

## HUMAN RIGHTS VS FUNDAMENTAL RIGHTS : THEORETICAL DIALECTICS OVER THE DEBATE BETWEEN UNIVERSALIST AND PARTICULARIST VIEWS

**Rachminawati**

Universitas Padjadjaran

*rachminawati@mail.unpad.ac.id*

### ***Abstract***

*The term “human rights” represents a universalist notion and doctrine of rights brought by the 1948 United Nations Universal Declaration of Human Rights, thus often appears to be in friction with particularistic notions of rights. Despite the Vienna Declaration 1993 purportedly settling the debate, problems appear to persist and often only escalates day after day. Here, I comparatively examine the doctrinal foundations of the “human rights” notion and compare it with the “fundamental rights” notion in how they affect the dilemma of universality versus particularism, and their impact on the enforcement and institutionalization of rights. This paper concludes by finding that the use of the term ‘fundamental rights’ instead of ‘universal human rights’ better accommodates states’ uniqueness ultimately achieving the ideals of human rights and is more acceptable to then afford more protection.*

**Keywords:** *Human Rights, Universality, Particularity, Fundamental Rights*

### ***Intisari***

Istilah “hak asasi manusia” mewakili gagasan universal dan doktrin hak-hak yang ada dalam Deklarasi Universal Hak Asasi Manusia Perserikatan Bangsa-Bangsa 1948, dan sering kali terlihat berseberangan dengan gagasan-gagasan hak yang bersifat partikularistik. Meskipun Deklarasi Wina 1993 seolah menyelesaikan perdebatan tersebut, ternyata hari demi hari tampak masalah-masalah itu masih ada dan sering kali semakin meruncing. Tulisan ini secara komparatif menelaah landasan doktrinal dari gagasan “hak asasi manusia” dan membandingkannya dengan gagasan “hak-hak fundamental” dalam hal bagaimana gagasan tersebut memengaruhi dilema universalitas versus partikularisme, serta dampaknya pada penegakan dan institusionalisasi hak-hak. Makalah ini menyimpulkan bahwa penggunaan istilah ‘hak-hak fundamental’ daripada ‘hak asasi manusia universal’ adalah lebih baik karena dapat menyesuaikan dengan keunikan setiap negara yang pada akhirnya mencapai cita-cita hak asasi manusia, selain lebih diterima oleh negara-negara sehingga diharapkan memberikan perlindungan yang lebih besar.

**Kata Kunci:** *HAM, Universalitas, Partikularitas, Hak Fundamental*

## A. Introduction

It has been acknowledged that many people could not easily claim their rights although those rights are recognized as a universal human rights. Because it is self-evident that human rights fulfillment and protection are not equally and universally applied to all human beings. Fundamental rights, to a certain extent easier to claim. The facts show that the fulfillment of human rights that often identify as “universal rights” remains a big problem due to states and peoples’ hesitation or acceptance in that regard. Furthermore, at the level of implementation, rights that so-called “human rights” or “universal rights” show huge differences from one state to another state, and from one area to another area within a state.<sup>1</sup>

A universal approach to rights quite often fails to prove that such rights are universally applied everywhere regardless of social, economic, political, race, or religion. The use of fundamental rights is believed stronger implications than “human rights or universal rights” terms. Fundamental rights are more powerful because it is usually stipulated and guaranteed in the state’s constitution. Something that states are legally bound to fulfill those rights. So, there is a sense of different treatment of human rights notions coming from the international law regime than fundamental rights coming from the national constitution, although it talks about the same rights. For example, the rights of women to have equal access to education. It has a sense of both universalist and particularist views. If it is viewed that the right is universal, states are less reluctant to recognize it. However, if it is referred to the rights as guaranteed by the state’s constitution, the state is more willing to fulfill it. Even though the right of women to have equal access has been recognized as a universal right, the fulfillment of the rights of women in rural areas and cities is significantly different. Women living in cities often have more access to education than those in rural areas. Hence, there is no such thing as human

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<sup>1</sup> Hurst Hannum, *Guide to International Human Rights Practice, 4th ed* (New York: Transnational Publisher, Lc. Ardsley., 2004), 14. Hurst also questions the definition of human rights. He presumes that it is difficult for more than 190 countries with different cultures, political systems, and ideologies, and at different stages of economic development, to come with an agreement on the rights that ought to be protected through international rules and institutions, as well as on the priorities among them when these rights conflict with one another.

rights as universal, but it is universal in terms of values, but not in terms of application.<sup>2</sup> Therefore, using human rights as fundamental rights needs to be considered as it will impact the recognition and implementation of rights.

The theoretical dialectics inherent in the cohabitation of “human rights” and “fundamental rights,” also contribute to the acceptance and enforcement of human rights. To that, this study investigates their doctrinal foundations of human rights terminology over the debate between the universality and particularity of human rights, and whether there is an impact on the fulfillment and enforcement of human rights at the domestic level. By traversing the complexity of these doctrinal foundations, the study hopes to provide light on the pragmatic consequences for the preservation of rights and the adoption of international standards by various nation-states to protect peoples’ fundamental rights.

#### **B. Universality and Particularity of Human Rights’ Dialectics: Searching its Fundamental Rights Guarantee for An Effective Human Rights Protection**

Human rights discourse has long been marked by a contradiction between universalist ambitions and acceptance of particularistic viewpoints. The notion of “human rights” is rooted in the 1948 United Nations Universal Declaration of Human Rights (UDHR) and represents a global commitment to a set of fundamental entitlements that transcend geographical, cultural, and political borders. The battle with more localized conceptions of rights, on the other hand, has continued, sparking continuing discussions over the theoretical basis and practical ramifications of this universalist approach.

The foundation of the United Nations (UN) in 1945 marked a watershed moment in the international law regime’s development of regional organizations. This is because the UN proposes regulation of regional organizations. More importantly, the UN Charter specifically outlines the important roles of regional organizations in a broader international context, particularly with a focus on

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<sup>2</sup> Micheline Ishay, *The history of human rights: From ancient times to the globalization era* (Univ of California Press, 2008), 3.

peace and security. A discussion on the topic of regional organizations could not be separated from the debate between universalists and regionalists on whether the existence of regional organizations could undermine international law—the debate includes the issue of human rights and cultural particularity which remains unsolved until now.

In the human rights context, the existence of regional human rights organizations or human rights regional mechanism raises the question of whether their existence supports the universal human rights values and mechanisms that have been agreed upon by states under the UN regime. It is generally accepted that most regional organizations have their “uniqueness”. This regional uniqueness leads to the issue of the universality and particularity of human rights. Theoretically, the debate over both principles politically ended in 1993 when the Vienna Declaration and Programme of Action 1993 were adopted. However, the facts show that the implementation of universal principles, such as freedom from torture, remains problematic. There are norms, values, and principles at the regional level that could be assumed to contradict or diminish the universality principles, such as the principle of non-interference and Asian values. Theoretically, regional human rights mechanisms are expected to accommodate both principles to give full protection of human rights. Their success in accommodating this issue will impact the effectiveness of their mechanism.

The problem of the enforcement and institutionalization of human could not be separated with the debate over the universality and particularity of human rights. Therefore, discussing its enforcement and institutionalization of human rights this debate must be reviewed. The concept of human rights requires a balance between universality and particularity to be effectively implemented in international law. This means that human rights must be defined both in a way that is universally applicable and in a way that considers the specific cultural, social, and political contexts in which they are being applied.<sup>3</sup> Writings on the topic have rapidly grown to enrich existing works

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<sup>3</sup> Ibid.

of literature.<sup>4</sup> Thus, what new essentials can be added to the bulk of existing knowledge on this issue?

Scholars have identified discrepancies between the two concepts, and this inquiry investigates the difficulties in upholding universal human rights in the context of regional distinctions and human rights particularities. Suggestions are made for bridging this gap. This conversation is essential to understanding how domestic human rights acts must be compatible with international human rights regulations or vice versa how international law must take into account local traits and human rights' uniqueness. In relation to that, the use of term "human rights" or "fundamental rights" plays a role in ending the debate and furthermore in making the rights enforceable.

