomy are not principles that every culture embraces. Many believe that there is no *a priori* justification for the priority of autonomy and liberal individualism that could uphold this type of arguments as a universal justification for minority rights at the international level. This point shall be explained in greater detail.

The classic form of a dignitarian argument attempts to deduce minority rights from a more basic moral value, such as autonomy. The underlying assumption of the argument is mostly based on the liberal conception of human flourishing. This is what Appiah calls

[22] For a similar criticism, see Appiah, A. (2004) *The ethics of identity*. Princeton, NJ, United States: Princeton University Press, pp. 114-155.

"ethical individualism" (Appiah 2004, 72), the idea that the essential precondition for an individual to live a meaningful life is to have the capability to choose for one's self and have the freedom to determine one's own conception of the good, and have the ability to critically reflect on one's past and the inherited tradition. From the liberal perspective, group rights merit protection only to the degree that they contribute to the wellbeing of individuals.

The problem is that different cultural traditions have different reasonable perspectives on what constitutes a flourishing life. The liberal concept of human flourishing and priority of individual autonomy are not necessarily universally accepted views. From the perspectives of some other cultures, norms such as solidarity, harmony, family values or national stability take priority over autonomy of individuals. Consider, for example, the case of Confucianism. As in the East Asian culture, Confucianism provides a normative structure that prioritizes the stability and solidarity of community over individuals. In the Confucian worldview, individuals exist not separately but in the context of their families, and families exist as a part of the wider society. As Baogang He describes, "East Asian countries share the Confucian legacy which emphasizes the Great Way, the harmony of minorities and majority, and the necessity of cultural assimilation" (He 2005, 60).

To be persuasive, a universal theory of minority rights must reach beyond a particular understanding of diversity and human flourishing and become acceptable from broader and more universal moral perspectives.[23] To employ a term used by Rawls, the

[23] Liberalism is usually considered to be compatible with all forms of cultural diversity. However, this view has been criticized by some commentators. According to Parekh, for example, in the liberal context "other things being equal, a culture that encourages autonomy and choice is better or richer, and in this sense superior to, one that does not" (Parekh 1997, 56). One can argue that liberalism is not compatible with

dignitarian account does not follow the 'politically-liberal' principle of legitimacy. Instead, it contains some elements of 'comprehensive' doctrines of liberalism, which means it would not be unreasonable if other communities reject this understanding of human flourishing.

The above-mentioned problems – misidentifications of the content of the norms and their historical context, along with the normative instability of its underlying assumptions – indicate that the dignitarian approach does not provide a persuasive normative model for protection of minority cultures. In the following section, we will consider the political account as an alternative theory of minority rights.

3. The Political Account of Minority Rights

Another way to conceptualize and defend the norms of minority rights is what I call political account, which includes a variety of different arguments for protection of the rights of minorities. What these arguments have in common is that they rely less on the normative or functional value of dignity, autonomy, culture or language and emphasize more on the value of domestic and international distribution of sovereignty. The political account avoids some of the main deficiencies of the dignitarian approach, including the inability to formulate targeted norms for different types of minorities and its normative instability of imposing universal value on controversial concepts such as dignity, autonomy and culture.

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many forms of cultural diversity. As Spinner points out, in liberal society, diversity by itself, or what he calls "cultural pluralism", is not a value. Diversity is desirable as long as it is compatible with the overarching liberal principles (Spinner-Halev 1994, 62). A similar point has been made in United Nations Development Programme. *Human Development Report: Cultural Liberty in Today's Diverse World: 2004*. New York: United Nations Development Programme, 2004.

Instead, the focus of the political theory is more on the wrongs produced by formation of modern states and particularly by the modern international law.

This point can be illustrated by two examples. Consider the situation of the Kurds after World War I. Following the collapse of the Ottoman Empire, the international Treaty of Sèvres (1920) was replaced by Treaty of Lausanne (1932), through which the Allies divided the territories once under the rule of the Ottoman Empire into newly established nations, including Egypt, Sudan, Iraq, Syria and Lebanon. The original plan for an autonomous Kurdistan under the Treaty of Sèvres was abandoned. Since then, the Kurds have never regained the political sovereignty for which they have been aspiring for more than a century. Additionally, the Palestinians have suffered from the effects of a similar distribution of power in the Middle East following the two World Wars.

The idea at the heart of the political account of minority rights is that the redistribution of sovereign power by the modern international laws has unjustly marginalized the claims of certain groups of minorities to any meaningful form of control over their homelands, while granting the others the full international recognition. Under the modern legal order, the world has been divided into mutually exclusive sovereign territories. International law has granted certain collectivities, and not others, the legitimacy to exercise sovereign power over these territories.[24]

Another classic example is the history of the colonization of indigenous peoples. According to the political account, the main rationales for the moral entitlement of indigenous peoples to international protection is that they have suffered from historic

[24] For further discussion see Macklem 2015.

injustices as a result of the European colonization. The sovereignty of indigenous peoples has been disrupted for centuries through unjust dispossession of their territories and resources, and destruction of their political, economic and social institutions. The unjust assertion of sovereignty over indigenous lands and peoples by outside colonizers was in fact validated by international laws of the time. As Macklem explains, "international indigenous rights mitigate some of the adverse consequences of how international law validates morally suspect colonization projects that participated in the production of the existing disruption of sovereign power" (Macklem 2015, 162).

The legal and philosophical literature contains at least two types of political arguments for protection of homeland minorities, each describing a different aspect of the political account of minority rights. There are those arguments that explain how the process of formation of a national state has marginalized minorities *within* the boundaries of the modern states, and there are other arguments that focus more on how the boundaries of modern nation states have been created in the first place and how creation of new states and international distribution of sovereignty *across* the borderlines have led to grave repercussions for the rights of homeland minorities around the world. The former can be called "arguments from nation building" and the latter is "argument from unjust distribution of sovereignty".

3.1 Arguments from Nation Building

The nation building arguments have been mostly advanced by Will Kymlicka in a series of influential books and articles defending what he calls "liberal multiculturalism" (Kymlicka 1997). It is important to note that while some of the earlier work of Kymlicka

advances a dignitarian argument, his later work relies more on the political argument from nation-building. Although he claims that the two arguments are not inconsistent, I think it is helpful to distinguish them clearly and to evaluate them separately.

According to Kymlicka's later work, minority rights are best conceived as a response to and rejection of the older models of homogenous nation-state. Let us start with explaining what is meant by the older models of homogenous nation-state.

At one point or another, most states around the world have engaged in diffusing a single culture and unified national identity throughout their entire territory. Many justifications have been cited for the rise of nationalism, ranging from the goal of mobilizing citizens to create a larger army attacking "enemies of the nation" to a more liberal goal of invoking nationhood to build civic solidarity required for democratization, efficient labour market, and social justice

Earlier in this chapter, we referred to this process as the process of "nation-building", through which the culture and the identity of the dominant group (which is the majority group in most cases) will be promoted as the "national culture". This process can comprise a variety of state policies including the adoption of the dominant group's language as the official language of the state and the education system; the promotion of the dominant group's identity, symbols, history and literature through national media and standardized curriculum at the public schools; the adoption of immigration and settlement policies that demographically disadvantage the minorities in their historic homelands; and the establishment of a centralized political and judicial system, which usually involves elimination of minorities' local institutions and results in under-representation of the

minorities in the central government.[25]

Nationalistic and assimilative programs were pervasive during the nineteenth and twentieth century particularly in the Western democracies. While very few countries in the world were mono-ethnic, through this model, many states began to pursue the ideal of creating national homogeneity. To implement the ideal of homogeneity, the states have adopted the above-mentioned policies to construct a single national identity, which requires deconstructing the national identity of minority cultures. Faced with the oppressive assimilative policies, minority groups had only two choices: assimilation or exclusion.

This process had crucial consequences for minority cultures. The results of nation building policies, as Kymlicka notes, have created serious injustices, including "the creation of multiple and deeply rooted forms of exclusion and subordination for minorities, often combining political marginalization, economic disadvantage, and cultural domination" (Kymlicka 2009, 65).

Although in many instances minority groups accepted integration into the majority's culture during the past two centuries, some minority groups responded by contesting the majority's attempt to dominate and monopolize the national identity and fighting back to protect their own identity and culture. In many liberal democracies, the minorities have been successful in convincing the larger society that recognition of diversity and

[25] For a more detailed explanation of the nation-building policies, see Kymlicka, W. (2009) *Multicultural Odysseys: Navigating the new international politics of diversity*. Oxford, United Kingdom: Oxford University Press, Ch. 3; and Norman, Norman, W.J. (2006) *Negotiating nationalism: Nation-building, federalism, and secession in the multinational state*. Oxford: Oxford University Press, Ch. 2.

accommodation of cultural rights would be a more desirable and fair alternative to the old model of homogenous nation-state.

During the past fifty years, there has been a substantial policy shift toward sub-state national minorities and indigenous peoples in the Western countries. They are granted various forms of accommodation in the form of cultural, political and language rights. This is clear in the case of Quebec in Canada, Scotland in the United Kingdom, Flanders in Belgium, Catalonia in Spain, Puerto Rico in the United States, the Swedish minority in Finland, the German minority in South Tyrol in Italy, and the French and Italian minorities in Switzerland.

For Kymlicka, the demand for minority rights must be conceptualized "in the context of, and as a response to, state nation-building" and as a remedy to mitigate this historical injustice (Kymlicka 2002, 50). This does not mean that he is opposed to any form of nation building policy. In contrast, he agrees that these policies promote various legitimate purposes, including building the required solidarity to mobilize citizens behind projects of democratization, promotion of welfare state and equal opportunity (Kymlicka 2009, 64).[26]

Kymlicka distinguishes between legitimate and illegitimate nation building. A policy will not be legitimate if it pursues as part of its goals assimilation, disempowerment, or exclusion of minority groups. To be legitimate nation-building policies have to be complimented with a robust form of minority rights. That includes adoption of various

[26] See, also, Laden, A.S. and Owen, D. (eds.) (2007) *Multiculturalism and political theory*. Cambridge, UK: Cambridge University Press, p. 8.

group-specific rights intended to allow homeland minorities to reconstruct their own societal culture by going through a parallel process of national building. According to Kymlicka, it is possible for a state to encourage and sustain more than one societal culture within its territories (Kymlicka 1997, 35). This could entail providing the sub-state group with the similar tools that the majority employs to promote its nation building, such as some form of local control over language policies; political and legal institutions; immigration and the curriculum of public schools within their sub-state territory. In some cases, this model of multiculturalism could permit historic minorities to conceives of itself "as a nation within a larger state, ... either in the form of an independent state or through territorial autonomy within the larger state" (Kymlicka 2009, 68).

The proposed accommodation model is basically consisted of a form of what he calls "multination federalism", that is, "creating a federal or quasi-federal subunit in which the minority group forms a local majority, and can thereby exercise meaningful forms of self-government" (Kymlicka 2009, 69). This is in fact the characterization of many contemporary multinational states such as Canada, Spain, Belgium and Switzerland.

The argument from nation building is an example of political approach to the theorizing minority rights. It calls for a new model of dispersed sovereignty and internal political autonomy *within* the boundaries of nation states. Below, we will discuss the argument from international distribution of sovereignty, which is more focused on allocation of sovereign power *across* the official borders of nation states.

3.2. The Argument from Distribution of Sovereignty

Considering the modern history of the struggles of nation states to draw national boundaries and control over contested territories, the distribution of sovereign power around the world has not often followed a fair process. This is the pivotal point behind Macklem's argument for minority rights. Following the First World War, for example, there has been a sweeping redistribution of sovereignty and redrawing of national boundaries. The distribution had serious consequences for minorities, which resulted in creating new states, displacing populations, and creating a new equilibrium of power between the majority and the minorities in many countries, particularly in Europe and the Middle East.

One of the main purposes for formation of the League of Nations in 1920 was to monitor and respond to the possible adverse effects of this dramatic redistribution of power after the First World War. The League of Nations along with the Permanent Court of International Justice and many multilateral treaties were created partly to resolve the disputes and frictions between the minorities and the states. This mechanism contained many instruments for protection of minorities, including "the right to equal treatment, rights against non-discrimination, and protection of ethnic, religious or linguistic identity, including the right to officially use their mother tongue, to have their own schools, and to practice their religion." (Macklem 2008b, 547)

However, the protection provided by the League of Nations was not universal. The application of minority instrument was mostly limited to the new states and the defeated countries, such as Germany and Turkey. Even within those countries only certain minorities (e.g. non-Muslims in Turkey and Muslims in Greece) were covered. The

protection mechanism contained no universally articulated principle that could be applied to all ethnic minorities around the world. The system also lacked a proper enforcement mechanism, which, as we know, failed to prevent the outbreak of another World War in 1939.

For Macklem, the study of the interwar system of minority protection is important, because it points to an alternative approach to international minority rights protection. This alternative approach is based less on the universal value of dignity, autonomy and culture and more on "the structure and operation of the international legal order" (Macklem 2008b, 548). From this perspective, the minority protection regime is a direct response to the adverse and unjust consequences of international redistribution of sovereignty. As he put it, "minority rights are part of a larger arsenal of international entitlements that monitor the justice of the distribution of sovereign power in the world" (Macklem 2008b, 548).

The international laws have played an important role in authorizing this redistribution of power. The modern way of organizing the world's territories into mutually exclusive sovereign units has been supported by international laws. Under the international laws, the territory of the world is divided into clearly demarcated states, and each state has the legal and the political authority over the individuals under the state's jurisdiction. When a state's claim to a territory becomes recognized by international law, the state will be entitled to territorial integrity and other states will bear the duty to respect it. This modern combination of statehood, territorial demarcation and sovereignty is what we now call "territorial sovereignty".

Based on the customary international laws, to make an effective claim for sovereignty, a state has to satisfy a set of minimum conditions: a definite territory, a population and an effective government. These conditions are mentioned in the Montevideo Convention on the Rights and Duties of States (1933).[27] In practice, however, claims to territorial sovereignty will be validated by international law only when two pre-conditions are met:

(1) a state has exercised an exclusive and effective control over the territory and its population to a degree that excludes all other states; and

(2) the statehood of the claimant has been recognized by the major powers in the world.

Although the act of recognition has legal consequences, its function is mainly political. It is not legally obligatory for states to recognize each other and when they do recognize a new state, the recognition almost always takes place on an individual state basis, not collectively.[28]

Take for example the status of the Kurds and the Palestinians. Even though both groups more or less meet the Montevideo requirements of having a definite territory, a population and a government, they do not fully qualify as an independent state under the current international law, because they do not exercise effective control over most of their territory nor have they been recognized as states by major world powers.

Some of these principles of the modern system of territorial sovereignty have been

[27] *The Montevideo Convention on the Rights and Duties of States,* opened for signature December 26 1933, 165 LNTS 19 (entered into force December 26 1934).
[28] It is not obligatory for states to recognize one another's exact territorial extent.

affirmed in the well-known case of *Island of Palmas*[29] and in the Advisory Opinion of the International Court of Justice to the UN General Assembly in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.*[30]

Accordingly, international law to some extent determines which collectives constitute "peoples" and whether they are entitled to exercise sovereign power over a specific territory, or as more commonly called the right of self-determination. International law distinguishes between legal and illegal claims for external self-determination. It confers the legal authority to exercise sovereignty over certain territories to some collectives, and not to others. As Macklem notes, sovereignty in international law is

> [a] legal entitlement to rule people and territory that the field confers on the multitude of legal actors that it recognizes as states. International legal rules determine which collectivities are entitled to exercise sovereign authority and over which territory and people such authority operates. In doing so, international law effectively performs an ongoing distribution of sovereignty among certain collectivities throughout the world (Macklem 2008b, 549).

Following the First World War, Woodrow Wilson, the President of the United States has famously defended the principle of the self-determination in his "Fourteen Points," and called for redrawing the boundaries of territories under the control of the defeated Central

[29] *Island of Palmas*, Scott, Hague Court Reports 2d 83 (1928), Perm. Ct. Arb. 1928, 2 U.N. Rep. Intl. Arb. Awards 829.
[30] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, I.C.J. Reports 2010, p. 403.

Powers in order to reflect "the will of peoples."[31] This remark has been taken as a sign for the beginning of a new trend in international relations to put an end to the past history of colonialism and imperialism; and, instead, encourage a new international system of states, in which the boundaries of states *corresponds* more accurately with the boundaries of nations. This is partly the reason for creation of many nation states in the aftermath of the two World Wars, including countries such as Poland, Czechoslovakia, Yugoslavia, Austria and Hungary. However, not every nation was given a chance to experience sovereignty. Ireland went through guerilla fighting for many years to secure self-determination in 1922. Some colonies were simply transferred from one major power to another, whereas a great number of African and Asian colonies including India, Morocco, Sudan, Vietnam, and Indonesia did not gain independence until decades later through the decolonization process post World War II.

The complete correspondence between the boundaries of states and the boundaries of nations never became a reality for a variety of political and pragmatic reasons. For one thing, while there are only 191 officially defined states worldwide, there exist about 8,000 different ethnic groups speaking a similar number of languages. That explains why an overwhelming majority of states, approximately 171 of them, are multi-ethnic (Vijapur 2006).

In the modern process of state formation, many historic homeland minorities either never succeeded in forming a state of their own which was respected by all other nation states (e.g. people in Tibet, Basque and Chechnya), or they found themselves on the "wrong"

[31] For further discussions see: Manela, E. (2007) *The Wilsonian moment: Self-determination and the international origins of anticolonial nationalism*. New York: Oxford University Press.

side of the international borders departed from their kin-state, as in the case of Germans in Poland, Hungarians in Romania, or ethnic Turks in Bulgaria.

Minorities and majorities exist partly because international laws, as manifested in treaties such as the Treaty of Lausanne, validate and distribute sovereign power over demarcated territories. The modern process of state formation and its underlying principle of territorial sovereignty are the results of the modern international legal order. This international legal order legitimizes the assertion of sovereignty over minorities who have no cultural or national affiliation to the larger political community.

This situation creates a duty on the international community to respond to the injustices that are produced by the operation of the international legal order to protect those groups who might be vulnerable to allocation and recalibration of territorial sovereignty. This normative concern is the backbone of the arguments from the distribution of sovereignty. Minority rights in this view, first and foremost, "serve as instruments that can mitigate injustices associated with the kinds of recalibrations of sovereign power embodied in the Treaty of Lausanne that international law treats as possessing international legal force" (Macklem 2008b, 550).

4. The Critique of the Political Account

Now that we have a clear picture of the different normative approaches to theorizing minority rights, let us examine how the political account can be compared with the dignitarian account of minority protection.

4.1. Theoretical Advantage of the Political Account

The most significant advantage of the political account is that it avoids the three problems

mentioned earlier in the critique of the dignitarian view.

First, the political account analyzes and explains the claims of minorities within its appropriate historical context. It does not rely on heroic assumptions about the universal value of culture and religion; and it does not attempt to deduce minority rights from a fundamental moral value such as dignity or autonomy. Instead, it is built on a more stable normative foundation grounded on contingent historical facts about the relationship among the state, the minority cultures and the modern international legal order.

This leads us to the second and the most important advantage of the political account. It addresses the diversity of claims made by different types of minority communities. It not only clarifies why the claims of homeland minorities (including national minorities and indigenous peoples) are normatively distinct from the claims of immigrants and other types of ethno-cultural groups, it also identifies the content of their rights and the type of legal protection these groups are entitled to. For example, under the political account we can justify multicultural accommodative policies for homeland groups, such as granting a certain measure of autonomy within a form of federal or quasi-federal system and protection from assimilative policies of the central government. That entails creating territorial or federal sub-units within which the minority group can enjoy a form of self-administration.

This multicultural model could also promote official language policies, through which the group's local language will be recognized as an official language and can be used in the public institutions locally or nationally. This is the emerging trend amongst many Western democracies from Switzerland and Canada to Finland, Spain, Belgium, and the

United States.

According to the political account, the rationale behind these multicultural policies is that many homeland minorities used to hold sovereign power over their land and control local political and social institutions in their own language. However, their sovereignty has been taken away from them either through an unjust and brutal process of nation-building or by international manipulation of national boundaries by major powers, which has resulted in suppression of their national identity. These policies are in place to function as a remedy for this historical injustice.

This is in clear contrast with the situation of immigrants, who have never acquired or lost territorial autonomy. The political account explains why some minorities merit international protection against assimilation, while others are expected to eventually integrate into the host society.

4.2. Implementation Difficulties with the Available Multicultural Models

Although the political theory of minority rights provides a more refined theoretical approach to minority protection, formulating an appropriate policy for implementation of the theory is not an easy task. The proposed multinational or multilingual federalism is not a practical solution in many regions of the world, mainly due to the sheer number and variety of minorities. Therefore, part of the challenge for promoting an international mechanism for minority protection is to develop new political models to overcome the pragmatic difficulties, particularly with regard to minority groups within the developing countries.

The process of nation building is a much more recent phenomenon in many third world countries. Due to the history of colonization, many of these countries consider multicultural polices with distrust. Some developing countries have valid concerns with respect to national security and stability of the states and the concern about the capacity of these policies to divide people and pit ethnic groups against each other. Let me explain some of these implementation challenges in the developing world.

Most of the available multicultural policies are designed after the particular makeup of minority-majority relationship in Western democracies, which, as explained earlier, has roots in the history of nation building in the West. However, the formation of nations and the history of ethnic struggles for power vary dramatically around the globe. The history of colonization had a great impact on the nation-building capacity of many Asian, African, and Latin American countries, most of which were created after the First and the Second World Wars through the process of decolonization. In some regions that were not directly colonized by the Europeans, the process of nation-building in the real sense did not begin until the second half of the twentieth century, partly because the majority did not recognize the need for nation building or did not have the required tools and political structure to diffuse a unique national identity throughout the country.

As a result, many developing states did not have the chance or were not fully successful in deconstructing and assimilating their own homeland minorities. One piece of evidence for this claim is the number of national and ethnic minorities in the developing world. Unlike the Western countries that each contains only a very few national minorities, there are hundreds and thousands of recognized ethnic groups in Asia and Africa, from a large

country like India to a comparably small one such as Malaysia.

As Spinner points out, “countries with a large number of homeland minorities pose a challenge for federal multicultural policies. No model of territorial autonomy or official language policy seems feasible in a country with numerous national minorities.” Pointing to this problem, Spinner notes “states with two or three national groups pose little problem for Miller [’s theory of multiculturalism]; states with two or three hundred render his argument meaningless.”(Spinner-Halev 2001, 18)

Another factor relevant to the situation of developing countries is the geo-political concerns. Although the post-war international regime of human rights have imposed some constraints on the way post-colonial states can engage in coercive nation-building, the geo-political situations of developing countries make minorities in these regions more vulnerable to some new types of threats and injustices. The fact that many postcolonial states live in unstable regions with contested boundaries means that states are often more nervous about their minorities; and the fact that postcolonial states are often poor means that there is a higher compulsion to try to gain access to resources in the territories where minorities live, and through coercive resettlement programs, if necessary. So even though the period of nation building in Asia and Africa has been much shorter than the similar process in the West and it is potentially more constrained by the norms of human rights, it is also true that postcolonial states have stronger geo-political and economic reasons for suppressing their minorities. In the last fifty years, one can find numerous examples of ‘demographic engineering’ and coercive assimilation policies around the world, despite governments’ alleged commitments to the norms of human rights.

These considerations show that the mixture of threats for national minorities was and still is dissimilar in different parts of the world, and therefore we need to develop new multicultural models accordingly to serve the particular needs of minorities in different parts of the globe.

4.3. Theoretical Shortcomings of the Political Account

In order to explain the main weakness of the political account, we have to first understand the reason behind the widespread popularity of the dignitarian account, despite all its theoretical shortcomings.

The dignitarian view has an important theoretical advantage: it can effortlessly explain how the theory of minority rights connects with the broader doctrine of human rights. If we accept the dignitarian assumption that minority rights protects and promotes the universal value of dignity and autonomy in every human being, then it would be reasonable to conclude that the protection of minority rights must be a part of the international mechanism for promotion of human right norms. Based on the standard account of the field, human rights are mainly considered to be *universal* rights "inherent to all human beings" and "the essential features of what it means to be a human" (Simmons, 2000). A universalist understanding of minority rights, like the one proposed by dignitarians, places the normative status of minority protection within the more familiar field of human right theories.

This approach to understanding minority rights is mainly what international human right laws have adopted in the UN documents. Interpreting minority rights in merely individualistic and universal terms, Article 27 of the *International Covenant on Civil and*

Political Rights, declares that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Similarly, Article 2 of the UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic* Minorities, specifies that "persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."[32]

According to some scholars, these provisions are incapable of properly protecting homeland minorities for the same reasons that dignitarian account fails to justify substantive minority rights (Barany 2005, 192). First, the scope of these provisions is too broad and they do not make any attempt to distinguish between different types of minorities. They lump together all types of ethnic, religious and linguistic groups no matter how large or small, recent or historic, territorially concentrated or dispersed. Second, the content of the provisions is mostly framed in individualistic and negative terms. They primarily address the negative obligation of states not to *deny* members of minorities the right to enjoy their culture, to profess and practice their religion or to use their own language, without conferring a right to self-determination and without providing any positive measure to limit assimilation policies of the broader political community.

[32] UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1992, A/RES/47/135.

Although these provisions were considered by many to provide insufficient protection for cultural minorities, they still clearly indicate the integral tie between the dignitarian account and standard human rights theory. In other words, by protecting the basic interests that majorities and minorities have in common, such as access to culture, freedom of expression and religion, the dignitarian account links more integrally with "a conception of international human rights law as a field devoted to shielding essential features of what it means to be human from the exercise of sovereign power" (Macklem 2008b, 532).

The political account, in contrast, either disregards or fails to explain how its normative justification of minority rights could connect in a systematic and an integral way with the larger international human rights discourse. This is perhaps one of the greatest drawbacks of the political account.

If the justification for minority rights merely lies in the contingencies of historical facts about formation of modern states, unrelated to the universal and basic features of humanity as such, then it is difficult to identify how minority protection could be an extension of the human right regime. Given that the human rights are rights to which "we are all equally entitled" *regardless* of "our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status,"[33] one might wonder whether the political account implicitly assumes that the human rights doctrine does not

[33] The United Nations, Office of the High Commissioner of Human Rights (1996) *What are human rights*. Available at: http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx (Accessed: 12 September 2016).

(or should not) include rights of minorities to cultural protection or self-determination. What is the relationship between the two bodies of rights?

Some of the political theorists are simply silent about these questions, while others explicitly defend the idea of disconnecting and distinguishing the regime of minority rights from what they consider as "universal rights". Although Kymlicka regards the human rights revolution as an "inspiration" for, and also a "constraint" on, the political movement of historically subordinated ethnocultural groups (Kymlicka 2009, 88), he does not develop a detailed theoretical scheme explaining how his group-differentiated theory of minority rights fits into the universal aspiration of the UN human rights regime.

Macklem, on the other hand, mostly embraces the "tenuous relationship" between his idea of minority rights and the universal values. He wrote:

> Minority rights run counter to the aspiration of international human rights law to protect universal, not contingent, features of human identity. On this universal conception, human rights protect essential characteristics or features that all of us share despite the innumerable historical, geographical, cultural, communal, and other contingencies that shape our lives and our relations with others in unique ways. They give rise to duties that we owe each other in ethical recognition of what it means to be human. But belonging to a minority is not something we all share; it is a function of history and circumstance. (Macklem 2008b, 533).

He further explains, "comprehending minority rights claims in distributive terms reveals that their normative status rests not on whether they protect universal human values,"

because the normative grounds for international minority rights "fit awkwardly within a universal account." (Macklem 2008b, 547) To solve this problem, Macklem has recently developed an alternative legal theory of human rights (Macklem, 2015), which will be discussed further in Chapter Four.

This confusion about the relationship between universalism and minority protection is also apparent in the 1946 work of former Deputy Secretary General of the League of Nations, Pablo de Azcárate, when he writes: "Protection of national minorities is a question limited in time and space, and essentially relative; its solution depends on concrete historical circumstances subject to constant shift and change. Guarantee of human rights is an absolute, general question as wide as humanity. They may or may not be set up. But if they are set up, the ideal would be to establish them in the most absolute and universal form possible. To that end, any attempt to make one institution approximate to the other will only prejudice both."

This confusion was perhaps one of the reasons behind reluctance of the international community to develop minority rights laws within the UN system. Contrary to the efforts made by the League of Nations during the inter-war era, in the aftermath of the Second World War, the international law took a very passive stance towards the protection of minorities. In fact, the Universal Declaration of Human Rights in 1948 did not contain even a single reference to the protection of minorities.[34]

[34] In fact, the preliminary draft of the UNHDR contained some reference to the rights of minorities to cultural, educational, religious and institutional protection. However, reference to these provisions were removed from the final draft following political opposition by many states represented in the UN General Assembly in 1948. See Morsink, J. (1999) *The universal declaration of human rights: Origins, drafting, and intent*. Philadelphia: University of Pennsylvania Press.

4.4. The Significance of Establishing a Link between Minority Protection and Human Rights

Disconnecting the theory of minority rights from the international norms of human rights has serious consequences, both theoretically and strategically, for the proponents of the international regime of minority protection. Looking at the actual practice of human rights around the world, one can find an overwhelming number of evidence suggesting the affinity and complementary relationship between the two regimes. A theory that is unable to make sense of this apparent link is incapable of analyzing a part of the reality of the contemporary human rights enterprise.

The new global trend in recognition of the claims of minorities has been encouraged by the human rights idea of equality of human beings both individually and collectively. The worldwide dissemination of the ideal of human equality and the language of human rights have been the motivation behind a sequence of political movements in the twentieth century contesting the older form of sexual, ethnic and racial hierarchies. From the decolonization of Asia and Africa in the 1950s, to the civil right movements and the abolishment of racial segregation in the United States in the 1960s, to the indigenous peoples and national minorities' struggle for recognition in Western democracies in the 1970s, to the more recent LGBT rights movements, these are all manifestations of how the human rights discourse of equality has become the pervasive and default language of marginalized groups, including homeland minorities, who demand equality of status as of their rights.

Each of these movements has gradually helped the human rights discourse to evolve further into an indispensable part of international law and morality. The demands of

Asian, African and Latin American nations for recognition of self-determination of the European colonies led to adoption of the right of all peoples to self-determination in Article 1 of both *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* in 1966. The struggles of African-Americans in the United States for recognition of their civil rights eventually became translated into the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1969. The mobilization of national minorities for recognition has resulted in the UN's 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.* Finally, the demands of indigenous peoples for cultural rights and collective determination have recently led to the UN *Declaration on the Rights of Indigenous Peoples* in 2007.

A theory of minority rights that fails to grasp the actual interconnection between the evolution of human right discourse and its effects on minorities' claim-making is arguably far from the realities and the actual practice of international law. It is missing what has made minority rights an indispensable part of the contemporary human rights consciousness.

The disconnection of the two regimes is also strategically consequential. In the world we live in, the most effective way to demand international protection of rights is by engaging the human rights organizations, by using the rubric and forums of human rights, by speaking the language of human rights, and by employing the tools available globally as a part of human right regime. Cutting off the link between the two regimes has the unintentional result of divesting the minority rights project the tools it needs to grow and

gain publicity within the international law and the international organizations. If the project of international minority protection falls outside the category of human right norms, it will likely lose its sense of urgency and priority that it fully deserves.

The global diffusion and a successful internationalization of minority rights are normatively and strategically dependent on its close ties with the broader context of human rights. The discourse of multiculturalism and legal codification of minority rights has be taken seriously by powerful human rights institutions and international organizations, precisely because it is overwhelmingly regarded as a natural extension of the norms of human rights.

Finally, the integral connection between the two regimes of rights alleviates the legitimate concerns about abusing minority rights by illiberal groups to violate the human rights of individual members at the inter-group level. A solid integration of minority norms within the human rights regime guarantees that the mechanism for minority protection operates well within the constraint of human rights norms and the fundamental liberties and freedoms of individual members of the group are secured from patriarchal and oppressive tendencies.[35]

[35] The primacy of individual rights to group rights is at the heart of the liberal theory of multiculturalism. In cases where promotion of group rights competes with protecting individual autonomy (for example in the case of indigenous rights and women rights), liberals have defended the supremacy of human rights over minority rights. For example, Kymlicka's distinction between "external protections" and "internal restrictions" is aimed at defending protections of minority groups without reinforcing oppression within groups. See Kymlicka, W. (1995) *Multicultural citizenship: A liberal theory of minority rights*. New York: Oxford University Press, p. 35–44.

5. The Dilemma of Theorizing Minority Rights

Let me quickly summarize what we have discussed so far. As it was explained at the beginning of this chapter, there are at least two ways of thinking about the international norms of minority rights: the dignitarian account and the political account. Each of these views has a different approach in conceptualizing and defending the norms of minority protection. As a consequence, the two approaches diverge and go in completely different directions in terms of (1) explaining the content of the minority norms, (2) identifying the appropriate minority groups as the right holders, and (3) describing the relationship between minority rights and human rights regimes.

Both of these views are faced with some problems. On the one hand, the dignitarian account is having serious difficulty making sense of the distinction between the claims of indigenous peoples, national minorities and other ethno-cultural groups, such as immigrants. Additionally, the dignitarian justification for minority rights is unhelpful in understanding the actual evolution of the minority norms and its historical context upon which the claims of homeland minorities are grounded. This view also does not provide a proper account of the content of the minority norms. The types of rights that are justified under this approach are limited mainly to anti-discriminatory entitlement, such as the right not to be denied access to enjoy one's culture. It falls short of addressing more significant claims of minorities, such as the right to some measure of autonomy, official language policies, and self-administration of the issues related to the minority's cultural survival.

Nevertheless, the dignitarian account has a crucial advantage: it explains how its theory of minority rights fits integrally within the larger theory of human rights. According to the dignitarians, by promoting the values of dignity and autonomy of individuals, minority rights deepen and solidify the aspiration of the human rights doctrine to protect the fundamental and universal features of what it means to be a human being.

Conversely, the political approach is more responsive to the normative distinction between homeland minorities and immigrants as the right holders and their respective entitlements. It also provides a more refined explanation of the content of minority rights and its historical context. Unlike the dignitarian view, the political account is theoretically capable of developing group-specific norms; it is also more resourceful in justifying and addressing collective demands of minorities, including the right to some form of territorial sovereignty.

However, there is a price for the theoretical success of the political account: it disconnects the minority rights theory from the broader human rights norms. It leaves it unclear at best why minority rights are to be considered as a part of a human rights regime. As it was explained, undermining the vital link between the two regimes, poses a significant risk, both theoretically and strategically, to the whole international project of minority rights.

An ideal theory of minority rights, therefore, is a theory that not only accurately explains the content of the norms and their appropriate right holders, but it also correctly captures the right relationship between the two regimes. The available theories, however, fail to achieve either or both of these goals. This is the dilemma facing the available theories of

minority right, which has resulted in all sorts of perplexities about the global diffusion of the minority norms.

These confusions are best reflected in the legal and political debates around the UN Declaration on the Rights of Indigenous Peoples (*UNDRIP*). The declaration was adopted in 2007 following more than 20 years of debate. Unlike many of the UN documents on the rights of minority groups, the *UNDRIP* largely deals with the collective rights of indigenous peoples. It clearly addresses the right of indigenous peoples to self-determination and autonomy in matters relating to their internal and local affairs (Article 3); the right to use and control the land and resources that they have traditionally owned (Article 26); the right to develop and maintain their institutional structures, including judicial systems (Article 33); and, finally, the rights to maintain and develop their distinct cultural identity, their spirituality, their language and their traditional way of life (Article 12 and Article 36).

This new trend in codifying collective rights has caused profound debates and invited different reactions from legal and political theorists. On the one hand, some commentators praised the new trend and welcomed it as a new phase in the gradual evolution of the underlying idea of human rights. Anaya, for example, has characterized the trend as "developments over time" yielding to "an overarching normative trend defined by visions of world peace, stability, and human rights." He adds:

> "Understood as a human right, the essential idea of self-determination is that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are

> devised accordingly. It is this universally applicable idea that promoted the downfall of classical colonial structures and that can now be seen as energizing authoritative responses to indigenous peoples' demands, including the adoption of the Declaration" (Anaya 2010, 187). Xanthaki calls the UN's works on the indigenous rights "a great success of the UN system" and considers the indigenous debate to be "the most important contribution" to "a re-evaluation of human rights standards" (Xanthaki, Crawford, and Bell 2007, 2).

On the other hand, those who believed that human rights are necessarily individualistic and universalistic in character have criticized the collective ethos of the new declaration, voicing concern about the Declaration's lack of "adequate guidance on the resolution of conflicts between collective indigenous rights and individual human rights" (Badger, 2011, 487). They mostly consider the recent documents on indigenous rights as only a one-off exception to the rule that excludes collective rights from being a part of the norms of human rights. (Donnelly, 2002) [36]

There are still other commentators, like Macklem, who refuse to recognize the universality of the norms of the *UNDRIP*:

> "International indigenous rights possess normative significance not because they transcend the contingencies of history and protect universal features of humanity. Their significance lies in the contingencies of history itself, namely,

[36] See also Miller, D. (2002) 'Group rights, human rights and citizenship', *European Journal of Philosophy*, 10(2), pp. 178–195.

> in the ways in which international law has organized international political reality into a legal order … international indigenous rights mitigate some of the adverse consequences of how international law validates morally suspect colonization projects that participated in the production of the existing distribution of sovereign power" (Macklem, 2008a, 43).

The confusion about the normative justification of the collective rights in the *UNDRIP* is an excellent piece of evidence for the lack of a consistent normative theory of how group-differentiated rights of minorities can integrate with the broader universal norms.

6. The Way Forward: A Possible Solution

Is there an alternative way to resolve the dilemma of the minority rights theory: to explain the content of the norms with sufficient accuracy, without sacrificing its capacity to integrate seamlessly with the doctrine of human rights?

The next chapters will show that, contrary to what may appear, the dignitarian approach and the political approach to minority rights are not incompatible. The arguments provided by both approaches can be incorporated into a single and broader theory of human rights. I will argue that the normative platform of the fiduciary theory of human right creates a unique support for the two accounts of minority rights to work together. This would provide a solution to take advantage of the available theories of minority right to accurately identify the group-differentiated content of the norms without losing the capacity to explain minority rights are essentially part of the family of the human rights standards.

I think part of the reason for the failure of the political account to connect with the theories of human rights is the underlying assumptions of many of the minority rights theorists about what human rights are. The problem, at least partially, is the uncritical adoption of the *foundationalist* understanding of the idea of human rights, which define human rights as "the rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity" (Simmons, 2000, 185).[37] On this account, the normative justification for human rights is grounded on the rights and duties arising from the abstract and universal notion of what it means to be a human being.

Consider this example: David Miller, in his paper, *Group Rights, Human Rights and Citizenship*, has expressed doubt about the claim that group rights, such as the right to self-determination, could be counted as human rights. One of his reasons is that the right to self-determination is not required by what he *assumes* to be the definition of human rights. The argument goes as follows: the right to self-determination will not qualify as human rights

> "if one sticks to my original definition of human rights as rights to those conditions that are universally necessary for human beings to lead minimally adequate lives. It is clear that throughout human history many people have led minimally adequate lives without enjoying rights of self-determination, and that in the case of those whose lives have been less than adequate, the absence

[37] Similarly, Donnelly maintains that "[h]uman rights are, literally, rights that one has simply because one is a human being." Donnelly, J. (2002) *Universal human rights in theory and practice*. 2nd edn. United States: Cornell University Press.

> of national self-determination has not usually been the important causal factor." (Miller, 2002, 186)

Similarly, if we take human rights to be, as Macklem did, "the essential and universal features of what it means to be a human being," (Macklem, 2008b, 532) then it would be difficult to explain the consistency of the two regimes of rights, because the political understanding is more about the historical contingencies of particular groups rather than fundamental features that we all share as human beings.

I think the foundationalist conception of human rights (or as Beitz calls it the "orthodox conception") is questionable. In fact, this view has many contemporary critics, including John Rawls, Joseph Raz and Charles Beitz. These critics reject the foundationalist understanding of human rights, because this conception of human rights relies, unjustifiably, on contestable assumptions about the essential features of human nature.[38] There is a wide discrepancy between the set of rights that could be reasonably justified by appeal to the essential features of human nature and the set of rights that exist in the main human rights documents. The discrepancy is particularly noticeable when you consider the norms under *International Covenant on Economic, Social and Cultural Rights*, such as the right to employment or the right to form and join trade unions.

In recent years, an alternative interpretation of human rights has been developed, one that I believe is more compatible with promotion of minority rights. The alternative theory is usually called 'political' or 'practical' conception of human rights (Beitz, 2004, 196). The

[38] These criticisms will be explained further in the next chapter. See also Beitz, C.R. (2009) *The idea of human rights*. New York: Oxford University Press.

political theory of human rights draws on John Rawls's reconstruction of the philosophy of human rights in *The Law of Peoples* (Rawls, 1999). Instead of trying to derive human rights from an abstract pre-conception about human nature, the practical theory explains the idea of human rights based on their political functions.

They are norms for assessing the conduct and legitimacy of political powers in protecting basic interest of individuals. The violation of these norms by the states justifies interference in the internal affairs of a state and put limits on the state's internal autonomy (Rawls, 1999, 79). According to Beitz, the practical conception regards the "functional role of human rights in international discourse and practice ... as definitive of the idea of a human right." Human rights, in his view, become a state's duty of protecting "urgent individual interests" of its citizens against "standard threats". Where a state fails to guarantee a human right, other states and the international community have the responsibility to intervene and protect human rights of the affected individuals. (Beitz, 2009, 109)

In the next chapters, I will argue for a version of the political theory of human rights, which I call the fiduciary theory. I will argue that the understanding of human rights in political terms not only provides a more refined conception of what human rights are, it also better illustrates the inherent connection between the norms of minority rights and the larger normative scheme of human rights.

I will provide a critical analysis of the dominant theories of human rights. It will be explained why the fiduciary theory of human rights could offer a more elaborative

description of the function of the universal norms, as well as more appropriate normative criteria for identifying and generating the content of human rights.

Chapter Five will revisit the core questions of this research project. First, I will argue that we can apply the normative logic of human rights to defend the rights of homeland minority. I will also clarify how minority rights with a collective dimension, such as the right to self-determination, can be correctly construed as human rights. Finally, it will be explained that this new understanding of human rights can provide a non-sectarian basis for justifying minority norms reasonable from a plurality of moral perspectives.

Chapter 4

A Critical Review of the Major Theories of Human Rights

In order to explain how theories of minority rights fit into the normative framework of the international human rights discourse we need to review the available normative theories of human rights. This chapter will provide a critical analysis of the existing theories in the literature. I will start with making two preliminary notes: one on the major international documents on human rights and another on cultural relativism. Then, I will follow Charles Beitz in dividing the existing theories of human rights into three competing branches: naturalistic theories, agreement theories, and political theories of human rights. The philosophical basis and theoretical elements of each branch will be discussed. I will assess the advantages and weaknesses of each view.

In addition, inspired by the works of Beitz and Rawls, I will provide a slightly refined account of the political theory by developing what I call the fiduciary theory of human rights. It will be explained that the fiduciary account provides a better normative framework for understanding the function and the content of the international doctrine. It also delivers a more robust normative structure to defend the cultural rights of homeland minorities as part of the international standards of human rights.

1. Theorizing Human Rights: Preliminary Notes

1.1. The Two UN Covenants: Civil and Political Rights Versus Economic, Social and Cultural Rights

Human rights are traditionally divided into two major categories of rights: Civil and Political Rights under the International Covenant on Civil and Political Rights ("ICCPR")

and Economic Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Although the United Nations has repeatedly made it clear that it regards these two categories as equally important, indivisible, and complementary, [39] generally, the two categories were treated differently both in theory and practice. Far fewer countries have recognized the socio-economic rights in their domestic courts and very few implemented them in their national constitutions. Also, there has been less emphasis on monitoring and oversight of the enforcement of the socio-economic rights. International non-governmental organizations such as Amnesty International and Human Rights Watch have traditionally paid more attention to violations of civil and political rights. Moreover, from the theoretical point of view, some have argued that the two categories of rights are fundamentally different in nature and normative status. The general impression is that the socio-economic rights have been accorded a second-class status in international law, which is arguably a violation of the principle of indivisibility and equal value of all human rights.

Some commentators, such as David Kelley, have argued that civil and political rights are essentially distinct from economic, social and cultural rights. They describe the distinction as the difference between the concepts of "freedom from" (or negative obligations) and "freedom to" (or positive obligations). I think this distinction is invalid and does not withstand a close scrutiny of rights under the UN Covenants.

Those who argue against the equality of the two categories have provided many reasons. David Kelley, for example, argues that while the civil and political rights include

[39] UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

freedom *from* interference, the economic, social and cultural rights (or in his vocabulary "welfare rights") include freedom *to* enjoy certain goods (Kelley 1998, 46). According to this view, the civil and political rights impose only negative obligations on states, which can be implemented immediately. That means states have the duty to refrain from infringing them. On the contrary, the economic, social and cultural rights impose positive obligations on states, which can be realized only progressively. That means states are required to take steps and allocate resources gradually in order to implement them.

There is some validity in the general claim that the two categories impose a different level of obligations on states. Under ICCPR state parties undertake to "respect and to ensure… the rights recognized in the Covenant", [40] while under ICESCR state parties undertake to "*take steps*, individually and through international assistance and co-operation… to achieve *progressively* the full realization of the rights recognized in the Covenant." (Emphasis added) [41]

However, it is unhelpful and misleading to frame the two categories of rights as having *entirely* a negative/immediate or a positive/progressive nature. Many civil and political rights under the ICCPR require state parties to take positive measures, to intervene in public or private domains, and to allocate a considerable amount of resources for that purpose. For example, consider Article 6 of the ICCPR, the right to life. The right obligates state parties to refrain from arbitrary deprivation of life, prevent "killing", "disappearance of individuals", and also *taking positive measure*s to "reduce infant

[40] Article 2, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[41] Article 2, UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

mortality" and "increase life expectancy." [42] These obligations require states not only to abstain from intervention, but also to allocate resources and invest in a system of courts and police, and to improve the health care or even education system.