Many scholars have discussed the universality and particularity of human rights in depth. An Naim, Donnelly, Tomuschat, and Chomsky have all weighed in on the subject, providing definitions and raising challenges that are confronted by their ideas. This section will look at how the principles of universality and particularity can be enforced in practice and what happens when they conflict. Using a "bottom-up" approach, the findings of this study will be used to help form a clearer concept of human rights.

The universality principle of human rights is an important concept that is essential for ensuring the protection of all individuals around the world. This concept promotes the idea that everyone is entitled to the same basic rights, regardless of their nationality, gender, culture, religion, age, or status.<sup>5</sup> This notion is often referred to as the Western claim of human rights, which is not always accepted by Eastern societies. It is recognized that the universality principle of human rights is a basic human right that should be acknowledged and respected in all countries and cultures to ensure that all individuals are treated with dignity and respect.<sup>6</sup>

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4 Such as Christian Tomuschat, *Human rights: between idealism and realism*, (OUP Oxford, 2014); many scholars in edited book of Abdullahi Ahmed An-Na'im, and Abd Allah Ahmad Naim. *Human rights in cross-cultural perspectives: A quest for consensus*, (University of Pennsylvania Press, 1995).

5 The Universal Declaration of Human Rights (UDHR)

6 This is in line with the previous claim in this research that modern human rights law started after the establishment of the UN in 1945, and the adoption of the UDHR in 1948.

However, human rights are not just a result of Western culture, but rather a product of modern transformations in society, economics, and politics. This means that regardless of the culture of any given place, human rights are applicable if those transformations have been experienced. This suggests that the concept and implementation of human rights are universal and not limited to the West value minded.<sup>7</sup> Furthermore, the universal human rights norm was not similarly and uniformly applied to all individual persons across the globe in practice. There is a huge disparity in the fulfillment of human rights between developed and undeveloped states, between the West and the East. Theoretically, universal human rights can be interpreted in such a way that allows for the inclusion of national, regional, and cultural particularity, as well as other forms of variation and relativity. This interpretation would recognize the diversity of various contexts and provide room for customs and traditions to be respected. This could ensure that human rights are not perceived as homogenous, but rather as a flexible framework that can accommodate the unique circumstances of each region, culture, and individual.<sup>8</sup>

If the application of human rights is not standardized, then individuals may not have equal access to these rights. This can lead to disparities in how people are able to benefit from them, creating an imbalanced system that fails to provide equal protection to all. It is important that human rights are consistently and uniformly applied to ensure that everyone has the same opportunity to enjoy the same rights and freedoms.

Unfortunately, the question of what rights can be applied universally is one that has been debated for centuries. Generally, the most widely recognized human rights are those that focus on basic freedoms and protections, such as freedom of speech and religion, the right to a fair trial and protection from torture, and freedom from discrimination. These rights are fundamental rights and are considered to be universal in their application. However, other rights, such as the right to health care or the right to a basic income, are much more controversial and are seen as less universal. Ultimately, the determination of

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<sup>7</sup> Jack Donnelly, "The relative universality of human rights," *Human rights quarterly* 29, no. 2 (2007): 287.

<sup>8</sup> *Ibid*, 282.

which rights are universal is a complex and ongoing debate.

The debates on universality mainly focus on ethnocentrism.<sup>9</sup> The charge of ethnocentrism in human rights discourse points to the potential for bias and manipulation of the concept of universality to serve a political agenda. This debate is likely to be ongoing, as it is rooted in the political realm and can never be fully resolved. This highlights the importance of being aware of potential bias and the need to be vigilant in order to ensure that human rights are treated fairly and with respect.<sup>10</sup>

Whereas the particularity of human rights means that human rights are the rights of every individual person, a recognition that every person is unique, a special feature, and therefore, the attainment of human rights is different according to this uniqueness.<sup>11</sup> It is not only the individual that is unique, but also the states. The idea that every state is unique reflects the concept of cultural relativity, which acknowledges the diversities across time and space. For example, different cultures may have different values and beliefs, and these values and beliefs can evolve and change over time. By recognizing the uniqueness of each state, we can better appreciate the complexity of different cultures and the need to be aware of and respect cultural differences.

Culture is a complex and multifaceted concept that can be viewed from various perspectives. It can be defined as the set of values, beliefs, norms, and practices that shape the behavior of individuals and communities. Culture provides the shared foundation of values, expectations and behaviors that guide people's interactions within and between societies. It can be seen as the

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9 Abdullahi Ahmed An-Na'im and Abd Allah Ahmad Naim, *Human rights in cross-cultural perspectives: A quest for consensus*, (University of Pennsylvania Press, 1995), 23-24. This analogy may also explain our tendency to view our own race or social group as a model of human experience. Ethnocentrism does not mean that there are no conflicts and tensions between a person and his or her own culture or between different classes and groups within a society. Rather, integrate those conflicts and tensions into the ideal model. This leads us to perceive the conflicts and tensions that we have in our own culture as part of the norm. Valuing our own ethnocentrism should lead us to respect: the ethnocentrism of others. Thus, enlightened ethnocentrism would grant others the right to be "different", either as members of another society or as individuals within the same society. This perspective would preserve the same human worth and dignity of members of other societies and of dissidents within society.

10 Bantekas, Ilias and Lutz Oette, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2013), 38.

11 Ibid.



source of the individual and communal worldview, providing the values and interests that should be followed as well as the legal means to do so. Culture also establishes the norms and values that influence people's perceptions of their own self-interest and the objectives and methods of individual and collective power struggles within and between civilizations. By understanding culture, we can better comprehend the motivations and decisions of individuals and communities, helping us to create better relationships and foster mutual understanding.<sup>12</sup> Hence, culture relates to any aspect of life, including human rights.

The idea of culture is often seen as unchangeable and all-encompassing, so it is assumed to override any other beliefs, values, and standards, including the concept of universal human rights. This is used as a way to deflect criticism of certain actions that go against these rights, like discrimination against women. As put forth by Bastekas, this serves as an excuse to demand that no one interferes.<sup>13</sup> In sociological terms, such views are commonly known as cultural relativism.<sup>14</sup> Some have argued that cultural relativism has the potential to render moral judgement powerless and, as a result, stifle action against injustice. Furthermore, it has been suggested that because of its lack of engagement in dialogue, relativism may lead to a nihilistic perspective in which criticism is not possible.<sup>15</sup>

Donnelly has identified a series of beliefs that pervade cultural relativity with prescriptive force.<sup>16</sup> Cultural relativism, on the other hand, is frequently used in human rights discourse as a substantive normative notion requiring respect for cultural diversity.<sup>17</sup> These absolutist views on culture (cultural relativism) and its opposition (universalism of human rights) are the extreme product of a thought that not anymore relevant in the discourse.

Critics who focus on the relativist perspective may overstate the

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12 An-Na'im, *A quest for consensus*, 23.

13 Bantekas, *International Human Rights Law and Practice*, 39.

14 An-Na'im, *A quest for consensus*, 24.

15 Ibid.

16 Donnelly, "The relative universality of human rights": 282.

17 Ibid, 294. For example, the norms of the Universal Declaration are presented as having no normative force in view of different cultural traditions. Instead, the practice should be evaluated according to the standards of the respective culture.



influence of the West in the realm of human rights law, without taking into account the many authors and efforts that have shaped the development of such laws. It is clear from the Universal Declaration of Human Rights that the universality principle values cultural diversity. As the UDHR was created, people were conscious of the potential for bias and worked to ensure that cultural sensitivity was taken into account.<sup>18</sup> In Africa, regional human rights treaties demonstrate a multifaceted approach to protecting the rights of individuals. These treaties are centered around recognizing the obligations of countries to respect human rights, as well as protecting collective rights and promoting novel methods for protecting the rights of women and internally displaced people. By acknowledging the special considerations necessary for protecting the rights of vulnerable populations, these treaties provide an important framework for ensuring that all individuals are afforded the same basic rights and freedoms. Only basic rights and freedom.

Universality critics claim that different cultures and communities have acquired distinct understandings of human nature and ‘rights,’ which may include a rejection of the notion that rights are a good way to manage social relationships. Since rights are informed by and applied in specific societal and cultural contexts, the concept of universal rights is considered illusory. It’s also considered culturally insensitive, as it basically imposes an alien concept (specifically individual civil-political rights). Furthermore, it is the result of a unique historical evolution and specific political systems (liberal democracies) of the cultures.<sup>19</sup>

Scholars offer many approaches to respond the universality and particularity in many contexts and cases. One of them is An-Naim with his notorious concept of “a cross-cultural analysis and reinterpretations”.<sup>20</sup> His approach’s fundamental argument is that, because people are more inclined to follow normative ideas if they believe they are authorized by their own cultural heritage, human rights can be improved by increasing cultural legitimacy

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18 An-Na’im, *A quest for consensus*, 22.