Another example is the right against torture under Article 7 of the ICCPR. Beside prohibiting state parties from actions that cause physical or mental suffering, Article 7 also mandates state parties to take steps to educate, train and monitor enforcement personnel, medical personnel, and police officers who are involved in the treatment of individuals subjected to arrest, detention or imprisonment. These objectives are not all capable of immediate implementation, and some of them require "progressive realization". [43]

On the other hand, some economic, social and cultural rights under the ICESCR can be fulfilled to a great extent by a government abstaining from intervention or imposing a proper legal regime. Consider the right to join trade unions, under Article 8(a) of the ICESCR, or the right to strike, Article 8(d). Traditionally one of the main threats against the fulfillment of these labour rights was government intervention. The implementation of these rights is dependent more on establishing an effective legal regime restricting the government and third parties from interference, rather than mere allocation of goods and resources.

[42] UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982.
[43] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

Contrary to the argument of some commentators, the binary of positive and negative human rights (that is, the binary of "freedom to" and "freedom from") is not valid and does not accurately capture the nature of the two categories of rights under the ICCPR and the ICESCR.

1.2. Cultural Relativism and the Universalism of Human Rights

Some forms of cultural relativism seem to be irreconcilable with the idea of universal human rights. If all moral norms are culturally relative, how can *universal* human rights exist?

One type of cultural relativism is the idea that each culture has its own evaluative standpoint, and no evaluative standpoint is better than any other. In this view, moral norms and values of different cultures are incommensurable (Perry 2000, 80).

This form of cultural relativism relies on a false assumption about the nature of culture. It rests on a contested idea that cultures are unified and homogenous wholes subject to our judgments as discrete entities. As Amartya Sen explains in his criticism of this view, some advocates of cultural relativism claim that values such as tolerance, individual autonomy, or civil and political freedoms are exclusively rooted in "Western" culture, while Asian or Islamic cultures are more concerned with communal values, order, and hierarchy (Sen, 1999, 227).

Facing with the complex degree of diversity in the world, it might be tempting to draw artificial boundaries around cultures and assume that they are static, homogenous and

coherent systems of beliefs and practices, which can be labeled as "individualistic" or "authoritarian" to describe every individual who falls within them. However, one might ask if this is a reasonable assumption about culture. Probably not.

We have all experienced participating in cultures with multiple competing narratives each pulling toward different sets of values. Cultures have emergent and dynamic properties and narratives with no clear boundaries. Through the passage of time, cultural narratives overlap with each other, contest each other, and evolve through interaction with other cultures. As Benhabib correctly put it:

> "The social observer...is the one who imposes, together with local elites, unity and coherence on cultures as observed entities...Participants in the culture, by contrast, experience their traditions, stories, rituals and symbols, tools, and material living conditions through shared, albeit contested and contestable, narrative account. From within, a culture need not appear as a whole; rather, it forms a horizon that recedes each time one approaches it." (Benhabib, 2002, 5)

Understanding cultures as homogeneous and monolithic wholes is not only naive, it could also be harmful, because this type of understanding dangerously promotes "cultural essentialism". When we generalize characteristics about a culture, we falsely assume that dominant norms or narratives are central to everyone who is associated with that culture. This generalization could impose an artificial identity on minorities, impede the

development of less powerful narratives, and oppress intercultural interaction and dialogues.

I agree with Sen in claiming that the pursuit of civil and political rights and respect for tolerance and individual freedoms are not exclusively Western values. These values might not be currently the dominant narratives of every culture around the world, but the main elements of civil rights and fundamental freedoms were present within all major traditions throughout history.

Sen, in his article, mainly focuses on the existence of civil and democratic aspiration in Asian cultures. I believe the same idea is true about Islamic traditions. Contrary to the image that is usually displayed about the Islamic culture as a culture hostile to tolerance, diversity and individual freedom, there has been a long tradition of diversity, accommodation and individualism in Islamic countries. During the period of the Mogul Empire in India, Samanid Dynasty in Iran and Ottoman Empire in Turkey, one can find many examples of political and religious tolerance toward individuals and minority groups, including the Millet System under the Ottoman Empire (Pföstl, 2014, 62).

Moreover, as Abdullahi An-Na'im rightly points out, many scholars and theologians have shown that Islamic *Shari'*, similar to any other religious texts, could be interpreted in a variety of ways to promote the ideals of egalitarianism and civil and political rights in Islamic laws (An-Na'im, 1996, 161-171). One can identify many examples of alternative interpretations of Shari' in the history of Islam. Fresh elaboration and progressive

interpretation of Sharia' is an important tool to support and defend the norms of human rights from *within* the Islamic culture.

Cultural relativism creates an illusion that non-Western traditions are more opposed to human rights than they truly are. It could also lead to dangerous forms of essentialism, over-generalization and stereotyping. We should perhaps strive for a more reasonable and comprehensive account of cultural diversity by promoting intercultural dialogue and recognition of the multiplicity of narratives within each culture.

2. Three Normative Understandings of Human Rights

One of the best ways to explain the political conception of human rights, or as Beitz calls it the "practical" conception (Beitz 2009, 8), is to contrast the theory against other competing understandings of human rights.

Traditionally human rights have been regarded as a contemporary version of natural rights tradition, grounded in common features of humanity. Contemporary versions of this view, commonly called naturalistic or moral theories, follow a similar foundationalist justification and ground human rights in features which all humans allegedly share, such as personhood and agency. The second understanding of human rights, which I follow Beitz in calling them agreement theories, relies on the common ground among the world's major moral perspectives to justify human rights. Human rights, under this theory, are more or less what falls within the agreement of the international community.

Beitz, as well as many political theorists of human rights, [44] rejects both understandings of human rights. They reject the natural rights tradition by arguing that the contemporary versions of the natural rights theory rely, unjustifiably, on contestable assumptions about the essential features of human nature. On the other hand, political theorists argue that international agreement on a set of rights by itself does not provide a sufficient normative justification for the moral authority of human rights.

The political theory of human rights draws on John Rawls's reconstruction of the philosophy of human rights in *The Law of Peoples* (Rawls, 1999). Instead of trying to derive human rights from an abstract pre-conception about human nature, Rawls explains human rights in terms of contemporary political practice. According to him, the most important function of human rights is to mark the boundaries of international toleration among the independent states. For this mechanism to work any violation of a human right in any part of the world should trigger the concern and consequent actions of the international community. Human rights in this sense, as Rawls put it, sets the limits of toleration within 'society of peoples' (Rawls 1999, 4).

Charles Beitz follows a similar approach in his book *The Idea of Human Rights* (Beitz, 2009). He argues that human rights should be conceived as a "mechanism" to stand against the harms and threats that the modern political world order, consisted of

[44] See generally Raz, J. (2010) 'Human Rights without Foundations', in Besson, S. and Tasioulas, J. (eds.) *The Philosophy of International Law*. Oxford University Press; Baynes, K. (2009) 'Toward a political conception of human rights', *Philosophy & Social Criticism*, 35(4), pp. 371–390; Sangiovanni, A. (2008) 'Justice and the priority of politics to morality', *Journal of Political Philosophy*, 16(2), pp. 137–164; Cohen, J. (2004) 'Minimalism about human rights: The most we can hope for?', *Journal of Political Philosophy*, 12(2), pp. 190–213; Macklem, P. (2015) *The Sovereignty of Human Rights*. New York, NY: Oxford University Press.

sovereign nation-states, could impose on individuals. This mechanism is designed to protect some important and generic interests of individuals against the most probable dangers of the contemporary political institutions, or as he puts it, protecting "urgent individual interests" against "standard threats" (Beitz, 2009, 109). In his view, the idea of human rights departs in its nature and in its justification from the classic understanding of "natural rights." (Beitz, 2009, 49).

In what follows, I will mainly draw on Beitz's analysis and examine each understanding of human rights in further detail. Then, I will explain the political understandings of human rights, particularly the fiduciary theory, have the right normative capacity to justify the function and the content of the international doctrine.

3. Naturalism and Human Rights

This section will discuss the main interpretations of the naturalistic theory and summarize the major criticisms provided by some of the contemporary theorists of human rights, particularly Charles Beitz.

According to naturalistic theories, human rights are those rights that are possessed by all humans "in virtue of their humanity." (Simmons, 2000, 185) Although there are several interpretations of this conception of human rights, almost all naturalistic theories have some conceptual features in common: they usually justify human rights based on a few fundamental moral values and conceptualize them as pre-institutional and timeless rights.

While there are some significant advantages to this conception, by conflating natural rights with human rights, naturalistic theories are unable to capture the actual function of human rights as a contemporary political practice.

3.1. Core Ideas of the Naturalistic Theory

In *Human Rights and World Citizenship*, John Simmons writes, "human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity." (Simmons, 2000, 185) He describes how the modern idea of human rights has roots in the natural rights theories of the early modern period in Europe. He describes natural rights as "rights that are possessed by persons in the state of nature", "rights that are innate and inalienable", "rights that can be claimed by humans in virtue of their humanity", "rights that belong to human being regardless of any social or political construction", and "rights that are possessed by every human being in all time and all places." (Simmons, 2000, 185)

The idea of rights in the "state of nature" originated from the early modern legal and political thinkers, such as Locke and Hobbes. The early modern thinkers developed the natural rights theory to explain and justify the legitimacy of the authority of the state to impose duties on its subjects. They evaluated political authority by considering the likely alternative if there was no political authority at all. This pre-political condition is commonly called "the state of nature". It is a hypothetical scenario in which there is no sovereign power, and people are free from any imposition of political power that limits their 'natural' freedom.

According to Locke, in the state of nature, each individual possesses natural rights as a human being. These are the rights to life, health, liberty, and property. The state exists in order to protect our natural rights. Therefore, in the context of religious and moral diversity, it is illegitimate for a state to abuse its coercive power and limit the natural rights to life, liberty or property.

However, as will be explained in further detail, it is far from clear why the contemporary doctrine of human rights should be identical, or limited, to the early modern theory of natural rights. As explained by Beitz, human rights doctrine represents "a more ambitious assumption of responsibility for the public sphere than was required by motivating concerns of classical natural rights theories." (Beitz, 2009, 57).

Early modern theories of natural rights are not the only type of naturalistic theories. Contemporary political theorists such as James Griffin and Martha Nussbaum have presented their own versions of naturalism as it relates to human rights.

Griffin in his book, *On Human Rights*, grounds his theory of human rights in the two ideas of "personhood" and "practicalities" (Griffin, 2008, 33-37). He identifies personhood with the status of a person as a normative agent. The normative agency, according to him, is "our capacity to choose and to pursue our conception of a worthwhile life." (Griffin, 2008, 45) Human rights can be seen as the fundamental moral norms in that their fulfillment is necessary for the development of our status as agents.

He particularly speaks of three higher order rights: autonomy, liberty and "minimum provision of resources and capabilities." (Griffin, 2008, 33) Together with the concept of

"practicalities", which are "empirical information about human nature and human societies", Griffin discusses how these three rights can be expanded to include many of the rights contained within the international human rights documents. For example, autonomy as a higher level right would be the source of some lower level rights, such as freedom of expression or the right to some degree of healthcare or education, because the exercise of autonomy requires having a minimum level of health or the ability to express one's opinion. From the second level rights, together with the concept of particularities, we can derive the third level of rights. For instance, the realization of freedom of expression in particular circumstances of our society requires protecting the freedom of the press. (Griffin, 2008, 38) Accordingly, we can derive the lower level human rights, such as freedom of the press, from the highest level which is individual autonomy.

Martha Nussbaum has developed another version of the naturalistic theory. She argues that the most defensible notion of human rights is one grounded in the idea of "basic human capabilities." (Nussbaum, 1997) The notion of "capability" was first formularized by Amartya Sen in order to provide a better framework to assess social justice, quality of life and human development (Sen, 1999).[45]

Instead of focusing on the equal distribution of resources and utility in society, the capability approach measures the degree to which individuals have transformed resources into valuable actions and states of being ("doings" and "beings"). People vary in how they transform money or resources into meaningful capabilities and functioning. To

[45] The Human Development Index, which is a new measure used by the UN for assessing the human element of economic development, is created partly based on the works of Amartya Sen.

borrow Arneson's example, "what counts is not the food one gets, but the contribution it can make to one's nutritional needs, not the educational expenditures lavished, but the contribution they make to one's knowledge and cognitive skills." (Arneson, 1989, 90)

Inspired by the works of Aristotle, Nussbaum formulates "basic" capabilities by asking "what activities characteristically performed by human beings are so central that they seem definitive of the life that is truly human?" (Nussbaum, 2000, 39) To answer this question, she provides a list of basic human capabilities that are "especially urgent," which she claims people are entitled to "simply by virtue of being human adults and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group." (Nussbaum, 1997, 292) The list includes ten basic capabilities: Life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species, play and control over one's environment (Nussbaum, 1997, 41-42). According to her, governments have the duty to ensure that everyone enjoys the minimal thresholds of these basic capabilities.

3.2. Shared Elements of Naturalistic Conceptions of Human Rights

As we have seen, there are various interpretations of how naturalist theory relates to human rights. Most of these conceptions share some significant conceptual similarities. First, they attempt to derive the list of human rights from what they conceive as "the nature" of the human being or, alternatively, from some "fundamental" moral norms and principles. Second, many of these conceptions regard human rights as pre-institutional in the sense that their contents are "conceivable independently of any reference to the

structural feature of institutions." (Beitz, 2009, 54) Finally, a naturalist usually considers human rights as "timeless rights", which can be claimed by all individuals at all times and in all places.

It is important to note that not all of these three features are necessarily shared by all naturalistic theories. The type of similarities that exist among them might be better described as "family resemblance" than "common core" connections;[46] some of these theories embody all of these features, while others only take one or two. Although these features are theoretically distinct, they are conceptually interrelated. The claim that human rights are based on the nature of humanity in itself could naturally support the idea that human rights are timeless. Since modern social institutions are fairly recent artifacts of human civilization, one could jump to the conclusion that human rights, at least in their first order expression, are pre-institutional.

Before discussing the problems of the naturalistic theories, let us first examine the appeal and advantages of this approach. Human rights are supposed to be "universal" in nature. Naturalistic theories can persuasively explain why and in what sense human rights are universal rights. According to these theories, universality can be explained in the form of naturalness and timelessness. If human rights are grounded in the 'nature' of humanity, then they should *universally* belong to every human being in all times and all places.

[46] A family resemblance refers to a "…network of similarities overlapping and criss-crossing..." such that the similarities between objects "...crop up and disappear" as one moves from object to object, much like a family resemblance. (Wittgenstein, 1968, 66)

Another advantage of naturalistic theories is their ability to explain the critical aspect of the international doctrine. Human rights are commonly believed to be critical standards for measuring the appropriateness of actual rules and conventions of existing societies. Human rights, at least according to the original framers, are not dependent on moral codes or conventional beliefs of any particular nation, culture, or religion (Maritain, 1949). Contrarily, they are supposed to be a set of standards toward which every nation and community must strive.

As it has been explained, the naturalistic approach is able to theorize human rights without relying on any existing moral or cultural conventions. The two ideas of naturalness and the pre-institutional status of the natural rights explain why human rights, in some significant sense, are justified regardless of contingencies of cultural and geographical considerations and how they can be seen as critical standards for the evaluation of existing moral codes, cultural norms and practices in the world.

Another reason that makes naturalism appealing is its theoretical simplicity. The theory basically derives a list of rights from higher-level moral values based on its understanding of 'human nature'. The tasks of a naturalist are to decide what philosophical and moral norms are fundamental to human nature, what set of rights can be derived from this higher level, and finally how the actual international doctrine of human rights represents or misrepresents this "proper" set of rights. As a result, such a theory can be developed without referring to the actual practice of human rights. In this sense, the theory is to some extent detached from the complexity of the contemporary human rights laws.

3.3. Problems of the Naturalistic Theory

Human rights, according to the naturalists, can be understood without reference to contingencies of actual social, political or legal institutions. Since these rights do not depend on laws or conventions of any society, they can be claimed by every human being even if no societal structure or institution exists.

The *prima facie* problem with this idea is that many actual rights found in international human rights documents cannot be conceptualized or implemented without reference to modern societal institutions. Take, for example, the following list of rights: the right to primary and secondary education (Article 13, ICESCR), the right to take part in the conduct of public affairs through freely chosen representative (Article 25, ICCPR), the right to nationality (Article 24, ICCPR), the right to form trade unions (Article 8, ICESCR), and the right to have access to a fair and public hearing(Article 14, ICCPR). In order to enjoy any of these rights as a human being, it is required to go beyond the state of nature. The enjoyment of these rights is not possible without the modern political, economic and legal institutions.

Faced with this problem, naturalists usually find themselves caught in a dilemma: either to yield to a skeptical conclusion that many of the actual rights enumerated in international documents are improperly recognized as human rights, or to abandon the whole natural rights idea of pre-institutionality; neither is quite satisfactory.

Another proposition supported by naturalistic theories and inspired by the natural rights tradition is the idea that human rights claims are justified at all times and in all places.

Similar to the previous claim, the main problem with this conception is that many internationally recognized norms of human rights presuppose a particular type of institutional setting that has only existed in certain periods of human history and might not exist in this form beyond a certain point in the future. As James Nickle notes,

> "[S]ome human rights cannot be universal in the strong sense of applying to all humans at all times, because they assert that people are entitled to services tied to relatively recent social and political institutions … Due process rights, for example, presuppose modern legal systems and the institutional safeguards they can offer. Social and economic rights presuppose modern relations of production and the institutions of the redistributive state." (Nickel, 2006, 38)

Also, consider Article 26(1) of the Universal Declaration of Human Rights ("UDHR"):

> "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

Pointing to this article, Josef Raz notes that if human rights were timeless, then it would follow that "cave dwellers in the Stone Age had that right. Does that make sense? . . . The very distinctions between elementary, technical, professional and higher education would have made no sense at that, and at many other times." (Raz, Joseph, 2010, 40)

Beitz also rejects the idea that human rights are timeless in the sense that it has a bearing for "future human beings in societies not yet existing." He emphasizes that "[i]nternational human rights are not even prospectively timeless. They are standards appropriate to the institutions of modern or modernizing societies." (Beitz, 2009, 58)

Proponents of timelessness face a similar problem as those who claim that human rights are pre-institutional. Some deny that human rights that are not seemingly timeless are not "proper", while others, such as Griffin, distinguish between basic rights and "derived rights", and argues that timelessness only apply to the former and not the latter. (Griffin, 2008, 50) Liao and Etinson explain this two-level rights solution in this way:

> "[i]t is true that it would seem odd to claim that cavemen had a human right to free elementary education…But this still leaves open the possibility that the right to free elementary education is a modern right that is nevertheless derived from a more basic right that does apply timelessly. The relevant basic human right may be that of acquiring the knowledge necessary to be an adequately functioning individual in one's circumstances, or, perhaps even more basic than that, the right to effective agency." (Liao and Etinson, 2012, 243)

The problem with this solution is that it is nearly impossible to produce the extensive list of actual human rights in a satisfactory way from a very restricted list of first-order rights such as the right to life, liberty and bodily integrity. Another problem with this strategy is that while it indicates that basic rights must be "genuine" human rights, neither the right

to "effective agency" nor the right to "acquiring knowledge necessary for effective agency" is among the human rights recognized by the international community. Moreover, the assumption that human rights can be derived from a few basic moral values, such as agency, runs the risk of rendering human rights unacceptable from the perspectives of people who do not share the liberal notion of "agency" as a higher level value in their moral systems.

Let me explain the last criticism in further detail. According to the naturalistic account, human rights are regarded as an expression of one general moral or philosophical idea based on the basic interest of human beings. The whole content of human rights has to be derived from few fundamental interests such as agency, dignity, personhood or basic capabilities. One of the main criticisms comes from Rawls in *The Law of Peoples*. According to Rawls, naturalistic accounts of human rights generate the content of human rights based on what he calls "comprehensive doctrines," which involves a particular "theological, philosophical or moral conception of human person."(Rawls, 1999, 81) Rawls argues that by grounding the content of human rights on a comprehensive doctrine, human rights will become unacceptable from the view of some other comprehensive doctrines which are based on incompatible philosophical and moral views about the nature of humanity.

Justifying human rights solely on the liberal conceptions of autonomy and agency would make it very challenging to form a non-sectarian consensus on the norm of human rights from morally diverse perspectives. As Beitz put it, "it is essential to take seriously the aspiration for a normative doctrine suitable for contemporary international and open to

endorsement from a variety of reasonable points of view." (Beitz, 2009, 68) There is no good reason to expect the whole content of human rights be generated out of a single basic interest or a fundamental moral value. It is not clear why the content of human rights cannot be justified by multiple and distinct reasoning strategies depending on the nature of each right. I will explain this point further in the next chapter.

The idea of natural rights might be a worthwhile theoretical project, but it is important to identify its anomalies in comparison to the contemporary project of human rights. It is certainly true that some natural rights such as rights to life and physical security are also among the broader set of rights protected by human rights, but it would be a mistake to conflate the motivating concerns beyond the two doctrines. Human rights as a modern political phenomenon should be understood in the context of the contemporary social conditions of human being.

It is not surprising that most of the proponents of naturalistic theories express concerns about the scope and the content of the existing rights included in the international law documents. Some of the theorists have suggested narrowing down the content of existing human rights, because many of the norms recognized in the international human rights documents do not meet the normative requirements of the naturalistic theory (Cranston, 1973, 65-71). The inability of the naturalistic theory in justifying main parts of the content and the scope of the widely recognized and long-standing practice of human rights could indicate that the theory might be misguided about the normative structure of the doctrine.

3.4. Naturalistic Theories and Minority rights

The naturalistic account of human rights is capable of providing a limited level of support for minority rights, which is mostly restricted to the entitlements of the individual members not to be denied the right to express and learn their own mother tongue or practice some of their own cultural traditions and customs.

The naturalistic arguments are aligned with the dignitarian account of minority rights, focusing on the important role of cultural group membership in an individual's self-identification, self-respect and exercise of autonomy. According to some of the naturalistic scholars, protecting basic cultural rights could lead to a "robust sense of identity" and a "rich array of options in life," which is consequential for prosperity and flourishing of individual agency. This understanding of minority protection is consistent with the limited and anti-discriminatory cultural rights of persons belonging to "ethnic, religious or linguistic minorities" identified under Article 27 of the ICCPR.