19 Bantekas, *International Human Rights Law and Practice*, 36.

20 An-Na’im, *A quest for consensus*, 5.

criteria.<sup>21</sup> The cultural legitimacy proposal recognizes existing international standards while attempting to promote logical views and interpretations of cultural values and norms within the world's major traditions through internal discourse and struggle.<sup>22</sup> Although An-Naim's approach provides a framework for understanding and reconciling cultural differences, it also has a contradictory aspect. On the one hand, An-Naim's approach seeks to promote universal values and norms through dialogue and debate within different cultures. On the other hand, it also suggests that cultural values and norms should be respected and preserved, thus potentially limiting the ability of individuals to challenge existing norms or pursue their own views. This paradox reflects the difficulty in finding a balance between respecting cultural diversity and promoting universal values.<sup>23</sup>

Richard Falk, a renowned scholar of international relations, argued that human rights norms and practices will not take root in non-western civilizations unless they are mediated through the web of cultural circumstances with the assistance of international human rights.<sup>24</sup> "If cultural practices and traditions are not challenged against international human rights principles, there is a risk of continued acceptance of cruel, oppressive, and exploitative practices in the name of religion and culture.

Both viewpoints suggest that there is an interconnectedness between international norms and regulations, and cultural understanding. The aim is to harmonize global norms with local cultural values in order to ensure respect for each individual and group, while also recognizing cultural diversity: "The goal is to find a way to discuss what is acceptable behavior in a context of greater acceptance of differences stemming from different cultural identities."<sup>25</sup>

An-Naim believes that this analysis and reinterpretation is accepted as a useful approach to enhance international human rights norms' credibility and efficacy. The remaining challenge is to develop the appropriate methodology

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21 Ibid, 20.

22 Ibid, 21.

23 An-Naim, A, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, (New York: Syracuse University Press, 1992), 1.

24 Falk, Richard, *Re-imagining Human Rights*, (Routledge, Taylor & Francis Group, 2016), 5.

25 An-Na'im, *A quest for consensus*, 46.

to reach it.<sup>26</sup> Despite his view, he provides quite comprehensive thoughts from many scholars in his book edited.<sup>27</sup> There are common findings in this regards which are: firstly, much of the literature dealing with human rights focus on the texts, rather than the contexts; secondly, the promulgation of international instruments is an insufficient step in the attainment of human rights, and thirdly, human rights law cannot restructure relations between the state, the individual, the organizations, and other stakeholders, and this is needed because human rights is not applied in a cultural vacuum.<sup>28</sup>

While Fajri and Hisham argue in their paper that the existence of cultural relativism in the context of international human rights allows for the justification of different practices, interpretations, and implementations of human rights values based on an individual's culture or religious beliefs, this perspective contrasts with universalism, which advocates applying the same human rights values to everyone regardless of their cultural differences.<sup>29</sup> However, in their view, neither universalism nor cultural relativism is the preferred approach when applying human rights values. Instead, within Islam, they propose that these values can be applied through the concept of "*mashlahat*," which is derived from five fundamental aspects of human life: (a) the preservation of religion, fulfilling the human need to worship Allah, (b) the preservation of life, including health and well-being, (c) the preservation of intellect and reason, (d) the preservation of progeny and lineage, and (e) the preservation of wealth<sup>30</sup>

The Beirut Declaration and the 18 Commitments on Faith for Rights are agreement papers resulting from a workshop held in Beirut at the initiative of the United Nations Office of the High Commissioner for Human Rights.<sup>31</sup> They hope to bring together followers of many religions from around the world to show their support for human rights as an intrinsic component of

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26 An-Na'im, *A quest for consensus*, 5.

27 Ibid.

28 Ibid.

29 Fajri Matahati Muhammadin and Mohd Hisham Mohd Kamal, "The Western Universalism v. Cultural Relativism Debate On Human Rights and Islam: And 'Aqidah-Based Approach,'" *Afkar* 21, Issue. 2 (2019): 196 - 204.

30 Ibid.

31 An-Na'im, *A quest for consensus*, 74.

their faith.<sup>32</sup> However, according to a report evaluating the text of these papers, several aspects within the Beirut statement do not totally correspond with the teachings of Islam, one of the religions represented in the statement.<sup>33</sup> The first of these is contained in Commitment XV, which states, “We pledge neither to coerce people nor to exploit persons in vulnerable situations into converting from their religion or belief, while fully respecting everyone’s freedom to have, adopt, or change a religion or belief and the right to manifest it through teaching, practice, worship, and observance, either individually or in community with others and in public or private.”<sup>34</sup> In this case, the scenario might be justified by emphasizing the word ‘coerce,’ as encouraging someone to accept Islam is called *da’wah* and is permissible in Islam. As a result, the issue becomes whether the UN honestly aims to collect the opinions of many religions and establish a set of laws that truly reflect them all, or whether they already have the set of rules in mind, and this is merely a ploy to find ‘religious legitimacy’ in the third world.<sup>35</sup>

There was not just cultural diversity, but also diversity in economic, social, and political aspects. Economic variety has an impact on human rights perspectives, particularly on what is deemed fundamental or not. Furthermore, it implies differences in the priority of rights among countries.

Ultimately, the universality of human rights is accepted as a universal principle that cuts across diverse cultures and regions and hence accommodates the particularity of human rights. Hence, human rights are present when and where there is a sense of universality and particularity. This principle is crucial to bringing international communities, mainly states, to be more accountable, just, and ethical regarding human rights. Bantekas strongly argues that “universality can act as a useful Yardstick as well as a tool of fostering global solidarity”.<sup>36</sup> However, a sense of using term fundamental rights in both context is actually ones that these principles more acceptable and enforceable by states. This understanding is crucial to achieve fundamental human rights

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32 Ibid.

33 Ibid., 111.

34 Ibid., 110.

35 Ibid., 112.

36 Bantekas, *International Human Rights Law and Practice*, 40.

in peace and harmonious relations.

### **C. Challenges with the Universal Human Rights Approach: Various Perspectives on the Implementation of Rights**

The universality of human rights remains a contentious topic within human rights discussions. Bantekas highlights disparities in the acknowledgement of rights across various contexts.<sup>37</sup> In particular, numerous nations, particularly those with a predominantly Muslim population, contest the idea of universal human rights. Their argument centers on the belief that certain secular principles, such as freedom of expression, may clash with religious convictions. Consequently, these nations have actively opposed such concepts within the Human Rights Council (HRC), prompting efforts to redefine the delineations between these rights.<sup>38</sup>

Human rights are often presumed as the utopia norms.<sup>39</sup> However, Tomuschat challenges this view.<sup>40</sup> He offers three steps that need to be taken on the road to utopia or in the positive sense, into legal positivism (an approach used in this study). The first step is the identification of potential human rights. These contestants have to translate into a legal substance with the approval of states following their wishes and desires.<sup>41</sup> This step is not considered difficult to acknowledge. The second is about transforming the rights-identified into a juridical commitment.<sup>42</sup> The third is about enforcing those rights, or the need to be enforceable.<sup>43</sup> An example of this context is the adoption of the UDHR (first step), where there was no rejection from the states. Following that, the ICCPR and ICESCR have also been adopted, and the states are committed to giving away their sovereignty to be legally

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37 Bantekas, *International Human Rights Law and Practice*, 38. The recognition of rights, in particular collective rights such as the right to development, the validity of reservations to human rights treaties, for example with respect to Sharia law (Islamic law), and the inclusion and interpretation of rights in the regional treaties.

38 *Ibid*, 39.

39 Martti Koskenniemi, *From apology to utopia: the structure of international legal argument*, (Cambridge University Press, 2006).

40 Christian Tomuschat, *Human rights: between idealism and realism*, (OUP Oxford, 2014)

41 *Ibid*, 3.

42 *Ibid*, 3.