However, most of the naturalistic theorists criticize the inclusion of more substantive minority rights in the human rights norms, such as funding of a minority's cultural practices, land rights or territorial autonomy. Some critics argue that these rights are by nature group rights and cannot be consistent with the individualistic nature of the norms of human rights. Some others, including Griffin, argue that human rights are not rights to "any forms of flourishing" but they are rights to "more austere conditions" and "minimum material provisions" for our status as an agent. According to Griffin, the rights to the survival of one's culture, however, cannot be considered as a "minimum" material condition. (Griffin, 2008, 262-264)

4. Agreement Theories

The idea of generating the whole content of human rights out of our conflicting assumptions about human nature or a higher level moral value was opposed by a number of human rights theorists from the agreement camp. Richard Rorty rejects the idea as "human rights foundationalism." (Rorty, 1994, 167-185) According to Rorty, it is possible to legitimatize a human rights regime without appealing to an unnecessary foundational theory about human nature and morality. Michael Ignatieff criticizes metaphysical justifications for human rights, or what he calls "philosophical idolatry," as unclear and controversial. (Ignatieff, 2001, 54) For him, this approach to understanding human rights can lead to disagreement about the international doctrine and it could eventually undermine the global commitments to enforcement of the universal norms.

For many of the opponents of the naturalistic approach, an obvious alternative was a form of agreement theory. Unlike naturalistic theories that are based on abstract ideas about the human nature, agreement theories take a more pragmatic approach by justifying the norms of human rights based on the intercultural commonalities among various moral codes and rights recognized across different societies. In what follows, we evaluate some variations of the agreement account developed in the works of contemporary scholars.

4.1. Core Elements of the Agreement Theory

According to this approach, human rights consist of those rights that fall within the overlapping norms of existing cultures and moral codes in the world. Human rights, in this sense, represent the most basic values common in all societies such as rights to life and bodily securities. Since different cultures can be deeply dissimilar in their moral

value systems, this approach could potentially put a limit on the scope and the content of the universal doctrine. It is no surprise that many of the adherents of the agreement view endorse a "minimalist" conception of human rights.

There are at least two ways that such an agreement can be understood: the agreement can be based on common values that all cultures share, or it can be seen as a reachable consensus among incompatible comprehensive views over a single set of norms. I will explain each of these understandings in further detail.

According to one understanding of the concept of agreement, human rights function as an agreement on the most basic set of rights that are *present* among all existing cultures. I follow Beitz in calling it "common core" conception of agreement theory.(Beitz 2009, 74) The idea is similar to what others have described as "thin moralities" (Walzer, 1994, 9) or a "lowest common denominator" among all cultures. (Vermeersch, 2005, 48)

An obvious challenge for proponents of this view is that, as an empirical matter, many rights enumerated in the international documents do not simply fall within the present overlap of different cultures and moral norms. For example, many of the civil and political rights under the ICCPR and socio-economic rights under the ICESCR are arguably outside of the common ground of the major cultures and moral value systems in the world. Examples include rights such as freedom of religion, equality of men and women before the law, freedom of expression, equal rights to marriage, the right to private property, protection against unemployment and the right to join trade unions.

For the same reason, this understanding of agreement theory usually leads to skeptical views about the content of human rights. Similar to the naturalistic approach, proponents of agreement theories face the dilemma of choosing between what they see as "genuine" rights, the minimal set of rights that falls within the overlap, and what are widely recognized as human rights included in the international documents.

Ignatieff, for example, argues that if we limit the focus of human rights on the protection of physical security, "to stop torture, beatings, killings, rape, and assault," (Ignatieff, 2001, 173) we can achieve a truly global consensus on human rights. According to him, human rights should flow from "assumptions about the worst we can do, instead of hopeful expectations of the best." (Ignatieff, 2001, 80) Although he does not directly advocate for any version of agreement theory, one of the implications of his idea is that protection of bodily security is perhaps one of the few norms that can be the subject of the unanimous agreement by all cultures and worldviews around the world. Minimalism, in Ignatieff words, is "the most we can hope for" (Ignatieff, 2001, 173) and, as the result, we eventually have to abandon a substantive part of the existing content of the international human rights.

Another understanding of the concept of the agreement does not rely on the present commonality among moral norms; rather it aims to *build* a consensus on a set of norms among opposing moral and religious perspectives in the world.[47] According to this conception of the agreement, supporters of different cultural and ethical traditions can

[47] Although the concept is borrowed from John Rawls's idea of overlapping consensus., he was not a proponent of agreement theory of human rights. His view will be discussed further below.

potentially agree on a set of human rights norms, for a certain political purpose, while each of these groups can justify the same set of norms based on their own moral value system.

The idea of justifying a single set of human rights standards from within the value system of different cultures has been appealing to many human rights scholars. Abdullahi An-Na'im, for example, defends this view and writes,

> "Unless people accept these [human] rights as binding upon themselves from their own cultural, religious and/or philosophical point of view, they will neither voluntarily comply in practice, nor require their government to respect and promote human rights in the official functioning of the state." (An-Na'im, 1999, 315)

To achieve this purpose, he has developed a secular "framework of interpretation" to reinterpret Islamic holy texts in order to create support for human right norms based on Islamic Shari'a. (An-Na'im, 1996, 84-90)

An initial problem with this global convergence on a set of human rights standards is that it assumes most of the recognized international norms are reachable from within every cultural and moral tradition. This might not be a valid assumption. In fact, if we consider some available interpretations of world's major religions and traditions, particularly the conservative versions, we can quickly realize that many of the traditions are fundamentally incompatible with some of the international norms including rights of women and children.

Joshua Cohen is aware of this problem when he argues that in order to reach a truly global consensus on human rights, it is required to provide "fresh elaborations" of the traditional views. He argues that:

> "Because the formulation of the ideas and principles of global pubic reason is not undertaken with an eye to find common ground among determinate ethical traditions, the enterprise of showing that those ideas and principles can win support within different ethical traditions may require fresh elaboration of those traditions by their proponents—where it is understood that the point of a fresh elaboration is not simply to fit the tradition to the demands of the world, but to provide that tradition with its most compelling statement." (Cohen, 2004, 201)

To illustrate this point, he examines the evolution of the Roman Catholic Church in the twentieth century from rejecting the traditional idea of "exclusive rights of truth" to embracing the concept of religious toleration based on the Christian idea of "human dignity". (Cohen, 2004, 202) Accordingly, in this view, the intercultural agreement on norms of human rights can be reached by the progressive reinterpretation of the conservative and traditional value systems to make room for a consensus on a set of universal moral standards.

4.2. Advantages of the Agreements Theory

The idea of justifying human rights as an actual or a potential intercultural agreement has some theoretical and practical advantages. First of all, it explains why human rights are

universal. This account regards human rights as nothing but a set of norms that exists within each and every culture. The norms are either explicitly present in each moral tradition around the world, or they can be inferred by a fresh re-interpretation of them. Through this approach, human rights can be defended from within many different societies without appealing to any philosophical or metaphysical assumption about human nature or fundamental moral values. The agreement theory regards human rights as a political assertion rather than a philosophical one and, therefore, the theory avoids some of the common problems of the naturalistic theories.

Another advantage of the theory is its capacity to support humanitarian interventions. Agreement theories are politically effective because they can justify international intervention to protect against violation of basic human rights. Intervention to protect people of a country by outside agents might seem paternalistic and parochial unless there is a reason to believe that people whose rights are violated would authorize intervention based on their own values if they would have been able to choose so. As Beitz explains,

> "If the human rights at stake in an interference were the actual or possible objects of an agreement that embraces the society in question, then the aims of the interference could be seen as ones that those affected, themselves, would accept if they were in a position to bring their own moral beliefs to bear on the matter at hand. Confining human rights to the contents of a possible intercultural agreement seems to offer the best defense against the objection that interference to defend human rights is unacceptably paternalistic." (Beitz, 2009, 85)

The intervention mechanism refers to one of the essential functions of human rights in modern international relation. It is widely believed that severe human rights violation should legitimately trigger international reaction through political or economic intervention. A proper theory of human rights should be able to explain and justify this intervening role of the international practice. Humanitarian intervention will be discussed further under the political theories of human rights.

4.3. Problems of the Agreement Theory

The agreement theory has been criticized widely in the literature. Here, I only discuss two issues: the problems with the idea of minimalism and the problem of normativity. These issues are mainly the restatement of the criticisms raised by Raz and Beitz.

As I briefly explained earlier, the first challenge for advocates of agreement theories is the fact that the moral values that are shared among different worldviews and moral codes are very limited. Even if you consider the set of rights or values that are "reachable from" within world culture, what we end up with is probably a minimal set of rights or values mostly related to physical security of individuals and peaceful relationships among states. As we have seen in the works of Michael Ignatieff and Joshua Cohen, some agreement theorists advocate for restricting the list of human rights to a minimal set of norms by excluding a significant portion of what are presently included in the international human rights law documents.

The fact that agreement theories do not endorse the existing content of human rights is not, by itself, sufficient to justify a conclusion that the theory has no merit. It is perfectly

appropriate for any theory of the human rights to be critical about the current content of the doctrine and to provide a guideline to change and revise the content and scope of the human rights. For example, as many scholars have pointed out, the fact that the right to "periodic holidays with pay" exists under Article 24 of the UDHR does not mean that the available theories should not criticize it as improper.

Perhaps a more important problem with the agreement theory is the problem of normativity. According to the agreement theory, a right is not a human right unless it falls within the intercultural agreement. However, human rights are more than a set of norms and values that different cultures happen to have in common; rather, the human rights are the set of norms and values that they *should* have in common. These norms are critical standards that are supposed "to provide a basis for criticizing existing institutions and conventional beliefs and justifying efforts to change or revise them." (Beitz, 2009, 78) If a human rights enterprise is established to assess and criticize the existing practices around the world, it would be wrong to conflate their source of normativity with the very practices they are supposed to assess and criticize. As it was mentioned earlier, a desirable theory of human rights should be able to explain this critical aspect of the doctrine. Limiting the moral standing of the human right to a factual claim about actual or potential agreements on existing values among different cultures fails to capture the normative aspect and the critical edge of the doctrine.

Consider the following example. It should not be difficult to imagine a universe very similar to our world except for the fact that in this hypothetical universe slavery is a common and valuable practice among all of the existing cultures. Suppose that this

practice is considered to be acceptable or even highly respected in almost all of the major recognized religions and traditions in the world. Does the intercultural agreement by itself make slavery a human right?[48]

The answer to this question is clear. The fact that the dominant moral perspective in our hypothetical society is flawed, and their value systems fail to capture the evil of slavery and racism has no bearing on what counts as a human right. In other words, from the empirical fact that some societies accept or potentially agree on a set of values, it does not follow that those sets of values have a moral or normative authority. Our shared set of values could always be misguided and wrong. A theory of human rights must be able to explain and capture the normative aspect the doctrine. [49]

We assume that the right against slavery is or should be a human right precisely because our reasons for such an assumption are independent of the actual agreement or disagreement of the world's cultures. This demonstrates that the source of normative authority of a human right is irrelevant to the empirical fact about what set of values are happened to be shared by certain communities in a given period of time. A different type of normative structure is required to explain the source of authority of the universal doctrine.

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[48] This is Beitz's example. See Beitz, C.R. (2009) *The idea of human rights*. New York: Oxford University Press, p.78.
[49] For further discussion see Beitz, C.R. (2009) *The idea of human rights*. New York: Oxford University Press, p. 78-80.

Although the agreement conception is relatively successful in providing a non-sectarian and uncontroversial basis for defending the core norms of human rights, it is unable to provide a compelling account of its normativity.

4.4. Agreement Theories and Minority rights

Among all theories of human rights, the agreement theory has the least theoretical capacity to support the norms of homeland minority protection. It is a very challenging task to find a global convergence among all cultures on the substantive norms of minority rights including both negative and positive protections.

In many countries around the world, the issue of accommodation of national minorities and indigenous peoples are among highly securitized issues. Supporting the rights of ethnic minorities is commonly seen as a serious threat to national solidarity, identity and security. Even Western democracies are increasingly divided over the question of which method is more appropriate in dealing with the claims of ethnocultural minorities at the national or international level. In 2007, when the Draft Declaration on the Rights of Indigenous Peoples was first passed by overwhelming majority of the state parties in the United Nations, four Western countries, including Canada and the United States, voted against the Declaration. The opposing countries sounded worry about a range of issues including the fact that the provisions requires the governments to obtain "free, prior and informed consent" from indigenous peoples when dealing with developing natural resource projects in their historical lands.

5. Political Theories of Human Rights

As we have seen in the previous sections, even though the naturalistic and agreement accounts of human rights have some theoretical appeals, they both have several unsatisfactory implications. These problems have encouraged some of the contemporary legal and political scholars to look for a new approach in understanding the idea of human rights. In the wake of John Rawls's seminal theory in *The Law of Peoples*, the "political" conceptions of human rights became increasingly popular. Since the first formulation of the theory by Rawls, some notable theorists such as Raz, Wenar and Beitz have developed different versions of the theory.

According to the political theorists, any account of human rights should have the capacity to articulate a set of normative standards to explain and judge the actual practice of human rights. It should provide a theoretical framework to shed lights on the human rights enterprise as it currently functions in the international relations of states. It should also illuminate what kind of role the contemporary practice attributes to human rights and why they should be enforced.

Naturalistic and agreement theories attempt to derive the concept of human rights from expressions of one or another more general philosophical ideas which are remote and irrelevant to its practice. As Raz remarks they pay little attention to the difference between "something being valuable, and having a right to it." (Raz, 1986, 177) They fail to adequately explain the function that human rights are supposed to play in regulating the conduct of political actors and to fully elucidate what agents should primarily bear the responsibility of protecting human rights and what should happen if a norm is infringed.

Political conception, in contrast, offers more elaborative answers to these questions by grounding the theory of human rights on a broader political practice, because it takes the practice of human rights "as the source materials for constructing a conception of human rights."(Beitz, 2009, 102)

A political account of human rights considers the concept of human rights to be its role or function in the contemporary international relations. The proponents of political conception each have differently labeled this alternative approach; Charles Beitz and Leif Weinar prefer to call the approach "the practical conception" (Wenar, 2005, 285), while John Tasioulas calls it "functionalist theory" of human rights. (Tasioulas, 2012, 1) Here, I will refer to all the variant accounts of the approach as the political conception of human rights.

I will start with providing a comprehensive overview of John Rawls's human rights theory. Next, I will explore the political conception through a critical review of the works of two contemporary political philosophers, Joseph Raz and Charles Beitz. Finally, relying on the idea of the fiduciary theory of human rights, I will develop and defend a new account of the political theory.

5.1. John Rawls's Theory of Human Rights

In his first major book, *A Theory of Justice*, John Rawls lays out the foundation for what he called the principle of justice *within* a nation-state. About two decades later, in *The Law of Peoples*, Rawls takes upon himself the task of explaining what is the principle of justice *among* nation states, or as he calls it, the "society of peoples." His work embodies,

as he writes, the culmination of his "reflections on how reasonable citizens and peoples might live together peacefully in a just world." (Rawls, 1999, vi) The main project of the book was to formulate a set of principles which can be appealing to both liberal and non-liberal societies for regulating international relations and promoting fair and peaceful coexistence. These principles are supposed to provide a guideline for the foreign policy of liberal democratic societies. As a result, the theory must not be regarded as a theory of justice for a cosmopolitan state.

Rawls makes a fundamental distinction between liberal people and people in "decent consultation hierarchies", each organized politically in the form of states. People in decent hierarchical societies, according to Rawls, do not follow a liberal ideology, and their societies are not structured based on the norms of liberal justice. However, decent hierarchical people have a distinct idea of justice, which include some form of consultation, legislation and procedural fairness through which citizens and their interests are represented in the political system. Decent people are not aggressive toward other societies, and they respect the sovereignty and independence of other peoples.

"Society of Peoples" is composed of liberal and hierarchical decent people. They are both reasonable people and they can accept the same set of reasonable international laws, which Rawls calls "Law of Peoples" to regulate their mutual interaction and conflicts.

The distinction between liberal and decent societies represents the cultural diversity in the world and the level of toleration required for a fair cooperation in the international

relations. According to Rawls, non-liberal decent societies are sufficiently fair societies and liberals should not demand that they transform into liberal states.

To fully understand Rawls's idea of toleration, one must go back to his prior work, including *Political Liberalism*, where he makes a distinction between liberalism as a "political" doctrine and liberalism as a "comprehensive" doctrine:

> "[T]here are many reasonable comprehensive doctrines that understand the wider realm of values to be congruent with, or supportive of, or else not in conflict with, political values as these are specified by a political conception of justice for a democratic regime." (Rawls, 1996, 169)

As Aysel Dogan correctly observes,

> "just as a citizen of a liberal society respects other citizens' comprehensive doctrines within the limits of a political conception of justice, so a liberal society must respect other societies, which have comprehensive doctrines different from liberalism, provided that the terms of the law of peoples are secured." (Dogan, 2004, 136)

People who live in liberal societies might have distinct moral, philosophical or religious conceptions of what constitutes a good life; however, what unites them as citizens of a liberal society is their consensus upon some fundamental political values, such as the general conception of justice and equality of opportunity. The distinction between

political liberalism and comprehensive doctrines makes room to extend the law of peoples to non-liberal but decent societies.

Rawls adopts his familiar hypothetical tools such as the original position and the veil of ignorance to generate the principles of the law of peoples.[50] The following are some of the principles that reasonable people would agree on:

1) Peoples are free and independent, and their freedom and independence are to be respected by other peoples.

2) Peoples are to observe treaties and undertakings.

3) Peoples are equal and are parties to the agreements that bind them.

4) Peoples are to observe a duty of non-intervention.

5) Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.

6) Peoples are to honour human rights.

7) Peoples are to observe certain specified restrictions in the conduct of war.

8) Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime. (Rawls, 1999, 37)

[50] These hypothetical tools have been used by Rawls in *A Theory of Justice* for the first time. See: Rawls, J. (1971) *A theory of justice*. Oxford: Oxford University Press.

Principle number 6 introduces the concept of human rights and its role in a society of peoples.[51] Both liberal and decent societies would agree on the same set of basic human rights. By honouring human rights, decent people can earn "equal respect and tolerance" in the society of peoples. In fact, Rawls argues that respecting human rights "is a necessary condition of decency of a society's political institutions and of its legal order." (Rawls, 1999, 80)

Human rights, in Rawls's view, set limits on international toleration among a society of peoples; they "specify limits to a regime's internal autonomy" and their fulfillment is "sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force." (Rawls, 1999, 79) Those societies with their institutions respecting human rights qualify as a member "in good standing in a reasonably just Society of Peoples" and are safe from "justified and forceful intervention by other peoples." (Rawls, 1999, 80)

In this theory, human rights can be defined by their "special role" or function in the international relations. The violation of human rights triggers international concern and possible interventions and put certain constraints on the sovereignty and internal autonomy of the violating states. In his words, "human rights are a class of rights that play a special role in a reasonable Law of Peoples; they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy." (Rawls, 1999, 79) Additionally, Rawls considers human rights to be "necessary conditions of any

[51] Although Rawls puts the principle of non-interference higher in the list than the duty towards human rights, he seems to place no hierarchy among the eight principles.

system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind." (Rawls, 1999, 68)

The content of human rights is a fairly minimal set of basic rights including "the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as pressed by the rules of natural justice (that is, that similar cases be treated similarly)." (Rawls, 1999, 65) This core list of human rights, or "human rights proper" as Rawls calls it, intentionally leaves out a more robust set of civil and political rights such as rights of political participation, gender equality, or freedom of expression.

There is a third category of societies beside liberal and decent peoples, which he labels as "outlaw states". [52] Outlaw states reject the law of peoples and violate human rights. In particular, they dismiss the principle of non-aggression by threatening the peace for the promotion of their interests. The principles of law of peoples allow all states to take coercive measures in self-defense, to use force against the aggression of outlaw states and to stop the violation of human rights. That explains why human rights are universal. They are universal because human rights "extend to all societies, and they are binding on all people and societies, including outlaw states." (Rawls, 1999, 80-81)

[52] There are in fact five types of societies according to the book: liberal, decent hierarchical, outlaw, burdened, and benevolent absolutist. Liberal people owe a duty of assistance to burdened societies, whose resources are not sufficient to support just and functional political institutions.

The publication of *The Law of Peoples* sparked off a growing debate between critics and supporters of Rawls's approach. One of the main criticisms is that his proposed list of rights is very narrow failing to capture the major civil and political rights included in the present doctrine. Backed by an empirical research, Amartya Sen, for example, argued that there is widespread evidence to believe that denial of civil and political rights can adversely affect the well-being of citizens and human development in any society (Sen, 1999).[53] Furthermore, Sen rejected the idea that the pursuit of civil and political rights and respect for human rights are exclusively Western or liberal values. He argued that the main elements of civil rights and democratic aspiration exist in all major traditions. (Sen, 1999, 147-148)

Moreover, one of the implications of excluding civil and political rights from the list of human rights is that it grants legitimacy to oppressive regimes. According to some commentators, it is wrong to accord legitimacy and equal respect to repressive regimes that do not treat their members equally, deny political participation and deprive women and minorities from their basic rights.

In response, advocates of the view have drawn attention to the distinction between legitimacy and justice.[54] Leif Wenar, for example, points out that legitimacy is a more permissive standard than justice, as he writes "institutions may be legitimate without

[53] Sen has famously argued that no major famine has occurred in any country with a democratic form of government and a relatively free press, see Sen, A.K. (1999) *Development as freedom*. Oxford: Oxford University Press.

[54] Freeman explains the distinction between justice and requirements of social cooperation by using the following example: "the right to vote and the right to run for office, however central to democratic societies, are not necessary for social cooperation. Historically, most people in most societies have not enjoyed democratic rights, and even in societies where they do, these rights often willingly go unexercised." Freeman, S. (2006) 'The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice.', *Social Philosophy and Policy*, 23(01), p. 29.

being wholly just, and no doubt many nations' institutions are exactly this way." (Wenar, 2006, 100) In addition, they argue that a narrow list of human rights is a necessity for achieving two important goals: universal acceptability of the doctrine and restricting the use of force against countries who violate the norms of human rights.

A generous catalogue of rights derived from a comprehensive worldview, according to Rawls, would attract the charge of parochialism and jeopardizes the international consensus. More importantly, one of the most significant functions of human rights is that any serious violation of its norms could potentially lead to external pressure, including the possibility of military intervention. Adopting a minimal list of human rights is important because, for Rawls, respecting the duty of non-interference is a crucial obligation for all societies. Therefore, interfering with the sovereignty of a state should be left only for violation of the most essential rights of individuals.