43 *Ibid*.

bounded (second step). The last step is how these rights should be enforceable through monitoring mechanisms or others.<sup>44</sup>

Arguably, there are no unbreakable constraints for human rights to be protected through procedures and mechanisms set into motion if something is identified or recognized as human rights.<sup>45</sup> Its success proves that human rights are not merely utopian ideas. In fact, they are enforceable. However, this success raises the question of what lists of rights are enforceable and, therefore, meet that success criterion. It is no longer about universal or particular human rights, but more about whether the rights can be enforced or not for each person's benefit.

Donnelly also addresses those questions above in a more concrete way by emphasizing his idea of human rights' relative universality. He vigorously demarcates human rights divisions into two groups: the senses of universal and the senses of relative human rights. This division gives rise to those questions. In short, he acknowledges that there are some rights that are universal and particular in nature and practice. What are they? To answer this question, he does not come up with a list of rights but critically discusses fourteen relevant points<sup>46</sup> whereby five of them are very much relevant for addressing those questions. The first point entails the conceptual and substantive universality which is related to a list of rights; the conceptual universality is a high-level abstraction of "universal" rights in the sense that they are held "universally" by all human beings in practice. The second point entails universal possession, not universal enforcement i.e. the fact that human rights in principle are held by human beings, but the implementation or enforcement is "extremely relative". The third point entails international legal universality in the view of positivism i.e. the list of rights in the UDHR and international human rights treaties. The fourth point entails justifying particularity i.e. universal rights and not identical practices; a confirmation of the relative universality of human rights. Lastly, universal human rights are voluntary and not coerced consensus; from the reflection on the concept of State Sovereignty; at the

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44 Ibid.

45 Ibid, 4.

46 Donnelly, "The relative universality of human rights": 281-306.

very end, human rights protection lies in States.<sup>47</sup> According to what has been revealed by Donnelly, the list of rights can be traced from the five points above.

What about the content of universal human rights? What content of rights can be applied the same to everyone everywhere in this world? Can all human rights enshrined in the UDHR, or other treaties be held by everyone in the same way? It is easy to answer these questions by merely highlighting the fact that not all human rights stated in the UDHR can be possessed by all people. For example, Syrians seem to have no basic rights as other people who live in peaceful countries. According to An Naim, different attainment of individual rights could not disregard the universality of universal human rights. In the Syrian context, the world has to be responsible for protecting the Syrians' fundamental rights. The question is, how far does the world understand and apply this concept?

When examining the actions of the states, it appears that only core or essential rights, which are legally enforceable, are considered to be genuine human rights. This implies that any rights that are not legally binding, such as the right to education or housing, are not considered to be true human rights. This situation is concerning, as it overlooks the importance of a wide range of human rights, which can have a significant impact on the quality of life for individuals, communities, and society as a whole.<sup>48</sup> Both binding and non-binding human rights at the national, regional, and international levels have been stipulated in many human rights instruments. It is all about the content of rights. The content of human rights is an open-ended endeavor depending on states' interests and people's needs. It is a consensual arrangement and later becomes a legal arrangement once states have agreed to be bound.

Furthermore, states have a legal obligation to comply with or implement the content of rights. However, this compliance does not guarantee that a person in one state can enjoy the same rights in the same way as the others

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47 Ibid.

48 Starting from 1948 onwards, human rights as a universal norms have been transformed into legal norms through the adoption of the norms into national, regional and international human rights treaties. States incline to ratify and furthermore comply with the arrangements. States rarely rely on human rights as nature rights. Courts rely more on positive law than natural law.



in other states. Accordingly, perhaps the idea of plurality despite universality has to be taken into account.<sup>49</sup>

The universality of human rights substantially links to the justifiability of human rights. Not all human rights contents in international treaties are justiciable, particularly treaties that relate to economic, social, and cultural rights such as ICESCR. Hence, this is a big challenge for universalists to prove the universality of these rights applied to everyone everywhere. It is generally accepted that only core rights or fundamental rights are justiciable, and mostly these rights are civil and political. Does this mean that the content of civil and political rights is universal human rights? Conceptually yes, but practically it remains partial. There is less debate over the universality and particularity of civil and political rights than of economic, social, and cultural rights.

The next part is the context in which the concept and content should be applied; it is an area where universal human rights tend to be rejected and leads to contestation. Freedom of expression, which is acknowledged as a universal and non-derogable right, can be tested for this thesis. None of the states rejects the universality of this freedom. Hence, there is no discrepancy in terms of the concept. Acceptance of this concept results in the ease of these universal norms to be transformed into legal norms through treaties or other international human rights instruments. The success of this step can be found in Article 19 of the ICCPR.<sup>50</sup> However, the content of freedom of expression may be subjected to certain restrictions such as public health and morals. This content of rights can be interpreted in many ways and raise discrepancies.

These discrepancies seem different in various contexts when states apply the freedom of expression norm in practice. Discourses on Lesbian Gay Bisexual and Transgender (LGBTs) rights to the freedom of expression give us a clear instance of such discrepancy in different contexts in each state. The universalist view that LGBTs are entitled to have the same freedom of expression as other people. They are free to express their opinion, speak up and

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<sup>49</sup> Bantekas, *International Human Rights Law and Practice*, 47.

<sup>50</sup> ICCPR, Article 19

speak out about their view without fear, threat, and discrimination. However, they often face rejections once it comes to the implementation of their rights in each state. For example, their demands to have same-sex marriage legalized by states or to adopt children have often been refused by many states based on religion, culture, or health reasons.

In Indonesia, sixty-eight percent of poll respondents, as confirmed by LGBTQIA+ participants in the national consultation, said that the suggestion to provide legal safeguards to ensure LGBTQIA+ freedom of expression, assembly, association, and religion or belief had not been adopted and accepted. Due to the lack of legal safeguards, the extreme organization, police, and public order officials (Satpol PP) engaged in persecution, normalization of the use of violence, ill-treatment, and torture. Furthermore, some of this state-led violence included sexual assault against transwomen. In addition, Arus Pelangi (a national LGBTQIA+ organization) reported one hate crime against a transgender person in 2019 and five attempted murders in 2018.<sup>51</sup> Why did this happen? The enjoyment of an LGBT person's rights in one state is different from that of in other states. On one hand, same-gender marriage has yet to be recognized as a human right (in the sense of the universality of human rights). Same-sex marriage, on the other hand, cannot be acknowledged as a human right due to numerous reasons in particular conflicting with religion or cultural values.<sup>52</sup> The top-down approach based on universal human rights claims would not only violate LGBTQ rights to same-sex marriage but will also jeopardize their fundamental rights such as the rights to life. As a result, in order to defend their fundamental rights, states must take into account local values, which are typically based on religion and culture. It's simply a matter of time before more individuals adopt or reject this right, and the state is required to respect it.

Many elements influence the environment in which universal conceptions

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51 Indonesia National Coalition of the Marginalised Group against Discrimination on the basis of Sexual Orientation Gender Identity, "Universal Periodic Review Indonesia", (March 2022), 5.

52 While such antagonism may reflect the predominant or predominant view of the cultural position, it may not need to be the only view available, so there may be room to develop a cultural position from within through an internal discourse on values, central culture, and justification of values. (An-Na'im, *A quest for consensus*, 4.)

of rights must be interpreted and appropriated in order to be meaningful and beneficial, as seen by the context analysis above. One of them is cultural and moral values. In the case of certain rights, there is considerable evidence that this process is already underway in regional human rights systems.<sup>53</sup> The universality question is especially important in situations where there is a lack of agreement on specific actions, ostensibly due to cultural rituals or religious beliefs.<sup>54</sup> The ECtHR's concept of margin of appreciation is comparable to this context-specific interpretation of rights.<sup>55</sup> The recognition of fundamental rights in a specific context is more crucial than the debate whether the rights are universally accepted or not. This context analysis provides a valuable framework of culturally transcendent and genuinely universal aspirations.<sup>56</sup> This kind of understanding is needed to promote and protect human rights for certain sensitive rights, such as LGBTs rights. Otherwise, any effort to promote human rights could end up with unnecessary conflict.

Despite the Universal Declaration of Human Rights stating that all human beings are born free and equal in dignity and rights without distinction of any kind,<sup>57</sup> various countries still have different responses to the emergence of LGBT rights expressions. In this context, the United States, being a liberal country under the Biden administration, is strengthening protections for LGBT people to prevent discrimination based on sexual orientation and gender identity.<sup>58</sup> However, in several Islamic countries, or in countries where the majority of citizens practice Islam, such as Afghanistan, Pakistan, the United Arab Emirates, Saudi Arabia, and Brunei, the death penalty is applied for

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53 Bantekas present his interview in his book to see directly how regional mechanisms settle some cases in relation to this interplay principles. Bantekas, *International Human Rights Law and Practice*, 40 – 47.

54 *Ibid*, 37.

55 More discussions about margin of appreciation can be found in Chapter 3 or its rejection, for example, certain practices, for example, because they are seen as ordained by God. The last position shows the boundaries of the dialogue where the differences cannot be bridged. But seeking open dialogue can be helpful in promoting a culture of human rights if it is cosmopolitan, takes others' arguments seriously, and brings different points of view.

56 Bantekas, *International Human Rights Law and Practice*, 38.

57 Article 1 of Universal Declaration of Human Rights.

58 United Nations Human Rights Office of the High Commissioner, "United States: UN Expert Warns LGBT Rights Being Eroded, Urges Stronger Safeguards", <https://www.ohchr.org/en/press-releases/2022/08/united-states-un-expert-warns-lgbt-rights-being-eroded-urges-stronger>.

same-sex relations, even when it is consensual.<sup>59</sup> These countries enforce this rule because they make Islam the guiding principle of the state, and within the Islamic religion, same-sex relations are prohibited. Therefore, this highlights the challenges in implementing the principle of the universality of human rights.

Another example is a death penalty. Article 7 of International Covenant on Civil and Political Rights, stated that “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*” Furthermore, Article 6 of the covenant also stated that “*every human being has the inherent right to life*” and such right protected by law, therefore this article emphasizes that the right to life cannot be arbitrarily deprived.<sup>60</sup> These two provisions represent universal human rights values within the framework of international legal standards. Nonetheless, in practice, there are still several countries that maintain the use of the death penalty. The application of the death penalty continues to be a subject of debate regarding the protection of human rights or an act for pays for the violation of a fundamental moral rule.<sup>61</sup> In December 2022, Zambia removed the death penalty from its penal code.<sup>62</sup> Conversely, India still retains the death penalty. The application of this punishment is deemed necessary in cases of sexual assault and aggravated sexual battery involving children.<sup>63</sup>

Jacques Derrida, as a philosopher of ethics, explains a pre-ethical civilization characterized by inherent violent differences that if forced, it will have the potential forms of physical violence. *Thus*, he believed that every human being is a unique individual, and as a consequence, it is highly possible that the uniqueness (differences) among these individuals can influence the

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59 Malin Bjork, “Motion For A Resolution: to wind up the debate on the statements by the Council and the Commission pursuant to Rule 132(2) of the Rules of Procedure on the Universal Decriminalisation of Homosexuality in the Light of Recent”, *European Parliament*, (2023), 3/9.

60 See Article 6 of International Covenant on Civil and Political Rights.

61 Ican Simonovic, *Moving Away from the Death Penalty: Arguments, Trends, and Perspectives*, (New York: United Nations, 2014), 9.

62 Bronwyn Dudley, “Zambia is the 25th Africal State to Abolish teh Death Penalty”, <https://worldcoalition.org/2023/01/06/zambia-abolishes-the-death-penalty/>.

63 Aarushi Dhryan, “Death Penalty: A Necessary Evil or a Violation of Human Rights?”, *Journal of Reseach in Humanities and Social Science*, Vol. 11, Issue 6, (2023), 1.

existence of different rights for each individual.<sup>64</sup> Therefore, human rights values should allow the discourse (exchange of ideas) for everyone, which enables the application of these human rights values to be based on the unique values inherent in each individual or group of individuals. Furthermore, this encourages him to reconsider the idea of the universality of law, questioning whether it can indeed apply to all of humanity?

In Latin America, by contrast, the States had united with each other to create their own human rights system that included the Inter-American Court of Human Rights, which handed down many notable judgments that were innovations in the sphere of human rights law worldwide.<sup>65</sup> The Inter-American system of human rights suggested a model in which the universal human rights would be enforced by a regional system, that would be all the more effective because it somehow better represented the understandings and culture of the countries which were bound.<sup>66</sup>

International human rights norms are now significantly influencing the lives of individuals in developing countries in various ways.<sup>67</sup> Beyond their presence on the international stage, these norms have been integrated into constitutions, exemplified by South Africa, and are enshrined in regional instruments.<sup>68</sup> Human rights law is evolving through interpretation, application, and extension in diverse settings, each characterized by complex backgrounds and unforeseeable impacts.<sup>69</sup> This process can be viewed as a localization of human rights, where their abstract principles become pertinent and effective through application in specific contexts.<sup>70</sup> Below turning attention to the main idea and analysis of this study, the discussion on the Fundamental Rights.

#### **D. Fundamental or Core Rights Instead of Universal Human Rights**

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64 Walter Schwedler, "Human Rights and Natural Law: An Intercultural Philosophical Perspective", (Bahnstraße: Academia Verlag, 2012), 62 – 63.

65 V. Rodriguez, "Inter-American Court of Human Right", *Human Rights Law Journal*, Ser. C, Vol. 9, No. 4, (1998), 212.

66 Scott Sheeran and Sir Nigel Rodley, *Routledge Handbook of International Human Rights Law*, (New York: Routledge, 2013), 122.

67 *Ibid.*, 122 - 123.

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

As the discourse on human rights evolves, a critical examination emerges in Section D, focusing on “Fundamental or Core Rights Instead of Universal Human Rights.” Amid the widespread use of the term “human rights” in various scholarly works, legal instruments, and reports, the absence of a universally agreed-upon definition prompts an investigation into the nuanced complexities surrounding its interpretation. As scholars navigate the challenges of definition and interpretation within this dynamic and multifaceted realm, this subsection delves into the complexities of human rights discourse, shedding light on the preference for fundamental or core rights over a universally accepted understanding.

A literature search on “Human Rights” indicates that the term is commonly used in books, journal articles, reports, legal instruments, and other writing forms. However, it was a search for a needle in a haystack when it comes to finding the precise definition of human rights. Most scholars often directly discuss a particular topic related to human rights without defining it. Likewise, many human rights instruments do not give a clear definition of the term. It has frequently been used as if it were self-explanatory, assuming that it can be interpreted in many ways according to the needs of the “user”. It is an indication that states can be very loose in defining human rights and deciding whether there is a violation of human rights or not.<sup>71</sup>

Therefore, the study proposes a working definition of human rights that accommodate both principles to achieve fundamental human rights for all human beings to not lose the meaning of human rights itself.<sup>72</sup>

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71 Bantekas, *International Human Rights Law and Practice*, 9. According to them, human rights have different meanings for different things, both positive and negative, depending on the context and the purpose for which they are used. They recommend clarifying the meaning (s) of the term by following its genealogy and examining its use in different contexts.

72 Mark Gibney, *International Human Rights Law: Returning to universal principles*, (Rowman & Littlefield, 2015), 2. Gibney questions the existence of the universality of human rights in the international human rights regime. He states: “Despite the almost universal declaration of the universality of human rights, there is almost nothing that is ‘universal’ or even ‘international’ in international human rights law. Rather, states have come (universally) to interpret international human rights law in a purely national way, see their human rights obligations as the beginning, but mostly as the end at their own territorial borders, and have a license to interpret international law in this way. of some of the main judicial organs, in particular the ICJ, the ECHR and the Supreme Court of the United States”. Consequently, he proposes a return to central universal principles. He defines the universality of human rights as a condition in which states are responsible for human rights abuses committed within their own internal and external borders.

The importance of a precise definition is twofold. First, a well-defined understanding of human rights serves as a guiding beacon for the effective enforcement and implementation of human rights law, which is especially important as the discourse navigates diverse cultural and societal contexts. Second, a universally agreed-upon definition establishes a standard, mitigating potential conflicts arising from the tension between universality and particularity.