Rawls's view has been the subject of further criticisms. Throughout his book, Rawls writes about "peoples" instead of "states". For him, peoples or "societies"—a word he uses interchangeably—are groups of individuals who are united based on a common conception of good and justice. Rawls makes an assumption that people and their conception of good reflect the interests of individuals in the society. However, in reality, those conceptions might only represent the interest of the majority and not that of the minority groups. As Buchanan put it:

> "[t]o say that the parties represent peoples is, in effect, to ensure that the fundamental principles of international law that will be chosen reflect the

> interest of those who support the dominant or official conception of the good or of justice in the society, and this may mean that the interests of dissident individuals or minorities are utterly disregarded." (Buchanan, 2000, 698)

Consider the following example. What if, as Bruce Ackerman envisions, in a society with a decent consultation hierarchy a majority of people demand their civil and political rights, but their political claims become systematically repressed by the representatives of an oppressive and non-liberal minority. Faced with this situation, Ackerman asks, "why should we choose to betray our own principles and side with the oppressors rather than the oppressed?" (Ackerman, 1994, 383)

Putting all the criticism aside, it is important to notice that Rawls's theory has revolutionized the debates surrounding human rights, the concept of political tolerance, and pluralism in international relations. Here, I summarize three essential features of his theory of human rights:

1. Rawls's perception of the idea of a human right stands in contrast to more conventional philosophical theories such as the naturalistic account and the agreement account. Unlike the naturalistic conception, Rawls emphasized that human rights should not be derived from "a theological, philosophical, or moral conception of the nature of the human person." (Beitz, 2009, 98) In contrast to the agreement view, in order to justify the concept of human rights or its content, Rawls made no appeal to the notion of intercultural agreement. Even though the Law of Peoples eventually falls within the

consensus of the society of peoples, what constitutes the authority of human rights and delineates its content is not dependent on the commonalities of different cultures.

2. Human rights, in Rawls's view, is a "political" doctrine with a special political role in regulating the interaction of the society of peoples. The role of human rights is to delimit the proper scope of international toleration and to define the boundaries of "acceptable pluralism in international affairs." Honouring human rights in the society of peoples legitimizes the sovereignty of states and protects them against external intervention. In this sense, human rights could be regarded as a "standard of international legitimacy."

3. The content of human rights remains restricted to the most basic norms of human rights. It includes only those rights that guarantee peaceful cooperation of the society of peoples, provides a common basis for justifying political actions, and secure stability and peace in the world. As a result, it excludes those rights that are "peculiarly liberal or special to the Western tradition." (Rawls, 1999, 267)

In what follows we consider the works of two other political philosophers, Joseph Raz and Charles Beitz, who have further developed Rawls's political theory of human rights.

5.2. Joseph Raz and "Human Rights Without Foundations"

In his influential article, *Human Rights Without Foundations* (Raz, 2010b), Raz endorses the political conception of human rights. He agrees with Rawls's suggestion that human rights constitute limits on the state sovereignty and the internal autonomy in global affairs

and international relations. Human rights, according to Raz, are those rights that invalidate a particular type of defence against intervention in the internal affairs of a state by outsiders. He calls it the defence of "none of your business":

> "[T]hey disable, or deny the legitimacy of the response: I, the state, may have acted wrongly, but you, the outsider are not entitled to interfere. I am protected by my sovereignty. Disabling the defense 'none of your business', is definitive of the political conception of human rights." (Raz, 2010a, 40)

Raz accuses naturalistic theories of conflating the concepts of values with rights. According to him, the mere fact that some people value interests such as autonomy or personhood might not be enough by itself to justify a right to them. [55]

A political account, for Raz, has the advantage of explaining why human rights are "important rights." He points out that "neither being universal, that is rights that everyone has, nor being grounded in our humanity, guarantees that they are important." (Raz, 2010a, 34) Rather, since intervention is a crucial matter, human rights have to be important norms, because a government's conformity to the requirements of these norms set the degree of its legitimacy.

[55] Raz uses the following example for illustrating this distinction: "…by that argument if the love of my children is the most important thing then I have a right to it." See Raz, J. (2010a) 'Human rights in the emerging world order', *Transnational Legal Theory*, 1(1), pp. 31–47.

The approach taken by Raz diverges from Rawls's account on a few issues. While Rawls believes that the duty to protect human rights in the first instance applies to states, Raz argues that all individuals, international players, and stakeholders can rightfully make human rights claims against each other, including corporations and non-governmental organizations.

Another point of difference is the threshold of what constitutes international legitimacy. According to Rawls, conformity to the norms of human rights is a necessary condition of social cooperation and it determines the limit of legitimacy. However, Raz rejects this idea by arguing that "not every action exceeding a state's legitimate authority can be a reason for interference by other states, whatever the circumstances, just as not every moral wrongdoing by an individual can justify intervention by others to stop or punish it." (Raz, 2010a, 42) For Raz, what defines the limits of sovereignty depends not only on the conditions within the society, but also depends on "who is in the position to assert the limitations of sovereignty, and how they are likely to act a result." (Raz, 2010a, 42)

5.3. Charles Beitz and *The Idea of Human Rights*

According to Charles Beitz, the discourse of human rights has become an elaborate global dialogue, which receives an increasingly greater international attention. He sought to develop a "practical" theory of human rights that pays close attention to the ways it is actually practiced and discussed in the international political domain.

Let us start with briefly highlighting some of the nuances of his theory. His work was heavily influenced by *The Law of Peoples*, but he has revised and extended the Rawlsian theory in several respects.

First, similar to Rawls, Beitz defines the concept of human rights based on its distinctive functional role it formally plays in the international political discourse. However, he notes that the actual role of these norms extends way beyond justification of coercive intervention. (Beitz, 2009, 101) In his theory, he incorporates a broad range of "non-coercive political and economic measures," including public praise or criticism, economic sanction or monetary incentives, that governments and international organizations could employ to influence the internal affairs of other societies to protect against human rights violation. These measures might come in forms of *assistance* rather than *interference*. Human rights can also represent a justification for individual efforts aimed at reform-oriented political actions. For Beitz, therefore, Rawls's formulation of the function of human rights is "narrower than what is found in present international practice." (Beitz, 2009, 101)

Moreover, Beitz theory is "state-centric". It means that states are the primary bearers of responsibility for protecting and promoting human rights of their own citizens. He creates a "two-level model" to explain how the international doctrine should be enforced. States and their basic political institutions have a first-level responsibility to protect the basic interests of the citizens. Where a state, for any reasons, fails to fulfill this duty or violates human rights, international actors on a second-level are obligated to take remedial measures. As he describes this two-level model,

> "the central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents." (Beitz, 2009, 13)

Finally, in contrast to Rawls, the scope and the content of human rights, for Beitz, are not restricted to a minimal set of rights. According to his normative "schema", which we will examine further below, the content of human rights is defined as a set of rights to protect the "urgent individual interests" against "standard threats" and the dangers of dealing with the realities of a modern state. Accordingly, for him, human rights are "requirements whose object is to protect urgent individual interests against certain predictable dangers ("standard threats")." (Beitz, 2009, 109) The protection of urgent interests of individuals can potentially encompass, as Beitz claims, a generous catalogue of human rights. According to Beitz, Rawls's understanding of the scope of human rights is narrower than what is found in international human rights law. Unlike Rawls, he aims to present a more expansive understanding of human rights to generate a broader view of the doctrine's normative range which is closer to the actual practice of human rights. In this sense, his account is not a minimal theory of human rights.

Beitz distinguishes between three sorts of questions in theorizing human rights: (Beitz, 2009, 126)

a. The question of conceptualization: what type of concepts/objects are human rights?

b. The question of content and scope: what is the content of this set of norms?

c. The question of normativity: on what ground human rights can be justified?

We can distinguish between these questions for the sake of conceptual analysis, but in any theory of human rights, they are closely related. Any answer to the question of conceptualization will affect the scope of the human rights standards. Similarly, the normative basis of a theory can determine the relevant content. Nevertheless, it would be wrong to conflate these questions and their answers.

In his book, Beitz responds to these questions with setting three goals: (Beitz, 2009, 108)

(a) To present a concept of human rights that is not grounded on a single fundamental moral value and could be reached from a variety of perspectives and worldviews.

(b) To provide a normative justification to explain why human rights are morally significant and what set of rights are included under this regime.

(c) To justify the scope and the content of the theory to correspond, as far as possible, to the existing norms of human rights as found in the existing international legal documents.

To achieve these goals, Beitz separates the concept of human rights from its content and justification. He defines the concept of human rights by identifying its function in the actual political practice. The idea is that although different people or communities might disagree about the content or justification of human rights, nevertheless they may agree about the role or function that these norms play in the international relations. According

to Beitz, the function of human rights is providing institutional protection for "urgent individual interests against certain predictable dangers ('standard threats') to which they are vulnerable under typical circumstance of life in a modern world order composed of state." (Beitz, 2009, 109)

Although, according to his account, the norms of human rights fall within an agreement among different cultures and societies; agreement by itself plays no normative role in his view. Beitz provides a framework that he calls the "schema" to explain the normative structure of his theory.

5.3.1. The Schema

If I claim that there is a human right to R, regardless of its content, one can ask the following question: How should we decide whether to accept that there is a human right to R?

According to Beitz, this question demands a normative answer. Any assertion in reply to the question must go beyond the observation that the international community recognizes some right to R; rather, it is to explain why the international community *should* do so. In response, Beitz proposes a normative schema. (Beitz, 2009, 136)

The schema has two levels: states, at the first level, act as the duty holders; and the international community, at the second level, acts as the guarantor. If R is a human right, then states are the primary agents who bear the responsibility to promote and protect R in their main public institutions. Yet at another level, the international community, composed of independent states, is the principal guarantor of such responsibility; they

can monitor and potentially intervene when the right to R is breached anywhere in the world.

The model has three main elements:

1- Human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers ("standard threats").

2- Human rights apply in the first instance to the political institutions of states, including their constitutions, laws and public policies.

3- Human rights are matters of international concern. A government's failure to carry out its first-level responsibilities may be a reason for action for appropriately placed and capable "second-level" agents outside the state. (Beitz, 2009, 137)

These three elements shape the normative structure of the Beitz theory of human rights. To be qualified as a human right, a right has to meet four requirements:

a) Urgency requirement: the individual interest that is protected by the right is sufficiently urgent when reasonably regarded from the perspective of those protected.

b) Standard threat requirement: there is a reasonably predictable threat against the interest in circumstances under which the right is supposed to operate.

c) Institutional requirement: it would be possible and feasible to protect this interest through the state's institutions.

d) International concern requirement: the violation of the right would be a matter of international concern in a way that could justify political actions by external agents.

One can argue that some of the requirements are reducible to other ones. Take for example institutional requirements. If we follow Pogge's line of argument about the institutional understanding of human rights, it seems that the institutional requirement is, in fact, reducible to the element of urgency and standard threat. Similar to Beitz, Pogge argues that human rights are standards that should be applied in first instance to institutions of a state and they protect individuals against arbitrary use of power by those institutions. (Pogge, 2002) Standard threats in this view are predictable institutional threats against interests of individuals. This account of standard threat would reduce the third requirement to the second one, because if human rights are about protection of individuals against probable *institutional* threats in the first place, it is possible for the state to avoid these threats through constraining those institutions.

Urgency and standard threat requirements are the main criteria for evaluating the content of human rights in the Beitz theory of human rights.

As he notes, standard threats do not refer to all sorts of imaginable threats and do not require unrestricted protections of urgent interests. A standard threat is "a threat that which is reasonably predictable under the social circumstances in which the right is intended to operate." (Beitz, 2009, 111) Moreover, standard threats should be understood as institutional threats in the modern system of nation-states. That means the satisfaction of this condition is more or less dependent on empirical facts about the behavior of

modern social and political institutions. So if one claims that, for example, access to water is an urgent interest of individuals, they also need to provide some empirical data to show that it is probable that such an interest could be threatened or set back by a contemporary state's institutions.

Urgency requirement perhaps is the most important condition in the schema. What indeed makes protection of an interest urgent? According to Beitz, urgent interests are not natural human interests; rather they are those interests that we have enough reasonable ground to believe that they are important in a wide range of situations. (Beitz, 2009, 111-112) These reasons are likely to be diverse; they include a variety of considerations, such as the advantage of protecting the interests through institutional means, the weight of responsibility and the costs for external agents in case states fail to protect the interest. Other considerations include the nature, cost and likelihood of the violation of the interests by governments. He argues that an urgent interest is one that would be recognizable as important in a variety of typical lives in contemporary societies.

Human rights are limited to protection of the most urgent interest against the most likely of institutional threats. Interests might vary in their overall importance. As Beitz says "urgency is a scalar, not a binary, property," (Beitz, 2009, 110) so obviously there must be some sort of threshold below which they do not qualify for international protection.

Similar to human rights, urgent interests are universal. They apply to every person regardless of their historical, geographical or cultural circumstances. But this does not mean that an urgent interest is shared or desired by everyone in the world. They do not

necessarily fall within the overlapping interests of all cultures and societies. Rather, urgent interests are those interests that it would be "reasonable to regard its satisfaction as important within some range of normal lives." (Beitz, 2009, 110)

5.4. Political Theories and Minority rights

Despite all the theoretical and pragmatic advantages of the political theory, it does not provide a practical guideline for expansion or revision of the existing standards of human rights, particularly with respect to the inclusion of minority rights norms.

While the Beitzian theory, for example, is very clear about the function and concept of human rights, he does not suggest any substantive list of human rights that would follow from the schema. In his book, he consistently calls the regime of human rights as an emergent and evolving practice without providing a concrete example of how we can apply his proposed normative structure to new claims and rights in order to develop the content of human rights.

Some critics have called his approach as being "normatively inert" due to its "formalistic" approach toward identifying the scope and generating the content of human rights. As Liao explains, "[a] formal account provides criteria for distinguishing human rights claims from those that are not human rights claims. A substantive account, by contrast, provides criteria for generating the content of human rights." (Liao and Etinson, 2012) Liao argues that while Beitz was very successful in explaining what is the political role of the human rights, he failed to provide a substantive account of the content of human rights.

With regard to the cultural rights of minorities, Beitz and most of the political theorists are largely silent about the merit of including the minority norms under the umbrella protection of human rights. Nevertheless, Beitz briefly explains that his two-level normative model can theoretically accommodate rights with "collective dimension," including "the right of self-determination." He argues that "a value can have a collective dimension without being non individualistic. The value of self-determination, for example, has a collective dimension because its importance to the individuals who enjoy (or wish to enjoy) it cannot be explained without reference to their group membership, but it is still an individualistic value: it is a value *for* the individuals who enjoy it." (Beitz, 2009, 113)

Nevertheless, he does not discuss how self-determination in the context of the claims put forward by historically subordinated homeland minority groups can be evaluated under his normative theory of human rights. Instead, he acknowledges that he is "agnostic" about whether there is a "sufficient justification" for protecting minority rights by appealing to "the mechanism of a human right." (Beitz, 2009, 113)

6. The Fiduciary Theory of Human Rights: A New Approach to the Political Theory Based on the Modern Concept of Sovereignty

In the remaining of this chapter, I will develop a new account of the political theory of human rights, especially by relying on the works of Beitz, Criddle and Fox-Decent. I will explain how the political theory can provide a guideline for expansion of human rights norms particularly in the context of minority rights. This is what I call the fiduciary

theory of human rights.[56] It will also be argue that the theoretical difference between the naturalistic account and political theories of human rights can be bridged.

The concept of human rights, in my view, is closely tied with the concept of sovereignty in international law and the fiduciary duties of states arising from the assumption of the sovereign power. The failure of a state to protect human rights undermines its claim to sovereignty.

I think human rights are best understood as rights arising from the special relationship that exists between the state and people subject to the state's sovereign power. I will explain the normative implications of the state's assumption of sovereign power, including its fiduciary duty to exercise this entrusted power fairly and even-handedly with regard to all the beneficiaries subject to its sovereignty.

In what follows I will first provide a historical background of the modern idea of "sovereignty of states" and the international mechanisms that have been developed to put a constraint on the arbitrary use of sovereign power. Then, a more thorough explanation of the fiduciary theory of human rights will be presented.

6.1. The Modern Concept of Sovereignty: Historical Background

From the historical point of view, the Peace of Westphalia is considered to be one of the earliest sources of the modern concept of sovereignty of states. The Peace of Westphalia

[56] The term has been used by Criddle and Fox-Decent in explaining human rights and concept of Jus Cogens, which is based on the Kantian approach to human rights. See Criddle, E. and Fox-Decent, E. (2009) 'A Fiduciary Theory of Jus Cogens', *The Yale Journal of International Law*, 34, pp. 331–387; Criddle, E.J. and Fox-Decent, E. (2016) *Fiduciaries of humanity: How international law constitutes authority*. Oxford University Press.

in 1648 ended the Thirty Years War among a variety of kingdoms in Europe and initiated the path to the modern European state system. The idea of sovereignty behind the treaty was simple: every state has the equal right to govern over its territory and the people within its territory, with no role for external intervention. As some scholars have shown, the concept of sovereignty of states has existed long before the peace; (Croxton and Tischer, 2001) however, the idea behind Westphalia Peace includes three novel and distinctive normative components, which had a significant role in development of the modern understanding of sovereignty:

(1) The norm of (legal) equality of sovereign states

Although under the treaty of Westphalia some kingdoms were not granted full independence, the main rationale for the peace was that no independent state has more right to sovereignty than any other state. States have equal status in interstate relations and they should avoid forming political systems similar to that of the Holy Roman Empire to impose imperial power in violation of another European state. The peace treaty created an interstate regime that made it viable for all sorts of small to mid-size European kingdoms to coexist with larger and more powerful ones.

(2) The norm of non-intervention:

Closely related to the first principle, the second norm stands for the proposition that external agents are not allowed to intervene in the affairs and territory of another European state, particularly through use of force and military intervention. The external agents could include other states, emperors or the Church. The norm of non-intervention led to a greater divide between the church and the state, and it also created a legal barrier

to protect the autonomy and sovereignty of smaller and weaker states against the exploitation by the main European powers of the time.

(3) The principle of sovereignty of each state over certain territorial boundaries

Sovereignty over certain territories, as divided by non-physical yet precise boundaries, was a noble idea in the 17th century. According to some scholars, the idea did not fully exist during Roman or Medieval times. (Hassan, 2006) The modern concept of sovereignty, therefore, is closely related to the concept of territorial boundaries. "Territorial sovereignty", as we now call it, refers to the idea that, within each demarcated territory of the world, there is only one absolute sovereign power, which is the ruling state of that territory. This idea implies that the sovereign state has the "exclusive and supreme authority" over almost all individuals who live within those boundaries. (Johnston, 1992, 452)

The Westphalian doctrine of equal, separate, and territorially bounded states, or as some have called it, "the anti-hegemonic concepts of territorial sovereignty," (Johnston, 1992, 463) was embraced in Europe in the 18th century. It paved the way for the formation of nationalism in the 19th century, under which the concept of "one nation, one state" went hand in hand with the idea of territorial sovereignty to create the mosaic of nation-states covering the entire face of the planet in 20th century.

The normative underpinnings of the Westphalian sovereignty have been embedded in Article 2 of the Charter of the United Nations. Article 2(1) confirms the equality of sovereign states:

> "The Organization is based on the principle of the sovereign equality of all its Members."

Article 2(4) of the United Nations Charter considers the use of force in international relations:

> "All states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner in accordance with the Purposes of the United Nations."

Article 2(7) emphasizes the importance of the principle of non-intervention:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Within the past century, especially after the two World Wars, a growing net of constraints and restrictive mechanisms have been formed around the Westphalian concept of sovereignty. These international mechanisms have put severe restrictions on the arbitrary use of sovereign power and the principle of non-intervention in domestic affairs. The contemporary political system has regionally and globally shifted political authority, as Valaskakis put it, "upwards to supranational institutions, downwards to sub-national governments and sideways to market forces." (Valaskakis, 2006) Sovereignty in the legal

sense is not the monopoly of central governments anymore. The emergence of the European Union as a new form of transnational institution is one of the clearest examples of the shift away from the traditional concept of sovereignty. During the past decades, the member states have increasingly transferred part of their sovereign power to a variety of the EU institutions, controlling policy areas such as legal, economics, immigration, security, trade and foreign affairs. In another word, issues that have traditionally been considered as "indispensable exclusive State functions are presently accomplished by virtue of international cooperation in its various instrumental modes and forms (international organizations; multilateral instruments; integrated communities)." (Pike, 1995, 409)

Human rights can be best understood as one of the main mechanisms developed in the twentieth century to restrict the Westphalian structure of sovereignty and to limit the abuse of sovereign power in the treatment of vulnerable individuals. In what follows I will argue that the assumption of sovereignty by the state entails a responsibility and the fiduciary duty to protect the most fundamental interests of the people from arbitrary use of sovereign power. This responsibility and the fiduciary duty is the backbone of the normative justification of human rights.

6.2. The Fiduciary Theory: Human Rights as a Modern Constraint on the State's Sovereignty

To understand the concept of human rights, we need to pay attention to its close connection to the protection of individuals against the abuse of power by sovereign states. One of the most important international mechanisms that imposes significant constraints on the Westphalian model of sovereignty is the international norms of human rights.

A theory of human rights is credible if it can offer reasonable answers to at least two fundamental issues:

1- Why do we need an international regime of human rights in the first place? Or on what ground human rights can be justified?

2- What is the appropriate content of human rights? Or how do we determine if a right is a human right?

The answers to these two questions are among the most fundamental and controversial issues in the recent theoretical debates concerning human rights. Moreover, they are highly significant from the practical point of view, because the answers to these questions provide a guideline for the future expansion and development of the universal norms. Let us deal with each issue separately.

6.2.1. Why do we need a regime of human rights in the first place?

To understand why it matters to have a regime of human rights in place, we need to identify what role human rights play in the international relations among independent states, as well as the role it plays between the state on one hand and the individuals subject to the state's sovereignty on the other hand.

According to the fiduciary theory, the role of human rights is to impose a major form of constraint on the Westphalian model of sovereignty. In the contemporary international law, states have a unique form of power and responsibility: they are the exclusive holders of sovereign power over demarcated territories. That means each state exclusively

controls a supreme legal and political authority over every individual who lives inside the boundaries of the state's territory. Under the international laws, this exclusive authority is supposed to be respected, legitimized and not interfered with by other countries. Pursuant to Article 2 of the UN Charter, the UN establishment "is based on the principle of the sovereign equality of all its Members". [57]

Because the state is the trustee who has been trusted by the individuals with the exclusive authority to rule, by the very fact that the state exclusively assumes the role of a sovereign power, it comes under a fiduciary duty and responsibility toward individuals who are vulnerable to the state's monopoly of power. The state and its institutions have the fiduciary obligation to exercise the power in good faith and equally protect the interests of the individuals who have granted the state its sovereignty in the first place.

As evidenced by numerous human catastrophes in the recent political history, we know that not every state honour their fiduciary duties toward their people. The concentrated power in the hand of states with no higher-level control could pose a serious risk to fundamental interests of individuals and groups, who are subject to the abuse of power by the exclusive authority of the state and its institutions.

It is important to have an international regime of human rights in place, because the role of human rights system is to mitigate the serious risk, which stem from the structure of the modern international order. The international human rights law creates an international apparatus to provide a higher-level supervision over the abuse of

[57] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

concentrated power in the hand of sovereign states and their misconducts toward individuals.