The legal-institutional approach, which is based on international law and values, offers a background for comprehending the complexity surrounding the notion of human rights.<sup>73</sup> Notably, the paragraph emphasizes the natural law school's derivation of a standard and basic concept of human rights, depicting these rights as innately linked to persons merely by virtue of their humanity.<sup>74</sup> This detailed investigation meshes well with the propose idea, where the discussion goes into the preference for fundamental or core rights above a widely recognized view. The legal-institutional viewpoint enriches the continuing discussion regarding the meaning and extent of human rights in various global contexts.

The term “natural rights” rather than “human rights” is used in this definition to refer to all human beings' rights irrespective of nationality,

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Therefore, in his opinion, international human rights law creates a certain national, international and extraterritorial obligation to which countries are also bound. I would say that your claim is a bias, on the one hand Gibney is pessimistic about the concept of “universality”, but on the other hand he supports a “different” meaning of the principle of universality, in which in my opinion the meaning of the principle of Universality must coincide with its natural legal importance of human rights. His proposal on human rights obligations, in particular the formulation of “International human rights laws create certain national, international and extraterritorial obligations to which countries are also bound”, is, however, a smart concept or approach to the application of human rights. Of course, the concept is not new, but the way he emphasizes it is amazing.

73 Bantekas, *International Human Rights Law and Practice*, 10. It is recognized that the philosophical and political conceptions of human rights are broader than international human rights law, which is essentially a normative term that refers to rights validated in recognized sources, however, due to the trajectory of the researcher, this research will focus solely on International Human Rights. Rights are based on law and principles.

74 Siegfried van Duffel in Dinah Shelton, *The Oxford Handbook of International Human Rights Law*, (Oxford: Oxford University Press, 2013), 33; Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, (Oakland: Univ of California Press, 2008), 3.

The orthodox view human rights as they are inherent and derive simply from the fact of being human.



culture, religion, gender, language, age, social and economic circumstances, and others.<sup>75</sup> It is widely acknowledged as a universal human rights principle.<sup>76</sup> Philosopher John Finnis is one of the supporters of this concept.<sup>77</sup> Finnis has argued that a right is more than an individual entitlement, but that it is a moral claim against society. He has argued that if an individual right is seen as a moral claim, then it must apply to all individuals, and not only some groups. He states that rights must be universal, and not determined by cultural or other differences. As such, he is opposed to the idea of natural or human rights being limited to a particular group or culture.<sup>78</sup> This definition which represents an orthodox view of human rights seems to be challenging to put into practice. In response to this, Rawls is well-known as an opponent of this view and contends that human rights limit tolerance among people.

Furthermore, Rawls argues that there are necessary conditions for any cooperation or relations<sup>79</sup> which are distinguished from other moral rights.<sup>80</sup> Discussions on human rights and morality topics are observed to be highly unlikely to speed up human rights implementation.<sup>81</sup> It is evident that

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75 Clayton, Richard, *et al.*, *The law of human rights, Vol. 2* (Oxford: Oxford University Press, 2000), 19. According to Clayton, *et al.*, The doctrine of natural rights is said to have inspired the glorious revolution of 1688, as well as the American and French revolutions. Rights have been a central issue in political debate since their emergence in the 12th century. Rights could be seen as the product of the modern state, which is often an essential element in the constitutional design of the modern state. Furthermore, rights provide the moral justification for assertions and counter-assertions in a wide variety of political debates. Clayton gives some examples of asserted rights, for example, for unborn children, animals, and the environment. In addition, he believes that rights are used both to defend the position of minorities over the majority and to justify the superiority of the majority over the minority, to justify compliance (and disregard) of the law, and to defend and combat the free market. and the welfare state. He added that there are problems when it comes to protecting human rights in reality.

76 UNC, Art 1(3); UDHR 1; Vienna Declaration (adopted 1993 (VN), Art 1; Siegfried van Duffel in Dinah Shelton, *The Oxford handbook of international human rights law*, (Oxford: Oxford University Press, 2013), 33; Daniel Moeckli, *et al.*, *International human rights law, 2nd Ed*, (Oxford: Oxford University Press, 2014), 3.

77 Finnis, John. *Natural Law and Natural Rights*. Oxford University Press, 2011.

78 "Human Rights: Definition, Examples and History." *Human Rights*, Oxford Research Encyclopedia of Politics, Oxford University Press, 2020, doi:10.1093/acrefore/9780190228637.013.227.

79 It points out that human rights relate to cooperation between or within states and individuals.

80 John Tasioulas, "Are Human Rights Essentially Triggers for Intervention?", *Philosophy Compass*, Vol. 4, No. 6 (2009): 938-950.

81 Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe", *International Organization*, Vol. 54, Issue 2 (2000), 217-252. Moravcsik also reveals that the discussion of human rights in the "new orthodoxy" is an uncomfortable study. He finds that modern theories, both realistic and ideal, tend to "merge" in their prediction of human rights.

morality and human rights are inextricably linked, and that the moral values that underlie human rights are essential for their existence and application. While the traditional moral approach to human rights has been the dominant approach, a positivist approach may provide a more effective way to promote and protect human rights. The positive theory of human rights is based on the idea that the state has a duty to protect its citizens from harm, and that the legal recognition of human rights is an essential part of upholding this duty. Ultimately, however, the moral principles that constitute human rights must remain the foundation upon which the implementation of these rights is based.<sup>82</sup>

Since human rights are defined as rights possessed simply by being human, the concept of human rights has evolved throughout human history<sup>83</sup>. The dynamic growth of the notion of human rights throughout human history, particularly its relationship with independence and liberty, closely correlates with the concepts examined in Section D, headed “Fundamental or Core Rights Instead of Universal Human Rights.” The paragraph looks into the history of human rights, emphasizing that these rights are inherent in humans purely due to their humanity. The relationship between human rights and the desire for freedom, particularly in the 18th century, connects with the overall analysis<sup>84</sup> The story emphasizes the difficulties in defining and restricting the idea of liberty in various cultural contexts, as well as the impacts of church and politics. Notably, awareness of the universality of human rights is depicted as a respect of plurality and difference, encompassing many religions, cultures, political beliefs, and ways of life.<sup>85</sup> This contextual understanding contributes to the current study by offering insight on the complicated interplay between

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Most theories, whether realistic or ideal, predict that governments, interest groups and public opinion in established democratic states will lead efforts to establish and enforce international human rights regimes, and will induce, compel or they will persuade others to join. He means that morality is less influential in this modern age. For more information, see his book on page 224-225.

82 Ellman, Steven J, “Human Rights and Human Morality” Oxford University Press, 1995.

83 Sus Eko Z. Ernada, “Challenges to the Modern Concept of Human Rights”, *Jurnal Sosial - Politika*, Vol. 6, No. 11, (March, 2013), 2.

84 Ibid, 4.

85 Heiner Bielefeldt, “Muslim Voices in the Human Rights Debate”, *Human Rights Quarterly*, Vol. 17, No. 4, (1995), 5 – 6.

universality and various interpretations of human rights.<sup>86</sup>

The term “fundamental human right” tends to open accessibility to all individuals to whom it applies than “human rights” or “universal human rights”.<sup>87</sup> “universal human rights” ideally place wherever humans are, even if they are in different geographical locations, they still possess the same rights as human beings.<sup>88</sup> The task of justifying human rights does not ultimately depend upon their being endorsed by all human beings.<sup>89</sup> A coherent case for the universality of human rights can be made despite the fact that not everyone views human rights as universally valid. Thus, human rights must be both universally applicable, essentially independent of their recognition within bodies of law, and, to a certain extent, impervious to people’s opinion of them is only “The Idea”, a utopia.<sup>90</sup> Even though the Universal Declaration of Human Rights (UDHR) declares itself as a “common standard of achievement for all peoples and all nations”, we cannot close our eyes to the fact that the content of the UDHR contains principles and norms which constitute the identity of European nations, and using the UDHR these principles and norms are trying to be applied universally.<sup>91</sup> This shows that it cannot be denied that the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world.<sup>92</sup>

The levers of power at the United Nations and other international law-making have traditionally been out of the reach of the Third World, and even if they were within reach, it is doubtful that most Third World states actually represent their peoples, cultures, and ability to enforce it.<sup>93</sup> Therefore, it’s crucial for a new human rights movement not only to address Eurocentrism but also to tackle the significant imbalances of power among and within

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86 Ibid.

87 Andrew Fagan, “Human Rights and Cultural Diversity: Core Issues and Cases”, (Edinburgh: Edinburgh University Press, 2017), 8.

88 Ibid, 8.

89 Ibid, 9.

90 Ibid, 9.

91 Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights”, *Harvard International Law Journal*, Vol. 42, No. 1, (Winter, 2001), 210 - 219.

92 Ibid, 210 - 219.

93 Ibid, 216.

different cultures, national economies, states, genders, religions, races, and ethnic groups, as well as other societal divisions. This movement should not treat Eurocentrism as the central starting point with other cultures seen as peripheral, instead, the movement should be grounded in the fundamental belief in the moral equality of all cultures [that usually embrace in their constitutional promised].<sup>94</sup>

From the positivist point of view, countries are held accountable for upholding human rights through their obligations under international law. These legal obligations are based on the universal human rights standards set out in various global human rights treaties.<sup>95</sup> The term “obligation” is used to refer to the responsibility of governments.<sup>96</sup> International human rights law imposes duties on states on both a domestic and international level, as well as on an extraterritorial basis.<sup>97</sup> However, it is important to recognize that these obligations are dynamic, with states having varying degrees of capacity to meet them.<sup>98</sup> This creates an opportunity for creative approaches to the enforcement of human rights.

To define a human being is to include the objectives or goals of attaining

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94 Ibid, 207.

95 Universal Human Rights standards can be found in many human rights instruments such as UDHR 1948, Twin Covenant ICCPR and ICESCR 1966, CRC, CEDAW, and other instruments.

96 Daniel Moeckli, *et al.*, 7. Moeckli says: “It is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” In his book, Kenneth Roth, Executive Director of Human Rights Watch, defines international human rights as a statement of the government’s central commitment to its people and the basic freedoms governments must respect and the steps governments must take to defend the common good.

97 Daniel Moeckli, *et al.*, 7. Moeckli says: “It is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” In his book, Kenneth Roth, Executive Director of Human Rights Watch, defines international human rights as a statement of the government’s central commitment to its people and the basic freedoms governments must respect and the steps governments must take to defend the common good.

98 Frederic Megret, Nature of Obligations in Moeckli, Daniel, et.al., *International Human Rights Law*, (Oxford: Oxford University Press, 2013), 148. Megret also argues that the flexibility of international human rights obligations differs from general obligations under international law. While the obligations that arise from many international treaties are legally binding, states fulfill their obligations in many ways. This is because the history of international human rights law is different from the history of general international law. Later this flexibility of human rights contributes to the development of international law, especially when it redefines the concept of equality between states. It must be remembered that this flexibility must meet a universal human standard.

human rights. As there is no universal definition of human rights in many international documents, it needs to make concrete the abstract concept of human rights by ascertaining their aims. Sources of the goals of human rights can be located in a variety of human rights documents, both legally binding and non-binding. Arosemena, for example, identifies five aims of human rights in the context of his study.<sup>99</sup> They include: firstly, to ensure human existence including their life and personal integrity; secondly, to ensure individual autonomy where there is freedom for the individual from state or third party intervention; thirdly, to ensure equality of the persons in their society regardless of identity, quality, gender, religion, culture, and others; fourthly, despite individual autonomy, human rights shall also serve public autonomy to have political and collective rights, and lastly, to ensure that the individual can get a minimum level of welfare.<sup>100</sup> The last goal of human rights is “to ensure that the individual can get a minimum level of welfare” which is regarded as the ultimate goal of human rights.<sup>101</sup> Arosemena suggests that for a state to effectively uphold human rights, not only individual rights but collective rights must be taken into account. This is especially true as new rights emerge due to the ever-changing nature of society. Ultimately, the welfare of the citizens will be an indicator of how well these rights are being implemented. This has to be included in the working definition of human rights.

Despite that, the study also observes and supports the argument of Joseph and McBeth, asserting that the UDHR basically defines ‘human rights’ as stipulated in the human rights provisions in the UN Charter, such as Article

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99 One of the academics suggesting a list of human rights targets is Gustavo Arosemena, who in his book titled: “Rights, scarcity, and justice: an analytical inquiry into the adjudication of the welfare aspects of human rights.” Gustavo Arosemena, “Rights, scarcity, and justice: an analytical inquiry into the adjudication of the welfare aspects of human rights,” (Ph.D. dissertation, Maastricht University, 2014).

100 Ibid, 16.

101 Based on Arosemena, Roth points to the common good as the primary goal of human rights. Roth, executive director of Human Rights Watch, defines international human rights law as a statement of the government’s central obligation to its people, prescribing the fundamental freedoms that governments must respect and the steps they must take to serve the good. public. (Daniel Moeckli, et al. *International human rights law*, (Oxford University Press, 2nd edn., 2014), 7)

1 (3)<sup>102</sup>, 55<sup>103</sup> and 56<sup>104</sup> which mention international cooperation as well as peaceful and friendly relations as essential elements towards achieving human rights.<sup>105</sup> According to it, human rights could not be separated from international peace and security.<sup>106</sup> Their interaction influences one another. There would be no human rights without peace and security, and in another situation, there would be no peace and security without respect for human rights. It has been confirmed clearly in the UN Charter that respect for human rights must go hand in hand with the maintenance of international peace and security. No way implementing human rights can create a threat to international peace and security. The world response to the case of Palestine and Rohingya proved that we do not have yet a similar understanding of what human rights are. Countries' responses were based on their moral and legal commitment stipulated in their Constitution. International loses its power and credibility by inaction towards these atrocities that violate many human rights.

The considerations highlighted in the paragraph are closely related to the topics covered in this study. The study emphasizes the need of defining human rights in a way that includes the conditions and requirements necessary to ensure their realization. This viewpoint is consistent with the shift in emphasis toward fundamental or core rights, emphasizing the importance of a full grasp of the boundaries that regulate the enjoyment of human rights. The paragraph underlines the multiple character of human rights definitions, urging an all-encompassing approach that includes both governmental and social

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102 UNC, Article 1(3) states that the objectives of the United Nations are: to achieve international cooperation to solve international problems of an economic, social, cultural or humanitarian nature and to promote and encourage respect for human rights and fundamental freedoms for all, regardless of their race, gender, language or religion.

103 Ibid, Article 55

104 Ibid, Article 56

105 Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law*, (Cheltenham: Edward Elgar Publishing, 2011), 2.

106 Daniel, 4. Daniel supports this hypothesis, arguing that the language of human rights manifests the relationship between fundamental freedom and social justice and the connection of these elements with peace and security. In line with this, there are many scholars who also agree with these relationships or interactions, such as Andrew Moravcsik, Martti Koskeniemi, ... .. The latest informal report on linking human rights, peace and security was published at The Quaker United Nations. Office (QUNO) and the Friedrich Ebert Foundation (FES), *Report on Linking Human Rights, Peace and Security in Preparation for The High-Level Thematic Debate on International Peace and Security in May 2016*, (2016).

factors, as well as current domestic and international rules and institutions. This broad view is consistent with the nuanced investigation in this study, where the debate extends beyond a general understanding to comprehend the delicate interplay of many settings and conditions. The paragraph underlines the diverse character of human rights definitions, urging for an inclusive approach that includes both governmental and social contexts, as well as current domestic and international rules and processes. This comprehensive viewpoint is consistent with the nuanced examination in this study, where the debate extends beyond a universal understanding to comprehend the delicate interplay between many situations and conditions.

According to the above analyses, the definition of human rights must take into account the conditions and necessities required to ensure rights are fulfilled. It should encompass both state and societal conditions, as well as existing domestic and international provisions and mechanisms that are connected to human rights. Evidence of successful human rights implementation is seen in individual well-being and international peace and security. Misunderstanding the definition of these rights can lead to their diminished value, as well as a lack of effectiveness in their application.

The term “human rights” or “talking about human rights” is all about three things: ethical reasons, legal and political rules that society accepts, and people coming together to support these rights.<sup>107</sup> These three ways of talking about human rights are not separate; they’re used depending on who’s talking about them, who they’re talking to, and what they hope to achieve.<sup>108</sup> These ways of talking about human rights are connected because when people discuss ethics and work together to support rights, it can shape the laws and institutions that make human rights a part of our society.<sup>109</sup>

Human rights constitute a set of norms governing the treatment of individuals and groups by states and non-state actors based on ethical principles regarding what society considers fundamental to a decent life.<sup>110</sup> These norms

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107 Stephen P. Marks, *Human Rights: A Brief Introduction*, (Cambridge: Harvard University Press, 2016), 1 – 2.