How does this international apparatus work? One of the core principles of Westphalian order and the modern international law is that states are required to respect each other's sovereignty and are not allowed to intervene in the affairs and territory of each other. However, the human rights regime adds a caveat to this general principle: those states who fail to honour human rights and their fiduciary duty to protect the fundamental interests of their people could risk losing political legitimacy. The loss of legitimacy may justify intervention or some form of remedial or punitive actions by other states. In this sense, human rights constitute the standard for international legitimacy, because a government's conformity or lack of conformity to the requirements of human right norms set the degree of its legitimacy. Consequently, violation of human rights can be a ground for external political, economic or militaristic intervention in a country by the international community.

Accordingly, the fiduciary theory offers a clear answer for the question of why human rights matter. It is critical to have the international human rights mechanism in the modern system of states, because the function of this global mechanism is to set a higher-level limit on the legitimate conduct of the sovereign states toward the individuals, who are subject to their authority.

6.2.2. How Do We Determine If a Right is a Human Right?

According to the fiduciary theory, in order to identify the proper content of human rights we need to examine the constituting elements of the duty that arise from the fiduciary

relationship between the state and those subject to its powers. Very briefly, the normative consequence of the state's assumption of sovereignty is the duty of the state to provide equal protection to fundamental interests of individuals that are susceptible to the abuse of sovereign power. There are two main components in this definition: (a) equal protection and (b) fundamental interests of individuals that are susceptible to the abuse of sovereign power. Let me explain the second element first.

An interest of individuals is susceptible to the abuse of sovereign power if its fulfilment considerably depends on the action or inaction of the state. Many of the most fundamental interests of individuals are susceptible to the state's use of sovereign power in both a negative and a positive way. Take a simple example: the interest of individuals in a life free of torture impose a negative duty on the state to restrain from using its entrusted power to torture its people; and a positive duty to create a mechanism, such as a trustworthy judiciary and police system, to ensure that individuals and state officials would refrain from torturing other individuals. The possibility of having a life free of torture for individuals in a society is dependent to a great degree on the use and abuse of power by the sovereign state.

The fulfilment of some other fundamental interests imposes a more substantive positive duty on the state. For example, the fundamental interest of individuals in uniform childhood education or a health care system or even a functioning financial market requires states to create various intuitions, and pass extensive laws and regulations. It is nearly impossible to have a uniform childhood educational system or a functioning universal health care without a whole host of state's rules, regulations and enforcement

mechanism. That is probably why these areas are highly regulated by governments around the world.

The second component of the fiduciary duty of the state is equal protection. State as the trustee holds a discretionary power over a great number of beneficiaries, who equally confer to the state the entrusted sovereign authority in the first place. In return, the state has the duty to treat its multiple beneficiaries equally, fairly and even-handedly. This requires the state to provide individuals with equal protection of their fundamental interests without preferring the interests of one individual over another or a group of individuals over another group.

Accordingly, under the fiduciary theory of human rights, in order to generate the content of human rights the following criteria have to be satisfied: if we universally agree that (a) the interest in X is one of the most fundamental interests of individuals around the world, and (b) that the interest in X is susceptible to the use of power by sovereign states; then we have a human right to X. Therefore, every state has a duty to secure the right to X equally for all the individuals subject to its authority.

This also means that when state Z neglect or refrain from securing X equally for all of its people, other states have the duty to intervene through variety of political and economical means to protect the people of Z's interest in X. Norms would qualify as human rights only if they satisfy this test.

Prior to explaining how minority rights fit into this normative framework, I need to comment on two issues.

First, it is important to note that human rights are about *fundamental interests* that we share *universally*. one can always ask under what conditions an interest would qualify as a "fundamental interest" of individuals around the world. I do not believe that there is a fixed and comprehensive list of fundamental interests of all individuals. This is more than anything a matter of public reasoning. I agree with Beitz in holding that there are different ways to come to a consensus about what counts as a fundamental interest. For example, some interests are generic enough that their significance is recognized in almost every culture and country. Those are interests such as bodily security and minimum amount of nutrition.

The significance of some other interests might be derivative. This happens when the satisfaction of one interest is a pre-requisite for the satisfaction of some other fundamental interests. For instance, the right to sufficient and clean source of water might be necessary for fulfilling the right to good health or the right to life. Another example could be that the right to political participation might be the prerequisite for the realization of other fundamental rights such as the right of self-determination. Similarly, the right to a language interpreter in the court of a multilingual country could be instrumental in having a fair public hearing.

Still in some other situations, a single interest can be justified in more than one way by appealing to a variety of distinct justifying considerations. Although different cultures and countries might hold incompatible views about moral values and human nature, they might be able to agree on fundamental significance of certain interests while appealing to different value systems in justifying the importance of those interests. For example, the

significance of the interest in life free of torture can be justified in more than one way across different cultures. On the one hand, it can be justified by appealing to the liberal/Kantian doctrine of non-instrumentalization, according to which persons should always be regarded as ends rather than mere means. Alternatively, it can be justified by interpreting the Buddhist doctrine of enlightenment and non-violence to support human rights against degrading treatments including torture.

At the end, what matters is that the universal significance of an interest can be identified and developed through use of public reasoning and by appealing to parallel lines of justification. In this way, different theories of human rights can work together under the fiduciary theory of human rights to build a non-sectarian ground for human rights. We will discuss this issue further in the next chapter.

The second issue that requires some clarifications is the concept of equal protection. It is important to note that equal protection of fundamental interests of individuals does not necessarily require the state to use the same measures and methods in securing the interests of all individuals. In order to *equally* protect a single interest of two persons in two different situations, the state might be required to implement two separate measures. Securing a minimum amount of nutrition in case of a child demands applying a different set of standards than securing the same interest in the case of an adult. Similarly, providing a minimum degree of healthcare equally for men and women might impose different obligations on the state. For example, due to pregnancy and childbirth-related needs of women, the equal protection of the interests of men and women to have access

to minimum health care could require adoption of different methods and dissimilar allocation of resources.

As Amartya Sen notes, in understanding the concept of equality what matters is not necessarily the equal distribution of resources and utility, but the degree to which individuals have transformed resources into valuable actions and state of being. People depending on their particular situation, history and background may not equally transform resources into capabilities and functioning. While it seems to be a fundamental interest of all individuals to receive elementary education, due to the historical discrimination in many countries, women were systematic denied equal access to primary education. As a result, the states in those countries might have a particular positive duty to create a mechanism to remedy this historical injustice and ensure that women enjoy secure access to the educational system. This situation might also justify adopting affirmative actions and positive discriminations as a temporary measure to level the playing field.

For the very same reason, the international community has developed specific international instruments to implement and expand the human rights of women and children. The 1979 UN Convention on the Elimination of All Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child build on the human right principle of equal protection of fundamental interests. For example, the UN Convention on the Elimination of All Forms of Discrimination against Women not only outlines a series of general anti-discriminatory measures, it also encourages state parties to take special measures including measures to ensure that women have "appropriate

services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[58]

6.3. Comparing the Normative Structure of the Fiduciary Theory with the Beitz's Schema and the Macklem's Legal Theory of Human Rights

The normative mechanics of the fiduciary theory are slightly different from the recent political theories in two important ways: (1) by their emphasis on the interconnection between the ideas of equal sovereignty and fiduciary duty; and (2) by their attention to the indispensable moral dimension of human rights including the commitment to equal protection.

As we know, Beitz provides a precautionary account of the purposes of human rights consistent with the view of the original framers. According to him the purpose of human rights is to "address the pathologies of a global political structure that concentrates power at dispersed locations not subject to higher order control." (Beitz, 2009, 129) One of the pathologies that human rights address, in Beitz's view, is the structural deficiency in the pre-war system of states, which provides "a safe haven" for sovereign states to mistreat their populations in ways that could have "devastating consequences" for the interests of individuals, evidenced by the two World Wars (Betiz 2009, 129). Human rights in this view is a set of standards and implementation mechanisms that remedy this structural deficiency of the contemporary political order.

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[58] Article 12, UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

The fiduciary account advanced in this thesis shares significant affinities with Beitz's insight in defining the purpose of human rights. The structure that Beitz refers to is the same structure that we called the Westphalian model of territorially defined state sovereignty, in which states are protected by the principle of non-intervention with no higher-level control. This system gives the states the legitimate authority to exercise the sovereign power in ways they see fit even against the most fundamental interests of individuals and groups subject to the state's jurisdiction.

What makes the fiduciary theory different from the Beitz's practical account is the link between the purpose of human rights and the specific normative criteria for selecting its content. In his book, Beitz does not make it very clear why the remedy for the flaws of the modern political order has to be in the suggested form of a "two-level model", or what gives the states the primary responsibilities to protect human rights and the international community the duty to guaranty these responsibilities. In addition, Beitz does not provide any reason why he chooses his particular selection criteria – "urgent individual interests vulnerable to certain predictable dangers (standard threats)" – over other normative selection criteria for justifying claims about the content of human rights doctrine. One answer to these questions is that Beitz created his schema mainly based on the "practice" of human rights. He formulates his model as "an interpretation of the idea of a human right *found in contemporary international practice*" [emphasis added]. (Beitz, 2009, 108) The problem is that the practice cannot be the source of human rights' normative significance. The overreliance on practice in determining the normative aspects of human rights runs the risk of conflating prescriptive and descriptive (facts and norms) dimensions of the theory.

The fiduciary account, in contrast, explains the normative selection criteria for the content of human rights by focusing on the concept of fiduciary duty and its relation to the role that sovereignty plays in modern international law. By the very fact that the state assumes the exclusive claim to sovereignty over individuals in demarcated territories, and by the very fact that the international laws legitimize and validate this form of sovereignty coupled with the principle of non-intervention, two interconnected forms of fiduciary relationships arise: one between the state and its people and the other between the international community and the people subject to the authority of each state. While the source of the first type of fiduciary duty flows from the bottom up based on the assumption of sovereignty by the state on behalf of people, the second one comes from above, based on the fact that international laws vest sovereignty in states.

The content of the fiduciary duty determines the normative aspect of human rights. The fiduciary relationship between the state and its people arises from the fact that the state exclusively holds a discretionary legal, political and administrative power over the fundamental interests of multiple individual beneficiaries who are deeply vulnerable to the abuse of the entrusted sovereign power. The state has the duty to exercise sovereign power in good faith and impartially by equally protecting the fundamental interests of its people.

On the other hand, the fiduciary relationship between the international community and each state arises from the fact that international law distributes sovereign power internationally and authorizes states to exercise sovereign power over people in defined territories. Through this process, the international community vests the state with the

legitimacy to assume sovereign powers on behalf of its people. The international laws also protect states from the external imposition of power through the principles of non-intervention and equal sovereignty. This relationship imposes a fiduciary duty on the international community to create a precautionary system to monitor the treatment of individuals by sovereign states, and the duty to take action when a state fails to meet its human rights responsibility to equally protect the fundamental interests of individuals subject to its, potentially unfettered, authority. As Criddle and Fox-Decen put it, "international law entrusts sovereign powers to states, subject to concomitant duties to advance the human rights of their own people and respect the fundamental rights of foreign national." (Criddle and Fox-Decent, forthcoming, Ch.1)

The failure of a state to carry out its fiduciary duties obligates the international community to provide assistance to states which lack capacity to meet their responsibilities, or the obligation to intervene through diplomacy, economic sanctions, or, in the most extreme cases, by use of force to punish those states which lack the will to fulfil their human rights duties on a sufficiently large scale.

This approach to theorizing human rights is partly in line with Macklem's recent account of sovereignty and human rights. In 2016, Macklem developed a legal theory of human rights which emphasizes the role human rights play in a fair exercise and a fair distribution of sovereignty within the contemporary political order. The purpose of international human rights, he argues, is "to identify and mitigate adverse effects of the structure and operation of the international legal order." (Macklem, 2015, 25) According to him, international human rights:

> "speak to distributional consequences of the fact that international law deploys sovereignty, as a legal entitlement, to organize global economic and political realities into an international legal order.... International human rights monitor the distribution and exercise of sovereign power to which international law extends legal validity." (Macklem, 2015, 25-26)

Despite some similarities in employing the concept of sovereignty, the fiduciary theory is different from Macklem's approach in some substantial ways. Macklem contrasts his legal understanding of human rights with both naturalistic and political theories. On the one hand, he makes a sharp distinction between legal and moral grounds of human rights. His theory rests on a positivist claim that human rights exist not because they reflect our common human aspirations, but because international law recognizes and validates human rights through international legal instruments. To use his example, an international human right to food exists only "because the International Covenant on Economic, Social, and Cultural Rights enshrines such a right." (Macklem, 2015, 18) On the other hand, Macklem seeks to distinguish his project from political accounts of human rights as well. He accuses the political theorists of over attentiveness to the practice of human rights. Accordingly, he opts for a purely legal approach to human rights.

There are few problems with the legal account developed by Macklem. First of all, it is not entirely clear whether the sharp distinction he makes between human rights law, politics and morality is tenable. His account fails to explain why human rights should be necessarily approached and understood in "distinctly legal terms." (Macklem, 2015, 21-

22) Moreover, his distinction between law and morality seems to be in clear contrast to the actual practice of human rights. As we know, when the content and the scope of human rights are discussed in regional and international human rights forums, they are discussed with a clear reference to their underpinning moral and political grounds. The global human rights discourse does not limit itself to a purely legal characterization of the norms.

More importantly, by focusing solely on the macro-level and purely legal aspect of the human rights, Macklem loses sight of the normative side of human rights and runs the risk of failure to provide any meaningful guideline with regard to the content of the doctrine. While it is a relatively straightforward task to determine legal validity of a human right from a positivist perspective by a simple reference to existing international laws, the positivistic description is not very helpful when it comes to determining whether a right should be human right. To justify the specific norms of human rights we need to go beyond a mere description of the legal validity of a right and explore the normative foundation of the rights. The fact that we have a human rights law to food does not justify the proposition that we should have one.

Finally, although Macklem correctly identifies the role of human rights in mitigating adverse effects of the exercise and distribution of sovereignty, he sidesteps direct engagement with the question of what he means by adverse effects or injustices produced by the exercise of sovereignty. It is a challenging task to address this issue without any reference to the moral and political dimensions of human rights. In fact, in order to determine whether or not an effect is adverse or unjust, we need to draw on moral

concepts. However, drawing on moral concepts to explain adverse effects of sovereignty would undermine the pursuit of a strictly legal approach to understanding human rights. It would reintroduce the moral dimension into the theory, which eventually collapses the sharp dividing line, which Macklem draws between law and morality of human rights. This problem is perhaps the most important criticism to his theory.

In contrast, the fiduciary account does not shy away from addressing the moral aspect of the theory of human rights. For example, the concept of fiduciary is deeply connected with the moral ideas of impartiality and equality. The state as a public trustee is required to refrain from preferring one beneficiary or one group of beneficiaries over another without providing a reasonable and fair justification. As a result, the state has the duty to exercise its sovereign power in an impartial manner in protecting the interests of individuals and groups. The concept of equality, as we explained, does not necessarily require equal outcomes, or even same treatment in all cases. Rather, it requires treating individuals impartially with equal concern and respect.

We can use the fiduciary normative framework to generate, expand and evaluate the content of human rights. The theory can employ parallel lines of reasoning – including moral reasons provided by naturalistic and dignitarian accounts as well as political reasons presented by political accounts –- to explain what constitutes the fundamental interests of individuals and what sort of rights and duties arise from them.

In the next chapter, we will argue that the fiduciary approach can provide a more substantial ground for defending the norms of minority rights as part of the logic of the human rights doctrine. The political account and the naturalistic/dignitarian account can

work together under the fiduciary framework to explain why we can expand the scope of the human rights standards to protect the rights of homeland minorities.

Chapter 5

Protection of Minority Rights as an Extension of the Normative Logic of Human Rights

In this chapter, I will outline my answers to the central questions of this dissertation and explain why I think we can employ the normative logic behind the protection of human rights to defend the cultural rights of homeland minorities. In other words, it will be shown that we have a strong case for claiming that minority rights are, in fact, human rights.

First, I will provide a brief summary of the main ideas and findings presented in the previous chapters, including an overview of the normative structure of the fiduciary theory of human rights. Next, I will explain how the new understanding of human rights can be used as a principled method for determining what types of norms would qualify as human right norms. Finally, I will argue that the available theories of minority rights and some of the suggested norms of minority protection fit conveniently into the larger framework of the international human rights discourse.

This chapter also revisits some other core questions of this research project. I will be explained that both the dignitarian approach and the political approach to minority rights can be defended and incorporated under a single theory of human rights. I will also clarify how minority rights with a collective dimension, such as the right to self-determination, can be correctly construed as human rights. Based on a multi-factor

approach, the argument will be made for expanding the category of indigenous peoples for protection of other types of historically disadvantaged minorities. Lastly, it will be explained that this new understanding of human rights can provide a non-sectarian basis for justifying minority norms reasonable from a plurality of moral perspectives.

1. Revisiting the Dilemma Facing the Theories of Minority Rights

Let us start with one of the central questions of this research project: should the norms that protect the cultural rights of homeland minority groups be regarded by the international community as a part of the international standards of human rights? We shall refer to this as "Question A".

In order to answer this question, first we have to clarify some conceptual ambiguities. The answer to Question A partly depends on how we define minority groups and minority rights. Concepts such as "Culture" and "minority groups" are extremely overbroad concepts. "Culture" can refer to anything from tradition and religion to history, language and race. Similarly, the term "minority groups" is used to refer vaguely to all sort of minorities, including immigrants, national minority groups, indigenous peoples, religious minorities, linguistic minorities and sexual minorities.

It is important to recall how we narrowed down the scope of the concept of "cultural rights of minorities" at the beginning of this work. With regard to the concept of minorities, the focus of this research project is the rights of "homeland minority groups" as opposed to other types of minority groups, such as immigrant, religious or sexual minorities. In a nutshell, homeland minorities are defined as "culturally distinct sub-state groups, who self-identify themselves as a distinct nation or people, and has a close

cultural affinity with a particular territory or homeland."[59] Defined in this way, the category of homeland minorities includes both national minority groups, such as Quebecois and Kurds, and indigenous peoples, such as Inuits and Maori people; yet it excludes immigrants, refugees and other forms of ethnic and non-ethnic cultural minorities.

We also need to determine the scope of the concept of cultural rights to clarify what type of norms and standards we are referring to when we speak of *cultural* rights of homeland minorities.

Cultural rights of minorities could range from the negative and anti-discriminatory rights, such as equality before the law and the rights not to be discriminated based on race, language, and religion, to more positive and substantive rights, such as the right to mother-tongue education, funding of activities and organizations of minorities, official bilingualism of the governmental institutions, guaranteed representation in the political system, control over historical lands and its resources, and some forms of legal or political autonomy, including minority self-administration or self-government in a federal arrangement.

While there is a broad consensus among state parties on the idea that non-discriminatory forms of minority rights should be included under the umbrella protection of human right norms, the inclusion of the more positive and substantive minority rights has been widely resisted and refused across the board. For example, under Article 27 of the International Covenant on Civil and Political Rights and Article 30 of the Convention on the Rights of

[59] For more discussions, see Chapter 2, p.16.

the Child, the state parties have been accorded with the obligation not to deny individuals belonging to "ethnic, religious or linguistic minorities" the right "to enjoy their own culture, to profess and practise their own religion, or to use their own language." However, there is no sign of recognition of more positive rights, such as the right to use the minority language in the courts and educational system or the right to enjoy a degree of internal legal or political autonomy. [60]

To clarify, the issue for this research project is whether the negative *and* positive cultural rights of *homeland minority groups* can be justified under the normative framework of international human right norms.

In order to find a proper answer to this question, we need to address a more fundamental issue, which is why minority rights matter in the first place. Let us call this "Question B". Why should we obligate the state's political and legal institutions to use public funding to accommodate or encourage cultural and ethnic diversities? Given that one of the primary purposes of forming modern nation-states was to unite people from different backgrounds and ethnicities under the single umbrella of national identity, why would we want to encourage multiculturalism and ethnocultural diversity, which would possibly chip away from national solidarity and shared national identity?

Chapters 2 and 3 of this dissertation canvas some available arguments suggesting possible answers to the question of why minority rights matter (Question B). The

[60] It is important to note that as the minority rights become more substantive, they take the format of group rights rather than individual rights. For example, the rights not to be discriminated based on race or language can be formulated as an individual right of "every human being". However, the right to self-government cannot be construed as a right of each person, rather it is a group right that can only be exercised collectively as a group.

available literature on the normative grounds of minority rights gives us at least two ways of justifying the norms of minority protection: the Dignitarian approach and the Political approach. Each of these approaches provides a different reason explaining why minority rights are important and why it is necessary to have a legal and political mechanism at the national or international level to protect those rights. The two approaches diverge in describing the content of the minority norms, the appropriate minority groups as the right holders, and the relationship between the standards of minority rights and human rights.

While the Dignitarians generally focus on the role of culture in facilitating the fulfillment of individual dignity, identity and, most importantly, the autonomy to make a meaningful choice among a range of options, the Political account puts emphasis on alleviating the wrongs produced by the aggressive assimilation policies of modern states during the process of nation-building and the unfair distribution of sovereignty among nations by the modern international law.

Here, I will review a simplified version of the main arguments presented by the two camps in defense of minority rights. The following is a classic example of the Dignitarian answer to the Question B.

According to the Dignitarian view, individuals who belong to minority cultures cannot fully exercise their autonomy and freedom when their culture and identity has not been equally recognized by the state or when they are denied having secure access to their own culture. The underlying liberal assumption for this argument is that the promotion of dignity, autonomy, and freedom of individuals is an important moral value. The argument is that a meaningful choice among options requires a cultural context of choice. It is only

through the lens of one's own culture that an individual can realize what options are available and what it means to choose among them. As a result, protection of cultural rights of minorities is a necessary condition for enabling individual agency and autonomy in a liberal society.

The Political account, on the other hand, has a different way of defending the same notion. According to this view, minority rights are best conceived as a response to the injustices created by the older models of the homogeneous nation-state. Historically, nation-states have used strict and often cruel assimilation policies to construct a single national identity throughout the political borders, which have resulted in exclusion, and political and economic marginalization of minority groups.

Some of the Political theorists also argue that, during the past two centuries, the drawing of national borders and the distribution of sovereignty at the international level by the major world powers have often followed an unfair process. Minorities and majorities exist partly because international laws have unfairly distributed sovereign powers over demarcated territories. This unfair distribution has given the legal authority to exercise sovereignty over certain territories to some ethnocultural groups in a region (e.g. Turks) and not to others (e.g. Kurds). Through this process, many historical homeland minorities either never succeeded in forming a state of their own recognized by the international laws, or they found themselves on the "wrong side" of the international borders, departed from their kin-state. Minority rights in this view are regarded as remedies for wrongs produced by the oppressive assimilation policies toward ethnocultural minorities and unfair redistribution of sovereignty under the modern international laws.

The two accounts have their advantages and disadvantages in providing answers to Question A and Question B.