108 Ibid, 1 – 2.

109 Ibid.

110 Ibid.



are integrated into both domestic and international legal frameworks, which specify mechanisms and procedures to ensure that those responsible for upholding these rights can be held accountable and that potential victims of human rights violations can seek remedies.<sup>111</sup>

Human rights are ethical concepts founded in a society's collective conscience that outline the essential circumstances required for a life of decency and dignity. These concepts represent common ideals and moral imperatives that transcend cultural and political barriers, and they serve as a foundation for just and compassionate society.

Human rights norms should be justifiable from within all of the world's major ethical traditions, according to Joshua Cohen, but this may "require fresh elaboration... 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."

Human rights are held by all humans by definition, either because of their common humanity, their human dignity, or because a set of basic needs and interests shared by all humans is so important that their protection naturally has the status of a fundamental moral right.

The use of universal human rights is often biased and results in a problem. Universal human rights are ideally characterized by the strong acceptance of states, voluntarily and without coercion, which is not easy and unlikely by states.<sup>112</sup> States prefer to accept human rights norms as universal human rights by way of ratifying and/or adopting international human rights treaties and integrating them into their national legal systems. However, their practice of reservation on certain rights devalues universal human rights. States seem to believe that there is "a group" of fundamental or core rights among rights in the conventions or treaties. States only accept rights that are not in contradiction with their national value and law. There is a tendency of

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<sup>111</sup> Ibid.

<sup>112</sup> Oona A Hathaway, "Do Human Rights Treaties Make a Difference?", *The Yale Law Journal*, Vol. 111, No. 8 (2002): 1935-2042. doi:10.2307/797642.1960. The most recent addition to the normative theoretical framework is Harold Koh's theory of transnational legal process. Koh shares with Franck and Chayes and Chayes the conviction that the secret to a better application of international law does not lie in compulsory compliance, but in voluntary obedience.

narrowing international human rights norms through their national framework. To some extent, there is a trend of over *positivisation* of human rights.

Such over *positivisation* is to protect human rights. However, the reality is far from that. For example, many people are still struggling to have their fundamental rights, including access to water and food. This is happening in many parts of the world due to war and conflict, such as in Sudan, Somalia, Syria, Myanmar, Palestine, and other. Therefore, it seems that the trend of *positivisation* has failed to address the issues concerning the fulfillment of fundamental human rights. By definition, fundamental human rights are something fundamental, the source or base from which everything is made and not be able to be divided into any other fundamental particles.<sup>113</sup> Accordingly, fundamental human rights can be understood as core rights, the basis for other human rights without which human beings are unable to have other rights.

It is very complex to determine which rights are fundamental or which are not. There are international Bill of Rights and the core human rights treaties in the international human rights treaties<sup>114</sup>; does this mean that these rights are fundamental? How can they be acknowledged as core human rights treaties? How about the non-core human rights treaties? Do the states have less obligation to protect these rights? There are more questions that need to be addressed to determine fundamental human rights.

In the Council of Europe, there are at least eleven human rights treaties on fundamental rights<sup>115</sup> and several treaties under the EU, the American, and the African system. Similar questions like that of the international system can

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113 Oxford Learners Dictionary (OLD), "Fundamental", <[http://www.oxfordlearnersdictionaries.com/definition/english/fundamental\\_1?q=fundamental](http://www.oxfordlearnersdictionaries.com/definition/english/fundamental_1?q=fundamental)> (accessed 21 June, 2019).

114 International core human rights treaties are ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICMW, CPED, CRPD.

115 In the Council of Europe, there are ECHR, Additional Protocol to ECHR, European Social Charter and revised European Social Charter, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Framework Convention for the Protection of National Minorities/ European Charter for Regional or Minority Languages, European Convention on the Exercise of Children's Rights, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, European Convention on the Legal Status of Migrant Workers/Convention on the Participation of Foreigners in Public Life at Local Level/European Convention on Nationality, Council of Europe Convention on Action against Trafficking in Human Beings, Convention on preventing and combating violence against women and domestic violence.

also be raised. An additional question entails the difference in the systems' definitions of the concept of fundamental human rights. Does ASEAN need to create one as well?

Fundamental human rights are generally employed in analyzing whether there are interferences in the Convention, such as considerations concerning lawfulness, necessity, proportionality, and balancing rights and interests, by the European Court of Human Rights.<sup>116</sup> Freedom from torture, brutal and humiliating treatment, or punishment; physical liberty; freedom of expression; and the ability of a man and woman to marry and start a family are just a few of the rights. A well-known revolutionary case has been contributed to the progress of fundamental human rights protection at the Inter-American Court of Human Rights. The *Gonzales Lluy et al. vs. Ecuador* case highlights the concept of "basic social rights" specifically healthcare rights and its interrelationships with other human rights.<sup>117</sup> Regional human rights frameworks could help in this instance. The lack of a unified definition of fundamental human rights presents a challenge to international human rights law. As such, it is essential to develop a more comprehensive understanding of these rights in order to effectively protect and promote them. This understanding should not only encompass the normative quality of fundamental human rights as enshrined within a system but should also take into account the procedural implications of these rights in order to ensure their protection and promotion. Additionally, efforts should be taken to ensure that the rights of all people are respected, regardless of race, gender, or other characteristics.

Ultimately, the above thesis is strongly related to the thesis "Fundamental or Core Rights Instead of Universal Human Rights." It emphasizes the importance of the international community adopting a stronger definition of fundamental human rights, which emphasizes the preference for fundamental or core rights over a universally recognized list.<sup>118</sup> In international human

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116 John Graham Merrills, *The development of international law by the European Court of Human Rights*, (New York: Manchester University Press, 1995), 40.

117 Oscar Parra-Vera, "The Protection of the Right to Health through Individual Petitions before the Inter-American System of Human Rights", *Litigating the Right to Health in Africa: Challenges and Prospects* (2016): 243.

118 There are procedural obligation that states have to comply with after ratification of treaties.

rights, the notion of a hierarchy, the recognition that acceptance of fundamental or core rights might alter depending on governments' desire and interests complicates the discourse under this discourse. This acknowledgment is consistent with the wider analysis, which examines the dynamics of human rights interpretation and adoption in the context of governments' viewpoints and interests. Law, in which fundamental human rights are supposed to be better protected. This viewpoint adds dimension to the continuing debate by underlining that certain rights are seen as basic and of greater importance.<sup>119</sup> The use of fundamental or core rights opens more acceptance of the rights listed in the UDHR and other human rights conventions, although such acceptance can change any time according to the states' will and interest.<sup>120</sup>

#### **E. Conclusion**

In conclusion, the idea of fundamental or core rights as an alternative position, acknowledging a subset of rights that are considered important and foundational would be positively impactful in the fulfillment and enforcement of rights. The recognition of the complexities in determining which rights are crucial highlights the nuanced investigation inside where the discourse grapples with the problems of prioritizing specific rights above a uniformly defined set. In essence, by outlining the practical limitations of universal human rights and preparing the way for the consideration of fundamental or core rights as a viable alternative approach.

Accordingly, this article advocates using the phrase 'fundamental rights' as a more realistic and acceptable alternative. This terminological change better fits the different legal, cultural, and political landscapes, encouraging a more comprehensive and culturally respectful approach to human rights. The advocacy for fundamental rights demonstrates a sophisticated perspective

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119 This issue can also be further analyzed in relation to the sources of international law especially jus cogens norms and erga omnes obligation. Further research on this specific issue needs to be done separately. It is highly relevant to the validity of the norms, the more likely norms will be gradually internalized in domestic practices (see Phan, 32).

120 States' compliances are different context. According to Hathaway, states' compliance not only because of acceptance of norms through many kind of processes, but because norms are internalized. See : Hathaway, Oona A. "Do Human Rights Treaties Make a Difference?", *The Yale Law Journal* 111, no. 8 (2002): 1935-2042. doi:10.2307/797642., 1960.

that understands the difficulty of developing a universally acknowledged foundation for human rights in varied situations.

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