The Political approach is able to provide a non-sectarian and historically sensitive account of why minority rights matter (Question B). Unlike the Dignitarian approach, the political theories of minority rights do not rely on general assumptions about the liberal value of dignity or autonomy. Instead, they are based on contingent historical facts about the relationship between the state and minorities. Because this account is rooted in historical contingencies about the power struggle between the state and minority groups, it has the theoretical capacity to distinguish among different types of ethnocultural minorities, such as indigenous peoples, national minorities and immigrants.

It is also able to provide a meaningful guideline about the kind of rights and protections that each group of minorities is entitled to. For example, according to the Political account, national minorities are entitled to a more substantive form of minority rights such as political self-determination, because national minorities often have lost their long time sovereignty due to conquest and involuntary incorporation into a larger state. In contrast, immigrants are entitled mostly to softer forms of protection, such as fairer terms of integration through temporary measures, because in most cases immigrants have consented to integrate into the host society by voluntarily choosing to move to a new state.

In contrast, since the Dignitarian account is disconnected from the actual evolution of the minority norms and its historical context, it has been theoretically incapable of

developing group-specific norms and making sense of the normative distinction between different types of minority groups and their respective entitlements.

Nevertheless, the Dignitarian account provides a more refined explanation of whether minority rights can be regarded as human rights (Question A). Because most of the available justifications for the protection of human rights are dignity based, the Dignitarian account can rely on a common ground. By acknowledging the significance of cultural rights for the fulfillment of individual dignity and autonomy, the Dignitarian approach can more effectively explain how the theory of minority rights stem from the broader logic of human right theories.

A simplified version of the reason for the close connection between the Dignitarian approach and the dignity-based theory of human rights could be formulated as follows:

- The international regime of human rights promotes the respect for the inherent dignity of human beings, by protecting the rights we have by virtue of being a person;

- equal respect for dignity of individuals requires equal respect for their cultural rights, because having access to one's culture and language promotes individual autonomy and dignity;

- As a result, establishing an international mechanism to protect cultural rights of minorities would be a natural extension of the idea of human rights.

Conversely, the Political account of minority rights does not provide a clear answer to Question A and seems to be disconnected from the broader discourse of human rights. It does not offer persuasive explanation of whether minority rights are to be considered as a

part of the human rights regime. According to the classic human rights theories, the norms of human rights protect universal and essential features that we all share as a human being despite our historical, geographical and cultural contingencies. However, belonging to a minority group does not seem to be a feature that all of us share. If we accept the Political account that the justification for minority rights is grounded in the historical contingencies that we do not share, then it is difficult to regard minority protection as an indispensable part of the universal aspiration for human rights.

However, the ideal theory of minority rights must be capable of providing satisfactory answers to both Questions A and B. It has to (1) accurately identify the normative structure underlying the proposed group-specific rights and the appropriate right holders, and (2) explain the relationship between the two regimes of rights. The two accounts of minority rights fail to achieve either of these goals. We referred to these theoretical challenges in Chapter Three as the dilemma of the current theories of minority rights.[61]

In what follows we will argue that the fiduciary theory not only provides a more robust justification for the doctrine of human rights, it also more efficiently explains how group-differentiated rights of minorities can integrate with the broader norms of human rights.

2. The Fiduciary Theory of Human Rights

One way to approach the question of whether minority rights are human rights (Question A) is to understand the normative underpinning of the idea of human rights and examine whether this normative ground has the capacity to justify any norms of minority protection. In Chapter 4, we scrutinized the classic theories of human rights, such as the

[61] For more discussion, see Chapter 3, p. 75-80.

naturalist theory and the agreement theory, and explained why they cannot deliver an adequate normative ground for a universal theory of human rights.

The classic theories mostly characterize human rights as "the rights possessed by all human beings, simply by virtue of their humanity."(Simmons, 2000) These accounts, generally, ground human rights in the abstract and controversial assumptions about what it means to be a human being. As a result, they unjustifiably interpret the norms of human rights based on a single underlying value such as human dignity, autonomy or personhood.

We also explained an alternative interpretation of human rights, which we called the fiduciary theory, based on the works of human rights theorists such as John Rawls, Joseph Raz, and Charles Beitz.

Below, we will provide a brief summary of the main principles of the fiduciary theory and will explain its normative advantages in providing a guideline for revising or expanding the content of human rights.

In the modern international legal order, states are the unique holders of the sovereign power. They operate under the principles of equal sovereignty and non-intervention. Although the modern states under the international law have never possessed an unfettered and absolute authority to do whatever they wish, sovereign states exclusively hold a supreme legal authority over the individuals who live in the state's territory and are subject to state's sovereignty. As Beitz has argued, the modern structure of sovereignty "concentrates power at dispersed locations not subject to higher-level control." (Beitz, 2009, 129) If we do not create an international mechanism to provide a

higher-level control over these sovereign authorities, there is a grave risk that the states abuse their exclusive power to undermine the fundamental interests of the vulnerable individuals and groups who are within the state's jurisdiction.

The human rights project in this sense operates "to address the pathologies that would flow if sovereigns were relatively free to exercise their sovereign power in ways they saw fit." (Macklem, 2015, 45) Accordingly, the function of human rights in the international legal order is to set limits on the legitimate actions of the sovereign states.

Although the function of human rights in this account is defined politically, the content of the doctrine is determined by a normative inquiry. Relying merely on a descriptive account of the existing role that the human rights norms play in the international law does not help us in evaluating the content of human rights.

In order to understand what creates the content of human rights, we should consider the particular relationship between state and individuals, on the one side, and the relationship between the international community and each state on the other side.

Individuals are prone to the risk of arbitrary use of sovereign power by the state. The nature of the relationship between the state's institutions and the individuals they serve is one of "fiduciary" relationships. A fiduciary relationship is composed of a trustee and a beneficiary. The relationship is created in "circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to

the fiduciary's power in that she is unable, either as a matter of fact or law, to exercise the entrusted power." (Criddle and Fox-Decent, 2010, 311) [62]

The duty of the state arises from the role it takes by the exclusive assumption of sovereign power. Individuals are deeply vulnerable to the abuse of power by the state, precisely because in the modern legal and political order states not only exclusively entitled to exercise sovereign power, they also enjoy the protection of the non-intervention principle. Since the state and its institutions have monopolized the supreme authority to rule and regulate the affairs of the individuals, the state has a "fiduciary duty" toward individuals who are subject to its unfettered authority. The state has the duty to exercise sovereign power for the benefit of its people in good faith and not to exploit its power in a way that adversely affects the fundamental interests of the individual beneficiaries.

The human rights doctrine is the manifestation of the requirements of the fiduciary duty of the state. Since human rights are "constitutive of sovereignty's normative dimension." (Criddle and Fox-Decent, 2016, 94), when a state fails to uphold its duty to protect the human rights of the individuals subject to its power, the state "subverts its claim to govern and represent its people as a sovereign actor." (Criddle and Fox-Decent, 2016, 95)

The fiduciary role of the state which holds sovereign power in trust for individual beneficiaries under its jurisdiction generates some specific content and duties. It requires a state to treat multiple beneficiaries fairly and even handedly, and to exercise its

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entrusted power in good faith and safeguard those fundamental interests of the beneficiaries that are susceptible to the abuse of sovereign power.

Similarly, the fact that international laws vest sovereign power exclusively in states and authorize states to exercise this power over people in defined territories creates a fiduciary duty and responsibility for the international community to act when a state fails to secure or respect its people's human rights. The required action varies depending on the circumstance ranging from assistance and co-operation to warning and intervention.

Accordingly, to claim that there is a human right to X, one has to make a case that (a) the interests protected by the right to X are among fundamental interests of individuals around the world, and (b) these interests are susceptible to the abuse of sovereign power by the state. If the conditions are met, then states have a duty to provide equal protection of the right to X; and the international community has a corresponding duty to monitor and guarantee the protection of the right to X, where a state is unable or refuses to live up to its responsibilities.

These duties are grounded in the same principles that generate and justify the content of human rights. Individuals around the world have a variety of fundamental interests susceptible to the arbitrary use of sovereign power. While social and economic human rights protect a fair access to resources for all individuals, the civil and political human rights protect individuals' fundamental interests in equality of status.

3. Revisiting the Core Questions

As we saw in Chapter Three, existing accounts of minority rights fail to explain the content of the minority norms with sufficient accuracy, without sacrificing its capacity to

integrate seamlessly with the doctrine of human rights. I will now explain how my approach to theorizing human rights and minority rights can provide a more thorough understanding of some common and familiar problems regarding the interaction between the two regimes of rights.

The core issues of this thesis can be reformulated in the following questions:

(i) Is there any principled way to use the normative logic of human rights to support substantial forms of minority rights?

(ii) Can we incorporate the dignitarian account and the political account of minority rights into a single theory of human rights?

(iii) Can group rights be incorporated within the norms of human rights?

(iv) Is there a non-sectarian justification for defending minority rights?

(v) How does the political/fiduciary account of human rights provide stronger support for a theory of minority rights? And, conversely, how would the political account of minority rights contribute to our understanding of human rights?

In what follows, I will show that my account can provide compelling answers to these familiar problems.

3.1. Defending Minority Rights under the Normative Framework the Fiduciary Theory of Human Rights

Now that we have some criteria for evaluating the content of human rights, we can revisit Question A and determine whether the normative logic of the human rights doctrine

could justify a set of norms for the protection of homeland minority groups. In other words, let us see whether minority rights are human rights.

Earlier in this chapter, we described the role or function of the international regime of human rights as the higher-level standard for judging the treatment of individuals by sovereign states. It is important to notice that the practice of minority rights has a similar goal, serving an analogous function. The purpose of establishing minority norms is to set a standard for treatment of individuals who belong to minority groups by sovereign states. The ideas and theories developed by the minority rights activists aim to provide us with a series of norms to regulate the relation between states and ethnocultural groups. More importantly, the purpose behind these theories is to highlight how the abuse of power by sovereign states and sovereign intuitions can undermine the fundamental interests of individual members of minority groups in having secure access to their culture and language. The similarity in role and function of minority rights and human rights have motivated many scholars to investigate whether minority norms fulfill the required criteria for becoming universal human rights.

The normative test for generating the content of human rights under the fiduciary theory has two prongs. Minority rights are human rights if (a) the interests protected by cultural and language rights are among fundamental interests of individuals around the world, and (b) these interests are susceptible to the abuse of sovereign power by the state. If the answers to the both questions are positive, then states are required to provide equal protection of cultural and language rights.

Below, I will argue that there is strong evidence showing that, in fact, minority rights meet the two prongs of this test. In my view, arguments developed by the Dignitarian account of minority rights speak to the first prong of the test and explain why minority rights protect the fundamental interests of individuals universally in having access to their own language and culture. The evidence presented by the Political account, on the other hand, speaks to the second prong and supports the proposition that these fundamental interests of individuals, particularly in the case of homeland minorities, have been exceedingly susceptible to abuse of sovereign power throughout the modern history. In other words, the two competing accounts of minority rights can work together to demonstrate that minority rights are human rights. I will explain each of parts of the test separately below.

3.1.1. Cultural and Language Rights are among Fundamental Interests of Individuals Around the World

There are various arguments, including some advanced by Dignitarians, suggesting that recognition and accommodation of cultural identity and language rights have a crucial role in the well-being of individuals.

From the liberal perspective, cultural rights can be defended based on the values of autonomy and equality. One argument is that cultural rights are instrumentally necessary for the development of individuals' agency and autonomy. The ability of individuals to make an intelligent choice among meaningful options to some extent is dependent on the presence of a cultural context, defined by the shared vocabularies of language and history. As Margalit and Raz describe it, membership in culture "determines the boundaries of the imaginable." (Margalit and Raz, 1990, 449)

Besides, some social scientists argue that a substantive correlation exists between a person's self-esteem and the recognition of that person's culture by the larger society, as recognition is a "vital human need."[63] In this view, culture and language have an important role in shaping the identity of individuals. As a result, misrecognition and marginalization of a culture by the state would negatively affect the self-respect of the individuals who self-identify themselves as the members belonging to that culture. Misrecognition would also damage the ability of individuals to regard their identity and their goals as valuable.

Other arguments highlight the role of culture and language in enabling the individuals to participate actively in all aspects of the political, economic and social life of a country. In a multiethnic society, when political and economic discourse operates exclusively in the language of one particular ethnic group, those individuals whose native language and culture are different would be disadvantaged in terms of their ability to engage effectively in the public domain. They would also have a lower chance of success when it comes to competing in the financial market. That means public recognition of the culture and language of minorities has a critical role in the ability of the minority members in political participation, competition for job opportunities and access to social resources.

States in multicultural societies have traditionally used their entrusted sovereign power to sponsor only the culture and language of the majority ethnic group. In these countries, minorities often ended up at an extended disadvantaged political and economic position.

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[63] See Addis, A. (1997) 'On Human Diversity and the Limits of Toleration', *Nomos*, 39, pp. 112–153; Taylor, C. (1992) *Multiculturalism and 'the politics of recognition': An essay by Charles Taylor*. Edited by Amy Gutmann. 2nd edn. Princeton, NJ, United States: Princeton University Press, p.26.

Those who are politically marginalized will also find fewer opportunities in steering the direction of social policymaking affecting their needs. As a result, they find themselves becoming more and more marginalized.

It is important to note that when we try to answer the question of whether cultural rights are among fundamental interests of individuals, we are not required to limit our reasoning to only one type of argument. Parallel lines of reasoning can be used to explain why cultural and language rights are universally critical for individuals. These arguments can be grounded in liberal assumptions about the value of freedom and autonomy and political participation, or, alternatively, it could be based on non-liberal moral and political values. What matters ultimately is to create a universal consensus on the significance of the public recognition of an individual's culture and language.

A variety of non-liberal arguments has been put forward by scholars to defend access to culture and vernacular around the world. Communitarians, for example, argue that some social phenomena such as diversity of cultural identities and languages are "irreducibly social" goods. (Taylor, 1992) In their view, the value of these social goods including cultural diversity is not necessarily reducible to its contribution to individual well-being. Unlike most liberals, communitarians do not prioritize individual rights over community rights and collective values. Many political scholars such as Taylor, Young and Gutmann[64] argue that cultural rights are connected with what they call "politics of recognition" or "identity politics", which emphasizes the fundamental attachment of the

[64] See Young, I.M. (1992) *Justice and the Politics of Difference*. 11th edn. Princeton, NJ, United States: Princeton University Press; Gutmann, A. (2003) *Identity in Democracy*. Princeton, NJ, United States: Princeton University Press; Taylor, C. (1992) *Multiculturalism and 'the politics of recognition': An essay by Charles Taylor*. Edited by Amy Gutmann. 2nd edn. Princeton, NJ, United States: Princeton University Press.

individual's identity to his or her cultural background. The self, as Michael Sandel put it, is deeply "embedded" in one's cultural and social community. (Sandel, 1998) If this is true, it is not possible to have true equality among individuals unless we equally recognize individuals' culture, language and communities, which shape the identity of those individuals. In *Rethinking Multiculturalism*, Bhikhu Parekh appeals to the value of cultural diversity and argues for the necessity of encouraging multicultural dialogue between different cultural perspectives, in which liberalism is just one player among others. (Parekh, 2002)

There are still other arguments which focus on the instrumental, or in some cases the intrinsic, value of cultural plurality in enriching human life experience. Some proponents of the intrinsic value of cultural pluralism compare cultural diversity to genetic diversity and the role diversity plays in assisting individuals and the human race to more efficiently adapt to our ever-changing surrounding environment. For others, plurality of cultures is instrumentally important because it provides alternative modes of life for individuals to choose from. Cultural diversity enables us to reflect on different ways of living and, consequently, help us to re-evaluate and expand our conception of the good. According to this view, the recognition of the value of cultural pluralism, therefore, requires the prevention of forced assimilations of vulnerable minority cultures and preservation of existing cultures and languages around the world.

3.1.2. Survival of the Culture and Language of Minorities is Profoundly Susceptible to the Abuse of Power by the State

In Chapter Three, we discussed the detrimental effects of the modern process of "nation-building" on the survival of minority cultures. Through this process, the state uses its

power and resources to construct a single national identity and disseminates it forcefully throughout the national boundaries. The national identities adopted by central states in the past two centuries were mostly modeled based on the culture, history and language of the majority ethnic group, who was in control of the political power in most cases.

Minority cultures were prone to this process mainly because the cultures, language, and traditions of homeland minorities were considered by the state as the competing candidates for forming a national identity. Therefore, the nation-building process has mainly resulted in aggressive assimilation policies toward smaller ethnic communities to integrate their culture into a single homogenous society. As Nadim Rouhana points out, when "the majority's nation-building enterprise depends on the continued denial of the minority's culture and history, it becomes imperative for the majority to hinder the minority nation-building process…The majority's strong opposition in such cases emanates from a perception that such a project poses an 'existential threat' to the majority's national enterprise." (Rouhana, 2008, 75)

In practice, the competing cultural interests of the majority and minority groups have typically motivated the dominant groups to use the power of the state to target subordinated minorities groups and suppress their cultural and political interests through publicly-funded and often oppressive assimilative policies. States have commonly used a variety of policies ranging from the softer forms of integration programs, such as the adoption of the dominant group's language as the official language of the state; the promotion of the dominant group's identity, symbols, history and literature through national media; and a standardized curriculum at the public schools, to harsher and more

aggressive policies, including ethnic cleansing, forcing minorities to migrate from their homeland and banning minority language and religion from all forms of public space.

Some have suggested that a possible solution for the undesirable effect of nation-building on cultural rights is to separate the two by requiring the state to be neutral toward all cultures in the same way that the modern state is supposed to be neutral toward all religions (Barry, 2000). However, as pointed out by many multicultural theorists, the separation of state and culture is an unrealistic and impossible task. Political systems may become "neutral towards all religions within its borders by not having an established religion, but the state cannot help but choose a language, and consequently at least partially establish a culture." (Addis, 2001, 748)

The state inevitably functions within a cultural framework, because, as Yael Tamir remarks, "those who create the political system, legislate its laws, occupy key political positions, and run the state bureaucracy have a culture that they cannot avoid bringing into the political domain, the separation between the state and culture is revealed as an impossible endeavor." (Tamir, 1993, 149) Similarly, Kymlicka points out to the different ways that a seemingly neutral state might disadvantage minority cultures:

> "A multinational state which accords universal individual rights to all its citizens, regardless of group membership, may appear to be 'neutral' between the various national groups. But in fact it can (and often does) systematically privilege the majority nation in certain fundamental ways – for example, the drawing of internal boundaries; the language of schools, courts and government service; the choice of public holidays; and the

division of legislative power between central and local governments." (Kymlicka, 1995, 51-52)

The available evidence shows that, throughout the recent history, the cultural interests of individuals, particularly those of minority groups, have been extremely vulnerable to the state's use and abuse of sovereign power, which have resulted in the disadvantaged position of the members of minority groups in modern societies.

3.1.3. What Does Equal Protection Minority Rights Entail?

If we are right about the claim that cultural and linguistic rights are among the fundamental interests of individuals around the world and are susceptible to the abuse of power by sovereign states, then we have a strong case for asserting that cultural right should be human rights. Consequently, states have the duty to secure these rights equally for all the individuals who are subject to the state's authority. But what does this *equality* entail?

One of the core fiduciary duties of the state is to treat different beneficiaries and their interests fairly and even-handedly. In multicultural and multi-ethnic societies, equal protection of cultural interests requires that no single ethnocultural group be entitled to monopolize the state's institutions to promote its own culture and language exclusively. Because the state belongs equally to all the individuals who live under the sovereign authority of the state, public institutions must serve as a vehicle to service all ethnocultural groups even-handedly. Accordingly, minority rights in this sense more than anything is a demand for equality in treatment by the state.

If the dominant ethnic group in a multi-ethnic society has the privilege to protect and promote its own culture and language, which is mostly sponsored by the state, why should homeland minority groups not be provided with the same opportunities to nourish and protect their own cultural identity. Similar to other human right norms, this would impose both positive and negative duties on the state. On the one hand, the state has the negative duty not to discriminate against individuals based on their ethnocultural group membership and the duty not to deny individuals from promoting their own culture or using their own language. On the other hand, there is a positive duty for the state to actively support ethnocultural groups within its territories by adopting measures that are essential for the survival of the language and culture of minorities.

These positive measures could include policies such as education in the native language, legal and financial support for certain cultural practices, and special modes of representations such as guaranteed representations in legal and political institutions or some forms of local self-government for homeland minority groups.

It is important to note that, like any other human right norms, equal protection of cultural interests does not necessarily require identical treatment of individuals or use of the same measures by the state towards all individuals and groups. The human rights to "the highest attainable standard of physical and mental health", pursuant to section 12 of the International Covenant on Economic, Social and Cultural Rights, would entail different treatments and accommodation depending on the particular situation of beneficiaries, including sex, age and the degree of physical abilities of individuals. Similarly,

depending on the circumstances of the minority groups and its members, each type of cultural minority might require a different set of rights and accommodations.

What is appropriate in response to the cultural needs of immigrants might not necessarily be suitable for the demands of indigenous peoples, because the cultural interests of these two groups are not under the same type of threats. While the culture, language and societal institutions of homeland minorities, including national minorities and indigenous peoples, are prone to extinction if not properly protected institutionally by the state, the culture and language of immigrant groups are generally not vulnerable to the same level of existential threat. As a result, the survival of the cultural identity of homeland minorities might require the state to create the opportunity for minorities to go through their own process of nation-building by creating educational, legal and political institutions operating in the minority language. Immigrants, however, might not require the same type of protection.

In addition, the mode of incorporation of the two groups is different. Immigrants mostly incorporate into host countries voluntarily after having the chance to balance their interests in having greater educational and economic opportunities in the host country against having convenient access to their culture. In contrast, the incorporation of homeland minorities into the host state has been mostly unchosen. Unlike immigrants, most of the homeland minorities, particularly indigenous peoples, have historically suffered from colonization, conquest, dispossession of lands, forced migrations, and coercive incorporation to another state. Through this unsolicited assertion of sovereignty by a more powerful state, their historical institutions and sovereignty in their homelands

have been disrupted. The historical injustices and disadvantages that homeland minorities have experienced are very different from those of immigrants. Consequently, they are entitled to distinct types of recognition and accommodation.

Finally, from the practical point of view, implementing certain minority rights such as the right to self-government would be more feasible in the case of homeland minorities, who are more or less territorially concentrated groups, and more challenging in the case of territorially dispersed groups such as immigrants.

The normative implications of the dissimilarity among ethnocultural groups have been highlighted by few scholars. Kymlicka, for example, makes a distinction between three types of minority rights: polyethnic rights, self-government rights and special representation rights. (Kymlicka, 1995, 113–115) Polyethnic rights refer to measures designed to facilitate the integration of minorities into the mainstream cultures on fair terms. These measures include eliminating racial discrimination, funding certain cultural or religious practices (e.g. public funding of language programs for immigrants), exemption from laws that disadvantage minorities (e.g. exemption of Jews and Muslims from Sunday-closing laws) or modification of the educational curricula. The aim of these measures is not to assist or encourage minorities to preserve their own distinct cultural identity, rather to ensure that minorities will incorporate into society fairly. This form of minority rights is more suitable to the situation of immigrants who more or less voluntarily joined their host countries and do not wish to recreate their own separate social and political institutions.

In contrast, the right to self-government and special representation are mostly sought by homeland minorities. Special representation of minority groups in political institutions make it possible for the group's interests to be more effectively heard by the larger society. Similarly, the self-government rights and territorial autonomy within a federal framework provide homeland minorities with the opportunity to preserve and recreate their own cultural and societal institutions to protect their identity from disappearance. Self-government rights and special representation rights have been implemented extensively in many Western democracies with multiethnic populations. Examples include indigenous peoples in North America, Quebec in Canada, Catalonia in Spain and Scotland in the United Kingdom.

However, I do not think that it is always right to lump all homeland minority groups under one category and make a bright line distinction between their entitlements and the entitlements of other ethnocultural groups. For one thing, homeland minorities come in different natures and forms, which affect the strength of their claims and entitlements.

Homeland minorities vary in their size; their historical experience of subjugation; their cultural and linguistic distinctiveness; their form of territorial concentration; and their desire to resist integration into the mainstream culture. For example, Québécois and Indigenous Peoples of Canada did not similarly experience colonization, forced migration, and economic marginalization. While Palestinians are a geographically concentrated minority group, the Bedouin Arabs are dispersed all over the Middle East.

There are also pragmatic concerns. When the size of a minority is too small or the number of minority groups in a country is too large, there is no viable mechanism to fund

minority practices equally and fulfill their legitimate demands without overburdening the society. How many languages can a state recognize as the official language in a country? There is a definite limit.

Clearly, minority rights, similar to most human rights, are not absolute rights. That means the satisfaction of a right can be limited temporarily when its fulfillment infringes upon other human rights or it is simply "too costly" to implement. Implementation of minority rights like any other rights requires a 'proportionality analysis', which entails balancing its costs and benefits for the society. As Tamir points out: "A distinction must be drawn between matters of principle and matters of policy. As a matter of principle, the right to practice a culture, like all other rights intended to protect the interests of individuals, is an individual right. As a matter of policy, it might be justified to obligate others to carry the burdens that follow from the realization of this right only if there is a minimal number of individuals who will benefit from it. Hence, the size of the group deriving benefits from a particular policy may influence the prospects of its implementation: the larger the number of individuals who will benefit from the implementation of a right, the stronger the justification to burden others with the costs entailed by this implementation." (Tamir, 1993, 45)

One way to distinguish between different types of homeland minorities and identify their entitlements to territorial autonomy is to adopt a multi-factor analysis. In chapter two, we suggested that a multi-factor approach can serve as a solution for the problem of the dual indigenous/minority regime. The approach also provides a sound basis for evaluating the claim of homeland minority groups to positive and substantial accommodation.

We suggested that a reasonable solution for the problem of the dual minority regime is to reject the dichotomy of indigenous peoples/national minorities and extend some of the protections available in the *UNDRIP* to all homeland minorities who meet some special parameters of vulnerability on a multi-factor basis.

Minorities fall on a continuum in terms of their experience of historical injustice, attachment to a land, territorial concentration, and complexity of its original institutions. When a homeland minority passes certain benchmarks on this continuum, its normative entitlement to collective rights, including the right to self-administration, increases accordingly.

Some parts of the existing international laws in fact support this solution. The UN Working Group on Minorities has prepared a Commentary as a guide on the *UN Minority Rights Declaration*, in which it alludes to the fact that a minority's claim for collective rights may vary according to the circumstance of the minority:

> Those who live compactly together in a part of the State territory may be entitled to rights regarding the use of language, and street and place names which are different from those who are dispersed, and may in some circumstances be entitled to some kind of autonomy. Those who have been established for a long time on the territory may have stronger rights than those who have recently arrived.[65]

[65] UN Sub-Commission on the Promotion and Protection of Human Rights, Commentary Of The Working Group On Minorities To The United Nations Declaration On The Rights Of Persons Belonging To National Or Ethnic, Religious And Linguistic Minorities, 4 April 2005, E/CN.4/Sub.2/AC.5/2005/2.

A multi-factor approach could be structured in a variety of ways. Inspired by the works of Benedict Kingsbury (Kingsbury, 1998), the following six indicia could be relevant to identify the legal entitlements of a homeland minority:

1. Self-identification as a distinct ethnic and cultural group and the wish to retain a distinct identity through institutional separateness.

2. Historical experience of severe marginalization, discrimination or exploitation.

3. The existence of previous territorial entitlements, political autonomy, or local institutions disrupted by a historic circumstance of invasion or colonization.

4. Long attachment to a land.

5. Lack of power to steer the decisions that directly affect the minority group.

6. Territorial concentration, constituting a recognizable percentage of the population.

When a group scores low on every criterion or in sum, it would be entitled only to benefit from the generic rights of non-discrimination under Article 27 of the ICCPR. However, when a group passes a threshold on each criterion or scores high in total, it would be entitled to the stronger form of minority rights, including the collective right to steer its own institutions in order to preserve its unique identity. This, as Vermeersch describes, could range from the introduction of minority self-governments; the granting of territorial or cultural autonomy to minority groups; the funding of activities and organizations of national minorities to guaranteed representation; or consultation of minorities in

government institutions and funding of bilingual education or mother-tongue instruction. (Vermeersch, 2005)

In dealing with these criteria, it is extremely important to be flexible to avoid arbitrary outcomes. That is why in balancing the factors one must consider the score on each criterion as well as the score in total. As an instance, long attachment to a land or territorial concentration might appear to be a constituting factor in identifying every homeland minority, however, it is a historical fact that many minority groups have been often relocated by the majority through the use of force. In some other cases, such as Bedouin Arabs, the nomadic nature of the group might affect the type of connection a group might have with its lands. Adopting a flexible approach in applying these criteria would enable us to widen the scope of the concept of homeland minorities and capture the countless nuances of real world cases.

3.2. Can Group Rights Be Incorporated Within the Norms of Human Rights?

The short answer to this question is yes. In fact, some of the important rights already included in the recognized international human rights documents are group rights. For example, under the first article of both the ICCPR and the ICESCR, the two main Covenants of the UN on human rights, all "peoples" have been granted a series of groups rights, including "the right of self-determination", the right to "freely dispose of their natural wealth and resources" and the right not to "be deprived of its own means of subsistence."

Similarly, group rights are the focus of the 2007 UN's Declaration on the Rights of Indigenous Peoples. It includes the right of indigenous peoples to self-determination and autonomy in matters relating to their internal and local affairs (Article 3), the right to use and control the land and resources that they have traditionally owned (Article 26), the right to develop and maintain their institutional structures including judicial systems (Article 33), and the rights to maintain and develop their distinct cultural identity, their spirituality, their language and their traditional way of life (Article 12 and Article 36). Although the declaration is not legally binding under international law, it is overwhelmingly considered by commentators to be a part of the international human rights documents. As suggested by the UN, the Declaration on the Rights of Indigenous Peoples is "an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations."[66]

Nevertheless, incorporating group rights as part of human right norms has not been free of controversy. Some scholars have argued that group rights cannot be human rights because human rights by 'nature' must be borne by individuals, not groups. Others have characterized group rights as threats against individual rights, because of the fear that granting an unqualified right to groups can result in the violation of the rights of individual members of the group, particularly in the case of women and in situations involving minorities residing within the territory of another minority group (Okin, 1999). The fear is that "individuals and their claims of right will be crushed beneath the greater weight of groups and their claims of right." (Jones, 1999, 92) Others have argued that

[66] United Nations (2006) *Press Release: UN system and NGOs call for an early adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly*. Available at: http://www.un.org/esa/socdev/unpfii/documents/press_release_2.pdf (Accessed: 2016).

group rights generally bring out differences between groups and individuals, whereas human rights are grounded on the features that we all share as human beings.[67]

The idea that group rights are inconsistent with the logic of human rights norms is partly the result of confusion about what human rights are and what group rights are. First of all, not every group right conflicts with individual rights and freedoms. While the right of a group against its individual members could be a threat to individual rights, the right of the group against the state to protect its members from external assimilating pressures can be aligned with individual rights.[68]

Second, some group-differentiated rights and individual rights are justified based on the same universal underlying concerns and values. For example, the right of members of a particular linguistic minority to receive elementary education in their native language could be derived from the universal right of equality of access to education. So, although a right might differentiate between its beneficiaries, it could be justified based on a more fundamental and universal concern that we all share.

The group right is usually defined as rights that are held by a group *qua* group, rather than by individuals. This definition could be misleading and confusing. To be more clear

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[67] For more discussion, see Jovanović, M.A. (2012) *Collective rights: A legal theory*. Cambridge: Cambridge University Press; Ingram, D. (2000) *Group rights: Reconciling equality and difference*. Lawrence, KS: University Press of Kansas; Galenkamp, M. (1993) *Individualism and Collectivism: the Concept of Collective Rights*. Rotterdam: Rotterdamse Filosofische Studies; Addis, A. (1992) 'Individualism, Communitarianism and the Rights of Ethnic Minorities', *Notre Dame Law Review*, 67(3), pp. 615–676; Young, I.M. (1992) *Justice and the Politics of Difference*. 11th edn. Princeton, NJ, United States: Princeton University Press.

[68] For more discussion, See the distinction Kymlicka makes between "external protections" and "internal restrictions" in Kymlicka, W. (1995) *Multicultural citizenship: A liberal theory of minority rights*. New York: Oxford University Press, p. 35-44.

about the nature of group rights, we can distinguish between three types of rights, each with some collective dimensions:

a. some rights are held by individuals *severally*, but can be exercised mainly in association with other individuals, such as freedom of religion or freedom of association. We can call this type of rights "individual rights with collective dimension".
b. There are some other rights that are held *jointly* by a group of individuals, but not by the individuals *severally*, such as the right of self-determination or the right of representation in a political institution. We can call this type of rights "collective rights".
c. Finally, there are some rights which are held by a group *as a separate entity* from individuals who formed the group, such as rights of business corporations. We can call this type of rights "corporate rights".

Human rights can take the form of the first and second type of group rights, but perhaps not the third form. Let me explain.

The first type, individual rights with collective dimensions, includes rights which are held by individual human beings. While the satisfaction of a right of a person to join a trade union, for example, requires some association with a group of individuals, the right itself is an individual right, because it is held in an individual capacity. In contrast, when a group of people has a right to develop and maintain a public institution, the right holder is not any single individual, rather it belongs jointly to a group of individuals. As Peter Jones mentions, "[w]hat distinguishes a right as a group right is its subject rather than its

object-who it is that holds the right rather than what the right is a right to." (Jones, 1999, 82-83)

The second type of group right, collective rights, includes rights that are borne by individual human beings, but jointly and not severally. A group of individuals has a collective right when their shared interest provides a sufficient ground to justify imposing a duty on others, while the interest of any single individual member would not be enough by itself to justify that duty.

Here, Raz's theory of right is insightful. According to him, "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." (Raz, 1986, 166) That means in order to have a right in something, one has to have an interest sufficiently important to justify imposing a duty on other people. Similarly, group rights arise when "the joint interest of a number of individuals provides sufficient justification for imposing duties upon others even though, if we were to consider the interest of only one of those individuals, that single interest would not provide the necessary justification." (Jones, 1999, 84)

Consider, for example, the right of people in a large city like Toronto to efficient public transportation. Each resident of Toronto has an *interest* in affordable and efficient transportation to move around the city. However, given the cost of constructing and maintaining such a public system, the interest of any single resident is not enough to impose a duty on the city to invest in public transportation. Therefore, no individual has a *right* to public transportation. Nevertheless, if we consider the interests of all the

residents jointly, we might have sufficient ground to impose a duty upon the authorities and claim that people of Toronto *jointly* have a right to efficient public transportation.

The example shows that moral standing underlying a collective right could be reduced to the moral standing of its members. Conceived in this way, the group *per se* does not have a moral status separate from the individuals who make up the group and jointly hold that right.

This understanding of collective rights is in contrast with corporate rights, where the corporation, as a single entity separate from its members, holds the rights in itself.

Because the right holder in the case of corporate rights is not a human being, it is problematic to characterize corporate rights as human rights. Nevertheless, human rights can take the form of collective rights or individual rights with collective dimension, as they both are held severally or jointly by human individuals.

Peter Jones makes a similar point when he writes,

> "An argument for a collective right must appeal to the good of the individuals who make up the collectivity, and individuals will figure in a right-holding collectivity only if they share in the interest that grounds its right."

According to him, there is "a continuity and complementarity between individual and collective rights":

> "respect and concern for the individual drive both. The difference between the two sorts of rights simply reflects the fact that, sometimes, our respect and concern relates to features of people's lives that they share with others and in relation to which they hold shared, rather than independent, claims." (Jones, 1999, 90)

Of course, not every collective right is a human right, in the same way that not every individual right is a human right. According to the fiduciary theory of human rights, collective rights and individual rights will qualify as human rights only if they protect an underlying fundamental interest of individuals that is universal in scope and is susceptible to the use of power by sovereign states. When a collective right meets these requirements, it would be a good candidate for incorporation in the norms of human rights.

Consider the following example. If we understand the right to self-government as a collective right rather than a corporate right, then it is a right that is born by individuals jointly, rather than a right being held by group qua group. That means the moral standing of the right can be reducible to that of the individual members of the group. The right to self-government is justified as a human right only if the individual members of the group jointly share an underlying fundamental interest in forming and maintaining themselves as a self-regulating nation or sub-nation. This underlying interest is, in fact, an interest that we all share universally around the world, but, for each of us, this interest is connected to our own particular nation, which could be different from that of others. So

even though our human right to self-government is held individually in relation to different nations, it is still a right we all share equally and universally.[69]

3.3. Is There a Non-Sectarian Justification for Defending Minority Rights?

It goes without saying that existing narratives within countries and cultures around the world have a different set of ethical standards, cultural norms, and moral values. These foundational differences in moral perspectives have made many human rights scholars doubtful about whether a single set of human right norms can be justified across different cultures to constrain the sovereignty of states.

Many responded by rejecting the human rights regime as mainly a tool in the hands of the hegemonic states to advance their own interests. According to these commentators, the human rights discourse benefits the new form of Western or American "imperialism". In their view, the norms of human rights in some significant ways reflect Western values. In addition, the justification provided for these standards are mostly grounded in the liberal value system disconnected from the plurality of moral values in the world. Finally, in their view, the role of human rights has been abused by the hegemonic powers to justify illegitimate political and militaristic interventions all over the world.

I think this imperial criticism of human rights does not dispute the need for having a global system similar to human rights in place to observe and limit the misconduct of states towards their citizens. On the contrary, the criticism is mainly about the way the system is designed, which makes it vulnerable to manipulation by more powerful

[69] For more discussions, see Jones, P. (1999) 'Human Rights, Group Rights, and Peoples' Rights', *Human Rights Quarterly*, 21(1), pp. 80–107.

courtiers. As a result, these considerations do not invite us to abolish the system altogether, rather it is a call for a structural revision to make the system more efficient and less disposed to abuse or corruption.

What is important in this criticism for our discussion though is that it rightly points out to the tendency in human rights discourse to justify the universal norms exclusively based on liberal values. Given the plurality of moral perspectives in the world, if we want to create a strong universal consensus on the norms of human rights we need to go beyond liberalism as the only source of justification for human rights.

The fiduciary and political theories make it clear that the justification for human right norms should be based on some form of non-sectarian ground, precisely because the role of the human right regime as a global supervisory mechanism is to call upon the *outsiders* of a society to intervene and act when the fundamental rights of individuals in that society are violated by the state. Because human rights function by giving external agents to a country reasons to take actions, the justification provided for the importance of human rights should be reasonable and persuasive from the perspective of those outside agents who are under the obligation to act and protect the norms in another country. Therefore, the success of this mechanism is closely tied to its ability to create a global consensus and a non-sectarian justification for its norms.

There are few ways through which people with opposing philosophical and moral views can converge on the same set of principles. First of all, as Beitz argues, there is no good reason to believe that all norms of human rights should be derived from a single set of moral principles, such as the liberal value of individual autonomy or dignity. (Beitz,

2009, 138) As long as we all agree on the function of human rights, justifications for the norms can be reached by appealing to a variety of different value considerations.

In addition, we can take advantage of Rawls' theory of "overlapping consensus", which he has proposed in several books and articles. The idea has been developed further by Charles Taylor in the context of human rights. To put it simply, the idea of overlapping consensus is that the *same* principle can be upheld for *different reasons* from opposing perspectives.[70] For Charles Taylor, for example, overlapping consensus is the path to an unforced and genuine international consensus in human rights. In fact, Taylor believes that the only possible way for having a "genuine, unforced consensus" on the standards of human rights is to leave room for disagreements over the fundamental underlying values and the way each of us would prefer to justify those standards. In his words,

> "Different groups, countries, religious communities, civilizations, while holding incompatible fundamental views on theology, metaphysics, human nature, etc., would come to an agreement on certain norms that ought to govern human behaviour. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms, while disagreeing on why they were the right norms. And we would be content to live in this consensus, undisturbed by the differences of profound underlying belief." (Taylor, 1999, 124)

[70] See also Scanlon, T.M. (2014) *The Difficulty of Tolerance: Essays in Political Philosophy*. Cambridge: Cambridge University Press.

As an illustration, Taylor explains how reformation in Thailand's Theravada Buddhism has led to a new foundation for human rights in East Asia. The emphasis of the Buddhist doctrine on the responsibility of individuals for their own enlightenment and the commitment to the doctrine of non-violence can be interpreted to support human rights against torture, degrading treatment, arbitrary arrest and detention from within the Buddhist culture.

This understanding of human rights is aligned with the view of some of the founders of the Universal Declaration of human rights in 1949. Jacques Maritain, one of the early framers, had expressed a similar idea when he wrote that:

> "I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality, fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, ... is equally the only way founded upon truth." (Maritain, 1949, 10-11)

We can apply the same idea in the context of minority protection and aim for an overlapping consensus over the norms of minority rights. In this thesis, we provided a variety of justifications to argue that the protection and recognition of one's culture and language are among fundamental interests of individuals around the world. The suggested lines of reasoning ranged from liberal arguments based on the worth of individual autonomy and communitarian arguments stemming from identity politics, to the fairness arguments from the history of nation building, as well as alternative arguments based on

the intrinsic value of cultural plurality. Of course, there is still room for some other possible modes of justification, perhaps grounded in the Confucian tradition in Asia[71] or the Islamic principles in the Middle East and North Africa. All of these claims are capable of working together in the normative framework of the fiduciary theory to form a basis for a non-sectarian justification for the norms of minority rights as part of the human rights regime.

3.4. How Does the Political/Fiduciary Account of Human Rights Provide a Stronger Support for a Theory of Minority Rights? And, Conversely, How Would the Available Theories of Minority Rights Contribute to Our Understanding of Human Rights?

One of the most important contributions that the minority rights discussion has for a theory of human rights is that it gives us an opportunity to reflect normatively on what makes the content of human rights and helps us to find out a principled way to expand or revise the norms of this universal doctrine.

Human right is an evolving practice. The norms of human rights by no means constitute a fixed list. As the need for protection of the fundamental interests of individuals has been recognized by the international community, human rights have evolved consistently and continuously in the past seventy years. Thus, the practice is capable of revising its content.

[71] See He, B. (2005) 'Minority Rights with Chinese Characteristics', in Kymlicka, W. and He, B. (eds.) *Multiculturalism in Asia*. Oxford, United Kingdom: Oxford University Press.

Given that the content of human rights is evolving, then the real issue is how we are going to decide methodically about revising the standards. In the recent years, there have been many discussions about expanding the norms of human right standards to include new norms such as the right to development, water or clean energy. Our analysis of the interaction between the theories of minority rights and human rights in this dissertation is an example of how the fiduciary theory of human rights can provide a principled and structured method for assessing such claims.

We distinguished between the function of the human rights and its content. It was explained that the function of human rights can be best conceived as constraining the sovereignty of modern states to hold them accountable internationally for improper treatment of the individuals. The content of human right, on the other hand, stems from the fiduciary duty of the state to provide equal protection to the most fundamental and universal interests of individuals susceptible to the abuse of sovereign power. The fundamental interests of individuals can be determined by appealing to public reason. That means striving to reach a consensus on a same set of norms by appealing to a variety of distinct moral considerations. The theory creates a platform in which parallel lines of reasoning, including moral *and* political reasons, can justify a single set of standards, while all contributing to the same global function.

Our discussion in this thesis is an example of how we can evaluate the incorporation of new standards, including new forms of rights such as "group rights", under the normative structure of the fiduciary theory of human rights.

Similarly, the fiduciary theory of human rights can contribute to our understanding of the existing minority rights theories. The fiduciary account of human rights is theoretically capable of explaining how the internationalization of homeland minority rights can be regarded as a natural extension of the human rights norms. It also clarifies how different accounts of minority rights could work together as parts of a single theory. Contrary to the common view, there is no persuasive evidence that the Dignitarian account and the Political account of minority rights are incompatible. Our discussion of the fiduciary theory illuminates that the theoretical difference between the two accounts could be bridged. While the Dignitarian view explains the significant role that culture and language play in human flourishing, the political approach illustrates the importance of overseeing the misconduct of sovereign states to safeguard the fundamental interests of the individuals in having access to their culture and language.

Additionally, as it was mentioned in the beginning of this chapter, one of the problems of the recent accounts of minority rights is their inability to explain how their normative theories would connect and interact with the international discourse of human rights in a systematic way. The fiduciary theory can reestablish the vital link between the theories of minority rights and human rights without sacrificing its capacity to justify the function and the content of human rights on non-sectarian grounds.

Establishing a correct relationship between the two regimes of rights is critical for a variety of reasons. In fact, the actual claims of homeland minorities around the world have been widely inspired by the language of human rights. Many historically subordinated minority groups understand their demands for equal treatment as part of a

larger aspiration for equality under the human rights regime. It is critical for a theory of minority rights to explain the natural affinity between the evolution of minority right claims and the contemporary human rights law. Moreover, the disconnection between the two regimes could result in depriving minority right movements of accessing the required tools, forums, and publicity that the human rights institutions could provide. If the need for international protection of homeland minorities could be characterized as a requirement of the human rights principles, the minority rights proponents will likely receive the international attention and recognition they desperately need.

The adoption of a more robust protection for homeland minorities by the UN would have a significant effect on the evolution of a new model of multicultural citizenship. In the new model, as Kymlicka put it, the question is not only "*how* power is exercised" over citizens, but "*who* exercises that power." (Kymlicka, 2011, 189) The new model will form multicultural societies that promote "multiple loyalties, dispersed sovereignty, and substate autonomies," while undermining traditional notions of "national homogeneity, exclusive loyalty and monolithic sovereignty." Multicultural citizenship in this sense will not only care about equal distribution of goods and opportunities, it will also be sensitive to just distribution of sovereign power within the society, focusing not only on cultural pluralism within the state, but also on plurality of the state itself.

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